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7 BEFORE THE BOARD OF ADMINISTRATION  
8 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
9

10  
11 In the Matter of the Appeal of CalPERS'  
12 Denial of Pension Benefits to Richard Lewis

13 RICHARD LEWIS and CITY OF SAN  
14 BERNARDINO,

15 Appellants.  
16

11 } CALPERS CASE NO.: 2014 0256  
12 } OAH CASE NO.: 2014040945

13 } RICHARD LEWIS' NOTICE OF  
14 } DEFENSE, AFFIRMATIVE DEFENSES,  
15 } AND NEW MATTER; EXHIBITS 1-3

16 } JURISDICTIONAL CHALLENGE FILED  
17 } CONCURRENTLY

18 Richard Lewis hereby timely submits this *Notice of Defense, Affirmative Defenses and*  
19 *New Matter* (hereinafter "*Notice of Defense*") in response to the California Public Employees'  
20 Retirement System's ("CalPERS") *Statement of Issues* dated April 22, 2014, although the  
21 *Statement of Issues* was not mailed until April 24, 2014 and not received by counsel for Mr.  
22 Lewis until April 30, 2014.

23 This *Notice of Defense* specifically denies each part of the *Statement of Issues* that is not  
24 expressly admitted. The *Notice of Defense* also sets forth special defenses and objections to the  
25 *Statement of Issues*.

26 Subject to the "Jurisdictional Challenge" filed concurrently herewith and with a  
27 reservation of all rights of any kind or nature, Lewis conditionally files his *Notice of Defense*  
28 under protest regarding CalPERS' attempted denial of pension rights and benefits concerning his



1 unilaterally reducing the pension allowance without first affording him the right to a fully  
2 litigated hearing that comports with due process, an opportunity to refute CalPERS' contentions,  
3 and a final resolution of the dispute in the administrative process or a court of law before any  
4 pension reduction. Counsel for Mr. Lewis sent a letter to CalPERS on April 18, 2014, three days  
5 after receiving notice from CalPERS that it would unilaterally reduce the pension effective May  
6 1, 2014, and requested that CalPERS refrain from any reduction until a hearing was held.  
7 CalPERS has never responded to that request.

8 Mr. Lewis' employer, the City, has affirmatively recognized that Lewis was entitled to  
9 the Battalion Chief position. The City filed an appeal of CalPERS' "final determination" to  
10 reduce Mr. Lewis' pension allowance, a true and correct copy of which is attached hereto as  
11 Exhibit 1.

12 The City duly and faithfully reported the Battalion Chief compensation and EPMC to  
13 CalPERS as "Temporary Upgrade Pay" as instructed and directed by CalPERS. CalPERS issued  
14 such direction after the City explicitly contacted CalPERS to determine how to report the  
15 compensation so that Mr. Lewis would receive an eventual pension allowance calculated based  
16 on his highest one-year earnings at the Battalion Chief level.

17 Mr. Lewis asserts all his equitable defenses and rights. CalPERS is equitably estopped  
18 from unjustly denying Mr. Lewis the pension allowance based on his highest one year of regular  
19 and special compensation pursuant to the City's retention of CalPERS to administer the City's  
20 pension promises. Laches bars this proceeding. The statute of limitations bars CalPERS from  
21 now acting to cut the pension allowance.

22 **SPECIAL DEFENSES AND RESPONSE TO STATEMENT OF ISSUES**

23 Mr. Lewis specifically denies each part of the *Statement of Issues* that is not expressly  
24 admitted. Mr. Lewis hereby presents the following special defenses, specific denials, and  
25 responses to the *Statement of Issues* pursuant to *Government Code* section 11506.

- 26 1. Mr. Lewis recognizes that Petitioner CalPERS makes and files the *Statement of*  
27 *Issues* in its Official capacity.
- 28 2. Mr Lewis timely filed an appeal and requested a hearing.



1 existing practice of the City's promotion process. The local rules, including those made pursuant  
2 to the City's charter powers, were established and in many instances became mandatory and  
3 binding.

4 7. Neither the Civil Service Commission, nor the City, nor the SBFD involved has  
5 the power to dispense with the essentials prescribed. Moreover, a city council or its department  
6 heads cannot evade the established provisions by enacting contrary ordinances or practices  
7 without notice of a change in practice. The City made no changes to established practices in this  
8 case.

9 8. Eligibility lists were established as a result of position and competitive  
10 examinations. The exams were open to persons who lawfully may be appointed to any position  
11 within the class for which these examinations are held. The persons must meet the minimum  
12 qualifications requisite to the performance of the duties of that position.

13 9. When an examination for a managerial position is conducted on an open and  
14 promotional basis, the names of eligible persons must be placed on one list, ranked in relative  
15 order of the examination score received, and for purposes of preference in certifying eligible  
16 persons the list must be considered an eligible list. The names of the applicants who pass the  
17 examination with a passing score must be placed on one list and ranked in the relative order of  
18 the examination score received.

19 10. Promotions are supposed to be made in order from the list. Under the City's  
20 charter practices and powers, the City established a formal and historic practice where  
21 certification of the person next highest on the eligible list for appointment is mandatory.  
22 Seniority and score must be respected in making appointments. Mr. Lewis was employed at the  
23 time that the City established these practices, which created an expectancy and right in Mr.  
24 Lewis.

25 **Promotional Test to Become Battalion Chief:**

26 11. Beginning in or about November 2002 and finishing in or about February 2003,  
27 while holding the position of Fire Captain, Mr. Lewis took the test to be promoted to the position  
28 of Battalion Chief. He had on occasion previously performed the duties normally assigned to

1 Battalion Chiefs, including in taking command responsibility at large fire events and directing  
2 the activities and responses of the other firefighter personnel on scene.

3 12. The first step in the Battalion Chief promotional test was a written examination.  
4 As is currently understood, Mr. Lewis, Lester Kulikoff, and Dennis Moon were the only three  
5 Fire Captains to pass.

6 13. The next step was a series of simulations where the examinees assumed command  
7 of a structure fire, a wild land fire and a hazardous materials incident. It was announced prior to  
8 the examination that simulated injury or death of any personnel under an examinee's command in  
9 any of the scenarios would be considered automatic failure of the test, and such an individual  
10 would be disqualified for promotion to Battalion Chief until they later retook the simulator  
11 portion and passed.

12 14. Years later, it is understood that both Kulikoff and Moon had failed the simulator  
13 portion; only Mr. Lewis passed. Nevertheless, both Kulikoff and Moon were kept in the pool of  
14 Fire Captains eligible for promotion to Battalion Chief.

15 15. The remainder of the examination included a writing exercise, a Fire Chief's oral  
16 examination and an outside Chief's oral board. The scores from the entire examination process  
17 were added up by Fire Chief Larry Pitzer. Chief Pitzer then sent the list to the City's Civil  
18 Service Board with the three individuals listed in order as to their ranked eligibility to be  
19 promoted at the opportunity when a Battalion Chief position opened up in the SBFD.

20 16. Mr. Lewis, along with two other Fire Captains (Kulikoff and Moon) were all  
21 deemed eligible to serve as Battalion Chief should an opening for that position develop. Chief  
22 Pitzer placed Mr. Kulikoff first on the promotion list, Mr. Lewis was placed second on the list,  
23 and Mr. Moon was placed last on the list.

24 17. Civil service rules and past practice in the City and the SBFD established that  
25 once an opening for Battalion Chief occurred, the SBFD would be required to first offer the  
26 position to the individual holding position number one on the list, i.e. Kulikoff. If Kulikoff  
27 declined the position or was no longer available to accept the promotion (e.g., because he had  
28 retired or left SBFD), the SBFD was required to offer the position to the next person on the

1 ranking list, i.e. to Mr. Lewis. Only if both Kulikoff and Mr. Lewis either declined the Battalion  
2 Chief position or were no longer available to accept the promotion could SBFD offer the position  
3 to Moon.

4 18. If another Battalion Chief position later opened up, the SBFD would be required  
5 to follow the same procedures, i.e. to first offer the promotion to the individual who was then at  
6 the top of the list, and only move to a lower-ranked individual if the higher-ranked individual  
7 declined or was unable to accept the promotion.

8 **Mr. Kulikoff's Promotion to Battalion Chief and Later Retirement:**

9 19. In or about early 2003, a position for Battalion Chief in the SBFD opened up.  
10 Pursuant to the procedures set forth above, SBFD offered the position to Mr. Kulikoff, who  
11 accepted the promotion in March 2003 and thereafter served as Battalion Chief. Mr. Lewis then  
12 moved up to number one on the ranking list in the event another opening for Battalion Chief  
13 occurred, and Mr. Moon moved up to number two on the ranking list.

14 20. Because of violations of SBFD policies governing employment and professional  
15 conduct, Mr. Kulikoff was placed on administrative leave at the end of 2003. He remained on  
16 administrative leave until September 2004 when he was granted industrial disability retirement  
17 and left the SBFD. This created a new Battalion Chief opening.

18 21. Mr. Lewis had earned the position as Battalion Chief, as well as the associated  
19 pay rate and related deferred compensation in the form of a pension, prior to October 2004. Mr.  
20 Lewis had a vested earned right to the position, compensation and deferred compensation, and  
21 other benefits of a Battalion Chief.

22 **Denial of Promotion, Challenge, and Settlement:**

23 22. Although City and SBFD policy and practice required that promotion to the new  
24 Battalion Chief position be offered first to Mr. Lewis because he was now number one on the  
25 promotion list, the City and SBFD violated existing procedure, bypassed Mr. Lewis for the  
26 promotion, and instead awarded the Battalion Chief position to Mr. Moon in October 2004.

27 23. The City and SBFD promoted Moon over Mr. Lewis without justification or legal  
28 cause in violation of Mr. Lewis' vested employment rights. The City and SBFD promoted Moon

1 even though Moon had scored much lower than Mr. Lewis on the Battalion Chief test (and is  
2 believed to have failed the simulator test which pursuant to announced testing and scoring  
3 procedures, should have disqualified him for the promotion list altogether). Under law, Moon  
4 was not entitled to take the new Battalion Chief position unless it was first offered to and  
5 declined by Mr. Lewis. However, the City and SBFDD did not offer the Battalion Chief position to  
6 Mr. Lewis (and he did not decline it), and instead promoted Moon contrary to law.

7         24. Mr. Lewis challenged the City's and SBFDD's actions, contending that they were  
8 illegal. Mr. Lewis instituted legal action, and filed a *Complaint*.

9         25. Three years passed between the time when Mr. Lewis vested in the Battalion  
10 Chief employment rights and the time when the underlying dispute was resolved. During that  
11 time, Mr. Lewis performed the job duties that were required of him by his employer. The City  
12 paid Mr. Lewis and made associated employer and employee contributions to CalPERS.

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

21         27. The City acted to remedy its failure to timely promote Mr. Lewis to the Battalion  
22 Chief position, including by granting Mr. Lewis the compensation and benefits to which  
23 Battalion Chiefs were entitled. Further, the City, did so in its capacity as a charter city with  
24 constitutional autonomous rights to determine its own governance structure, hire and promote  
25 employees of its own choosing, designate those employees' job duties and responsibilities, and  
26 compensate those employees as the City deemed appropriate.

27         28. The City later memorialized this in a March 2007 Settlement Agreement. A true  
28 and correct copy of the Settlement Agreement is attached hereto as **Exhibit 2**. However, the



1 City's acknowledgement of its obligations and of Mr. Lewis' rights to all benefits accruing from a  
2 promotion to Battalion Chief were already in existence prior to the Settlement Agreement.

3 29. Fire Chief Pitzer was a signatory on and party to the Settlement Agreement. Chief  
4 Pitzer agreed that Lewis was entitled to receive all of the rights and benefits of any other  
5 individual promoted to the position of Battalion Chief. However, Chief Pitzer, as the head of the  
6 SBFD and ultimate authority in SBFD, directed that Lewis would remain assigned to duties  
7 similar to those performed by Lewis prior to the enactment of the Settlement Agreement.

8 30. In recognition of his right to the Battalion Chief position, the City increased Mr.  
9 Lewis' compensation from the date of the City's agreement forward, paying him the  
10 compensation earned as a Battalion Chief pursuant to the City's publicly available pay schedule.

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

15 **City's Reliance on CalPERS for Instructions on Implementation:**

16 32. In or about June 2007, the City contacted CalPERS for advice on how to  
17 implement its decisions concerning compensation and other PERSible benefits the City was now  
18 providing to Mr. Lewis.

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

22 34. **After evaluating the request and applying its administrative experience and**  
23 **knowledge, CalPERS directed the City to calculate the difference between the pay Mr.**  
24 **Lewis received as Fire Captain and the new pay the City was awarding him pursuant to the**  
25 **Battalion Chief pay scale, and then to report that difference as "temporary upgrade pay".**  
26 **CalPERS also directed the City to pay employer and employee contributions calculated on**  
27 **the basis of the Battalion Chief compensation rate paid to Mr. Lewis. Pursuant to the**  
28 **PERL and Regulations, and CalPERS' policies and procedures, "temporary upgrade pay"**

1 **is PERSible compensation.**

2 35. CalPERS instructed the City to do so for the approximately three years of  
3 additional back pay (the difference between what Mr. Lewis had received as Fire Captain and  
4 what he should have received as Battalion Chief), as well as do so for Mr. Lewis' pay going  
5 forward.

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

11 37. As the pension administrator for the City and purportedly the agency most  
12 qualified to determine the applicability of the PERL to effect the pension promises of the City,  
13 CalPERS could have chosen to direct the City to characterize and report Lewis' Battalion Chief  
14 compensation in some other manner qualifying as PERSible special compensation, or if  
15 necessary it could have directed the City to take some other action to ensure that Lewis'  
16 compensation qualified as PERSible compensation.

17 38. The City and Lewis were entitled to rely on CalPERS' expertise that the Battalion  
18 Chief compensation had been properly reported and characterized to provide Lewis with the  
19 benefits attributable to that compensation, including deferred income in the form of an eventual  
20 pension allowance payable by CalPERS.

21 **Performed Duties of Battalion Chief:**

22 39. By virtue of his experience and knowledge, and his exemplary performance on  
23 the Battalion Chief promotional tests, Mr. Lewis had qualified to serve as Battalion Chief.

24 40. Mr. Lewis had served as Battalion Chief on an acting basis at various times prior  
25 to the time of the Settlement Agreement (**Exhibit 2**). He continued to perform duties of a  
26 Battalion Chief after the Settlement Agreement, such as taking command of fire suppression  
27 incidents.

28 41. Mr. Lewis shared the same work location as other individuals who had served as

1 Battalion Chief (i.e., at the Sbfd). Mr. Lewis also was in the same bargaining unit as those other  
2 individuals who had served as Battalion Chief. For example, he was required to and did take  
3 wage and benefit reductions when the City required that of all managerial personnel between  
4 March 2007 and Mr. Lewis' retirement from the Sbfd on October 31, 2012.

5 **Disability Leave:**

6 42. Beginning in or about July 19, 2011 Mr. Lewis went on disability leave from his  
7 Sbfd job due to injuries suffered on the job, including a diagnosis of lymphoma. Firefighters  
8 who are diagnosed with lymphoma are presumptively assumed to have contracted the illness due  
9 to the hazards of firefighting duties and resulting exposures to toxic and carcinogenic substances.

10 43. Throughout approximately 16 months that Mr. Lewis was on disability leave, he  
11 continued to receive compensation as Battalion Chief pursuant to Sbfd's and the City's publicly  
12 available pay schedules pursuant to *Labor Code* section 4850.

13 44. During his disability leave, Mr. Lewis did not perform the duties of any active  
14 Sbfd employee, regardless of title held, because he was on medical leave and unable to work as  
15 a firefighter. However, like any CalPERS Member who takes disability leave, he was entitled to  
16 receive the PERSible rights and benefits of the compensation reported to CalPERS, regardless of  
17 the fact that he was disabled and therefore unable to perform the duties of any active Sbfd  
18 employee. CalPERS, in fact, does not inquire into what, if any, duties a Member is performing  
19 while on disability leave and instead ministerially calculates the Member's accrual of pension  
20 benefits based on the compensation reported to CalPERS on behalf of that individual.

21 45. Throughout the period of his disability, the City continued to report Mr. Lewis'  
22 Battalion Chief compensation and EPMC to CalPERS throughout the time he was on disability  
23 leave and to make the required employer and employee contributions attributable to those  
24 earnings. CalPERS continued to accept the reports of compensation and the contributions.

25 **Retirement:**

26 46. On October 10, 2012, while still on disability leave, Mr. Lewis filed a retirement  
27 application for industrial disability retirement because of injuries he suffered on the job.

28 47. The contract between the Sbfd and CalPERS mandates that a retiree's "final

1 compensation" from the SBFD shall be calculated based upon his or her highest single year of  
2 earnings, together with total years of service credit earned from CalPERS-covered employment  
3 and the specific retirement formula based upon the employee's age at retirement.

4 48. Once Mr. Lewis retired effective November 1, 2012, he began receiving a  
5 retirement pension that was correctly calculated by using his highest one-year earnings, which  
6 was at the Battalion Chief rate of compensation during his final year of employment with the  
7 SBFD.

8 **CalPERS' Disallowance of Mr. Lewis' Highest Compensation and EPMC:**

9 49. Six (6) months after Mr. Lewis' retirement, and nearly six (6) years after CalPERS  
10 explicitly instructed the City to report his compensation as temporary upgrade pay, CalPERS  
11 suddenly reversed its long-stated position and instructions. CalPERS issued its March 8, 2013  
12 letter to Mr. Lewis which for the first time disallowed the temporary upgrade pay.

13 50. CalPERS also disallowed the Employer Paid Member Contributions ("EPMC") in  
14 which the City paid Mr. Lewis' nine percent (9%) Member contributions to CalPERS and  
15 included the value of those contributions in his total reported compensation.

16 51. All employees of SBFD are entitled to have EMPC included in their final  
17 compensation, regardless of whether they hold jobs as part of the "rank and file" or as part of the  
18 management and confidential employees of the SBFD.

19 52. CalPERS provided Mr. Lewis with appeal rights should he wish to challenge this  
20 determination.

21 53. Lewis timely appealed CalPERS' determination.

22 **LAW AND ARGUMENT**

23 **I. Law of Jurisdiction**

24 **A. No Jurisdiction, Charter City Authority, No Preemption**

25 CalPERS and the OAH have no jurisdiction to hear or to decide any issue that is relevant  
26 to Mr. Lewis' employment which ignore or attempt to circumvent the "home rule" authority of  
27 the City as a "charter city" under the California Constituion. The City made decisions pursuant to  
28 its protected charter city autonomy to establish rates of compensation and deferred

1 compensation, or to make decisions concerning the positions held by any of its employees or the  
2 duties undertaken in those positions.

3 **B. Challenge to Jurisdiction**

4 Mr. Lewis reserves all rights to challenge CalPERS' and the OAH's jurisdiction in this  
5 regard and this matter at all times. Mr. Lewis does not consent to jurisdiction. Specifically, Mr.  
6 Lewis expressly reserves and maintains his rights to challenge CalPERS' or the OAH's  
7 jurisdiction and challenge that CalPERS or the OAH is operating in excess of its jurisdiction in  
8 this matter. Mr. Lewis expressly reserves and maintains his rights to pursue his rights in the  
9 Superior or higher courts.

10 **No Implied or Express Consent.** Mr. Lewis' filing of this *Notice of Defense* is not  
11 implied or express consent to (1) the jurisdiction of the OAH, (2) CalPERS' administrative  
12 authority; or (3) other authority of CalPERS or OAH.

13 **No Subject Matter Jurisdiction.** CalPERS and the OAH lack subject matter jurisdiction  
14 over all matters arising from the City's actions awarding Mr. Lewis the compensation of a  
15 Battalion Chief and the attendant deferred compensation and pension promises related to that  
16 compensation in that the City, as a charter city organized under the California Constitution, acted  
17 in accordance with its constitutional authority. The question of subject matter jurisdiction of an  
18 administrative agency over the subject matter generally may be raised at any time during the  
19 pendency of an adjudicative proceeding before the agency, or at any stage of an appeal  
20 thereafter. (*Stuck v. Board of Medical Examiners of State* (1949) 94 Cal.App.2d 751.)

21 **No Waiver of Jurisdiction, No Consent.** Mr. Lewis does not waive or consent to  
22 jurisdiction. Although jurisdiction can be conferred by consent, Mr. Lewis does not consent.

23 While reserving all rights to challenge jurisdiction at every stage, Mr. Lewis recognizes  
24 the law often indicates that where questions concerning the agency's jurisdiction are presented,  
25 the doctrine of exhaustion of administrative remedies often requires a final decision in the  
26 administrative forum. (See generally, *County of Alpine v. County of Tuolumne* (1958) 49 Cal.2d  
27 787.) Mr. Lewis reserves all rights to later seek a court order in an appropriate proceeding to  
28 grant relief, including that an agency decision is unconstitutional or contrary to or in violation of

1 a constitutional right, privilege, immunity, or constitutional power, as where the agency action is  
2 beyond the powers that could constitutionally be vested in or exercised by an administrative  
3 agency or are in excess of the agency's statutory jurisdiction. (2A Cal. Jur. 3d Administrative  
4 Law § 627.)

5 Unless and until CalPERS successfully moves a court with appropriate jurisdiction for a  
6 ruling that CalPERS can invade the City's "home rule" charter city authority to set compensation  
7 and make decisions concerning employment, CalPERS has a ministerial duty to accept the  
8 Battalion Chief salary paid to Mr. Lewis by the City and also accept the EPMC benefit given to  
9 Mr. Lewis in connection with the Battalion Chief salary as "compensation earnable" and to use  
10 that as Mr. Lewis' "final compensation" when calculating his pension allowance.

11 **C. Limited Agency Authority**

12 It is fundamental that an administrative agency has only such power as has been  
13 conferred upon it by the constitution or by statute and an act in excess of the power conferred  
14 upon the agency is void." (*BMW of North America, Inc. v. New Motor Vehicle Bd.* (1984) 162  
15 Cal.App.3d 980, 994.)

16 The powers of public agencies are derived from the statutes which create them and define  
17 their functions (*Kaiser Foundation Health Plan, Inc. v. Zingale* (2002) 99 Cal.App.4<sup>th</sup> 1018) and  
18 an administrative agency cannot enlarge or exceed the scope of authority that has been statutorily  
19 delegated to it (*Western States Petroleum Ass'n v. Department of Health Services* (2002) 99  
20 Cal.App.4<sup>th</sup> 999). Accordingly, an agency's adjudicative jurisdiction must be pursuant to  
21 legislative authorization (*Dominguez Land Corp. v. Daugherty* (1925) 196 Cal.453; *Hardin*  
22 *Oldsmobile v. New Motor Vehicle Bd.* (1997) 52 Cal.App.4<sup>th</sup> 585, as modified on denial of reh'g,  
23 (Feb. 28, 1997); *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44  
24 Cal.App.4<sup>th</sup> 194), which must be conveyed expressly and unequivocally (*Campos v. Anderson*  
25 (1997) 57 Cal.App.4<sup>th</sup> 784).

26 An agency cannot validly act in excess of the limits of jurisdiction that have been  
27 conferred on it. (*Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d  
28 245; *Hamilton v. Gourley* (2002) 103 Cal.App.4<sup>th</sup> 351; *Hardin Oldsmobile v. New Motor Vehicle*

1 *Bd. (1997) 52 Cal.App.4<sup>th</sup> 585, as modified on denial of reh'g, (Feb. 28, 1997).*)

2 **D. No Voluntary Appearance, No Waiver, No Consent, Notice of Defense Under**  
3 **Protest**

4 Mr. Lewis files this *Notice of Defense* under protest. Mr. Lewis is not volunteering, not  
5 consenting, and not waiving his rights. He appears involuntarily, under compulsion.

6 **II. Property Right Vested, Right to a Full Due Process Adjudicative Hearing in**  
7 **Superior Court Before Any Reduction in Pension, Reduction is Inappropriate**

8 Mr. Lewis asserts that CalPERS has no authority proceed to reduce his pension without  
9 first affording him the right to a full hearing on the matter.

10 Mr. Lewis has been receiving the proper pension for more than eight months since his  
11 retirement on November 1, 2012. His right to said pension fully vested upon his retirement. He  
12 has neither waived his vested rights nor consented to any amendment to or revision of those  
13 rights. CalPERS does not possess the right or authority to reduce his pension after it has fully  
14 vested.

15 Nevertheless, CalPERS advised Mr. Lewis by letter dated April 9, 2014, that it was  
16 unilaterally reducing the pension by nearly thirty percent (30%) effective May 1, 2014, before  
17 any hearing on the matter had taken place or any ruling on CalPERS' authority to make the  
18 reduction had been issued. Counsel for Mr. Lewis objected to the planned reduction by letter  
19 dated April 18, 2014, and demanded that CalPERS refrain from any reduction unless and until it  
20 received a final determination in the administrative process or in a court of law that CalPERS  
21 was entitled to make the reduction, but CalPERS has never responded to that letter demand and  
22 has moved forward with the unilateral pension reduction.

23 CalPERS' reduction of Mr. Lewis' pension allowance is a taking away of a vested  
24 property right. CalPERS' action constitutes a taking or a seizure of vested benefits. CalPERS  
25 cannot take such action, or in any other way imperil Mr. Lewis' vested rights, especially without  
26 first affording him the right to a full hearing before a neutral judge in a court of law and  
27 permitting him to challenge the grounds for any reduction. Any attempt to do so constitutes a  
28 denial of due process rights to Mr. Lewis.

1 Before CalPERS can seek to reduce vested pension benefits, it must conduct a  
2 predeprivation hearing in Superior Court "as a matter of constitutional right" because full relief  
3 cannot be obtained at a predeprivation or postdeprivation administrative hearing where CalPERS  
4 is also barred from declaring a statute unenforceable, or to from refusing to enforce a statute.  
5 (*Cal. Const.*, art. III, §3.5; *Matthews v. Eldridge* (1976) 424 U.S. 319, 331, 96 S.Ct. 893, 900.)

6 **III. Employment with a Contracting Agency**

7 The City has contracted with CalPERS to provide pension rights and benefits to its  
8 employees. Said contract was entered into some years prior to Mr. Lewis' employment at the  
9 City with the SBFD. The City-CalPERS contract does not preempt the City's charter city powers  
10 and authority.

11 Pursuant to the contractual arrangements, Mr. Lewis entered and continued in CalPERS  
12 membership throughout his employment with the SBFD. He is a vested Member of CalPERS  
13 entitled to the rights and benefits associated with such membership.

14 **IV. Mr. Lewis Satisfies the Public Employees' Retirement Law**

15 The PERL sets forth the conditions for CalPERS membership, accrual of service credit,  
16 and the calculation of retirement benefits to which such an individual might be entitled. Mr.  
17 Lewis meets all such terms and is entitled to a retirement pension calculated on the basis of his  
18 highest earnings, i.e., the highest year of Battalion Chief compensation he received as well as the  
19 associated EPMC.

20 **A. Mr. Lewis' Compensation as Battalion Chief Meets CalPERS' Requirements**

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

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

28



1           **B.     Group or Class:**

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

7           **C.     "Regular Rate of Pay":**

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

12           The regular rate by its very nature must reflect all payments which the parties  
13 have agreed shall be received regularly during the workweek, exclusive of  
14 overtime payments. It is not an arbitrary label chosen by the parties; it is an actual  
15 fact. Once the parties have decided upon the amount of wages and the mode of  
16 payment the determination of the regular rate becomes a matter of mathematical  
17 computation, the result of which is unaffected by any designation of a contrary  
18 'regular rate' in the wage contracts.

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

18           **D.     Labor Code Requirements Re "Average Weekly Earnings":**

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

23           This is an implicit determination that his wages were what he received as Battalion Chief,  
24 irrespective of what duties he performed. For example, *Labor Code* section 4453 sets disability  
25 payments based on "average weekly earnings".  
26  
27  
28

1 **V. CalPERS Must Accept Mr. Lewis' Battalion Chief Compensation as "Compensation**  
2 **Earnable"**

3 **A. Prior Advice:**

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

8 **B. Correction of Errors and Omissions:**

9 *Government Code* sections 20160, *et seq.*, state that CalPERS and contracting agencies  
10 (such as the City) have a mandatory duty to correct their errors and omissions which negatively  
11 impact Members, and that this duty continues throughout the lifetime of the Member and his/her  
12 beneficiaries.

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

17 **C. Mr. Lewis' Battalion Chief Compensation Qualifies as "Temporary Upgrade**  
18 **Pay"**

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

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

25 There is no definition in the PERL or the Regulations which further defines what  
26 constitutes "limited duration".

27 Further, if CalPERS insists that Mr. Lewis' receipt of the Battalion Chief compensation  
28 was not of limited duration, but was permanent in nature, then CalPERS should either correct the

1 prior reporting and include all of the Battalion Chief compensation in Mr. Lewis' base salary or  
2 instruct the City to make such corrections.

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

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

13 **D. CalPERS Must Either Accept the Disputed Portion of Mr. Lewis' Battalion**  
14 **Chief Compensation As "Temporary Upgrade Pay" Or Must Now**  
15 **Appropriately Redesignate It**

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

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

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

25 The fact that Mr. Lewis performed as Battalion Chief on an acting basis before he took  
26 the Battalion Chief promotional tests, then achieved exemplary scores in those tests, and then  
27 continued to be called on to periodically perform Battalion Chief duties such as taking command  
28 of fire suppression events under the Incident Command System constituted "superior

1 performance." Moreover, Mr. Lewis did so pursuant to his high scores in the Battalion Chief  
2 promotional test which meets the definition of "a program or system ... in place to plan and  
3 identify performance goals and objectives."

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

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

9 Pursuant to the Settlement Agreement (**Exhibit 2**) and the City's decision to award Mr.  
10 Lewis the benefits and rights of Battalion Chief, he became a member of the confidential  
11 management staff of the SBFDD and was mandated to carry out his duties with trust and  
12 discretion. If CalPERS maintains that he did so while remaining a member of the SBFDD rank and  
13 file holding the position of Fire Captain, then the additional compensation he received would  
14 constitute "compensation to rank and file employees who are routinely and consistently assigned  
15 to sensitive positions requiring trust and discretion."

16 **VI. Mr. Lewis Qualifies for Inclusion of EPMC in His Pension Calculation**

17 All safety employees at the SBFDD at the time of Mr. Lewis' retirement were entitled to  
18 inclusion of EPMC in their "compensation earnable", whether a member of the "rank and file"  
19 employees covered by Local 891 of the San Bernardino Professional Firefighters Union or a  
20 member of the management/confidential employees' bargaining unit. (See resolutions of the City  
21 granting EPMC to all safety employees of the SBFDD, true and correct copies of which are  
22 attached hereto as **Exhibit 3**.)

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

25 **AFFIRMATIVE DEFENSES**

26 **VII. CalPERS' Duty to Correctly Inform**

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

1 compensation in the form of a pension, including one administered by CalPERS, based upon the  
2 Battalion Chief compensation that the City paid to Mr. Lewis. It was also fully informed of the  
3 fact that the City requested advice from CalPERS about how to properly report Mr. Lewis'  
4 Battalion Chief compensation so that he would qualify for an eventual pension based upon that  
5 compensation.

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

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

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

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

28 **Pension is Consideration for Work.** " 'A pension plan offered by the employer and

1 impliedly accepted by the employee by remaining in employment constitutes a contract between  
2 them, whether the plan is a public or private one, and whether or not the employee is to  
3 contribute funds to the pension. [Citations.] The continued employment constitutes consideration  
4 for the promise to pay the pension, which is deemed deferred compensation. [Citations.]'  
5 (*Hannon Engineering, Inc. v. Reim* (1981) 126 Cal.App.3d 415, 425, 179 Cal.Rptr. 78.) As a  
6 result, '[p]ension plans create a trust relationship between pensioner beneficiaries and the trustees  
7 of pension funds who administer retirement benefits ... and the trustees must exercise their  
8 *fiduciary trust* in good faith and must deal fairly with the pensioners-beneficiaries. [Citations  
9 omitted.]' (*Ibid.*; emphasis in originals.)" (*Hittle v. Santa Barbara County Employees Retirement*  
10 *Assn.* (1985) 39 Cal.3d 374, 392.)

11 **Duty to Inform.** CalPERS has a fiduciary duty to provide timely and *accurate*  
12 information to its members. (See *In re Application of Smith* (March 31, 1999) PERS Prec. Dec.  
13 No. 99-01 ["The duty to inform and deal fairly with members also requires that the information  
14 conveyed be complete and unambiguous"]; see also *City of Oakland v. Public Employees'*  
15 *Retirement System* (2002) 95 Cal.App.4th 29, 40.)

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

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

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

27 This fiduciary relationship is judicially guarded by the application of *Civil Code*  
28 section 2235, which provides that "[a]ll transactions between a trustee and his  
beneficiary during the existence of the trust, or while the influence acquired by

1 the trustee remains, by which he obtains any advantage from his beneficiary, are  
2 presumed to be entered into by the latter without sufficient consideration, and  
under undue influence."

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

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

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

22 (30 Cal.Jur.3d, *Estoppel and Waiver*, §1.)

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

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

1 *Beach v. Mansell* (1970) 3 Cal.3d 462, 501 ("*Mansell*").

2 **VIII. CalPERS is Estopped from Denying the Use of Mr. Lewis' Battalion Chief Salary**

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

8 **A. Elements of Equitable Estoppel**

9 It is well-established that the doctrine of estoppel may be applied against a government  
10 body where justice and right require it. (*Mansell, supra; Piazza Properties, Ltd. v. Department of*  
11 *Motor Vehicles* (1977) 71 Cal.App.3d 622, 631.)

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

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

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



1 City.

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

7 Nothing from CalPERS put Mr. Lewis on notice that CalPERS would disallow the use of  
8 his Battalion Chief compensation and associated EPMC in the calculation of his pension benefits  
9 before he retired.

10 **Evidence Not in Conflict.** Although estoppel is generally a question of fact, when the  
11 evidence is not in conflict and is susceptible of only one reasonable inference, the existence of an  
12 estoppel is a question of law. (*Driscoll v. City of Los Angeles, supra*, at 305.)

13 **B. CalPERS' Authority to Effect What Estoppel Would Accomplish**

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

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

24 Moreover, CalPERS *does* have authority to allow the use of Mr. Lewis' Battalion Chief  
25 compensation in calculating his pension.

26 CalPERS has "plenary authority and fiduciary responsibility for ... administration of the  
27 system", subject among other things to the mandate that "[a] retirement board's duty to its  
28 participants and their beneficiaries shall take precedence over any other duty." (Cal. Const., art.

1 XVI, §17.) If CalPERS is permitted to seriously and repeatedly misinform a Member in ways  
2 that cause the Member permanent, irreparable and substantial harm, this would eviscerate the  
3 mandate to put the interest of Members above all other duties. The constitutionally mandated  
4 fiduciary duties certainly give CalPERS the authority to now award Mr. Lewis a pension based  
5 on his Battalion Chief compensation at the City, even if that compensation does not meet all of  
6 the technical requirements that CalPERS (wrongly) asserts.

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

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

12 Nothing in the PERL precludes CalPERS from determining that an award of pension  
13 benefits utilizing Mr. Lewis' Battalion Chief compensation is appropriate.

14 **C. CalPERS Is Estopped From Now Disallowing Mr. Lewis' Battalion Chief**  
15 **Compensation**

16 The doctrine of equitable estoppel is based on the theory that the party estopped has  
17 misled the other party to its prejudice, and may be applied against a governmental body where  
18 justice and right require it. (*Piazza Properties, supra; Emma Corp. v. Inglewood Unified School*  
19 *District* (2004) 114 Cal.App.4<sup>th</sup> 1018.) Whenever a party has, by his own statement or conduct,  
20 intentionally and deliberately led another to believe a particular thing to be true and to act upon  
21 such belief, he is not, in any litigation arising out of such statement or conduct, permitted to  
22 contradict it. (*Leasequip Inc. v. Dapeer* (2002) 103 Cal.App.4<sup>th</sup> 394; *California Evidence Code*  
23 §623.)

24 The requisite elements for equitable estoppel are met in this case: (1) The party to be  
25 estopped (CalPERS) was apprised of the facts; (2) the party to be estopped (CalPERS) intended  
26 by its conduct to induce reliance by the other party (Mr. Lewis) on the explicit and implicit  
27 promises that Mr. Lewis could utilize his Battalion Chief compensation at the City in the  
28 calculation of his eventual pension (and acting in such a way as to cause Mr. Lewis reasonably to

1 believe reliance was intended); (3) the party asserting estoppel (Mr. Lewis) was ignorant of the  
2 facts, if indeed any facts exist which would otherwise support CalPERS' recent refusal to provide  
3 a pension based upon the Battalion Chief compensation; and (4) the party asserting estoppel (Mr.  
4 Lewis) suffered injury in reliance on CalPERS' conduct, to wit: he accepted continued  
5 employment at the City, made his retirement plans and left City employment believing that his  
6 Battalion Chief compensation was PERSible. Mr. Lewis retired from CalPERS with this  
7 understanding and thereby ended his career, only to find that he would be receiving a far smaller  
8 pension allowance from CalPERS than he had been promised.

9       If those estoppel elements are established against the government, the court must then  
10 balance (i) the burden on the party asserting estoppel if the doctrine is not applied against (ii) the  
11 public policy that would be affected by the estoppel. (*Lentz v. McMahon* (1989) 49 Cal.3d 393,  
12 400-401.)

13       As the doctrine of equitable estoppel states, justice and right require that CalPERS be  
14 estopped from now disallowing use of Mr. Lewis' Battalion Chief compensation and associated  
15 EPMC in the calculation of Mr. Lewis' retirement pension.

16 **IX. CalPERS' Breach of Constitutional and Fiduciary Duties Owed to Mr. Lewis**

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

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

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

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

10 (b) The members of the retirement board of a public pension or retirement system  
11 shall discharge their duties with respect to the system solely in the interest of, and  
12 for the exclusive purposes of providing benefits to, participants and their  
13 beneficiaries, minimizing employer contributions thereto, and defraying  
14 reasonable expenses of administering the system. A retirement board's duty to its  
15 participants and their beneficiaries shall take precedence over any other duty.  
16 (*Cal. Const.*, art. XVI, §17.)

17 In addition to CalPERS' pre-existing trust and fiduciary duties, Proposition 162 mandates  
18 that a retirement board shall have *fiduciary responsibility to its members and beneficiaries above*  
19 *all other duties*. In other words, the constitutional changes were not simply aimed at blocking  
20 "outside forces" (i.e., the government) from exerting control over the disposition and  
21 management of pension funds, but were also directed at ensuring that *the pension systems*  
22 *themselves* fulfilled their fiduciary responsibilities to their respective memberships.

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

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

1           **A. CalPERS Breached Its Fiduciary Duties Owed to Mr. Lewis**

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

6           CalPERS' unjust disallowance of the use of Mr. Lewis' Battalion Chief compensation in  
7 the calculation of his pension allowance meets each of the elements to bring a breach of fiduciary  
8 claim against CalPERS.

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

10          CalPERS and Mr. Lewis were engaged in a fiduciary relationship giving rise to a  
11 fiduciary duty. It has been held that the administrator of a pension is a fiduciary in its  
12 relationship with its pensioner. In *Hittle v. Santa Barbara County Employees Retirement Assn.*,  
13 *supra*, at 392-393, the Supreme Court concluded that trustees who administer pension plan  
14 retirement funds owe fiduciary duties of good faith and fair dealing towards the pensioner-  
15 beneficiaries.

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

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

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

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

28

1           **C. CalPERS' Breach of Fiduciary Duty**

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

5           **X. CalPERS' Actions Provide Unjust Enrichment to CalPERS**

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

10           CalPERS' refusal to calculate Mr. Lewis' pension allowance on the basis of his Battalion  
11 Chief compensation, even though that compensation meets all requirements of the PERL  
12 concerning what constitutes "final compensation", means CalPERS has collected and is retaining  
13 funds in excess of the pension allowance the contributions were expected to pay for. CalPERS  
14 thus would accrue a windfall if the pension benefits paid to Mr. Lewis are reduced as CalPERS  
15 has done, resulting in an unjust enrichment to CalPERS' benefit and to the detriment of Mr.  
16 Lewis and the City.

17           **XI. CalPERS Is Barred By Laches**

18           Laches is such unreasonable delay by a plaintiff in asserting a right to relief as will render  
19 the granting of relief inequitable. (*Nicolopoulos v. Superior Court* (2003) 106 Cal.App.4<sup>th</sup> 304; 30  
20 Cal.Jur.3d, *Equity* §36.) Laches will operate as a bar in equity to the successful maintenance of  
21 the plaintiff's cause of action. (*Cahill v. Superior Court of City and County of San Francisco*  
22 (1904) 145 Cal. 42; *Kleinclaus v. Dutard* (1905) 147 Cal. 245; 30 Cal.Jur.3d, *Equity*, §36.) The  
23 defense of laches requires unreasonable delay in bringing suit plus either acquiescence in the act  
24 about which plaintiff complains, or prejudice to the defendant resulting from the delay. (*Conti v.*  
25 *Board of Civil Service Commissioners* (1969) 1 Cal.3d 351; *Miller v. Eisenhower Medical*  
26 *Center* (1980) 27 Cal.3d 614.)

27           **A. Laches in Administrative Hearings**

28           The elements of unreasonable delay and resulting prejudice, which must be established in

1 order for the defense of laches to operate as a bar to a claim by a public agency, may be "met" in  
2 two ways: first, they may be demonstrated by the evidence in the case, and the person arguing in  
3 favor of a finding of laches has the burden of proof on the laches issue; second, the element of  
4 prejudice may be "presumed" if there exists a statute of limitations which is sufficiently  
5 analogous to the facts of the case, and the period of such statute of limitations has been exceeded  
6 by the public administrative agency in making its claim. (*Fountain Valley Regional Hospital &*  
7 *Medical Center v. Bonta* (1999) 75 Cal.App.4<sup>th</sup> 316; 2 Cal.Jur.3d, *Administrative Law*, §440.)

8 **B. Acquiescence By CalPERS**

9 As described above, CalPERS has known since at least June 2007 of the City's  
10 determination to provide Mr. Lewis with compensation paid pursuant to the Battalion Chief  
11 salary scale. CalPERS had sufficient information in its possession from the outset to determine  
12 how that compensation should be reported to CalPERS so as to make it PERSible for use in the  
13 calculation of Mr. Lewis' eventual pension allowance. CalPERS gave the City explicit advice on  
14 how to report the compensation based upon that knowledge.

15 **C. Undue Prejudice and Injury To Mr. Lewis**

16 Mr. Lewis was injured by CalPERS' delay in waiting to raise its disallowance of his  
17 Battalion Chief compensation and/or CalPERS' failure to properly advise the City on how to  
18 report that compensation so that it would be utilized in calculating Mr. Lewis' pension.

19 Based on CalPERS' representations that he would earn an eventual pension that could be  
20 calculated based upon his PERSible Battalion Chief compensation, Mr. Lewis made career and  
21 life choices – including, *inter alia*, continuing employment at the SBFD and later retiring from  
22 CalPERS when he did – to his detriment. Mr. Lewis would have made different job, career, or  
23 work choices had he known that CalPERS would deny him a pension based on his Battalion  
24 Chief compensation.

25 Mr. Lewis suffered prejudice because he relied on CalPERS' representations about how  
26 his Battalion Chief compensation should be reported to make it PERSible in planning his  
27 retirement and in his job selection and generally planning his life. The large and small, conscious  
28 and unconscious, decision matrix that an individual uses to plan his life, his retirement, his

1 activities are founded on the accepted facts of one's life. Material changes of condition, including  
2 retirement, have taken place between the parties during that period of CalPERS' neglect.  
3 CalPERS should not now be able to unsettle Mr. Lewis' expectations by belatedly and  
4 prejudicially asserting that it has a right to change its mind.

5 **D. CalPERS' Delay Creates An Injustice**

6 Mr. Lewis suffered prejudice in that he continued employment at the SBFD and retired  
7 based on CalPERS' representations that is Battalion Chief compensation was being properly  
8 reported to CalPERS and associated contributions were being properly made such that he would  
9 be entitled to a pension based upon that compensation. CalPERS' delay would, were the claim  
10 upheld, permit the imposition of an unwarranted injustice. Mr. Lewis could not now easily begin  
11 to look for other work, make alternative jobs choices, or seek other benefits.

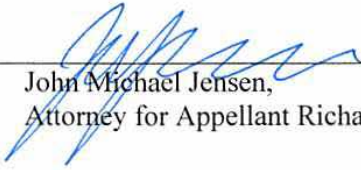
12 **E. Laches is Appropriate**

13 Mr. Lewis may assert laches against CalPERS to prevent relief of a strictly legal nature  
14 because of CalPERS' failure to make the correction, or to prosecute it with diligence. In some  
15 cases of delay, equity may bar an administrative proceeding, and the courts will apply notions of  
16 laches borrowed from the civil law. (30 Cal.Jur.3d, *Equity*, §36.)

17 The doctrine of laches and statutes of limitations are both designed to promote justice by  
18 preventing surprises through the revival of claims that have been allowed to slumber until  
19 evidence has been lost, memories have faded, and witnesses have disappeared. These policies  
20 also guard against other injuries caused by a change of position during a delay. While a statute of  
21 limitations bars proceedings without proof of prejudice, laches requires proof of delay that  
22 results in prejudice or change of position.

23 Respectfully submitted.

24  
25 Dated: May 14, 2014

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



# **EXHIBIT 1**



OFFICE OF THE CITY ATTORNEY  
CITY OF SAN BERNARDINO

JAMES F. PENMAN  
CITY ATTORNEY

June 5, 2013

KAREN DEFRANK, Division Chief  
Customer Account Services Division  
P.O. Box 942709  
Sacramento, CA 94229-2709

Re: Appeal of Decision re: Richard Lewis

Dear Ms. DeFrank:

Please allow this letter to serve as the City of San Bernardino's objection to, and appeal of, the May 8, 2013 decision regarding retired Fire Captain Richard J. Lewis, II. Below is a summary of the applicable facts and law that pertain to this appeal:

**STATEMENT OF FACTS**

On or about March 6 2007, the City of San Bernardino entered into a settlement agreement with employee Richard J. Lewis, II, which was fully executed on or about March 23, 2007. As part of the settlement agreement, Captain Lewis was to receive the pay of a battalion chief as though he were promoted to that position even though he remained a captain. The City corresponded with CalPERS to determine how this pay should be reported. On July 5, 2007, CalPERS unequivocally instructed the City to report the extra pay as "special compensation" pursuant to *Government Code* section 20636 so that it could be counted for retirement purposes. CalPERS went further and instructed the City to report this compensation retroactive back to October 2, 2004. The City followed the instructions of CalPERS and has paid contributions at the battalion chief level.

In December 2007, nearly six months after CalPERS indicated the additional income to be reported was acceptable as "special compensation," the *Prentice v. Bd. of Administration (CalPERS)* (2007) 157 Cal.App.4th 983 case was published. The *Prentice* case stands for the proposition that a city manager's approximate 10% increase in salary did not constitute special compensation because the increase was not reflected in the published salary range and it was not available to other managers.

F:\LUCZAK\ltr to PERS re Lewis Decision.wpd

KAREN DEFRANK, Division Chief  
Customer Account Services Division

Re: Appeal of Decision re: Richard Lewis

June 5, 2013

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On May 8, 2013, CalPERS began second-guessing its 2007 decision to allow the additional compensation for Captain Lewis' retirement. The May 8, 2013 letter from CalPERS relies on *Government Code* section 20160 and argues that despite CalPERS' accord regarding the pay received by Captain Lewis, it was now taking the position that the agreed upon designated special compensation would no longer be considered as such and would be excluded from his retirement pay.

### LEGAL ARGUMENT

**1. CalPERS Instructed the City to Report the Income as "Special Compensation," Thus There Was No Error.**

*Government Code* section 20160(b) allows the board to correct errors or omissions by other agencies or "this system" (presumably meaning CalPERS), subject to certain provisions, namely, subsections (c) and (d). Subsection (c) of 20160 does not apply to the present facts, but because CalPERS seeks correction of a purported error, it has the burden of presenting documentation and other evidence establishing a right to correction subject to the provisions of subsections (a) and (b). *Gov. Code* § 20160(d).

While *Government Code* section 20160's language is somewhat circular, CalPERS must demonstrate: (1) the request to correct an error or omission is made within a reasonable time after discovery of the right to make the correction, not to exceed six months; (2) the error or omission was made due to mistake, inadvertence, surprise, or excusable neglect as defined in *Code of Civil Procedure* section 473; and (3) the correction will not provide CalPERS with a status, right or obligation not otherwise available. *Gov. Code* § 20160(a).

**A. The request to correct the error is untimely.**

CalPERS instructed the City to report the income as special compensation in July of 2007. It had all the same information available to it at that time as it does today. Thus, the decision by CalPERS to allow the increased pay to be reported as special compensation was intentional, with full knowledge of its effect, and cannot be argued as an error.

The first prong of the analysis cannot be met because CalPERS had all facts available to it to determine there was an error, if indeed it maintains there was an error, in July of 2007, or at the latest, December 7, 2007 when the *Prentice* case was published. Thus, should it still argue there was an error, it had from January up to May 2008 to attempt to correct the error.

KAREN DEFRANK, Division Chief  
Customer Account Services Division

Re: Appeal of Decision re: Richard Lewis

June 5, 2013

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In fact, CalPERS never raised the issue until May 2013, almost six years past the statutory deadline.

***B. The error or omission did not result from mistake, inadvertence, surprise, or excusable neglect.***

Again, CalPERS cannot rely on the relief afforded by CCP 473's mistake, inadvertence, surprise or excusable neglect because all actions taken were knowingly authorized, were not a mistake, any surprise was never acted upon, and while there may be neglect, it is not of the excusable variety.

"Mistake" is extrinsic, so that a judgment based thereon may be set aside on principles of equity. *In re Whelan's Estate* (1969) 1 Cal.App.3d 517. "Inadvertence" means lack of heedfulness or attentiveness, inattention or fault from negligence. *Alderman v. Jacobs* (1954) 128 Cal.App.2d 273. "Surprise" is some condition in which a party finds himself unexpectedly placed to his injury. Without any fault or negligence of his own and against which ordinary prudence could not have guarded. *Porter v. Anderson* (1911) 14 Cal.App.716. "Excusable neglect" means that neglect which might have been the act of a reasonably prudent person under the same circumstances. *Alderman, supra*, 128 Cal.App.2d 273.

The only occasion for application of provisions of CCP 473 authorizing the vacation of a judgment entered through mistake, inadvertence, surprise or excusable neglect is where the party is unexpectedly placed in a situation to his injury without fault or negligence of his own and against which ordinary prudence could not have guarded. *Elms v. Elms* (1946) 72 Cal.App.2d 508. To authorize vacation of judgment, facts shown by applicant must constitute mistake, inadvertence, surprise or excusable neglect as a matter of law, and erroneous reliance on reasons which would merely constitute everyday excuse for suffering judgment will not suffice. *Salazar v. Steelman* (1937) 22 Cal.App.2d 402.

In the present case, in 2007 CalPERS was provided all pertinent information and data to make a determination on what to do with the increased pay. CalPERS took that data and then instructed the City to report the increased pay as special compensation so that it could be recovered during Captain Lewis' retirement. CalPERS cannot now argue that it was suddenly put into a situation to its detriment without fault or negligence of its own. Sudden realization cannot reasonably occur six years after the decision is made. In 2007, CalPERS made a decision fully apprised of all facts.

KAREN DEFRANK, Division Chief  
Customer Account Services Division

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At best, CalPERS could have argued the December 2007 *Prentice* case created surprise, but that argument needed to be made in 2008 soon after the case was published. Again, because six years has passed, it can no longer rely on mistake, inadvertence, surprise or excusable neglect because it is culpable in not using due diligence to correct any newly perceived error in the instructions for reportable compensation.

**2. *Assuming Arguendo Government Code § 20160 Does Not Apply, The Statute of Limitations Is Three Years.***

*Assuming arguendo* the six month provision of *Government Code* section 20160 does not apply, the applicable statute of limitations would be the three year provision found in *Code of Civil Procedure* section 338(a) [action based on statute]. The cause of action accrued either on July 5, 2007, the date CalPERS sent the purportedly mistaken letter, or December 7, 2007, the date *Prentice* was published and a reasonably prudent person would have determined that a potential mistake in calculation occurred. Ignoring the provisions of *Government Code* section 20160 for the moment, CalPERS would have had three years from December 7, 2007 within which to attempt to correct its July 5, 2007 action. The last day to attempt to cure the actions from July 2007 was December 7, 2010.

In the present case, CalPERS may attempt to argue the cause of action did not arise for statute of limitations analysis until Captain Lewis retired and it realized the amount of money it was obligated to pay, however, this argument would be disingenuous. The actions of CalPERS were documented in July 2007, evidencing knowledge of the consequences of the instructions as well as complicity and acquiescence.

**3. *Estoppel Precludes CalPERS from Excluding the Increased Special Compensation.***

Equitable estoppel is a doctrine that precludes a party from benefitting from conduct that misleads another to the latter's prejudice. *Kleinecke v. Montecito Water Dist.* (1983) 147 Cal.App.3d 240. A party may not deny the existence of a state of facts if that party intentionally led another party to believe the facts to be true and to rely on that belief to the party's detriment. *City of Goleta v. Superior Court* (2006) 40 Cal.4th 270.

In the present case, on July 5, 2007 CalPERS informed the City and Captain Lewis that the increased salary would be considered "special compensation" for purposes of retirement calculation. The City paid contributions to CalPERS based on its instructions and the employee relied on CalPERS' statements that the money would be paid as promised, and did not test for the

KAREN DEFRANK, Division Chief  
Customer Account Services Division

Re: Appeal of Decision re: Richard Lewis

June 5, 2013

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battalion chief position again. Both the City and Captain Lewis relied on CalPERS' instructions to their detriment and CalPERS is estopped from reversing its decision six years after it was issued.

**4. The *Prentice* Case Occurred After this Matter, Is Inapposite, and Should Not Be Applied Retroactively.**


In *Prentice v. Bd. of Administration (CalPERS)* (2007) 157 Cal.App.4th 983, a city manager was provided an approximate 10% increase in salary which was not consistent with the published rates for the position. The court decided the increased pay did not constitute special compensation because the increase was not reflected in the published salary range and it was not available to other managers.

This case was published on December 7, 2007, almost six months after CalPERS sent its letter instructing the City to report the increased pay as special compensation. Thus, it was not the law of the land at the time CalPERS instructed the City to report the increased pay. It can be distinguished because the pay schedule for Captain Lewis is actually published and is available to all individuals holding the position of battalion chief pursuant to the City's salary resolution, the labor agreement with the Fire union, and the settlement agreement with Captain Lewis. Additionally, CalPERS permitted the City to report the special compensation unlike in *Prentice* where it prohibited the salary increase.

Furthermore, the *Prentice* case should not be applied retroactively because of the estoppel argument listed above.

Very truly yours,

JAMES F. PENMAN, City Attorney



Richard D. Luczak  
Deputy City Attorney

encls.: Settlement Agreement  
July 5, 2007 CalPERS Letter

**KAREN DEFRANK, Division Chief**  
**Customer Account Services Division**

Re: Appeal of Decision re: Richard Lewis

June 5, 2013

Page -6-

cc: **Richard J. Lewis, II**  
**16790 Lake Knoll Parkway**  
**Riverside, CA 92503**

**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.

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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. 10/6/04
- 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. 3/23/07 He doesn't get only.
- 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

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

PR# 12 6/30/07

PR# 12 6/30/07

(PL 632) \* update % + cost  
2006 P-5 10367  
P-4 8107  
2260 mo.  
2009 P-5 11845  
#16 10/31/09 P-4 9007  
2838 mo.  
(904) \* 117/58.50 x 5 = 292.50

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

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PR# 9 5/15/09  
max vac increase  
+15% eff 4/1/09

2007 P-5 11040  
8512  
#3 08 2528 mo.

2008 P-5 11504  
P-4 8783  
#19 2008 2721 mo.  
#19 2008 19342 = 386 (904)

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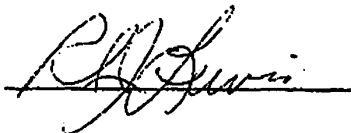
12. EFFECT OF WAIVER OF BREACH. No waiver of any breach of any term or provision of this Agreement shall be construed to be, or shall be, a waiver of any other breach of this Agreement. No waiver shall be binding unless in writing and signed by the party waiving the breach.

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.

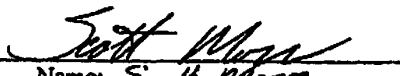
Dated: 3-6, 2007

RICHARD LEWIS



Dated: 3/, 2007

SAN BERNARDINO PROFESSIONAL  
FIREFIGHTERS UNION, LOCAL 891

By:   
Name: Scott Moss  
Position: PRESIDENT

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— City  
— LP

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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Mr. Lewis' experience and length of service.

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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: \_\_\_\_\_, 2007

RICHARD LEWIS

\_\_\_\_\_

Dated: \_\_\_\_\_, 2007

SAN BERNARDINO PROFESSIONAL  
FIREFIGHTERS UNION, LOCAL 891

By: \_\_\_\_\_

Name: \_\_\_\_\_

Position: \_\_\_\_\_

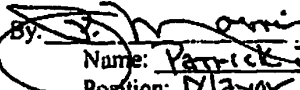
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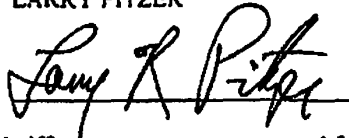
Dated: 3/21, 2007

CITY OF SAN BERNARDINO

By:   
Name: Patrick 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. Odium, counsel of record for Defendants, approve as to content and form.

Dated: \_\_\_\_\_, 2007

JAMES A. ODLUM  
MUNDELL, ODLUM & HAWS

\_\_\_\_\_  
James A. Odium  
Attorneys for Defendants

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Union  
  
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# **EXHIBIT 2**

**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.

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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 Alp

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. 10/6/04
- 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. 3/23/07 He doesn't get only.
- 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

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

Attached spreadsheet

PR#12 6/30/07

PR#12 6/30/07

2006 P-5 10367  
P-4 8107  
2260 mo.  
\* update to 2009 P-5 11845  
#4 10/31/09 P-4 9007  
2838 mo.  
(904) \* 117/58.50 x 5 = 242.50

2

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

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City  
LP

PR# 9 5/15/09  
men vac increase  
+15% eff 4/1/09

2007 P-5 11040  
8512  
#3 2/28/08 2528 mo.

2008 P-5 11504  
P-4 8783

#19 2/21/08 2721 mo.  
2008 P-4 8783 (904)



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.

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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.

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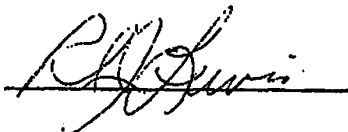
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Dated: 3-6, 2007

RICHARD LEWIS



Dated: 3/, 2007

SAN BERNARDINO PROFESSIONAL  
FIREFIGHTERS UNION, LOCAL 891

By:   
Name: Scott Moss  
Position: PRESIDENT

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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

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.

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AGREEMENTS

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

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- 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

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Mr. Lewis' experience and length of service.

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proceeding to enforce the 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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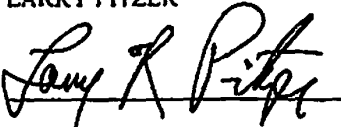
Dated: 3/21, 2007

CITY OF SAN BERNARDINO

By:   
Name: Patrick 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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# **EXHIBIT 3**

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Resolution No. 1999-235

**RESOLUTION OF THE CITY OF SAN BERNARDINO IMPLEMENTING THE PROVISIONS OF SECTION 414(H) (2) OF THE INTERNAL REVENUE CODE FOR LOCAL FIRE AND POLICE MEMBERS**

**WHEREAS, the City of San Bernardino has the authority to implement Government Code Section 20636(c) (4) pursuant to Government Code Section 20691;**

**WHEREAS, the City of San Bernardino has a written labor policy or agreement which specifically provides for the inclusion of normal member contributions paid by the employer on behalf of the members as additional compensation.**

**WHEREAS, one of the steps in the procedures to implement this section is the adoption by the governing body of the City of San Bernardino of a Resolution giving notice of its intention to commence reporting the value of employer paid member contributions (EPMC) as compensation for all members of local fire and police safety members;**

**WHEREAS, the following is a statement of the proposed change in reporting compensation to PERS:**

**The City of San Bernardino elects to pay nine percent (9%) of employees' compensation earnable as Employer Paid Member Contributions and report the same percent (value) of compensation earnable (excluding Government Code Section 20636(c) (4)) as additional compensation.**

**This benefit shall apply to all employees of local fire and police safety classes.**

**The effective date of this Resolution shall be January 1, 2000.**

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1999-235

1 RESOLUTION OF THE CITY OF SAN BERNARDINO IMPLEMENTING THE  
2 PROVISIONS OF SECTION 414(H) (2) OF THE INTERNAL REVENUE CODE FOR  
3 LOCAL FIRE AND POLICE MEMBERS

4 NOW, THEREFORE, BE IT RESOLVED that the governing body of the City of  
5 San Bernardino shall implement Government Code Section 20636(c )(4) pursuant to  
6 Section 20691 by paying and reporting the value of Employer Paid Member  
7 Contributions for all employees of the local fire and police safety classes as indicated  
8 above.

9 I HEREBY CERTIFY that the foregoing Resolution was duly adopted by the  
10 Common Council of the City of San Bernardino at a joint regular meeting thereof,  
11 held on the 20th day of September, 1999, by the following vote,

12 to wit:

13 COUNCILMEMBERS:	AYES	NAYES	ABSTAIN	ABSENT
14 ESTRADA	x	_____	_____	_____
15 LIEN	x	_____	_____	_____
16 MCGINNIS	x	_____	_____	_____
17 SCHNETZ	x	_____	_____	_____
18 VACANT - 5th Ward	_____	_____	_____	_____
19 ANDERSON	x	_____	_____	_____
20 MILLER	x	_____	_____	_____

21 Rachel G. Clark  
22 Rachel G. Clark, City Clerk

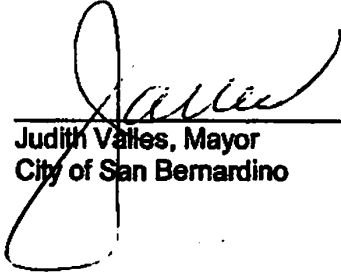
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1999-235

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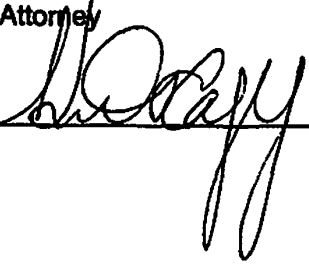
**RESOLUTION OF THE CITY OF SAN BERNARDINO IMPLEMENTING THE PROVISIONS OF SECTION 414(H) (2) OF THE INTERNAL REVENUE CODE FOR LOCAL FIRE AND POLICE MEMBERS**

The foregoing resolution is hereby approved this 27<sup>th</sup> of September, 1999.

  
\_\_\_\_\_  
Judith Valles, Mayor  
City of San Bernardino

Approved as to form and  
Legal content:

JAMES F. PENMAN,  
City Attorney

By:   
\_\_\_\_\_



1999-235

**2000, Section H of this article will replace this section.**

**H. The City will increase the base salary of all employees covered by this agreement by converting the nine percent (%) Employer-Paid Member Contribution (EPMC) to base salary. This base salary is "compensation earnable" as defined in Section 20636 ( c ) of the California Government Code and shall be reported to the Public Employees' Retirement System (hereinafter "PERS"). Employees will then assume responsibility for payment of the nine percent (9%) employee retirement contribution to PERS and all associated costs for the conversion of the EPMC to base salary. The City shall designate such payment as an Employer Pick-Up as defined under the provisions of Section 414(h)(2) of the Internal Revenue Code (26 USC & 414(h)(2)). The employee contribution to PERS shall be made through automatic payroll deductions from the base salary in accordance with PERS regulations.**

**For purposes of determining overtime compensation and other salary payments, including but not limited to, payoffs of sick leave, vacation accruals, holiday accruals and comp time balances, the aforementioned nine percent (9%) base salary increase shall not be considered.**

**I. The City shall provide written notification to representatives of the union prior to the end of each fiscal year, which identifies the applicable rate for the next fiscal year.**

#### **Section 7 - On-Call/Call-Back/Standby**

Any employee on "on-call" status will receive a minimum of two- (2) hours' pay at time-and-a-half for all or any portion of a 24-hour day. If called back any time within the first two (2) hours of on-call, the time worked will be deducted from the two (2) hours on-call. If the call-back occurs after two (2) hours expire, call-back time will be clocked from the time the employee receives the call to report. Compensation for that time is in addition to the on-call status.

In the event an employee is placed on "standby" for court subpoena, the employee will receive two (2) hours standby pay at time-and-a-half. If the employee is called to court and does not go beyond 12:00 hours on that day, it will be considered part of the two (2) hours standby. If the employee has to appear after the noon recess, any additional time will be added to the two (2) hours standby, plus one-half hour travel time. In cases where the subpoena is for 13:30 hours, or another time, the standby will start with time stated on the subpoena. In those cases where the subpoena is for 13:30 or later, the employee's time will be computed at the amount of time between the time of subpoena and 17:00, plus 30 minutes travel time. In the event the employee is required to pay parking fees, the employee will be reimbursed. If the employee is required to stay through noon recess, he

*Fire Safety MOU*

1999-235

EXCERPT FROM POLICE SAFETY MOU  
CONTRACT EFFECTIVE 1/1/99 TO 12/31/01  
ARTICLE III, SECTION 2

**Section 2 - PERS/Retirement Plan**

A. The City will continue to participate in an employees' retirement plan for members by contract with the California Public Employees' Retirement System (PERS), under the current "2% at age 50" formula.

B. The City will continue to contract with PERS to provide the "highest 12 month" retirement formula.

C. The City will pay nine percent (9%) of the members' contribution to PERS through December 31, 1999. Effective January 1, 2000, Section E below will supercede this section.

D. The City will provide Post Survivors' Retirement benefit.

E. **PERS Salary Conversion:** The City will increase the base salary of all employees covered by this agreement by converting the nine percent (9%) Employer Paid Member Contribution (EPMC) to base salary. This base salary is "compensation earnable" as defined in Section 20636 ( c ) of the California Government Code and shall be reported to the Public Employees' Retirement System (hereinafter "PERS"). Employees will then assume responsibility for payment of the nine percent (9%) employee retirement contribution to PERS and all associated costs for the conversion of the EPMC to base salary. The City shall designate such payment as an Employer Pick-Up as defined under the provisions of Section 414(h)(2) of the Internal Revenue Code (26 USC & 414(h)(s)). The employee contribution to PERS shall be made through automatic payroll deductions from the base salary in accordance with PERS regulations.

For purposes of determining overtime compensation and other salary payments, including but not limited to, payoffs of sick leave, vacation accruals, holiday accruals and comp time balances, the aforementioned nine percent (9%) base salary increase shall not be considered.

F. The City shall provide written notification to representatives of the union prior to the end of each fiscal year, which identifies the applicable rate for the next fiscal year.

**Section 3 - Overtime**

A. **Policy:** It is the policy of the City to discourage overtime, except when necessitated by abnormal or unanticipated workload situations. The City has the right to require overtime to be worked as necessary. Consistent with this policy, the Chief will make every effort to assign overtime evenly among the employees with similar skills or assignments.

*Police Safety MOU*

1999-235

**EXCERPT FROM FIRE SAFETY MOU  
CONTRACT EFFECTIVE 1/1/99 TO 12/31/02  
ARTICLE III, SECTION 6**

A. **Policy:** It is the policy of the City to discourage overtime except when necessitated by abnormal or unanticipated workload situations. The City has the right to require overtime to be worked as necessary. Consistent with this policy, the Fire Chief, Deputy Chief and Battalion Chiefs, will make every effort to assign overtime evenly among the employees with similar skills or assignments.

B. **Definition:** Overtime is defined as all hours worked in excess of the regularly scheduled workweek. All overtime shall be reported in increments of six (6) minutes and is non-accumulative and non-payable when incurred in units of less than six (6) minutes. Holiday leave, sick leave, vacation leave and court time shall be considered as time worked for purposes of computing overtime compensation.

C. **Compensation:** Payment for overtime shall be made on the first regular payday following the pay period in which overtime is worked, unless overtime compensation cannot be computed until some later date, in which case overtime will be paid on the next regular payday after such computation can be made.

**Section 6 - Retirement Plan**

A. The City shall continue to participate in an employees' retirement plan for Public Safety Officers, by contract with the California Public Employees' Retirement System (PERS) under the current "2% at age 50" formula.

B. The City shall continue to provide the "highest 12 month" retirement formula and Military Service Credit.

C. The City shall contract with PERS to provide the Fourth Level 1959 Survivor Benefit. All costs will be borne by the employee.

D. The City shall continue to provide the Post-Survivors' Retirement Benefit.

E. The City shall continue to provide the Post-Retirement Survivor Allowance to Continue After Remarriage benefit.

F. The City shall continue to pay through December 31, 1999, nine percent (9%) of the members' contribution to PERS credited to the employee's account as a fringe benefit, for current, active employees hired prior to July 1, 1997. Effective January 1, 2000, Section H of this article will replace this section.

G. For any employee hired on or after July 1, 1997, the City will pay five percent (5%) of the members' contribution to PERS credited to the employee's account as a fringe benefit. Upon said employees completing five (5) years of service the City will pay nine percent (9%) of the members' contribution to PERS credited to the employee's account as a fringe benefit on the first pay period of the sixth year of service. Effective January 1,

*Fire Safety MOU*

Resolution No. 1999-236

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3 RESOLUTION OF THE CITY OF SAN BERNARDINO EXPRESSING ITS  
4 INTENT TO AMEND THE CONTRACT BETWEEN THE BOARD OF  
5 ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM (PERS)  
6 AND THE CITY OF SAN BERNARDINO TO IMPLEMENT THE PROVISIONS OF  
7 SECTION 414(H) (2) OF THE INTERNAL REVENUE CODE.

8 BE IT RESOLVED BY THE MAYOR AND COMMON OF THE CITY OF SAN  
9 BERNARDINO AS FOLLOWS:

10 WHEREAS, the City of San Bernardino has the authority to implement the  
11 provisions of Section 414(h) (2) of the Internal Revenue Code (IRC); and,

12 WHEREAS, the Board of Administration of the Public Employees' Retirement  
13 System adopted its resolution re: section 414(h) (2) IRC on September 18, 1985; and,

14 WHEREAS, THE Internal Revenue Service has stated in December 1985, that  
15 the implementation of the provisions of section 414(h) (2) IRC pursuant to the  
16 Resolution of the Board of Administration would satisfy the legal requirements of  
17 sections 414(h) (2) IRC; and,

18 WHEREAS, the City of San Bernardino has determined that even though the  
19 implementation of the provisions of section 414(h) (2) IRC is not required by law, the tax  
20 benefit offered by section 414(h) (2) IRC should be provided to its employees who are  
21 members of the Public Employees' Retirement System:

22 NOW THEREFORE, BE IT RESOLVED:

23 I. That the City of San Bernardino will implement the provisions of section  
24 414(h) (2) Internal Revenue Code by making employee contributions pursuant to  
25 California Government Code section 20691 to the Public Employees' Retirement  
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1999-236

1 RESOLUTION OF THE CITY OF SAN BERNARDINO EXPRESSING ITS  
2 INTENT TO AMEND THE CONTRACT BETWEEN THE BOARD OF  
3 ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM (PERS)  
4 AND THE CITY OF SAN BERNARDINO TO IMPLEMENT THE PROVISIONS OF  
5 SECTION 414(H) (2) OF THE INTERNAL REVENUE CODE.

6 System on behalf of its employees who are members of the Public Employees  
7 Retirement System. "Employee contributions" shall mean those contributions to the  
8 Public Employees' Retirement System which are deducted from the salary of local fire  
9 and police employees and are credited to individual employee's accounts pursuant to  
10 California Government Code section 20691.

11 II. That the contributions made by the City of San Bernardino to the Public  
12 Employees' Retirement System, although designated as employee contributions, are  
13 being paid by the City of San Bernardino in lieu of contributions by the employees who  
14 are members of the Public Employees' Retirement System.

15 III. That employees shall not have the option of choosing to receive the  
16 contributed amounts directly instead of having them paid by the City of San Bernardino  
17 to the Public Employees' Retirement System.

18 IV. That the City of San Bernardino shall pay to the Public Employees'  
19 Retirement System the contributions designated as employee contributions from the  
20 same source of funds as used in paying salary.

21 V. That the amount of the contributions designated as employee  
22 contributions and paid by the City of San Bernardino to the Public Employees'  
23 Retirement System on behalf of an employee shall be the entire contribution required of  
24 the employee by Public Employees' Retirement Law (California Government Code  
25 sections 20000, et. seq.).  
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1999-236

1 RESOLUTION OF THE CITY OF SAN BERNARDINO EXPRESSING ITS  
2 INTENT TO AMEND THE CONTRACT BETWEEN THE BOARD OF  
3 ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM (PERS)  
4 AND THE CITY OF SAN BERNARDINO TO IMPLEMENT THE PROVISIONS OF  
5 SECTION 414(H) (2) OF THE INTERNAL REVENUE CODE.

6 VI. That the contributions designated as employee contributions made by the  
7 City of San Bernardino to the Public Employees' Retirement System shall be treated for  
8 all purposes, other than taxation, in the same way that member contributions are treated  
9 by the Public Employees' Retirement System.

10 I HEREBY CERTIFY that the foregoing Resolution was duly adopted by the  
11 Common Council of the City of San Bernardino at a joint regular meeting thereof,  
12 held on the 20th day of September, 1999, by the following vote,

13 to wit:

14 COUNCILMEMBERS:	AYES	NAYES	ABSTAIN	ABSENT
15 ESTRADA	<u>  x  </u>	<u>      </u>	<u>      </u>	<u>      </u>
16 LIEN	<u>  x  </u>	<u>      </u>	<u>      </u>	<u>      </u>
17 MCGINNIS	<u>  x  </u>	<u>      </u>	<u>      </u>	<u>      </u>
18 SCHNETZ	<u>  x  </u>	<u>      </u>	<u>      </u>	<u>      </u>
19 VACANT - 5th Ward	<u>      </u>	<u>      </u>	<u>      </u>	<u>      </u>
20 ANDERSON	<u>  x  </u>	<u>      </u>	<u>      </u>	<u>      </u>
MILLER	<u>  x  </u>	<u>      </u>	<u>      </u>	<u>      </u>

21 Rachel G. Clark  
22 Rachel G. Clark, City Clerk  
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1999-236

1 RESOLUTION OF THE CITY OF SAN BERNARDINO EXPRESSING ITS  
2 INTENT TO AMEND THE CONTRACT BETWEEN THE BOARD OF  
3 ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM (PERS)  
AND THE CITY OF SAN BERNARDINO TO IMPLEMENT THE PROVISIONS OF  
SECTION 414(H) (2) OF THE INTERNAL REVENUE CODE.

4 The foregoing resolution is hereby approved this 22nd of  
5 September, 1999.

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9 Judith Valles, Mayor  
City of San Bernardino

10 Approved as to form and  
11 Legal content:

12 JAMES F. PENMAN,  
13 City Attorney

14 By:   
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1999-236

EXCERPT FROM POLICE SAFETY MOU  
CONTRACT EFFECTIVE 1/1/99 TO 12/31/01  
ARTICLE III, SECTION 2

**Section 2 - PERS/Retirement Plan**

A. The City will continue to participate in an employees' retirement plan for members by contract with the California Public Employees' Retirement System (PERS), under the current "2% at age 50" formula.

B. The City will continue to contract with PERS to provide the "highest 12 month" retirement formula.

C. The City will pay nine percent (9%) of the members' contribution to PERS through December 31, 1999. Effective January 1, 2000, Section E below will supercede this section.

D. The City will provide Post Survivors' Retirement benefit.

E. **PERS Salary Conversion:** The City will increase the base salary of all employees covered by this agreement by converting the nine percent (9%) Employer Paid Member Contribution (EPMC) to base salary. This base salary is "compensation earnable" as defined in Section 20636 ( c ) of the California Government Code and shall be reported to the Public Employees' Retirement System (hereinafter "PERS"). Employees will then assume responsibility for payment of the nine percent (9%) employee retirement contribution to PERS and all associated costs for the conversion of the EPMC to base salary. The City shall designate such payment as an Employer Pick-Up as defined under the provisions of Section 414(h)(2) of the Internal Revenue Code (26 USC & 414(h)(s)). The employee contribution to PERS shall be made through automatic payroll deductions from the base salary in accordance with PERS regulations.

For purposes of determining overtime compensation and other salary payments, including but not limited to, payoffs of sick leave, vacation accruals, holiday accruals and comp time balances, the aforementioned nine percent (9%) base salary increase shall not be considered.

F. The City shall provide written notification to representatives of the union prior to the end of each fiscal year, which identifies the applicable rate for the next fiscal year.

**Section 3 - Overtime**

A. **Policy:** It is the policy of the City to discourage overtime, except when necessitated by abnormal or unanticipated workload situations. The City has the right to require overtime to be worked as necessary. Consistent with this policy, the Chief will make every effort to assign overtime evenly among the employees with similar skills or assignments.

*Police Safety MOU*



1999-236

**EXCERPT FROM FIRE SAFETY MOU  
CONTRACT EFFECTIVE 1/1/99 TO 12/31/02  
ARTICLE III, SECTION 6**

A. **Policy:** It is the policy of the City to discourage overtime except when necessitated by abnormal or unanticipated workload situations. The City has the right to require overtime to be worked as necessary. Consistent with this policy, the Fire Chief, Deputy Chief and Battalion Chiefs, will make every effort to assign overtime evenly among the employees with similar skills or assignments.

B. **Definition:** Overtime is defined as all hours worked in excess of the regularly scheduled workweek. All overtime shall be reported in increments of six (6) minutes and is non-accumulative and non-payable when incurred in units of less than six (6) minutes. Holiday leave, sick leave, vacation leave and court time shall be considered as time worked for purposes of computing overtime compensation.

C. **Compensation:** Payment for overtime shall be made on the first regular payday following the pay period in which overtime is worked, unless overtime compensation cannot be computed until some later date, in which case overtime will be paid on the next regular payday after such computation can be made.

**Section 6 - Retirement Plan**

A. The City shall continue to participate in an employees' retirement plan for Public Safety Officers, by contract with the California Public Employees' Retirement System (PERS) under the current "2% at age 50" formula.

B. The City shall continue to provide the "highest 12 month" retirement formula and Military Service Credit.

C. The City shall contract with PERS to provide the Fourth Level 1959 Survivor Benefit. All costs will be borne by the employee.

D. The City shall continue to provide the Post-Survivors' Retirement Benefit.

E. The City shall continue to provide the Post-Retirement Survivor Allowance to Continue After Remarriage benefit.

F. The City shall continue to pay through December 31, 1999, nine percent (9%) of the members' contribution to PERS credited to the employee's account as a fringe benefit, for current, active employees hired prior to July 1, 1997. Effective January 1, 2000, Section H of this article will replace this section.

G. For any employee hired on or after July 1, 1997, the City will pay five percent (5%) of the members' contribution to PERS credited to the employee's account as a fringe benefit. Upon said employees completing five (5) years of service the City will pay nine percent (9%) of the members' contribution to PERS credited to the employee's account as a fringe benefit on the first pay period of the sixth year of service. Effective January 1,

*Fire Safety MOU*

1999-236

**2000, Section H of this article will replace this section.**

**H. The City will increase the base salary of all employees covered by this agreement by converting the nine percent (%) Employer-Paid Member Contribution (EPMC) to base salary. This base salary is "compensation earnable" as defined in Section 20636 ( c ) of the California Government Code and shall be reported to the Public Employees' Retirement System (hereinafter "PERS"). Employees will then assume responsibility for payment of the nine percent (9%) employee retirement contribution to PERS and all associated costs for the conversion of the EPMC to base salary. The City shall designate such payment as an Employer Pick-Up as defined under the provisions of Section 414(h)(2) of the Internal Revenue Code (26 USC & 414(h)(2)). The employee contribution to PERS shall be made through automatic payroll deductions from the base salary in accordance with PERS regulations.**

**For purposes of determining overtime compensation and other salary payments, including but not limited to, payoffs of sick leave, vacation accruals, holiday accruals and comp time balances, the aforementioned nine percent (9%) base salary increase shall not be considered.**

**I. The City shall provide written notification to representatives of the union prior to the end of each fiscal year, which identifies the applicable rate for the next fiscal year.**

#### **Section 7 - On-Call/Call-Back/Standby**

Any employee on "on-call" status will receive a minimum of two- (2) hours' pay at time-and-a-half for all or any portion of a 24-hour day. If called back any time within the first two (2) hours of on-call, the time worked will be deducted from the two (2) hours on-call. If the call-back occurs after two (2) hours expire, call-back time will be clocked from the time the employee receives the call to report. Compensation for that time is in addition to the on-call status.

In the event an employee is placed on "standby" for court subpoena, the employee will receive two (2) hours standby pay at time-and-a-half. If the employee is called to court and does not go beyond 12:00 hours on that day, it will be considered part of the two (2) hours standby. If the employee has to appear after the noon recess, any additional time will be added to the two (2) hours standby, plus one-half hour travel time. In cases where the subpoena is for 13:30 hours, or another time, the standby will start with time stated on the subpoena. In those cases where the subpoena is for 13:30 or later, the employee's time will be computed at the amount of time between the time of subpoena and 17:00, plus 30 minutes travel time. In the event the employee is required to pay parking fees, the employee will be reimbursed. If the employee is required to stay through noon recess, he

*Fire Safety MOU*

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Resolution No. 1999-252

RESOLUTION OF THE CITY OF SAN BERNARDINO RESCINDING RESOLUTION NO. 1999-235 AND IMPLEMENTING THE PROVISIONS OF SECTION 414(H)(2) OF THE INTERNAL REVENUE CODE FOR ALL LOCAL FIRE AND POLICE MEMBERS.

WHEREAS, the City of San Bernardino has the authority to implement the provisions of Section 414(h)(2) of the Internal Revenue Code (IRC); and,

WHEREAS, the Board of Administration of the Public Employees' Retirement System adopted its resolution re: section 414(h)(2) IRC on September 18, 1985; and,

WHEREAS, THE Internal Revenue Service has stated in December 1985, that the implementation of the provisions of section 414(h)(2) IRC pursuant to the Resolution of the Board of Administration would satisfy the legal requirements of sections 414(h)(2) IRC; and,

WHEREAS, the City of San Bernardino has determined that even though the implementation of the provisions of section 414(h)(2) IRC is not required by law, the tax benefit offered by section 414(h)(2) IRC should be provided to its employees who are members of the Public Employees' Retirement System:

WHEREAS, on September 22, 1999, the Mayor and Common Council of the City of San Bernardino adopted Resolution No. 1999-235, to implement the provisions of Section 414 (h)(2) of the Internal Revenue Code for all Local Fire and Police members.

WHEREAS, it is now necessary to correct said resolution to implement the provisions of Section 414(h)(2) of the Internal Revenue Code for all local fire and police members.

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1999-252

1 RESOLUTION OF THE CITY OF SAN BERNARDINO RESCINDING RESOLUTION  
2 NO. 1999-235 AND IMPLEMENTING THE PROVISIONS OF SECTION 414 (H)(2) OF  
3 THE INTERNAL REVENUE CODE FOR ALL LOCAL FIRE AND POLICE MEMBERS.

4 BE IT RESOLVED BY THE MAYOR AND COMMON OF THE CITY OF SAN  
5 BERNARDINO AS FOLLOWS:

6 SECTION 1. Resolution No. 1999-235, adopted by the Mayor and Common  
7 Council of the City of San Bernardino on September 22, 1999, entitled:

8 **"RESOLUTION OF THE CITY OF SAN BERNARDINO IMPLEMENTING THE**  
9 **PROVISIONS OF SECTION 414(H)(2) OF THE INTERNAL REVENUE CODE**  
10 **FOR LOCAL FIRE AND POLICE MEMBERS"**

11 is hereby rescinded in its entirety.

12 SECTION 2. That the City of San Bernardino will implement the provisions of  
13 section 414(h)(2) Internal Revenue Code by making employee contributions pursuant to  
14 California Government Code section 20691 to the Public Employees' Retirement  
15 System on behalf of its employees who are members of the Public Employees  
16 Retirement System. "Employee contributions" shall mean those contributions to the  
17 Public Employees' Retirement System which are deducted from the salary of all local  
18 fire and police employees and are credited to individual employee's accounts pursuant  
19 to California Government Code Section 20691.

20 SECTION 3. That the contributions made by the City of San Bernardino to the  
21 Public Employees' Retirement System, although designated as employee contributions,  
22 are being paid by the City of San Bernardino in lieu of contributions by the employees  
23 who are members of the Public Employees' Retirement System.

24 SECTION 4. That employees shall not have the option of choosing to receive  
25 the contributed amounts directly instead of having them paid by the City of San  
26 Bernardino to the Public Employees' Retirement System.  
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RESOLUTION OF THE CITY OF SAN BERNARDINO RESCINDING RESOLUTION NO. 1999-235 AND IMPLEMENTING THE PROVISIONS OF SECTION 414(H)(2) OF THE INTERNAL REVENUE CODE FOR ALL LOCAL FIRE AND POLICE MEMBERS.

SECTION 5. That the City of San Bernardino shall pay to the Public Employees' Retirement System the contributions designated as employee contributions from the same source of funds as used in paying salary.

SECTION 6. That the amount of the contributions designated as employee contributions and paid by the City of San Bernardino to the Public Employees' Retirement System on behalf of an employee shall be the entire contribution required of the employee by Public Employees' Retirement Law (California Government Code sections 20000, et. seq.).

SECTION 7: That the contributions designated as employee contributions made by the City of San Bernardino to the Public Employees' Retirement System shall be treated for all purposes, other than taxation, in the same way that member contributions are treated by the Public Employees' Retirement System.

I HEREBY CERTIFY that the foregoing Resolution was duly adopted by the Common Council of the City of San Bernardino at a joint regular meeting thereof, held on the 18th day of October, 1999, by the following vote,  
to wit:

1999-252

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RESOLUTION OF THE CITY OF SAN BERNARDINO RESCINDING  
RESOLUTION NO. 1999-235 AND IMPLEMENTING THE PROVISIONS OF SECTION  
414 (H)(2) OF THE INTERNAL REVENUE CODE FOR ALL LOCAL FIRE AND POLICE  
MEMBERS.

COUNCILMEMBERS:	AYES	NAYES	ABSTAIN	ABSENT
ESTRADA	<u>  x  </u>	<u>      </u>	<u>      </u>	<u>      </u>
LIEN	<u>  x  </u>	<u>      </u>	<u>      </u>	<u>      </u>
MCGINNIS	<u>  x  </u>	<u>      </u>	<u>      </u>	<u>      </u>
SCHNETZ	<u>  x  </u>	<u>      </u>	<u>      </u>	<u>      </u>
VACANT - 5th Ward	<u>      </u>	<u>      </u>	<u>      </u>	<u>      </u>
ANDERSON	<u>  x  </u>	<u>      </u>	<u>      </u>	<u>      </u>
MILLER	<u>  x  </u>	<u>      </u>	<u>      </u>	<u>      </u>

*Rachel G. Clark*  
Rachel G. Clark, City Clerk

The foregoing resolution is hereby approved this 19th of  
October, 1999.

*Jalles*  
Judith Valles, Mayor  
City of San Bernardino

Approved as to form and  
Legal content:  
JAMES F. PENMAN,  
City Attorney

By: *James F Penman*

1999-252

EXCERPT FROM POLICE SAFETY MOU  
CONTRACT EFFECTIVE 1/1/99 TO 12/31  
ARTICLE III, SECTION 2

**Section 2 - PERS/Retirement Plan**

A. The City will continue to participate in an employees' retirement plan for members by contract with the California Public Employees' Retirement System (PERS), under the current "2% at age 50" formula.

B. The City will continue to contract with PERS to provide the "highest 12 month" retirement formula.

C. The City will pay nine percent (9%) of the members' contribution to PERS through December 31, 1999. Effective January 1, 2000, Section E below will supercede this section.

D. The City will provide Post Survivors' Retirement benefit.

E. **PERS Salary Conversion:** The City will increase the base salary of all employees covered by this agreement by converting the nine percent (9%) Employer Paid Member Contribution (EPMC) to base salary. This base salary is "compensation earnable" as defined in Section 20636 ( c ) of the California Government Code and shall be reported to the Public Employees' Retirement System (hereinafter "PERS"). Employees will then assume responsibility for payment of the nine percent (9%) employee retirement contribution to PERS and all associated costs for the conversion of the EPMC to base salary. The City shall designate such payment as an Employer Pick-Up as defined under the provisions of Section 414(h)(2) of the Internal Revenue Code (26 USC & 414(h)(s)). The employee contribution to PERS shall be made through automatic payroll deductions from the base salary in accordance with PERS regulations.

For purposes of determining overtime compensation and other salary payments, including but not limited to, payoffs of sick leave, vacation accruals, holiday accruals and comp time balances, the aforementioned nine percent (9%) base salary increase shall not be considered.

F. The City shall provide written notification to representatives of the union prior to the end of each fiscal year, which identifies the applicable rate for the next fiscal year.

**Section 3 - Overtime**

A. **Policy:** It is the policy of the City to discourage overtime, except when necessitated by abnormal or unanticipated workload situations. The City has the right to require overtime to be worked as necessary. Consistent with this policy, the Chief will make every effort to assign overtime evenly among the employees with similar skills or assignments.

*Police Safety MOU*

1999-252

EXCERPT FROM FIRE SAFETY MOU  
CONTRACT EFFECTIVE 1/1/99 TO 12/31  
ARTICLE III, SECTION 6

A. **Policy:** It is the policy of the City to discourage overtime except when necessitated by abnormal or unanticipated workload situations. The City has the right to require overtime to be worked as necessary. Consistent with this policy, the Fire Chief, Deputy Chief and Battalion Chiefs, will make every effort to assign overtime evenly among the employees with similar skills or assignments.

B. **Definition:** Overtime is defined as all hours worked in excess of the regularly scheduled workweek. All overtime shall be reported in increments of six (6) minutes and is non-accumulative and non-payable when incurred in units of less than six (6) minutes. Holiday leave, sick leave, vacation leave and court time shall be considered as time worked for purposes of computing overtime compensation.

C. **Compensation:** Payment for overtime shall be made on the first regular payday following the pay period in which overtime is worked, unless overtime compensation cannot be computed until some later date, in which case overtime will be paid on the next regular payday after such computation can be made.

#### **Section 6 - Retirement Plan**

A. The City shall continue to participate in an employees' retirement plan for Public Safety Officers, by contract with the California Public Employees' Retirement System (PERS) under the current "2% at age 50" formula.

B. The City shall continue to provide the "highest 12 month" retirement formula and Military Service Credit.

C. The City shall contract with PERS to provide the Fourth Level 1959 Survivor Benefit. All costs will be borne by the employee.

D. The City shall continue to provide the Post-Survivors' Retirement Benefit.

E. The City shall continue to provide the Post-Retirement Survivor Allowance to Continue After Remarriage benefit.

F. The City shall continue to pay through December 31, 1999, nine percent (9%) of the members' contribution to PERS credited to the employee's account as a fringe benefit, for current, active employees hired prior to July 1, 1997. Effective January 1, 2000, Section H of this article will replace this section.

G. For any employee hired on or after July 1, 1997, the City will pay five percent (5%) of the members' contribution to PERS credited to the employee's account as a fringe benefit. Upon said employees completing five (5) years of service the City will pay nine percent (9%) of the members' contribution to PERS credited to the employee's account as a fringe benefit on the first pay period of the sixth year of service. Effective January 1,

*Fire Safety MOU*



1999-252

**2000, Section H of this article will replace this section.**

**H. The City will increase the base salary of all employees covered by this agreement by converting the nine percent (%) Employer-Paid Member Contribution (EPMC) to base salary. This base salary is "compensation earnable" as defined in Section 20636 ( c ) of the California Government Code and shall be reported to the Public Employees' Retirement System (hereinafter "PERS"). Employees will then assume responsibility for payment of the nine percent (9%) employee retirement contribution to PERS and all associated costs for the conversion of the EPMC to base salary. The City shall designate such payment as an Employer Pick-Up as defined under the provisions of Section 414(h)(2) of the Internal Revenue Code (26 USC & 414(h)(2)). The employee contribution to PERS shall be made through automatic payroll deductions from the base salary in accordance with PERS regulations.**

**For purposes of determining overtime compensation and other salary payments, including but not limited to, payoffs of sick leave, vacation accruals, holiday accruals and comp time balances, the aforementioned nine percent (9%) base salary increase shall not be considered.**

**I. The City shall provide written notification to representatives of the union prior to the end of each fiscal year, which identifies the applicable rate for the next fiscal year.**

#### **Section 7 - On-Call/Call-Back/Standby**

**Any employee on "on-call" status will receive a minimum of two- (2) hours' pay at time-and-a-half for all or any portion of a 24-hour day. If called back any time within the first two (2) hours of on-call, the time worked will be deducted from the two (2) hours on-call. If the call-back occurs after two (2) hours expire, call-back time will be clocked from the time the employee receives the call to report. Compensation for that time is in addition to the on-call status.**

**In the event an employee is placed on "standby" for court subpoena, the employee will receive two (2) hours standby pay at time-and-a-half. If the employee is called to court and does not go beyond 12:00 hours on that day, it will be considered part of the two (2) hours standby. If the employee has to appear after the noon recess, any additional time will be added to the two (2) hours standby, plus one-half hour travel time. In cases where the subpoena is for 13:30 hours, or another time, the standby will start with time stated on the subpoena. In those cases where the subpoena is for 13:30 or later, the employee's time will be computed at the amount of time between the time of subpoena and 17:00, plus 30 minutes travel time. In the event the employee is required to pay parking fees, the employee will be reimbursed. If the employee is required to stay through noon recess, he**

*Fire Safety MOU*

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Resolution No. 1999-253

RESOLUTION OF THE CITY OF SAN BERNARDINO RESCINDING RESOLUTION NO. 1999-236 AND AUTHORIZING THE CITY OF SAN BERNARDINO TO REPORT THE VALUE OF EMPLOYER-PAID MEMBER CONTRIBUTIONS (EPMC) TO CALPERS AS ADDITIONAL COMPENSATION FOR ALL LOCAL FIRE AND POLICE MEMBERS.

WHEREAS, the City of San Bernardino has the authority to implement Government Code Section 20636(c )(4) pursuant to Government Code Section 20691;

WHEREAS, the City of San Bernardino has a written labor policy or agreement which specifically provides for the inclusion of normal member contributions paid by the employer on behalf of the members as additional compensation;

WHEREAS, one of the steps in the procedures to implement this section is the adoption by the governing body of the City of San Bernardino of a Resolution giving notice of its intention to commence reporting the value of Employer-Paid Member Contributions (EPMC) as compensation for all local fire and police safety members;

WHEREAS, the following is a statement of the proposed change in reporting compensation to PERS:

The City of San Bernardino elects to pay nine percent (9%) of employees' compensation earnable as Employer Paid Member Contributions and report the same percent (value) of compensation earnable {excluding Government Code Section 20636(c )(4)} as additional compensation.

This benefit shall apply to all employees of all local fire and police safety classes.

The effective date of this Resolution shall be January 1, 2000.

173

1999-253

1           RESOLUTION OF THE CITY OF SAN BERNARDINO RESCINDING  
2 RESOLUTION NO. 1999-236 AND AUTHORIZING THE CITY OF SAN BERNARDINO  
3 TO REPORT THE VALUE OF EMPLOYER-PAID MEMBER CONTRIBUTIONS (EPMC)  
4 TO CALPERS AS ADDITIONAL COMPENSATION FOR ALL LOCAL FIRE AND  
POLICE MEMBERS.

5           WHEREAS, on September 22, 1999, the Mayor and Common Council of the City  
6 of San Bernardino adopted Resolution No. 1999-236, expressing its intent to amend the  
7 contract between the Board of Administration of the Public Employees' Retirement  
8 System (PERS) and the City of San Bernardino to implement the provisions of Section  
9 414 (h)(2) of the Internal Revenue Code;

10           WHEREAS, it is now necessary to correct said resolution to authorize the  
11 reporting of the value of Employer-Paid Member Contributions (EPMC) to CalPERS as  
12 additional compensation for all local fire and police members.

13           BE IT RESOLVED BY THE MAYOR AND COMMON OF THE CITY OF SAN  
14 BERNARDINO AS FOLLOWS:  
15

16           SECTION 1. Resolution No. 1999-236, adopted by the Mayor and Common  
17 Council of the City of San Bernardino on September 22, 1999, entitled:

18           **"RESOLUTION OF THE CITY OF SAN BERNARDINO EXPRESSING ITS  
19 INTENT TO AMEND THE CONTRACT BETWEEN THE BOARD OF  
20 ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
21 (PERS) AND THE CITY OF SAN BERNARDINO TO IMPLEMENT THE  
22 PROVISIONS OF SECTION 414(H)(2) OF THE INTERNAL REVENUE CODE."**

23           Is hereby rescinded in its entirety.

24           SECTION 2. The governing body of the City of San Bernardino shall implement  
25 Government Code Section 20636(c )(4) pursuant to Section 20691 by paying and  
26 reporting the value of Employer-Paid Member Contributions for all employees of the  
27 local fire and police safety classes as indicated above.  
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1999-253

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RESOLUTION OF THE CITY OF SAN BERNARDINO RESCINDING  
RESOLUTION NO. 1999-236 AND AUTHORIZING THE CITY OF SAN BERNARDINO  
TO REPORT THE VALUE OF EMPLOYER-PAID MEMBER CONTRIBUTIONS (EPMC)  
TO CALPERS AS ADDITIONAL COMPENSATION FOR ALL LOCAL FIRE AND  
POLICE MEMBERS.

I HEREBY CERTIFY that the foregoing Resolution was duly adopted by the  
Common Council of the City of San Bernardino at a joint regular meeting thereof,  
held on the 18th day of October, 1999, by the following vote,

to wit:

COUNCILMEMBERS:	AYES	NAYES	ABSTAIN	ABSENT
ESTRADA	<u>x</u>	<u>      </u>	<u>      </u>	<u>      </u>
LIEN	<u>x</u>	<u>      </u>	<u>      </u>	<u>      </u>
MCGINNIS	<u>x</u>	<u>      </u>	<u>      </u>	<u>      </u>
SCHNETZ	<u>x</u>	<u>      </u>	<u>      </u>	<u>      </u>
VACANT -5th Ward	<u>      </u>	<u>      </u>	<u>      </u>	<u>      </u>
ANDERSON	<u>x</u>	<u>      </u>	<u>      </u>	<u>      </u>
MILLER	<u>x</u>	<u>      </u>	<u>      </u>	<u>      </u>

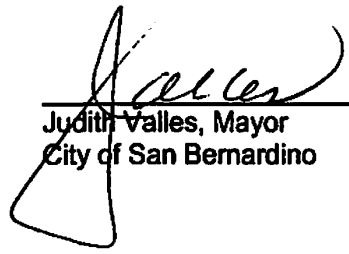
  
Rachel G. Clark, City Clerk

1999-253

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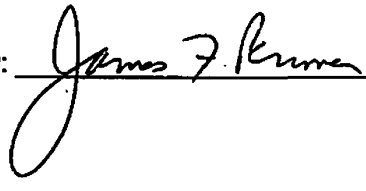
RESOLUTION OF THE CITY OF SAN BERNARDINO RESCINDING  
RESOLUTION NO. 1999-236 AND AUTHORIZING THE CITY OF SAN BERNARDINO  
TO REPORT THE VALUE OF EMPLOYER-PAID MEMBER CONTRIBUTIONS (EPMC)  
TO CALPERS AS ADDITIONAL COMPENSATION FOR ALL LOCAL FIRE AND  
POLICE MEMBERS.

The foregoing resolution is hereby approved this 19th of  
October, 1999.

  
\_\_\_\_\_  
Judith Valles, Mayor  
City of San Bernardino

Approved as to form and  
Legal content:

JAMES F. PENMAN,  
City Attorney

By:  \_\_\_\_\_

1999-253

EXCERPT FROM FIRE SAFETY MOU  
CONTRACT EFFECTIVE 1/1/99 TO 12/31  
ARTICLE III, SECTION 6

A. **Policy:** It is the policy of the City to discourage overtime except when necessitated by abnormal or unanticipated workload situations. The City has the right to require overtime to be worked as necessary. Consistent with this policy, the Fire Chief, Deputy Chief and Battalion Chiefs, will make every effort to assign overtime evenly among the employees with similar skills or assignments.

B. **Definition:** Overtime is defined as all hours worked in excess of the regularly scheduled workweek. All overtime shall be reported in increments of six (6) minutes and is non-accumulative and non-payable when incurred in units of less than six (6) minutes. Holiday leave, sick leave, vacation leave and court time shall be considered as time worked for purposes of computing overtime compensation.

C. **Compensation:** Payment for overtime shall be made on the first regular payday following the pay period in which overtime is worked, unless overtime compensation cannot be computed until some later date, in which case overtime will be paid on the next regular payday after such computation can be made.

#### **Section 6 - Retirement Plan**

A. The City shall continue to participate in an employees' retirement plan for Public Safety Officers, by contract with the California Public Employees' Retirement System (PERS) under the current "2% at age 50" formula.

B. The City shall continue to provide the "highest 12 month" retirement formula and Military Service Credit.

C. The City shall contract with PERS to provide the Fourth Level 1959 Survivor Benefit. All costs will be borne by the employee.

D. The City shall continue to provide the Post-Survivors' Retirement Benefit.

E. The City shall continue to provide the Post-Retirement Survivor Allowance to Continue After Remarriage benefit.

F. The City shall continue to pay through December 31, 1999, nine percent (9%) of the members' contribution to PERS credited to the employee's account as a fringe benefit, for current, active employees hired prior to July 1, 1997. Effective January 1, 2000, Section H of this article will replace this section.

G. For any employee hired on or after July 1, 1997, the City will pay five percent (5%) of the members' contribution to PERS credited to the employee's account as a fringe benefit. Upon said employees completing five (5) years of service the City will pay nine percent (9%) of the members' contribution to PERS credited to the employee's account as a fringe benefit on the first pay period of the sixth year of service. Effective January 1,

*Fire Safety MOU*

1999-253

**2000, Section H of this article will replace this section.**

**H. The City will increase the base salary of all employees covered by this agreement by converting the nine percent (%) Employer-Paid Member Contribution (EPMC) to base salary. This base salary is "compensation earnable" as defined in Section 20636 ( c ) of the California Government Code and shall be reported to the Public Employees' Retirement System (hereinafter "PERS"). Employees will then assume responsibility for payment of the nine percent (9%) employee retirement contribution to PERS and all associated costs for the conversion of the EPMC to base salary. The City shall designate such payment as an Employer Pick-Up as defined under the provisions of Section 414(h)(2) of the Internal Revenue Code (26 USC & 414(h)(2)). The employee contribution to PERS shall be made through automatic payroll deductions from the base salary in accordance with PERS regulations.**

**For purposes of determining overtime compensation and other salary payments, including but not limited to, payoffs of sick leave, vacation accruals, holiday accruals and comp time balances, the aforementioned nine percent (9%) base salary increase shall not be considered.**

**I. The City shall provide written notification to representatives of the union prior to the end of each fiscal year, which identifies the applicable rate for the next fiscal year.**

#### **Section 7 - On-Call/Call-Back/Standby**

**Any employee on "on-call" status will receive a minimum of two- (2) hours' pay at time-and-a-half for all or any portion of a 24-hour day. If called back any time within the first two (2) hours of on-call, the time worked will be deducted from the two (2) hours on-call. If the call-back occurs after two (2) hours expire, call-back time will be clocked from the time the employee receives the call to report. Compensation for that time is in addition to the on-call status.**

**In the event an employee is placed on "standby" for court subpoena, the employee will receive two (2) hours standby pay at time-and-a-half. If the employee is called to court and does not go beyond 12:00 hours on that day, it will be considered part of the two (2) hours standby. If the employee has to appear after the noon recess, any additional time will be added to the two (2) hours standby, plus one-half hour travel time. In cases where the subpoena is for 13:30 hours, or another time, the standby will start with time stated on the subpoena. In those cases where the subpoena is for 13:30 or later, the employee's time will be computed at the amount of time between the time of subpoena and 17:00, plus 30 minutes travel time. In the event the employee is required to pay parking fees, the employee will be reimbursed. If the employee is required to stay through noon recess, he**

*Fire Safety MOU*

1999-253

EXCERPT FROM POLICE SAFETY MOU  
CONTRACT EFFECTIVE 1/1/99 TO 12/31  
ARTICLE III, SECTION 2

**Section 2 - PERS/Retirement Plan**

A. The City will continue to participate in an employees' retirement plan for members by contract with the California Public Employees' Retirement System (PERS), under the current "2% at age 50" formula.

B. The City will continue to contract with PERS to provide the "highest 12 month" retirement formula.

C. The City will pay nine percent (9%) of the members' contribution to PERS through December 31, 1999. Effective January 1, 2000, Section E below will supercede this section.

D. The City will provide Post Survivors' Retirement benefit.

E. **PERS Salary Conversion:** The City will increase the base salary of all employees covered by this agreement by converting the nine percent (9%) Employer Paid Member Contribution (EPMC) to base salary. This base salary is "compensation earnable" as defined in Section 20636 ( c ) of the California Government Code and shall be reported to the Public Employees' Retirement System (hereinafter "PERS"). Employees will then assume responsibility for payment of the nine percent (9%) employee retirement contribution to PERS and all associated costs for the conversion of the EPMC to base salary. The City shall designate such payment as an Employer Pick-Up as defined under the provisions of Section 414(h)(2) of the Internal Revenue Code (26 USC & 414(h)(s)). The employee contribution to PERS shall be made through automatic payroll deductions from the base salary in accordance with PERS regulations.

For purposes of determining overtime compensation and other salary payments, including but not limited to, payoffs of sick leave, vacation accruals, holiday accruals and comp time balances, the aforementioned nine percent (9%) base salary increase shall not be considered.

F. The City shall provide written notification to representatives of the union prior to the end of each fiscal year, which identifies the applicable rate for the next fiscal year.

**Section 3 - Overtime**

A. **Policy:** It is the policy of the City to discourage overtime, except when necessitated by abnormal or unanticipated workload situations. The City has the right to require overtime to be worked as necessary. Consistent with this policy, the Chief will make every effort to assign overtime evenly among the employees with similar skills or assignments.

*Police Safety MOU*





2000-333

I HEREBY CERTIFY that the foregoing resolution was duly adopted by the Mayor and Common Council of the City of San Bernardino at a Joint Regular meeting thereof, held on the 20th day of November 2000, by the following vote to wit:

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<u>COUNCILMEMBERS</u>	<u>AYES</u>	<u>NAYS</u>	<u>ABSENT</u>	<u>ASTAIN</u>
ESTRADA	<u>X</u>	<u>          </u>	<u>          </u>	<u>          </u>
LIEN	<u>          </u>	<u>          </u>	<u>X</u>	<u>          </u>
MC GINNIS	<u>X</u>	<u>          </u>	<u>          </u>	<u>          </u>
SCHNETZ	<u>X</u>	<u>          </u>	<u>          </u>	<u>          </u>
SUAREZ	<u>X</u>	<u>          </u>	<u>          </u>	<u>          </u>
ANDERSON	<u>X</u>	<u>          </u>	<u>          </u>	<u>          </u>
McCAMMACK	<u>X</u>	<u>          </u>	<u>          </u>	<u>          </u>

Rachel Clark  
Rachel Clark, City Clerk

By Sandra Medina, Deputy

The foregoing resolution is hereby approved this 2<sup>nd</sup> day of November 2000.

Betty Dean Anderson

Betty Dean Anderson  
Mayor Pro Tem  
City of San Bernardino

Approved as to  
Form and legal content:

JAMES F. PENMAN  
City Attorney

By: James F. Penman

Resolution No 2008-454

**RESOLUTION OF THE MAYOR AND COMMON COUNCIL OF THE CITY OF  
SAN BERNARDINO FOR PAYING AND REPORTING THE VALUE OF EMPLOYER  
PAID MEMBER CONTRIBUTIONS**

**WHEREAS**, the governing body of the City of San Bernardino has the authority to implement Government Code Section 20636(c)(4) pursuant to Section 20691;

**WHEREAS**, the governing body of the City of San Bernardino has a written labor policy or agreement which specifically provides for the normal member contributions to be paid by the employer, and reported as additional compensation;

**WHEREAS**, one of the steps in the procedures to implement Section 20691 is the adoption by the governing body of the City of San Bernardino of a Resolution to commence paying and reporting the value of said Employer Paid Member Contributions (EPMC);

**WHEREAS**, the governing body of the City of San Bernardino has identified the following conditions for the purpose of its election to pay EPMC:

- This benefit shall apply to all employees of Safety members (74001, 75001).
- This benefit shall consist of paying the full 9% normal member contributions as EPMC, and reporting the same percent (value) of compensation earnable (excluding Government Code Section 20636(c)(4)) as additional compensation.
- The effective date of this Resolution shall be December 16, 2008.

**NOW, THEREFORE, BE IT RESOLVED** that the governing body of the City of San Bernardino elects to pay and report the value of EPMC, as set forth above.

2008-454

1           **RESOLUTION OF THE MAYOR AND COMMON COUNCIL OF THE CITY OF**  
2 **SAN BERNARDINO FOR PAYING AND REPORTING THE VALUE OF EMPLOYER**  
3 **PAID MEMBER CONTRIBUTIONS**

4           I HEREBY CERTIFY that the foregoing Resolution was duly adopted by the Mayor and  
5 the Common Council of the City of San Bernardino at a joint regular meeting thereof, held  
6 on the 15th day of December, 2008, by the following vote, to wit:

COUNCILMEMBERS:	AYES	NAYES	ABSTAIN	ABSENT
8 ESTRADA	<u>X</u>	<u>      </u>	<u>      </u>	<u>      </u>
9 BAXTER	<u>X</u>	<u>      </u>	<u>      </u>	<u>      </u>
10 BRINKER	<u>X</u>	<u>      </u>	<u>      </u>	<u>      </u>
11 VACANT	<u>      </u>	<u>      </u>	<u>      </u>	<u>      </u>
12 KELLEY	<u>X</u>	<u>      </u>	<u>      </u>	<u>      </u>
13 JOHNSON	<u>X</u>	<u>      </u>	<u>      </u>	<u>      </u>
14 MCCAMMACK	<u>X</u>	<u>      </u>	<u>      </u>	<u>      </u>

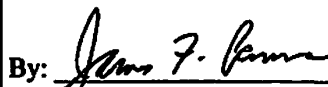
15   
16 Rachel G. Clark, City Clerk

17           The foregoing resolution is hereby approved this 16<sup>th</sup> day of  
18 December, 2008.

19   
20 Patrick J. Morris, Mayor  
21 City of San Bernardino

22 Approved as to form:

23 JAMES F. PENMAN,  
24 City Attorney

25 By:   
S:\Agenda Items\Reso.Paying&Reporting.Value.Employer.Contributions.doc

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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 May 14, 2014, I served the following document(s) by the method indicated below:

**RICHARD LEWIS' NOTICE OF DEFENSE, AFFIRMATIVE DEFENSES, AND  
NEW MATTER; EXHIBITS 1-3**

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 E. Kennedy  
Senior Staff Counsel  
CalPERS Legal Office  
P.O. Box 942707  
Sacramento, CA 94229-2707

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 14, 2014, at Los Angeles, California.



Griselda Montes De Oca