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EXHIBIT
28 (2)

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7 BEFORE THE BOARD OF ADMINISTRATION
8 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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11 In the Matter of the Appeal of CalPERS'
12 Denial of Pension Benefits to Richard Lewis

CALPERS CASE NO.: 2014 0256
OAH CASE NO.: 2014040945

13 RICHARD LEWIS and CITY OF SAN
14 BERNARDINO,

RICHARD LEWIS' NOTICE AND
MOTION TO HEAR HIS COLLATERAL
ESTOPPEL/RES JUDICATA CLAIMS AT
THE OUTSET OF THE HEARING;
MEMORANDUM OF POINTS AND
AUTHORITIES AND DECLARATION OF
JOHN MICHAEL JENSEN IN SUPPORT

15 Respondents.

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18 HEARING: October 13 and 14, 2014
19 LOCATION: CalPERS Regional Office
20 650 E. Hospitality Ln, Ste. 330
San Bernardino, CA 92408

21
22 TO THE CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, AND
23 THE BOARD OF ADMINISTRATION OF CALIFORNIA PUBLIC EMPLOYEES'
24 RETIREMENT SYSTEM ("CALPERS") AND TO ITS ATTORNEYS OF RECORD:

25 PLEASE TAKE NOTICE that on _____, 2014 at ___:00 ___m. or as soon thereafter
26 as counsel may be heard, before the Office of Administrative Hearings, San Diego Division,
27 located at 1350 Front Street, Suite 3005, San Diego, CA 92101, respondent Richard Lewis will
28 and hereby does move the Presiding Administrative Law Judge and/or the Office of


1 Administrative Hearings for a ruling that Lewis' collateral estoppel/*res judicata* claims shall be
2 heard at the outset of the administrative proceedings on October 13 and 14, 2014, prior to the
3 commencement of the portion of the hearing focusing on CalPERS' disallowance of Lewis'
4 highest compensation and Employer Paid Member Contributions ("EPMC") reported by the City
5 of San Bernardino to CalPERS.

6 The collateral estoppel/*res judicata* issues are threshold questions. If Lewis prevails on
7 those claims, no hearing on CalPERS reduction may go forward, and the OAH should then issue
8 a *Proposed Decision* granting the collateral estoppel/*res judicata* claims and finding that
9 CalPERS is barred from proceeding with the hearing on its reduction of Lewis' pension
10 allowance, and **must recommence paying the higher pension, and all other remedies (such as**
11 **back payments or interest) in accord with a determination that Mr. Lewis is entitled to the**
12 **higher pension.**

13 This motion is based on the attached Memorandum of Points and Authorities and the
14 Declaration of John Michael Jensen in support, the files and records herein, and upon such oral
15 argument and additional pleadings as may be taken by the Court at the hearing on this matter.

16 Respectfully submitted,

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19 Dated: October 3, 2014



John Michael Jensen,
Attorney for Respondent
Richard Lewis



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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Introduction**

3 Collateral estoppel and res judicata apply to bar re-litigation of this matter. CalPERS
4 previously made a binding determination on the same facts and law that CalPERS seeks again to
5 re-litigate in this case.

6 After the city provided the factual and legal documents to CalPERS, CalPERS explicitly
7 reviewed, considered, and made a binding determination that Lewis was entitled to a pension
8 based on the salary of the Battalion Chief.

9 In furtherance of that determination, CalPERS instructed the City to (a) report all of Mr.
10 Lewis' approximately three years of back wages to CalPERS and make the necessary employer
11 and employee contributions associated with that, (b) to then continue reporting his base salary (at
12 the Battalion Chief pay scale) and EPMC special compensation to CalPERS going forward, (c)
13 to make all necessary employer and employee contributions associated with the reported
14 compensation, and (d) to report all of this as temporary upgrade pay. The City diligently and
15 faithfully followed CalPERS' instructions all the way through Mr. Lewis' retirement in
16 November 2012.

17 The documents, issues, facts, and law in this administrative matter were the same
18 documents issues facts and law that were previously received, considered, and determined by
19 CalPERS. CalPERS already determined these issues, facts, and law in Lewis' favor.

20 Under Government Code 20099 and the regulations adopted by CalPERS, CalPERS staff
21 has the right and ability to make final determinations, as they did previously in this matter.

22 **II. Factual Background**

23 Respondent Richard Lewis was a career firefighter with the San Bernardino Fire
24 Department ("SBFD"), spending three decades of his life as an active firefighter. He was first
25 employed in March 1981 and ultimately retired after he was determined disabled as a result of
26 both on-the-job injuries and ultimately a diagnosis of cancer that was presumptively deemed to
27 have been caused by his exposure to carcinogenic substances he was exposed to in the course of
28 his firefighting duties.

1 Eight years before his retirement, Mr. Lewis was wrongly passed over for promotion to
2 the position of Battalion Chief, the highest rank in the SBF D other than the Chief. This was
3 despite the fact that Mr. Lewis had received the highest test scores of all the individuals on the
4 promotion list and that long-standing City policies and procedures mandated that he should have
5 been selected for the position. Several years later the City reached a settlement of a lawsuit
6 brought by Lewis by which he would technically remain in the position of Fire Captain, but he
7 would receive all of the compensation and other benefits of the Battalion Chief position,
8 including the right to have his base salary and Employer Paid Member Contributions ("EPMC")
9 special compensation used to calculate his ultimate pension allowance.

10 The City dutifully communicated with CalPERS to find out how to report both Mr.
11 Lewis' back wages (back to the time he was wrongly passed over for the Battalion Chief
12 position) and his compensation going forward in order to ensure he would receive CalPERS
13 pension benefits based on those earnings. The City also sent CalPERS a copy of the City's
14 settlement agreement with Mr. Lewis which fully disclosed the settlement terms.

15 After review of the materials and information provided to CalPERS by the City,
16 CalPERS explicitly instructed the City to (a) report all of Mr. Lewis' approximately three years
17 of back wages to CalPERS and make the necessary employer and employee contributions
18 associated with that, (b) to then continue reporting his base salary (at the Battalion Chief pay
19 scale) and EPMC special compensation to CalPERS going forward, (c) to make all necessary
20 employer and employee contributions associated with the reported compensation, and (d) to
21 report all of this as temporary upgrade pay. The City diligently and faithfully followed CalPERS'
22 instructions all the way through Mr. Lewis' retirement in November 2012.

23 Six months after Mr. Lewis retired, and nearly six years after CalPERS instructed the
24 City on how to report Mr. Lewis' compensation on an ongoing basis, CalPERS suddenly and
25 without warning sent letters to Mr. Lewis and the City advising that CalPERS had changed its
26 position and was now disallowing the additional compensation attributable to the Battalion Chief
27 position as well as the EPMC, drastically reducing Mr. Lewis' pension allowance by nearly thirty
28 percent (30%).

1 **III. Collateral Estoppel and Res Judicata Bar CalPERS' Action and This Proceeding**

2 CalPERS is largely seeking to re-litigate a dispute that it was already aware of and privy
3 to as administrator of the City's pension benefits. CalPERS is seeking to re-litigate and to assert
4 jurisdiction over a civil service and discrimination dispute that it previously accepted. Now, after
5 the fact, CalPERS tries to deny Mr. Lewis the benefits of the resolution of the dispute between
6 the parties that CalPERS previously approved.

7 Specifically, received information from the City and Mr. Lewis about the nature of the
8 dispute and its resolution including the settlement agreement between Mr. Lewis and the City.
9 (Exhibit 1.) Through its "compensation review unit", CalPERS explicitly weighed evidence and
10 made determinations of law. Although a formal Administrative Procedures Act ("APA",
11 *Government Code*, §§11340, *et seq.*) hearing was available to CalPERS, CalPERS chose not to
12 make an adversarial record. Instead, CalPERS issued its letter to the City instructing it to report
13 Mr. Lewis' Battalion Chief compensation as "temporary upgrade pay" special compensation on
14 July 5, 2007. (Exhibit 2.) As indicated in the letter, CalPERS did so based on its full
15 understanding of the terms of the settlement agreement between Mr. Lewis and the City.
16 (Exhibit 1.)

17 **IV. Procedural Background**

18 Mr. Lewis filed a Jurisdictional Challenge on July 8, 2014 which included his claim that
19 the administrative process is barred at the threshold by collateral estoppel/*res judicata*. CalPERS
20 filed an Opposition on May 28, 2014. Acting Presiding Administrative Law Judge Beth Faber
21 Jacobs issued a ruling on July 13, 2014, that denied the Jurisdictional Challenge to the extent it
22 sought to dismiss the *Statement of Issues* and indicated that the OAH lacks the authority to do so,
23 but (1) ruled that the denial was without prejudice, (2) found that resolution of the issues in the
24 Jurisdictional Challenge required an evidentiary hearing, and (3) ruled that these issues can be
25 appropriately addressed in the administrative hearing and that Mr. Lewis can present his claims
26 during the hearing.

27 Mr. Lewis will act in accordance with the Court's order and present his claims during the
28 hearing. With due respect for the Court's ruling, however, he requests that the collateral

1 estoppel/*res judicata* claim be taken up as the first matter in the hearing because of its threshold
2 nature.

3 **LAW AND ARGUMENT**

4 **I. Collateral Estoppel and Res Judicata Generally**

5 The doctrine of collateral estoppel, or issue preclusion, [fn. omitted] is firmly
6 embedded in both federal and California common law. It is grounded on the
7 premise that "once an issue has been resolved in a prior proceeding, there is no
8 further fact-finding function to be performed." [Citation omitted.]
(*Murray v. Alaska Airlines, Inc.*, (2010) 50 Cal.4th 860, 864.)

9 Further, these doctrines apply not simply to decisions in courts of law, but under
10 appropriate conditions to decisions of administrative agencies as well.

11 We have long favored application of the common-law doctrines of collateral
12 estoppel (as to issues) and *res judicata* (as to claims) to those determinations of
13 administrative bodies that have attained finality. "When an administrative agency
14 is acting in a judicial capacity and resolves disputed issues of fact properly before
15 it which the parties have had an adequate opportunity to litigate, the courts have
16 not hesitated to apply *res judicata* to enforce repose." [Citation omitted.]
(*Astoria Federal Sav. and Loan Ass'n v. Solimino* (1991) 501 U.S. 104, 107.)

17 [R]espect for the administrative decisionmaking process requires that the
18 prospective plaintiff continue that process to completion, including exhausting
19 any available judicial avenues for reversal of adverse findings. [Citation omitted.]
20 Failure to do so will result in any quasijudicial administrative finds achieving
21 binding, preclusive effect and may bar further relief on the same claims. [Citation
22 omitted.].
(*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88,
113.)

23 The litigation of issues that could and should have been pursued in a prior proceeding
24 action is also barred. (*Takahashi v. Board of Regents* (1988) 202 Cal.App.3d 1464.) Unreviewed
25 findings of a state administrative agency are entitled to preclusive effect. (*Brand v. Regents of*
26 *Univ. of California* (2008) 159 Cal.App.4th 1349.) An administrative adjudicatory decision
27 which has not been overturned through the courts is absolutely immune from collateral attack.
(*Bank of America Nat. Trust & Savings Ass'n v. Mundo* (1951) 37 Cal.2d 1.)

28 **II. CalPERS' Authority to Make Decision; Discretionary Administrative Hearing**
Process

1 Prior to the determination in July 2007 (Exhibit 2), the CalPERS Board, or the Executive
2 Officer acting on the Board's behalf, authorized CalPERS' staff to make final determinations that
3 were sufficient to support collateral estoppel and *res judicata*. (Government Code, §§20099,
4 20123.) A formal OAH hearing is optional.¹

5 CalPERS and its Board are an administrative agency of limited jurisdiction.
6 Administrative agencies "have only such powers as have been conferred on them, expressly or
7 by implication, by constitution or statute." (*Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96,
8 103; *United States F. & G. Co. v. Superior Court* (1931) 214 Cal. 468, 471.)

9 Mr. Lewis recognizes that under the APA, neither the OAH nor the ALJ has authority or
10 power to stop a proceeding or order the agency to do anything. Specifically, the APA does not
11 provide the OAH and ALJ with any authority or power (1) to preclude re-litigation of already
12 decided matters, (2) to merge a cause into a judgment or a prior final decision of the agency, or
13 (3) to otherwise meaningfully allow an individual to assert defenses of collateral estoppel and *res*
14 *judicata*.² This was the import of Judge Jacobs' ruling on June 13, 2014.

15 But more importantly, Mr. Lewis urges the Court to recognize that CalPERS has no
16 inherent authority to reconsider a final administrative decision. (*Heap v. City of Los Angeles*
17 (1936) 6 Cal.2d 405, 407; *Olive Proration etc. Com. v. Agri. etc. Com.* (1941) 17 Cal.2d 204,
18 209; *Gutierrez v. Board of Retirement of Los Angeles County Employees Retirement Ass'n* (1998)
19 62 Cal.App.4th 745, 749, fn. 3.)

20
21 ¹ "The board may, *in its discretion*, hold a hearing for the purpose of determining any
22 question presented to in involving any right, benefit, or obligation of a person under this part."
23 (*Government Code*, §20134, emphasis added.) "The Executive Officer is hereby authorized ... to
24 fix and authorize the payment of any refund, allowance or benefit to which such applicant may
25 be found to be entitled.... The Executive Officer *may refer* the question of an applicant's
26 entitlement to any refund, allowance or benefit ... to a hearing officer for hearing." (*California*
27 *Code of Regulations*, §555, emphasis added.)

28 ² The APA only empowers the ALJ to conduct a hearing based on the limited issues. The
APA requires the ALJ (1) to hear the litigation in full, (2) to write a *Proposed Decision*, and (3)
to send that "non-binding" *Proposed Decision* to the agency for the agency's approval or
rejection. (*Ibid.*) CalPERS cites no law or process that would allow an individual in the
administrative process to bar or preclude an agency from undertaking a second administrative
process on the same law and facts.

1 The general rule is that, "[u]nless authorized by statute, an administrative agency acting
2 in an adjudicatory capacity ... may not in any event reconsider or reopen a decision. [Citations
3 omitted.]" (*Gutierrez v. Board of Retirement of Los Angeles County Employees Retirement Ass'n*
4 (1998) 62 Cal.App.4th 745, 749, fn. 3.)

5 **A. CalPERS Has No Statutory Authority to Reopen Cases**

6 The Public Employees' Retirement Law ("PERL", §§20000, *et seq.*) does not provide
7 CalPERS with specific authority to reopen a case. Specifically in this case, the PERL does not
8 contain any statute that would allow CalPERS to reopen the case,³ such as *Vehicle Code* section
9 13353.2(e) or *Unemployment Insurance Code* section 1960.

10 **B. CalPERS' Continuing Oversight to Correct Errors is Not Specific Statutory**
11 **Authority to Reopen the Case**

12 CalPERS proposes that the statutes enabling the correction of errors and omission allows
13 a second process. (*See* §§20160 and 20164.) However, those statutes are not specific or sufficient
14 authority for reopening cases or overcoming preclusion.

15 This issue has been litigated before. The County Employees Retirement Law or "CERL"
16 (§§31450, *et seq.*) has a statute governing corrections of errors and omission similar to Sections
17 20160 and 20164 in the PERL, stating that "[t]he board may, in its discretion and upon any terms
18 it deems just, correct the errors or omissions of any active or retired member, or any beneficiary
19 of an active or retired member, if all of the following facts exist." (§31541.) The Appellate Court
20 ruled in a very similar case involving the Los Angeles County Employees' Retirement
21 Association ("LACERA"), that LACERA had no statutory authority (including in its errors and
22 omissions statutes) that allowed it to reopen prior decisions:

23 Unless authorized by statute, an administrative agency acting in an adjudicatory
24 capacity (as LACERA does when it decides whether to grant disability retirement
benefits) may not in any event reconsider or reopen a decision.

25
26
27 ³ While a few statutes allow CalPERS in limited instances to reconsider its prior
28 disability decisions, CalPERS has no statutory authority to reopen its prior *final determinations*
like the determination in Mr. Lewis' favor in July 2007.

1 (Gutierrez v. Board of Retirement of Los Angeles County Employees Retirement
2 Ass'n, supra, at 749, fn. 3, citing Heap v. City of Los Angeles, supra, at 407, and
3 Olive Proration etc. Com. v. Agri. etc. Com., supra, at 209.)

4 Yet in this case, CalPERS relies on the errors and omissions language in Government
5 Code section 20160(b) as its authority to reopen cases.⁴ Under Gutierrez, Sections 20160 and
6 20164 fail to provide authority to reopen resolved matters.

7 **C. Statutes in PERL Allow Reopening of Specific Matters**

8 Several statutes in the PERL authorize CalPERS to reopen matters in narrow cases. The
9 existence of this specific and limited authority to reopen specific matters demonstrates that
10 CalPERS does not have greater generalized authority to avoid preclusion. The Legislature would
11 not authorize reconsideration of the more limited cases if the Legislature had already granted
12 CalPERS the broader authority to reopen all cases.

13 For example, the PERL allows CalPERS through the Workers Compensation Appeals
14 Board to reopen disability determinations within 5 years:

15 The Workers' Compensation Appeals Board shall have continuing jurisdiction
16 over its determinations made under Section 21166 and may at any time within
17 five years of the date of injury, upon notice and after an opportunity to be heard is
18 given to the parties in interest, rescind, alter, or amend the determination, good
19 cause appearing therefor.
20 (§21171.)

21 CalPERS also has the ability to alter benefits in other limited circumstances.

22 If, prior to attaining the minimum age for voluntary retirement for service
23 applicable to members of his or her class, a recipient of a disability retirement
24 allowance, other than one for industrial disability, engages in a gainful occupation
25 not in state service, the board shall reduce his or her monthly disability retirement
26 pension... When he or she reaches the minimum age for voluntary retirement for
27 service applicable to members of his or her class his or her retirement allowance
28 shall be made equal to the amount it would be if not reduced under this section,
and shall not again be modified for any cause.
(§21432.)

As another "disability" example, Government Code section 19871.2 reads: "The
appointing authority may periodically review the employee's condition by any means necessary

⁴ Section 20160 reads, "The Board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system." (§20160.)

1 to determine an employee's continued eligibility for enhanced benefits."

2 **III. Public Interest Exception and Changing Legal Interpretation Do Not Negate**
3 **Collateral Estoppel and Res Judicata**

4 CalPERS has in the past asserted that the public interest exception should exempt
5 CalPERS from collateral estoppel and *res judicata*. But "[t]he public interest exception is an
6 extremely narrow one; we emphasize that it is the exception, not the rule, and is only to be
7 applied in exceptional circumstances. (*Housing Authority v. Workers' Comp. Appeals Bd.* (1998)
8 60 Cal.App.4th 1076, 1086.)

9 But when the issue is a question of law rather than of fact, the prior determination
10 is not conclusive either if injustice would result or if the public interest requires
11 that re-litigation not be foreclosed. [Citations omitted.]
(*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64.)

12 Regarding the "public interest" exception, the *City of Sacramento* court found that it
13 applies only when "the consequences of any error transcend those which would apply to mere
14 private parties." (*Ibid.*)

15 In this case, no other parties suffer consequences. The underlying issue in this case is one
16 person's pension benefit which was fully funded at the time of his retirement. There is no general
17 public interest in one person's fully funded retirement benefit. There is no injustice in CalPERS
18 paying a benefit that was fully funded by the State under Judge Naughton's salary at the time of
19 retirement. The *City of Sacramento* case finds:

20 Of course, *res judicata* and the rule of final judgments bar us from disturbing
21 individual claims or causes of action, on behalf of specific agencies, which have
22 been finally adjudicated and are no longer subject to review. [Citations omitted.]
(*Id.*, at 65.)

23 CalPERS' idea that changing legal interpretations are sufficient to negate collateral
24 estoppel and *res judicata* is also without merit. As laws and interpretations change all the time,
25 CalPERS' idea that it can reopen litigated cases *without specific authority to do so* simply
26 because it has changed its interpretation is without legal support. It also effectively means no
27 decision is ever resolved and, contrary to law, collateral estoppel does not apply to CalPERS.

28 **IV. Application of Collateral Estoppel and Res Judicata**

1 CalPERS is barred at the threshold from proceeding with a second administrative
2 process on the same matters that it previously determined.

3 **A. CalPERS' Determination**

4 In the summer of 2007, Carlous Johnson of CalPERS made a determination that Mr.
5 Lewis' additional pay at the Battalion Chief level should be included in the compensation
6 reported to CalPERS for purposes of pension benefit accrual. Mr. Johnson then explicitly
7 instructed the City on July 5, 2007 to report additional compensation to CalPERS as "temporary
8 upgrade pay" special compensation. (Exhibit 2.)

9 There is no question that CalPERS obtained a copy of the settlement agreement between
10 Mr. Lewis and the City; that CalPERS reviewed the terms of the agreement and other
11 information it received from the City; and that CalPERS made a determination that the City
12 should report Mr. Lewis' additional pay for at the Battalion Chief position level as "temporary
13 upgrade pay" special compensation. (Exhibits 1 and 2.) CalPERS was fully informed that Mr.
14 Lewis would be receiving the increased pay attributable to the Battalion Chief position on an
15 ongoing basis, yet saw no reason to object at the time or throughout the next five years of Mr.
16 Lewis' employment that that the pay was not "temporary" as CalPERS now contends.

17 Further, no new facts or law have developed since CalPERS' decision. Indeed, there
18 could be no factual situation because (a) Mr. Lewis received the Battalion Chief pay from the
19 time of the settlement agreement until his retirement from the SBFD, (b) the City reported all of
20 that increased compensation as "special upgrade pay" pursuant to CalPERS' instructions
21 throughout the remainder of Mr. Lewis' employment until he retired from the SBFD, and (c)
22 CalPERS issued its letter disallowing the "special upgrade pay" reporting after Mr. Lewis retired,
23 so by definition there could have been no change in his employment status or the way his
24 compensation was reported to and treated by CalPERS.

25 **B. Collateral Estoppel Applies to Agencies and CalPERS in This Matter**

26 Collateral estoppel/*res judicata* applies to agencies acting in a quasi-judicial capacity.

27 An administrative agency acts in a judicial capacity when it resolves disputed
28 issues of fact properly before it and provides the parties with an opportunity to
present evidence and to litigate fully the issues. (*United States v. Utah Constr.*

1 *Co., supra*, 384 U.S. at p. 422 [16 L.Ed.2d at pp. 660-661].)
2 (*Rymer v. Hagler* (1989) 211 Cal.App.3d. 1171, 1178-1179.)

3 Collateral estoppel and *res judicata* apply to agencies. An administrative order
4 determining facts within its jurisdiction, and relating to individual rights, will often be held
5 binding in a subsequent proceeding before the agency itself, where the statute does not expressly
6 give the agency power to modify its decisions. (*Olive Proration Program Committee for Olive*
7 *Proration Zone No. 1 v. Agricultural Prorate Com.* (1941) 17 C.2d 204, 209, 109 P.2d 918;
8 *Louis Stores v. Department of Alcoholic Beverage Control* (1962) 57 C.2d 749, 756, 22 C.R. 14,
9 371 P.2d 758, see *People v. Sims* (1982) 32 C.3d 468, 186 C.R. 77, 651 P.2d 321.

10 C. **General Rule: Collateral Estoppel and Res Judicata Apply to Agencies**
11 **Except When There is Statutory Authority to Reopen Cases**

12 Res judicata (and collateral estoppel) principles applies except where the
13 Legislature has specified exactly what preclusive effect a judicial determination
14 has on a related administrative proceeding. (*Gikas v. Zolin* (1993) 6 Cal.4th 841,
15 851-852, 25 Cal.Rptr.2d 500, 863 P.2d 745 [traditional collateral estoppel
16 principles did not govern where Legislature had specified in Vehicle Code exactly
17 what preclusive effect criminal proceeding had on administrative license
18 suspension for drunk driving]; see *Branson, supra*, 24 Cal.App.4th at p. 345, 29
19 Cal.Rptr.2d 314.)
20 (*Le Parc Community Ass'n v. Workers' Compensation Appeals Bd.* (2003) 110
21 Cal.App.4th 1161, 1170.)

22 CalPERS has no jurisdiction to determine its own jurisdiction re collateral estoppel and
23 *res judicata*. The doctrine of jurisdiction to determine jurisdiction is probably inapplicable to an
24 administrative agency's determinations of its own jurisdiction.⁵ (See *San Francisco v. Padilla*
25 (1972) 23 Cal.App.3d 388, 400.)

26 D. **Final Determination**

27 CalPERS' prior administrative determination met the threshold requirements of a final

28 ⁵ Although Mr. Lewis has disputed the scope and nature of CalPERS' authority in this
and other pending actions or papers, CalPERS asserts that it is authorized by the PERL and the
California Constitution to determine the right to and amount of benefits payable to Members,
including Mr. Lewis, and to initiate administrative processes to make those determinations, by
itself, by its Board, and by delegation, including to the OAH under the APA, and to hold
hearings, if necessary to make those determinations.

1 decision:

2 ... 'First, the issue sought to be precluded from re-litigation must be identical to
3 that decided in a former proceeding. Second, this issue must have been actually
4 litigated in the former proceeding. Third, it must have been necessarily decided in
5 the former proceeding. Fourth, the decision in the former proceeding must be final
6 and on the merits. Finally, the party against whom preclusion is sought must be
7 the same as, or in privity with, the party to the former proceeding. [Citations.] The
8 party asserting collateral estoppel bears the burden of establishing these
9 requirements.' [Citation.]" ... If all of these threshold requirements of collateral
10 estoppel are met, the analysis determining whether that doctrine applies to give
preclusive effect then looks to " 'the public policies underlying the doctrine before
concluding that [it] should be applied in a particular setting.' [Citation.]"
(*Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174
Cal.App.4th 339, 356-357, quoting *Pacific Lumber Co. v. State Water Resources
Control Bd.* (2006) 37 Cal.4th 921, 943-944.)

11 **E. Applying the Threshold Requirements of Collateral Estoppel/Res Judicata**
12 **Doctrine**

13 This controversy meets all five threshold requirements:

14 1) **Identical to issue litigated in former process.** CalPERS asserts the same
15 issues in 2013 as it asserted in 2007: whether and how Mr. Lewis' increased
16 compensation at the Battalion Chief level should be reported to CalPERS and considered
17 in the calculation of his pension allowance.

18 2) **Issue must have had opportunity to be litigated.** In 2007, CalPERS'
19 staff interpreted the law to facts and made a quasi-judicial determination in Mr. Lewis'
20 favor by ruling on law as applied to facts.

21 *Sims* explained that "[a]n issue is actually litigated '[w]hen [it] is *properly raised*,
22 by the pleadings or otherwise, and is submitted for determination, and is
23 *determined* A determination may be based on a *failure of ... proof*' (Rest.2d,
24 Judgments (1982) § 27, com. d, p. 255, italics added.) (*Sims, supra*, 32 Cal.3d at
p. 484, 186 Cal.Rptr. 77, 651 P.2d 321.)
(*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 871.)

25 In *Murray v. Alaska Airlines, Inc., supra*, the Supreme Court found that the
26 Department of Labor's administrative process met the "actual litigation" requirement *even*
27 *though plaintiff (Murray) had no opportunity to participate in a contested process up to*
28 *that point.*

1 3) **Issue necessarily raised in former process.** The issues raised now were
 2 either decided and/or had to be raised for decision by CalPERS in 2007.

3 CalPERS cannot "reserve" the right to reopen a certain cause of action based on
 4 the same underlying core nucleus of facts about positions and pay.⁶

5 4) **Determination is Final.** CalPERS is not required by statute to make every
 6 binding quasi-judicial decision in any particular way, but its staff is empowered to make
 7 binding final decision. (*Government Code*, §20099.)

8 5) **Same party as in former process or one in privity.** Both parties—
 9 CalPERS and Mr. Lewis (and if necessary the City)—are identical in 2007 and currently.
 10 Collateral estoppel/*res judicata* applies to the administrative process and CalPERS in this
 11 matter:

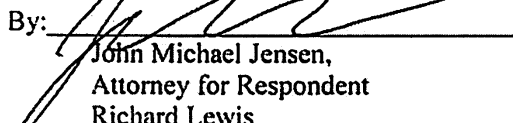
12 An administrative agency acts in a judicial capacity when it resolves disputed
 13 issues of fact properly before it and provides the parties with an opportunity to
 14 present evidence and to litigate fully the issues. (*United States v. Utah Constr.
 15 Co.*, *supra*, 384 U.S. at p. 422 [16 L.Ed.2d at pp. 660-661].)
 16 (*Rymer v. Hagler* (1989) 211 Cal.App.3d. 1171, 1178-1179.)

16 **CONCLUSION**

17 Mr. Lewis understands that he will be required to persuade the Court that his collateral
 18 estoppel/*res judicata* claims are persuasive before he can obtain a *Proposed Decision* to that
 19 effect. By this motion, he is simply asking that the Court allow him have those claims heard at
 20 the threshold, before the case in chief proceeds, to protect the foundational*preclusive nature of
 21 the collateral estoppel/*res judicata* and due process claims he has asserted.

22 Respectfully submitted,

23
 24 Dated: October 3, 2014

25 By: 
 26 John Michael Jensen,
 27 Attorney for Respondent
 28 Richard Lewis

28 ⁶ In 2007, CalPERS neither asserted a right to re-litigate the issues in the future nor
 obtained an agreement from Mr. Lewis or the City that it would be permitted to do so.

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DECLARATION OF JOHN MICHAEL JENSEN

I, JOHN MICHAEL JENSEN, declare as follows:

1. The statements herein are based upon my personal knowledge and if called to testify under oath in court I could and would so testify.

2. I am over 18 years old.

3. I am the attorney for Respondent Richard Lewis and have been since the commencement of this administrative process.

4. Attached as Exhibit 1 is a true and correct copy of a *Settlement and General Release Agreement* executed in March 2007 resolving the dispute between Mr. Lewis and the City of San Bernardino concerning the San Bernardino Fire Department's failure to promote Mr. Lewis to the position of Battalion Chief. I obtained a copy of this document as part of a Public Records Act request I submitted to CalPERS.

5. Attached as Exhibit 2 is a true and correct copy of a July 5, 2007 letter from Carlous Johnson, Compensation Review Analyst in CalPERS' Employer Services' Division, to Laura King of the City of San Bernardino, referencing CalPERS' consideration of the terms of Exhibit 1 and instructing the City to report Mr. Lewis' three years of back pay at the Battalion Chief level and his Battalion Chief compensation going forward as "temporary upgrade pay" special compensation. I obtained a copy of this document as part of the same Public Records Act request I submitted to CalPERS.

Under penalty of perjury, I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true.

DATED: October 3, 2014

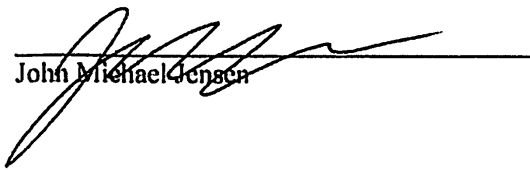

John Michael Jensen

Exhibit 1

SETTLEMENT AND GENERAL RELEASE AGREEMENT

This Settlement and General Release Agreement ("Agreement") is entered into by and between the San Bernardino Professional Firefighters Union, Local 891 ("Union") and Richard Lewis (collectively "Plaintiffs"), on the one hand, and the City of San Bernardino ("City") and Larry Pitzer (collectively "Defendants"), on the other hand, based on the following circumstances.

RECITALS

A. On May 4, 2005, Plaintiffs filed a complaint in the California Superior Court for the County of San Bernardino, Case No. SCV 125902, against Defendants. On June 2, 2005, Case No. SCV 125902 was removed to the United States District Court, Central District of California and assigned Case No. EDCV05-473 VAP (hereafter "Lawsuit").

B. In the Lawsuit, Plaintiffs alleged causes of action arising from or related to the decision to promote Dennis Moon rather than Mr. Lewis to Battalion Chief. Mr. Moon was promoted to Battalion Chief effective October 5, 2004.

C. On May 25, 2006, the Court granted summary judgment to the City, dismissing the City from the Lawsuit. The Court granted partial summary judgment to Chief Pitzer, dismissing all claims against him except the claim for violation of 42 U.S.C. § 1983.

D. Defendants deny, and continue to deny, any and all allegations by Plaintiffs of wrongful act or omission.

E. The parties desire to resolve all pending actions between them, without the further expenditure of time or expense of litigation and, for that reason, enter into this Agreement.

10/23/07 11:42 PM

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AGREEMENTS

In consideration of the promises, covenants and conditions hereinafter set forth, IT IS AGREED AS FOLLOWS:

1. SETTLEMENT PAYMENT. The City agrees to pay Plaintiffs the total sum of Seventy Five Thousand Dollars (\$75,000.00). This payment shall be without withholding for taxes, and represents full settlement of Plaintiffs' claims for attorneys' fees, emotional distress and other non-wage damages. Said payment shall be made by check payable to "Goldwasser & Glave, LLP", delivered to Plaintiffs' counsel within twenty days of Plaintiffs' execution of this Agreement, provided that Defendants' counsel has received by then this Agreement and the Stipulation for Dismissal with Prejudice, bearing the signatures of Plaintiffs' counsel, and the Request for Dismissal with Prejudice, bearing the signature of Plaintiffs' counsel.

pd. by A/P

2. OTHER SUBSTANTIVE TERMS OF THE SETTLEMENT. As further consideration for this settlement, the parties agree as follows:

- a) Mr. Lewis will be paid back pay from the effective date of Mr. Moon's promotion to the present, less required tax withholdings. The back pay shall consist of the difference between Mr. Lewis's actual pay as Captain for all regular hours and what Mr. Lewis would have been paid during such period for such hours had he been a Battalion Chief.
- b) Mr. Lewis shall be compensated from the date of this agreement forward as if he had been promoted to the position of Battalion Chief (including all current and/or future benefits granted to Battalion Chiefs) with the exception listed in subsection c, below.
- c) Mr. Lewis shall be compensated for all future overtime hours at the Captain rate; to wit, time and one half (1.5) the regular rate of pay Lewis would receive for Fire Captains of

10/6/04

PR# 11 6/15/07
\$68,562.26

Attached spreadsheet

PR# 12 6/30/07

3/23/07

He doesn't get only.

PR# 12 6/30/07

(PL 632) * update to
 2006 P-5 10367
 P-4 8107
 2260 mo.
 2009 P-5 11845
 P-4 9007
 2838 mo.
 (900) * 117/58.50 x 5 = 292.50

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Prior Year Holiday Payoff
 #6 3/31/08
 includes additional
 BC pay.

L X RL
 SBI Union
 City
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PR# 9 5/15/09
 max vac increase
 +15% eff 4/1/09

2007 P-5 11040
 8512
 2528 mo.

#3 08
 2008 P-5 11504
 P-4 8783
 #19
 2009 2721 mo.
 19512 = 336 (901)

Mr. Lewis' experience and length of service.

- d) For a period of two years from the effective date of this Agreement, the City shall not reassign Mr. Lewis from the station he is currently assigned to without his consent.

3. STIPULATION FOR DISMISSAL AND REQUEST FOR DISMISSAL. Plaintiffs counsel shall deliver to counsel for Defendants a Stipulation for Dismissal with Prejudice signed by counsel, in the form attached hereto as Exhibit "A", and a Request for Dismissal with Prejudice, signed by Plaintiffs' counsel, in the form attached hereto as Exhibit "B." Counsel for Defendants shall be authorized to file said Stipulation for Dismissal with Prejudice and Request for Dismissal with Prejudice after the payment specified in paragraph 1 has been made. Each party shall bear its, her or his own attorneys' fees and costs. Plaintiffs further agree not to pursue an appeal of the summary judgment in favor of the City.

4. RELEASE, DISCHARGE AND COVENANT NOT TO SUE. Except for those obligations created by or arising out of this Agreement, Plaintiffs, and each of them, on behalf of themselves and any others claiming by or through them, hereby release and covenant not to sue Defendants and their agents, attorneys, employees, officers, directors, affiliated entities, attorneys, successors and assigns, and representatives, if any, past and present, with respect to any and all causes of action, actions, wages, judgments, liens, indebtedness, damages, losses, claims, liabilities, and demands of whatever kind and character based on acts or omissions occurring on or before the effective date of this Agreement, including but not limited to, claims relating to or arising from the decision not to promote Mr. Lewis to Battalion Chief. Without otherwise limiting the scope of the releases contained in this Agreement, nothing in this paragraph or in paragraph 5 shall limit or affect: (a) the Union's right to pursue claims unrelated


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to Mr. Lewis or to the decision not to promote him to Battalion Chief or (b) Mr. Lewis' rights under the California Workers' Compensation Act related to claims and/or injuries unrelated to the decision not to promote him to Battalion Chief.

5. WAIVER OF STATUTORY PROVISIONS. Plaintiffs understand and expressly agree that this Settlement and General Release Agreement extends to all claims of every nature and kind, known or unknown, suspected or unsuspected, direct or derivative, vested or contingent, past, present or future, arising from or attributable to any allegedly unlawful act or omission or employment practice occurring on or prior to the date of execution of this Agreement, whether set forth in any claim, charge, complaint, or pleadings referred to herein or not, and that any and all rights granted to Plaintiffs under Section 1542 of the California Civil Code or any analogous state or federal law or regulation are hereby expressly waived. Said Section 1542 of the California Civil Code reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

6. DENIAL OF ANY VIOLATION; AGREEMENT NOT EVIDENCE. This Agreement and the settlement embodied herein do not constitute an admission by Defendants of any of the matters alleged in the Lawsuit or of any violation of federal, state or local law, ordinance or regulation or of any liability or wrongdoing whatsoever. Neither this Agreement nor anything in this Agreement shall be construed to be or shall be admissible in any proceeding as evidence of liability or wrongdoing by Defendants. This Agreement may be introduced, however, in any


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proceeding to enforce the Agreement.

7. WARRANTY OF NON-TRANSFER OF RELEASED MATTER. Plaintiffs warrant and represent that they have not heretofore assigned or transferred to any person not a party to this Agreement any released matter or any part or portion thereof.

8. PAYMENT OF TAXES. Plaintiffs agree that they shall be exclusively responsible for the payment of federal and state taxes, if any, which may be due as the result of the consideration paid under this paragraph 1 of this Agreement. Plaintiffs hereby agree fully to indemnify and hold harmless Defendants from payment of taxes, interest or penalties that may be required by any government agency at any time due to Plaintiffs' failure to pay federal or state taxes on the consideration paid under this Agreement.

9. COMPLETE AGREEMENT. This Agreement constitutes and contains the entire agreement and understanding between the parties concerning settlement of the Lawsuit and the other subject matters addressed herein, and supersedes and replaces all prior negotiations and all agreements, proposed or otherwise, whether written or oral.

10. COUNTERPART EXECUTION; EFFECT; PHOTOCOPIES. This Agreement may be executed in counterparts, and each counterpart, when executed, shall have the efficacy of a signed original. Photographic copies or facsimile copies of such signed counterparts may be used in lieu of the originals for any purpose, absent a genuine issue as to authenticity.

11. JOINT PREPARATION OF AGREEMENT. Each party has cooperated in the drafting and preparation of this Agreement. Hence, in any construction to be made of this Agreement, the same shall not be construed against any party on the basis that the party was the drafter.

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12. EFFECT OF WAIVER OF BREACH. No waiver of any breach of any term or provision of this Agreement shall be construed to be, or shall be, a waiver of any other breach of this Agreement. No waiver shall be binding unless in writing and signed by the party waiving the breach.

13. FULL UNDERSTANDING AND VOLUNTARY ACCEPTANCE. In entering into this Agreement, the parties represent that they have relied upon the advice of their attorneys, who are attorneys of their own choice, and that the terms of this Agreement have been completely read and explained to them by their attorneys, and that those terms are fully understood and voluntarily accepted by them.

14. COOPERATION IN FULFILLMENT OF AGREEMENT. All parties agree to cooperate fully and to execute any and all supplementary documents and to take all additional actions that may be necessary or appropriate to give full force to the basic terms and intent of this Agreement and which are not inconsistent with its terms.

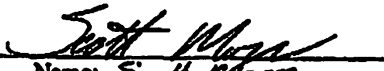
Dated: 3-6, 2007

RICHARD LEWIS



Dated: 3/, 2007

SAN BERNARDINO PROFESSIONAL
FIREFIGHTERS UNION, LOCAL 891

By: 
Name: Scott Moss
Position: PRESIDENT

4/22/07 3:42 PM

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Dated: _____, 2007

CITY OF SAN BERNARDINO

By: _____

Name: _____

Position: _____

Dated: _____, 2007

LARRY PITZER

I, Corey W. Glave, counsel of record for Plaintiffs, approve as to content and form.

Dated: 3/23, 2007

COREY W. GLAVE
GOLDWASSER & GLAVE



Corey W. Glave
Attorneys for Plaintiffs

I, James A. Odlum, counsel of record for Defendants, approve as to content and form.

Dated: _____, 2007

JAMES A. ODLUM
MUNDELL, ODLUM & HAWS

James A. Odlum
Attorneys for Defendants.

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SETTLEMENT AND GENERAL RELEASE AGREEMENT

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Dated: _____, 2007

RICHARD LEWIS

Dated: _____, 2007

SAN BERNARDINO PROFESSIONAL
FIREFIGHTERS UNION, LOCAL 891

By: _____

Name: _____


Position: _____

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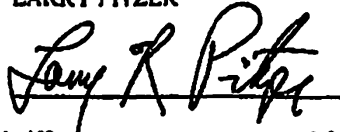
Dated: 3/21, 2007

CITY OF SAN BERNARDINO

By: 
Name: Kenneth J. Morris
Position: Mayor

Dated: 3-22, 2007

LARRY PITZER



I, Corey W. Glave, counsel of record for Plaintiffs, approve as to content and form.

Dated: _____, 2007

COREY W. GLAVE
GOLDWASSER & GLAVE

Corey W. Glave
Attorneys for Plaintiffs

I, James A. Odlum, counsel of record for Defendants, approve as to content and form.

Dated: _____, 2007

JAMES A. ODLUM
MUNDELL, ODLUM & HAWS

James A. Odlum
Attorneys for Defendants

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Union


Exhibit 2



Employer Services Division
P.O. Box 942709
Sacramento, CA, 94229-2709
Telecommunications Device for the Deaf - (916) 795-3240
888 CalPERS (or 888-225-7377) FAX (916) 795-3005

July 5, 2007

Laura King
City of San Bernardino
300 N. D Street
San Bernardino, CA 92418

CITY OF SAN BERNARDINO
EMPLOYER SERVICES DIVISION
07 JUL 10 PM 2:06
RECEIVED

Dear Ms. King:

This letter is in response to your inquiry concerning the Settlement agreement between Mr. Richard Lewis and the City of San Bernardino.

The City has agreed to compensate Mr. Lewis at the Battalion Chief level retroactive back to October 2, 2004. Your specific question is – should this compensation be reported as regular base pay and earnings or as special compensation - temporary up-grade pay.

Since Mr. Lewis will retain his current position title of Fire Captain, the compensation at the Battalion Chief's position should be treated as temporary up-grade pay, and reported as special compensation.

CalPERS request that the City report this compensation on a monthly or semi monthly basis retroactive back to October 2, 2004.

If you have any questions, please feel free to contact CalPERS toll free at (888) CalPERS (225-7377).

Sincerely,

A handwritten signature in cursive script that reads "Carlous Johnson".

Carlous Johnson, Compensation Review Analyst
Employer Services Division



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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Law Offices of John Michael Jensen, 11500 W. Olympic Blvd., Suite 550, Los Angeles, CA 90064-1524.

On October 3, 2014 I served the following document(s) by the method indicated below:

RICHARD LEWIS' NOTICE AND MOTION TO HEAR HIS COLLATERAL ESTOPPEL/RES JUDICATA CLAIMS AT THE OUTSET OF THE HEARING; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF JOHN MICHAEL JENSEN IN SUPPORT

By placing the document (s) listed above in a sealed envelope (s) and consigning it First Class Mail through the U.S. Postal Service to the address (es) set forth below.

Wesley Kennedy
CalPERS Legal Office
P.O. Box 942707
Sacramento, CA 94229-2707

Jolena E. Grider
Sr. Assistant City Attorney
City of San Bernardino
300N.D Street, 2nd Floor
San Bernardino, CA 92418

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 3, 2014, at Los Angeles, California.

Griselda Montes De Oca