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October 6, 2014
BY EMAIL AND U.S. MAIL

Wesley Kennedy
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CalPERS Legal Office
PO Box 942707
Sacramento, CA 94229-2707

Re: In Re the Pension Calculation of Richard Lewis
CalPERS Case No. 20140256, OAH Case No.: 2014040945

Dear Mr. Kennedy:

I am writing in response to your email late Sunday night. You objected to Richard Lewis' *Motion to Hear Collateral Estoppel/Res Judicata Claims at the Outset of the Hearing*.

We previously filed a similar motion labeled as a Jurisdictional Challenge. The OAH sought a response from CalPERS and you filed an Opposition. Acting Presiding ALJ Beth Faber Jacobs then considered the motion but indicated the substance was to be heard in the administrative process. Friday, we filed our motion to reiterate the earlier motion. We are trying to remain consistent with the ALJ's prior ruling.

Your Sunday email objected on the grounds that the recent motion was not timely submitted. I respectfully disagree with your analysis.

I believe you have also misconstrued the intent of the motion and what it is seeking. This letter is being sent to clarify. I am sending a copy of this letter to the OAH and counsel for the City of San Bernardino as well.

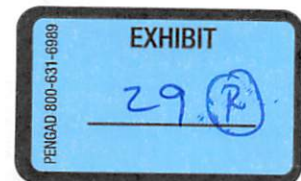
Motion Seeks Implementation of the Court's Prior Order

On May 14, 2014, we *Notice and Motion Regarding Jurisdictional Challenge* that challenged OAH's and CalPERS' jurisdiction on charter cities grounds and on collateral estoppel/res judicata.

CalPERS filed its Opposition on May 29, 2014.

On June 13, 2014, Judge Jacobs of the OAH issued an order. Judge Jacobs made several findings:

1. First, she found that the issues required an evidentiary hearing.



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2. Second, she found that the issues can be appropriately addressed during the administrative hearing and resolved in the *Proposed Decision*.

3. Third, she found that to the extent Lewis' challenge could be deemed a motion to dismiss the *Statement of Issues* prior to the hearing, it was denied. She ruled that the CalPERS board has authority to hold a hearing to address questions of Mr. Lewis' pension calculations. She found that the administrative hearing process will provide the parties the opportunity to present their evidentiary cases, call witnesses, introduce exhibits, etc.

4. Finally, Judge Jacobs found that Respondent had not established that the *Statement of Issues* was jurisdictionally defective or that the Board lacks authority to hear the matter and denied the jurisdictional motion, but she did so without prejudice and indicated Respondent may present his claims during the hearing.

In the motion filed Friday, Mr. Lewis seeks the Court to determine how and when the presentation of the threshold collateral estoppel and *res judicata* claims will take place.

Friday's Motion, Request for Scheduling Collateral Estoppel, Res Judicata at Threshold

The motion is compliant with Judge Jacobs' prior order and consistent with renewing Lewis' earlier motion.

Specifically, the motion (i) summarized Judge Jacobs' ruling in the Procedural Background section of the motion and then (ii) indicated, "Mr. Lewis will act in accordance with the Court's order and present his claims during the hearing. With due respect for the Court's ruling, however, he requests that the collateral estoppel/*res judicata* claim be taken up as the first matter in the hearing because of its threshold nature."

The only real procedural issue raised in the motion is the timing of the renewed presentation of the collateral estoppel/*res judicata* claims.

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

Perhaps Respondent inartfully presented the procedural issues and should have renewed his request to the court to determine the collateral estoppel/*res judicata* claims at the threshold. In any event, he is clearly acting within the scope and direction of Judge Jacobs' June 3, 2014

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ruling.

Threshold Issues, Order of Case Presentation

As we seek to present the collateral estoppel and *res judicata* claims at the threshold, I agree to present Mr. Lewis' case first.

I also appreciate flexibility in the calling of witnesses, including out of turn. For example, I intend to present some testimony of witnesses with some difficult scheduling availability.

I hope to complete my case by the end of the first day, although I reserve the right (subject to Court oversight) to go over into the second day. As you know, I argued before the hearing was scheduled that I thought the proceedings would take three days to complete, not one as you suggested, and you ended up asking the OAH for two days.

Burden of Proof

You have raised "burden of proof" issues. In response to my October 3, 2014 letter, you asserted that Lewis has the burden of proof. CalPERS assumed I would present my case first.

I disagree with your burden of proof analysis. I assert that CalPERS must prove its claims that Mr. Lewis is not entitled to the higher pension.

CalPERS has already made a final decision that it seeks to change. As a result, CalPERS bears the burden of proof on the grounds for changing its prior decision. Indeed, because CalPERS is taking away a vested property right, CalPERS must prove its case to a standard higher than a "preponderance of the evidence". Instead, CalPERS must prove its case to the standard of clear and convincing evidence to a reasonable certainty.

CalPERS' Burden to Produce Evidence to Support its *Prima Facie* Case

If the Court does not agree that *procedurally* the re-litigation or re-determination of the matter is barred by collateral estoppel and *res judicata*, then CalPERS must still *substantively* bear the burden of proof on why its decision has changed.

Substantively, CalPERS must first produce admissible evidence to support its *prima facie* case, including for example that Mr. Lewis' increased compensation at the Battalion Chief level does not qualify as "compensation earnable" under the PERL, whether as "temporary upgrade pay" as CalPERS instructed the City of San Bernardino to report it or in some other fashion.

Without sufficient credible and admissible evidence in the administrative record on the

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substance of why the determination has changed, CalPERS is bound by the substance of its prior determination, which is already in evidence. Without CalPERS bearing the burden of proof, the ALJ is not supplied sufficient facts to satisfy *Government Code* section 11425.50 requiring "a concise and explicit statement of the underlying facts of record that support the decision" that is "based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding".

Burden of Proof Under *Government Code* Section 20160

Further, CalPERS seeks to make the "corrections" to Mr. Lewis' PERSible compensation and the resulting calculation of his pension allowance based on *Government Code* section 20160.¹

Subsection (d) of 20160 indicates that "[t]he party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) [describing corrections requested by a member] and (b) [describing correction of errors and omissions of CalPERS or contracting agencies]."

The obligation of a party to sustain the burden of proof requires the production of evidence for that purpose. (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155.)² Thus, until CalPERS has met its burden of producing evidence to support a finding on all the elements, Mr. Lewis has no duty to rebut the allegations or otherwise respond. (*Ibid.*; see also *Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99.)

The party having "the affirmative of the issue" bears the burden of proof in administrative proceedings. (See *La Prade v. Department of Water & Power of Los Angeles* (1945) 27 Cal.2d 47,51) CalPERS, as the moving party, bears the burden of proof. (*Schaffer v. Weast* (2005) 546 US 49.) Mr. Lewis is not required to refute the allegations that CalPERS makes (unless or until CalPERS establishes its *prima facie* case, but even then the "burden of ultimate persuasion

¹ CalPERS does not reference Section 20160 in its *Statement of Issues*. However, it explicitly did so in the May 8, 2013 final determination letter that commenced this administrative proceeding. Further, although CalPERS has not cited that statutory section in the *Statement of Issues*, it cannot claim any authority to make adjustments to Mr. Lewis' pension unless it can demonstrate the statutory authority to do so, presumably Section 20160's "correction of errors" language.

² The mere fact that the licensee has the right to subpoena witnesses does not relieve the agency of meeting its burden of producing competent evidence supporting the discipline. (*Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532.)

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remains on the agency".) (*Anderson v. Board of Dental Examiners* (1915) 27 Cal.App. 336, 338.)

No New Facts or Law

CalPERS already received all of the factual evidence relevant to Mr. Lewis' situation, including the settlement agreement between the City and Mr. Lewis resolving the issue of his entitlement to all of the compensation and benefits of the Battalion Chief position.

CalPERS reviewed all of the facts and applied the law to those facts, and then issued a formal decision finding that the increased compensation should be reported as "temporary upgrade pay" special compensation and instructing the City to do so. CalPERS also accepted those reports, including three years of retroactive "back pay" compensation and five years of compensation going forward, as well as accepting the employer and employee contributions attributable to that reported compensation.

The City of San Bernardino and Mr. Lewis respected and followed CalPERS' prior determination in every aspect.

Mr. Lewis contends that no new facts or law have emerged since that time. If CalPERS contends otherwise, it has the burden to establish this. This relates to Mr. Lewis' collateral estoppel/*res judicata* claims, but also underlines CalPERS' burden of proof obligations.

CalPERS' Higher Degree of Proof Required

Mr. Lewis' higher pension is a vested property right. CalPERS must meet a higher standard if it seeks to revise its prior decision (and if procedurally it can overcome the threshold bar arising from collateral estoppel and *res judicata*).

The higher standard of clear and convincing evidence to a reasonable certainty standard applies to CalPERS here, for example, as it applies to cases involving the revocation of professional licenses. (See, *Furman v. State Bar* (1938) 12 Cal.2d 212, 229; *Mann v. DMV* (1999) 76 Cal.App.4th 312; *Ettinger v. Board of Med. Quality Assur.* (1982) 135 Cal.App.3d 853.) The State Bar Court Review Department has held that mitigating evidence in attorney discipline must be equally established by clear and convincing evidence. (*In re Twitty* (1994) 2 Cal. State Bar Ct Rptr 664.)

Once a professional license vests, the higher standard of proof applies when an agency seeks to limit it.³ As both seek to deprive a person of a property interest for life that required

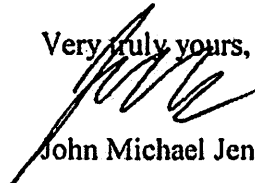
³ Because administrative proceedings are civil in nature (*Hughes v. Board of*

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"time consuming requirements" for an individual to obtain, a reduction in a vested pension is fundamentally the same as a limitation to a professional license. CalPERS has also made comments that the public availability and other requirements in pension law are to protect the public. (*Id.* at 856.) Similar to doctors' and lawyers' discipline hearings that reduce their rights to practice, CalPERS' seeking to reduce Mr. Lewis' existing vested property right earned over life requires that the higher standard of proof should apply.

If it can otherwise proceed, CalPERS must therefore present evidence establishing by clear and convincing proof to a reasonable certainty on all of the elements of the *prima facie* case

Very truly yours,



John Michael Jensen

JMJ:gm
cc: Office of Administrative Hearings
Jolena Grider, counsel for City of San Bernardino

Architectural Exa'rs (1998) 17 Cal.4th 763, 784), the standard of proof used in most cases is a preponderance of the evidence. (See, for example, *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.)