

Filed OAH
By: Richard Lewis 06/19/15 3:51

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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' REPLY BRIEF

14 Appellants.
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INTRODUCTION

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2 Disregarding basic facts and mischaracterizing Lewis' BC pay as tort payments in
3 settlement of a lawsuit, CalPERS Closing Brief wrongly characterizes the BC pay as
4 supplemental payment to Lewis in addition to and unrelated to the services that he performed for
5 the City and unrelated to a status as confidential management personnel under the CBAs.

6 CalPERS basic premise is flawed and contrary to the record: CalPERS argues that Lewis
7 was a fire Captain who performed only Fire Captain duties and was paid a Fire captain's salary
8 plus an additional "tort" settlement associated with settlement of a law suit. CalPERS argues that
9 the BC payments arose only from a settlement, and the payments were not related to his actual
10 work, his duties, or his right to hold the BC position. CalPERS asserts that the payments to
11 Lewis were not associated with the performance of any actual duties, no actual changes in his
12 responsibilities, and no change in which Collective Bargaining Agreement applied to him. CCB
13 p 11-15.

14 However, the clear facts in the administrative record oppose each of CalPERS faulty
15 premises. In this reply brief, we show (again) that Lewis was a member of the BC bargaining
16 group and subject to the terms of the Confidential management MOU that represented BCS, and
17 that he received the same benefits and pay as other BC, while also performing the duties of BC.
18 The payments were for a position that Lewis earned and had the right to occupy and for which he
19 regularly performed the duties and requirements. The BC pay was reported regularly on payroll
20 checks associated with and regularly paid for Lewis's work for the City, and were taxable
21 compensation to Lewis (not tort recovery). The settlement agreement simply denied Lewis the
22 title of BC, however titles are not determinative of pension rights under the PERL.

23 The issues in this hearing are (1) how Mr. Lewis' pay received from the city of San
24 Bernardino qualifies under the Public Employees Retirement Law ("PERL") and (2) whether
25 CalPERS is barred by laches or estopped to deny the effect of CalPERS prior "final decision"
26 that the pay was "temporary upgrade pay" or otherwise qualifying under the PERL. *Testimony of*
27 *Laura King Yarnornicky* LKY 87:5-92:6. EXHIBITS 7, 39.

28 In his Notice of Defense and in this hearing, Mr. Lewis has argued that his Battalion

1 Chief compensation qualifies as payrate or special compensation. Mr. Lewis also asserted other
2 defenses such as equitable estoppel, collateral estoppel, res judicata, and laches. Mr. Lewis is
3 allowed under the Administrative Procedures Act to add new matter by way of his Notice of
4 Defense and other pleadings and place those matters at issue. CalPERS wrongly tries to narrow
5 the "sole issue" to that in the Statement of Issues, as whether the payments are "temporary
6 upgrade pay", while misconstruing Lewis' argument as referring to "Settlement payments" and
7 estopped from excluding payments. CalPERS Closing Brief CCB 1:20 to 2:5.

8 Lewis regularly received the BC pay in his payroll checks during the period that they
9 were earned. Lewis pay was historically consistent with BC pay and regularly and consistently
10 paid. The fact that there were no "settlement payments" is clear in that the City only paid Lewis
11 by regular payroll check associated with his actual work or his lawful excuse from work under
12 disability.

13 Mischaracterizing the BC pay as "resolution of a tort" claim (which is not taxable and
14 would not occur on a taxable payroll check), CalPERS wrongly argues that Lewis "received the
15 payments not as remuneration for services performed but as consideration for the resolution of a
16 lawsuit". CCB 8:11-13. CalPERS argues that there is no evidence that "the settlement payments"
17 were remuneration for services Lewis performed or for which he was excused from performing.
18 CCB 9:3-6.

19 CalPERS "tort" argument is simply and patently false. CalPERS itself pointed out that
20 that the BC pay occurred regularly on the payroll check in evidence in this court. The BC pay
21 was taxable to Lewis. They were not tort recovery or settlement payments.

22 CalPERS Lueras testified and opined that the payments were not "final settlement pay".
23 Any reference to the *Molina* case is not appropriate because Lewis worked for the City or was on
24 disability during all of the time in question and the compensation that he received was for
25 performing regular full time services for the City or for 4850 time on disability.

26 Regarding "temporary upgrade pay", CalPERS required the City to report them as
27 temporary upgrade pay. The testimony is clear that the City of San Bernardino desired the pay to
28 Lewis to increase his pension, contacted CalPERS for this purpose, and provided documentation

1 to CalPERS for purposes of gaining a final determination on this matter. After reviewing the
2 same documents that were presented in this case (i.e. no new facts have arisen), CalPERS
3 specifically ruled that the amount would increase Lewis' pension and instructed the City to
4 report it to CalPERS as "temporary upgrade pay". LKY 86:5-92:6. EXHIBITS 7, 39.

5 Because CalPERS' Carlous Johnson specifically gave Laura King Yarnovnicka a "final
6 determination", collateral estoppel and res judicata apply to bar this process from changing that
7 determination. 86:5-92:6.

8 Regarding "acting pay" to the extent it could apply to this matter, Lewis testified that he
9 was not required to document his work as BC, including because the City did not require
10 documentation if there was no financial impact, the Fire Chief Pitzer designated Lewis' duties
11 including assigning the BC duties when Pitzer signed the Settlement Agreement (among other
12 things), he already received the pay, and other reasons. Since Lewis was already paid the BC pay
13 and treated as a BC under the collective bargaining agreement, he was paid no matter what duties
14 that he was assigned. CalPERS takes these comments out of context and misconstrues them.

15 CalPERS legal arguments that the payments were not made pursuant to a Labor Policy or
16 Agreement is a mixed question of fact and law. Lewis performed the duties of a BC and received
17 the pay of a BC pursuant to publicly available pay schedules. CalPERS tries to argue that
18 Settlement agreement was the document that created or gave rise to Lewis's rights to receive the
19 BC pay, but the Settlement agreement simply recognized that Lewis had earned the BC position
20 but was wrongly denied the position (and the title). The BC rights were not created in the
21 Settlement agreement, and in fact Lewis only suffered detriment by the Agreement: he received
22 the pay, duties, and responsibilities of a BC but was assigned a fire captain title. In settlement,
23 Lewis accepted the detriment of having to retain the title of Fire Captain but perform the duties
24 of BC, receive the pay of the BC, and be subject to the MOU of other BCs.

25 Because the settlement agreement was not the source of the pay rights (his lawful right to
26 be promoted created the BC right), the Settlement agreement itself did not need to qualify as a
27 labor policy or agreement under the *Government Code Section 20636*. Lewis did not receive any
28 compensation pursuant only to terms of the settlement agreement, as he had already earned the

1 BC pay by his merit and his right to promotion.

2 Lewis earned the actual pay and compensation in rendering service to the City thereafter,
3 including by performing the BC duties. The BC compensation rights and payrate already existed
4 in the MOU and the publicly available pay schedule that provided for the BC pay. The
5 confidential management MOU applies to BCs is a labor policy or agreement that qualifies under
6 and satisfies Government Code Section 20636. When viewing the settlement agreement in its
7 appropriate context, the BC pay that Lewis received properly satisfied the publicly available pay
8 schedule and labor agreement requirements under the PERL.

9 In this multi-day hearing, the evidence clearly showed that Lewis performed the duties of
10 the BC and was treated as a BC under the collective bargaining agreement. CalPERS did not
11 introduce any contrary evidence regarding the duties that Lewis performed.

12 CalPERS arguments focus on the title of "Fire Captain" and then argue that because
13 Lewis had the label of a Fire Captain, he could not be covered under the Management and
14 confidential MOU that applied to BCs. However, CalPERS focus on "title" is misplaced and
15 contrary to the PERL. A job "title" is irrelevant under the PERL. "Title" does not determine the
16 group or class under the PERL.

17 Instead, it is the duties performed, the collective bargaining agreement (CBA), and other
18 criteria in Section 20636(e) that determine whether an individual is in the same group or class
19 with other individuals. Since the PERL establishes a group or class based on duties and CBA,
20 Lewis was in same group or class with other BC.

21 Lewis has not claimed that he was in more than one group or class. Lewis was only in the
22 BC group or class for CalPERS purposes under the MOU that applies to BCs. Any other
23 differences between Lewis and other BCs that do not involve pensionable compensation are
24 irrelevant for these purposes.

25 Although CalPERS cites to *Snow*, it is more helpful to Lewis than CalPERS. *Snow*
26 involved a situation where " the mere assumption and performance of the duties of a higher
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28

1 classification¹ cannot require that the employee be appointed to [the higher position]” *Snow v.*
2 *Bd. of Admin.*, 87 Cal. App. 3d 484, 489, 151 Cal. Rptr. 127, 130 (Ct. App. 1978). “Since the
3 Personnel Board failed or refused to classify Snow as an associate land agent, he was not entitled
4 to that status for the purpose in question.” *Snow v. Bd. of Admin.*, 87 Cal. App. 3d 484, 490, 151
5 Cal. Rptr. 127, 131 (Ct. App. 1978)

6 However, in *Snow*, the Board of Control [did not] undertake to determine or purport to
7 interfere with Snow’s employment status. *Snow v. Bd. of Admin.*, 87 Cal. App. 3d 484, 490, 151
8 Cal. Rptr. 127, 131 (Ct. App. 1978)

9 In *Snow*, the Court based its decision² in part on the fact that Snow made “no contention
10 that during the disputed period he ever took part in a competitive examination for or was
11 appointed to the [higher] position of associate land agent. *Snow v. Bd. of Admin.*, 87 Cal. App. 3d
12 484, 488, 151 Cal. Rptr. 127, 130 (Ct. App. 1978)³

13 In this case⁴, obviously, Lewis not only took the competitive exam, but that he passed it,
14 was entitled to the position, and then was wrongfully denied the BC position. The City
15

16 ¹ In *Snow*, the State Personnel Board had jurisdiction “to create and adjust classes of
17 positions within the civil service system (Gov.Code, ss 18702, 18800), to establish and adjust the
18 salary to be paid state employees (Gov.Code, ss 18850-18852), to establish and maintain
19 employment lists for state positions (Gov.Code, s 18900 et seq.), and to establish and maintain
20 promotion lists (Gov.Code, s 18950 et seq.) *Snow v. Bd. of Admin.*, 87 Cal. App. 3d 484, 488,
21 151 Cal. Rptr. 127, 130 (Ct. App. 1978)

22 ² Snow concedes that during the period in question he never took a competitive examination for
23 the position of associate land agent, and that the Department of Water Resources and the State
24 Personnel Board did not certify him to that position. In fact, the Department of Water Resources
25 repeatedly refused to initiate the procedure to secure that status for him. It is manifest therefore
26 that the highest position he could legally hold during the time in question was that of assistant
27 land agent. *Snow v. Bd. of Admin.*, 87 Cal. App. 3d 484, 489, 151 Cal. Rptr. 127, 130 (Ct. App.
28 1978)

29 ³ In his claim before the Board of Control he alleged that “(d)uring this four-year period (he) and
30 his supervisors repeatedly requested that (he) be permanently classified as an Associate Land
31 Agent,” but that no examination was scheduled which would have enabled him to be so
32 appointed; despite the fact that his request for promotion was repeatedly denied, he continued to
33 perform the duties of the higher classification. *Snow v. Bd. of Admin.*, 87 Cal. App. 3d 484, 488,
34 151 Cal. Rptr. 127, 130 (Ct. App. 1978)

35 ⁴ In *Snow*, there was no acceptance of an appointment to the higher position, and Snow was fully
36 aware that his requests therefor had repeatedly been rejected. There was neither a good faith

1 recognized that Lewis was qualified to perform the BC duties, grouped him with the other BC by
2 duty and CBA, and treated him like a BC when performing confidential or management tasks.
3 Since the City had the power to classify Lewis in fact as a BC by causing him to perform the
4 duties of BC pursuant to the Management and confidential CBA, then the City classified him as
5 a BC for CalPERS purposes as well (as Lueras admitted that the City classifies the employees
6 and CalPERS accepts the City's classifications.). Withholding the title of BC and having some
7 document that use the title as a fire captain does not mean that he performed the duties of Fire
8 Captain or was subject to the rank and file fire MOU, or otherwise classify him as only a fire
9 captain.

10 CalPERS also cites *Ligon* but the underlying reasoning in *Ligon* supports Lewis. Lewis
11 was entitled to hold the BC position (as well as qualified to hold the BC promotion) but was
12 wrongly denied the promotion by the City:

13 ... the difference between one who is entitled to and holding a position
14 and one who is qualified to be so entitled to hold the position is only a
15 question of degree based on the promotional scheme of the civil service
16 system. Paramount to a fair, equitable and complete scheme is an
17 advancement and promotion plan based upon compliance with the statutes
18 and applicable regulations.

19 *Ligon v. State Pers. Bd.*, 123 Cal. App. 3d 583, 590-91, 176 Cal. Rptr.
20 717, 720 (Ct. App. 1981)

21 Lewis complied with the statutory scheme and earned his promotion, the City failed to
22 comply with the civil service promotion scheme and at first wrongly denied Lewis the BC
23 position.

24 *Snow* and *Ligon* have also been distinguished in *Dominey v. Dep't of Pers. Admin.*, 205
25 Cal. App. 3d 729, 736, 252 Cal. Rptr. 620, 623-24 (Ct. App. 1988):

26 None of the authorities and nothing in the statutes prohibit DPA from
27 reallocating the plaintiffs' positions to the class of special agent, leaving it
28 to the incumbent plaintiffs to compete for the reclassified positions. This is
precisely one of the remedies sought by plaintiffs. Moreover, DPA clearly

29 belief of an appointment by Snow nor an attempted appointment, *Snow v. Bd. of Admin.*, 87 Cal.
30 App. 3d 484, 489, 151 Cal. Rptr. 127, 131 (Ct. App. 1978)

1 has the authority pursuant to section 19818.16, to award back pay for out-
2 of-class work for up to one year prior to the date the employee filed a
3 claim. (See *ante*, fn. 3.)
4 *Dominey v. Dep't of Pers. Admin.*, 205 Cal. App. 3d 729, 736, 252 Cal.
5 Rptr. 620, 623-24 (Ct. App. 1988)

6 In other words, everything that Lewis did was correct. Ultimately, the City
7 partially corrected its wrong and provided Lewis with the BC pay, the BC duties, coverage under
8 the management and confidential CBA that covered the BCs, and otherwise treated him as in the
9 BC group or class, even if it continued to deny the "BC" title. Lewis was in the group or class of
10 other BCs because they shared similarities in job duties, work location, collective bargain unit,
11 and other logical work-related grouping. Lewis was paid cash regularly like other BCs for his
12 full time services that included regularly performing BC duties.

13 The "group or class" designation drives the payrate. Because Lewis performed the duties
14 of a BC and was employed pursuant to the terms of the CBA on BCs, Lewis was in the group or
15 class of BC and therefore entitled to the pay of BC.

16 For payrate purposes, compensation qualifies as "payrate" if it is paid in "cash to
17 similarly situated members of the same group or class of employment for services rendered on a
18 full-time basis during normal working hours, pursuant to publicly available pay schedules."
19 Gov't Code § 20636. "As used in this part, "group or class of employment" means a number of
20 employees considered together because they share similarities in job duties, work location,
21 collective bargaining unit, or other logical work-related grouping". Gov't Code § 20636 (e)(1)

22 As far as a publicly available pay schedule, there is no question in this matter that the BC
23 pay was pursuant to a publicly available pay schedule. Since the BC pay schedule is publicly
24 available, and Lewis was paid pursuant to the BC pay schedule, then Lewis was paid pursuant to
25 a publicly available pay schedule.

26 CalPERS arguments about collateral estoppel and laches are addressed *infra*.

27 CalPERS arguments about Final settlement pay are also addressed above and below.

28 In general, CalPERS misrepresents the facts and misapplies the law to deny Lewis the
higher pension that the PERL entitles him to.

1 the Fire Management confidential MOU, "then it would have changed -- or could have changed -
2 - my determination." (LL2 72:17-73:5.)

3 The City treated Lewis as a member of the Fire Management group or class. Lewis
4 himself corroborated this by testifying at length that the City applied the Fire Management MOU
5 to him.

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

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

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

16 The other City BCs came to Lewis in their capacity as representatives for the Fire
17 Management group. (RL3 147:7-9.) They sought Lewis' input as to what to negotiate for and
18 what they had reached consensus on "because we did not all get together and vote on it. It was
19 just a consensus and they went around and gathered that from all the BCs." (RL3 147:25148:19.)

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

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

24 Lewis was also subject to the detriments of being a BC, such as taking the pay reductions
25 that were applied only to management personnel under the Fire Management MOU.
26 (RL3145:23-146:14.)

27 As an example, the Fire Management group decided that it would be beneficial to the
28 City to take a reduction in pay. As they did, Fire Management sought input from the Fire

1 Management group, including Lewis. "Because whenever they were going to negotiate they
2 came to hear what I had to say because I was part of their Fire Management Group. And we
3 voted to -- or basically by consensus said yes, we will relinquish this. So for a period of a little
4 over a year we in Fire Management had to give up and it was about a thousand dollars a month."
5 (RL3 146:6-21.)

6 There were usually two BC's that did the direct negotiations with the City. (RL3 146:24-
7 147:6) "So during negotiations we talked about what our benefits should be, or could be. Or what
8 we should negotiate for if there was a takeaway, like the one time when that was discussed and
9 got input from all the members of the Fire Management Group, which I was a member of the
10 Fire Management Group." (RL3 149:18-150:1.)

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

15 When Fire Management made a concession to receive a cut in pay, the rank and file did
16 not do so. "They did not do any monetary concession, it was only the Fire Management." (RL3
17 164:2-7.) As part of Fire Management, Lewis also took a concession.

18 While Lewis maintained membership and paid due in the San Bernardino City
19 Professional Firefighters, Local 891, he was only in Fire Management "group or class" as far as
20 the city and the PERL. Several of the BCs paid dues into the rank and file union to help support
21 it. (RL3 167:9-16.)

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

25 Lewis was not an active member of the rank and file union after 2007 because he was
26 under the Fire Management MOU. (RL3 181:24-182:1.)

27 There were similar benefits to both the rank and file and the Fire Management group.
28 Generally, the rank and file would negotiate a benefit and then Fire Management would

1 ask for the same benefits. (RL3 142:6-14.)

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

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

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

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

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

16 Lueras did not ask the City what duties Lewis performed, nor did she question the duties.
17 (LL2 83:2-4.) No one else at CalPERS talked to the City or anyone at the City about Lewis'
18 duties. (LL 83:5-7.) Lueras said that to her knowledge, Lewis was not in the Fire Management or
19 confidential group. (LL2 100:14-102:6.) She thought Lewis was solely in the rank and file group,
20 because the position title fell under the category of fire safety. (*Ibid.*)

21 CalPERS' analysis was based solely on the Settlement Agreement, the MOU for Fire
22 Management which covers the BC, and the MOU for fire safety which covers the Fire Captain
23 position. (LL2 89:2-90:12.)

24 When pressed, Lueras admitted that if Lewis worked in the same location as a BC,
25 performed the duties of a BC, and was in the Fire Management group similar to other BC's,
26 Lueras would put Lewis in the group or class that the agency told her an individual falls under.

27 Lueras admitted, however, that the BC pay was reported to CalPERS consistently and
28 predictably. (LL2 66:7-11.) Further, CalPERS does not look at whether the duties were

1 performed sporadically or consistently, but rather whether the pay was reported consistently or
2 sporadically, (LL 67:1-10.)

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

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

12 **CalPERS Factual Misrepresentations Highest Position Equated With "Title" that Lewis**
13 **Held.**

14 CalPERS wrongly focuses on the "title". Based largely on Carlous Johnson's instruction
15 to report the pay as "temporary upgrade pay" with the implication that the prior pay as "fire
16 captain" should also remain, the City reported a fire captain salary with the BC pay reported as
17 "temporary upgrade pay". CalPERS conveniently forgets that CalPERS instructed the City to
18 report the pay at the fire captain salary with the BC pay as "temporary upgrade pay", and then
19 thereafter faults the City and Lewis for CalPERS advice.

20 Instead of focusing on the title, the PERL focuses on the duties performed and the CBA.
21 Under the Public Employees' Retirement Law ("PERL", *Government Code*, §§20000, *et seq.*⁵),
22 Lewis' BC pay should have been reported as payrate for performing the regular duties of BC. It
23 was instead misreported as "temporary upgrade pay" only because of CalPERS' explicit and
24 continuing direction to the City to do so.

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

28 ⁵ Unless otherwise indicated, all statutory references are to the *Government Code*.

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

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

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

12 Factually, it was proven that Lewis regularly performed the duties of BC and the City
13 regularly and consistently paid Lewis the BC pay, reported that pay to CalPERS, acted under the
14 Management and confidential CBA, and paid contributions to CalPERS on the BC salary.
15 CalPERS typically is going to use any payrate that was normal, consistent, and falls under
16 compensation earnable. (Testimony of CalPERS' Lolita Lueras, ("LL"), 2/26/15, LL2 55:11-13.)⁶
17 The compensation paid to Lewis was regularly and consistently paid over the last seven years of
18 his employment with the San Bernardino Fire Department ("SBFD") and is not final settlement
19 pay.

20 After his settlement with the City, Lewis was otherwise in the "group or class" of
21 other BC's: He was represented only by the bargaining unit that represented BC's. He was treated
22 as a BC by the City and other BC's in management and confidential matters. He regularly
23 performed the normal duties and responsibilities of a BC. He received the benefits and the
24 detriments of the BC position, including a mandatory reduction in his pay and other concession
25 that only BC's and others in management made. The City's HR department treated Lewis as a
26 BC, including by having him act in a confidential manner to city employees on discipline issues.

27
28 ⁶ 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.

1 The SBF D treated Lewis as a BC when he worked on budgets, planned new fire stations, and
2 acted on the fire scene.

3 While many of the duties of a BC are similar to the duties of a Fire Captain, Lewis
4 regularly performed duties that the Fire Captains did not (RL3 193:3-5.) Lewis did numerous
5 things on a regular basis that were exactly what a BC would do. (RL3 153:25-154:25.) Lewis
6 performed the duties that were not any different from those of any other BC. (RL3 201:10-17.)

7 Lewis regularly performed the duties of a BC on a day-to-day basis. (RL3 155:2-17.)
8 "The day is full of stuff like that." (RL3 155:16-17.) "It's not our job where we would go in and
9 two hours you do this, two hours you do that; it's throughout the shift on an as-need basis. So if I
10 wasn't needed to go somewhere to deal with some issue, I might be going over the budget on the
11 remodels for the stations or gathering information for the new station to be built...." (RL3 155:8-
12 13.)

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

16 Part of the BC duties were to take care of discipline issues within the SBF D personnel.
17 (RL3 152:7-14.)

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

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

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

25 Lewis also performed the duties of a BC when on a fire site, when responding to fire
26 calls, when planning a new fire station, and when appearing in BC uniform. (RL3 179:10-21,
27 183:13-184:9.)

28 Lewis testified that he was instrumental in getting a new fire station built in the Cajon

1 area. (RL3 152:1-6.)

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

3 Lewis performed BC duties "on a regular basis at least once a week and probably more.

4 With the way we work is three shifts consecutively, on four shifts off, and then back to three on.

5 So basically, you did a cycle. That's what we call the cycle, and we did those on a weekly basis.

6 And so during the course of that period of time, all of the things that we've talked about, the

7 advice to the BCs, especially the discipline because it was an ongoing thing with many

8 employees." (RL3 194:7:15.)

9 Lewis performed oversight supervision of the Battalion on a very regular basis. Also,

10 "[s]ometime during the 72-hour period I would end up either in a BC position on an incident,

11 because San Bernardino is a very busy city, or as administrative oversight for the Battalion. And

12 ... more regularly than that, maybe depending on the time, I was actively involved in advising

13 them on disciplinary issues and doing administrative things as far as the budgets, the

14 equipment...." (RL3 195:3-19.)

15 Each of those were "things that only a BC would do and I did on a regular basis each

16 cycle. Whether it was filling in trying to prepare budgets, or disciplinary things. Those were

17 things that took up time but they fit in between the emergency responses, the training, the

18 development of policies and procedure." (RL3 196:25-197:7.)

19 Lewis also developed policies and procedure for the fire department, which only

20 management does. (RL3 196:6:25 to 197:7)

21 Lewis performed the duties of BC, like "taking care of the staffing requirements, going

22 through planning out the next shift, responding of the incidents, training evaluations." (RL1

23 178:22-25.)

24 When a BC did arrive on the scenes, most of the time Lewis remained acting as a BC.

25 "They had a great deal of confidence, and it's always better to have two people in a uniform

26 command than it is to just have one and break down the unit." (RL3 153:3-12.)

27 As part of performing BC duties, Lewis kept track of what the remodels were going to be

28 for a fire station. He had the Fire Captains look into how much was needed and how it would be

1 allotted. The Deputy Chief was running the program, so Lewis met with him and told him "this is
2 what I think we need, and this is where I think we can trim. Consequently, that is how the budget
3 went down and I made sure they were on track doing the remodel." (RL3 178:24-179:8.)

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

7 While performing BC duties, Lewis prepared the equipment budget for a new fire station.
8 It was submitted together with all the other pieces so they could get an evaluation of what the
9 estimated cost was going to be. (RL3 179:17-25.) Lewis would put it in the budget package for
10 the supplies for the vehicles and met with the Deputy Chief who approved the budget. (RL3
11 180:2-24.)

12 Like it did for other BCs, the City placed a Suburban vehicle at the station that Lewis
13 could respond in as a BC if he needed to. "[O]r if I needed to go do administrative things, I could
14 go offsite and take care of those tasks." (RL3 153:1222.)

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

17 The BCs all had their own (non-personal) City-provided cars that belonged to the fire
18 department assigned to them, just like the one assigned to Lewis. (RL3 153:12-22, 164:18-
19 165:7.) "It's not a benefit, it's a necessity in being able to coordinate emergencies and respond to
20 the incidents." (RL2 164:18-165:7.)

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

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

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

1 Captains." (RL3 198:9-18.)

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

5 Lewis was knowledgeable on discipline and he had a confidential qualification because
6 he was in the confidential management group. The others in management did not have any
7 problem discussing discipline issues with Lewis "because Fire Management knew they hadn't
8 violated any rules." (RL3 199:13-18.)

9 Councilmember McCammack learned on the council or through experience serving on
10 committee to distinguish between the duties of a BC and the duties of a Fire Captain. (WM
11 146:6-10.) She testified that she personally saw Lewis performing the duties of a BC. (WM
12 143:20-24.) She made a habit of going to as many fire incidents or traffic collision incidents as
13 possible that happened within the district that she represented. (WM 145:2-15.) She saw Lewis
14 act as BC at several incidents. (WM 145:11-15.)

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

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

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

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

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

3 Based on a faulty premise, CalPERS has manufactured this dispute around the issue of
4 "title". CalPERS ignores that Lewis' rights did not arise from the Settlement Agreement, but
5 instead arose independently from Lewis' work, his civil service performance, and his entitlement
6 to the BC position. The Settlement Agreement simply recognized the rights as wrongly denied,
7 and added an unrelated impairment of not having the formal BC title.

8 **CalPERS Factual Misrepresentations Regarding Reporting it to CalPERS**

9 Regarding reporting the compensation to CalPERS to increase Lewis' pension, the
10 payroll supervisor Laura King Yarvornicky became involved when "there was a question if he
11 should have been changed to a battalion chief or remained as a captain with an acting pay.
12 LKY80:23 to 81:2

13 The City's payroll supervisor, Laura King Yarvornicky contacted CalPERS before
14 implementing the payroll LYK 85:14-19. Yarvornicky contacted CalPERS prior to receiving the
15 response form Ms. Easland on June 17th. LYK 86:6-11.

16 Yarvornicky did not have any clarification on Lewis' CalPERS benefits so the City
17 contacted CalPERS "regarding reporting of Mr. Lewis' compensation to them". At first,
18 Yarvornicky wrote "no final determination by CalPERS". LKY 86:14:20. EXHIBIT 39. The
19 second notice say "to call with the final" and to "to call with the final answer on 6/25" LKY
20 86:22 to 87:1

21 Yarvornicky requested and sought a final determination from CalPERS' Carlous
22 Johnson about how to treat Lewis compensation for pension purposes in the first fax on June 11.
23 LKY87:5-11. Yarvornicky does not recall exactly which documents were faxed to CalPERS but
24 it included the Settlement agreement which was part of the fax. LKY89 :12 -17 Exhibit 39.
25 CalPERS Carlous Johnson was going to contact Yarvornicky with a "final answer" on June 25
26 following a review of the documentation that Yarvornicky supplied to CalPERS. LKY 87:5-11
27 Yarvornicky contacted Carlous Johnson at CalPERS and left a message on June 26 because she
28 had not heard a "final answer" yet. LKY 87:5-11. EXHIBIT 39.

1 Carlous Johnson responded to Yarnornicky with the letter in Exhibit 7. LYK90:23-25.
2 Yarnornicky considered Carlous Johnson's response to report it as "temporary upgrade
3 pay" to be "final answer form CalPERS' on how to report Lewis' pay for purposes of increasing
4 his pension. LKY91:6-8.

5 CalPERS did not request any other information about Lewis pay thereafter until the
6 public records act request (in 2013 by Wesley Kennedy). LKY 91:15:25 to 92:6. In other words,
7 CalPERS did not request any information from payroll regarding Lewis when it was making its
8 determination. LKY 91:15:25 to 92:6

9 **Factual Misrepresentation About Acting Pay.**

10 CalPERS claims that Lewis' pay does not qualify as "acting pay" as a means of attacking
11 the designation of temporary upgrade pay.

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

20 But responding to the acting pay allegations, Lueras said that when reviewing a
21 temporary upgrade pay position or an upgrade payment that was reported to the system, she
22 generally asks for personal action forms showing that the employee was entitled to the payments
23 pursuant to an MOU or a written member policy or agreement, but that in this case she was given
24 the Settlement Agreement that she considered outside of what was written in the MOU. (LL2
25 76:23-77:9.)

26 "In other words, you look for the city to document each time there is an acting position in
27 order to substantiate the temporary upgrade pay. If there is no underlying documentation, then
28 CalPERS would deem the payment not reportable. If you can't substantiate a payment, it

1 wouldn't be reported to the system. (LL2 77:10-18.)

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

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

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

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

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

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

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

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

28 Tran did not inquire into what the process was before she was hired. (HT 114:22.) She

1 has seen acting pay change from the time she has been at the City. (HT 116:8-10.)

2 According to the City *Charter*, the Fire Chief alone certifies the acting pay that allows the
3 individual to receive the pay of the higher position. (SE 66:4-7.) Acting pay does not have to get
4 City Council approval. (SE 66:4-7.) *Charter* section C32, sub-part B, "Special Salary Provisions"
5 indicates that the Chief certifies that the employee is being assigned to the acting position. (SE
6 66:23-25.) "They receive the higher salary only while in the acting position." (SE 68:12-19.)

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

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

13 Regarding the City's policies and practices about titles and acting pay, Laura King also
14 provided an example. Laura King in the payroll department was given the payroll manager
15 versus the payroll supervisor. LKY72:1 to LKY74:18 "The job description didn't change , just
16 the title" LKY74:17-18. Basically my duties have been the same from the supervisor to the
17 manager, the only thing that I've incurred in the last few years is that as the manager, if the
18 director is gone or absent, we haven't had one for periods of time, then I might have to go to a
19 duty that would be the responsibility of the director in the absence of an accounting manager.
20 But other than that, all the other payroll duties would remain the same. LKY74:17- 75:1 Laura
21 King did not receive any "temporary upgrade pay" when performing these higher duties. LKY
22 75:13-15

23 With respect to the documentation about acting pay, CalPERS claims that the City would
24 have documented Lewis' work as an acting BC if Lewis was in the acting position. The
25 testimony of Lewis, union attorney Corey Glave and City HR employee Helen Tran indicated
26 that the City, and particularly the SBF, did not document and was not required to document
27 "acting pay". Instead, the City *Charter* indicates that the Fire Chief simply has to certify that
28 Lewis was acting as a BC, which the Fire Chief did when he signed the Settlement Agreement.

1 The SBFD does not document every time someone is in an acting BC position. (CG
2 118:17-22.) The records about people functioning in an acting capacity may never have been
3 made. (CG 119:10-13.)

4 The City's and SBFD's records are not well maintained and not well organized. (CG
5 119:2-17.) In addition, the City and SBFD are missing records. (CG 119:2-7.) Glave thought that
6 the City would agree that its record keeping was very poor. (CG 121:8-9.)

7 **Factual Misrepresentation About Settlement Agreement**

8 Richard Lewis earned the right to hold and perform the duties of the Battalion Chief
9 ("BC") position by merit. Lewis was entitled to act in, and did in fact regularly perform, the
10 duties and responsibilities of the BC position. CalPERS argues that the "payments are not
11 remuneration for service performed but as consideration for the resolution of a lawsuit" is
12 contrary to undisputed facts in issue.

13 In this case, Lewis continued to work for the City before and after the settlement of the
14 City's inappropriate labor practice.⁷ The settlement was directed to restore Lewis in full to the
15 benefits that he had accrued related to his past, current and future employment rights. The
16 settlement only reset the clock at a specific time, and set the stage for the terms of his continuing
17 work with the City as BC in all but title. The Agreement itself did not grant Lewis rights that he
18 was not otherwise already entitled to. Lewis would have earned the pay of BC for the time that
19 he worked for the City after October 2004 had the City not acted inappropriately.

20 Although superficially similar because it involved a settlement agreement, the *Molina*
21 case law involved a different situation where the employee did not work for the city after the
22 dispute arose, and the settlement was separate and distinct from any work-related activities.

23 Pitzer did not have a problem with Lewis in an acting BC role. (CG 109:16-17. Lewis
24 had performed in an acting BC role numerous occasion and there was no problem. (CG 109:15-
25 18.) The City acknowledged that Lewis was an acting BC. (CG 115:6-8.) Pitzer did not have a
26

27 ⁷ Fire Chief Pitzer wrongly failed to formally promote Lewis to Battalion Commander in
28 October 2004 as required by City policies and procedures and past practice. The City ultimately
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 problem with Lewis functioning as a BC (CG 109:18-21) and Lewis' performance evaluations as
2 BC were all outstanding. (CG 114:18-21.) The crux of the problem was the title of the BC.
3 (Testimony of former San Bernardino City Councilmember Wendy McCammack ("WM"),
4 2/25/15, 148:20-224.)

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

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

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

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

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

1 113:19-114:6.)

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

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

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

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

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

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

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

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

27 Importantly for purposes of this dispute, the City also recognized its obligation to ensure
28 that Lewis would receive the deferred compensation he was entitled to, including an eventual

1 CalPERS pension calculated based upon his highest earnings at the BC pay scale.

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

7 Instead of offering a lump sum immediately, the City offered to pay Lewis as a BC and
8 give him all the benefits, including the CalPERS benefits, instead of a lump sum at one time.
9 (CG 89:9-11, 90:21- 91:2.) The City and Lewis' attorney specifically discussed Lewis' CalPERS
10 retirement and the difference between a pension based on the BC wage and one based on the Fire
11 Captain wage. (CG 89:16-18.)

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

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

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

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

26 The City acted to remedy its failure to timely promote Lewis to the BC position,
27 including by granting Lewis the compensation and benefits to which BCs were entitled. Further,
28 the City did so in its capacity as a charter city with constitutional autonomous rights to determine

1 its own governance structure, hire and promote employees of its own choosing, designate those
2 employees' job duties and responsibilities, and compensate those employees as the City deemed
3 appropriate.

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

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

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

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

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

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

28 Easland received a memo from the City's payroll officer, Laura King Yavornicky, in

1 regard to how to implement the provisions of the Settlement Agreement. (SE 27:9-30:19.)

2 Payroll was trying to see how the extra salary was to be reported to CalPERS. (SE 31:4-7.)

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

7 Easland looked at the CalPERS law on Westlaw and the CalPERS website. (SE 33:20-
8 35:2.) She might have contacted Jim Odlum, the attorney who represented the City in the dispute
9 with Lewis. (SE 36:22-25.)

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

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

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

23 If CalPERS had told Easland that the BC pay was not reportable, then she would have
24 "double-checked the settlement agreement to see if we were in violation of the settlement
25 agreement." (SE 48:4-12.)

26 Councilmember Wendy McCammack testified that she raised the issue of whether Lewis
27 was going to receive a CalPERS benefit associated with the BC pay and she was told by the City
28 Manager and the City Attorney that Lewis would receive a CalPERS benefit based on the BC

1 pay. (WM 140:7-14.)

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

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

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

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

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

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

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

25 The City implemented Johnson's specific advice and reported the BC pay as temporary
26 upgrade pay in every period thereafter until Lewis retired. The advice also implicitly requires the
27 City to report the Fire Captain salary.

28 After the Settlement Agreement was implemented, Lewis checked to make sure the

1 correct percentage was being taken out of his BC pay for CalPERS. (RL3 170:21-25.)

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

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

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

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

13 After evaluating the request and applying its administrative experience and knowledge,
14 CalPERS directed the City to calculate the difference between the pay Mr. Lewis received as
15 Fire Captain and the new pay the City was awarding him pursuant to the BC pay scale, and then
16 to report that difference as "temporary upgrade pay". CalPERS instructed the City to do so for
17 the approximately three years of additional back pay (the difference between what Mr. Lewis
18 had received as Fire Captain and what he should have received as BC), as well as do so for Mr.
19 Lewis' pay going forward.

20 CalPERS also directed the City to pay employer and employee contributions calculated
21 on the basis of the BC compensation rate paid to Mr. Lewis. Pursuant to the PERL and
22 Regulations, and CalPERS' policies and procedures, "temporary upgrade pay" is PERSible
23 compensation.

24 CalPERS never advised that there was any "time limit" or duration on how long such pay
25 should be reported as "temporary upgrade pay", nor did it ever inform the City that the City
26 needed to take any other actions to comply with CalPERS' policies and procedures concerning
27 CalPERS' interpretation of the PERL. The City and Mr. Lewis relied on CalPERS' advice.

28 As the pension administrator for the City and purportedly the agency most qualified to

1 determine the applicability of the PERL to effect the pension promises of the City, CalPERS
2 could have chosen to direct the City to characterize and report Lewis' BC compensation in some
3 other manner qualifying as PERSible pay rate or special compensation, or if necessary it could
4 have directed the City to take some other action to ensure that Lewis' compensation qualified as
5 PERSible compensation.

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

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

14 15 **CORRECT APPLICATION OF LAW AND ANALYSIS**

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

19 Judicial Estoppel: CalPERS and the City of San Bernardino. The City of San Bernardino
20 and CalPERS are judicially estopped from taking inconsistent positions from (i) the City's
21 statements made in prior determination process, and (ii) CalPERS' statements on to treat the
22 monies as temporary upgrade pay. (See *People ex rel. Sneddon v. Torch Energy Servs., Inc.*
23 (2002) 102 Cal.App.4th 181, 188.)

24 Laches. Determined in 2007, laches bars CalPERS' prosecution of this case at this late
25 date. CalPERS argues in 2015 that it could not previously figure out what occurred, but
26 CalPERS had the opportunity to investigate or litigate earlier when information was fresher but
27 chose not to pursue it.

28 Charter City Autonomy. As a charter city, the City of San Bernardino maintained its

1 reserved rights to determine compensation and office structure. (*Batters v. City of Santa Monica*,
2 (1980) 101 Cal.App.3d 595.)

3 **City Establishes Duties; Few Limitations**

4 Even under the more restrictive general law, the City establishes the duties or position.
5 (*Gov't Code*, §§36501, 36505, 41005.)

6 **I. Public Employees' Retirement Law ("PERL")**

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

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

14 **Not Final Settlement Pay or Pay In Anticipation of Retirement.** Lewis received the
15 increased BC compensation dating from 2007 (and actually including two years of retroactive
16 payments that CalPERS directed the City to report to CalPERS.) Lewis did not retire until 2012.
17 While Section 20636(e)(2) permits CalPERS to review the pay increases received by an
18 employee in the three to five years prior to retirement if they exceed those received by other
19 employees in their group or class, there were no above-average or significant pay increases in the
20 three to five years preceding Lewis' retirement, other than the pay raises (and at least one pay
21 *reduction*) that all of the BC's received.

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

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

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

5 CalPERS argues that Lewis' compensation is final settlement pay associated with a
6 written settlement agreement. However, CalPERS looks at form over substance. Lewis was
7 given the settlement because he was entitled to hold the position of BC. If the City had not acted
8 contrary to law in denying Mr. Lewis the promotion to BC that he had earned, then clearly Lewis
9 would have taken the BC position and he would be entitled to the BC pay. Only because the City
10 acted inappropriately did the matter have to be litigated, where the City recognized its errors, and
11 then granted Lewis the substance of the relief he requested and that he earned.

12 CalPERS cites a different kind of "final settlement" pay as authority to attempt to reduce
13 Lewis' pension, arguing that Lewis was given the money in effect as a way of artificially
14 increasing his retirement benefits. However, there is no testimony that Mr. Lewis was a preferred
15 employee. In fact, it appears that Mr. Lewis was the victim of *discriminatory* action by the City.
16 CalPERS Lueras said that CalPERS did not determine Lewis' compensation to be final
17 settlement pay and that it did not appear to have been such. (LL2 57:19-58:18.)

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

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

25 **Not Settlement Pay, Molina Does Not Apply See Above**

26 Under law, settlements are encouraged and should be given the effect of law contained
27 within them. The form of the settlement agreement should not deny Lewis the just benefits that
28 he was entitled to as a matter of his work and his civil service entitlement. CalPERS should not

1 require that the City and Mr. Lewis litigate each dispute to conclusion in order to have the courts
2 by judgment restore Lewis to his proper rights. Even then, the restoration to proper rights would
3 arise from a written decision, which CalPERS might wrongly consider a form of settlement pay.

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

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

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

20 No Retroactive Application. CalPERS must apply statutes in the PERL and/or the
21 *California Code of Regulations* that were in effect on Lewis' retirement. CalPERS cites *C.C.R.*
22 *§570.5*, even though it did not become operative until August 10, 2011, years after these matters
23 occurred and after Lewis' retirement.

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

25 Lewis was legally entitled to hold the position of BC at the SBFD and to receive the
26 compensation, deferred compensation and pension rights, and benefits flowing therefrom. He
27 received the BC compensation for full-time work.

28 Lewis' BC salary thus qualifies as "compensation earnable" pursuant to *Government*

1 Code section 20636 – he received a monthly rate of pay and was paid for performing services on
2 a full-time basis during normal working hours based on a publicly available pay schedule duly
3 adopted by the City.

4 **A. Compensation Earnable and Payrate**

5 “Compensation earnable” consists of a member's “payrate” and “special compensation” (
6 Gov.Code, § 20636,) “Compensation earnable” by a member means the payrate and special
7 compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by
8 Section 21752.5.

9 An employee's “payrate” is the monthly amount of cash compensation received by the
10 employee “pursuant to publicly available pay schedules.” (Gov.Code, § 20636, subd. (b)(1).)

11 (b)(1) “Payrate” means the normal monthly rate of pay or base pay of the member
12 paid in cash to similarly situated members of the same group or class of
13 employment for services rendered on a full-time basis during normal working
14 hours, pursuant to publicly available pay schedules. “Payrate,” for a member who
15 is not in a group or class, means the monthly rate of pay or base pay of the
16 member, paid in cash and pursuant to publicly available pay schedules, for
17 services rendered on a full-time basis during normal working hours, subject to the
18 limitations of paragraph (2) of subdivision (e)⁸. Gov't Code § 20636 (West)

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

23 **B. Group or Class**

24 Section 20636(b) of the PERL says payrate is the rate of pay "paid ... to similarly
25 situated members of the same group or class of employment". Section 20636(e)(1) defines

26 ⁸ 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
determined pursuant to regulations adopted by the board that establish reasonable standards for
granting exceptions.

1 "group or class of employment" as "a number of employees considered together because they
2 share similarities in job duties, work location, collective bargaining unit, or other logical work-
3 related grouping."

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

7 **Labor Policy or Agreement**

8 CalPERS legal arguments that the payments were not made pursuant to a Labor Policy or
9 Agreement is a mixed question of fact and law and is addressed in both sections. Lewis
10 performed the duties of a BC and received the pay of a BC pursuant to publicly available pay
11 schedules. CalPERS tries to argue that Settlement agreement was the document that gave rise to
12 Lewis's rights to receive the BC pay, but the Settlement agreement simply recognized that Lewis
13 had earned the BC position but was wrongly denied, and therefore in settlement Lewis would
14 retain the title of Fire Captain but perform the duties of BC, receive the pay of the BC, and be
15 subject to the MOU of other BCs. As such, the Settlement agreement itself did not need to
16 qualify under the Government Code Section 20636 because Lewis did not receive the
17 compensation as arising from rights wholly granted in the settlement agreement, rather Lewis
18 retained the "Fire Captain" title detriment pursuant to the Settlement agreement but he had
19 already earned the BC position and pay by merit, and thereafter performed the BC duties. The
20 BC duties and pay responsibilities were already existing in the MOU and CBA that applied to
21 BCs. The CBA and MOU that provides for the BC pay is a labor policy or agreement under
22 Section 20636, and therefore the pay that Lewis received was proper under the PERL.

23 In CalPERS arguments about the labor policy or agreement, CalPERS wrongly assert
24 unsupported allegations that Lewis was in the rank and file and that he therefore received
25 payments that other fire captains are not entitled to.

26 The evidence shows that Lewis performed the duties of the BC and was treated as a BC
27 under the collective bargaining agreement. The PERL establishes a group or class based on
28 duties, and Lewis was in group or class with other BC.

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 **Special Compensation "Temporary Upgrade Pay"**

15 Whether applied by collateral estoppel, res judicata, or otherwise, CalPERS determined
16 that Lewis' BC compensation qualified as "temporary upgrade pay". *California Code of*
17 *Regulations* section 571(a)(3), Premium Pay, states:

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

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

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

28 There is also no definition in the PERL or the Regulations which further defines what it
means to "work in an upgraded position/classification". As a charter city and Lewis' employer,

1 the City had constitutional autonomy and authority to determine what duties Lewis performed or
2 did not perform. CalPERS has no authority under the PERL to evaluate the specific duties
3 performed by any employee.

4 Instead, CalPERS has the ministerial duty as applied to the instant case to (i) accept the
5 City's determination that Lewis was eligible to and would receive compensation pursuant to a
6 publicly approved pay schedule at the rate paid to BC's, and (ii) accept the City's determination
7 of whatever duties Lewis would then perform for the City in exchange for that compensation.

8 **II. Lewis Qualifies for Inclusion of EPMC in His Pension Calculation**

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

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

15
16 **AFFIRMATIVE DEFENSES**

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

18 CalPERS was fully informed in or about June 2007 and explicitly instructed the City how
19 to report Lewis' BC compensation in a manner that would meet CalPERS' requirements and
20 provide him with the promised pension based upon that compensation. The City had no reason or
21 basis to dispute CalPERS' explicit reporting instructions. The City duly followed CalPERS'
22 reporting instructions from June 2007 through Lewis' retirement effective on November 1, 2012.
23 The City also made all employer and employee contributions to CalPERS that were attributable
24 to the reported compensation, and CalPERS accepted all such contributions.

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

28 CalPERS has a fiduciary duty to provide timely and *accurate* information to its

1 members. (See *In re Application of Smith* (March 31, 1999) PERS Prec. Dec. No. 99-01 ["The
2 duty to inform and deal fairly with members also requires that the information conveyed be
3 complete and unambiguous"]; see also *City of Oakland v. Public Employees' Retirement System*
4 (2002) 95 Cal.App.4th 29, 40.)

5
6 **Equitable Estoppel.**

7 Equitable Estoppel bars CalPERS from changing the designation as PERSible
8 compensation. Lewis' long term detrimental reliance on a seemingly reasonable representation by
9 CalPERS creates one of those " 'exceptional cases' where 'justice and right require' that the
10 government be bound by an equitable estoppel." (*City of Long Beach v. Mansell* (1970) 3 Cal.3d
11 462, 501 ("*Mansell*".))

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

19 Moreover, CalPERS *does* have authority to allow the use of Lewis' BC compensation in
20 calculating his pension. *Government Code* section 20125 states that CalPERS is the "sole judge
21 of the conditions under which persons may be admitted to and continue to receive benefits under
22 this system". It previously determined that the BC pay was PERSible.

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

25 If those estoppel elements are established against the government, the court must then
26 balance (i) the burden on the party asserting estoppel if the doctrine is not applied against (ii) the
27 public policy that would be affected by the estoppel. (*Lentz v. McMahon* (1989) 49 Cal.3d 393,
28 400-401.)

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

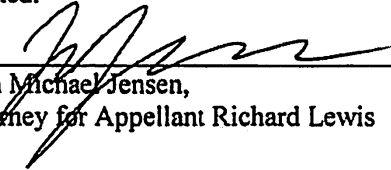
4 CalPERS' unjust disallowance of the use of Lewis' BC compensation in the calculation of
5 his pension allowance meets each of the elements to bring a breach of fiduciary claim against
6 CalPERS.

7 **CONCLUSION**

8 Under the PERL as applied to the facts, Lewis is entitled to have CalPERS use the actual
9 final compensation that SBFD paid Lewis as payrate under Section 20636 as Lewis was paid to
10 those person similarly situated to him, the other BCs, pursuant to publicly available pay
11 schedules for the actual work responsibilities that he performed or was available and responsible
12 to perform during his normal work day, even though he did not always have the formal title of
13 Battalion Chief.

14 Respectfully submitted.

15 Dated: June 15, 2015

16 By: 
17 John Michael Jensen,
18 Attorney for Appellant Richard Lewis

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24 **APPENDIX "A": FINDING GUIDE**

25 **References to Testimony of Witnesses Cited in the Brief**

26
27 **Initials Name of Witness, Capacity, Date of Transcript, Page Location in Transcript**
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- 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 15, 2015, I served the following document (s) by the method indicated below:

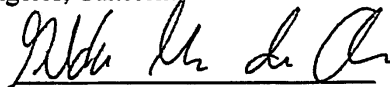
RICHARD LEWIS' REPLY BRIEF

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 15, 2015, at Los Angeles, California


Griselda Montes De Oca