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 Employees' Retirement System

BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Final Compensation	)	CASE NO. 2014-0256
)	
RICHARD LEWIS,	)	OAH NO. 2014040945
)	
Respondent,	)	CALPERS' OPPOSITION TO
	)	RESPONDENT LEWIS' MOTIONS
and	)	REGARDING JURISDICTIONAL
	)	CHALLENGES RE: HOME RULE;
CITY OF SAN BERNARDINO,	)	COLLATERAL ESTOPPEL AND
	)	PAROL EVIDENCE RULE
Respondent.	)	DOCUMENT TITLE
)	
	)	Hearing Date: October 13, 2014
	)	Hearing Time: 10:00 am
	)	Hearing Location: Orange
	)	Prehearing Conf.: None Scheduled
	)	Settlement Conf.: None Scheduled

I.

INTRODUCTION

This administrative proceeding concerns the calculation of a retirement allowance under the Public Employees' Retirement Law ("PERL"). (Gov. Code § 20000 et seq.) CalPERS contends that it is statutorily mandated and authorized to adjust Lewis' retirement allowance consistent with the PERL. Lewis asserts that as an employee of a charter city he is exempt from provisions of the PERL that determine members' final compensation for purpose of calculating a member's

1 pension benefit. Lewis also contends that because it initially (and erroneously)
2 included part of a portion of his settlement proceeds with the City of Sn Bernardino to
3 be used in the calculation his pension benefit, CalPERS is collaterally estopped from
4 correcting that error and any adjustment to his final compensation. Finally, Lewis
5 argues that CalPERS is barred by the parol evidence rule (PER) from determining
6 Lewis' final compensation to be less than the "consideration" characterized as in an
7 integrated settlement agreement with his former employer the City of San Bernardino
8 ("City").

9 Initially, CalPERS objects to the characterization of Lewis' motion as one for
10 dismissal. The California Administrative Procedures Act makes no provision for an
11 Administrative Law Judge, sitting alone, to entertain summary motion to dismiss a
12 matter referred for hearing by CalPERS. (Tit. 2 Cal.Code Regs., §§555.4.)

13 II.

14 **BACKGROUND LAW AND FACTS**

15 **A. CalPERS' Role is to Administer the PERL**

16 CalPERS is a unit of the Government Operation Agency (Gov. Code § 20002)
17 and is charged with the administration of the retirement system for employees of the
18 State of California and other public entities pursuant to the PERL. (Gov. Code §
19 20120.) All employees of the state and contracting public agencies are members of
20 the system. Because of the need for statewide uniformity in its application, the Board
21 has been vested with the sole authority to determine "... who are employees and the
22 sole judge of the conditions under which persons may be admitted to and continue to
23 receive benefits under this system" following a hearing if necessary. (Gov. Code §§
24 20120, 20125, 20134; *Metropolitan Water District of California v. Cargill* (2004) 32
25 Cal.4th 491, 503-505; *City of Sacramento v. Public Employees Retirement System*
(1991) 229 Cal.App.3d 1470, 1478-1479 (*City of Sacramento*). *City of Los Altos v.*
Board of Administration (1978) 80 Cal.App.3d 1049, 1051 (*Los Altos*).)

1 The PERL describes the three factors affecting a retiree's benefit: a member's
2 credited years of service, "final compensation," and age at retirement. (See, *Prentice*
3 *v. Board of Administration* (2007) 157 Cal.App.4th 983, 989.) Of these three factors,
4 only the amount of "final compensation" is in dispute in this case. "Final
5 compensation" is a function of "compensation earnable," and "compensation
6 earnable" is the aggregate of "payrate" and "special compensation." All four of these
7 terms are explicitly and narrowly defined by the PERL. (Gov. Code §§ 20037,
8 20636(a).) CalPERS employers frequently report "compensation" that may be in
9 excess of what may qualify as compensation earnable. (See *Molina v. CalPERS*
10 (2011) 200 Cal.App.4th 53, 67 [CalPERS member "fails to recognize the important
11 difference between the amount he was paid by Oxnard ... and the much narrower
12 category of 'compensation earnable' that can be taken into account for pension
13 purposes, as established under PERL."]) However, neither employers nor even
14 collective bargaining agreement may dictate what constitutes compensation earnable
15 for the purpose of calculating a member's final compensation under the PERL (*Oden*
16 *v. Board of Administration* (1994) 23 Cal.App.4th 194, 201.) In point of fact the
17 legislature specifically enacted the PERL to prevent this type of manipulation and
18 pension spiking between an employer and an employee that is evidenced in this
19 case. (*Pomona Peace Officers' Association v. City of Pomona* (1997) 58 Cal.App.4th
20 578, 587.) Nor, is the calculation of 'compensation earnable' based on individual
21 efforts, but is defined as "the average monthly compensation as determined by the
22 board upon the basis of the average time put in by members in the same group or
23 class of employment and at the same rate of pay. (§ 20023; *City of Sacramento, ibid.*)
24 Importantly for the current motion, "[n]ot all items of compensation paid in addition to
25 the member's base salary amount are admissible as special compensation." (*City of*
Pleasanton v. Board of Administration (2012) 211 Cal.App.4th 522, 527.) "This
means that an employee's pension will not necessarily reflect his total personal
compensation because compensation earnable 'measured by the amounts provided

1 by the employer to similarly situated employees'." (*Molina v. Board of Administration*
2 (2011) 200 Cal.App.4th 53, 65, (*Molina*) citing *Prentice v. Board of Administration*
3 (2007) 157 Cal.App.4th 983, 989-992, (*Prentice*).) It is "plainly clear that an
4 individual's pay will not amount towards 'compensation earnable' unless it qualifies as
5 either 'payrate' or 'special compensation.'... [¶] Whether or not back pay might be
6 considered, 'compensation' is academic. It is 'compensation earnable' – not
7 'compensation' that is used to set the amount of the pension; and 'compensation
8 earnable' is a narrow subset of compensation'." (*Molina*, at p. 68 [emphasis added],
9 citing, *Ventura County Sheriff's Association, v. Board of Retirement* (1997) 16 Cal.4th
10 483,493-494; See also, *Prentice, supra*, at p. 984. ["PERS acted properly in looking
11 at the published salary range rather than the exceptional arrangement the city made
12 with *Prentice* and reflected in the City's budget documents."]; *Molina, supra*, at p. 64,
13 ["L]ike the plaintiff in *Prentice*, *Molina* fails to recognize the important difference
14 between the amount he was paid by [his employer]... and the much narrower
15 category of 'compensation earnable' that can be taken into account for pension
16 purposes as established by the PERL."] (*Id.*, at p. 67.) "Allowing conduct of [a] City to
17 estop PERS would, in effect permit [a] City to usurp PERS' statutory authority to
18 determine compensation for retirement purposes. To find estoppel by privity in this
19 context could have the pernicious effect of inducing subordinate governmental
20 entities to disregard the rule of law." (*Hudson v. Board of Administration* (1997) 59
21 Cal.App.4th 1310, 1331-1332, internal citations and marks omitted.)

22 Allowing the system to be dependent on the choice of individual participating
23 agencies, could lead contrary to the letter and spirit of the law and to a patchwork of
24 standards by local agencies rather than a uniform definition set and applied by the
25 CalPERS administering board. (*Cargill, supra*, at p. 505.) And, "[t]he right of any
member to receive benefits... is in the first instance for CalPERS itself to decide, after
a hearing if necessary, when such benefits are sought." (*Id.*, at p. 503; See Also,
McIntyre v. Santa Barbara County Employees' Retirement System (2001) 91

1 Cal.App.4th 730, 724. [The Board "cannot fulfill this mandate unless it investigates
2 application and pays benefits only to those members who are eligible for them."].)

3 Accordingly, Lewis's contentions in this matter that it is the City, not CalPERS,
4 that is the final arbiter of Lewis' pension benefits received by its employees and that
5 the City is immune from CalPERS' statutory obligation to adjust his final
6 compensation in a manner consistent with the PERL must fail. The City contracted
7 with CalPERS and expressly acknowledged that pension rights and obligations are to
8 be decided under the PERL. Even more fundamental, his retirement allowance is not
9 based solely on what he or his employer may characterize as his "compensation."
10 When CalPERS calculates a member's compensation enable and final compensation
11 it is not impacting or intruding upon the employer's right to set the member's salary or
12 compensation. Even if the City had, in some enacted some resolution or ordinance
13 that was in conflict with the PERL, which is not apparent here, the PERL would
14 preempt any contrary local law, as a matter of public policy. In any event, the issue is
15 purely academic because, as Lewis admits, the City has no pension laws that conflict
16 with the PERL. It is the PERL that must govern Lewis retirement allowance.

15 **B. The City Contracted with CalPERS and Agreed to be Subject to the**
16 **PERL**

17 Public agencies may enter into contracts that permit them to participate in
18 CalPERS. (Gov. Code § 20460, et seq.) Contracting agencies must abide by the
19 PERL. (Gov. Code § 20506 ["Any contract ... shall subject the contracting agency
20 and its employees to all provisions of this part and all amendments thereto...."]).

21 The City is a public agency that contracted with CalPERS. In doing so it
22 expressly agreed to be "subject to the provisions of the [Public Employees'
23
24
25

1 Retirement Law]"¹ A subsequent amendment in 1973 specified that: "All words
2 and terms used herein which are defined by the Public Employees' Retirement Law
3 shall have the meaning defined therein unless otherwise specifically provided."²

4 III.

5 **THE PERL WOULD PREEMPT ANY CONFLICTING LOCAL LAW**

6 The City has neither resisted the PERL nor enacted an ordinance that conflicts
7 with the PERL. Even if it had done so, the PERL would prevail. The courts have
8 expressly held that the PERL preempts contrary municipal law. (*City of Los Altos v.*
9 *Board of Administration* (1978) 80 Cal.App.3d 1049, 1052 ["State statutes dealing
10 with PERS matters preempt municipal provisions."]) The preemptive power of the
11 PERL arises from the, "strong policy favoring statewide uniformity of interpretation as
12 between the PERS and all of its contracting agencies." (*Id.* at p. 1051.) "PERS has
13 contracts with several hundred public agencies and cannot be expected to accept
different interpretations for different agencies." (*Id.* at p. 1052.)

14 Once a city decides its employees are entitled to retirement benefits, and then
15 contracts with CalPERS, the PERL will preempt local law. (See *Marsille v. City of*
16 *Santa Ana* (1976) 64 Cal.App.3d 764, 771 ["State statutes dealing with PERS matters
17 preempt municipal provisions."]) Nonetheless, Lewis questions this principle, citing
18 *Batters v. City of Santa Monica* (1980) 101 Cal.App.3d 595 and *Campbell v. City of*
19 *Monrovia* (1978) 84 Cal.App.3d 341. But *Batters* and *Campbell* address entitlement
20 to sick leave, not retirement benefits. The PERL provision addressed in those
21 decisions – then Gov. Code section 21025.2, now Gov. Code section 21163 –
specifically deferred to local laws in determining whether sick leave was owed prior to

22
23 ¹ See, A true and correct copy of which is attached hereto as Exhibit 1. CalPERS requests official notice
of this document pursuant to Govt. Code Sections 11515 and evidence code sections 451, subd.(f), 452
subd.(b); 453 subd.(a); 454 subd..

24 ² See, A true and correct copy of which is attached hereto as Exhibit 2. CalPERS requests official notice
25 of this document pursuant to Govt. Code Sections 11515 and evidence code sections 451, subd.(f), 452
subd.(b); 453 subd.(a); 454 subd..

1 a disability retirement becoming effective. Nothing in section 21025.2, or the cases
2 cited by Lewis change the PERL's preemption of local law where retirement benefits
3 are concerned. (See *Campbell, supra*, 84 Cal.App.3d at pp. 348-349 ["T]here is no
4 doubt, in our view, that questions pertaining to the retirement of persons employed by
5 agencies contracting with PERS are to be answered by recourse to state rather than
6 local law and that preemption on that issue occurs simply by virtue of the contractual
7 relation."].) But again, the entire discussion of preemption is academic because the
8 City has not passed any pension law in conflict with the PERL.

IV.

LEWIS CANNOT ESTABLISH THE ELEMENTS OF COLLATERAL ESTOPPEL

A. Elements of Collateral Estoppel Against an Agency

11 Lewis contends that CalPERS is collaterally estopped³ from altering his final
12 compensation. Collateral estoppel may generally be applied to "prevent an
13 administrative agency from reconsidering, in the absence of new facts, its prior final
14 decision made in a judicial or quasi-judicial capacity in the context of an adversary
15 hearing." (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 794.)
16 The basic elements of collateral estoppel are: "(1) the issue is identical to that
17 decided in the former proceeding, (2) the issue was actually litigated in the former
18 proceeding, (3) the issue was necessarily decided in the former proceeding, (4) the
19 decision in the former proceeding is final and on the merits, and (5) preclusion is
20 sought against a person who was a party or in privity with a party to the former
21 proceeding." (*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 481.)

23 ³ Apart from collateral estoppel ("issue preclusion"), Lewis also appears to refer to res judicata ("claim
24 preclusion"). Collateral estoppel is a "distinct aspect of res judicata" and is the specific doctrine
25 applicable to final agency action. (See *In the Matter of Henderson*, Precedential Board Decision No. 98-
02, effective November 18, 1998 [holding that an equitable rule barring CalPERS from correcting benefit
overpayments would have "a disruptive effect on the administration of the retirement system."]).

Beyond these basic elements, **additional** requirements must be met before collateral estoppel will be applied against governmental entities. Lewis does not mention these additional requirements in his motion.

First, collateral estoppel will not bind a governmental agency unless its initial determination was based on "a question of fact within its powers." (*Aylward v. State Board Chiropractic Examiners* (1948) 31 Cal.2d 833, 839.) Where the agency simply made an "erroneous conclusion of law," the agency cannot be barred from making a correction. (*Id.*) Agencies "have only such limited authority as is conferred upon them by law," and collateral estoppel will not be applied to preserve agency determinations that "are beyond their statutory jurisdiction." (*City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 679.)

Second, collateral estoppel does not apply where, "it is clear that the legislature intended that the agency should exercise a continuing jurisdiction with power to modify or alter its orders...." (*Olive Proration Etc. Com. v. Agricultural Prorate Commission* (1941) 17 Cal.2d 204, 209.)

Third, collateral estoppel is inappropriate where the issue addressed by the agency "concerns a matter of public interest." (*Modesto City Schools v. Education Audits Appeal Panel* (2004) 123 Cal.App.4th 1365, 1379.)

Lewis cannot prove either the basic or additional agency-related conditions for collateral estoppel.

B. Lewis Cannot Satisfy the Elements of Collateral Estoppel Against an Agency⁴

1. There was no Actual Litigation of Lewis' Retirement Benefit

CalPERS cannot be estopped from correcting Lewis' final compensation unless, as a first step, Lewis shows the issue was already "actually litigated" with CalPERS. "For purposes of collateral estoppel, an issue was actually litigated in a

⁴ Lewis appears to make a feint that the CalPERS may be barred on basis equitable estoppel based on a naked assertion and that CalPERS "was already aware of an privity (sic) to as administrator of the City's pension benefits." Lewis does not pursue this argument.

1 prior proceeding if it was properly raised, submitted for determination, and
2 determined in that proceeding.” (*Hernandez v. City of Pomona* (2009) 46 Cal.4th
3 501, 511.) Litigation becomes “actual” (and not just possible) when “parties each
4 presented evidence and witnesses in support of their positions.” (*Lucido v. Superior*
5 *Court* (1990) 51 Cal.3d 335, 341; see also, *Castillo v. City of Los Angeles* (2001) 92
6 Cal.App.4th 477, 482 [litigation is “actual” when a full hearing is set during which the
7 parties can raise issues and present evidence.]) Indicia of actual litigation include, “a
8 hearing before an impartial decision maker; testimony given under oath or affirmation;
9 a party’s ability to subpoena, call, examine, and cross-examine witnesses, to
10 introduce documentary evidence, and to make oral and written argument; the taking
11 of a record of the proceeding; and a written statement of reasons for the decision.”
(*Murray v. Alaska Airlines* (2010) 50 Cal.4th 860, 867-68.)

12 At most, CalPERS made an initial but erroneous decision at a staff level which
13 is now being corrected and respondents are no getting an opportunity pursue an
14 administrative appeal of that determination. That error was not an actual litigation of
15 Lewis’ final compensation. There was no hearing, no evidence, no motions, and no
16 argument to a judge. In fact, CalPERS avoided actual litigation by initially not issuing
17 a Statement of Issues. (Tit. 2, Cal. Code Regs. §§ 555.2, 555.4.) Lewis concedes as
much. (Motion at p. 10.)

18 **2. There was no Final Determination on the Merits of Lewis’ Final**
19 **Compensation**

20 Had CalPERS initially adjusted Lewis’s final compensation, the parties would
21 have engaged in actual litigation governed by the Administrative Procedures Act.
22 (Tit. 2, Cal. Code Regs. § 555.4.) Only after the issues were decided by a hearing
23 officer would there be a decision on the merits. (*Castillo, supra*, 92 Cal.App.4th at p.
24 483 [A decision is on the merits if it “followed a ‘full hearing’ in which ‘the substance
25 of the claim [was] tried and determined.’”]; accord, *Basurto v. Imperial Irrigation*
District (2012) 211 Cal.App.4th 866, 892.) And any merits decision would have been

1 subject to review by the CalPERS Board. (Gov. Code § 11440.10(a).) Only after the
2 Board acts (or declines to act) can any decision be deemed "final." (See Gov. Code
3 § 11517(c)(1) ["If a contested case is originally heard by an administrative law judge
4 alone, he or she shall prepare within 30 days after the case is submitted to him or her
5 a proposed decision in a form that may be adopted by the agency as the final
6 decision in the case." (Emphasis added.)]) The Board has final say on the amount
7 of pension benefits, adjustments to benefits, and is the sole judge of the conditions
8 under which benefits are provided. (Motion at p. 18, citing Gov. Code §§ 20123-
20125; see also § 20134.)

9 The amount of Lewis's final compensation has never been the subject of a
10 judicial decision of any kind. There has not been an administrative hearing, a
11 decision on the merits, or final Board review of a merits decision.

12 **3. CalPERS is Expressly Required by Law to Correct Lewis 's**
13 **Pension Benefit**

14 Even if CalPERS had previously initiated administrative litigation to decide
15 Lewis' final compensation, and even if that administrative litigation had resulted in a
16 final decision on the merits in Lewis's favor, that result would not prevent CalPERS
17 from making corrections required by law. The PERL mandates CalPERS correct its
errors. (Gov. Code § 20160.)

18 As previously stated, collateral estoppel will not bind an agency to an
19 "erroneous conclusion of law." (*Aylward, supra*, 31 Cal.2d at p. 839; *City and County*
20 *of San Francisco v. Ang, supra*, 97 Cal.App.3d at p. 679.) This is especially true
21 where, "it is clear that the legislature intended that the agency should exercise a
22 continuing jurisdiction with power to modify or alter its orders...." (*Olive Proration,*
23 *supra*, 17 Cal.2d at p. 209.) Moreover, even if no express statutory authority to make
24 corrections existed, an exception to collateral estoppel exists: "when the issue is a
25 question of law rather than of fact, the prior determination is not conclusive either if
injustice would result or if the public interest requires that relitigation not be

1 foreclosed." (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979)
2 25 Cal.3d 891, 902.) "[T]he courts will not apply [collateral estoppel] to foreclose the
3 relitigation of an issue of law covering a public agency's ongoing obligation to
4 administer a statute enacted for the public benefit and affecting members of the
5 public not before the court." (*California Optometric Assn. v. Lackner* (1976) 60
6 Cal.App.3d 500, 505.)

7 Here, CalPERS is obliged to decide the correct amount of Lewis' final
8 compensation. CalPERS must "determine and . . . modify benefits for service and
9 disability" in accordance with the PERL (Govt. Code, § 20123.) and "is the sole judge
10 of the conditions under which persons may be admitted to and continue to receive
11 benefits under this system" according to the PERL. (Govt. Code, § 20125.)

12 There is no time limit for CalPERS to make corrections; CalPERS has the duty
13 to correct mistakes, "throughout PERS membership and through the lifetime of retired
14 PERS members." (*City of Oakland v. Public Employees' Retirement System* (2002)
15 95 Cal.App.4th 29, 50-51) The PERL reflects the legislature's intent that CalPERS
16 "exercise a continuing jurisdiction with power to modify or alter its orders...." (*Olive*
17 *Proration, supra*, 17 Cal.2d at p. 209.) Applying collateral estoppel here would
18 improperly interfere with CalPERS' "ongoing obligation to administer a statute
19 enacted for the public benefit and affecting members of the public not before the
20 court." (*California Optometric Assn., supra*, 60 Cal.App.3d at p. 505.) There is no
21 authority for applying collateral estoppel when doing so would force an agency to
22 violate a statute.

23 V.

24 **THE PER HAS NO APPLICATION IN THIS CASE**

25 The PER is a substantive rule of law that, when properly invoked, preclude
introduction of evidence for the purpose of conflicting with or contradicting the terms
of an integrated agreement. Code of Civil Procedure § 1856 Lewis contends that he
and the City entered into an integrated settlement agreement that recited that as a

1 part of its consideration, the City would pay Lewis an increased component of his
2 salary for a period of time. The amount of that difference would be based on the
3 difference between his actual position (a fire Captain) and that of a fire Battalion
4 Chief. Neither Lewis nor the City contend that CalPERS was a party to the
5 agreement, nor that CalPERS is seeking to introduce any evidence of a prior or
6 contemporaneous agreement in conflict with the terms of that agreement. Neither the
7 City have or can reasonably contend that the agreement even addresses CalPERS
8 or the PERL at all.⁵ Under such circumstances the PER simply does not apply.
(*Penberthy v. Vahl* (1950) 101 Cal.App.2d 1, 4-5.)

9 "The key consideration in application of the parol evidence rule, whether
10 invoked by a party or a stranger to the contract, is whether the extrinsic evidence is
11 being offered to reconstruct the parties' contractual obligations." (Thomson v.
12 Canyon (2011) 198 Cal.App.4th 594, 608-09, [The parol evidence rule does not apply
13 where a third party is offering extrinsic evidence to reconstruct her obligations, or the
14 obligations of the buyer, under the purchase agreement.].) The legal issue in dispute
15 in this case is not what the City agreed to pay Lewis in consideration for his
16 agreement not to appeal a judgment entered against him in a discrimination law suit.
The issue is what portion of his compensation is consistent with the PERL.

17 "[T]he rule applies where contractual obligations are at issue, but no further: "it
18 does not follow from the parol evidence rule that the written contract between two
19 parties, which is conclusive as to them, must necessarily be conclusive as to the
20 proof of any rights or claims either one of them may have against a third party merely
21 because those claims grow out of the same transaction reflected in the written
22 contract." (*ibid*, at p. 599, citing 11 Williston on Contracts (4th ed. 1999) § 33:9, p.
23 599.).)

24
25 ⁵ Even if the agreement attempted to dictate to CalPERS such matters, the PER would not CalPERS
from arguing that such terms would be an invalid and unlawful usurpation of CalPERS authority.

VI.

**LEWIS' ASSERTION THAT CALPERS IS SEEKING TO IMPROPERLY APPLY A
PROVISION OF LAW RETROACTIVELY LACKS MERIT ON ITS FACE**

Lewis also makes an assertion that he CalPERS is improperly attempting to apply a provision of law retroactively. His argument addresses no specific provision of law. CalPERS is unable and need not respond to such an argument.

VII.

THIS COURT HAS NOT JURISDICTION TO AWARD ATTORNEY FEES

Lewis' request for attorney fees pursuant to Code of Civil Procedure section 1021.5 and Government Code section 800 fails. There is no applicable provision of the California Administrative Procedures Act that would authorize this court to award attorney fees to Lewis. Even if Lewis were to become a prevailing party, he does not qualify as a "private attorney general" because he has an adequate incentive to pursue his claim for personal profit. Further, as a matter of positive law, Government Code section 800 does not apply against the action of CalPERS. (Gov. Code § 20126.)

VIII.

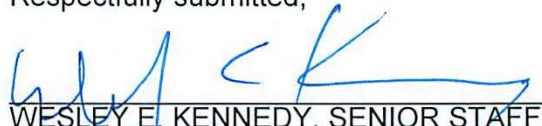
CONCLUSION

For the reasons set forth above, the OAH should deny Lewis' "jurisdictional challenges" (motion to dismiss) and must be rejected by this court and this matter should proceed to a hearing on the merits, wherein the lawful amount of Lewis' final compensation will be decided.

Respectfully submitted,

Dated:

5/28/11


WESLEY E. KENNEDY, SENIOR STAFF
ATTORNEY
Attorney for California Public Employees'
Retirement System

Exhibit

"1"

STATE EMPLOYEES' RETIREMENT SYSTEM
SACRAMENTO, CALIFORNIA

Contract

BETWEEN

MAYOR AND COMMON COUNCIL

NAME OF LEGISLATIVE BODY

OF

CITY OF SAN BERNARDINO

NAME OF MUNICIPAL CORPORATION

AND THE

BOARD OF ADMINISTRATION

OF THE

CALIFORNIA STATE EMPLOYEES' RETIREMENT SYSTEM

This Agreement made this 6th day of February, 1945, by and between
the Legislative Body of City of San Bernardino,
Name of Municipal Corporation
hereafter referred to as "City," and the Board of Administration, California State Employees' Retirement System, hereafter
referred to as "Board."

WITNESSETH:

In consideration of the covenants and agreements hereinafter contained and on the part of both parties to be kept
and performed, City and Board hereby agree as follows:

1. City is to participate in the State Employees' Retirement System, subject to the provisions of the State Employees'
Retirement Act. ~~Said Retirement Act is attached hereto marked Exhibit "A" and by such reference is hereby made a part of
this agreement as though herein set out in full.~~

2. City shall participate in said Retirement System, making its employees members of said System, from and
after March 1, 1945.

3. Employees of City in the following classes shall become members of said Retirement System in accordance with
the provisions of said Retirement Act, governing membership in said Retirement System, and subject to the further exclusions
from membership in the next following sentence:

CLASSES OF EMPLOYEES	NUMBER OF EMPLOYEES ELIGIBLE FOR MEMBERSHIP ON <u>March 1</u> , 194 <u>5</u>	MINIMUM AGE FOR VOLUNTARY SERVICE RETIREMENT
a. City Firemen, as defined in Section 8c of the State Employees' Retirement Act	<u>49</u>	<u>55</u>
b. City Policemen, as defined in Section 8b of the State Employees' Retirement Act	<u>50</u>	<u>55</u>
c. Employees other than City Firemen and City Policemen	<u>185</u>	As provided in the Retirement Act

In addition to the employees excluded from membership by said Retirement Act, the following employees shall not
become members of the Retirement System:

3a. The provisions of Section 84 of the State Employees' Retirement Act, shall apply to employees of City who become members of said Retirement System.

3. Continued from Page 1

No additional Exclusions

3. Continued Board and City agree that, except as provided in paragraph 5, no adjustment shall be made in the amount of contributions provided in paragraph 5a, on account of prior service, or in the percentage provided in paragraph 5b, because of variations in the numbers of employees who become members of said Retirement System on the effective date hereof, from the numbers listed above, due to termination of service by such causes as death, resignation or discharge, or the employment of individuals not included in said numbers.

3a. See Above

4. Benefits on account of prior service, that is, service credited hereunder as rendered to City prior to the effective date hereof, shall be allowed to city firemen and city policemen and to other employees, only as percentages of the respective average salaries specified in said Retirement Act, for each year of such service, and said percentages shall be equal to 100% per cent of the analogous percentages now used under said Retirement System in calculating benefits on account of prior service, allowed to members of the California State Highway Patrol and to other employees of the State of California, respectively.

5. City shall contribute to said Retirement System as follows:

- a. The sum of \$33,599.26 per annum, payable in equal monthly or less frequent installments as Board shall require, for a period of 30 years, on account of the liability for benefits based on service rendered to City prior to the effective date hereof.
- b. 8.765 per cent of total salaries paid by City each month to its employees who are members of said Retirement System, provided that only salary earned as members of said System shall be included in said total salaries, and that employees who are members of said System shall include employees who become members upon the effective date hereof and employees who become members thereafter.
- c. A reasonable amount as fixed by Board, payable in equal monthly or less frequent installments, as Board shall require, to cover the costs of administering said System as it affects the employees of City, not including the costs of special valuations or of the periodical investigation and valuation required by law, provided that said amount shall not exceed \$1.98 per fiscal year per member, on the basis of the number of employees of City who are members on July 1st of the respective fiscal years, or with respect to the first year of participation, on the effective date of said participation.
- d. A reasonable amount as fixed by the Board, payable in one installment from time to time as the occasions arise, to cover the costs of special valuations on account of employees of City and the costs of the periodical investigation into the experience under said Retirement System, as it affects said employees, and the valuation of the assets and liabilities of said System on account of said employees.

Contributions required of City and its employees shall be subject to adjustment by the Board of Administration on account of amendments to the State Employees' Retirement Act, and on account of experience under the Retirement System, as determined by the periodical investigation, valuation and determination provided for by said Retirement Act.

6. Contributions required of City under paragraph 5 immediately preceding, and contributions required of City's employees who are members of said System, shall be paid by City to the State Employees' Retirement System within thirty days after the end of the month or longer period to which said contributions refer. If more or less than the correct amount of contribution required of City or its employees is paid for any period, proper adjustment shall be made in connection with subsequent remittances of the City to the Board, to rectify the errors; or such adjustments on account of errors made in contributions required of employees, may be made by direct cash payments between the employee in connection with whom the error was made, and Board. Payments of City to Board may be made in the form of warrants, bank checks, bank drafts, certified checks, money orders, or cash.

WITNESS OUR HANDS the day and year first above written.

ATTEST:

Earle Chapman
Secretary

BOARD OF ADMINISTRATION
STATE EMPLOYEES' RETIREMENT SYSTEM

By Mrs. E. Stanton
BOARD OF ADMINISTRATION President
MAYOR AND COMMON COUNCIL of

Name of Legislative Body

ATTEST:

John H. Leborn
Clerk

CITY OF SAN BERNARDINO

By W. R. LeCombe
MAYOR Presiding Officer

Exhibit

"2"

AMENDMENT TO CONTRACT BETWEEN THE
BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
AND THE

CITY COUNCIL
OF THE
CITY OF SAN BERNARDINO

The Board of Administration, Public Employees' Retirement System, hereinafter referred to as Board and the CITY COUNCIL of the CITY OF SAN BERNARDINO, hereinafter referred to as Public Agency having entered into a contract under date of February 6, 1945, effective March 1, 1945, and as amended effective November 1, 1949, September 1, 1951, January 1, 1952, July 1, 1954, February 1, 1965, February 24, 1969, and March 8, 1971, and as provided by Chapters 170 and 316, Statutes of 1971, which provide for participation of Public Agency in said System, Board and public agency hereby agree as follows:

A. Paragraphs 1 through 9 are hereby stricken from said contract as executed effective March 1, 1945, and are hereby replaced by the following paragraphs numbered 1 through 9 inclusive:

1. All words and terms used herein which are defined in the Public Employees' Retirement Law shall have the meaning as defined therein unless otherwise specifically provided. "Normal retirement age" shall mean age 60 for miscellaneous members and age 50 for local safety members.
2. Public Agency shall participate in the Public Employees' Retirement System from and after March 1, 1945, making its employees as hereinafter provided, members of said System subject to all provisions of the Public Employees' Retirement Law except such as apply only on election of a contracting agency and are not provided for herein and to all amendments to said Law hereafter enacted except such as by express provision thereof apply only on the election of contracting agencies.
3. Employees of Public Agency in the following classes shall become members of said Retirement System except such in each such class as are excluded by law or this agreement:
 - a. Local firemen (herein referred to as local safety members);
 - b. Local policemen (herein referred to as local safety members);
 - c. Employees other than local safety members (herein referred to as miscellaneous members).

The following employees shall be excluded from membership in said Retirement System:

EXCLUDE CROSSING GUARDS WHOSE EMPLOYMENT
COMMENCES JANUARY 1, 1952 OR AFTER.

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4. The fraction of final compensation to be provided for each year of credited prior and current service as a miscellaneous member shall be that provided in Section 21251.13 of said Retirement Law.
5. The fraction of final compensation to be provided for each year of credited prior and current service as a local safety member shall be determined in accordance with Section 21252.01 of said Retirement Law.
6. The following additional provisions of the Public Employees' Retirement Law which apply only upon election of a contracting agency shall apply:
 - a. Section 21263 (providing upon death of a miscellaneous member who retired for service or disability for the continuation of a post-retirement survivor allowance to certain survivors).
 - b. Section 21222.1 (providing for increases in allowances to which the annual cost-of-living provisions apply, payable for time commencing on the first day of the calendar month coinciding with or next following the effective date of this amendment to or on account of persons retired or members deceased on or prior to December 31, 1970).
7. Public Agency shall contribute to said Retirement System as follows:
 - a. With respect to miscellaneous members, the agency shall contribute the following percentages of monthly salaries earned as miscellaneous members of said System:
 - (1) 0.32 percent until June 30, 2000 on account of the liability for prior service benefits.
 - (2) 10.33 percent on account of the liability for current service benefits.
 - (3) 0.20 percent for ten (10) years on account of the liability for the benefits provided under Section 21222.1 of the Retirement Law.
 - b. With respect to local safety members, the agency shall contribute the following percentages of monthly salaries earned as local safety members of said System:
 - (1) 0.404 percent until June 30, 2001 on account of the liability for prior service benefits.
 - (2) 19.696 percent on account of the liability for current service benefits.
 - (3) 0.51 percent for ten (10) years on account of the liability for the benefits provided under Section 21222.1 of the Retirement Law.

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- c. A reasonable amount per annum, as fixed by Board to cover the costs of administering said System as it affects the employees of Public Agency, not including the costs of special valuations or of the periodical investigation and valuation required by law.
 - d. A reasonable amount as fixed by the Board, payable in one installment as the occasions arise, to cover costs of special valuations on account of employees of Public Agency, and costs of the periodical investigation and valuations required by law.
8. Contributions required of Public Agency and its employees shall be subject to adjustment by Board on account of amendments to the Public Employees' Retirement Law, and on account of the experience under the Retirement System, as determined by the periodical investigation and valuation required by said Retirement Law.
9. Contributions required of Public Agency and its employees shall be paid by Public Agency to the Retirement System within thirty days after the end of the period to which said contributions refer. If more or less than the correct amount of contributions is paid for any period, proper adjustment shall be made in connection with subsequent remittances, or adjustments on account of errors in payments between the employee and Board. Payments by Public Agency to Board may be made in the form of warrants, bank checks, bank drafts, certified checks, money orders, or cash.
- B. This amendment shall be attached to said contract and shall become effective on the First day of October, 1973.

Witness our hands this 7th day of September 1973

BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM

CITY COUNCIL
OF THE
CITY OF SAN BERNARDINO

BY William E. Payne
William E. Payne, Executive Officer

BY [Signature]
Presiding Officer

Attest:

[Signature]
Clerk

PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On May 29, 2014, I served the foregoing document described as:

CALPERS' OPPOSITION TO RESPONDENT LEWIS' MOTIONS REGARDING JURISDICTIONAL CHALLENGES RE: HOME RULE; COLLATERAL ESTOPPEL AND PAROL EVIDENCE RULE DOCUMENT TITLE - In the Matter of the Final Compensation Calculation of RICHARD LEWIS, Respondent, and CITY OF SAN BERNARDINO, Respondent.; Case No. 2014-0256; OAH No. 2014040945.

on interested parties in this action by placing the original XX a true copy thereof enclosed in sealed envelopes addressed and/or e-filed as follows:

John M. Jensen
Law Offices of John Michael Jensen
11500 W. Olympic Blvd., Suite 550
Los Angeles, CA 90064

Office of Administrative Hearings –
San Diego
1350 Front Street, Suite 3005
San Diego, CA 92101
(Via e-file - sanfilings@dgs.ca.gov)

Jolena Grider
City of San Bernardino,
Office of the City Attorney
300 North "D" St., 6th Fl.
San Bernardino, CA 92418

Richard J. Lewis II
16790 Lake Knoll Parkway
Riverside, CA 92503-6551

City of San Bernardino
300 North "D" Street
San Bernardino, CA 92418-0001

☒ BY MAIL -- As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Sacramento, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing an affidavit.

☒ BY ELECTRONIC TRANSMISSION: I caused such document(s) to be sent to the addressee(es) at the electronic notification address(es) above. I did not receive within a reasonable time of transmission, any electronic message, or other indication that the transmission was unsuccessful.

☐ BY TELEFACSIMILE: I caused such documents to be telefaxed to the fax number(s) shown above.

Executed on May 29, 2014, at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

CHRISTY L. BODILY
NAME


SIGNATURE