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BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Calculation of Final Compensation of RICHARD LEWIS, Respondent, and CITY OF SAN BERNARDINO, Respondent.[1]	AGENCY CASE NO. 2014-0256 OAH NO. 2014040945 **CLOSING BRIEF**

The California Public Employees' Retirement System (CalPERS) submits the following as its Closing Brief in the above-captioned matter:

I THE ISSUE

The sole issue submitted in the Statement of Issues is whether payments to a member pursuant to a settlement of a lawsuit qualify under the Public Employees' Retirement Law as "temporary upgrade pay." (Exh. 1.)

[1] The City of San Bernadine had initially appealed CalPERS determination, but apparently abandoned the appeal. The City declined to appear at the hearing.

Respondent, Richard Lewis (Lewis) has also raised an alternative argument and several affirmative defenses, including:

(a) that the settlement payments constitute payrate;

(b) CalPERS is estopped from excluding the settlement payments as special compensation.[2]

II FACTUAL BACKGROUND

The material facts in this case are both direct and not subject to reasonable dispute.

- Lewis was employed by City of San Bernardino (City) from March 30, 1981, until the effective date of his retirement on November 30, 2012, (Exh. 11) through such employment Lewis was a local fire safety member of CalPERS. (Exh. 16, at p. 2.)[3]
- The highest position Lewis held during his employment was that of Fire Captain. (Exhs. 6, 11; Lew. 3,34; Vol. II 44/12-25 – 45/1-7; 219/4;61/17-18; 106/1-7)
- At all times Lewis was a rank-and-file employee and member of Bargaining Unit 891 and as such was covered und the Fire Safety Employee MOU (Exh. 13, Vol. II, 45/98/18-23).)
- Lewis' "regular" pay rate and as reported to CalPERS was that of a Fire Captain. (Exh. 15; Lew. 30; Vol III, 61/9-25 – 62/4-5; 214/1; Vol. II; 195/19-20.)

[2] To the extent Lewis may persist to pursue certain affirmative defenses not specifically addressed herein, CalPERS will respond in its reply.
[3] Transcript Key: Vol. I, refers to 10/23/14; Vol II, refers to 10/24/14; Vol. III refers to 2/25/15; Vol. IV refers to 2/26/15.

- As a Fire Captain Lewis could receive "acting pay" as a Battalion Chief under two scenarios: (1) he was appointed to fill-in during the vacancy in a higher position (up to 90 days) and this appointment was formally approved; or, (2) it was certified by the Fire Chief that he had worked at least 10 consecutive shifts (one month). In the latter case, he would receive acting pay only during the acting period. (Vol. II 168/16-20; 183/13-17; Exh. 13; Request for Official Notice (RON) Exh. B, C, D.)
- Lewis never qualified for "acting pay" and no documentation exists to the contrary; Vol. II 169/2-6; 208/13-25; 20/18-2; 32-33; 63.)
- Lewis and the City entered into an integrated settlement agreement (Agreement) on March 22, 2007,[4] the purpose of which was to bring repose to a pending lawsuit alleging a cause of action under 42 U.S.C § 1983, again the former City Fire Chief.[5]
- Pursuant to the terms of Agreement –
    - Lewis would remain in the position of Fire Captain.
    - Lewis would receive an amount of "back pay" consisting of the difference between "his actual pay as Captain" and what he would have been paid "had he been promoted."
    - Lewis would receive a similarly calculated prospective supplement to

[4] "'An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.' In California, the rule is embodied in Code of Civil Procedure section 1856, which states that '[t]erms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.'" (Citation.) Such an integration was clearly the intent of the parties here. (*Molina v. Board of Admin., California Public Employees' Retirement System, (2011)* 200 Cal.App.4th at p. 62.)

[5] See, Exh. 6. By the time of the Agreement, the City had been dismissed and only a single cause of action remained against the former fire chief. (Vol. III 100/12-13).

his regular salary prospectively from the date of the agreement.

- Lewis would continue to accrue overtime pay in his position as a Captain.

- The Agreement neither mentioned nor required Lewis to perform any duties beyond those required as a Fire Captain in order to receive the payments. (Exh. 6.)
- The Agreement was silent as to any indication that his payments would be included in or even reported to CalPERS for the purpose of calculating Lewis' pension. (Exh. 6; Vol. IV 48/13-17.)
- Neither the City nor Lewis contacted CalPERS before executing the agreement or responding to questions as to how it should be implemented. (Vol. III, 27/6-7.)

III RESPONDENT HAS THE BURDEN OF PROOF

As the sole agency charged with the enforcement of the PERL, and specifically membership and benefits, CalPERS determinations are entitled to great deference. (*City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System* (2012) 211 Cal.App.4th 522, 539 ['where our review requires that we interpret the PERL or a PERS regulation, the court accords great weight to PERS interpretation."]; See also *Molina v. Board of Administration* (2011) *supra,* 200 Cal.App.4th at 61; [construing § 20636]; *Prentice v. Board of Administration, supra,* 157 Cal.App.4th at 989, [construing § 20636]; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478,) CalPERS has the expertise and technical knowledge

as well as an intimate knowledge of the problems dealt with in the statute and the various administrative consequences arising from particular interpretations. (*City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System,* supra; 211 Cal.App.4th at p. 539, citing *Yamaha Corp. of America v. State Bd. of Equalization* (1999) 73 Cal.App.4th 338, 353.) In addition to the great deference, CalPERS determinations are entitled to a *presumption* of correctness. (Evid. Code § 664; *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1047; *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691; *Rau v. Sacramento County Retirement Board* (1966) 247 Cal.App.2d 234, 238; *Bowman v. Board of Commissioners* (1984) 155 Cal.App.3d 937, 947.)

Ambiguity or uncertainty in the meaning of pension legislation may not be resolved in favor of a member if it would be inconsistent with the clear language and purpose of the statute. Thus, "courts must not blindly follow such rule of construction where it would eradicate the clear language and purpose of the statute and allow eligibility for those for whom it was obviously not intended." (*Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1608–1609; *Hudson v. Board of Admin. of Public Employees' Retirement System* (1997) 59 Cal.App.4th 1310, 1324-25.)

In this matter, Lewis has appealed CalPERS determination of his retirement allowance. (Title 2, Cal. Code Regs. 555.1, 55.2; 555.4.) It is his burden to establish his entitlement to a retirement allowance greater than that determined by CalPERS, and of course as to all affirmative defenses and new matter. (Vol. II, 68/20-22.)

IV DISCUSSION

A. In General

The PERL is a comprehensive statutory scheme which vests the management and control of the Public Employees' Retirement System with the CalPERS, Board of Administration, as "...the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this System" (Gov. Code §§ 20120, 20123, 20125, 20134[6].)

All employees of the state and public agencies are members of the System. Because of the need for statewide uniformity in its application, the Board has been vested with the sole authority to determine "... who are employees and the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this System" following a hearing if necessary. (*Metropolitan Water District of California v. Cargill* (2004) 32 Cal.4th 491, 503-505; *City of Los Altos v. Board of Administration* (1978) 80 Cal.App.3d 1049, 1051.)

A member's retirement allowance is based on factors including "final Compensation," service credit and age. (*In re Marriage of Sonne* (2010) 48 Cal.4th 118, 121; *City of Sacramento v. Public Employees Retirement System,* supra, *229 Cal.App.3d 1470, 1478*, fns. omitted.) "Final compensation" is an employee's highest 12 or 36 continuous months of "compensation earnable." (§§ 20037, 20042.) "Compensation earnable" is a combination of a "payrate"

[6] Unless otherwise stated all statutory references are to the Government Code.

and "special compensation." (§20636, subd. (a); Title. 2, Cal.Code Regs., § 570.)[7]

Compensation earnable in not simply the amount of remuneration received, by a member. It is "exactingly defined to include or exclude various employment benefits and items of pay." (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198; citing former 20020 (currently 20630.) The principal purpose for these rules and the strict enforcement is "[p]*reventing local agencies from artificially increasing a preferred employee's retirement benefits by providing the employee with compensation increases which are not available to other similarly situated employees.*" (*Prentice v. Board of Administration, supra,* 157 Cal.App.4th at p. 993, italics added.)

"Compensation" is defined under the PERL as "remuneration paid out of funds controlled by an employer in payment *for the member's services performed* during normal working hours or for time during which the member is excused from work." (§20630.) "Payrate" is defined as the "normal" monthly rate of pay or base pay of the member paid in cash to *similarly situated* members of *the same group or class* of employment for services rendered on a full-time basis during normal working hours, *pursuant to* publicly available pay schedules." (§20636, subd. (b); Cal. Code Regs. § 570.5) "Special Compensation," is statutorily defined as an amount "received by a member *pursuant to a labor policy or agreement*, [paid] to similarly situated members of *a group or class of employment* that "*is in addition to payrate*" in payment for "special skills, knowledge, abilities, work assignment, workdays or

[7] All regulatory references are to Title 2.

hours, or other work conditions." Special compensation must be available to all members of "a" group or class of employment with the employer. (§29636, subd. (c)(1), (2), (6), (7); Cal. Code Regs. § 571.)[8] An exclusive list of what may be included as special compensation and the criteria that all items of pay must conform with to be considered as special compensation is set and defined in Cal. Code Regs., § 571.)

B. Settlement Payments Do Not Qualify As Compensation

An overarching and determinative fact in this case is that Lewis was not promoted to a position as Battalion Chief[9] and not required to have performed or to perform any duties of a Battalion Chief in order to receive the settlement payments. Understandably so, because he received the payments not as remuneration for services performed but as consideration for the resolution of a lawsuit.

Before considering payments made by an employer to qualify as compensation earnable they must first qualify as "compensation." (§20630.) "Compensation earnable" is a narrow subset of 'compensation.' (citation). An item must first meet broad definition of "compensation" if it is also to fall within the narrower category of "compensation earnable" (*Molina v. Board of Admin., California Public Employees' Retirement System*, supra, 200 Cal.App.4th at pp. 68-69, ["...we find that none of the settlement proceeds constitutes any kind of

[8] Even before the determination of compensation earnable, the payments must first qualify as "compensation." (§ 20630.) In order to qualify as "compensation" the payments must be "in payment for the member's *services performed*" and in some instances where the actual "*work*" has been excused based on a recognized leave of absence, and shall *"not exceed compensation earnable."* (§ 20630, subd.(b).)

[9] (Vol. Easland – 59 – 70; tam 32-33)

compensation used for the purpose of computing his CalPERS retirement benefits...".].)

There has been no credible evidence that the settlement payments made to Lewis were paid as remuneration for services Lewis performed or for which he was excused from performing. The agreement is silent as to any duties. The payments were, in fact, simply consideration for the resolution of a tort claim.

Failing to qualify under the PERL even as compensation, further examination of whether the settlement payments would qualify as "compensation earnable" is an unnecessary exercise. By definition compensation earnable is comprised of "compensation". (§§ 20630; 20636, subd. (a).) The fact that the City may have paid Lewis monies for reasons other than to compensate his for his services is irrelevant.

C. The Settlement Payments Fail To Qualify As Special Compensation

(1) Generally

The statutory definition of special compensation is compensation received by a member that is, *in addition to a member's payrate,* and paid "for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions." Payment must be "pursuant to a labor policy or agreement" and available to all "similarly situated members of a group or class of employment that is in addition to payrate"[10] (§ 20636, subd. (c)(1)(2).)

Furthermore, the Legislature expressly charged and delegated to CalPERS the obligation to "s*pecifically and exclusively"* promulgate regulations

[10] There is no "quantum duality" that would allow an item of be compensation may not be both payrate and special compensation.

to identify criteria that may be considered as special compensation. (§20636 subd. (c)(6).) CalPERS responded to this legislative mandate, inter alia, by promulgating California Code of Regulations, section 571.

Section 571, subpart (a) identifies and defines a number of items that may be considered special compensation. Included in this list is "temporary upgrade pay." Notwithstanding an item's inclusion in subdivision (a), in order for a specific payment to be included in as special compensation, it must also meet all of the criteria set forth under subdivision (b) and (c). (Cal.Code Regs. § 571, subd. (c), (d). (*City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System* , supra, 211 Cal.App.4th at p. 527, [settlement payments not included as special compensation]; *Prentice v. Board of Admin., California Public Employees' Retirement System, supra,* 157 Cal.App.4th at pp. 991-992.) Nowhere under the statute or regulation are settlement payments included as an item of special compensation.

(2) Lewis Rendered No Services for the Settlement Payments

There is no evidence in this case rationally supporting a finding that settlement payments were remuneration for Lewis' "special skills, knowledge, activities, work assignment, work days or hours, or work conditions." To the contrary, the evidence plainly establishes that the payments were made to bring repose to a civil rights action. The fully integrated agreement, pursuant to which the payments were paid, neither contemplated nor required Lewis to perform any work at all (certainly not retroactively.) (Exh 6.)

As repeatedly stated by Lewis, he was paid whether or not he performed any service more than those he was already receiving regular pay for as a Fire

Captain and compliance with the City Civil Service and MOU was "inconsequential" because the City was already paying him a supplemental payment under the settlement agreement. (Vol. II, 197/3-7; 208/10-18; 209/23-25.)

(3) The Payments Were Not Made Pursuant To a Labor Policy or Agreement

To qualify as special compensation, compensation must be paid *pursuant to a labor policy or agreement.* (§20636, subd. (c)(2); Cal Code Regs. §571, subds. (a),(b).) Section 20049, a labor policy or agreement, is defined as –

> "Any written policy, agreement, memorandum of understanding, legislative action of the elected or appointed body governing the employer, or any other document used by the employer to specify the payrate, special compensation, and benefits of represented and unrepresented employees."

Any settlement, or even an employment, agreement affecting a single individual employee cannot, as a matter of law, constitute a labor policy or agreement. "As used in the regulation, the term "labor" modifies both "policy or agreement," and implicitly restricts the referenced policies or agreements to either policies which cover a whole class of employees or collective bargaining agreements. This restricted and more literal reading of the regulation is required because the broad interpretation would essentially provide no limit on the compensation a local agency could provide to individual employees by way of individual agreements." (*Prentice v. Board of Admin., California Public Employees' Retirement System, supra, 157 Cal.App.4th at* 995.) See also, *Molina v. Board of Admin., California Public Employees' Retirement System, supra,* 200 Cal.App.4th at 695 [payments made pursuant to settlement agreement "*even if deemed for back pay*" could not qualify as special compensation"

because it was not "set forth 'in a written labor policy or agreement' and 'available to all members in the group or class.' No agreement between the City and Lewis, even if contained in labor negotiation agreement, would alter the legislative determination of what is or is not included in the calculation of a member's final compensation.]; *Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578, 585.) Public agencies are not free to characterize what is includable as pensionable companion. (*Oden v. Board of Administration*, supra, 23 Cal.App.4th at p. 201.)

(4) The Settlement Payments Were Not Available To All Members Of A Similarly Situated Members Of A Group Or Class To Employment

As a Fire Captain he remained in a rank and file position. (Exh. 6; Core 87/9-10.) Accordingly, his "regular" pay rate was as a Fire Captain, (Exhs. 6, 14, 15.) However, as a Fire Captain, he received payments pursuant to his Agreement that were unavailable to other Fire Captains (or anyone else in the City for that matter). The arrangement was unique to Lewis. No other Fire Captain with the City had a similar arrangement. (Vol. 131/2-6.)

In order to constitute special compensation, a specific item of pay must be available to members in his "group or class of employment." (§20636, subd. (b.) The PERL defines a group or class of employment as *a number of employees* considered together because they share *similarities in job duties, work location, collective bargaining unit, or other logical work related grouping.*" (*Prentice v. Board of Admin., California Public Employees' Retirement System, supra, 157 Cal.App.4th at 993.) One employee may not be considered a group*

or class." (§20636, subd. (e)(1).) Nor can a single member be considered to be in a member of more than "a" (one) group or class of employment. *(Ibid.)*[11]

As if speaking directly to the circumstances of this case, the court in *Prentice,* rejected an attempt in that case to justify the use of supplemental payments beyond those available to other members of his primary group or class on the basis that he believed he was also performing duties similar to members of another classification to which his increase would be in conformity. The court rejected this attempt to straddle more than one group and class, holding that:

> *"More importantly, the alternative classification scheme Prentice asserts would be inconsistent with what we perceive as the central role of the limitations on compensation earnable, to wit: preventing local agencies from artificially increasing a preferred employee's retirement benefits by providing the employee with compensation increases which are not available to other similarly situated employees. An alternative classification scheme would plainly give local agencies a level of flexibility inconsistent with the purpose of the limitations." (Ibid, emphasis added.)*

In other words, whether the City had authority to enter into a settlement.

The means and method by which they agreed to make the settlement payments is irrelevant to whether the payments qualify as compensation or compensation earnable under the PERL. What is material to the decision in this case is that whatever authority the City may or may not extend to characterizing

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[11] *Prentice v. Board of Admin., California Public Employees' Retirement System, supra, 157 Cal.App.4th at 993.* ["[W]e do not believe that for purposes of applying the limitations on compensation earnable set forth in the PERL an employee may be a member of more than one group or classification. We note that in both the PERL and the applicable regulations, references to class, group or classification are, for the most part, preceded by the definite article "the," rather than the indefinite "a." This word choice strongly implies the existence of a single classification rather than alternative classifications.)

the payments for purposes of calculating his final compensation.[12] Furthermore, the fact that they choose to use a calculation based on the difference between two positions in different classifications of employment, does not allow Lewis to base his pension as a Fire Captain on payments not available to other members of his group or class of employment as properly determined by CalPERS.

However, because compensation earnable is *limited to* the compensation provided to similarly situated employees, and Lewis at least appears to assert that CalPERS is only using his title as a surrogate for his group and class, CalPERS wishes to also submit the following discussion to support of its determination.

(1) Job Duties

Once again, Lewis was never promoted to a Battalion Chief.[13] (Vol. IV 165/8-13.) He does, however, make vague anecdotal and often inconsistent references to what he contends were functions he performed as a Battalion Chief. But on closer examination, it is evident that these were in fact most often functions typically expected of and required of a Fire Captain or otherwise wholly gratuitous actions. The fact that he may have from time to time served in a "move-up" [14] or that certain functions of a Fire Captain may "overlap" other

[12] Lewis's putative argument that as a charter City, the City's authority trumps that of CalPERS on these issues is clearly erroneous. *Marsille v. City of Santa Ana* (1976) 64 Cal.App.3d 764; "State statutes dealing with PERS matters preempt municipal provisions; See Also, *City of Los Altos v. Board of Administration*, supra, 80 Cal.App.3d at p. 1051.)

[13] Exh.6, 11, 14.

[14] A "move-up" putatively was when a dire captain would be asked informally to perform a function of a higher rant fwor a limited period of time, but less than that qualifying for acting pay. (Vol. II, 170/14-20.)

positions, (e.g., assumed charge at an incident before a Battalion Chief arrived), did not alter his group and class.[15]

A change of classification could only (but it never did for Lewis) occur upon compliance with the City's Charter, Civil Service Rules and Memorandum of Understanding with the Safety Employee Members. At most, Lewis has described even what he describes as this sort of flexibility represents the "para-military" nature of the department. These situational events did not result in a change of his primary group or class of employment or a *de facto* promotion.

(2) Collective Bargaining Group

As a Fire Captain, Lewis was and remained a member of Local 891, and his position was covered under Fire Safety Employees MOU. (Exh 13 at p. 3; Vol. II., 194/12-15[16].) Lewis believes that as a Fire Captain he was **uniquely** covered under the Management and Confidential Memorandum of Understanding. (Vol. IV, 199/1-6; Exh.12). However, like much of his

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[15] Q: There are certain functions that without acting in a capacity that would mimic or overlap between fire captain and battalion chief, certain types of functions?
A Yes. For instance, the first truck to -- I'm sorry. The first piece of equipment with a captain on it is usually the engine that arrives at the fire. He's in commanding control of that fire until the BC comes and relieves him. So is there a cross-over function, yes.
Q Is that considered acting?
A No. That would be considered a captain. There would be times when a BC is not available that the captain would maintain control of that scene.
Q That's part of a captain's duties?
A It's part of a captain's duties, and it is part of a battalion's duties. They overlap. (Vol. III, 122/14 – 123/3.)

[¶]...[¶]

Q: He was still doing fire captain duties and therefore, he would be paid overtime, potentially or required to be paid overtime. So the issue, I believe, is were his duties limited to just the fire captain duties or was he prevented from acting in a BC position by this agreement?
A: No. My understanding is that he still performed in an acting capacity as times, but his primary job duty was fire captain. He did not get promoted to a permanent, full-time battalion chief position. (Vol. III, 125/19-25 - 126/1 5.)

testimony, this testimony was goal oriented, vague and unsubstantiated. In fact on this point, Lewis' belief is based ultimately on a conversation he may have had with a staff person in the fiscal department of the City and that he determined that it was also a "benefit" conferred upon him by the Agreement. (Vol. 200/4-25-201/4.) In point of fact, as a Fire Captain, he was never covered under the management and confidential employee group. (Exh. 13.)

(3) Other Work Related Grouping.

As previously stated, a fundamental precept in the PERL is that 'compensation earnable' is not based on individual efforts. (*Prentice v. Board of Admin., California Public Employees' Retirement System, supra, 157* Cal.App.4th at p. 992. "[A]n employee's payrate and special compensation, are measured by the amounts provided by the employer to similarly situated employees.] See also, § 20636, subds. (b)(1), (2), (c), (e)(2).]; citing *City of Sacramento v. Public Employees Retirement System, supra,* 229 Cal.App.3d at p. 1479.)

Also as previously discussed, the central purpose of the group and class limitation is to prevent and limit the amount of compensation that a public agency can claim to be included in a member's compensation earnable and thus final compensation. Lewis purports to argue that because the City paid him additional payments calculated on the difference between his regular pay rate as a Fire Captain and that of a Battalion Chief, he should be considered to be in the same group or class as a Battalion Chief. But it is the purpose of the "group

[16] I was still a member of the union and I remained a member, you know, until I retired because I had always been a member and I supported the union.

and class" requirement that dictates what may or may not be included in the amount of compensation earnable; not the other way around. If it were as Lewis argues, there would be no need to determine more than simply what a particular member has been paid by his/her employer. Such reasoning renders essentially meaningless most if not all of the provisions in the PERL intended to circumscribe what may be included in the calculation fo final compensation.

(4) The Settlement Payments Were Not Payments for Normally Required Duties Nor For Work Performed Within Normal Working Hours Or Otherwise

No evidence clearly established, and Lewis repeatedly admits, that he was required to perform any duties other than as a Fire Captain to receive the settlement payments. (Exh. 6; Vol. II, 120/20 -25 -121/1-2; 129.)

(5) The Payments Were Not Paid As Earned

In no common meaning of the term, were the payments paid as earned. More than half were paid retroactive to the Agreement and in total were paid as part of a settlement payment, not for services rendered.

(6) The Settlement Payments Were Plainly Not Historically Consistent and would Result In Unanticipated Losses To the Public Employees' Retirement Fund By Exceeding Actuarial Assumptions

Strict adherence to this requirement is critical in no insignificant part because rates as established using pay rates, an unanticipated increase in a single member's compensation that has no historical antecedent and will exist for a brief period of time will understate the accrued liability.[17] In this case the

[17] "[T]he cost of the retirement promise is an 'actuarial liability.' Determining the amount of the actuarial liability for a retirement system requires the actuary to propose assumptions about the size and future growth of the workforce and payroll, how salaries will grow over time, how long employees and surviving spouses/registered domestic partners will live, how long employees will work, how many

evidence clearly establishes that the additional payments were not historically consistent with any possible rate of compensation for the position of Fire Captain. Lewis's position was indeed historically unique

Because they were based entirely on the unique Agreement, they would not inure or carry forward into a similar position in the future. Nor can it even be assumed that the accrued liability might be reflected in the rate of compensation of a Battalion Chief. As was attested to at the hearing, Lewis was not filling a vacant position as Battalion Chief. His pay, and any corresponding contributions supporting the claimed pension benefits for him and his beneficiaries, if at all, would exist only for a specific and finite period of time. Since most of the funding for pension benefits is derived from the return of long term investments of contributions over time, the increased liability of the fund will not possibly be offset by the circumscribed period that contributions were paid.

(7) The Payments Were Not Temporary Upgrade Pay

Cal. Code Regs. tit. 2, § 571, recognizes under a general category of premium pay, "temporary upgrade pay." Temporary upgrade pay is defined as "compensation *to employees* who are *required by their employer* or governing board or body *to work in an upgraded position/classification of limited duration.* The evidence in this case is clarion that the payments made to Lewis pursuant to the settlement agreement were available only to him, and were not paid

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employees will become disabled, how many employees will marry or enter into registered domestic partnerships, etc. These are often called demographic assumptions. An actuary makes assumptions about these various demographic factors and then periodically, perhaps every three to five years, compares the actual experience under the plan to the various demographic assumptions, and recommends changes to the assumptions to make them closer to actual experience." (Cal. Public Sector Employment Law (Matthew Bender 2014) Pensions and Retirement, § 9.08[2], pp. 9–30 to 9–31.) {*Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619, 624, fn. 3, reh'g denied (Apr. 24, 2015), review filed (May 6, 2015).)

because he had or would be required to work in an upgraded position regardless of duration.

D. The Settlement Payments Do Not Qualify As Payrate

Lewis apparently seeks to assert as an alternative argument not raised in the Statement of Issues, that if he is not eligible to include the settlement payments as special compensation in addition to his payrate as a Fire Chief, CalPERS should deem him to be a Battalion Chief and use the pay schedule for that position in place of his regular payrate.

(1) Payrate Defined

Section 20636, subdivision (b)(1) defines "Payrate" as "the normal monthly rate of pay or base pay of the member paid in cash *to similarly situated members of the same group or class* of employment *for services rendered* on a full-time basis during normal working hours, *pursuant to publicly available pay schedules*." (*Prentice v. Board of Admin., California Public Employees' Retirement System, supra,* 157 Cal.App.4th at 990.)

(2) The Supplemental Payments Were Not Available To Members of Lewis' Group of Employment

In determining Lewis' payrate under the PERL, CalPERS must look to the normal rate of pay or base pay of the similarly situated members of the same group or class of employment rendering services on a full time basis during normal working hours. (§20636, subd. (b); *Prentice v. Board of Admin., California Public Employees' Retirement System, supra,* 157 Cal.App.4th at 990.) As previously discussed, while Lewis may or may not have performed function of a Battalion Chief does not alter the fact that he was a Fire Captain.

Neither does the fact that he received additional payments calculated on the difference between his and another group or class of employment,

In Prentice, the City created its Department of Water and Power in order to develop its own energy delivery system and asked *Prentice*, the Director of Water Utilities, to serve as its general manager. In consideration, the City gave him a 10.49 percent pay raise. Upon his retirement, Prentice claimed his final compensation should include both his based salary rand the supplemental compensation paid by the City.

Prentice argued that because his new assignment required him to perform duties that in part mimicked some of the duties of another class for whom his increased pay was more in conformity, CalPERS should have used that classification in addition to his own in reviewing the limitations on his payrate. However, in rejecting this argument the court found CalPERS acted properly in restricting its review to Prentices primary classification, holding that "for purposes of applying the limitations on compensation earnable set forth in the PERL that an employee may be a member of more than one group or classification" and "...would plainly give local agencies a level of flexibility inconsistent with the purpose of the limitations." *(Prentice v. Board of Admin., California Public Employees' Retirement System, supra,* 157 Cal.App.4th at p. 993.)

A further reason for rejection of Lewis' claim to be treated similar to higher management group and class of employee is the case of *Snow v. Bd. of Admin.* (1978) 87 Cal. App. 3d 484, 490-91 (*Snow*). In *Snow*, the member argued that notwithstanding the fact that he had not been promoted, he had

nevertheless perfumed the duties of a higher classification and in fact had an award based on such assertion granted by the Board of Control. Seeking to require the amount to be included it in calculating his pension benefit over the denial by CalPERS, the court denied *Snow's* request, holding:

"We note further that the Board of Control has been granted no authority over PERS. That authority is placed in the defendant Board. The award of the former cannot be held to have a binding effect on the latter. Nor did the Board of Control undertake to determine or purport to interfere with *Snow's* employment status. Its subject matter was money only, not classification. The propriety of its award is not before us. It has no res judicata effect. (*id.*) *We hold that the award is not "compensation earnable"* by *Snow*. As we have noted, *Snow* was entitled to the position of assistant land agent and not that of associate land agent. The compensation earnable by him therefore must be computed on the basis of "the average time put in" by assistant land agents and at the assistant land agent rate of pay. (Gov. Code, § 20023.) The board correctly refused to consider the award of the Board of Control in computing *Snow's* retirement benefits."

The decision in *Snow* was later followed in *Ligon v. State Personnel Bd.* (1981) 123 Cal.App.3d 583, 589-590, in which the court refuted similar assertion as Lewis makes here that his as a Fire Captain was merely nominal and that he should nevertheless be deemed to have been a management group or class, the court held. The court concluded that "...an award would be improper: "(T)he mere assumption and performance of the duties of a higher classification cannot require that the employee be appointed to it. *Snow's* assumption, with

the concurrence of his supervisors, of the duties of an (out-of-class position) did not entitle him to the higher classification...."]

Lewis contends that because he was paid as if he were a Battalion Chief, then he should be classified as such is as erroneous under the PERL, as it was under the City's rules and policies. It is the group or class of employment that drives the pay rate, not the other way around. What a specific member is actually paid will be limited and circumscribed to that paid by similar situated members and the excess is irrelevant for use in the calculation of pension benefits. (§20636, subd. (b); *City of Sacramento v. Public Employees Retirement System, supra,* 229 Cal.App.3d at p. 1470.)

(3) The Settlement Payments Were Not Paid Pursuant to a Publicly Available Pay Schedule

The very fact that the increase pay was paid pursuant to an individual settlement agreement militates against it being treated as payrate. *(Molina v. Board of Admin., California Public Employees' Retirement System,* supra, 200 Cal.App.4th at pp. 66-67; settlement agreement not a publicly available salary schedule; *In re the Matter of Randy Adams* (OAH 2012030095 (Adams).), individual employment agreement.): Cal. Code Regs. 570.5.)[18]

In *Molina,* a former employee filed a wrongful termination action against his employer. (*Molina v. Board of Administration, supra,* 200 Cal.App.4th at p. 56.) That action was settled and pursuant to a settlement agreement. *Molina* was paid a lump sum of $200,000 he claimed as "back-pay" and requested that CalPERS include it in the calculation as compensation earnable. (id., at p. 58.) The court concluded that even if $200,000 of the settlement proceeds was

considered "back pay," that would not necessarily increase his retirement benefits because the "payrate" for the position *Molina* held was $8,527.98 per month and "was not affected by the settlement payout." (id., at p. 66.)

> "Because, under PERL, even if a portion of the settlement amount had been labeled back pay and was included in taxable income, it could not be included in *Molina*'s 'payrate' because there was no evidence that the amount was either (1) paid to similarly situated employees or (2) paid in accordance with a 'publicly available pay schedule] for services rendered on a full time basis during normal working hours.' (Gov. Code, § 20636, subd. (b)(1).)" (*Id.* at p. 67.)

In *Adams*, the court addressed the plain language and legislative history for what qualifies as a publicly available pay schedule. After a review of the plain language and legislative history, concluded as a matter of law, that an individual employment agreement even if potentially was available to the public cannot qualify as a [publicly available pay schedule, finding:

> "SB53 was designed "to curb "spiking," the intentional inflation of a public employee's final compensation, and to prevent unfunded pension fund liabilities. SB53 defined "compensation earnable" in terms of normal payrate, rate of pay, or base pay so payrates would be "stable and predictable among all members of a group or class" and "publically noticed by the governing body." The legislation was intended to restrict an employer's ability to spike pension benefits for preferred employees and to result in equal treatment of public employees. (Senate File History Re: SB 53).
>
> Using a broad interpretation of "pay schedule" based upon the inclusion of a salary disclosed only in a budget has the vice of permitting an agency to provide additional compensation to a particular individual without making the compensation available to other similarly situated employees. And, a written employment agreement with an individual employee should not be used to establish that employee's "compensation earnable" because the employment agreement is not a labor policy or agreement within the meaning of an existing regulation and would not limit on the compensation a local agency could provide to an individual employee by way of individual agreements for retirement purposes. *(Prentice v. Board of Admin., California Public Employees' Retirement System, supra,* 157 Cal.App.4th at pp.994-995.)

[18] See, RON, Exh. 3.

Lewis also asserts that his settlement agreement may have been discussed by the City also in connection with the budget (at least in closed session.) (Vol. III, 54/14-16.)

However, for reasons similar to both *Molina* and *Adams*, these arguments must be rejected. The Agreement does not conform with any of the criteria necessary for it to have been considered a publicly available pay schedule pursuant to California Code of Regulations 570.5[19] or as discussed in *Adams*. Even after its execution, the Agreement was maintained in the City's legal office. (Vol III, 26/6-13; 47; Vol. II, 111.) Furthermore, the possibility that it may have been produced in response to a public records act request or other legal process after the fact, is insufficient. (In Re Adams, supra.)

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[19] See also, California Code of Regulation's §570.5, providing:

(a) For purposes of determining the amount of "compensation earnable" pursuant to Government Code Sections 20630, 20636, and 20636.1, payrate shall be limited to the amount listed on a pay schedule that meets all of the following requirements:
(1) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;
(2) Identifies the position title for every employee position;
(3) Shows the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;
(4) Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, bi-monthly, or annually;
(5) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;
(6) Indicates an effective date and date of any revisions;
(7) Is retained by the employer and available for public inspection for not less than five years; and
(8) Does not reference another document in lieu of disclosing the payrate.
(b) Whenever an employer fails to meet the requirements of subdivision (a) above, the Board, in its sole discretion, may determine an amount that will be considered to be payrate, taking into consideration all information it deems relevant including, but not limited to, the following:
(1) Documents approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer;
(2) Last payrate listed on a pay schedule that conforms to the requirements of subdivision (a) with the same employer for the position at issue;
(3) Last payrate for the member that is listed on a pay schedule that conforms with the requirements of subdivision (a) with the same employer for a different position;
(4) Last payrate for the member in a position that was held by the member and that is listed on a pay schedule that conforms with the requirements of subdivision (a) of a former CalPERS employer."

In addition, there is no evidence that it was subject to public notice or vetting. At most, Lewis tried to illicit testimony that the terms of some potential settlement (including discussion of a promotion or a payment of a lump sum) may have been discussed by the City council. However, disclosure or even discussions related to an agreement in a budget document does not satisfy the criteria required for a publicly available salary scheduled. (Vol. III, 136; See, *Prentice v. Board of Administration, supra,* 157 Cal.App.4th at p. 994 ["Prentice points out his full salary would have been available to anyone examining the City's annual budget. However, as a practical matter, inclusion of a provisional or temporary salary in a budget document would not have afforded any other person holding the position the right to receive the same increase, where, as here, the City itself consistently recognized that the salary range did not include the raise. Because, as we view the entire statutory scheme, the limitations on salary are designed to require that retirement benefits be based on the salary paid to similarly situated employees, PERS acted properly in looking at the published salary range rather than the exceptional arrangement the City made with Prentice and reflected in the City's budget documents. The defect in *Prentice's* broad interpretation of "pay schedule" is that it would permit an agency to provide additional compensation to a particular individual without making the compensation available to other similarly situated employees."

The same "defect" infects Lewis' argument in this case. Like the court in *Prentice*, *Molina*, *Pleasanton* and *In re Adams*, this court should also reject Lewis' attempt to bootstrap his way into claiming payments paid pursuant to

personal Agreements, as compensation earnable generally and most certainly as payrate.

E. The City's Characterization Of The Settlement Payments As Pensionable Is Irrelevant

Public policy disfavors permitting a contracting employer, such as the City, to determine what elements of its compensation package should be considered compensation for retirement purposes. "[P]*ublic agencies are not free to define their employee contributions as compensation or not compensation under PERL-the Legislature makes those determinations.* Statutory definitions delineating the scope of PERS compensation cannot be qualified by bargaining agreements. (citation)." (*Oden v. Board of Administration*, supra, 23 Cal.App.4th at p. 201.)

Allowing conduct of the City to estop PERS would, in effect, permit the City to usurp PERS' statutory authority to determine compensation for retirement purposes. "To find an estoppel by privity in this context could have the pernicious effect of inducing subordinate governmental entities to disregard the rule of law." (*Hudson v. Board of Admin. of Public Employees' Retirement System, supra,* 59 Cal.App.4th at pp. 1310, 1330-32, quoting *California Tahoe Regional Planning Agency v. Day & Night Electric, Inc.* (1985) 163 Cal.App.3d 898, 905.)

Furthermore, such intent is nowhere expressed in the permit City's settlement agreement and should not be inferred. (*Molina v. Board of Admin., California Public Employees' Retirement System*, supra, 200 Cal.App.4th at pp. 61-62 ["... we agree with the trial court's conclusion that the settlement

agreement was integrated. *Molina* argues that the settlement agreement was not integrated and that both the ALJ and the trial court should have considered extrinsic evidence on the issues of (1) the proper characterization of the settlement proceeds, and (2) which of the parties had the right to designate such characterization. He argues ... that his right to characterize the settlement proceeds was made a "condition of settlement" and that Oxnard had "agreed to allow *Molina* to characterize the settlement proceeds. *Molina* argues further that he and Oxnard had an "understanding" about how the settlement proceeds meet the PERL standards for increasing *Molina*'s pension and that this understanding is, "[e]xplicit in the language of the Settlement Agreement." He goes on to state that [i]mplicit in that understanding is that *Molina* had the right to characterize whether the proceeds were salary or tort damages." This argument is without merit because it is not supported by the record. Not only did *Molina* fail to provide any evidence before the ALJ to support these contentions, they are inconsistent with the law on integrated agreements."]

Perhaps the silence of the agreement presages the conclusion later testified to at hearing by the City's former attorney who was charged with the implementing the agreement; that characterizing the payments as compensation earnable was improper if not unlawful. (Vol., III, 53/1-25 – 54/1-2.) Nor that CalPERS refusal to include the reported payments in Lewis' final compensation would even result in a breach of the Agreement. (Vol. II, 48.)

F. COLLATERAL ESTOPPLE IS NOT APPROPRIATE

Qualifying under the PERL neither payrate nor special compensation, the increased compensation cannot be included in Lewis' final compensation.

(*Molina v. Board of Admin., California Public Employees' Retirement System, supra,*) 200 Cal.App.4th at 66, citing *Prentice v. Board of Admin., California Public Employees' Retirement System*, supra, 157 Cal.App.4th at p. 983.) However, failing on all grounds under the provisions of the PERL, Lewis may attempt to invoke estopple to come down as some *deus ex machina* to resolve all conflicts brought about by respondents' scheme. However, estopple is not available to provide Lewis a benefit not otherwise available under the express provisions of the PERL. (*Chaidez v. Board of Administration of California Public Employees' Retirement System* (2014) 223 Cal.App.4th 1425, 1432, review denied (May 14, 2014.)[20]

A party asserting the doctrine of equitable estoppel must establish: (1) the party to be estopped was apprised of the facts; (2) the party to be estopped intended or reasonably believed that claimant would act in reliance on its conduct; (3) the claimant was ignorant of the true state of facts; and (4) the claimant actually and reasonably relied on the conduct of the party to be estopped to his detriment. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489 *(Mansell)*. Where estoppel is sought to be asserted against a governmental entity, a fifth element must be established - the interests of a private party must outweigh by effect on public interests and policies. *Mansell*, at pp. 496-97. It is the burden of the party asserting estoppel to affirmatively establish each of its elements. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 fn.5. ["[W]here one of the elements of an estoppel is missing there can be no

[20] "[N]o court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations." (*Ibid.*; *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 869.)

estoppel."]; *People ex rel. Franchise Tax Bd. v. Superior Court* (1985) 164 Cal. App.3d 526, 552.)

In this case, neither Lewis nor the City sought to confirm with CalPERS prior to entry into the Agreement whether the proceeds would qualify as compensation earnable and final compensation. Even though Lewis purportedly contacted CalPERS at least once prior to his actual retirement to inquire about the status of the additional sum, his testimony as to what he may have actually informed CalPERS is utterly confusing and ambiguous. More importantly, even if there were any basis for estopple otherwise, which CalPERS does not believe to exist, permitting estopple in this case is specifically proscribed by the act that it would undoubtedly conflict with strong public interest by permitting "local agencies from artificially increasing a preferred employee's retirement benefits by providing the employee with compensation increases which are not available to other similarly situated employees." (*Prentice v. Board of Admin., California Public Employees' Retirement System,* surpa,157 Cal.App.4th at p. 993.)

Lewis' alternative argument that CalPERS breached its fiduciary duty theory "is simply a way of restating his equitable estoppel claim. PERS' fiduciary duty to its members does not make it an insurer of every retirement promise contracting agencies make to their employees. PERS has a duty to follow the law. As stated in *City of Oakland,* the policy reflected in the constitutional provision is to "ensure the rights of members and retirees to their full, earned benefits." (*City of Oakland, supra,* 95 Cal.App.4th at p. 46.) It does not authorize an order compelling PERS to pay greater benefits than section 20636 allows, either by estoppel or as tort damages for an inadvertent failure to

timely correct a contracting agency's error. (Cf. § 20160, subd. (a)(3) [authorizing PERS to correct errors or omissions of members, contracting agencies, or itself, but not to provide the party seeking correction with a "status, right, or obligation not otherwise available" under the PERL].)"[21] *(City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System, supra,* 211 Cal.App.4th at 544.)

G. FINAL SETTLEMENT PAY

Even if otherwise cognizable as compensation enable, Lewis' settlement proceeds are appropriately excluded as final settlement pay. Final settlement pay is statutorily defined as "pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment. (§20626, subd. (f).) The Legislature expressly charged the Board with the promulgation of regulations that delineate more specifically what constitutes final settlement pay. (ibid.)

In addition to the statutory description of final settlement pay, California Code of Regulations, Title 2, § 570 provides that [f]inal settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable." Furthermore, the proscribed payments may be based on accruals over a period of prior service and are not limited to the compensation *paid during the period of final compensation" whether "paid in either lump-sum, or periodic payments." (ibid.)* It may also take the form of a "retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS. (ibid.)

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[21] CalPERS "shall" correct actions taken resulting from errors or omissions of contracting agency or this System itself and to make adjustments to member's retirement benefits. (§§20160, 20164) whenever possible, CalPERS shall make such corrections retroactively. (§§20610, subd. (e); 20163.)

In this case, the payments were admitted, calculated, and adjusted in contemplation of Lewis' retirement. (Vol. III, 160/19-24 – 164/24.) The fact that he stayed on the City's books while burning off leave under section 4850 is not determinative. Like a "golden parachute, the sudden and unanticipated increase in the reported compensation isolated to this specific member over a relatively brief period of time, will result in the unanticipated and unfunded liability to the public employees retired fund. These unanticipated actuarial losses are not redressed by contribution have been paid by on behalf of a single individual. In this case, contributions were limited only during the brief tenure of Lewis. As discussed, infra, a creation of an unfunded liability is unavoidable.

CONCLUSION

That fact that the City decided for fiscal and other reasons to settle a lawsuit by a single employee by agreeing to payments in part through the member's pay warrants and reporting the same to CalPERS, does not change the character or purpose of those payment. Nor does the action of respondents preclude CalPERS from the proper administration of the PERL.

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As did the Court concluded in an analogous case:

"Because, as we view the entire statutory scheme, the limitations on salary are designed to require that retirement benefits be based on the salary paid to similarly situated employees, *PERS acted properly in looking at the published salary range rather than the exceptional arrangement the city made with Prentice and reflected in the city's budget documents. The defect in Prentice's broad interpretation of 'pay schedule' is that it would permit an agency to provide additional compensation to a particular individual without making the compensation available to other similarly situated employees.*" (*Prentice v. Board of Administration, supra,* 157 Cal.App.4th at p. 994, italics added.)

Respectfully submitted,

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM

Dated: June 1, 2015 BY _____
WESLEY E. KENNEDY
Senior Staff Counsel

PROOF OF SERVICE

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

On June 1, 2015, I served the foregoing document described as:

CLOSING BRIEF - In the Matter of the Final Compensation Calculation of RICHARD LEWIS, Respondent, and CITY OF SAN BERNARDINO, Respondent.; Case No. 2014-0256; OAH No. 2014040945.

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

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Executed on June 1, 2015, at Sacramento, California.

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

Odessa Moore
NAME

SIGNATURE