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

9
10 In the Matter of the Appeal of CalPERS'
11 Denial of Pension Benefits to Richard Lewis

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

12 RICHARD LEWIS and CITY OF SAN
13 BERNARDINO,

RICHARD LEWIS' POST HEARING
BRIEF

14 Appellants.
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23
24
25
26
27
28

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

 I. CalPERS Wrongly Focuses on “Title”, Not Actual Job Duties and Performance 1

 II. The City Included Lewis in the Fire Management Confidential Bargaining Group 3

 III. CalPERS’ Determination Is Based Not on the PERL, But on CalPERS’ Faulty Interpretation of the Applicable Facts and Law 4

FACTUAL BACKGROUND 6

LAW AND ANALYSIS 40

 I. Threshold Legal Issues 40

 II. City Establishes Duties; Few Limitations 43

 III. Public Employees’ Retirement Law (“PERL”) 44

 A. Lewis’ Compensation as BC Meets CalPERS’ Requirements 45

 B. Group or Class 45

 C. “Regular Rate of Pay” 46

 D. *Labor Code* Requirements Re “Average Weekly Earnings” 46

 IV. CalPERS Must Accept Mr. Lewis’ BC Compensation as “Compensation Earnable” 46

 A. Prior Advice 46

 B. Correction of Errors and Omissions 47

 C. Compensation Earnable and Payrate 47

 D. Special Compensation “Temporary Upgrade Pay” 48

 E. CalPERS Must Either Accept the Disputed Portion of Lewis’ BC Compensation As “Temporary Upgrade Pay” Or Must Now Appropriately Redesignate It .. 49

 V. Lewis Qualifies for Inclusion of EPMC in His Pension Calculation 50

 VI. Not Final Settlement Pay, *Molina* Does Not Apply 50

AFFIRMATIVE DEFENSES 51

 I. CalPERS’ Duty to Correctly Inform 51

 II. CalPERS is Estopped from Denying the Use of Mr. Lewis’ BC Salary 54

1 A. Elements of Equitable Estoppel..... 54
2 B. CalPERS' Authority to Effect What Estoppel Would Accomplish..... 55
3 C. CalPERS Is Estoppel From Now Disallowing Lewis' BC Compensation..... 56
4 **III. CalPERS' Breach of Constitutional and Fiduciary Duties Owed to Lewis 57**
5 A. CalPERS Breached Its Fiduciary Duties Owed to Lewis..... 58
6 B. The Existence of A Fiduciary Relationship Giving Rise to Fiduciary Duty 59
7 C. CalPERS' Breach of Fiduciary Duty..... 59
8 **IV. CalPERS' Actions Provide Unjust Enrichment to CalPERS 60**
9 **V. CalPERS Is Barred By Laches 60**
10 A. Laches in Administrative Hearings 60
11 B. Acquiescence By CalPERS 61
12 C. Undue Prejudice and Injury to Mr. Lewis 61
13 D. CalPERS' Delay Creates An Injustice..... 61
14 E. Laches is Appropriate 62
15 **CONCLUSION..... 62**
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

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Associated Builders & Contractors, Inc. v. San Francisco Airports Com. (1999) 21 Cal.4th 352
42

Banco Mercantil v. Sauls, Inc. (1956) 140 Cal.App.2d 316.....55

Batters v. City of Santa Monica, (1980) 101 Cal.App.3d 595.....43

Berg v. Davi (2005) 130 Cal.App.4th 223.....42

Cahill v. Superior Court of City and County of San Francisco (1904) 145 Cal. 42.....60

Campbell v. City of Monrovia (1978) 84 Cal.App.3d 341.....43

City of Fremont v. Board of Administration, supra, 214 Cal.App.3d at p. 1031, 263 Cal.Rptr. 164
48

City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 501.....54

City of Oakland v. Public Employees' Retirement System (2002) 95 Cal.App.4th 29, 40.....52,58

City of Sacramento v. Pub. Employees Ret. Sys., 229 Cal. App. 3d 1470, 1484, (Ct. App. 1991) .48

City of San Bernardino City Charter; First Street Plaza Partners v. City of Los Angeles (1998)
65 Cal.App.4th 650.....43

Commissioner of Internal Revenue v. Summen (1948) 333 U.S. 591.....41

Conti v. Board of Civil Service Commissioners (1969) 1 Cal.3d 351.....60

Driscoll v. City of Los Angeles, 67 Cal.2d 297, 305 (1973).....54,55

Eldridge v. Sierra View Local Hospital Dist. (1990) 224 Cal.App.3d 311.....44

Emma Corp. v. Inglewood Unified School District (2004) 8 Cal.Rptr. 3d 213.....56

Estate of Migliaccio v. Midland Nat'l. Life Ins. Co. (C.D. Cal. 2006) 436 F.Supp.2d 1095.....59

Fountain Valley Regional Hospital & Medical Center v. Bonta (1999) 75 Cal.App.4th 316; 2
Cal.Jur.3d, Administrative Law, §440.....61

Gutierrez v. Bd of Ret. of Los Angeles Cnty Employ. Retirement Ass'n (1998) 62 Cal.App.4th 745
42

Hannon Engineering, Inc. v. Reim (1981) 126 Cal.App.3d 415, 425, 179 Cal.Rptr. 78.....52,57

Hittle v. Santa Barbara County Employees Retirement Assn. (1985) 39 Cal.3d 374, 392 .52,53,59

1	<i>Hollywood Circle, Inc. v. Dep't of Alcoholic Beverage Control (1961) 55 Cal.2d 728, 732.....</i>	41
2	<i>Hughes v. Board of Architectural Examiners (1998) 17 Cal.4th 763</i>	42
3	<i>In re Application of Smith (March 31, 1999.....</i>	52
4	<i>Johnson v. Bradley (1992) 4 Cal.4th 389.....</i>	42,43
5	<i>Kleinclaus v. Dutard (1905) 147 Cal. 245; 30 Cal.Jur.3d, Equity, §36.....</i>	60
6	<i>Leasequip Inc. v. Dapeer, 126 Cal.Rptr. 2d 782.....</i>	56
7	<i>Lentz v. McMahon (1989) 49 Cal.3d 393, 400-401.....</i>	57
8	<i>Masters v. San Bernardino County Employees Retirement Assn. (1995) 32 Cal.App.4th 30, 43-45</i>	
9	<i>.....</i>	59
10	<i>Molina v. Bd. of Admin., California Pub. Employees' Ret. Sys. (2011) 200 Cal.App.4th 53, 66..</i>	50
11	<i>Murray v. Alaska Airlines, Inc. (2010) 50 Cal.4th 860, 864.....</i>	41
12	<i>Nicolopoulos v. Superior Court (2003) 106 Cal.App.4th 304; 30 Cal.Jur.3d, Equity §36.....</i>	60
13	<i>Parth v. Pomona Valley Hosp. Med. Ctr. (9th Cir. 2010) 630 F.3d 794, 802</i>	46
14	<i>People ex rel. Sneddon v. Torch Energy Servs., Inc. (2002) 102 Cal.App.4th 181, 188.....</i>	42
15	<i>People v. Sims (1982) 32 Cal.3d 468, 484</i>	41
16	<i>Piazza Properties, Ltd. V. Department of Motor Vehicles, (1997) 357 Cal.App. 1 Dist. 622.....</i>	56
17	<i>Symington v. City of Albany (1971) 5 Cal.3d 23, 33, 95.....</i>	52
18	<i>Takahashi v. Board of Regents (1988) 202 Cal.App.3d 1464</i>	41
19	<i>Ventura County Deputy Sheriffs' Assn. v. Board of Retirement (1997) 16 Cal.4th 483, 490.....</i>	44
20	<i>Walling v. Youngerman-Reynolds Hardwood Co. (1945) 325 U.S. 419, 424</i>	46
21	<i>Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose (2009) 174 Cal.App.4th 339,</i>	
22	<i>356-357.....</i>	40
23	Statutes	
24	<i>Civil Code section 2228.....</i>	52
25	<i>Code of Civil Procedure, §1094.5</i>	40
26	<i>Evidence Code, §664</i>	40
27	<i>Gov.Code, § 20636, subd. (b)(1)</i>	47
28	<i>Government Code §20099.....</i>	41

1	<i>Government Code section 20125</i>	56
2	<i>Government Code Section 20134</i>	41
3	<i>Government Code section 20636</i>	45
4	<i>Gov't Code section 11506</i>	42
5	<i>Gov't Code, §§36501, 36505, 41005</i>	44
6	<i>Gov't Code, §11507, et seq</i>	43
7	<i>Gov't Code, §1194</i>	44
8	<i>Gov't Code, §1220</i>	44
9	<i>Gov't Code, §40805.5</i>	44
10	<i>Gov't Code, §40812</i>	44
11	<i>Other Authorities</i>	
12	<i>Labor Code section 4453</i>	46
13	<i>Section 20636</i>	<i>passim</i>
14	<i>Section 20636(b)</i>	45
15	<i>Section 20636(e)(1)</i>	45
16		
17		
18	<i>Regulations</i>	
19	<i>C.C.R. §570.5</i>	45
20	<i>C.C.R. §571(a)(1)</i>	49
21	<i>C.C.R. §571(a)(4)</i>	49
22	<i>California Code of Regulations section 571(a)(3)</i> ,	48
23	<i>Constitutional Provisions</i>	
24	<i>Article XVI, Section 1</i>	59
25	<i>Cal. Const., art. XVI, §17</i>	56, 58
26	<i>Cal. Const., art. XI, §5(b)</i> ;.....	42

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1 **INTRODUCTION**

2 Richard Lewis earned the right to hold and perform the duties of the Battalion Chief
3 ("BC") position by merit. Lewis was entitled to act in, and did in fact regularly perform, the
4 duties and responsibilities of the BC position.

5 The City of San Bernardino ("City" or "San Bernardino") regularly and consistently paid
6 Lewis the BC pay, reported that pay to CalPERS, and paid contributions to CalPERS on the BC
7 salary. CalPERS typically is going to use any payrate that was normal, consistent, and falls under
8 compensation earnable. (Testimony of CalPERS' Lolita Lueras, ("LL"), 2/26/15, LL2 55:11-13.)¹
9 The compensation paid to Lewis was regularly and consistently paid over the last seven years of
10 his employment with the San Bernardino Fire Department ("SBFD") and is not final settlement
11 pay.

12 **I. CalPERS Wrongly Focuses on "Title", Not Actual Job Duties and Performance**

13 After his settlement with the City, Lewis was otherwise in the "group or class" of other
14 BC's: He was represented only by the bargaining unit that represented BC's. He was treated as a
15 BC by the City and other BC's in management and confidential matters. He regularly performed
16 the normal duties and responsibilities of a BC. He received the benefits and the detriments of the
17 BC position, including a mandatory reduction in his pay and other concession that only BC's and
18 others in management made. The City's HR department treated Lewis as a BC, including by
19 having him act in a confidential manner to city employees on discipline issues. The SBFD
20 treated Lewis as a BC when he worked on budgets, planned new fire stations, and acted on the
21 fire scene.

22 Under the Public Employees' Retirement Law ("PERL", *Government Code*, §§20000, *et*
23 *seq.*²), Lewis' BC pay should have been reported as payrate for performing the regular duties of
24 BC. It was instead misreported as "temporary upgrade pay" only because of CalPERS' explicit
25 and continuing direction to the City to do so.

26
27 ¹ For ease of reference, attached as Exhibit A is a list of all witnesses called at hearing,
along with the date of their testimony and pages in the transcript.

28 ² Unless otherwise indicated, all statutory references are to the *Government Code*.

1 In essence, the Fire Chief assigned Lewis the title of Fire Captain while also certifying or
2 assigned him the actual duties of BC. Fire Chief Pitzer denied Lewis the BC title due to Lewis'
3 prior union activity for the rank and file.

4 In effect, Lewis was in fact promoted to fill and act in the position of Battalion Chief by
5 the City in 2007, but the Settlement Agreement withheld the formal BC title. However, the
6 denial of the BC *title* is not sufficient to deem the actual payrate to be noncompliant with the
7 PERL.

8 CalPERS recognizes that the City determines the job duties of the position as well as the
9 titles. Moreover, under the PERL, the relevant "group or class" issue is the similarity of job
10 duties with other BC's, not the title or other matters. At the latest after 2007, Lewis regularly
11 performed the duties of BC just like the other BC's and received the pay that other BC's received.

12 CalPERS mistakenly and overwhelmingly focuses on the formal title, then uses the "Fire
13 Captain" title to argue that Lewis was not performing the duties of either a BC or an acting BC.

14 For example, the City did not indicate to CalPERS or its Compensation Review Unit
15 analyst Lueras whether the Fire Management MOU applied to Lewis or whether the rank and file
16 MOU applied to Lewis. When Lueras' single email to the City asked for a copy of the MOU, the
17 City sent copies of both the Fire Management and rank and file MOU's and a copy of the
18 Settlement Agreement. Lueras simply looked at the title of Fire Captain and wrongly determined
19 that the rank and file MOU applied to Lewis while the Fire Management MOU did not. But
20 Lueras made this determination independent of the City, even though acknowledging that it is
21 the City that makes the determination of job duties and position. (LL2 87:17-88:21.)

22 Lueras testified that her analysis of the pay rate reported was based on the title (of Fire
23 Captain) that was on Lewis' disability retirement application, stating too broadly that "it was
24 determined *as per the city* that that title fell under fire safety". (LL2 93:25-94:9.) But Lueras also
25 admits that the City never told her or CalPERS which MOU applied to Lewis. (LL2 87:17-
26 88:21.) She instead said that to her knowledge, Lewis was not in the Fire Management or
27 confidential group. (LL2 100:14-102:6.) Lueras thought that Lewis was solely in the rank and
28 file group because the position title fell under the category of fire safety. (LL2 100:14-102:6.)

1 As another example, CalPERS claims that the City would have documented Lewis' work
2 as an acting BC if Lewis was in the acting position. The testimony of Lewis, union attorney
3 Corey Glave and City HR employee Helen Tran indicated that the City, and particularly the
4 SBFD, did not document and was not required to document "acting pay". Instead, the City
5 *Charter* indicates that the Fire Chief simply has to certify that Lewis was acting as a BC, which
6 the Fire Chief did when he signed the Settlement Agreement.

7 Wrongly focusing on title nomenclature instead of duties, CalPERS is not allowed to use
8 a title to deny a benefit based on whether a person is performing the duties of others in a similar
9 group or class. Here Lewis was performing BC duties like others in the BC group or class on a
10 regular basis. He was regularly and consistently paid the BC payrate pursuant to publicly
11 available pay schedules for the BC position.³ Lewis is entitled to have the BC salary designated
12 as payrate and used to underlie a higher pension.

13 As a fallback position, CalPERS argues in its *Statement of Issues* that Lewis was not
14 regularly performing the duties of BC. But CalPERS admitted at hearing that the City determines
15 the duties. The evidence also overwhelmingly shows that Lewis *did* perform the BC duties. In
16 the hearing, Lueras testified that CalPERS does not look at whether an individual is performing
17 certain job duties or determine if a member has completed a checklist of duties because "that's
18 getting into city affairs." (LL2 70:17-71:1.) The duties and work schedule are outside CalPERS'
19 purview and instead are the provenance of the City's HR department or otherwise City affairs.
20 (LL2 66:15-22.)

21 **II. The City Included Lewis in the Fire Management Confidential Bargaining Group**

22 The City treated Lewis as a member of the Fire Management group or class. Lueras
23 admits that that is up to the employer to identify who the confidential employees are. (LL2
24 100:4-6.) Lueras admitted that the City groups its employees "based on the bargaining --
25 collective bargaining. That's how they group their individuals. So that's the one that was
26 applicable." (LL2 105:17-109:21.)

27 ³ Again, the City wrongly reported and wrongly described Lewis' BC compensation as
28 "temporary upgrade pay" and special compensation only because of *CalPERS'* prior guidance.

1 **If the bargaining group is how the City groups its individuals, then why did**
2 **CalPERS not accept Lewis as a member of Fire Management, and therefore CalPERS**
3 **accept his BC pay as payrate under Section 20636, since Lewis was receiving the same BC**
4 **pay as other BC's? Lueras testified that if Lewis' employer had stated to Lueras that his**
5 **category was under the Fire Management confidential MOU, "then it would have changed -- or**
6 **could have changed -- my determination." (LL2 72:17-73:5.)**

7 In her single email about this matter, Lueras requested information from the City about
8 which MOU governed Lewis. The City supplied both the Fire Management MOU and the rank
9 and file MOU. The only reason the City would supply the Fire Management MOU is because the
10 City applied that Fire Management MOU to Lewis. Lewis himself corroborated this by testifying
11 at length that the City applied the Fire Management MOU to him.

12 **III. CalPERS' Determination Is Based Not on the PERL, But On CalPERS' Faulty**
13 **Interpretation of the Applicable Facts and Law**

14 Although CalPERS attempts to make a big deal over irrelevant or unrelated issues such as
15 overtime, CalPERS fails to clarify that overtime is not PERSible under Section 20635.⁴ Some
16 BC's get overtime and Fire Captains get overtime when it is part of FLSA-required firefighter
17 duties. To the extent that any overtime could be reported, the City did not report any overtime for
18 Lewis as Fire Captain that would not also qualify as overtime for a BC.

19 The only PERL issue in dispute is the amount of Lewis' final compensation. And that
20 dispute is related solely to whether Lewis is entitled to have CalPERS base his pension on the
21 actual final compensation that SBFD paid Lewis pursuant to publicly available pay schedules for
22 the actual work responsibilities that he performed or was available and responsible to perform
23 during his normal work day, even though he did not always have the formal title of Battalion
24 Chief.

25 In this case, Lewis continued to work for the City before and after the settlement of the
26
27

28 ⁴ Overtime that is not a regular part of a firefighter's job is not reportable to CalPERS.

1 City's inappropriate labor practice.⁵ The settlement was directed to restore Lewis in full to the
2 benefits that he had accrued related to his past, current and future employment rights. The
3 settlement only reset the clock at a specific time, and set the stage for the terms of his continuing
4 work with the City as BC in all but title. The Agreement itself did not grant Lewis rights that he
5 was not otherwise already entitled to. Lewis would have earned the pay of BC for the time that
6 he worked for the City after October 2004 had the City not acted inappropriately.

7 Essentially, CalPERS' arguments are without basis. Based on a faulty premise, it has
8 manufactured this dispute around the issue of "title". CalPERS ignores that Lewis' rights did not
9 arise from the Settlement Agreement, but instead arose independently from Lewis' work, his civil
10 service performance, and his entitlement to the BC position. The Settlement Agreement simply
11 recognized the rights as wrongly denied, and added an unrelated impairment of not having the
12 formal BC title.

13 In addition, CalPERS failed to make adequate inquiry, including failing to inquire into
14 the merits such as the job duties that were normally part of Lewis' responsibilities to the City
15 after the settlement.

16 There is no precedential case law directly on point. Although superficially similar
17 because it involved a settlement agreement, the *Molina* case law involved a different situation
18 where the employee did not work for the city after the dispute arose, and the settlement was
19 separate and distinct from any work-related activities.

20 In any event, looking at the period after the settlement, Lewis is entitled to have the
21 pension calculated on the payrate that was actually paid him for the duties that he actually
22 performed or was responsible, available or required to perform. CalPERS cannot deny the pay
23 rate simply because Lewis did not have the formal title at all times, especially because Lewis did
24 actually perform on many occasions (and was available to perform at other times) all of the
25 duties and responsibilities of a BC.

26 ⁵ Fire Chief Pitzer wrongly failed to formally promote Lewis to Battalion Commander in
27 October 2004 as required by City policies and procedures and past practice. The City ultimately
28 recognized this labor violation in 2007, resulting in the effective promotion of Lewis to BC in all
but name as documented in the 2007 Settlement Agreement.

1 In addition, Lewis was disabled for the last year-plus of his employment for the City, and
2 he performed no work duties of any kind in this period. Pursuant to the CalPERS-San Bernardino
3 contract, Lewis' final compensation period is his highest single year compensation. He received
4 *Labor Code* section 4850 disability pay during his final year at his BC compensation rate. As a
5 result, the issue of duties and titles should not negatively affect Lewis.

6 As additional equitable issues, Lewis asserts collateral estoppel, *res judicata*, equitable
7 estoppel, promissory estoppel, laches, and that CalPERS has failed to state a ground on which it
8 can proceed.

9 FACTUAL BACKGROUND

10 City of San Bernardino's Charter City Status

11 1. Taking advantage of the rights guaranteed under the California Constitution, the
12 electorate of the City of San Bernardino first voted in 1905 to establish San Bernardino as a
13 charter city with full constitutional autonomous rights. It has been a charter city since then.

14 2. The City has contracted with CalPERS to administer its pension benefits since the
15 mid-1960's.

16 3. The City has a one year "final compensation" period. SBFD firefighters accrue
17 pension benefits at a 3% at 50 formula.

18 4. The City provides industrial disability benefits to firefighters if they become
19 incapacitated for work from injuries suffered in the line of safety duty. Firefighters accrue
20 pension benefits even when out on disability or *Labor Code* section 4850 time.

21 CalPERS Membership

22 5. On March 31, 1981, Richard Lewis started work as a firefighter for the SBFD.
23 (Testimony of Richard Lewis ("RL"), 10/14/14, RL1 159: 22-24, 160:2-4.)

24 6. Throughout Lewis' employment, the SBFD contracted with CalPERS to provide
25 pension benefits to all of SBFD's firefighters. Lewis was enrolled in CalPERS at the start of his
26 SBFD employment and remained a CalPERS member throughout his SBFD career.

27 SBFD Career

28 7. Lewis earned 30.272 years of CalPERS service credit.

1 8. Lewis held a number of positions with the SBFD during the course of his career,
2 working his way up through the ranks with promotions and associated increases in salary along
3 the way. (RL1 159:13-162:25.)

4 9. In May 1991, Lewis had been promoted to a Fire Captain within the SBFD. (RL1
5 162:20-24.)

6 10. Lewis was a Fire Captain for 13 years.

7 11. His highest one year final compensation as a Fire Captain was \$121,971.

8 12. Fire Captain is the highest-ranking position a firefighter can hold in the SBFD
9 while still being a member of the "rank and file" and not a part of the management and
10 confidential employees bargaining group of SBFD.

11 **Promotion Process for Battalion Chief Position**

12 13. The City had established a formal and historic civil service and promotion process
13 and structure.

14 14. As a practice, San Bernardino promotes its fire personnel pursuant to civil service
15 testing into available positions, including into management levels. (RL1 162:25-163:25.)

16 15. As a matter of practice and law, the City's employees became entitled to the
17 existing practice of the City's promotion process. The local rules, including those made pursuant
18 to the City's charter powers, were established, and in many instances became mandatory and
19 binding.

20 16. Neither the Civil Service Commission, nor the City, nor the SBFD has the power
21 to dispense with the essentials prescribed. Moreover, neither a city council nor a city's
22 department heads can evade the established provisions by enacting contrary ordinances or
23 practices without notice of a change in practice. San Bernardino made no changes to established
24 practices in this case.

25 17. Eligibility lists were established because of position and competitive
26 examinations. The exams were open to persons who lawfully may be appointed to any position
27 within the class for which these examinations are held. The persons must meet the minimum
28 qualifications requisite to the performance of the duties of that position. (RL1 165:10-17)

1 18. When an examination for a managerial position is conducted on an open and
2 promotional basis, the names of eligible persons must be placed on a list. The names of the
3 applicants who pass the examination with a passing score must be ranked in the relative order of
4 the examination score received.

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

10 **Promotional Test to Become Battalion Chief**

11 20. Beginning in or about November 2002 and finishing in or about February 2003,
12 while holding the position of Fire Captain, Lewis took the test to be promoted to the position of
13 Battalion Chief. (RL1 176:7-11.)

14 21. The BC reports directly to the Fire Chief and is a management position. Two
15 other candidates took the civil service exam in order to apply for an available BC position when
16 it opened.

17 22. Since taking the BC test, Lewis had on occasion performed the duties normally
18 assigned to BC's, including in taking command responsibility at large fire events and directing
19 the activities and responses of the other firefighter personnel on scene.

20 23. The civil service exam to become BC had a written portion and a practical or
21 simulation portion. The first step in the BC promotional test was a written examination. (RL1
22 164:21-165:7.)

23 24. As is currently understood, Lewis, Lester Kulikoff, and Dennis Moon were the
24 only three Fire Captains to pass the written test.

25 25. In order to be eligible for promotion, a candidate was required to pass both the
26 written exam and pass a simulation, with the result that none of the firefighters that were
27 simulated in the test would have been said to have "died". (RL1 166:21-25.)

28 26. The next step was a series of simulations where the examinees assumed command

1 of a structure fire, a wild land fire, and a hazardous materials incident. It was announced prior to
2 the examination that simulated injury or death of any personnel under an examinee's command in
3 any of the scenarios would be considered automatic failure of the test, and such an individual
4 would be disqualified for promotion to BC until they later retook the simulator portion and
5 passed. (RL1 163:3-25.)

6 27. Years later, it came to be understood that Moon had failed the simulator portion.
7 Only Lewis and Kulikoff passed both the written and simulator portions of the exam.
8 Nevertheless, Moon was kept in the pool of Fire Captains eligible for promotion to BC.

9 28. The remainder of the examination included a writing exercise, a Fire Chief's oral
10 examination, and an outside Chief's oral board. The scores from the entire examination process
11 were added up by Fire Chief Pitzer. Chief Pitzer then sent the list to the City's Civil Service
12 Board with the three individuals listed in order as to their ranked eligibility to be promoted at the
13 opportunity when a BC position opened up in the Sbfd.

14 29. Lewis, along with Kulikoff and Moon (all of them Fire Captains at the time) were
15 all deemed eligible to serve as BC should an opening for that position develop. Chief Pitzer
16 placed Kulikoff first on the promotion list, Lewis was placed second on the list, and Moon was
17 placed last on the list (even though Moon should have been disqualified by his failure to pass the
18 simulator portion of the test).

19 30. Civil service rules and past practice in the City and the Sbfd established that
20 once an opening for BC occurred, the Sbfd would be required to first offer the position to the
21 individual holding position number one on the list, i.e. Kulikoff. If Kulikoff declined the position
22 or was no longer available to accept the promotion (e.g., because he had retired or left Sbfd),
23 the Sbfd was required to offer the position to the next person on the ranking list, i.e. to Lewis.
24 Only if both Kulikoff and Lewis either declined the BC position or were no longer available to
25 accept the promotion could Sbfd offer the position to Moon.

26 31. If another Battalion Chief position later opened up, the Sbfd would be required
27 to follow the same procedures, i.e. to first offer the promotion to the individual who was then at
28 the top of the list (Lewis), and only move to a lower-ranked individual (Moon) if the higher-

1 ranked individual declined or was unable to accept the promotion.

2 **Kulikoff's Promotion to Battalion Chief and Later Retirement**

3 32. In or about early 2003, a position for BC in the SBFD opened up. Pursuant to the
4 procedures set forth above, SBFD offered the position to Kulikoff, who accepted the promotion
5 in March 2003 and thereafter served as BC. Lewis then moved up to number one on the ranking
6 list in the event another opening for BC occurred, and Moon moved up to number two on the
7 ranking list. (RL1 181:12-182:11.)

8 33. Because of violations of SBFD policies governing employment and professional
9 conduct, Kulikoff was placed on administrative leave at the end of 2003. He remained on
10 administrative leave until September 2004 when he was granted industrial disability retirement
11 and left the SBFD. This created a new BC opening.

12 34. Lewis had earned the position as BC, as well as the associated pay rate and related
13 deferred compensation in the form of a pension, prior to October 2004. Mr. Lewis had a vested
14 earned right to the position, compensation and deferred compensation, and other benefits of a
15 BC.

16 35. When a new BC position became available because of Kulikoff's retirement,
17 however, the SBFD passed over Lewis and put an unqualified candidate (Moon) into that BC
18 position. (RL1 182:1-5.)

19 **Underlying Problem**

20 36. SBFD Chief Pitzer had animus towards the union and those acting for the union.
21 (Testimony of Corey Glave ("CG"), 2/25/15, 108:9-10.) The fire management did not like Lewis
22 because of his union activities. (CG 88:25-89:2.) Fire Chief Pitzer did not want Lewis in
23 management. (CG 89:6-7.)

24 37. Pitzer did not have a problem with Lewis in an acting BC role. (CG 109:16-17.
25 Lewis had performed in an acting BC role numerous occasion and there was no problem. (CG
26 109:15-18.) The City acknowledged that Lewis was an acting BC. (CG 115:6-8.) Pitzer did not
27 have a problem with Lewis functioning as a BC (CG 109:18-21) and Lewis' performance
28 evaluations as BC were all outstanding. (CG 114:18-21.) The crux of the problem was the title of

1 the BC. (Testimony of former San Bernardino City Councilmember Wendy McCammack
2 ("WM"), 2/25/15, 148:20-224.)

3 **Denial of Promotion, Challenge, and Settlement**

4 38. Although City and SBFD policy and practice required that promotion to the new
5 BC position be offered first to Lewis because he was now number one on the promotion list, the
6 City and SBFD violated existing procedure, bypassed Lewis for the promotion, and instead
7 awarded the BC position to Moon in October 2004.

8 39. The City and SBFD promoted Moon over Lewis without justification or legal
9 cause in violation of Lewis' vested employment rights. The City and SBFD promoted Moon even
10 though Moon had scored much lower than Lewis on the BC test (and is believed to have failed
11 the simulator test which, pursuant to announced testing and scoring procedures, should have
12 disqualified him for the promotion list altogether). Under law, Moon was not entitled to take the
13 new BC position unless it was first offered to and declined by Lewis. However, the City and
14 SBFD did not offer the BC position to Lewis (and he did not decline it), and instead promoted
15 Moon contrary to law.

16 40. Lewis challenged the City's and SBFD's actions, contending that they were illegal.
17 Mr. Lewis instituted legal action, and filed a *Complaint* in Federal court alleging discrimination
18 and other civil rights violations.

19 **Federal Court Action**

20 41. In a civil rights case, the judge could exercise his equitable relief and order the
21 City to promote Lewis to the actual position of BC, which would also include all the pay and
22 benefits. (CG 89:2-5.) The position of the Court in a second summary judgment action was that
23 Lewis had been denied promotion because of Pitzer's animus toward the union. (CG 109:7-10.)

24 42. Lewis was able to establish in depositions of City officials in the Federal court
25 action that there were certain times that he worked as an acting BC; that the people doing the
26 rating, including Pitzer, had no issues with Lewis as an acting BC; and that the City would use
27 Lewis as an acting BC in the future. The City's acceptance of Lewis as BC became one of the
28 determining factors for the judge denying the City's summary judgment of the discrimination

1 suit. (CG 113:19-114:6.)

2 43. Three years passed between the time when Lewis vested in the BC employment
3 rights (2004) and the time when the underlying dispute was resolved (2007). During that time,
4 Lewis performed the job duties that were required of him by his employer. The City paid Lewis
5 and made associated employer and employee contributions to CalPERS.

6 44. With the case still pending in federal court, the City desired to settle the matter.

7 **Settlement Discussions**

8 45. The starting point of settlement negotiation was the understanding that Lewis had
9 the option of taking the BC position. (CG 90:4-8.) The original negotiation was that Lewis was to
10 be promoted. (WM 134:19.)

11 46. Cory Glave, Lewis' attorney in the employment discrimination action, testified
12 that there were two lines of discussion: One if Lewis was actually promoted to BC, and a second
13 if he was not actually promoted to take the BC title. (CG 88:2-16.) It was also understood that if
14 the City did not give Lewis the BC title, then the City would pay him the same wages and
15 benefits as if he had been promoted to BC. (CG 88:9-11.)

16 47. If the City did not allow Lewis to become a BC, then the City would have to make
17 Lewis financially whole for the losses that the City had caused. (CG 90:7-12.) But the lump sum
18 was large. (CG 89:7-8, 90:22-91:2.)

19 48. When Lewis and the City negotiated those benefits, they initially calculated a
20 lump sum which specifically included the difference in retirement benefits between Fire Captain
21 and BC. (CG 88:12-14.) The City did not want to pay a lump sum for the future CalPERS
22 retirement benefits, so the parties agreed, with the retirement benefits firmly in mind, that Lewis
23 would be treated as if he had been promoted to BC without getting the actual promotion to the
24 BC title.

25 49. Instead of offering a lump sum immediately, the City offered to pay Lewis as a
26 BC and give him all the benefits, including the CalPERS benefits, instead of a lump sum at one
27 time. (CG 89:9-11, 90:21- 91:2.) The City and Lewis' attorney specifically discussed Lewis'
28 CalPERS retirement and the difference between a pension based on the BC wage and one based

1 on the Fire Captain wage. (CG 89:16-18.)

2 50. While agreeing that Lewis was entitled to all benefits, the reason that the parties
3 did not specifically set out the CalPERS benefits was "because they're all included." (CG 93:24-
4 94:3.) The CalPERS benefit was part of what was being granted. (CG 94:5-7.) It was important
5 that Lewis would get the CalPERS benefits at the BC rate. (CG 95:5-13.) The CalPERS benefits
6 at the BC rate were a material term of the settlement agreement. (CG 96:8-10.)

7 **Terms of the Settlement**

8 51. In March 2007, the City and Lewis settled Lewis' discrimination lawsuit.

9 52. The relevant terms in the settlement are that the City agreed to provide Lewis all
10 the benefits and rights of the BC position starting from the time that Lewis was inappropriately
11 denied the promotion to the title of BC. (RL3 186:10-24.)

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

19 54. In essence, the Settlement Agreement denied Lewis the title of the BC, but
20 provided him with all of the substance and responsibilities of the BC position. For example, the
21 City regularly paid Mr. Lewis the salary of the BC as it did the other BCs, at the publicly
22 available rate of a BC. Lewis was represented by the management union and subject to the terms
23 of the MOU that bound management. (RL1 187:1-10; 15-23, 188:20-24.)

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

1 appropriate.

2 56. The City later memorialized this in a March 2007 Settlement Agreement. (Exhibit
3 6.) However, the City's acknowledgement of its obligations and of Mr. Lewis' rights to all
4 benefits accruing from a promotion to BC were already in existence prior to the Settlement
5 Agreement.

6 57. Fire Chief Pitzer was a signatory on and party to the Settlement Agreement. Chief
7 Pitzer agreed that Lewis was entitled to receive all of the rights and benefits of any other
8 individual promoted to the position of BC. Chief Pitzer was the head of the Sbfd and ultimate
9 authority in Sbfd,

10 58. The City's HR and Finance departments told Lewis that he was in Fire
11 Management and a confidential employee. The City conferred confidential status and ranking on
12 Lewis. The City's Finance department confirmed it when Lewis went in and he was told that he
13 would be a confidential employee. Confidentiality is a responsibility under the Fire Management
14 MOU. (RL3 200:7-24.)

15 **Lewis' Acceptance Conditioned on a CalPERS Pension at the BC Rate**

16 59. Lewis would not have accepted the Settlement Agreement if it did not promise the
17 CalPERS pension at the BC rate. (CG 97:12-15.) There was no known risk of not getting the
18 CalPERS pension at the BC rate when Glave and Lewis signed the settlement agreement. (CG
19 97:12-15.)

20 60. Glave said to Lewis that the Settlement Agreement will " 'get everything just as
21 though you were promoted.' And I said, 'That includes my retirement,' because obviously that's
22 the biggest benefit of being promoted. And he said, 'It says all benefits.' " (RL3 170:9-15.)

23 61. The City was a party to the settlement agreement and the *Complaint* because the
24 City was responsible for any damages. (CG 116:22-117:9.)

25 **City Checked With CalPERS**

26 62. In or about June 2007, shortly after signing the Settlement Agreement, the City
27 contacted CalPERS for advice on how to implement its decisions concerning compensation and
28 other PERSible benefits the City was now providing to Mr. Lewis.

1 63. At this time, Lewis was still working and the City could still effectively give him
2 the full title of a BC for a full year or otherwise qualify him under CalPERS' rules in any other
3 way that CalPERS may have sought to direct the City to act.

4 64. The City sent CalPERS a copy of the Settlement Agreement. (See reference in
5 Exhibit 9.) In this manner, CalPERS was aware that the City was asking for a decision on how to
6 treat this compensation for purposes of pension. CalPERS specifically ruled that the pay was
7 PERSible and that it should qualify to increase Lewis' pension in the manner sought in this
8 hearing.

9 65. In 2007, the Compensation Review Unit read the agreement and CalPERS analyst
10 Carlous Johnson specifically responded that the BC pay was to be PERSible and reportable as
11 "temporary upgrade pay". (RL3 172:15-20; Exhibit 9.)

12 66. CalPERS told the City to report it as temporary upgrade pay, a type of special
13 compensation. (LL 78:18-79:3.)

14 67. In 2007, CalPERS analyst Carlous Johnson, the one who gave the City the advice,
15 was the analyst that trained Lueras "probably almost a year." (LL2 79:5-9.)

16 68. The City implemented Johnson's specific advice and reported the BC pay as
17 temporary upgrade pay in every period thereafter until Lewis retired.

18 **CalPERS' Duty to Provide Accurate Advice**

19 69. 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. The City had the right to rely on CalPERS' performance of those duties.

22 70. CalPERS had all of the information necessary to make a ruling on this matter.

23 71. After evaluating the request and applying its administrative experience and
24 knowledge, CalPERS directed the City to calculate the difference between the pay Mr. Lewis
25 received as Fire Captain and the new pay the City was awarding him pursuant to the BC pay
26 scale, and then to report that difference as "temporary upgrade pay". CalPERS instructed the City
27 to do so for the approximately three years of additional back pay (the difference between what
28 Mr. Lewis had received as Fire Captain and what he should have received as BC), as well as do

1 so for Mr. Lewis' pay going forward.

2 72. CalPERS also directed the City to pay employer and employee contributions
3 calculated on the basis of the BC compensation rate paid to Mr. Lewis. Pursuant to the PERL
4 and Regulations, and CalPERS' policies and procedures, "temporary upgrade pay" is PERSible
5 compensation.

6 73. 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 comply with CalPERS' policies and procedures
9 concerning CalPERS' interpretation of the PERL. The City and Mr. Lewis relied on CalPERS'
10 advice.

11 74. 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' BC
14 compensation in some other manner qualifying as PERSible pay rate or special compensation, or
15 if necessary it could have directed the City to take some other action to ensure that Lewis'
16 compensation qualified as PERSible compensation.

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

21 **No Policies and Procedures Governing CalPERS' Determination**

22 76. In the Compensation Review Unit, there are no written policies or procedures.
23 (LL1 76:5-77:11.)

24 77. "In the Compensation Review Unit, every single case is different. The amount of
25 documentation we need is completely different. So also, the treatment of inquiries is completely
26 different.... [E]ach situation that we come across is completely unique in itself. I couldn't say
27 definitively how he [Johnson] came to his determination." (LL2 79:15-22.)

28 **City's Expectation That the Settlement Agreement Would Be PERSible**

1 78. Stephanie Easland was the City's attorney who advised the City on PERL matters,
2 on contract matters, on charter matters and on human resources matters. (Testimony of Stephanie
3 Easland ("SE"), 2/25/15, 20:17-22.)

4 79. Easland received a memo from the City's payroll officer, Laura King Yavornicky,
5 in regard to how to implement the provisions of the Settlement Agreement. (SE 27:9-30:19.)
6 Payroll was trying to see how the extra salary was to be reported to CalPERS. (SE 31:4-7.)

7 80. Easland's understanding was that "if it's CalPERS reportable, it would go towards
8 their future retirement amounts." (SE 31:20-32:2.) Easland responded in writing that "all future
9 monthly pay rates will be BC rate and CalPERS reportable". (Exhibit 4.) Easland said that Lewis
10 was "being paid as if he had been promoted to the BC position." (SE 33:8-17.)

11 81. Easland looked at the CalPERS law on Westlaw and the CalPERS website. (SE
12 33:20-35:2.) She might have contacted Jim Odlum, the attorney who represented the City in the
13 dispute with Lewis. (SE 36:22-25.)

14 82. The Settlement Agreement contained the language that "Lewis was to receive all
15 current and future benefits granted to BC." (SE 38:12-19.) BC's did not have a contract so the
16 benefits were set forth in resolutions that applied to BCs. (SE 38:14-19.) Easland assumed that
17 the City reported the BC pay to CalPERS for Lewis. (SE 39:9.)

18 83. Based on the Agreement, Easland's understanding was that Lewis was getting
19 paid as a BC and it would get reported to CalPERS accordingly. (SE 39:18-20.) She assumed
20 that getting a CalPERS pension based on the BC pay was "negotiated and the reason to get paid
21 as a BC." (SE 40:7-9.) "One of the results of the settlement agreement was to receive an
22 increased retirement." (SE 40:22-41:3.)

23 84. When Easland reviewed the Settlement Agreement, she assumed after reviewing
24 it that the City agreed to increase Lewis' salary to the BC pay to "ultimately increase the
25 retirement as if he had been promoted to BC." (SE 41:19-23.) Easland never heard the term
26 "temporary upgrade pay" while working for the City. (SE 46:10-12.)

27 85. If CalPERS had told Easland that the BC pay was not reportable, then she would
28 have "double-checked the settlement agreement to see if we were in violation of the settlement

1 agreement." (SE 48:4-12.)

2 86. Councilmember Wendy McCammack testified that she raised the issue of whether
3 Lewis was going to receive a CalPERS benefit associated with the BC pay and she was told by
4 the City Manager and the City Attorney that Lewis would receive a CalPERS benefit based on
5 the BC pay. (WM 140:7-14.)

6 87. McCammack said that she could not assume it would be anything but PERSible
7 because the City was required to pay its contributions based on the BC pay for Lewis. (WM
8 142:1-6.) If CalPERS was going to require the City to pay contributions for Lewis based on the
9 BC pay, then the BC pay had to be PERSible for Lewis. (WM 142:1-6.) McCammack asked the
10 City Manager or City Attorney whether CalPERS was accepting the contributions at the BC rate
11 for Lewis and the City told her that CalPERS was. (WM 143:3-6.)

12 **Lewis Checked to Make Sure Appropriate Contributions Were Being Taken Out for**
13 **CalPERS**

14 88. After the Settlement Agreement was implemented, Lewis checked to make sure
15 the correct percentage was being taken out of his BC pay for CalPERS. (RL3 170:21-25.)

16 **Expectations of the City and Lewis**

17 89. When drafting the settlement agreement, the City expressly considered whether
18 the agreement would provide Lewis with a CalPERS pension based on the salary that was
19 documented in the settlement agreement. (RL1 188:9-19.)

20 90. The documents show that the City queried the PERL law, researched it, and then
21 made specific findings that the compensation was PERSible. The City then acted in reliance on
22 this finding and paid contributions on the higher salary. (RL1 220:21-25.)

23 91. In the testimony before the Court, Councilmember McCammack testified that she
24 understood or expected that Lewis would also be entitled to a CalPERS pension based on the
25 salary of the BC. (WM 140:7-14.)

26 92. Importantly for purposes of this dispute, the City also recognized its obligation to
27 ensure that Lewis would receive the deferred compensation he was entitled to, including an
28 eventual CalPERS pension calculated based upon his highest earnings at the BC pay scale.

1 **All BC Positions Filled**

2 93. From the time of the settlement to his retirement, all of the other BC positions
3 were always filled. (RL3 173:8-9.)

4 **Publicly Available**

5 94. The BC pay was publicly available. It was published on a publicly available pay
6 schedule through the salary resolution of the City. (SE 77:2278:6.) The fact that Lewis was paid
7 as a BC was public information because he was a public employee. (WM 135:4-5.)

8 95. The Settlement Agreement was discussed in closed session and then subsequently
9 discussed in open session. (WM 134:22-136:24.) Lewis was publicly recognized as being paid as
10 a BC. (WM 137:12-14.)

11 **Duties of Fire Captain and BC**

12 96. Many of the duties of a BC are similar to the duties of a Fire Captain (RL3 193:3-
13 5.)

14 **Lewis Regularly Performed the Duties of BC**

15 97. Lewis regularly performed the duties of a BC on a day-to-day basis. (RL3 155:2-
16 17.) "The day is full of stuff like that." (RL3 155:16-17.) "It's not our job where we would go in
17 and two hours you do this, two hours you do that; it's throughout the shift on an as-need basis.
18 So if I wasn't needed to go somewhere to deal with some issue, I might be going over the budget
19 on the remodels for the stations or gathering information for the new station to be built...." (RL3
20 155:8-13.)

21 98. Lewis performed the duties that were not any different from those of any other
22 BC. (RL3 201:10-17.)

23 99. On a day-to-day basis, Lewis met with other BC's in preparation for them to go in
24 to do discipline. "So I was there with them before they went in. Usually not at the fire station
25 because it was confidential information. Employee disciplines are protected...." (RL3 186:20-
26 25.)

27 100. Lewis did numerous things on a regular basis that were exactly what a BC would
28 do. (RL3 153:25-154:25.)

1 101. Part of the BC duties were to take care of discipline issues within the SBFD
2 personnel. (RL3 152:7-14.)

3 102. Lewis performed the duties of a BC in both emergency incidents and some
4 administrative things. For example, he managed the budget for the remodel of the fire station.
5 (RL3 151:14-25.)

6 103. The daily duties of a BC "were sporadic in as much as the emergency calls are
7 throughout the day, and obviously not planned or scheduled. So fill-in work was done all the
8 time, whether that was managing a budget, or doing employee evaluations, or doing research on
9 a policy and procedures for fire ground safety or training." (RL3 154:6-14.)

10 104. A BC's work is done all over the city. (RL3 155:18-20.)

11 105. Lewis also performed the duties of a BC when on a fire site, when responding to
12 fire calls, when planning a new fire station, and when appearing in BC uniform. (RL3 179:10-21,
13 183:13-184:9.)

14 106. Lewis testified that he was instrumental in getting a new fire station built in the
15 Cajon area. (RL3 152:1-6.)

16 107. Lewis also did the administrative duties of a BC or acting as a BC. (RL3 194:3-
17 194:15)

18 108. Lewis performed BC duties "on a regular basis at least once a week and probably
19 more. With the way we work is three shifts consecutively, on four shifts off, and then back to
20 three on. So basically, you did a cycle. That's what we call the cycle, and we did those on a
21 weekly basis. And so during the course of that period of time, all of the things that we've talked
22 about, the advice to the BCs, especially the discipline because it was an ongoing thing with many
23 employees." (RL3 194:7:15.)

24 109. Lewis performed oversight supervision of the Battalion on a very regular basis.
25 Also, "[s]ometime during the 72-hour period I would end up either in a BC position on an
26 incident, because San Bernardino is a very busy city, or as administrative oversight for the
27 Battalion. And ... more regularly than that, maybe depending on the time, I was actively
28 involved in advising them on disciplinary issues and doing administrative things as far as the

1 budgets, the equipment...." (RL3 195:3-19.)

2 110. Each of those were "things that only a BC would do and I did on a regular basis
3 each cycle. Whether it was filling in trying to prepare budgets, or disciplinary things. Those
4 were things that took up time but they fit in between the emergency responses, the training, the
5 development of policies and procedure." (RL3 196:25-197:7.)

6 111. Lewis also developed policies and procedure for the fire department, which only
7 management does. (RL3 196:6:25 to 197:7)

8 112. Lewis performed the duties of BC, like "taking care of the staffing requirements,
9 going through planning out the next shift, responding of the incidents, training evaluations."
10 (RL1 178:22-25.)

11 **When a BC Arrived on a Fire Scene, Most of the Time Lewis Did Not Revert to Captain**

12 113. When a BC did arrive on the scenes, most of the time Lewis remained acting as a
13 BC. "They had a great deal of confidence, and it's always better to have two people in a uniform
14 command than it is to just have one and break down the unit." (RL3 153:3-12.)

15 **Remodel of Fire Station**

16 114. As part of performing BC duties, Lewis kept track of what the remodels were
17 going to be for a fire station. He had the Fire Captains look into how much was needed and how
18 it would be allotted. The Deputy Chief was running the program, so Lewis met with him and told
19 him "this is what I think we need, and this is where I think we can trim. Consequently, that is
20 how the budget went down and I made sure they were on track doing the remodel." (RL3
21 178:24-179:8.)

22 115. The Deputy Chief supervised the BCs. Lewis reported his budgeting material to
23 the Deputy Chief or the Chief if the Deputy Chief was gone because the Chief collected some
24 information as well. (RL3 188:4-10.)

25 116. While performing BC duties, Lewis prepared the equipment budget for a new fire
26 station. It was submitted together with all the other pieces so they could get an evaluation of
27 what the estimated cost was going to be. (RL3 179:17-25.) Lewis would put it in the budget
28 package for the supplies for the vehicles and met with the Deputy Chief who approved the

1 budget. (RL3 180:2-24.)

2 **City Put Suburban BC Vehicle at Lewis' Disposal**

3 117. The City placed a Suburban vehicle at the station that Lewis could respond in as a
4 BC if he needed to. "[O]r if I needed to go do administrative things, I could go offsite and take
5 care of those tasks." (RL3 153:1222.)

6 118. The other non-management personnel (including Fire Captains) did not have a
7 Suburban or similar vehicle available to them.

8 119. The BCs all had their own (non-personal) City-provided cars that belonged to the
9 fire department assigned to them, just like the one assigned to Lewis. (RL3 153:12-22, 164:18-
10 165:7.) "It's not a benefit, it's a necessity in being able to coordinate emergencies and respond to
11 the incidents." (RL2 164:18-165:7.)

12 **Treated As BC for Input on Discipline**

13 120. Within the group of Fire Management, Lewis participated in activities that the
14 Fire Management group did such as discussing discipline, or procedure issues, or safety issues.
15 "They gathered input from all of us. Mostly like discipline took up more time than any, and I
16 probably advised them more on that than any other advice." (RL3 150:9-21.)

17 121. The Fire Captain or the BC would sign the Disciplinary Action Form if he
18 delivered the discipline, even if the BC was overseeing it. (RL3 159:22-23.)

19 122. The BC would not seek the advice or input from Fire Captains. (RL3 198:9-18.)
20 "It's very specific and employee discipline is closely guarded as confidential. And, no, they
21 didn't ask other Captains." (RL3 198:9-18.)

22 123. Management only should have asked somebody who was in the confidential
23 management position about discipline matters "because if they were discussing disciplinary
24 issues with nonconfidential employees, they could find themselves in deep trouble." (RL3
25 198:20-25.)

26 124. Lewis was knowledgeable on discipline and he had a confidential qualification
27 because he was in the confidential management group. The others in management did not have
28 any problem discussing discipline issues with Lewis "because Fire Management knew they

1 hadn't violated any rules." (RL3 199:13-18.)

2 **City Councilmember Wendy McCammack Saw Lewis Perform BC Duties**

3 125. Councilmember McCammack learned on the council or through experience
4 serving on committee to distinguish between the duties of a BC and the duties of a Fire Captain.
5 (WM 146:6-10.) She testified that she personally saw Lewis performing the duties of a BC. (WM
6 143:20-24.) She made a habit of going to as many fire incidents or traffic collision incidents as
7 possible that happened within the district that she represented. (WM 145:2-15.) She saw Lewis
8 act as BC at several incidents. (WM 145:11-15.)

9 126. McCammack testified that "the first time I saw Mr. Lewis perform BC duties was
10 during the Old fire. That was October 2003." (WM 144:3-6.)

11 127. She further testified that she determined Lewis to be performing BC duties,
12 "because I was actually at the mobile command center in the City where all of the decisions were
13 made by the public safety administrators because it was close to my house." (WM 144:7-10.)

14 128. McCammack testified that Lewis performed BC duties when "he was actually
15 asked to present in front of City Council. He would not have been asked to present certain things
16 in front of the City Council as the Fire Captain. This was only the typical behavior, let's put it
17 that way, of either a BC or a deputy chief or chief that would make certain presentations to the
18 city council regarding certain agenda items." (WM 151:19-25.) Lewis was in BC uniform when
19 he was in front of the City Council. (WM 151:1-7, RL1 179:10-21.)

20 129. McCammack saw Lewis act in the BC capacity in many circumstances and with
21 clear recollection, she testified that she personally witnessed Lewis acting in the BC capacity at
22 least once a month after 2007. (WM 150:25-151:9.)

23 130. For example, Lewis appeared before the City Council in a BC uniform in one or
24 more public sessions that were televised. (WM 152:1-10.)

25 **Documenting Lewis' Time Acting in the BC Position**

26 131. The SBF do not document every time someone is in an acting BC position.
27 (CG 118:17-22.) The records about people functioning in an acting capacity may never have
28 been made. (CG 119:10-13.)

1 132. The City's and SBF's records are not well maintained and not well organized.
2 (CG 119:2-17.) In addition, the City and SBF are missing records. (CG 119:2-7.) Glave
3 thought that the City would agree that its record keeping was very poor. (CG 121:8-9.)

4 **Acting Pay**

5 133. The City uses various designations of acting pay. (CG 120:11-14.) There have
6 been different "acting" requirement in the City over the years. (CG 110:8-23.) At some point,
7 once someone committed five shifts, they qualified for additional "acting" pay. (CG 112:21-24.)

8 134. Employees track "acting pay" to make sure that they get the extra pay or put it on
9 their resume for promotion. (CG 113:1-5.) The City would keep track of shift as a cost savings
10 measure. If someone had four shifts, they would take the firefighter off a shift. (CG 122:1-6.)

11 135. Acting pay is when a Fire Captain, for example, "steps up to perform the duties of
12 the BC." (SE58:2-3.) "A lot of time you work in the position for a certain amount of time and
13 you start receiving the pay of the higher position for the period of time that you were acting that
14 position." (SE 58:6-9.) Easland did not know how the SBF works concerning acting pay. (SE
15 58:22-24.)

16 136. Part of the Fire Captain's and BC's duties overlap, such as when a BC is not
17 available and the captain would maintain control of the fire scene. (CG 122:23-123:3.)

18 137. Part of the summary judgment motion that Lewis succeeded on in the Federal
19 court action was that Lewis acted in the capacity of BC without issue. (CG 105:16-22.)

20 138. Lewis received the BC pay whether he was in the acting capacity of the BC or
21 not. The City could formally promote him and grant him the BC title and he would have received
22 the same pay. Lewis did not have to be in the acting capacity to get that pay. (CG 120:23-121:2.)

23 139. CalPERS takes the position that Lewis did not qualify for what the City calls
24 "acting pay." "There is a specific requirement that is in place, prior to receiving those payments.
25 From the testimony that I've heard it does not sound as though Mr. Lewis had fulfilled those
26 requirements." (LL2 97:11-97:16.)

27 140. Lueras testified that if an individual were being compensated for acting in the
28 capacity of higher rank, she would expect to see a Personnel Action Form. (LL2 114:24-115:12.)

1 141. City HR employee Helen Tran, however, testified that she has never seen a
2 Personnel Action Report where there is no fiscal impact. (Testimony of Helen Tran ("HT"),
3 2/26/15, 129:2-25.) By financial impact, Tran meant the individual was receiving separate or
4 additional pay. (HT 124:16-17.)

5 142. Tran testified that the only things that would be documented with respect to acting
6 pay is when a specific salary increase was associated with that acting pay (HT 121:2-21.)

7 143. Tran did not inquire into what the process was before she was hired. (HT 114:22.)
8 She has seen acting pay change from the time she has been at the City. (HT 116:8-10.)

9 144. According to the City *Charter*, the Fire Chief alone certifies the acting pay that
10 allows the individual to receive the pay of the higher position. (SE 66:4-7.) Acting pay does not
11 have to get City Council approval. (SE 66:4-7.) *Charter* section C32, sub-part B, "Special Salary
12 Provisions" indicates that the Chief certifies that the employee is being assigned to the acting
13 position. (SE 66:23-25.) "They receive the higher salary only while in the acting position." (SE
14 68:12-19.)

15 145. One of the main reasons for being designated as acting is to receive the pay of the
16 acting position. (SE 78:24-80:20.) Lewis was already receiving the BC pay.

17 146. The Fire Chief knew Lewis was entitled to be a BC and signed off on the
18 agreement. His signing the settlement agreement was effectively agreeing to certify that Lewis
19 was in the acting position and agreeing to acting BC pay. Since Lewis was already receiving the
20 BC pay, there was no additional need to designate him as "acting". (SE 80:1-20.)

21 **BC Pay**

22 147. Lewis was tasked with the duties of the BC and was paid the pay of a BC, but he
23 was not provided the title of a BC. In recognition of his right to the BC position, the City
24 increased Lewis' compensation from the date of the City's agreement forward, paying him the
25 compensation earned as a BC pursuant to the City's publicly available pay schedule.

26 148. Lewis accrued a total of five years at the BC rate.

27
28

1 149. His highest one year final compensation as a BC was \$161,773.⁶

2 150. The Settlement agreement provided Lewis with all the benefits of the BC
3 position. Although Mr. Lewis had a different overtime provision than other employees, for
4 CalPERS purposes overtime is irrelevant because overtime is not PERSible.

5 151. A pension is never based on overtime. Mr. Lewis does not seek to have overtime
6 counted as part of his pension in this matter. For CalPERS purposes, overtime cannot take Lewis
7 out of the BC group or class because overtime is always outside the PERL. (CG 124:22-125:15.)

8 **Lewis Was Represented by the Fire Management Collective Bargaining Unit**

9 152. After the settlement, Lewis went into the City and met with the HR department
10 and with payroll clerk Laura King. King went through the Fire Management MOU and explained
11 to Lewis what the changes would be because Lewis would from that point be under the Fire
12 Management MOU. (RL3 141:19-22.)

13 153. The City told Lewis what he would be privy to as part of the Fire Management
14 group, and that the fact he was under the Fire Management MOU and subject to all of the
15 benefits or detriments. (RL3 162:22-25.)

16 154. As an example, the Fire Management group decided that it would be beneficial to
17 the City to take a reduction in pay. As they did, Fire Management sought input from the Fire
18 Managemet group, including Lewis. "Because whenever they were going to negotiate they
19 came to hear what I had to say because I was part of their Fire Management Group. And we
20 voted to -- or basically by consensus said yes, we will relinquish this. So for a period of a little
21 over a year we in Fire Management had to give up and it was about a thousand dollars a month."
22 (RL3 146:6-21.)

23 155. There were usually two BC's that did the direct negotiations with the City. (RL3
24 146:24-147:6) "So during negotiations we talked about what our benefits should be, or could be.
25 Or what we should negotiate for if there was a takeaway, like the one time when that was
26 discussed and got input from all the members of the Fire Management Group, which I was a

27 _____
28 ⁶ The financial difference in his pension would be about \$3,224 a month for his life and
the life of his beneficiary.

1 member of the Fire Management Group." (RL3 149:18-150:1.)

2 156. The BCs came to Lewis as the representative for the Fire Management group.
3 (RL3 147:7-9.) They sought Lewis' input as to what to negotiate for and what they had reached
4 consensus on "because we did not all get together and vote on it. It was just a consensus and they
5 went around and gathered that from all the BCs." (RL3 147:25148:19.)

6 157. Lewis was included in the group of Fire Management. "They treated me like I was
7 just one of them; both on the emergency scene and in daily type duties." (RL3 149:18-150:1)

8 158. He was asked for his input during negotiations for benefits, on discipline,
9 procedure issues, or safety issues for the Fire Management group. (RL3 149:9-150:25.)

10 159. When Fire Management made a concession to receive a cut in pay, the rank and
11 file did not do so. "They did not do any monetary concession, it was only the Fire Management."
12 (RL3 164:2-7.) As part of Fire Management, Lewis also took a concession.

13 **No Dues, No Meetings, No Formal Requirements for Being in the Fire Management Group**

14 160. The Fire Management group collective bargaining group has no dues, no regular
15 meeting and no formalities. (RL3 151:6-13.) There were no other regular or formal requirements
16 of participating in the Fire Management group. (RL3 151:6-151:13.)

17 161. The members of the Fire Management group did not vote. The people that were
18 representing Fire Management went to the management group and then negotiated with the City.
19 "And whatever they negotiated they came back and said, 'This is what we got,' or, 'This is what
20 we didn't get.' " (RL3 165:14-21.)

21 **Maintained Rank and File Union Membership, But Not Active After the Settlement**

22 162. Lewis maintained membership and paid due in the San Bernardino City
23 Professional Firefighters, Local 891. Several of the BCs paid dues into the rank and file union to
24 help support it. (RL3 167:9-16.)

25 163. Prior to the settlement, Lewis participated in the rank and file union and voted as
26 a Fire Captain. After the settlement, however, Lewis no longer voted in the rank and file
27 elections. (RL3 166:4-12.)

28 164. Lewis was not an active member of the rank and file union after 2007 because he

1 was under the Fire Management MOU. (RL3 181:24-182:1.)

2 **Similarities and Differences Between the Benefits Under the Different Collective**

3 **Bargaining Agreements**

4 165. There were similar benefits to both the rank and file and the Fire Management
5 group. Generally, the rank and file would negotiate a benefit and then Fire Management
6 would ask for the same benefits. (RL3 142:6-14.)

7 166. Exhibit 47 compares what Fire Management got and what rank and file got. Lewis
8 reviewed the list of benefits in both the MOUs to show that he received only Fire Managements
9 benefits and terms after 2007. (RL3 156:17-157:1.)

10 167. Lewis indicated using Exhibit 47 that he received benefits consistent with the
11 Fire Management MOU, benefits that are not in the rank and file MOU. (RL3 157:10-13.)

12 168. Lewis highlighted the benefits associated with Fire Management including a
13 uniform allowance, one-year EPMC, education, FSLA, and takeaway pay. Under the Fire
14 Management bargaining agreement, Lewis was entitled to a once a year \$500 uniform allowance,
15 which was afforded to the Fire Management, but not to the rank and file. (RL3 142:6-14.)

16 169. After the effective date of the Settlement Agreement, Lewis received a uniform
17 allowance under the Fire Management collective bargaining agreement. (RL3 142:16-143:10.)

18 170. Under the Fire Management collective bargaining agreement, Lewis also received
19 administrative days, administrative pay, "e-days" or administrative leave like the BC's the
20 Deputy Chiefs, the Fire Marshal, the Assistant Chief and the Chief. (RL3 144:3-145:1.)

21 **Detriments of the BC Position**

22 171. Lewis was also subject to the detriments of being a BC, such as taking the pay
23 reductions that were applied only to management personnel under the Fire Management MOU.
24 (RL3 145:23-146:14.)

25 172. Because they negotiated when the City was in really bad financial condition, the
26 Fire Management group decided that it would be beneficial to the City to take a reduction in pay.
27 They had input from everyone in management, including Lewis. (RL3 145:23-146:9.)

28 **Injuries to Lewis and Disability**

1 173. Lewis injured his right knee while acting as a BC. This was his first on-the-job
2 injury as a BC. (RL3 192:11-23.)

3 174. Lewis was subsequently diagnosed with lymphoma. Beginning in August 2011,
4 Lewis never returned to work as an active firefighter due to his injuries. (RL3 183:4-11.)

5 175. Beginning in or about July 19, 2011 Lewis went on disability leave from his
6 SBFDF job due to injuries suffered on the job, including the diagnosis of lymphoma.

7 176. Lewis' disability meant he was disabled for purposes of performing the duties of
8 Fire Captain as well as BC. (RL3 193:6-10.)

9 177. Arising from his injuries as a firefighter, the City has determined that Lewis has
10 qualified for industrial disability. Firefighters who are diagnosed with lymphoma are
11 presumptively assumed to have contracted the illness due to the hazards of firefighting duties and
12 resulting exposures to toxic and carcinogenic substances.

13 178. Throughout approximately 16 months that Lewis was on disability leave, he
14 continued to receive compensation as BC pursuant to SBFDF's and the City's publicly available
15 pay schedules pursuant to *Labor Code* section 4850.

16 179. Lewis was injured on the job several times. He was out on Section 4850 time for
17 the last year of his employment, where he performed no duties but was paid at the BC rate.

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

26 181. Throughout the period of his disability, the City continued to report Lewis' BC
27 compensation and EPMC to CalPERS throughout the time he was on disability leave and to
28 make the required employer and employee contributions attributable to those earnings. CalPERS

1 continued to accept the reports of compensation and the contributions.

2 **Worker's Compensation Claims**

3 182. There is an application for a workers' compensation pending on injuries that
4 Lewis sustained over his career, although it has not yet been settled and there has been no
5 remuneration paid. (RL3 189:11-15.)

6 183. The City's risk management employee that helped Lewis complete his application
7 for disability retirement told him there was a hearing on the matter the following week and
8 wanted to get the application in prior to that, so asked Lewis to come in and the employee helped
9 Lewis to fill out the application. (RL3 192:11-23.)

10 184. When Lewis filed for retirement, he was directed by the City's risk management
11 staff to list Fire Captain on the retirement application as the position from which he was retiring.
12 (RL3 183:17-21.) Lewis went in to the City's risk management office and filled out the
13 paperwork. (RL3 183:17-184:3.) The City's risk management people instructed Lewis on how to
14 fill out the form. Lewis did not write BC because he did not have the formal title of BC. (*Ibid.*)

15 **Retirement**

16 185. On October 10, 2012, while still on disability leave, Lewis filed a retirement
17 application for industrial disability retirement because of injuries he suffered on the job.

18 186. The contract between the SBFD and CalPERS mandates that a retiree's "final
19 compensation" from the SBFD shall be calculated based upon his or her highest single year of
20 earnings, together with total years of service credit earned from CalPERS-covered employment
21 and the specific retirement formula based upon the employee's age at retirement.

22 187. Once Lewis retired effective November 1, 2012, he began receiving a retirement
23 pension that was correctly calculated by using his highest one-year earnings, which was at the
24 BC rate of compensation during his final year of employment with the SBFD.

25 **CalPERS' Disallowance of Lewis' Highest Compensation and EPMC**

26 188. Six (6) months after Mr. Lewis' retirement, and nearly six (6) years after CalPERS
27 explicitly instructed the City to report his compensation as temporary upgrade pay, CalPERS
28 suddenly reversed its long-stated position and instructions. CalPERS issued its March 8, 2013

1 letter to Mr. Lewis, which for the first time disallowed the temporary upgrade pay. (Exhibit 3.)

2 189. CalPERS also disallowed the Employer Paid Member Contributions ("EPMC") in
3 which the City paid Mr. Lewis' nine percent (9%) Member contributions to CalPERS and
4 included the value of those contributions in his total reported compensation. (*Ibid.*)

5 190. All employees of SBFD are entitled to have EMPC included in their final
6 compensation, regardless of whether they hold jobs as part of the "rank and file" or as part of the
7 management and confidential employees of the SBFD.

8 **CalPERS' Review and Determination**

9 191. Originally, after the Settlement Agreement was reviewed by Carlous Johnson in
10 CalPERS' Compensation Review Unit, CalPERS told the City to report the money as "temporary
11 upgrade pay", a type of special compensation. (LL2 78:18-79:3.)

12 192. Lueras understood that Johnson had previously instructed the City on "what
13 bucket -- I put 'bucket' in quotes -- that the compensation would be reported in. The city was
14 instructed to report it as special compensation. I don't know how far Mr. Johnson went in making
15 that determination; if he went through the process of actually determining whether or not it was
16 compensation earnable. That wasn't apparent in my review of his file. I don't know what process
17 he went through to come to that determination." (LL2 78:18-79:3.)

18 193. In the Comp Review Unit, Lueras would first look at the employee's retirement
19 application and see what position title is actually indicated there. "If it matches the salary
20 schedule that was reported for that position, no other questions would be asked. But if there
21 were any discrepancies, I would reach out to the employer." (LL2 62:8-13.)

22 194. Lueras looked at the Fire Captain position because she was informed that was the
23 position Lewis was in. (LL2 62:17-20.) Fire Captain was listed on Lewis' retirement application.
24 Lueras said that she also verified with the city because there was a slight difference in the pay
25 rate that was reported, and Lueras thought that it was just because she did not have an updated
26 salary schedule. Lueras also noticed that there was some special compensation that may have
27 been contributed to BC. (LL2 62:19-63:7.)

28 195. Although her testimony is inconsistent, at times Lueras said that she actually

1 posed the question to the City, "Which position is he in?" Lueras testified that she was told
2 Lewis' title was Fire Captain and that she was provided with a copy of the Settlement
3 Agreement. (LL2 62:24-63:7)

4 196. Lueras' only email to the city was the one sent to Neil Thomsen of the Water
5 Department. (LL2 86:23-87:10; Exhibit 19.)

6 **Lueras' Determination that Lewis' "Final Compensation" Should Be Based on the Fire**
7 **Captain Title**

8 197. Lueras did not ask the City what duties Lewis performed, nor did she question the
9 duties. (LL2 83:2-4.) No one else at CalPERS talked to the City or anyone at the City about
10 Lewis' duties. (LL 83:5-7.)

11 198. Lueras had a series of questions asking what MOU Lewis fell under. She also
12 requested additional information regarding the temporary upgrade payments. (LL2 84:2-6.)

13 199. Lueras accessed the City's pay schedules on its website. The City did not send
14 Lueras a pay schedule. (LL2 87:17-21.) Lueras indicated that there should only be one pay
15 schedule. She did not find a pay schedule for the \$9,075 rate but did find a pay schedule that
16 matched the \$9,037 rate. (LL2 87:17-88:21.)

17 200. Lueras did not follow up with Georgia Chamberlain at the City for any more
18 information. (LL2 87:17-88:21.)

19 201. The City sent two MOUS and the Settlement Agreement. Lueras looked at the
20 title of Fire Captain and determined that the rank and file MOU applied to Lewis, but she did this
21 determination independent of the City. (LL2 87:17-88:21.) The City never told CalPERS or
22 Lueras which MOU applied to Lewis. (*Ibid.*)

23 202. Lueras said that to her knowledge, Lewis was not in the Fire Management or
24 confidential group. (LL2 100:14-102:6.) She thought Lewis was solely in the rank and file group,
25 because the position title fell under the category of fire safety. (*Ibid.*)

26 203. Lueras testified that the City was reporting a Fire Captain payrate. "The agency
27 informed me that the Fire Captain is covered under the fire MOU. That's my line of thinking."
28 (*Ibid.*)

1 204. Lueras testified that based on the pay rate that was reported, as well as the title (of
2 Fire Captain) that was on Lewis' disability retirement application, "it was determined as per the
3 City that that title fell under fire safety". (LL2 93:25-94:9.)

4 205. The City never answered Lueras' question of "What position was Mr. Lewis
5 filling to receive the temporary upgrade pay, and how long he'd been receiving the pay?"
6 CalPERS' analysis was based solely on the Settlement Agreement, the MOU for Fire
7 Management which covers the BC, and the MOU for fire safety which covers the Fire Captain
8 position. (LL2 89:2-90:12.)

9 206. When pressed, Lueras admitted that if Lewis worked in the same location as a
10 BC, performed the duties of a BC, and was in the Fire Management group similar to other BC's,
11 Lueras would put Lewis in the group or class that the agency told her an individual falls under.
12 The job title is not determinative, it is whatever the City deems is the correct group or class:

13 Q If the city treated Mr. Lewis in the management confidential fire
14 group, then would you accept that designation?

15 A Again, I look at the agency to provide me the information to
16 substantiate the information given to me.

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

18 THE WITNESS: Repeat your question.

19 BY MR. JENSEN:

20 Q If the city placed Mr. Lewis and treated him as a management
21 confidential group, would you put him in the management confidential
22 group?

23 MR. KENNEDY: Relevancy.

24 THE COURT: Overruled.

25 THE WITNESS: This is a loaded question.

26 THE COURT: You basically keep saying you rely on the information
27 from the city. Counsel is saying if the city told you he was in the
28

1 confidential management group, would you put him in the confidential
2 management group?

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

6 BY MR. JENSEN:

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

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

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

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

14 Q What is the starting point?

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

16 Q And what's the next step?

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

18 Q But we're talking about group or class. Did you look at the code
19 section of group or class?

20 A I did.

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

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

24 THE COURT: It's defined by statute.

25 BY MR. JENSEN:

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

28 A No.

1 Q Did you look at job duties?

2 A No.

3 Q And so do you defer to the city on those two issues?

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

6 Q So do you --

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

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

11 MR. KENNEDY: Objection.

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

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

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

16 BY MR. JENSEN:

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

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

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

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

24 Q So if he was paid the BC rate, he would be paid -- the pay would be
25 available to all BCs if he was in that group?

26 MR. KENNEDY: Your Honor, vague question.

27 THE COURT: Overruled.

28

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

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

4 MR. KENNEDY: Objection, your Honor.

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

6 MR. JENSEN: Okay.

7 THE COURT: Do you have anymore questions?

8 BY MR. JENSEN:

9 Q So let me just lastly phrase it.

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

12 A None. Because the city groups their employees based on the
13 bargaining -- collective bargaining. That's how they group their
14 individuals. So that's the one that was applicable.

15 (LL2105:17-109:21.)

16 207. "The job title is a specific portion of a group. So in Mr. Lewis's instance, he is a
17 fire safety employee rank five, if you will. They follow the same MOU. So he would be subject
18 or entitled into the benefits and payments in his group or class, which is identified as fire safety
19 Rank and File by his employer. If his employer had stated to me that his category was that under
20 the management confidential MOU, then it would have changed -- or could have changed -- my
21 determination." (LL2 72:17-73:5.)

22 208. "However, I was also given a Settlement Agreement that mirrored the instructions
23 that were given to me by the city that he was a rank and file employee." (*Ibid.*)

24 **CalPERS' New Determination Disallowing Reporting as "Temporary Upgrade Pay"**

25 209. CalPERS now claims the increase in salary was not "temporary upgrade pay"
26 because it was not temporary, nor was it other types of special compensation. (LL2 69:5-6.)

27 210. CalPERS also says that it is not payrate because Lewis held the title of Fire
28 Captain, not the title of BC, and that the reported regular pay rate was that of a Fire Captain, not

1 a BC. (LL2 72:12-13.) CalPERS also argues the compensation could not be payrate because
2 Lewis did not regularly perform the duties of a BC, but then in testimony said that it is up to the
3 City to determine the actual duties. (LL2 70:17-71:1.)

4 211. CalPERS in general does not like to see compensation earnable or compensation
5 reported that is sporadic and not consistent, stable, routine predictable. (LL2 65:25-66:5.) Lueras
6 admitted, however, that the payments were reported to CalPERS consistently and predictably.
7 (LL2 66:7-11.)

8 212. Further, CalPERS does not look at whether the duties were performed
9 sporadically or consistently, but rather whether the pay was reported consistently or sporadically,
10 (LL 67:1-10.)

11 213. Lueras said that even if Lewis' compensation was consistently reported at the BC
12 rate, it would not qualify as compensation earnable because the Settlement Agreement said that
13 Lewis would remain in the Fire Captain position and be compensated at the level of BC. "So in
14 my mind, that's making him a group or class of one which cannot happen for compensation
15 earnable purposes." (LL2 69:7-19.)

16 214. Lueras said that if an employee consistently performed the duties of a BC,
17 CalPERS would look to see that the payments were consistent and regularly in amount over time.
18 But she also testified that the duties and work schedule are outside of CalPERS' purview and
19 instead are the provenance of the HR department or City affairs. (LL2 66:15-22.)

20 215. In this case, the City determined that Lewis did perform duties of the BC, and the
21 City paid Lewis regularly at the BC rate. CalPERS, however, wants to interject itself into the
22 City's affairs and argues Lewis was not entitled to the payrate of the BC because he did not
23 regularly perform the duties of BC. But even Lueras says that the duties are the City's to
24 determine. (LL2 66:15-66:22.)

25 216. Lueras said that she would not change her determination unless there was no
26 Settlement Agreement. (LL274:25-75:19.)

27 217. Lueras said that when reviewing a temporary upgrade pay position or an upgrade
28 payment that was reported to the system, she generally asks for personal action forms showing

1 that the employee was entitled to the payments pursuant to an MOU or a written member policy
2 or agreement, but that in this case she was given the Settlement Agreement that she considered
3 outside of what was written in the MOU. (LL2 76:23-77:9.)

4 218. "In other words, you look for the city to document each time there is an acting
5 position in order to substantiate the temporary upgrade pay. If there is no underlying
6 documentation, then CalPERS would deem the payment not reportable. If you can't substantiate
7 a payment, it wouldn't be reported to the system. (LL2 77:10-18.)

8 219. Lueras said that CalPERS typically will accept compensation that was reported
9 consistently. She said that final settlement pay is excluded (LL2 51:4), but that she saw nothing
10 in the Settlement Agreement that constituted a "red flag to look for final settlement pay" such as
11 language that anticipated an end date of employment (LL2 56:8-14.)

12 **CalPERS Did Not Determine the Compensation To Be Final Settlement Pay**

13 220. Lueras said that an example of final settlement pay would be where an employee
14 is planning to retire in 12-18 months and the employer says the employee has "been awesome
15 this entire time you've been with us [and] we want to do you a favor and bump your pay rate up,
16 or give a bonus incentive because we know you are leaving and we want to reward you for the
17 superior performance that you've given us over the years." (LL2 54:19-25.)

18 221. However, she said that CalPERS did not determine Lewis' compensation to be
19 final settlement pay and that it did not appear to have been such. (LL2 57:19-58:18.)

20 **Labor Code Section 4850 Time**

21 222. *Labor Code* section 4850 time is given to safety members who are injured on the
22 job and are receiving workers' compensation payments. (LL2 14:11-13.) 4850 time qualifies as
23 compensation earnable. (LL2 22:3.) PERL section 20630 defines compensation in two different
24 ways, one is for service rendered, and the second is for time for which a member is excused from
25 work. (LL 17:20-21.)

26 223. Lueras testified that 4850 time "looks like regular payroll as if the member was
27 continuing to work." (LL2 16:17-18.) It is not distinguished in the CalPERS payroll system from
28 pay for actual work. (LL2 21:6-10.)

1 224. Lueras said that for pension calculations, it does not matter if the member is at
2 work or out on 4850 time. (LL2 19:8-9.) "So no, they were not performing the duties, but they
3 were excused from work as if they were working full-time." (LL2 29:18-20.)

4 225. The next step is to insure that the 4850 pay is compensation earnable. (LL2 20:3-
5 4.) "You start with pay rate. Review the pay rate, make sure it's pursuant to a publicly available
6 pay schedule." (LL2 20:7-8.)

7 226. With 4850 time, CalPERS does not look at whether the person is similarly
8 situated to others. (LL2 22:13-21.) However, Lueras again said she looked to Lewis' service
9 retirement application to identify what title was listed. (*Ibid.*)

10 Hearing

11 227. Now years after the fact, and based on minuscule inquiry, CalPERS contends that
12 Lewis is not entitled to have his pension calculated based on the BC position because CalPERS
13 believes that Lewis did not have the title of BC, without concern about whether he did or did not
14 perform or was available to perform all or most of the duties of a BC. CalPERS, however, has
15 admitted that it did not inquire into whether Lewis performed the duties of a BC. (LL1 97:9-
16 98:25.)

17 228. Secondly, CalPERS argues that Lewis' compensation is final settlement pay
18 associated with a written settlement agreement. However, CalPERS looks at form over
19 substance. Lewis was given the settlement because he was entitled to hold the position of BC. If
20 the City had not acted contrary to law in denying Mr. Lewis the promotion to BC that he had
21 earned, then clearly Lewis would have taken the BC position and he would be entitled to the BC
22 pay. Only because the City acted inappropriately did the matter have to be litigated, where the
23 City recognized its errors, and then granted Lewis the substance of the relief he requested and
24 that he earned.

25 229. Under law, settlements are encouraged and should be given the effect of law
26 contained within them. The form of the settlement agreement should not deny Lewis the just
27 benefits that he was entitled to as a matter of his work and his civil service entitlement. CalPERS
28 should not require that the City and Mr. Lewis litigate each dispute to conclusion in order to have

1 the courts by judgment restore Lewis to his proper rights. Even then, the restoration to proper
2 rights would arise from a written decision, which CalPERS might wrongly consider a form of
3 settlement pay.

4 230. CalPERS cites a different kind of "final settlement" pay as authority to attempt to
5 reduce Lewis' pension, arguing that Lewis was given the money in effect as a way of artificially
6 increasing his retirement benefits. However, there is no testimony that Mr. Lewis was a preferred
7 employee. In fact, it appears that Mr. Lewis was the victim of *discriminatory* action by the City.

8 231. In effect, the City tried to deny Lewis the proper benefits to which he was
9 entitled, and to deny him a pension based on the BC pay, but the City, under threat of litigation,
10 changed its mind and reversed its negative and inappropriate discriminatory practices to only
11 provide Lewis that to which he had already been entitled.

12 232. After the fact, CalPERS should not be seen as encouraging the City to
13 discriminate against its employees or reward the City for discriminating or inappropriate acts.

14 LAW AND ANALYSIS

15 I. Threshold Legal Issues

16 Independent Judgment Standard. Lewis obtained a vested fundamental right in his
17 pension, at the earlier of retirement or CalPERS' determination to characterize the BC pay as
18 includable in "compensation earnable" (as special compensation and temporary upgrade pay).
19 The ALJ must exercise independent judgment and weigh all the evidence when making a
20 finding. (*Code of Civil Procedure*, §1094.5.)

21 Evidentiary Presumption Regarding City of San Bernardino's Actions, Offices, and Pay.
22 It is presumed that official duty has been regularly performed. (*Evidence Code*, §664.)

23 Collateral Estoppel and Res Judicata. Collateral estoppel and *res judicata* apply to bar
24 CalPERS' reduction of Lewis's pension in this quasi-judicial proceeding. (*Y.K.A. Industries, Inc.*
25 *v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 356-357.)

26 (1) The issues in the 2007 determination and direction and in the current process are
27 identical;
28

1 (2) The 2007 determination was made pursuant to CalPERS' formal authority and
2 duty to apply the PERL. CalPERS' staff have authority to make final determinations
3 pursuant to CalPERS delegated authority to make *final* decisions. (§§20099, 20134; CCR
4 §555.) The 2007 determination was actually litigated in a quasi-judicial process once the
5 City of San Bernardino sent the Settlement Agreement to CalPERS and CalPERS'
6 Carlous Johnson determined it to be "temporary upgrade pay". *Sims* explained, "[a]n
7 issue is actually litigated '[w]hen [it] is *properly raised*, by the pleadings or otherwise,
8 and is submitted for determination, and is *determined....*" (*People v. Sims* (1982) 32
9 Cal.3d 468, 484, italics in original.) CalPERS had the opportunity to litigate the matter
10 further but chosen not to;

11 (3) The contested BC position, settlement agreement, and pay issues were
12 necessarily decided when CalPERS provided the City with the designation of temporary
13 upgrade pay;

14 (4) CalPERS' determination showed it considered and resolved the matter;

15 (5) The determination, the City and the City's attorneys' understanding, and then
16 ongoing treatment and acceptance of regular reporting of Lewis' increased compensation
17 as temporary upgrade pay for six years indicated that the determination was final; and

18 (6) The dispute was between the same parties (Lewis and CalPERS, and likely the
19 City of San Bernardino).

20 *Res judicata* gives certain conclusive effect to a former judgment in subsequent litigation
21 involving the same controversy. (*Commissioner of Internal Revenue v. Sunnen* (1948) 333 U.S.
22 591.) *Res judicata* and collateral estoppel bar CalPERS from re-litigating a quasi-judicial
23 determination considering evidence. (*Hollywood Circle, Inc. v. Dep't of Alcoholic Beverage*
24 *Control* (1961) 55 Cal.2d 728, 732.) The re-litigation of issues that could and should have been
25 pursued in a prior proceeding action is also barred. (*Takahashi v. Board of Regents* (1988) 202
26 Cal.App.3d 1464.) Collateral estoppel is grounded on the premise that "once an issue has been
27 resolved in a prior proceeding, there is no further fact-finding function to be performed."
28 (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 864.) No new fact has arisen. (*Hughes v.*

1 *Board of Architectural Examiners* (1998) 17 Cal.4th 763.) CalPERS does not have statutory
2 authority to reopen a decided matter.⁷ (*Gutierrez v. Bd of Ret. of Los Angeles Cnty Employ.*
3 *Retirement Ass'n* (1998) 62 Cal.App.4th 745.) Collateral estoppel and *res judicata* can prevent the
4 impeachment of a prior final judgment. *Berg v. Davi* (2005) 130 Cal.App.4th 223. Additionally,
5 CalPERS has failed to state a fact or law that would allow it to proceed under *Gov't Code* section
6 11506.

7 Judicial Estoppel: CalPERS and the City of San Bernardino. The City of San Bernardino
8 and CalPERS are judicially estopped from taking inconsistent positions from (i) the City's
9 statements made in prior determination process, and (ii) CalPERS' statements on to treat the
10 monies as temporary upgrade pay. (See *People ex rel. Sneddon v. Torch Energy Servs., Inc.*
11 (2002) 102 Cal.App.4th 181, 188.

12 Laches. Determined in 1007, laches bars CalPERS' prosecution of this case at this late
13 date. CalPERS argues in 2015 that it could not previously figure out what occurred, but
14 CalPERS had the opportunity to investigate or litigate earlier when information was fresher but
15 chose not to pursue it.

16 Statute of Limitations. If CalPERS had any authority to commence a new administrative
17 process to again attempt to reduce Lewis' pension, CalPERS was required to do so before when
18 the three-year statute of limitations ran on bringing a new administrative proceeding.

19 Charter City Autonomy. Charter cities enjoy "autonomous rule over municipal affairs
20 pursuant to article XI, section 5 of the California Constitution, 'subject only to conflicting
21 provisions in the federal and state Constitutions and to preemptive state law.'" (*Associated*
22 *Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352.) Two core
23 "municipal affairs" reserved for determination by charter cities are (i) the compensation of
24 municipal employees and (ii) the structure of government (including structuring offices, duties,
25 and positions). (*Cal. Const.*, art. XI, §5(b); *Johnson v. Bradley* (1992) 4 Cal.4th 389.)

26
27 ⁷ The correction of errors and omissions is not authority to reopen a case. (See *Gov't*
28 *Code* §§20160, 20164; *Gutierrez v. Bd. of Ret. of Los Angeles Cnty Employees Ret Ass'n.* (1998)
62 Cal.App.4th 745.)

1 The City exercised its right to become a charter city and reserved complete power over
2 compensation of its government officials and the structure of its sub-government offices. (City of
3 San Bernardino *City Charter; First Street Plaza Partners v. City of Los Angeles* (1998) 65
4 Cal.App.4th 650.) The City structured the settlement to provide the pay and benefits of the BC
5 position lacking only the title of BC. (Exhibit 6.) Pursuant to its *Charter*, resolutions, and
6 ordinances, the City paid Lewis the BC salary and benefits in cash, pursuant to publicly available
7 pay schedules, for services that the City required that he render on a full-time basis during
8 normal working hours.

9 As a charter city, the City of San Bernardino maintained its reserved rights to determine
10 compensation and office structure. (*Batters v. City of Santa Monica*, (1980) 101 Cal.App.3d
11 595.) Factually, the City never delegated its reserved charter autonomy to CalPERS. The City of
12 San Bernardino-CalPERS contract does not limit the City's power to designate compensation and
13 office structure. (*Campbell v. City of Monrovia* (1978) 84 Cal.App.3d 341.) The PERL does not
14 preempt charter city autonomy. (*Johnson v. Bradley, supra*, at 398-399.)

15 However, accepting *arguendo* the PERL as applied by contract or otherwise, the PERL
16 does not preempt or override the City's decisions, especially because there is no conflict or
17 inconsistency between them.⁸ For example, the PERL has no express term limiting the duties or
18 responsibilities that can be performed in an office or position. The PERL does not require that
19 the title of the position match any particular duties. The PERL allows temporary upgrade pay.

20 Especially when they arise from charter decisions, CalPERS is without authority in the
21 language of the PERL to disallow the BC pay to Lewis, especially after it designated it as
22 temporary upgrade pay and directed the parties to rely on that designation for years.

23 CalPERS' prosecution fails for lack of authority to revise the City of San Bernardino's
24 "home rule" decisions. (*Gov't Code*, §11507, *et seq.*)

25 **II. City Establishes Duties; Few Limitations**

26
27 ⁸ The amount that the City paid Lewis should establish the pay rate under the PERL. The
28 amount of the future pension arises from and during a member's employment with the agency.
(*Frank v. Board of Administration* (1976) 56 Cal.App.3d 236, 242.)

1 Even under the more restrictive general law, the City establishes the duties or position.
2 (*Gov't Code*, §§36501, 36505, 41005.) By ordinance, the City may authorize or require one
3 position to perform various duties, including of other positions. (*Gov't Code*, §40805.5, 40812.)
4 As an example, a city by ordinance may transfer or require performance of the City Clerk's
5 duties and responsibilities by other offices. (*Gov't Code*, §40805.5; see also §§51505, 51507.)
6 The city can require the City Clerk and other positions to perform "additional duties". (*Gov't*
7 *Code*, §40812.) (Once a charter city, City of San Bernardino had vastly greater power to
8 establish duties or position.) When not otherwise provided for, each deputy possesses the powers
9 and may perform the duties attached by law to the office of his principal. (*Gov't Code*, §1194.)
10 When an officer discharges *ex officio* the duties of another office than that to which he is elected
11 or appointed, his official signature and attestation shall be in the name of the office the duties of
12 which he discharges. (*Gov't Code*, §1220.) The limitations on performing multiple duties are
13 against an individual simultaneously being elected to "incompatible offices" (which does not
14 apply to this situation). (*Gov't Code*, §1099; *Eldridge v. Sierra View Local Hospital Dist.* (1990)
15 224 Cal.App.3d 311.)

16 PERL Scheme Does Not Address Titles. The PERL does not address titles. There is no
17 implication in the PERL that the Legislature delegated authority to CalPERS to restrict or
18 proscribe pensions based on the titles of jobs. In fact, the PERL describes groups or classes based
19 on the similarity of duties.

20 **III. Public Employees' Retirement Law ("PERL")**

21 Interpretation in Favor. The Supreme Court has held that "[a]ny ambiguity or uncertainty
22 in the meaning of pension legislation must be resolved in favor of the pensioner." (*Ventura*
23 *County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 490.)

24 Not Final Settlement Pay or Pay In Anticipation of Retirement. Lewis received the
25 increased BC compensation dating from 2007 (and actually including two years of retroactive
26 payments that CalPERS directed the City to report to CalPERS.) Lewis did not retire until 2012.
27 While Section 20636(e)(2) permits CalPERS to review the pay increases received by an
28 employee in the three to five years prior to retirement if they exceed those received by other

1 employees in their group or class, there were no above-average or significant pay increases in the
2 three to five years preceeding Lewis' retirement, other than the pay raises (and at least one pay
3 *reduction*) that all of the BC's received.

4 Further, Lewis was forced to retire on industrial disability after he was diagnosed with
5 lymphoma. This occurred long after the 2007 settlement whereby the City provided him with the
6 compensation and all other benefits of the BC position. The compensation increase to the BC
7 rate was clearly not in anticipation of retirement.

8 **No Retroactive Application.** CalPERS must apply statutes in the PERL and/or the
9 *California Code of Regulations* that were in effect on Lewis' retirement. CalPERS cites *C.C.R.*
10 §570.5, even though it did not become operative until August 10, 2011, years after these matters
11 occurred and after Lewis' retirement.

12 **A. Lewis' Compensation as BC Meets CalPERS' Requirements**

13 Lewis was legally entitled to hold the position of BC at the Sbfd and to receive the
14 compensation, deferred compensation and pension rights, and benefits flowing therefrom. He
15 received the BC compensation for full-time work.

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

20 **B. Group or Class**

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

26 Lewis both functioned as and performed the duties of a BC like the other BC's, and he
27 was a member of the Fire Management confidential employee bargaining unit like other BC's.
28 This, not formal title, determines which "group or class" he belongs in.

1 **C. "Regular Rate of Pay"**

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

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

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

14 **D. Labor Code Requirements Re "Average Weekly Earnings"**

15 When Lewis went on paid disability leave in July 2011 because of injuries and illness
16 incurred in connection with his work at the SBF, his BC wages were used to calculate his
17 disability pay. He received disability compensation based on the monthly earnings he received
18 based on the publicly available BC pay scale.

19 This is an implicit determination that his wages were what he received as BC,
20 irrespective of what duties he performed. For example, *Labor Code* section 4453 sets disability
21 payments based on "average weekly earnings". Further, CalPERS cannot argue that Lewis was
22 performing Fire Captain duties (as opposed to BC duties) during his highest and final year of
23 compensation because he was on disability leave and was not performing the duties of *any* active
24 firefighter position.

25 **IV. CalPERS Must Accept Mr. Lewis' BC Compensation as Payrate and**
26 **"Compensation Earnable"**

27 **A. Prior Advice**

28 After considering all of the facts relevant to the situation, CalPERS explicitly instructed
the City to report a portion of Mr. Lewis' BC compensation as "temporary upgrade pay".
CalPERS has now apparently decided its instructions were in error. CalPERS must correct those

1 errors, and cannot punish the City or Mr. Lewis for its incorrect advice.

2 The clearest way to correct the errors is to recognize that Lewis is entitled to use the BC
3 pay as "payrate under Section 20636.

4 **B. Correction of Errors and Omissions**

5 *Government Code* sections 20160, *et seq.*, state that CalPERS and contracting agencies
6 (such as the City) have a mandatory duty to correct their errors and omissions which negatively
7 impact members, and that this duty continues throughout the lifetime of the member and his/her
8 beneficiaries.

9 CalPERS argues or implies that Lewis or the City were in some manner responsible for
10 incorrectly reporting a portion of his BC compensation as "temporary upgrade pay", despite the
11 fact that the City submitted such reports after being explicitly directed to do so by CalPERS.

12 **C. Compensation Earnable and Payrate**

13 "Compensation earnable" consists of a member's "payrate" and "special compensation" (
14 *Gov. Code*, § 20636,) "Compensation earnable" by a member means the payrate and special
15 compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by
16 Section 21752.5.

17 An employee's "payrate" is the monthly amount of cash compensation received by the
18 employee "pursuant to publicly available pay schedules." (*Gov. Code*, § 20636, subd. (b)(1).)

19 (b)(1) "Payrate" means the normal monthly rate of pay or base pay of the member
20 paid in cash to similarly situated members of the same group or class of
21 employment for services rendered on a full-time basis during normal working
22 hours, pursuant to publicly available pay schedules. "Payrate," for a member who
23 is not in a group or class, means the monthly rate of pay or base pay of the
24 member, paid in cash and pursuant to publicly available pay schedules, for
25 services rendered on a full-time basis during normal working hours, subject to the
26 limitations of paragraph (2) of subdivision (e)⁹. *Gov't Code* § 20636 (West)

25 _____
26 ⁹ *Gov't Code* § 20636 (e)(2) Increases in compensation earnable granted to an employee
27 who is not in a group or class shall be limited during the final compensation period applicable to
28 the employees, as well as the two years immediately preceding the final compensation period, to
the average increase in compensation earnable during the same period reported by the employer
for all employees who are in the same membership classification, except as may otherwise be

1 "It has been beyond dispute that pay received for the performance of all normally
2 required duties ... constitutes compensation under PERS law.' " (*City of Fremont v. Board of*
3 *Administration*, supra, 214 Cal.App.3d at p. 1031, 263 Cal.Rptr. 164.) *City of Sacramento v.*
4 *Pub. Employees Ret. Sys.*, 229 Cal. App. 3d 1470, 1484, (Ct. App. 1991)

5 **D. Special Compensation "Temporary Upgrade Pay"**

6 CalPERS determined that Lewis' BC compensation qualified as "temporary upgrade
7 pay". *California Code of Regulations* section 571(a)(3), Premium Pay, states:

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

11 There is no definition in the PERL or the Regulations which further defines what
12 constitutes "limited duration". The time period during which Lewis received the BC pay clearly
13 had a start and end point and therefore was of limited duration.

14 Further, if CalPERS insists that Lewis' receipt of the BC compensation was not of limited
15 duration, but was permanent in nature, then CalPERS should either correct the prior reporting
16 and include all of the BC compensation in Lewis' base salary or instruct the City to make such
17 corrections, and then calculate Lewis' pension based on that increased base salary.

18 There is also no definition in the PERL or the Regulations which further defines what it
19 means to "work in an upgraded position/classification". As a charter city and Lewis' employer,
20 the City had constitutional autonomy and authority to determine what duties Lewis performed or
21 did not perform. CalPERS has no authority under the PERL to evaluate the specific duties
22 performed by any employee.

23 Instead, CalPERS has the ministerial duty as applied to the instant case to (i) accept the
24 City's determination that Lewis was eligible to and would receive compensation pursuant to a
25 publicly approved pay schedule at the rate paid to BC's, and (ii) accept the City's determination

26
27 determined pursuant to regulations adopted by the board that establish reasonable standards for
28 granting exceptions.

1 of whatever duties Lewis would then perform for the City in exchange for that compensation.

2 **E. CalPERS Must Either Accept the Disputed Portion of Lewis' BC**
3 **Compensation As "Temporary Upgrade Pay", As "Payrate" Or Must Now**
4 **Appropriately Redesignate It**

5 If CalPERS, despite explicitly advising the City to report a portion of Lewis'
6 compensation as "temporary upgrade pay", now believes that compensation must be reported to
7 CalPERS in some other fashion or designation, CalPERS is obligated to establish the correct
8 designation such that Lewis receives the full PERSible benefit of all of his BC compensation.

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

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

13 The fact that Lewis performed as a BC on an acting basis before he took the BC
14 promotional tests, then achieved exemplary scores in those tests, and then continued to be called
15 on to periodically perform BC duties such as taking command of fire suppression events under
16 the Incident Command System, constituted "superior performance." Moreover, Lewis did so
17 pursuant to his high scores in the BC promotional test, which meets the definition of "a program
18 or system ... in place to plan and identify performance goals and objectives."

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

21 **Confidential Premium** – Compensation to rank and file employees who are
22 routinely and consistently assigned to sensitive positions requiring trust and
23 discretion.

24 Pursuant to the Settlement Agreement and the City's decision to award Mr. Lewis the
25 benefits and rights of BC, he became a member of the confidential Fire Management staff of the
26 SBFD and was mandated to carry out his duties with trust and discretion. If CalPERS maintains
27 that he did so while remaining a member of the SBFD rank and file holding the position of Fire
28 Captain, then the additional compensation he received would constitute "compensation to rank
and file employees who are routinely and consistently assigned to sensitive positions requiring

1 trust and discretion."

2 **V. Lewis Qualifies for Inclusion of EPMC in His Pension Calculation**

3 All safety employees at the SBFD at the time of Lewis' retirement were entitled to
4 inclusion of EPMC in their "compensation earnable", whether a member of the rank and file
5 employees covered by Local 891 of the San Bernardino Professional Firefighters Union or a
6 member of the Fire Management confidential employees' bargaining unit.

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

9 **VI. Not Final Settlement Pay, Molina Does Not Apply**

10 CalPERS Lueras said that CalPERS did not determine Lewis' compensation to be final
11 settlement pay and that it did not appear to have been such. (LL2 57:19-58:18.)

12
13 (f) As used in this part, "final settlement pay" means pay or cash conversions of
14 employee benefits that are in excess of compensation earnable, that are granted
15 or awarded to a member in connection with, or in anticipation of, a separation
16 from employment. The board shall promulgate regulations that delineate more
17 specifically what constitutes final settlement pay.
18 (Section 20636.)

19 Although superficially similar because it involved a settlement agreement, the *Molina*
20 case law involved a different situation where the employee did not work for the city after the
21 dispute arose. The payrate for the position [Molina] had held with Oxnard was \$8,527.98 per
22 month and it was not affected by the settlement payout. (*Molina v. Bd. of Admin., California*
23 *Pub. Employees' Ret. Sys.* (2011) 200 Cal.App.4th 53, 66.) The settlement in *Molina* was
24 separate and distinct from any work-related activities. Molina, however, was not reinstated by
25 Oxnard for a year at a published monthly payrate that would have generated \$200,000 in yearly
26 compensation. Rather, he was reinstated for a single day at his *normal* monthly rate. Thus, there
27 was no legal basis for his assertion that \$200,000 of the settlement payment should increase
28 Molina's pension benefits. (*Molina, supra*, at 66-67.)

Lewis on the other hand performed the BC duties during his normal work hours and was
paid the BC rate regularly and consistently for years.

1 **AFFIRMATIVE DEFENSES**

2 **I. CalPERS' Duty to Correctly Inform**

3 CalPERS was fully informed in or about June 2007 of the City's decision to compensate
4 Lewis in accordance with the BC pay scale listed on the City's publicly available pay schedule. It
5 was fully informed of the City's intent to provide Lewis with deferred compensation in the form
6 of a pension, including one administered by CalPERS, based upon the BC compensation that the
7 City paid to Lewis. It was also fully informed of the fact that the City requested advice from
8 CalPERS about how to properly report Lewis' BC compensation so that he would qualify for an
9 eventual pension based upon that compensation.

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

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

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

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

1 including the rights and benefits of Lewis, and/or a breach of the CalPERS-City contract.

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

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

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

23 As this court has previously noted, "[i]n the vast development of pensions in
24 today's complex society, the numbers of pension funds and pensioners have
25 multiplied, and most employees, upon retirement, now become entitled to
26 pensions earned by years of service. We believe that courts must be vigilant in
27 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."

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

1 This fiduciary relationship is judicially guarded by the application of *Civil Code*
2 section 2235, which provides that "[a]ll transactions between a trustee and his
3 beneficiary during the existence of the trust, or while the influence acquired by
4 the trustee remains, by which he obtains any advantage from his beneficiary, are
presumed to be entered into by the latter without sufficient consideration, and
under undue influence."

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

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

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

24 (30 Cal.Jur.3d, *Estoppel and Waiver*, §1.)

25 If CalPERS' *current* position is correct that Lewis' BC compensation was improperly
26 reported to CalPERS or that any other element of Lewis' employment with the SBFD
27 disqualified him from receiving the pension benefits associated with his BC compensation, then
28 CalPERS utterly failed to notify the City and Lewis of this fact. The harm caused by this failure
to notify is no minor matter. Lewis maintained employment at the City with the full
understanding that his BC 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, Lewis' long term detrimental reliance on a

1 seemingly reasonable representation by CalPERS creates one of those " 'exceptional cases' where
2 'justice and right require' that the government be bound by an equitable estoppel." (*City of Long*
3 *Beach v. Mansell* (1970) 3 Cal.3d 462, 501 ("*Mansell*").)

4 **II. CalPERS is Estopped from Denying the Use of Mr. Lewis' BC Salary**

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

10 **A. Elements of Equitable Estoppel**

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

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

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

28 **Lewis Can Prove All Elements.** Lewis can establish that he meets all essential elements

1 of estoppel. CalPERS explicitly or implicitly represented to Lewis that it would grant him the
2 pension rights and benefits flowing from his BC compensation at the City.

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

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

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

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

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

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

25 Moreover, CalPERS *does* have authority to allow the use of Lewis' BC compensation in
26 calculating his pension.

27 CalPERS has "plenary authority and fiduciary responsibility for ... administration of the
28 system", subject among other things to the mandate that "[a] retirement board's duty to its

1 participants and their beneficiaries shall take precedence over any other duty." (Cal. Const., art.
2 XVI, §17.) If CalPERS is permitted to seriously and repeatedly misinform a Member in ways
3 that cause the Member permanent, irreparable and substantial harm, this would eviscerate the
4 mandate to put the interest of Members above all other duties. The constitutionally mandated
5 fiduciary duties certainly give CalPERS the authority to now award Lewis a pension based on his
6 BC compensation at the City, even if that compensation does not meet all of the technical
7 requirements that CalPERS (wrongly) asserts.

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

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

13 Nothing in the PERL precludes CalPERS from determining that an award of pension
14 benefits utilizing Lewis' BC compensation is appropriate.

15 **C. CalPERS Is Estopped From Now Disallowing Lewis' BC 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.4th 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.4th 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 (Lewis) on the explicit and implicit promises
27 that Lewis could utilize his BC compensation at the City in the calculation of his eventual
28 pension (and acting in such a way as to cause Lewis reasonably to believe reliance was

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

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

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

15 **III. CalPERS' Breach of Constitutional and Fiduciary Duties Owed to Lewis**

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

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

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

(a) The retirement board of a public pension or retirement system shall have the
sole and exclusive fiduciary responsibility over the assets of the public pension or

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

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

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

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

25 As the California Court of Appeals ruled in *City of Oakland v. Public Employees'*
26 *Retirement System, supra*, "[CalPERS] owes a fiduciary duty to provide timely and *accurate*
27 information to its members". (*City of Oakland, supra*, at 40, italics in original.) CalPERS itself
28 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*.)

29 **A. CalPERS Breached Its Fiduciary Duties Owed to Lewis**

Under California law, a breach of fiduciary duty includes (1) the existence of fiduciary

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

4 CalPERS' unjust disallowance of the use of Lewis' BC compensation in the calculation of
5 his pension allowance meets each of the elements to bring a breach of fiduciary claim against
6 CalPERS.

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

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

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

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

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

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

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

26 CalPERS has breached this duty by failing to fully and timely inform and/or correctly
27 inform Lewis of how its interpretation of the PERL would apply to Lewis' BC compensation and
28 its use in calculating his pension allowance.

1 **IV. CalPERS' Actions Provide Unjust Enrichment to CalPERS**

2 CalPERS freely and knowingly accepted employee and employer contributions
3 associated with Lewis' BC compensation earned at the City. Contribution amounts are
4 established on the basis of actuarial estimates of the pension allowances CalPERS will
5 eventually be required to pay to individuals based on the salaries they earned.

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

12 **V. CalPERS Is Barred By Laches**

13 Laches is such unreasonable delay by a plaintiff in asserting a right to relief as will render
14 the granting of relief inequitable. (*Nicolopoulos v. Superior Court* (2003) 106 Cal.App.4th 304; 30
15 Cal.Jur.3d, *Equity* §36.) Laches will operate as a bar in equity to the successful maintenance of
16 the plaintiff's cause of action. (*Cahill v. Superior Court of City and County of San Francisco*
17 (1904) 145 Cal. 42; *Kleinclaus v. Dutard* (1905) 147 Cal. 245; 30 Cal.Jur.3d, *Equity*, §36.) The
18 defense of laches requires unreasonable delay in bringing suit plus either acquiescence in the act
19 about which plaintiff complains, or prejudice to the defendant resulting from the delay. (*Conti v.*
20 *Board of Civil Service Commissioners* (1969) 1 Cal.3d 351; *Miller v. Eisenhower Medical*
21 *Center* (1980) 27 Cal.3d 614.)

22 **A. Laches in Administrative Hearings**

23 The elements of unreasonable delay and resulting prejudice, which must be established in
24 order for the defense of laches to operate as a bar to a claim by a public agency, may be "met" in
25 two ways: first, they may be demonstrated by the evidence in the case, and the person arguing in
26 favor of a finding of laches has the burden of proof on the laches issue; second, the element of
27 prejudice may be "presumed" if there exists a statute of limitations which is sufficiently
28 analogous to the facts of the case, and the period of such statute of limitations has been exceeded

1 by the public administrative agency in making its claim. (*Fountain Valley Regional Hospital &*
2 *Medical Center v. Bonta* (1999) 75 Cal.App.4th 316; 2 Cal.Jur.3d, *Administrative Law*, §440.)

3 **B. Acquiescence By CalPERS**

4 As described above, CalPERS has known since at least June 2007 of the City's
5 determination to provide Lewis with compensation paid pursuant to the BC salary scale.
6 CalPERS had sufficient information in its possession from the outset to determine how that
7 compensation should be reported to CalPERS to make it PERSible for use in the calculation of
8 Lewis' eventual pension allowance. CalPERS gave the City explicit advice on how to report the
9 compensation based upon that knowledge.

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

11 Lewis was injured by CalPERS' delay in waiting to raise its disallowance of his BC
12 compensation and/or CalPERS' failure to properly advise the City on how to report that
13 compensation so that it would be utilized in calculating Lewis' pension.

14 Based on CalPERS' representations that he would earn an eventual pension that could be
15 calculated based upon his PERSible BC compensation, Lewis made career and life choices –
16 including, *inter alia*, continuing employment at the SBFD and later retiring from CalPERS when
17 he did – to his detriment. Lewis would have made different job, career, or work choices had he
18 known that CalPERS would deny him a pension based on his BC compensation.

19 Lewis suffered prejudice because he relied on CalPERS' representations about how his
20 BC compensation should be reported to make it PERSible in planning his retirement and in his
21 job selection and generally planning his life. The large and small, conscious and unconscious,
22 decision matrix that an individual uses to plan his life, his retirement, and his activities are
23 founded on the accepted facts of one's life. Material changes of condition, including retirement,
24 have taken place between the parties during that period of CalPERS' neglect. CalPERS should
25 not now be able to unsettle Lewis' expectations by belatedly and prejudicially asserting that it has
26 a right to change its mind.

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

28 Lewis suffered prejudice in that he continued employment at the SBFD and retired based

1 on CalPERS' representations that is BC compensation was being properly reported to CalPERS
2 and associated contributions were being properly made such that he would be entitled to a
3 pension based upon that compensation. CalPERS' delay would, were the claim upheld, permit
4 the imposition of an unwarranted injustice. Lewis could not now easily begin to look for other
5 work, make alternative jobs choices, or seek other benefits.

6 **E. Laches is Appropriate**

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

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

17 **CONCLUSION**

18 Richard Lewis fully earned and vested in the right to be promoted to Battalion Chief in
19 October 2004 when a BC position opened up. It was only because of Fire Chief Pitzer's animus
20 toward Lewis due to his union activities that Lewis was denied the promotion, and Pitzer instead
21 chose someone lower on the promotion list and wrongly promoted that person ahead of Lewis.

22 The City later recognized its unlawful action and after being sued for discrimination and
23 related claims, sought to resolve the issue by granting Lewis all of the rights and entitlements he
24 had been denied. This included the pay of a BC based on the City's publicly available pay
25 schedule for the BC position, deferred compensation and pension rights based on the BC pay, the
26 benefits earned by all other BC's, and membership in the Fire Management confidential
27 bargaining group, rather than the rank and file bargaining group.

28 The only thing the City did not do was grant Lewis the formal title of BC. In all other

1 respects, however, Lewis functioned as a BC, regularly performed the duties of a BC, was
2 compensated as a BC, was expected to earn a pension based on the BC rate, and was in the
3 management bargaining group that all BC's and those above them were in. In short, the City
4 explicitly and affirmatively put Lewis in the "group or class" that all other BC's were in. As
5 CalPERS' witness Lolita Lueras acknowledged, it is the City—not CalPERS—which designates
6 the group or class employees are in and the duties they shall perform.

7 Under the PERL, Lewis is entitled to have his pension calculated at the higher rate for
8 BC. The compensation qualifies as payrate under Section 20636 (and it also qualifies as "special
9 compensation" under Section 20636).

10 Years ago, at the City's request, CalPERS reviewed the matter, determined that Lewis
11 was entitled that a pension based on the BC pay, and explicitly directed the City to report the
12 increase in the BC compensation (compared to Lewis' previous Fire Captain compensation) as
13 "temporary upgrade pay", which would entitle Lewis to the higher pension. CalPERS then
14 accepted reports on that pay and contributions attributable to the pay for pension funding
15 purposes, both for three years of retroactive pay and five years of pay going forward.

16 It was not until six months after Lewis' retirement that CalPERS suddenly changed its
17 mind and disallowed it as "temporary upgrade pay." Moreover, it did so simply based on the job
18 title formally held by Lewis, while completely ignoring the City's designation of Lewis' duties or
19 the "group or class" he was in.

20 CalPERS' last-minute reversal of its long-standing direction is wrong, is untimely, and is
21 completely counter to the evidence and the criteria that CalPERS itself claims should be
22 applied—i.e., that it is up to the *City*, not CalPERS, to determine Lewis' "group or class" and
23 work duties and to be compensated based on the City's publicly available pay schedules. It is
24 only just that CalPERS' pension reduction be rejected, and that Richard Lewis' pension be
25 restored to what he earned, expected and deserves under the PERL.

26 Respectfully submitted.

27 Dated: June 1, 2015

28 By: _____

John Michael Jensen,
Attorney for Appellant Richard Lewis

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APPENDIX "A": FINDING GUIDE

References to Testimony of Witnesses Cited in the Brief

<u>Initials</u>	<u>Name of Witness, Capacity, Date of Transcript, Page Location in Transcript</u>
RL	Richard Lewis, ("RL 1"), pages 159 to 226; ("RL 3"), pages 138 to 202
LL	Lolita Lueras, CalPERS Retirement Program Specialist II, ("LL 1"), pages 22 to 204; ("LL 2", pages 13 to 111
HT	Helen Tran, HR Division Manager for the City of San Bernardino, October 14, 2014, pages 10 to 68; February 26, 2015, pages 111 to 137
SE	Stephanie Easland, For City Attorney for the City of San Bernardino, February 25, 2015, pages 19 to 84
CG	Corey Glave, Mr. Lewis' former Attorney, February 25, 2015, pages 85 to 128
WM	Wendy McCammack, Former City Council member for the City of San Bernardino, February 25, 2015, pages 128 to 153

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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 West Olympic Blvd, Suite 550, Los Angeles, CA 90064-1524.

On June 1, 2015, I served the following document (s) by the method indicated below:

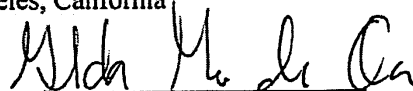
RICHARD LEWIS' POST HEARING BRIEF

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

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

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

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 1, 2015, at Los Angeles, California


Griselda Montes De Oca