



Law Offices of John Michael Jensen
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June 18, 2015
BY EMAIL

Mary Agnes Matyszewski
Office of Administrative Hearings
San Diego Regional Office
1350 Front Street, Suite 3005
San Diego, CA 92101

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

Dear Judge Matyszewski:

Attached please find a Request for Judicial and Official Notice and a Declaration of Richard Lewis submitted as part of the final briefing process on the above-captioned case.

In its Reply Brief, CalPERS newly raised an issue of who funds Mr. Lewis' pension benefits. CalPERS incorrectly implied that if Mr. Lewis were awarded the higher pension, it would somehow mean the cost of that pension would be foisted upon other CalPERS-contracting agencies or CalPERS itself.

The Request for Official Notice is appropriate to show the undisputed fact that the City of San Bernardino alone bears the full present and future cost and obligation to fund Richard Lewis' CalPERS retirement benefits

Very truly yours,

A handwritten signature in black ink, appearing to be "Jm", written over a horizontal line.

John Michael Jensen

JMJ:gm
Enclosures
cc: Wesley Kennedy, counsel for CalPERS
Richard Lewis





1 JOHN MICHAEL JENSEN, State Bar No. 176813
2 LAW OFFICES OF JOHN MICHAEL JENSEN
3 11500 West Olympic Blvd Suite 550
4 Los Angeles CA 90064
5 (310) 312-1100

6 Attorneys for Respondent Richard Lewis

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,

DECLARATION OF RICHARD LEWIS

14 Respondents.
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17 I, RICHARD LEWIS, declare as follows:

18 1. The statements herein are based upon my personal knowledge and if called to
19 testify under oath in court I could and would so testify.

20 2. I am over 18 years old.

21 3. I am the Respondent in this action.

22 4. On March 31, 1981, I began working as a firefighter for the City of San
23 Bernardino ("City") in the San Bernardino Fire Department ("SBFD"). I was enrolled as a
24 member of the California Public Employees' Retirement System ("CalPERS") at that time.

25 5. I continued working for the City as a member of the SBFD from then until my
26 retirement on November 1, 2012.

27 6. I only earned CalPERS service credit and CalPERS retirement benefits through
28 my work at the City of San Bernardino.

1 7. I remained a member of CalPERS throughout my employment with the SBFD.

2 8. I was never a member of any other public employee retirement system in
3 California.

4 9. Thus, the City is entirely responsible for paying all contributions associated with
5 my CalPERS retirement, which is entirely a result of approximately thirty years of employment
6 with the City.

7 10. To the best of my knowledge and belief, the City made all necessary pension
8 contributions to CalPERS attributable to the salary earned from the City, including the Battalion
9 Chief salary I received during my approximately eight (8) final years of employment.

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

12
13 DATED: June 18, 2015

Richard Lewis, Respondent

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through my work at the City of San Bernardino.

7. I remained a member of CalPERS throughout my employment with the SBF.

8. I was never a member of any other public employee retirement system in California.

9. Thus, the City is entirely responsible for paying all contributions associated with my CalPERS retirement, which is entirely a result of approximately thirty years of employment with the City.

10. To the best of my knowledge and belief, the City made all necessary pension contributions to CalPERS attributable to the salary earned from the City, including the Battalion Chief salary I received during my approximately eight (8) final years of employment.

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

DATED: June 18,
2015


Richard Lewis, Respondent

- 2 -

DECLARATION OF RICHARD LEWIS



1 JOHN MICHAEL JENSEN, State Bar No. 176813
2 LAW OFFICES OF JOHN MICHAEL JENSEN
3 11500 West Olympic Blvd Suite 550
4 Los Angeles CA 90064
5 (310) 312-1100

6 Attorneys for Appellant Richard Lewis

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' MOTION TO STRIKE
CALPERS REQUEST FOR OFFICIAL
AND JUDICIAL NOTICE

14 Appellants.
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17 To all parties and their attorneys of record:

18 PLEASE TAKE NOTICE that Richard Lewis move the court for an order striking
19 CalPERS Request for Official Notice filed in this action.

20 This motion is made under Government Code Sections 11506(a)(2) as the pleading does
21 not state grounds or act on which the agency may proceed, the pleading is indefinite
22 (Government Code Sections 11506(a)(2)) and additionally Code Civ. Proc.. §§ 435 to 437 on
23 the grounds that CalPERS seeks to improperly put irrelevant and unsupported material before the
24 court in a defective motion that purports to be a Request for Official and Judicial Notice.
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26 The Request for Official Notice is defective procedurally and substantially. For example,
27 even though it maintains a precedential case index for these purposes, CalPERS tries to introduce
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1 non-precedential case of Randy Adams. The use of that case in this matter is an underground
2 regulation and forbidden.

3 CalPERS also attempt to introduce without foundation or context the "Civil Service
4 Rules and regulation For the Classified Service of the City of San Bernardino", which were
5 available to CalPERS at the hearing but not introduced. It is irrelevant.

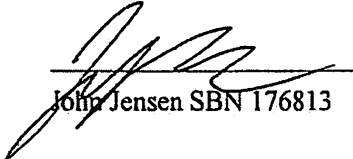
6 CalPERS also seeks to introduce a Management MOU that was also available during the
7 hearing but not testified to or admitted.

8 CalPERS RJN refers to Exhibit 15 and 16 which are not even provided or discussed.

9 The whole RJN is defective and must be stricken.

10 The motion is based on this notice of motion, the memorandum of points and authorities
11 that accompanies this notice, the pleadings and records on file in this action, and such oral and
12 documentary evidence as may be presented at the hearing.

13 Dated June 3, 2015

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15 John Jensen SBN 176813

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Memorandum of Points and Authorities'

Improperly, CalPERS attempts to introduce irrelevant information in a defective RJN.

Even though it maintains a precedential case index for these purposes, CalPERS tries to introduce non-precedential case of Randy Adams. The use of that case in this matter is an underground regulation and forbidden.

CalPERS also attempts to introduce without foundation or context the "Civil Service Rules and regulations For the Classified Service of the City of San Bernardino", which were available to CalPERS at the hearing but not introduced. It is irrelevant.

CalPERS also seeks to introduce a Management MOU that was also available during the hearing but not testified to or admitted.

CalPERS RJN refers to Exhibit 15 and 16 which are not even provided or discussed

The whole RJN is defective and must be stricken.

FACTS

Documenting Lewis' Time Acting in the BC Position

1. The SBFDD does not document every time someone is in an acting BC position. (CG 118:17-22.) The records about people functioning in an acting capacity may never have been made. (CG 119:10-13.)

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

Acting Pay

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

1 4. Employees track "acting pay" to make sure that they get the extra pay or put it on
2 their resume for promotion. (CG 113:1-5.)

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

6 6. CalPERS takes the position that Lewis did not qualify for what the City calls
7 "acting pay." However, failed to provide any persuasive evidence of that at the hearing.

8 7. Now after the hearing, CalPERS seeks to introduce documents without foundation
9 or relevance to confuse the issues.

10 8. City HR employee Helen Tran testified that there are no documents that the City
11 keeps about personnel matters where there is no fiscal impact. (Testimony of Helen Tran ("HT"),
12 2/26/15, 129:2-25.) By financial impact, Tran meant the individual was receiving separate or
13 additional pay. (HT 124:16-17.)

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

16 10. The testimony is clear and undisputed that the City would not maintain acting pay
17 documentation regarding Lewis because Lewis was already receiving the BC pay.

18 11. According to the testimony about their understanding and actions, the Fire Chief
19 alone certifies the acting pay that allows the individual to receive the pay of the higher position.
20 (SE 66:4-7.) Acting pay does not have to get City Council approval. (SE 66:4-7.)

21 12. The testimony was that *Charter* section C32, sub-part B, "Special Salary
22 Provisions" indicates that the Chief certifies that the employee is being assigned to the acting
23 position. (SE 66:23-25.)

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

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LAW

I. Request for Official Notice Contain Irrelevant Matter and is Defective on its Face

The RJN is improper and does not refer to documents that it purports to refer to.

The RJN or request for official notice must be struck in its entirety.

II.

THE COURT IS AUTHORIZED TO STRIKE ALL OR PART OF A PLEADING

1. General Authority Regarding Striking Pleadings or Portions of Pleadings.

This motion is made under Government Code Sections 11506(a)(2) as the pleading does not state grounds or act on which the agency may proceed, the pleading is indefinite (Government Code Sections 11506(a)(2))

Additionally this Motion to Strike is made under the Code of Civil Procedure, expressly or by implication.

"Any party, within the time allowed to respond to a pleading may serve and file a notice of motion to strike the whole or any part thereof, but this time limitation shall not apply to motions specified in subdivision (e) [motions to strike after failure to amend following judgment on the pleadings]."

C.C.P. § 435(b)(1).

"The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper:

(a) Strike out any irrelevant, false, or improper matter inserted in any pleading.

(b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." C.C.P. § 436.

C.C.P. § 435(b)(3) authorizes a party, within the time allowed to respond to a pleading, to serve and file a notice of motion to strike the whole or any part of a demurrer.

1 Where pleadings are defective, "the defect may be raised by a demurrer or motion to strike or by
2 motion for judgment on the pleadings." *Coyne v. Krempels*, 36 Cal. 2d 257, 223 P.2d 244 (1950).

3 III.

4 GROUND EXIST FOR AN ORDER STRIKING Entire Request For Official and Judicial

5 Notice

6 "A notice of motion to strike a portion of a pleading must quote in full the
7 portions sought to be stricken except where the motion is to strike an
8 entire paragraph, cause of action, count or defense. Specifications in a
9 notice must be numbered consecutively."
10 Cal. Rules of Court, rule 3.1322(a).

11 As set forth in the Notice herewith, Lewis seeks an order striking the entire Request for
12 Official Notice because it is irrelevant, false, improper, and/or not drawn in conformity with
13 laws, local rules, or order of court

14 IV.

15 THE GROUNDS FOR THIS MOTION APPEAR ON THE FACE OF THE PLEADING
16 AND/OR FROM MATTERS OF WHICH THE COURT IS REQUIRED TO OR MAY TAKE

17 JUDICIAL NOTICE

18 "The grounds for a motion to strike shall appear on the face of the challenged pleading or from
19 any matter of which the court is required to take judicial notice." (C.C.P. § 437(a).) "When the
20 motion to strike is based on matter of which the court may take judicial notice pursuant
21 to Section 452 or 453 of the Evidence Code, such matter shall be specified in the notice of
22 motion, or in the supporting points and authorities, except as the court may otherwise permit."
23 (C.C.P. § 437(b).)
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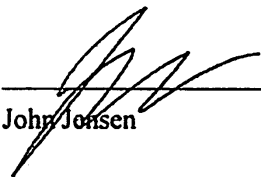
1 As set forth above, the grounds for striking the pleading or the designated portions of the
2 pleading appear on the face of the pleading

3 VI.

4 CONCLUSION

5 Based upon the foregoing facts and authorities, Lewis respectfully requests that the court issue
6 an order striking *CalPERS Request for Official Notice*

7 Dated: June 3, 2015

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9 
10 _____
11 John Jensen

12 DECLARATION

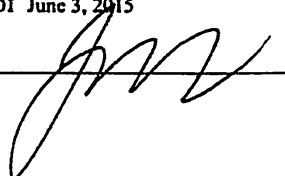
13 1. I am an attorney duly licensed to practice law before all courts of the State of California.
14 My law firm is counsel for Richard Lewis in this action. This declaration is submitted in support
15 of a Motion to Strike *CalPERS Request for Official Notice*.

16 2. The following facts are within my personal knowledge and, if called as a witness herein,
17 I can and will competently testify thereto.

18 3. Attached hereto as Exhibit "A" is a true and correct copy of the Request for
19 Official Notice.

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

22 Executed this day of June 3, 2015

23
24 By: 
25 _____

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



1 **MATHEW G. JACOBS, GENERAL COUNSEL**
2 **WESLEY E. KENNEDY, SENIOR STAFF ATTORNEY, SBN 99369**
3 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**
4 **Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95814**
5 **P.O. Box 942707, Sacramento, CA 94229-2707**
6 **Telephone: (916) 795-0725**
7 **Facsimile: (916) 795-3659**

8 **Attorneys for California Public Employees'**
9 **Retirement System (CalPERS)**

10 **BOARD OF ADMINISTRATION**

11 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

12 **In the Matter of the Calculation of Final Compensation**) **CASE NO. 2014-0256**
13) **OAH NO. 22014040945**
14)
15 **RICHARD LEWIS,**) **CALPERS' REQUEST FOR**
16) **OFFICIAL NOTICE**
17) **(Gov. Code § 11515)**
18)
19 **Respondent,**)
20)
21 **and**)
22)
23 **CITY OF SAN BERNARDINO,**)
24)
25 **Respondent.**)

17 **TO THE COURT AND ALL COUNSEL AND PARTIES OF RECORD:**

18 **The Board of Administration of the California Public Employees' Retirement**
19 **System, California Public Employees' Retirement System, in their official capacity,**
20 **(collectively "CalPERS") hereby requests Official Notice pursuant to Government Code**
21 **section 11515 and Evidence Code sections 452 and 453, of the following material**
22 **which constitute official acts, publications, and official records created and/or**
23 **maintained by of the California Public Employees' Retirement System ("CalPERS") in**
24 **the performance of its duties and functions. True and correct copies of the documents**

25 **CALPERS' SUPPLEMENTAL REQUEST FOR OFFICIAL NOTICE (Gov. Code § 11515)**
In Re the Matter of Richard Lewis

1 are submitted as Exhibits in the above-captioned matter and have previously
2 addressed at the hearing and discussed in the closing brief of CalPERS filed and
3 served concurrently herewith. The documents and portions thereof are relevant to
4 indicate the criteria for acting pay and publicly available pay schedules. Complete
5 copies are referenced below by hyper-link, however, for convenience pertinent
6 excerpts of RON Exhibit "B" and "C" are attached here to.

7 I. The Board seeks official notice of the following materials:

8 1. Board of Administration CalPERS Decision Adopting as its
9 Final Decision, the Proposed Decision in *In re the Matter of Randy Adams*
10 (OAH 2012030095) (Exh. A)

11 <http://www.calpers.ca.gov/index.jsp?bc=/about/committee-meetings>
12 [/archives/full-201503.xml](http://www.calpers.ca.gov/index.jsp?bc=/about/committee-meetings/archives/full-201503.xml)¹

13 <http://www.calpers.ca.gov/eip-docs/about/committee-meetings/agendas>
14 [/full/201503/item09a-attacha.pdf](http://www.calpers.ca.gov/eip-docs/about/committee-meetings/agendas/full/201503/item09a-attacha.pdf)

15 2. San Bernardino City Charter. (Exh. B)

16 <http://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx>
17 [?blobid=2375](http://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=2375)

18 3. Civil Service Rules and Regulations For the Classified Service of City
19 of San Bernardino. (Exh. C.)

20 <http://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=>
21 [16677](http://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=16677)

22 4. Management MOU -- (Exh. D.)

23 <http://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx>

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25 ¹ *In re Adams* is currently pending before the Board for designation as a "precedential decision."

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II. Grounds for Official Notice

Exhibit 15 and 16 consist of records of an administrative board and a record of a judicial proceeding, respectively. They are not subject to reasonable dispute and are relevant to the proceedings before this court. The Court can take official notice of official acts and files of any state administrative agency. (*Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1750; *Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 125, "records and files of an administrative board are properly subject to judicial notice," *Carleton v. Tomosa* (1993) 14 Cal.App.4th 745, 753, fn. 1, handbook published public agency, Evidence Code, § 452(c); See also, Evid. Code, § 1280.) Courts may also take official notice of facts not reasonably subject to dispute as well as those facts capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code § 452(g),(h).) The materials subject to the Board's Request for Official Notice constitute publications, records maintained by, and official acts of a public agency and facts not reasonably subject to dispute under Evidence Code section 452. A request for official notice of an unpublished decision is properly granted as evidence of the Board's administrative interpretation of governing statutes. (See, *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal. App. 4th 29, 57; *Styne v. Stevens* (2001) 26 Cal. 4th 42, 53, footnote 4.) Further, the existence and genuineness of the materials, as well as their significance, constitutes facts that are of common knowledge not reasonably subject to dispute under Evidence Code section 452, subdivision (g).

Gov't Code §1425.60; <http://www.calpers.ca.gov/index.jsp?bc=/about/leg-reg-statutes/board-decisions/res-precedential-bd-dec.xml>.)

1 Evidence Code section 453 mandates that the court take official notice of any
2 matters specified in section 452 if a party requests it, and (a) sufficient notice is given
3 to the adverse party; and (b) sufficient information has been furnished to the court to
4 take official notice.

5 **III. Conclusion**

6 Based on the above and the Declaration of Wesley E. Kennedy, filed and
7 served herewith, the Board requests that the court take official notice of the document
8 described above.

9
10 **BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

11 Dated: June 1, 2015

12 BY: 

13 **WESLEY E. KENNEDY,
Senior Staff Attorney**

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DECLARATION OF WESLEY E. KENNEDY

I, WESLEY KENNEDY, DECLARE:

1. I am an attorney at law, duly licensed to practice law before all the courts of the State of California. I am a Senior Staff Attorney for the California Public Employees' Retirement System, and am one of the attorneys of record in the above-captioned case. If called upon to testify as a witness, I could and would testify competently, of my own personal knowledge, as to the matters stated in this declaration.

2. Submitted with this Declaration, CalPERS Exhibits A through C are true and correct copies of the documents identified and described in CalPERS Request for Official Notice, to which this declaration is a part.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and was executed on June 1, 2015, in Sacramento California.



WESLEY E. KENNEDY, Senior Staff Attorney
CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM



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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 3, 2015, I served the following document (s) by the method indicated below:


RICHARD LEWIS' MOTION TO STRIKE CALPERS REQUEST FOR OFFICIAL AND JUDICIAL NOTICE

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 3, 2015, at Los Angeles, California


Griselda Montes De Oca