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8 BOARD OF ADMINISTRATION  
9 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

10 In the Matter of the Calculation of Final ) AGENCY CASE NO. 2014-0256  
11 Compensation of ) OAH NO. 2014040945  
12 RICHARD LEWIS, )  
13 Respondent, ) CALPERS REPLY BRIEF  
14 and )  
15 CITY OF SAN BERNARDINO, )  
16 Respondent. )

EXHIBIT  
6  
PENGAD 800-631-6888

17  
18 In the end, the determinative fact in this case is that the settlement payments  
19 received by Respondent, and reported to CalPERS, were not for his services, whether  
20 performed or excused, but to "make [him] whole for the losses that the City caused."  
21 (RC at p. 12, §47.)<sup>1</sup> Even the existence of the payments was because the City  
22 considered a lump sum payoff that would include the loss of a CalPERS pension would

23  
24 <sup>1</sup> There was never a viable option to promote Respondent. At the time of the settlement, there were no  
vacant Battalion Chief positions available. (Vol. IV 172/24-25;173/1-12.)



1 be "too large." (ibid.)

2 "The City did not want to pay a lump sum for the future CalPERS  
3 benefits, so the parties agreed ¶¶...[¶¶] [and] "the City offered to pay  
4 Lewis as a BC and give him ...CalPERS benefits instead of a lump  
5 sum at one time."<sup>2</sup>

6 So the parties structured an agreement to minimize the City's out of pocket  
7 payments and make the payments they did make appear to be additional  
8 compensation. The City hoped to pay off the balance of the settlement to Respondent  
9 with little more than a short-term increase in its contributions based on the aberrant and  
10 artificially inflated salary. In every real sense Respondents are using the Public  
11 Employees' Retirement Fund (PERF) to purchase a highly leveraged annuity.

12 Initially, because the payments only reflected proceeds of a settlement, the City  
13 was uncertain how to characterize them for reporting to CalPERS. When they did ask  
14 the initial response was that they could not be payrate because even at that early stage  
15 it was obvious that because Respondent remained in the position of a Fire Captain, the  
16 payments in excess of the salary schedule for that position could not be payrate.<sup>3</sup> It  
17 was only after he appealed that Respondent argued that he was entitled to the  
18 payments as payrate because he was uniquely "treated" as if he had been promoted to  
19 that position.

20 The parties were aware that merely reporting the payments to CalPERS did not

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22 <sup>2</sup> (id. at ¶¶ 48, 49.)

23 <sup>3</sup> The City's inquiry asked only if Respondent's settlement payments "should be reported as regular base  
24 pay and earning or as special compensation – temporary upgrade pay." The CalPERS staff member  
25 responded that "[s]ince Mr. Lewis will retain his current position title of Fire Captain, the only option was  
to report the payments "as special compensation." (Resp. Exh. 7.) Even at this interim point, it was clear  
that the payments could not qualify as payrate. (Contra, RC at p. 46, LI 26-27.)



1 mean they would be ultimately recognized as compensation earnable. When CalPERS  
2 did review the arrangement, it concluded that under the Public Employees' Retirement  
3 Law (PERL) the reported compensation could not be included in Respondent's final  
4 compensation.<sup>4</sup> Respondent appealed that determination. In essence, Respondent is  
5 trying to enforce his agreement with the City.

6 Perhaps because the City soon realized after the agreement had been put into  
7 effect, that it actually had no authority to "offer" Respondent a higher pension through  
8 the settlement agreement, that it did not appeal. Yet, having made the bargain, the  
9 parties set out to try to pull it off.

10 **A. The PERF Is Not Available to Fund Public Agency's**  
11 **Settlement With Its Employee.**

12 CalPERS is not an insurer of every agreement between an employer and its  
13 employees, let alone an agreement resolving an individual lawsuit. Nor was the PERF  
14 established for this purpose. (§2001.)

15 Such misuse of public of the PERF is made even more egregious because when  
16 a public agency is paying the additional contributions on behalf of an individual  
17 employee over a relatively brief period (March 2007 – November 2012). Such  
18 payments do not mitigate the increased liability assumed by the Fund. (Vol. IV  
19 214/218/25.) In this case, the settlement payments represent an excess of 35% and  
20 far outstripped the actuarial assumptions and the anticipated liability associated with  
21 CalPERS assumptions. (*id.*, at pp. 216 – 218). Even though the City paid contributions  
22 on a greater amount, it was for only a limited period of time, not historically consistent

23 <sup>4</sup> CalPERS has a duty to follow the law and pay benefits only as allowed under the PERL, even if it  
24 initially failure to timely correct a contracting agency's error. (Cf. § 20160, subd. (a)(3) [authorizing PERS  
25 to correct errors or omissions of members, contracting agencies, or itself, but not to provide the party  
seeking correction with a "status, right, or obligation not otherwise available" under the PERL].) (*City of  
Pleasanton v. Bd. of Admin.* (2012) 211 Cal.App.4th 522, 544.)



1 with Respondent's position or a similar position, nor would not persist after Respondent  
2 separated from employment. Under these circumstances, the resulting liability far  
3 exceeded the actuarial assumptions and would result in an actuarial loss to the fund  
4 that would be unrecoverable and be proscribed by the PERL. (See, RON, (Exh. A;  
5 § 20636, subd. (b); Cal.Code Regs. Subd. (c) – (d).) It is in fact Respondent's "unique"  
6 circumstances (Vol. IV 199/6)<sup>5</sup> that precludes his pension allowance to be based on  
7 the artificial salary level, "as if" he were a Battalion Chief. (Vol. IV 201/16/17.)

8  
9 **B. Characterizing Settlement Proceeds As Compensation  
Earnable Violates the PERL And City Law.**

10 If it is assumed that "acting pay," as defined by the City's charter and labor  
11 agreement, qualifies as "temporary upgrade pay"<sup>6</sup> it requires compensation for services  
12 rendered. In both cases, an employee is required to actually perform all the functions of  
13 a higher position. (CalPERS RON, Exhs. B-D; Cal.Code Regs., 671.) This is not true  
14 of the settlement payments received by Respondent.

15 Likewise, to recognize Respondent as being paid pursuant to a publicly available  
16 salary schedule would require his being promoted to one of the six occupied positions.  
17 Respondent was never promoted. To deem him to have been promoted, would require  
18 CalPERS to ignore this fact and override the City's Charter, Civil Service Rules and  
19 labor agreements as well as its own agreement that at all times Respondent held the

21 \_\_\_\_\_  
22 <sup>5</sup> Section 20636, subd. (e)(2), provides for a process to seek advance permission from CalPERS for a  
23 member who is not part of a group or class of employment. However, the City never attempted to invoke  
24 that provision and it would have been of doubtful benefit because the settlement payments represented  
25 such a large percentage increase.

26 <sup>6</sup> CalPERS does not concede this point. Respondent has failed to submit any evidence that, in fact, he  
27 ever qualified for such payments. Between 2005 – 3007 he may have done so "on occasion" (Vol. II.  
28 183/17.) However, each of these incidents was in fact function required of a Fire Captain. (id., 194/1-9;  
29 See Also, Resp. Exh. 33.)



1 position of a Fire Captain. (CalPERS RON Exhs. B-D; Exh. 6.)<sup>7</sup>

2           Although now asserting that he performed duties analogous to those of a  
3 Battalion Chief, even Respondent believed what duties he did or did not perform were  
4 irrelevant to his receipt of payments under the settlement agreement. Respondent has  
5 acknowledged that settlement payments were unrelated to any "work in an upgraded  
6 position/classification of limited duration." (Vol. IV. 173/10-24.)

7           These facts alone preclude the payments from being recognized as temporary  
8 ungraded pay. Added to this are the facts that the payments were not made pursuant to  
9 a labor policy and agreement, not historically consistent, not available to employees in  
10 the position of Fire Captain, and patently not included in the actuarial assumptions,  
11 and literally precludes any conclusion of their being qualified as temporary upgrade  
12 pay or any form of special compensation. (Cal. Code Regs., 571)<sup>8</sup>

13           **C. Respondent's Attacks on CalPERS' Group and Class**  
14           **Determination are factually flawed and Based On**  
15           **Erroneous Semantical and Absurd Statutory Construction**

16           Ignoring every other of the basis for rejecting the payments as special  
17 compensation, Respondent tries to argue that the payments should be considered  
18 temporary upgrade pay because they were received over a circumscribed period.  
19 (Resp. Closing Brief (RC) at p. 48.) However, he ignores that while the retroactive  
20 payment was calculated based on a date certain, the payment from and after the  
21 settlement, if not confirming their status as final settlement pay, were to be paid for an  
22 indefinite period. Respondent also confuses the fact that the phrase "limited duration"

23 <sup>7</sup> The City Charter, Civil Service Rules and Labor agreement all specifically state the qualifying service  
24 and duration for which payments could be made and well required documentation pursuant to which  
25 "acting pay" may be permitted.

<sup>8</sup> All regulatory references are to "Title 2.")



1 refers to the required work with the payment of compensation. Respondent essentially  
2 asserts a right to perpetual temporary upgrade pay.<sup>9</sup> Adopting Respondent's  
3 interpretation would lead to the absurd result that any additional compensation paid to  
4 a particular employee would qualify as temporary upgrade pay.

5 Respondent's anecdotal testimony was that he performed certain discrete duties  
6 which may have been analogous or overlapped those of a Battalion Chief. (Vol. II.,  
7 202/8-19; Vol. 179/4), taking charge at a fire incident pending arrival of a Battalion  
8 Chief and assisting in preparing a budget; Vol. 205/5-6, supervising a station staff.)  
9 However, in virtually every instance Respondent is referring to duties subsumed in the  
10 job description for the position of Fire Captain. (See, Resp. Exh. 33.)

11 Respondent also tries to argue that because the PERL does not specifically  
12 define the phrase "[required] to work in an upgraded position/classification"<sup>10</sup>, CalPERS  
13 must defer to the "authority" of the City "to determine what *duties* Lewis performed or  
14 did not perform." (RC at p. 28, LI. 18-21.) Except in his position statement, the City  
15 never defined Respondent's duties as a Fire Captain. However, Respondent does  
16 admit that in the two instances in which he could have qualified for "acting pay" each  
17 scenario required a personnel action. (vol. 2, 168/16-24; 170/17-24.) Yet, as previously  
18 discussed, no such documentation exists.<sup>11</sup>

19 Lastly, Respondent futilely attempts to make the strange argument that perhaps  
20 his settlement agreement itself should be deemed a "certification" of his services

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22 <sup>9</sup> Respondent apparently recognizes the infirmity of his argument that the payments qualify as special  
23 compensation, and seeks to have them found to be payrate. (RC 48-49.)

24 <sup>10</sup> Respondent significantly avoids the predicate words "required to" in his discussion of the provision.

25 <sup>11</sup> After the settlement, his participation even at this level was more limited. (Vol. IV 179/9-20.)



1 qualifying him for an acting pay. (RC at p. 25, ¶¶ 144 – 146.)<sup>12</sup> However, again the  
2 settlement agreement is utterly silent on duties and/or responsibilities and in fact did  
3 not require or even contemplate that he would perform any duties other than perhaps  
4 those of a Fire Captain and at most, simply sanctions the payment of money. (Exh. 6;  
5 Vol. 200/20-25; 201/1-4.)

6 To follow Respondent's line of arguments would essentially require CalPERS to  
7 recognize as pensionable any compensation a City pays to an employee so long as it is  
8 calculated based on a differential between payrates. Such a conclusion would  
9 unavoidably give license for employers "*artificially increasing a preferred employee's*  
10 *retirement benefits by providing the employee with compensation increases which are*  
11 *not available to other similarly situated employees.*" (*Prentice v. Board of Administration*  
12 (2007) 157 Cal.App.4th at 983, 993, (*Prentice*) italics added.; See *Hudson v. Board of*  
13 *Administration* (1997) 59 Cal.App.4th 1310, 1331–1332, [allowing conduct of  
14 contracting agency to estop PERS would usurp PERS's statutory authority to determine  
15 compensation for retirement purposes and permit such agencies to disregard the  
16 applicable law].)

17 Respondent argues that CalPERS "wrongfully focuses on" his title as Fire  
18 Captain, not the anecdotal statements that he performed duties of a Battalion  
19 Chief. (RC at p. 1.) Yet, it is the City and Respondent who denominated his  
20 position as a Fire Captain. (Exh 6; 9; 11; Resp. 11.) At all times, there were  
21 established position statements for Fire Captain under the aegis of which his  
22 anecdotally described duties fell. (Resp. 33.) At all times, Respondent reported  
23

24 <sup>12</sup> It is also notable that Respondent cites to the very document he now wishes to oppose Request for  
25 Official Notice by CalPERS. (RC at p. 25, ¶ 144.)



1 to "his Battalion Chief." (Vol. IV, 166/18/25 – 167/1-17 [another indicia of a fire  
2 captain position.]) At all times pertinent this action, the position of Fire Captain  
3 was covered under the Fire Safety (not the Management Confidential) MOU.  
4 (Exh. 13, at p. 4.)

5 More than merely a nominal designation, imposed on him by a pugnacious  
6 Fire Chief<sup>13</sup>, Respondent's title, in conjunction with an established position  
7 statement, memorandum of understanding, City Charter and Civil Service Rules<sup>14</sup>  
8 provide more than adequate basis to support the determination made by  
9 CalPERS of Respondent's group and class of employment.

10 Respondent's argument that CalPERS was required to consider his unique  
11 duties and circumstances is contrary to the PERL. The determination of  
12 compensation earnable is not intended to be based on an Individual effort and  
13 compensation. (*City of Sacramento v. Public Employees' Retirement System*  
14 (1991) 229 Cal.App.3d 1470, 1479; See Also, *Prentice, supra*, at 992 [purpose of  
15 group and class determination is to limit "compensation earnable" to that paid to  
16 "similarly situated employees".].)

17 In defining a group and class of employment, the legislature chose not to  
18 include an exclusive list of relevant indicia, or even a hierarchy, but stated certain  
19 specific considerations followed by a more general statement - "other logical work

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21 <sup>13</sup> That Respondent was not promoted to one of the six *occupied* Battalion Chiefs positions is not just  
22 another "inconsequential" fact, as he refers to the lack of any documentation of his acting pay. CalPERS  
23 may not disregard it as a "last little thing" that a pugnacious Fire Chief imposed out of *persona animus*.  
(Vol. II, 219/17-19<sup>13</sup>; RC at p. 10.) Respondent admits that at the time of the settlement he no longer  
24 was qualified for a promotion to the position of Battalion Chief because all of the available positions were  
25 filled. (RC at p. 19, ¶ 93.)

24 <sup>14</sup> Resp. Exh. 33 [Fire Captain works under supervision of a Battalion Chief or other supervisory  
25 personnel.]





1 related grouping." (§20636, subd. (e)(1).) The plain language provides that  
2 section anticipates that CalPERS may use "other" criteria to identify other work  
3 related similarities including a position title.

4 Provisions such as section 20636, subdivision (e)(1), are properly  
5 interpreted under the doctrine of ejusdem generis and its closely associated aid,  
6 noscitur a sociis. These doctrines instruct a court to reconcile the specific and  
7 general words so that all words in a statute and other legal instrument can be  
8 given effect, all parts of a statute can be considered together and no words will be  
9 superfluous." (Singer, Statutes and Statutory Construction" (6th Ed. 2000),  
10 §47:17, pp. 283-284.) However, the doctrine will not be applied where it results in  
11 a construction inconsistent with a statute's legislative history, other controlling  
12 rules of construction, or statutes in pari material. (id., at §47:22, pp. 302-303.)  
13 To the extent it would require CalPERS to focus exclusively or even primarily on  
14 duties is in fact an improper and unnecessary reading of the statutory language.

15 Respondent's assertion that "there is no implication in PERL that the  
16 Legislature delegated authority to CalPERS to restrict or proscribe pensions  
17 based on the title of jobs, but rather "on the similarity of *duties*," is also patently  
18 inaccurate. As with the requirement for a publicly available pay schedule, the  
19 concept of group and class is intended to promote uniformity, predictability, and  
20 stability in in the identification and recognition of compensation earnable  
21 (CalPERS RON, Exh. A; §20636; Cal.Code Regs., §§ 570, 570.5, 571.)

22 Arguments to the contrary, such as Respondent's, would be at odds with  
23 both the express language and purpose of PERL and other interpretative aids.  
24 (See, *White v. County of Sacramento* (1982) 31 Cal.3d 676.). Nor should one  
25



1 term or a whole subdivision be applied as abstract exercises in semantics.  
2 (Sutherland, Statutes and Statutory Construction (6th Ed. Revised 2000), §47:18,  
3 p. 289.)

4 CalPERS did not consider the title in isolation but did undertake an  
5 investigation of numerous other related indicia. (Vol. at pp. 42 – 73; Vol. IV, at pp.  
6 100 - 102.) Furthermore, the same analyst who reviewed and prepaid the  
7 determination in this case confirmed, after considering all the evidence at the  
8 hearing, (documentary and testimonial) CalPERS' determination. (Vol. IV at pp.  
9 102 – 103.)

10 It is Respondent, not CalPERS, who is seeking to improperly isolate and  
11 focus on a single indicia, and who provides his own definition based on his  
12 personal subjective beliefs and perceptions of how he was "treated", and then  
13 argues it should control all other considerations. If this were the standard, any  
14 hope at uniformity, stability and predictability in the determination of a member's  
15 compensation earnable would be lost. Fortunately, such an absurd interpretation  
16 is not required under the PERL. (CalPERS RON Exh. A; *Prentice, supra*, at 992  
17 ["In sum, '[c]alculation of 'compensation earnable' is not based on individual  
18 efforts."<sup>15</sup>

19 Respondent contends that the City informed CalPERS that he was a  
20 member of the Management and Confidential Bargaining Unit. This assertion is

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22 <sup>15</sup> Respondent's participation in budget matters was limited to working with other employees in providing  
23 input into a budget for a remodel of a fire station, preparing and obtaining quotes (Vol. II, 202/8-19.);  
24 Disciplinary actions were limited to "advising Battalion Chiefs (Vol. IV, 159/1-5; 160 2-4.) In addition,  
25 Respondent could "not think of one" policy over the decades of service that he developed. (Vol. IV,  
19710-12.) Respondent "maybe" took roll a half dozen times. (Vol. II, 205.) Even Respondent's claim that  
he was "conferred confidential status" based on the anecdotal and hearsay recollection of a comment  
made by a member of the City's fiscal office. (RC at p. 14. ¶ 58.)  
The City's own law and policies belie this contention. (CalPERS RON (B) – (D).)



1 premised on a single e-mail hearsay exchange between employees of the City's  
2 fiscal office.<sup>16</sup> However, the response correctly confirmed that the position of Fire  
3 Captain was covered under the rank and file "Fire MOU." (Exh.13.) and that the  
4 Battalion Chief was covered under a separate Management MOU that did not  
5 include the position of Fire Captain.<sup>17</sup> In response to her inquiry regarding the  
6 publicly available pay schedules, Ms. Lureas was directed to the City web page  
7 (ibid) which confirmed Respondent's "payrate" to be as reported. Contrary to  
8 Respondent's assertion (RR at p.4), the apparent purpose that the City referred  
9 to the Management MOU at all was to state that in reference as the yard stick  
10 against which the payments under the settlement payments were made.<sup>18</sup>

11 Finally, Respondent correctly asserts that remuneration paid for overtime,  
12 like payments for services that a member is not required to perform, are not  
13 included in the determination of a member's "compensation." (RR at p. 4.)  
14 However, Respondent misunderstands its significance in that he continued to  
15 accrue the right to receive overtime pay at the rate of a Fire Captain, and  
16 pursuant to rank and file MOU, because that was his right under his bargaining  
17 unit, unlike the concessions, which were simply another function in the calculation  
18 of the settlement payments and were not in fact a reduction in his regular pay as  
19 a Fire Captain.

20 \_\_\_\_\_  
21 <sup>16</sup> Contrary to Respondent's assertion in there is no reference that the City's human resources  
22 department stated to CalPERS or anyone else, including Respondent, that he was covered under the  
management memorandum of understanding.

23 <sup>17</sup> At best the response could be seen as an attempt at obfuscation.

24 <sup>18</sup> The response did not state that Respondent was covered under the Management MOU. The  
25 reference to October 2004 is more rationally seen, providing information as to how the settlement  
proceeds were calculated.



1           **D.     Respondent Fails to Distinguish Molina and Fails to Address**  
2           **Prentice and Other Controlling Interpretation of the Law**

3           Respondent's attempt to distinguish *Molina v. Bd. of Administration* (2011)  
4 200 Cal.App.4<sup>th</sup> 53 (*Molina*) fails. (See, RR at p. 5.) Respondent does not even  
5 attempt to distinguish *Prentice*, the very case the City's former legal  
6 representative now concedes that had she been aware of it at the time, she  
7 would not have rendered the legal advice upon which Respondent now relies.

8           Respondent misinforms this court that the settlement payments, rejected  
9 as compensation earnable in the *Molina* case,<sup>19</sup> were separate and distinct from  
10 any work-related activities." (RR at p. 5/18-19.) To the contrary, as in this case,  
11 the payments were made pursuant to an integrated agreement, which, as the  
12 court recited, pertinently provided:

13           "The settlement agreement contains several provisions that are relevant to  
14 the issues raised in this appeal. First, the purpose of the settlement  
15 agreement was set forth in its recitations, one of which states: "This  
16 Agreement is made as a compromise between Molina and Oxnard for the  
17 complete and final settlement of all claims, differences and causes of  
18 action with respect to Molina's employment with Oxnard and for every  
19 claim for relief, causes of action and/or any events occurring between the  
20 parties prior to the execution of the Agreement, including those set forth in  
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22 <sup>19</sup> "...Molina had sought to compel the inclusion in the calculation of his retirement pension all, or at least  
23 some portion of, the settlement proceeds received in the negotiated resolution of his wrongful termination  
24 action against the City of Oxnard. ...given the explicit language of the integrated settlement agreement  
25 between Molina and the City of Oxnard, the settlement proceeds constitute neither "payrate" nor "special  
compensation" and therefore are not taken into consideration as "compensation earnable" for purposes  
of Molina's "final compensation"; and ... under applicable state law, such settlement proceeds may thus  
not be legally utilized to increase Molina's pension benefits..." (*Molina*, supra at p. 56.)



1 the lawsuit entitled *Molina v. City of Oxnard*, Case No. 00-02291 CAS  
2 (SHx) in the United States District Court, Central District of California  
3 ('Lawsuit')." (*Molina*, at p. 57.)

4 The ostensible distinction addressed by Respondent is that *Molina* did not  
5 work for the City after the settlement agreement. Initially this is also technically  
6 inaccurate. (*Molina*, at p. 57.), but far more material was the fact that in *Molina*,  
7 like in this case, a large retroactive lump sum was paid and the contention was  
8 that these settlement payments were entitled to be characterized as "back pay."  
9 In rejecting the argument, the court notes that the settlement agreement was  
10 silent on this point, but ultimately held that even if the parties had specifically  
11 characterized the payments as pensionable compensation, it would have been  
12 futile and entirely irrelevant. (*Molina* at p. 64.) The court in *Molina* substantially  
13 relied on the decision in *Prentice*, *supra*. (*Molina* at pp. 65-66.) At least in  
14 *Prentice* the member, unlike Respondent, very clearly was being paid for  
15 additional services he performed that were arguably analogous to those of  
16 another group or class of employee. (*Prentice*, *supra*, at p. 987.)<sup>20</sup>

17 Finally, as in *In Re Adams*, Respondent bases his claim for payrate on a  
18 unique and individual agreement not otherwise reflected in a publicly available  
19 pay schedule. As in that matter, Respondent's contention now must also be  
20 rejected. Furthermore, even if the agreement referred to Respondent being paid

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<sup>20</sup> The court in *Prentice* rejected the member's argument that because he performed duties for which he received the disputed pay increase, and because those duties were similar to those of another group and class of employees whose compensation rate would support his increased payments, CalPERS should have compared his compensation increase to that other group and class. Even if Respondent actually performed duties of a Battalion Chief, his claim to be placed in the group and class of a Battalion Chief for purposes of establishing his payrate should be rejected.



1 as a Battalion Chief, it would still not qualify under California Code of Regulations  
2 570.5, as a pay schedule.<sup>21</sup>

3 Under that section, a Publicly Available Pay Schedule must: (1) be duly  
4 approved and adopted by the employer's governing body in accordance with  
5 requirements of applicable public meetings laws; (2) identify the position title for  
6 every employee position; (3) show the payrate for each identified position, which  
7 may be stated as a single amount or as multiple amounts within a range;  
8 (4) indicate the time base, including, but not limited to, whether the time base is  
9 hourly, daily, bi-weekly, monthly, bi-monthly, or annually; (5) be posted at the  
10 office of the employer or immediately accessible and available for public review  
11 from the employer during normal business hours or posted on the employer's  
12 internet website; (6) indicate an effective date and date of any revisions; (7) be  
13 retained by the employer and available for public inspection for not less than five  
14 years; and (8) not reference another document in lieu of disclosing the payrate.

15 Here, with the possible exception that the agreement identified the position  
16 of Respondent as a Fire Captain and may have been retained by the employer  
17 for at least five years, Respondent's Settlement Agreement fails to meet any of  
18 the criteria listed in subpart (a) of the above cited regulation. However, CalPERS'  
19 determination was in conformity with subdivision (b) of that regulation which  
20 provides that whenever an employer fails to meet the requirements of subdivision  
21 (a), the Board, in its sole discretion, may determine an amount that will be

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<sup>21</sup> CalPERS adopted Section 570.5 to clarify publicly available pay schedule requirements. (Ex. 79.) Clarifying regulations—like clarifying statutes—govern retroactively. (*People ex rel. Deukmejian v. CHE, Inc.* (1983) 150 Cal.App.3d 123, 134–35.)



1 considered to be payrate, taking into consideration all information it deems  
2 relevant including, but not limited to:  
3 (1) documents approved by the employer's governing body in accordance with  
4 requirements of public meetings laws and maintained by the employer; (2) last  
5 payrate listed on a pay schedule that conforms to the requirements of subdivision  
6 (a) with the same employer for the position at issue; (3) last payrate for the  
7 member that is listed on a pay schedule that conforms to the requirements of  
8 subdivision (a) with the same employer for a different position; and (4) the last  
9 payrate for the member in a position that was held by the member and that is  
10 listed on a pay schedule that conforms to the requirements of subdivision (a) of a  
11 former CalPERS employer.

12 In this case, the evidence clearly shows that CalPERS did consider factors  
13 listed in subpart (b) and properly concluded that Respondent's settlement  
14 agreement did not qualify as a publicly available pay schedule.

15 **E. Respondent's Remaining Arguments Are Unavailing**

16 Respondent has no vested right and CalPERS has no fiduciary duty to  
17 provide Respondent a benefit inconsistent with the PERL, nor was CalPERS'  
18 response to the City's request to report the payments a prior adjudication of the  
19 issue.<sup>22</sup> Furthermore, neither laches nor a statute of limitations prohibits  
20 CalPERS from, retroactively if need be, adjusting Respondent's final  
21 compensation whenever determined not to be in compliance with the PERL.

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23 \_\_\_\_\_  
24 <sup>22</sup> Respondent makes a fallacious argument that a single response to City as to how it might report the  
25 settlement proceeds as a "quasi-judicial proceeding." (RC at p. 41) The only authority Respondent  
suggests to support this odd argument is *People v Sims* (1982) 32 Cal.3d 468, 484. *Sims* is not even  
remotely similar nor supportive of such an assertion.



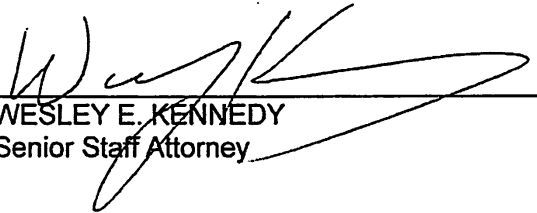
1 (§ 20160, subd. (b).) CalPERS has previously addressed, in a dispositive  
2 manner, Respondent's mistaken argument that because the employer in this  
3 case was a chartered city it somehow can preempt the Board's authority to  
4 administer the statewide public pension system according to the PERL. (RC at p.  
5 43.)<sup>23</sup>

6 **F. CONCLUSION**

7 Respondents in this matter settled a lawsuit and are attempting to pass  
8 the bulk of the cost off as an increased liability to the other patriating employers  
9 and employees. However, the PERL proscribes employers from using such  
10 agreements to dictate what qualifies as compensation earnable. (*Oden v. Board*  
11 *of Administration*, supra, 23 Cal.App.4th at p. 201.) The deal that the  
12 Respondents made was by its very purpose and design "unique" to one  
13 employee, and for that reason alone the proceeds may not be considered as  
14 compensation earnable. (*Prentice*, supra, at p. 994.) This court should deny  
15 Respondent's appeal and sustain CalPERS' determination.

17 BOARD OF ADMINISTRATION, CALIFORNIA  
18 PUBLIC EMPLOYEES' RETIREMENT SYSTEM

19 Dated: June 15, 2015

20 BY   
21 WESLEY E. KENNEDY  
22 Senior Staff Attorney

23 \_\_\_\_\_  
24 <sup>23</sup> Respondent's apparent and peculiar attempt to argue that Respondent was a statutory officer of the  
25 City is absurd and unavailing for obvious reasons. (RC at p. 44). Respondent is not a statutory officer  
and may not, under the City's civil service rules, be deemed or act as Battalion Chief in fact "ex officio."





**PROOF OF SERVICE**

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

On June 15, 2015, I served the foregoing document described as:

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

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

John M. Jensen  
Law Offices of John Michael Jensen  
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Los Angeles, CA 90064  
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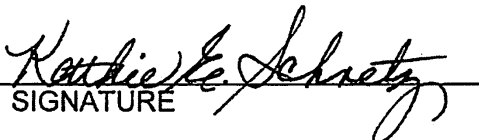
Office of Administrative Hearings  
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[sanfilings@dgs.ca.gov](mailto:sanfilings@dgs.ca.gov)

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

Executed on June 15, 2015, at Sacramento, California.

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

KATHIE SCHNETZ  
NAME

  
SIGNATURE