

MEETING
STATE OF CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
BOARD OF ADMINISTRATION
OPEN SESSION

ROBERT F. CARLSON AUDITORIUM
LINCOLN PLAZA NORTH
400 P STREET
SACRAMENTO, CALIFORNIA

WEDNESDAY, DECEMBER 16, 2015

9:04 A.M.

JAMES F. PETERS, CSR
CERTIFIED SHORTHAND REPORTER
LICENSE NUMBER 10063

A P P E A R A N C E S

BOARD MEMBERS:

Mr. Rob Feckner, President

Mr. Henry Jones, Vice President

Mr. Michael Bilbrey

Mr. John Chiang, represented by Mr. Grant Boyken

Mr. Richard Costigan

Mr. Richard Gillihan, represented by Ms. Katie Hagen

Ms. Dana Hollinger

Mr. J.J. Jelincic

Ms. Priya Mathur

Mr. Bill Slaton

Ms. Theresa Taylor

Ms. Betty Yee, represented by Ms. Lynn Paquin

STAFF:

Ms. Anne Stausboll, Chief Executive Officer

Ms. Cheryl Eason, Chief Financial Officer

Mr. Ted Eliopoulos, Chief Investment Officer

Mr. Douglas Hoffner, Deputy Executive Officer

Mr. Doug McKeever, Deputy Executive Officer

Ms. Donna Lum, Deputy Executive Officer

Mr. Brad Pacheco, Deputy Executive Officer

Mr. Matthew Jacobs, General Counsel

A P P E A R A N C E S C O N T I N U E D

STAFF:

Mr. Alan Milligan, Chief Actuary

Ms. Mary Anne Ashley, Chief, Legislative Affairs Division

Ms. Kara Buchanan, Board Secretary

Mr. Wesley Kennedy, Senior Staff Counsel

ALSO PRESENT:

Ms. Roberta Almeida

Mr. Michael Jensen, representing Mr. Richard Lewis

Mr. Chirag Shah, Shah and Associates

Mr. Stephen Silver, representing Ms. Christine Londo

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P R O C E E D I N G S

1
2 PRESIDENT FECKNER: Good morning. We'd like to
3 call the Board of Administration meeting to order.

4 Good morning, everyone.

5 The first order of business is to call the roll.

6 BOARD SECRETARY BUCHANAN: Good morning.

7 PRESIDENT FECKNER: Good morning.

8 BOARD SECRETARY BUCHANAN: Rob Feckner?

9 PRESIDENT FECKNER: Good morning.

10 BOARD SECRETARY BUCHANAN: Henry Jones?

11 VICE PRESIDENT JONES: Here.

12 BOARD SECRETARY BUCHANAN: Michael Bilbrey?

13 BOARD MEMBER BILBREY: Good morning.

14 BOARD SECRETARY BUCHANAN: Grant Boyken for John
15 Chiang?

16 ACTING BOARD MEMBER BOYKEN: Here.

17 BOARD SECRETARY BUCHANAN: Richard Costigan?

18 BOARD MEMBER COSTIGAN: Here.

19 BOARD SECRETARY BUCHANAN: Richard Gillihan?

20 BOARD MEMBER GILLIHAN: Here.

21 BOARD SECRETARY BUCHANAN: Dana Hollinger?

22 BOARD MEMBER HOLLINGER: Here.

23 BOARD SECRETARY BUCHANAN: J.J. Jelincic?

24 BOARD MEMBER JELINCIC: Here.

25 BOARD SECRETARY BUCHANAN: Ron Lind?

1 PRESIDENT FECKNER: Excused.

2 BOARD SECRETARY BUCHANAN: Priya Mathur?

3 BOARD MEMBER MATHUR: Good morning.

4 BOARD SECRETARY BUCHANAN: Good morning.

5 Bill Slaton?

6 BOARD MEMBER SLATON: Here.

7 BOARD SECRETARY BUCHANAN: Theresa Taylor?

8 BOARD MEMBER TAYLOR: Here.

9 BOARD SECRETARY BUCHANAN: And Lynn Paquin for
10 Betty Yee?

11 ACTING BOARD MEMBER PAQUIN: Here.

12 PRESIDENT FECKNER: Thank you. Item 2 is the
13 Pledge of Allegiance. I've asked Henry Jones, the Vice
14 Chair of the Board to please lead us the pledge. If
15 you'll all please rise.

16 (Thereupon the Pledge of Allegiance was
17 recited in unison.)

18 PRESIDENT FECKNER: Thank you.

19 Agenda Item 3, the Board President's report.

20 Well, good morning, everybody. Happy Holidays to all of
21 you.

22 Many people use this time of year as a time for
23 reflection, and a time to give thanks to the individuals
24 who make an impact in our lives, both personally as well
25 as professionally. This morning, I'd like to dedicate my

1 report to the employees here at CalPERS for their
2 dedication and commitment to serving our members as well
3 as their families. CalPERS is all about people. It's
4 about the dedicated individuals, our staff, who are the
5 heart of our organization. It's their work that helps us
6 to be successful. It's their work that brings life to our
7 mission, to protect the retirement and health security of
8 public employees in California.

9 CalPERS is also successful because of leadership,
10 both from this Board, and especially from our senior
11 leadership team led by Anne Stausboll. On behalf of the
12 Board, I want to thank our leadership team for their
13 outstanding work to transform CalPERS from the depths of a
14 financial crisis and a low point in our history. Time has
15 proven each of you has helped strengthen this
16 organization, its accountability, transparency, and
17 operations. CalPERS, our members, our employers, and tax
18 payers are all better off because of your work.

19 Now, let's celebrate the season by a performance
20 by our CalPERS choir. I'd like to ask my colleagues on
21 the Board to please either take a seat in the audience or
22 against the wall over here and allow our choir to please
23 entertain us.

24 (Off record: 9:08 AM)

25 (Thereupon the CalPERS choir sang).

1 (On record: 9:17 AM)

2 PRESIDENT FECKNER: Well, thank you. Again,
3 let's give another round of applause for a wonderful
4 choir. Thank you.

5 (Applause.)

6 PRESIDENT FECKNER: What a great way to start the
7 holiday season. Great job. Thank you.

8 So that brings us to Agenda Item 4a, the Chief
9 Executive Officer's report. Ms. Stausboll.

10 CHIEF EXECUTIVE OFFICER STAUSBOLL: Thank you.
11 Good morning, Mr. President, members of the
12 Board.

13 PRESIDENT FECKNER: Good morning.

14 CHIEF EXECUTIVE OFFICER STAUSBOLL: And as we
15 approach the end of the year, I'd like to echo our Board
16 President's remarks and thank the entire staff for all
17 that we've accomplished the last 12 months. You really
18 couldn't ask for a more committed talented and caring
19 staff, and I'm very grateful.

20 I also want to thank the Board for its support
21 throughout the year and your continued leadership as we
22 serve California's public employees.

23 So as we close out the year we've got a couple of
24 things to finish up. We'll be completing and posting our
25 annual CAFR, the Comprehensive Annual Financial Report.

1 That will be posted on the website as we complete it. And
2 then our actuaries are still working away, and we're
3 hoping to finalize the public agency employer valuation
4 reports and anticipate that most, if not all of them, will
5 be available through the my|CalPERS system by the end of
6 December.

7 So I thought what I'd do is just take a couple of
8 minutes to talk about where we'll focus our attention as
9 we move into the new year. I'm going to highlight some of
10 the areas where we'll be focusing our attention. On the
11 pension side, we'll begin with the implementation of the
12 new funding risk mitigation policy, put that process in
13 place.

14 And as you heard yesterday, we're developing a
15 new program that would allow public agencies that are able
16 to do so to pre-fund their future pension contributions.
17 So we'll be coming back to the Finance and Administration
18 Committee in February with that proposal.

19 On the health side, we've been very focused on
20 the impending excise tax. We woke up this morning to hear
21 the good news that in D.C. Congress and the White House
22 agreed on an omnibus package that would delay the excise
23 tax for another two years. We'll be learning more about
24 that. It sounds like there are also going to be studies
25 that were agreed to, to look at the age and gender

1 thresholds. So we'll be continuing to focus on that,
2 figure out what role we play. It's good news that we have
3 to delay, but there's still lots of work to be done. So
4 we'll be focusing on continuing to communicate and
5 education and outreach with our employers and
6 stakeholders, and, of course, work with our federal
7 representative in D.C. And this is a topic for the
8 January off-site as well.

9 In health care, we'll also be implementing the
10 population health management approach that you heard about
11 also yesterday to improve member health outcomes,
12 including maintaining wellness and disease prevention.

13 In investments, as we start the year, the program
14 will be focused on the portfolio priorities project.
15 We'll be bringing that to the Board in January, along with
16 the ESG strategy workshop that the Board requested a
17 couple of months ago.

18 Internally facing, we're exciting -- excited to
19 launch in January an innovation program that we've been
20 working on for some time now. This program will allow our
21 employees to submit ideas to improve operations,
22 efficiency, and programs. We're using our internal social
23 media platform for this program. We call that the Spark.
24 We've talked to you about that before. And we're really
25 excited about the launch. The idea is to very -- have a

1 very nimble platform that's very open.

2 And finally, our IT Services Branch will continue
3 its focus on protecting the data of our members and
4 employers. So we expect another busy year. Those are
5 just some of the highlights. We're looking forward to
6 moving the organization forward and completing the final
7 phases of the five year strategic plan.

8 We've also filled out our event calendar for
9 2016, so I wanted to highlight the main events for the
10 year. To begin the new year, we'll be hosting four of our
11 CBEEs, the CalPERS Benefits Education Events, throughout
12 Northern California. So the first one is scheduled for
13 Rohnert Park. It's January 29 and 30. And the following
14 events will be in Seaside, Oakland, and Redding.

15 We've also agreed this year to co-host the ICGN
16 conference. That's the International Corporate Governance
17 Network conference. It's going to be held in San
18 Francisco on June 27 through 29. And we're co-hosting
19 that with ICGN and CalSTRS.

20 And then we'll also be holding our emerging and
21 diverse manager day in September. This has now become an
22 annual event. It's the event where we invite our emerging
23 managers to visit us here at headquarters, and to meet
24 with our Investment staff, which is a great opportunity
25 for them.

1 And then our annual Employer Educational Forum
2 will be in Riverside, October 24 through 26. So those are
3 the main events external facing for the next calendar
4 year.

5 The 2015 California State employees food drive is
6 underway. That will go on through January 15. And the
7 donations that we collect during the food drive help
8 families and senior citizens here in the Sacramento area.
9 Helps them throughout the year.

10 Our goal this year is to collect 40,000 pounds of
11 food. So far, we've collected over 13,000 pounds. So at
12 CalPERS, we always do our share to bring the holiday
13 spirit to those less fortunate. I encourage everyone
14 who's able to do so, to contribute to this cause.

15 And finally, before I close today, I wanted to
16 again announce that CalPERS has won the 2015 asset owner
17 award for the best public defined benefit plan above \$100
18 billion. That was an award from the Chief Investment
19 Officer magazine. It's awarded to the best in global
20 institutional investing.

21 This year, the magazine's managing editor stated
22 that Ted Eliopoulos and his team at CalPERS exemplify what
23 these awards are all about, brave, smart, and cutting edge
24 leadership of institutional assets. So please join me in
25 congratulating Ted and the entire investment team.

1 (Applause.)

2 CHIEF EXECUTIVE OFFICER STAUSBOLL: Finally, our
3 winter all-staff gathering begins at 2:00 o'clock this
4 afternoon in this building in the atrium. So I hope you
5 can all attend. It's a great opportunity to thank the
6 staff, celebrate the holidays, and the upcoming new year.
7 And the wonderful chorus will be singing again.

8 So as I close, I want to wish everyone here in
9 the auditorium, everyone watching the webcast, all of you
10 all our employees Happy Holidays.

11 Thank you, Mr. President. That concludes my
12 remarks for this morning.

13 PRESIDENT FECKNER: Thank you.

14 Item 4b, Chief Investment Officer's Report. Mr.
15 Eliopoulos, please.

16 CHIEF INVESTMENT OFFICER ELIOPOULOS: Thank you.
17 Good, Mr. President, members of the Board.

18 PRESIDENT FECKNER: Good morning.

19 CHIEF INVESTMENT OFFICER ELIOPOULOS: I have a
20 brief update on the performance of the Public Employees'
21 Retirement Fund as of October 31st, 2015. The total fund
22 performance for the fiscal year to date is a negative 1
23 percent, which covers the four-month period from July
24 through October.

25 We like to look at much longer time periods, as

1 they are more meaningful for our performance. The
2 three-year return is 9.1 percent, the five-year return is
3 8.4 percent, the 10-year return is 5.8 percent, and the
4 20-year return of the total fund is 7.4 percent.

5 All asset classes are within their policy ranges,
6 and the total fund assets are valued, as of October 31st
7 2015, at \$295.8 billion.

8 Mr. President, that is my report.

9 PRESIDENT FECKNER: Thank you. Seeing no
10 requests to speak, we'll move to Agenda Item 5, the action
11 consent items. There is a request to move Item A to open
12 that up. Mr. Jelincic, you had a comment on Item A.

13 BOARD MEMBER JELINCIC: Yes.

14 PRESIDENT FECKNER: You need to --

15 BOARD MEMBER JELINCIC: Sorry.

16 PRESIDENT FECKNER: There you go.

17 BOARD MEMBER JELINCIC: On page five of the
18 minutes, the Risk and Audit, I'm listed as Chair and I'm
19 the Vice Chair, and the minutes ought to reflect that.

20 PRESIDENT FECKNER: Very good. Seeing no other
21 requests. Then we move on to -- Item 5a and 5b, nothing
22 else before us on that item. What's the pleasure of the
23 Board.

24 BOARD MEMBER BILBREY: Move approval.

25 BOARD MEMBER COSTIGAN: Second.

1 PRESIDENT FECKNER: Moved by Bilbrey, seconded by
2 Costigan.

3 All in favor say --

4 BOARD MEMBER JELINCIC: Did you want to point --

5 PRESIDENT FECKNER: Pardon?

6 BOARD MEMBER JELINCIC: Did you want to point out
7 the additional travel?

8 PRESIDENT FECKNER: No.

9 BOARD MEMBER JELINCIC: Oh, okay.

10 PRESIDENT FECKNER: Seeing no other requests.

11 All in favor say aye?

12 (Ayes.)

13 PRESIDENT FECKNER: Opposed, no?

14 Motion carries.

15 Item 6 is the consent items. I see no -- having
16 no requests to remove anything off of there, we move to
17 Item 7, Reports and Actions.

18 7a is the Investment Committee. For that, I call
19 on the Chair, Mr. Jones.

20 VICE PRESIDENT JONES: Thank you, Mr. President.

21 The Investment Committee met on December 14,
22 2015. The Committee discussed and approved the following:

23 Transition of the CalPERS emerging manager five
24 year plan annual report to the California legislature.

25 The Committee also approved the proposed revisions to the

1 Private Equity Program policy.

2 The Committee received presentations on the
3 following:

4 An update on the Investment Office Roadmap, an
5 annual review of the Real Assets Program by staff and
6 consultants, the first reading of proposed revisions to
7 the Real Assets Program Policy; and the Responsible
8 Contract Policy program annual update.

9 The Committee heard public comments on the
10 following:

11 CalPERS emerging manager five-year plan, the
12 revisions of the Private Equity Program policy, and the
13 Responsible Contract Policy.

14 Highlights of what to expect at the February
15 Investment Committee meeting include:

16 The second reading of the proposed revisions to
17 the Real Assets Program Policy, CalPERS trust level
18 review, and the first reading of the total fund investment
19 policy.

20 The next meeting of the Investment Committee is
21 scheduled for February 16, 2016 in Sacramento, California.

22 And that concludes my report, Mr. President.

23 PRESIDENT FECKNER: Thank you, Mr. Jones.

24 Before we move on to Item 7b, I want to go back
25 to 5b for a second, the Board travel approvals. In your

1 blue folders, there were four additional requests. I want
2 to make sure that everyone is noted on that. So I
3 would -- if there's no -- if there is any objections to
4 the vote being taken, I want to make sure you all were
5 aware that there are four additional requests. There's
6 seven total, four additional. There were three in the
7 original item. This is a revised item.

8 You have Theresa Taylor going to D.C., J.J. going
9 to risk allocation seminar, Henry going to CII, and Henry
10 going to CII in the fall. So those are the four
11 additional.

12 Ms. Mathur.

13 BOARD MEMBER MATHUR: Sorry, I didn't have
14 problem. I was just -- yeah.

15 PRESIDENT FECKNER: Oh. Okay. Very Good.

16 Then we're moving on to the Pension and Health
17 Committee. For that, I call on the Chair, Ms. Mathur.

18 BOARD MEMBER MATHUR: Thank you.

19 The Pension and Health Benefits Committee met on
20 December 15th, 2015.

21 The Committee is recommending the following
22 action item to the Board today:

23 I move -- the Committee moves -- the Committee
24 recommends and I move on Agenda Item 5 that the Board
25 approve staff's recommendation to sponsor legislation to

1 make minor clarifying technical changes to sections of the
2 Government Code administered by the California Public
3 Employees' Retirement System. The proposal will not
4 include the amendment to the statute regarding Board
5 approval of association plan rates.

6 PRESIDENT FECKNER: On motion by Committee.

7 Any discussion on the motion?

8 Seeing none.

9 All in favor say aye?

10 (Ayes.)

11 PRESIDENT FECKNER: Opposed, no?

12 Motion carries.

13 Please note that the -- CalHR is abstaining,
14 please.

15 BOARD MEMBER MATHUR: The Committee also received
16 several reports, including a presentation on CalPERS
17 strategic measures for Customer Services and Support and
18 Legislative Affairs. The Committee received information
19 regarding the Population Health Management Initiative,
20 prescription drug costs, and the process for health plans
21 interested in joining CalPERS.

22 The Chair directed staff to move forward with the
23 proposed strategic measures as presented for Customer
24 Services and Support Measures 10 and 11, and Legislative
25 Affairs Measure 14; allow -- and to allow additional

1 health plans interested in joining CalPERS to undertake
2 the same rigorous process that we was used in the Request
3 for Proposal process used in 2012-2013; and, as well, to
4 agree to CalPERS contractual terms and conditions if the
5 Board decides to include them in the annual rate-setting
6 process.

7 The Committee received public comment from Chris
8 Little regard high deductible plan options and regional
9 pricing criteria.

10 And at this time, I would like to share just a
11 couple highlights of what to expect in February at our
12 Pension and Health Benefits Committee meeting. At that
13 time, we will receive updates on federal health care and
14 retirement policy, retiree cost of living adjustments, and
15 public agency recruitment and retention for the Health
16 Program.

17 That concludes my report, Mr. -- oh, I'm sorry,
18 it does not.

19 (Laughter.)

20 BOARD MEMBER MATHUR: The Committee will also
21 review legislation for retirement options simplification.
22 The Committee will hear information on Customer Services
23 and Support performance, and health open enrollment
24 results.

25 The next meeting of the Pension and Health

1 Benefits Committee is scheduled for February 17th, 2016 in
2 Sacramento, California. And now, that concludes my
3 report, Mr. President.

4 PRESIDENT FECKNER: Thank you.

5 That brings us to Agenda Item 7c, Finance and
6 Administration Committee. For that I call on the Chair,
7 Mr. Costigan.

8 BOARD MEMBER COSTIGAN: Thank you, Mr. President.

9 The Finance and Administration Committee met on
10 December 15th, 2015.

11 The Committee recommends and I move the Board
12 approve the following:

13 Agenda Item 5a, the 2015-16 mid-year budget
14 revision, second reading. Approve the California Public
15 Employees' Retirement System fiscal year 2015-16 mid-year
16 budget total of \$1,807,600,000.

17 PRESIDENT FECKNER: On motion by Committee.

18 Any discussion on the motion?

19 Seeing none.

20 All in favor say aye?

21 (Ayes.)

22 PRESIDENT FECKNER: Opposed, no?

23 Motion carries.

24 BOARD MEMBER COSTIGAN: Agenda Item 6a, the State
25 Legislative Proposal, Policy, and Technical Amendments to

1 the Public Employees' Retirement Law. Approve the
2 sponsored legislation to make policy and technical changes
3 to sections of the Government Code affecting the benefits
4 program administered by the California Public Employees'
5 Retirement System.

6 PRESIDENT FECKNER: On motion by Committee.

7 Any discussion on the motion?

8 Seeing none.

9 All in favor say aye?

10 (Ayes.)

11 PRESIDENT FECKNER: Opposed, no?

12 Motion carries.

13 Please note Mr. Gillihan as abstaining.

14 BOARD MEMBER COSTIGAN: The Committee received
15 reports on the CalPERS strategic measures funded status
16 and the CalPERS strategic measures perception in the media
17 and perception among stakeholders.

18 I'd like to thank Mr. Neal Johnson for commenting
19 from the public on those items.

20 The February 2016 Finance and Administration
21 Committee meeting will include the 2015-17 business plan
22 mid-year update, the first reading of the CalPERS 2016-18
23 business plan, the Board of Administration election voting
24 process changes, proposed pension pre-funding trust
25 program, CalPERS budget policy, first reading, and the

1 actuarial policies framework and review.

2 That's my report, Mr. President. Thank you.

3 PRESIDENT FECKNER: Thank you.

4 That brings us to Agenda Item 7d, Performance and
5 Compensation Committee. For that, I call on the Chair,
6 Mr. Bilbrey.

7 BOARD MEMBER BILBREY: Thank you, Mr. President.

8 The Performance, Compensation and Talent
9 Management Committee met on December 15th, 2015. The
10 Committee received a report on the following information
11 item:

12 An update on the Human Resources Strategic
13 measures of employee turnover and the Organizational
14 Health Index survey.

15 At this time, I'd like to share a preview of what
16 to expect at the March Performance, Compensation and
17 Talent Management Committee meeting. The Committee will
18 conduct elections for Chair and Vice Chair, receive the
19 semiannual performance plan status reports of the Chief
20 Executive Officer and Chief Investment Officer, and review
21 the Performance, Compensation and Talent Management
22 Committee delegation.

23 The next meeting of the Performance, Compensation
24 and Talent Management Committee is scheduled for March 15,
25 2016. That concludes my report, Mr. President.

1 PRESIDENT FECKNER: Thank you.

2 7e, Risk and Audit. There was no meeting, no
3 report.

4 Item 7f, Board Governance Committee. For that, I
5 call on the Chair, Mr. Slaton.

6 BOARD MEMBER SLATON: Thank you, Mr. President.

7 The Board Governance Committee met on December
8 15th, 2015. The Committee recommends and I move the Board
9 approve the following:

10 Agenda Item 5, Proposed Revisions to Board Travel
11 Policy.

12 PRESIDENT FECKNER: On motion by Committee.

13 Any discussion on the motion?

14 Seeing none.

15 All in favor say aye?

16 (Ayes.)

17 PRESIDENT FECKNER: Opposed, no?

18 Motion carries.

19 BOARD MEMBER SLATON: The committee recommends
20 and I move the Board approve the following:

21 Agenda Item 6, Proposed Revisions to the Board
22 Education Policy.

23 PRESIDENT FECKNER: On motion by Committee.

24 Any discussion on the motion?

25 Seeing none.

1 All in favor say aye?

2 (Ayes.)

3 PRESIDENT FECKNER: Opposed, no?

4 Motion carries.

5 BOARD MEMBER SLATON: The Committee recommends
6 and I move the Board approve that following:

7 Agenda Item 7, Proposed Revision to the Board's
8 2016 Calendar.

9 PRESIDENT FECKNER: On motion by Committee.

10 Any discussion on the motion?

11 All in favor say aye?

12 (Ayes.)

13 PRESIDENT FECKNER: Opposed, no?

14 Please show Mr. Jelincic as abstaining.

15 Motion carries.

16 BOARD MEMBER SLATON: The Committee received
17 reports on the following topic:

18 Update on the education program attendance. The
19 Committee then participated in a discussion on the 2016
20 Board and Committee meeting calendar, periodic Board
21 self-appraisal, and terms of office for President and
22 Committee Chairs.

23 The next meeting -- oh, and also, the Committee
24 heard public comment from Neal Johnson with SEIU.

25 The next meeting of the Board Governance

1 Committee is scheduled for February 16th, 2016 in
2 Sacramento, California.

3 And that concludes my report.

4 PRESIDENT FECKNER: Thank you.

5 That brings us to Agenda Item 8, Proposed
6 Decisions of Administrative Law Judges. Before we begin,
7 I want to note that Chirag Shah, the Board's independent
8 counsel for administrative decisions is with us today, if
9 Board members have any questions or comments.

10 Mr. Shah, anything you want to say before we move
11 forward?

12 MR. SHAH: Nothing, other than Happy Holidays.

13 PRESIDENT FECKNER: We got that without the mic.
14 Thank you.

15 (Laughter.)

16 PRESIDENT FECKNER: All right. Then we -- Mr.
17 Jones.

18 VICE PRESIDENT JONES: Yeah. Thank you, Mr.
19 President. Item 8 I have three separate motions. The
20 first, I move to accept the recommendations of our
21 independent Board counsel and adopt the proposed decisions
22 at Agenda Items 8a and b, d through f, and h through o as
23 the Board's own decisions with the minor modification to
24 the Agenda Item 8o as argued by staff.

25 PRESIDENT FECKNER: Motion on the floor. Is

1 there a second?

2 BOARD MEMBER COSTIGAN: I'll second.

3 PRESIDENT FECKNER: It's been moved by Jones,
4 Seconded by Costigan.

5 Any discussion on the motion?

6 Mr. Jelincic.

7 BOARD MEMBER JELINCIC: Just so I understand,
8 he's not including c as in Charlie, and g as in George?

9 VICE PRESIDENT JONES: That is correct.

10 PRESIDENT FECKNER: Seeing no other discussion on
11 the motion.

12 Motion being before you, all in favor say aye?

13 (Ayes.)

14 PRESIDENT FECKNER: Opposed, no?

15 Motion carries.

16 Mr. Jones.

17 VICE PRESIDENT JONES: Yeah. Thank you, Mr.
18 President.

19 I move to accept the recommendation of our
20 independent Board counsel and remand Agenda Item 8c for
21 the taking of additional evidence regarding the opinions
22 and the writings of Dr. Kaer.

23 PRESIDENT FECKNER: Is there a second?

24 BOARD MEMBER HOLLINGER: Second.

25 PRESIDENT FECKNER: It's been moved by Jones,

1 seconded by Hagen -- I mean, by Hollinger, pardon me. It
2 was an H.

3 (Laughter.)

4 PRESIDENT FECKNER: Seeing no discussion on the
5 motion.

6 All in favor say aye?

7 (Ayes.)

8 PRESIDENT FECKNER: Opposed, no?

9 Motion carries.

10 Mr. Jones.

11 VICE PRESIDENT JONES: Yeah. Thank you, Mr.
12 President.

13 I move to accept the recommendation of our
14 independent Board counsel and schedule Agenda Item 8g for
15 a full Board hearing on the question of whether the
16 special salary adjustment reached pursuant to settlement
17 should be included in the member's final compensation
18 calculation.

19 BOARD MEMBER BILBREY: Second.

20 PRESIDENT FECKNER: Motion by Jones, seconded by
21 Bilbrey.

22 Any discussion on the motion?

23 Seeing none.

24 All in favor say aye?

25 (Ayes.)

1 PRESIDENT FECKNER: Opposed, no?

2 Motion carries.

3 That brings us to Agenda Item 9.

4 Mr. Jones.

5 VICE PRESIDENT JONES: Yeah. Thank you, Mr.

6 President. I move to accept the recommendations of our

7 independent Board counsel and deny the petition for

8 reconsideration at Agenda Item 9 a through d.

9 PRESIDENT FECKNER: Okay. Motion by Mr. Jones.

10 Is there a second?

11 BOARD MEMBER HOLLINGER: Second.

12 PRESIDENT FECKNER: Seconded by Hollinger.

13 All in favor of the motion say aye?

14 (Ayes.)

15 PRESIDENT FECKNER: Opposed, no?

16 Motion carries.

17 That moves us to Item 10, the full Board

18 decision.

19 Mr. Jones.

20 VICE PRESIDENT JONES: Yeah. Thank you, Mr.

21 President.

22 I move to accept the recommendations of our

23 independent Board counsel and adopt the full Board

24 decision as presented at Agenda Item 10 as the Board's

25 final decision.

1 PRESIDENT FECKNER: Is there a second?

2 BOARD MEMBER COSTIGAN: Second.

3 PRESIDENT FECKNER: It's been moved by Jones,
4 seconded by Costigan.

5 Any discussion on the motion?

6 Mr. Jelincic.

7 BOARD MEMBER JELINCIC: I did not participate in
8 the hearing and will be abstaining.

9 PRESIDENT FECKNER: Thank you.

10 Seeing no other requests on the motion, motion
11 being before you, all in favor say aye?

12 (Ayes.)

13 PRESIDENT FECKNER: Opposed say no?

14 Motion carries.

15 Thank you. That brings -- we have 11 -- yes,
16 please note Mr. Jelincic's abstention.

17 We have two full Board hearings. Before we move
18 to those, I'm going to take up Items 14 and 16, the State
19 Legislative Update, and the Public Comment.

20 So if we could, at this time, Ms. Ashley come
21 forward on Item 14 for the State Legislative update.

22 LEGISLATIVE AFFAIRS DIVISION CHIEF ASHLEY: Good
23 morning, President and members of the Committee.

24 PRESIDENT FECKNER: Good morning.

25 LEGISLATIVE AFFAIRS DIVISION CHIEF ASHLEY: Mary

1 Anne Ashley, CalPERS staff.

2 As the legislature is still out on interim
3 recess, there are no updates or changes to the last report
4 that was given. Legislative Affairs staff has been busy
5 preparing for the Legislature to reconvene in January on
6 January 4th. And as noted, we will be moving forward with
7 proposed legislation that the Board has agreed to sponsor.

8 The Board will be kept up-to-date on the progress
9 of CalPERS sponsored legislation and other legislation
10 that impacts CalPERS.

11 And for other issues, on December 9th, the
12 Attorney General issued the title and summary for both
13 Reed/DeMaio initiatives. Interestingly, both initiatives
14 were issued the same title, which is the Public Employees
15 Pension and Retiree Health Care Benefits. Neither the
16 proponents nor the opponents have praised or criticized
17 the Attorney General's title and summary.

18 The proponents have until June 6th, 2016 to
19 submit the more than 585,000 signatures that are required
20 to qualify the initiatives for the ballot. However, in
21 order for either of the initiatives to be on the November
22 2016 ballot, signatures would be -- need to be submitted
23 well before the June deadline, most likely in late April
24 or early May in order to provide sufficient time to count
25 and verify the signatures.

1 The proponents have not indicated which, if
2 either, of the initiatives they will move forward for
3 signature gathering, as they plan to review the title and
4 summary and do some polling before deciding.

5 So we will continue to monitor and watch as plans
6 are announced by the proponents of the measure. In
7 regards to the California Drug Relief Act initiative --
8 Drug Price Relief Act Initiative, currently, county
9 election officials are randomly sampling for verification
10 of signatures. Proponents have turned in over 500,000
11 signatures. And the officials have until December 24th,
12 2015 to complete the random sample.

13 CalPERS staff has identified that this initiative
14 would impact CalSTRS -- or sorry, CalPERS. And so staff
15 is currently analyzing the extent of the impact and will
16 update the Board again at the February meeting.

17 And additionally, I'd like to share some breaking
18 news. As Anne noted earlier, there has been bipartisan
19 agreement in the tax extender and overall omnibus
20 appropriations bill, which most likely will be passed
21 either Thursday or early Friday morning. There's no
22 indication yet that the President is not going to sign the
23 bill.

24 So as Ms. Stausboll noted, there will be a
25 delay -- a two-year delay in the Cadillac or excise tax.

1 And also the two pension -- public pension provisions that
2 Senator Hatch included in the -- in his Puerto Rico bill
3 that had hoped he could include in the omnibus bill, those
4 were not included in any of the federal bills. If you
5 remember, the provisions would be to include the Secure
6 Annuities For Employees, or the SAFE, Act and also the
7 Public Employee Pension Transparency Act. So we'll
8 continue to monitor his bill on Puerto Rico as that moves
9 forward.

10 And with that, that concludes my update. Thank
11 you very much. And I'm happy to answer any questions.

12 PRESIDENT FECKNER: Thank you.

13 Mr. Jelincic.

14 BOARD MEMBER JELINCIC: Can you give us a
15 thumbnail sketch on the pharmacy initiative that's out
16 there?

17 LEGISLATIVE AFFAIRS DIVISION CHIEF ASHLEY:

18 Right. So what it does is it prohibits the State
19 programs from paying more than the price that the United
20 States Department of Veterans Affairs pays for
21 prescription drugs. So that's the overall goal of it.
22 And currently, CalPERS staff is analyzing to what extent
23 that will impact CalPERS programs.

24 BOARD MEMBER JELINCIC: Thank you.

25 PRESIDENT FECKNER: Seeing no other requests,

1 thank you.

2 That brings us to Agenda Item 16, Public Comment.
3 I have one request from the public to speak. Roberta
4 Almeida. Please come forward down here. The Microphone
5 will be turned on for you. You have up to three minutes
6 to -- for your comments.

7 MS. ALMEIDA: Roberta Almeida, CalPERS member.

8 Government section 20283 of the PERL states, in
9 part, that an employer that fails to enroll an employee
10 into membership within 90 days of eligibility is required
11 to pay all arrears, both member and employer
12 contributions, and a \$500 administrative fee per member to
13 the System.

14 The section also states that employers cannot
15 pass on the cost to the employee. There is no statute of
16 limitations. Under section 20281, an employee becomes a
17 member upon his or her entry into employment. Yet today,
18 the Board chose to deny my membership rights under the
19 PERL using laches.

20 For the principle of laches to be used as a
21 defense, my employer was supposed to show that I was aware
22 they had cause of action. They did not show that. I was
23 not even aware that sections 20283 or 20028 of the PERL
24 exist during the 11 years I was a misclassified
25 contractor.

1 Section 20283 clearly puts the burden on the
2 employer to know of the eligibility. Yet, my employer
3 claims that by following my contracts, I lulled them into
4 relying on the status quo. So by showing up and doing my
5 work each day as agreed upon in the contracts written by
6 my employer, I apparently lulled them into thinking they
7 were getting away with breaking the law that they were
8 tasked with enforcing.

9 CalPERS excepts willful blindness of the PERL by
10 my employer, but I was supposed to be clairvoyant. My
11 employer contradicted themselves by initially arguing for
12 laches on the basis of prejudice due to the effects of
13 time on the evidence. Yet, they claimed in today's
14 arguments that there is an extensive record of exhibits
15 and oral testimony.

16 To my knowledge, CalPERS has never allowed laches
17 as the basis for evading membership rules. As with
18 estoppel, laches is not available where it would nullify
19 an important public policy adopted by the benefit of the
20 public. In fact, when CalPERS helped take the Cargill
21 case to the California Supreme Court, they claimed that
22 they had to in order to preserve the tax qualified status
23 of the System.

24 So why would CalPERS make an exception for my
25 employer and risk the tax qualified status of the System?

1 My employer was and is CalPERS. So this is sort of like a
2 case of the IRS not paying taxes for an employee and
3 blaming the employee for not advising them of the IRS
4 rules and regulations.

5 Going forward, if CalPERS does an audit and finds
6 a 1099 worker, will they allow other employers as -- to
7 use laches as a way to nullify sections of the PERL? Will
8 CalPERS stop requiring employers to bring employees along
9 with their retroactive contributions into membership if
10 the employee fails to make a claim?

11 The irony of my waiting over five years for the
12 process only to lose on laches, when it had never been
13 brought up before is almost too much.

14 CalPERS routinely goes back years and decades on
15 retirement issues. Making an exception in this case is
16 hypocritical and inappropriate behavior by a fiduciary.
17 The Board should apply the rules when it identifies any
18 employer in violation of the PERL, and hold CalPERS to
19 this same or even higher standard. Accountability doesn't
20 mean being perfect, but it does mean --

21 PRESIDENT FECKNER: Sorry, your time has expired.
22 Thank you for your comments.

23 Now, we are back to the full Board hearing. The
24 Item 11. Before we begin those, we are going to take a
25 five-minute break, so we will reconvene at 9:55.

1 (Off record: 9:48 AM)

2 (Thereupon a recess was taken.)

3 (On record: 9:57 AM)

4 PRESIDENT FECKNER: We're going to reconvene the
5 Board meeting, please. We're on agenda item 11a.

6 We're going to open the record for the full Board
7 hearing in the appeal of Mr. Richard Lewis, CalPERS case
8 number 2014-0256.

9 Let us first take roll.

10 BOARD SECRETARY BUCHANAN: Rob Feckner?

11 PRESIDENT FECKNER: Good morning.

12 BOARD SECRETARY BUCHANAN: Henry Jones?

13 PRESIDENT FECKNER: Excused.

14 BOARD SECRETARY BUCHANAN: Michael Bilbrey?

15 BOARD MEMBER BILBREY: Good morning.

16 BOARD SECRETARY BUCHANAN: Grant Boyken for John
17 Chiang?

18 ACTING BOARD MEMBER BOYKEN: Here.

19 BOARD SECRETARY BUCHANAN: Richard Costigan?

20 BOARD MEMBER COSTIGAN: Here.

21 BOARD SECRETARY BUCHANAN: Katie Hagen for
22 Richard Gillihan?

23 ACTING BOARD MEMBER HAGEN: Here.

24 BOARD SECRETARY BUCHANAN: Dana Hollinger?

25 BOARD MEMBER HOLLINGER: Here.

1 BOARD SECRETARY BUCHANAN: J.J. Jelincic?

2 BOARD MEMBER JELINCIC: Here.

3 BOARD SECRETARY BUCHANAN: Ron Lind?

4 PRESIDENT FECKNER: Excused.

5 BOARD SECRETARY BUCHANAN: Priya Mathur?

6 BOARD MEMBER MATHUR: Here.

7 BOARD SECRETARY BUCHANAN: Bill Slaton?

8 BOARD MEMBER SLATON: Here.

9 BOARD SECRETARY BUCHANAN: Theresa Taylor?

10 BOARD MEMBER TAYLOR: Here.

11 BOARD SECRETARY BUCHANAN: And Lynn Paquin for
12 Betty Yee.

13 ACTING BOARD MEMBER PAQUIN: Here.

14 PRESIDENT FECKNER: Thank you.

15 The proposed decision in this case was originally
16 considered by the Board at the October 2015 Board meeting.
17 At that meeting, the Board rejected the proposed decision
18 and scheduled this matter for a full Board hearing as
19 argue by staff on the question of whether the compensation
20 at issue should be included in Mr. Lewis's final
21 compensation calculation.

22 I note for the record that all parties have
23 received notice of the full Board hearing along with the
24 copies of the Statement of Policy and Procedures for full
25 Board hearings before the Board. In addition, all parties

1 have been information in writing that oral argument will
2 be limited to 10 minutes for each position, and rebuttal
3 will be limited to three minutes for each position.

4 Would counsel please take a moment to introduce
5 themselves starting with staff's counsel then Mr. Lewis'
6 counsel.

7 SENIOR STAFF COUNSEL KENNEDY: Good morning,
8 President Feckner and members of the Board. My name is
9 Wesley Kennedy, and I am Senior Staff Counsel for CalPERS.

10 PRESIDENT FECKNER: Thank you

11 MR. JENSEN: Good morning, Mr. President and
12 members of the Board, I'm John Jensen and I represent
13 Richard Lewis.

14 PRESIDENT FECKNER: Thank you.

15 Let the record also reflect that Chirag Shah,
16 from the Los Angeles based law firm of Shah & Associates,
17 the Board's independent counsel on full Board hearings and
18 proposed decisions from the Office of Administrative
19 Hearings is here now and will be in attendance throughout
20 the hearing. Mr. Shah will be advising members of the
21 Board on procedural as well as substantive issues that
22 arise in this proceeding should Board members have
23 questions.

24 Mr. Shah will also provide a brief summary of the
25 case before we begin oral arguments. As stated

1 previously, each position will have 10 minutes for oral
2 argument. Mr. Kennedy will have -- first have 10 minutes
3 to present staff's argument. After that, Mr. Jensen will
4 have 10 minutes to present argument on behalf of Mr.
5 Lewis.

6 Neither side is compelled to use the full 10
7 minutes. However, if you conclude your argument in less
8 than the time allotted, you do not get to roll-over any
9 remaining time for your -- any -- for your rebuttal or any
10 other portion of this proceeding.

11 After both sides have presented oral arguments,
12 each side will be given three minutes for rebuttal
13 arguments in the same order as the original presentation.
14 First, Mr. Kennedy, then Mr. Jensen. Here too, you may,
15 but do not have to, use the entire time allotted to you
16 for rebuttal. But if you decide to use less time, you
17 will not have any opportunity to use this time remaining
18 in your rebuttal.

19 There is a timer in front of you, which will be
20 set for 10 minutes for initial argument, and three minutes
21 or rebuttals. The timer will begin when you start to
22 speak. Please pay close attention to the timer as you
23 make your presentations order to avoid going over your
24 allotted time. When the timer turns red, your time will
25 have expired and the microphone will stop.

1 After all sides' arguments and rebuttals are
2 concluded, the Board may ask questions of any parties to
3 this proceeding as well as their independent counsel. The
4 alternatives available to the Board are set forth at
5 Agenda Item 11a.

6 Are there any questions so far? Do all the
7 parties understand the procedures?

8 SENIOR STAFF COUNSEL KENNEDY: Wesley Kennedy.
9 Yes, Mr. President.

10 MR. JENSEN: Yes, Mr. President.

11 PRESIDENT FECKNER: Thank you.

12 Now then, Mr. Shaw, please provide a brief
13 summary of the case.

14 MR. SHAH: Thank you, Mr. President. Good
15 morning to you. Good morning to members of the Board.

16 As you said, my name is Chirag Shah. I'm the
17 Board's independent counsel on full Board hearings. My
18 summary this morning will be very brief.

19 This is a dispute over the calculation of final
20 compensation under Section 20636 of the Public Employees'
21 Retirement Law, or PERL. In the proposed decision before
22 the administrative law -- before the Board today, rather,
23 the administrative law judge finds that the payments at
24 issue are includable in Mr. Richard Lewis's final
25 compensation determination.

1 Mr. Lewis, the member involved in this case, is a
2 disability retired Fire Captain with the City of San
3 Bernardino's Fire Department. Mr. Lewis served in various
4 capacities with the city's fire department over his
5 exemplary clear and service to the San Bernardino
6 community.

7 In 2007, Mr. Lewis and the city settled a lawsuit
8 in which Mr. Lewis had alleged that the city wrongfully
9 passed him over for a promotion to Battalion Chief several
10 times due to his union activity. The settlement agreement
11 provided three kinds of consideration relevant to this
12 appeal.

13 First, back-pay as if Mr. Lewis had been promoted
14 to battalion chief. Second, future pay and all benefits
15 at the rate of a battalion chief's salary. And third,
16 overtime at the rate of Fire Captain pay.

17 After execution of the settlement agreement,
18 member -- Mr. Lewis continued to work -- be classified as
19 a Fire Captain. Mr. Lewis argues however that he
20 performed the duties of a Battalion Chief even though he
21 was not required to under the settlement agreement. Mr.
22 Lewis argues that CalPERS staff misinformed both the city
23 and him into thinking that the Battalion Chief's pay, as
24 well as employer paid member contributions would be
25 included as temporary upgrade pay, an item of special

1 compensation at various times relevant to this case,
2 including near the execution of the settlement agreement.

3 On one occasion, specifically on July 5th, 2007,
4 staff advised the city in writing to report these items as
5 temporary upgrade pay. As discussed in the proposed
6 decision and briefed by each party's very capable counsel,
7 the question before the Board is whether the additional
8 pay, including the employer paid member contributions that
9 the member received should be included in member's final
10 compensation, as found by the administrative law judge in
11 the proposed decision.

12 Staff argues that the items at -- of pay at issue
13 do not satisfy PERL's definition of compensation earnable,
14 and therefore the appeal should be denied and the proposed
15 decisions should be revised accordingly.

16 Mr. Lewis argues that the item of pay -- items of
17 pay should absolutely be included in his retirement
18 calculation as correctly found by the administrative law
19 judge in the proposed decision. Therefore, Mr. Lewis
20 argues the Board should adopt the proposed decision in its
21 entirety as its own decision.

22 The details and the merits of the parties'
23 arguments are set forth in Agenda Item 11a.

24 Mr. President and members of the Board, that
25 concludes my brief summary of the case.

1 Thank you.

2 PRESIDENT FECKNER: Thank you.

3 Now, let us turn to the preliminary evidentiary
4 issues. As all parties are aware, we are not here to
5 relitigate factual issues or resubmit evidence into the
6 administrative record. However, in rare circumstances, in
7 the interests of achieving a just result, may require
8 consideration of newly discovered, relevant documentary
9 evidence, which could not, with reasonable diligence, have
10 been discovered and produce at the hearing before the
11 administrative law judge, and which therefore is not part
12 of the administrative record.

13 Under no circumstances may the Board accept new
14 witness testimony or any kind of examination or
15 cross-examination of anyone including Board members into
16 today's proceeding.

17 Under the Board's procedure, requests to
18 introduce newly discovered documentary evidence must have
19 been submitted in writing to the Board secretary no later
20 than the due date for written arguments, which in this
21 case was December 4th, 2015.

22 In order to avoid interruption during each
23 other's respective time today, please let us know now if
24 any of the parties have any relevant, newly discovered
25 evidence which could have not been discovered and produced

1 at the hearing that it seeks to be admitted into the
2 administrative record today, as to which a timely written
3 request was submitted to the Board.

4 Do either of you have any such evidence to offer
5 today as to which you have submitted a prior written
6 request by the due date for argument?

7 Mr. Kennedy.

8 SENIOR STAFF COUNSEL KENNEDY: Wes Kennedy. No,
9 Mr. President.

10 PRESIDENT FECKNER: Thank you.

11 Mr. Jensen.

12 MR. JENSEN: No new evidence.

13 PRESIDENT FECKNER: All right. I thank you.

14 Seeing that no requests to submit newly
15 discovered evidence, let us begin with oral arguments.

16 Mr. Kennedy, please present staff's argument.
17 Please start the clock for 10 minutes when Mr. Kennedy
18 begins to speak.

19 SENIOR STAFF COUNSEL KENNEDY: Good morning, Mr.
20 President, members of the CalPERS Board. I am Senior
21 Staff Counsel, Wesley Kennedy. And after -- following Mr.
22 Chirag's excellent entrée and description of the case, I
23 would just like to cut to the chase and indicate that the
24 settlement agreement entered into by the city and Mr.
25 Lewis represents a fully integrated settlement agreement.

1 In other words, the representations and comments in that
2 agreement are binding on the parties, and extraneous
3 materials, understandings, representations are intended to
4 be precluded.

5 In 2007, financially strapped, the City of San
6 Bernardino initially rejected a demand by Mr. Lewis for a
7 large lump sum payoff of his lawsuit.

8 Instead, they agreed to make periodic payments
9 calculated in part on the difference between respondent's
10 agreed actual pay, which he stipulated in his agreement
11 was that of a Fire Captain, and what the city paid
12 battalion chiefs. The agreement did not promote Mr.
13 Lewis. The agreement would still allow respondent to
14 receive all non-redundant benefits of Fire Captain.
15 Important among those, he would still accrue and be paid
16 overtime as a Fire Captain.

17 After the parties signed a fully integrated
18 agreement, the city did contact a CalPERS staff person,
19 and informed the staff person that they intended to report
20 the settlement payments to CalPERS as earnings.

21 Since the city made it clear the respondent was
22 not being promoted, the response was that the only other
23 option for reporting earnings was that of special
24 compensation. However, as the record has disclosed, all
25 parties knew that merely reporting the earnings to CalPERS

1 at that level did not mean that they were included in the
2 calculation of Mr. Lewis's pension benefit, and that
3 CalPERS has the right and duty to review and adjust
4 reported earnings to conform with the PERL. But the city
5 and the respondent took their chances and reported it, and
6 here we are today.

7 If successful, respondent would have gained a
8 windfall, and the city would have been able to pension
9 off -- use the pension fund instead of its own resources
10 as a cash reserve to payoff a lawsuit. The additional
11 cost, more than \$600,000 of unanticipated actuarial loss
12 and increased liability to the System, would be borne by
13 the System and buy its members and participating partners.

14 But for the observant and talented staff member,
15 they almost got away with it. It was worth -- it's worth
16 noting, in fact, that shortly after this agreement was
17 entered into, approximately in 2009, both the fiscal --
18 the director of the city's fiscal office and later their
19 own city attorney, after reading the case of Prentice
20 versus Board of Education -- Board of Administration had
21 indicated serious doubts and questions as to the
22 legitimacy and lawfulness of the settlement arrangements.

23 This case presents a question of whether side
24 payments made to resolve a lawsuit with an additional --
25 with an individual member can qualify as special

1 compensation and/or pay rate. The short answer is that
2 the payments qualified for neither.

3 Section 571 delineates specifically and
4 exclusively what items of pay may be considered
5 official -- special compensation, if they are -- and this
6 is the caveat -- important caveat, if the items are paid
7 pursuant to lay labor policy and agreement. The specific
8 type of pay and increase -- special compensation in this
9 case is referred to as temporary upgrade pay. Temporary
10 upgrade pay is compensation paid to an employee by an
11 employer and the employer -- the employee is required by
12 the employer to work in an upgraded position
13 classification of limited duration.

14 The settle payments in this case do not qualify
15 as TUP. Respondent was specifically not required to work
16 in any higher upgraded position or classification. In
17 point of fact, respondent could not -- respondent would
18 continue to receive the settlement payments, whether he
19 worked in any position at all.

20 Finally, beside the payments cannot qualify as
21 any form of special compensation, not -- other than TUP or
22 any form, because they were not paid pursuant to a policy
23 labor and agreement. In *Prentice v. Board of Education*, a
24 very analogous case to the one before you, the court
25 specifically defined labor policy and agreement and stated

1 as follows: "A written employment agreement with an
2 individual employee is not a labor policy and agreement
3 within the meaning of the regulation", meaning the PERL.

4 As used in the regulation, the term "labor"
5 modifies both policy and agreement and implicitly
6 restricts the referenced policies and agreements to either
7 policies which cover a whole class of employees or
8 collective bargaining agreements. This restricted and
9 more literal meaning -- reading of the regulation is
10 required because a broader interpretation offered by
11 Prentice would essentially provide no limit on the
12 compensation a local agency would -- could provide an
13 individual employee by way of individual agreements.

14 Accordingly, for same reasons, CalPERS requests
15 and postulates to the Board, that Mr. Lewis's settlement
16 agreements -- settlement payments do not qualify as
17 special compensation, and clearly, clearly not TUP.

18 For the first time though in this case, in his
19 post-hearing briefs, respondent raises the issue of
20 whether or not the payments in the compensation may
21 constitute pay rate. As this Board knows, pay rate is
22 monies paid by an employer that represent the normal rate
23 of pay, or base pay of a member, paid to similarly
24 situated members of the same group or class for services
25 rendered and paid pursuant to a publicly available pay

1 schedule.

2 To fail in one of these criteria is to fail as
3 pay rate. Mr. Lewis's payments fail in everyone of these
4 criteria. The cumulative evidence, as well as
5 respondent's agreement identify that his regular, his
6 actual pay rate is that of a Fire Captain. The payments
7 were not paid for services rendered. Indeed, there were
8 no services required by Mr. Lewis in order to receive the
9 additional payments.

10 The pay arrangement reflects a unique --
11 according to Mr. Lewis, a unique circumstance, and even in
12 the words of the city administrator, a challenging -- a
13 challenge to administer.

14 Respondent's contention that it -- he should be
15 in a -- he should be deemed a de facto member -- or a de
16 facto Battalion Chief defies both logic and law.

17 Finally, the evidence in this case clearly shows
18 that the side agreements were not paid pursuant to a
19 publicly available pay schedule, in the Board's recent
20 precedential decision, in, in re Randy Adams. In Section
21 570.5 code regulations, the Board affirmed that such
22 agreements do not constitute a salary schedule and are not
23 public unless they are vetted, noticed, and approved
24 before the governing body.

25 At the very best that occurred in this case, Mr.

1 Lewis's settlement agreement may have -- the terms may
2 have been discussed in a budget session. But if they were
3 approved at all, which is not proven in this case that
4 they were, they were in a closed session, and they were
5 never reported out.

6 Respondent's -- and in summary, respondent's
7 case -- respondent's arguments are very similar to a case
8 that this Board had some years back, and that's the case
9 of Snow versus Board of Education. In Snow versus Board
10 of Education, the respondent Snow worked as a -- well, he
11 worked as an assistant land agent, and -- but performed
12 the duties of a higher classification, known as a land
13 associate, associate land agent. He was paid the
14 compensation for the higher position.

15 When he retired he came to CalPERS and he asked
16 CalPERS to use that higher rate as his compensation
17 earnable. The court noting that he had completely failed
18 to follow any -- that his promotion, although may be de
19 facto, did not follow any of the civil service rules, and
20 of the MOUs or any of the laws necessary for a promotion,
21 denied it and denied his ability to use the PERL to
22 basically de facto promote him to that position and denied
23 the use of that -- his payments as compensation earnable.
24 Instead, they used the lower classification.

25 In conclusion, it's ironic that respondent

1 accuses CalPERS of raising -- of basing its determination
2 solely on respondent's title. CalPERS uses the titles
3 sometimes as a standard based -- no, I'm sorry, as a
4 title. They wished CalPERS to use a standard based on
5 anecdotal, contradictory subjective statements of the
6 member, unsupported by any documentation or -- and other
7 testimony.

8 Even if they were correct, and that CalPERS did
9 use title, Respondent diminishes the importance of the
10 employee's official title. When correlated with other
11 documents, such as duty statements, MOUs, and pay
12 schedules, it is an entirely reasonable and objective
13 means and manner by which CalPERS and members of the
14 public can identify a member's position, classification,
15 and pay schedule.

16 It assures, along with other compliance, with
17 governing laws, civil service laws, the city charter, MOUs
18 that the essential public transparency and uniformity
19 essential to the PERL is maintained.

20 It goes a long way to block the very type of
21 backroom deals and special and unique --

22 PRESIDENT FECKNER: Your time is up, Mr. Kennedy.

23 SENIOR STAFF COUNSEL KENNEDY: -- treatment as
24 exists in this case. Thank you.

25 PRESIDENT FECKNER: Mr. Kennedy, your time is up.

1 Thank you.

2 Mr. Jensen.

3 CHIEF RISK OFFICER JENSEN: Good morning.

4 PRESIDENT FECKNER: Wait a minute. Microphone.

5 There you go.

6 MR. JENSEN: Great. Good morning.

7 I frankly found that pretty disturbing, because
8 he's talking about that my client and the agency took
9 their chances and were looking for a windfall and somehow
10 were trying to make others pay for the pension liabilities
11 that were clearly associated with his job.

12 What happened in this case is pretty clear. Mr.
13 Lewis was a Fire Captain. He passed the promotion tests,
14 but he was very active in the rank and file union, and the
15 fire management didn't want him because of his union
16 activities. He was qualified for the job. He earned the
17 position. He was entitled to the open position, and they
18 passed over him, because of his union activities. And
19 those of you who represent unions, I think this would be
20 pretty important to you to recognize that that's not
21 acceptable behavior.

22 So what happened is he sued, like -- because he
23 had no other alternative, and the city settled,
24 recognizing that he'd been passed over irresponsibly and
25 inappropriately, but there wasn't an open Battalion Chief

1 position. So what do they do? If they can't promote him
2 to an open position, because they're all filled, they have
3 to work out some kind of arrangement where he's paid for
4 what he does, because he was performing the BC duties.

5 And the facts in -- that are listed in staff's
6 arguments are contrary to the facts in the proposed
7 decision. So he's performing the B -- I'm just going to
8 call it the BC duties. The city gives him a sport utility
9 vehicle like the other BCs. He's under the management
10 MOU. The city treats him under the management MOU. He
11 has all of the -- he's paid pursuant to the publicly
12 available pay schedules for the BC. He has all of the job
13 duties and responsibilities of the BC and he performs
14 those duties. The one thing he doesn't have is the title.
15 And the reason he doesn't have the title is because all
16 the positions were filled.

17 So this is the situation. They have another
18 American who is -- who didn't pass the test as high as he
19 did, who is in the BC position who has that title, and
20 then they have Mr. Lewis who's in a different agency who
21 doesn't have the title, but he's performing the duties.
22 He's being paid. He's being treated, and they call on him
23 to be a BC. That's just the facts in the record.

24 I wasn't there. I'm not representing it. But it
25 might be important for you to look at those facts and

1 determine whether he actually performed the duties of the
2 BC, whether he actually was treated by the city pursuant
3 to the management agreement. Those are the terms under
4 the PERL which entitle him to the BC pay.

5 What CalPERS is referring to in this case is that
6 he had the title of Fire Chief in certain aspects, in
7 particular when the human resources department at the city
8 was filing his disability application, they used the Fire
9 Captain title.

10 But what's most interesting in this is that this
11 whole designation the pay that CalPERS is representing to
12 you about temporary upgrade pay, it was really pay rate
13 from the whole -- from the very beginning, because that's
14 what he was doing. He was doing the position, and that's
15 what the publicly available pay rate was was the BC pay,
16 and that's what his bargain group was.

17 But the city called CalPERS and they asked, okay,
18 we have this situation, what do we do?

19 CalPERS advised them to treat it as temporary
20 upgrade pay. That's how this -- that's how this
21 designation is, what he calls TUP, came into existence.
22 And so that's what they did. They didn't treat it as pay
23 rate. They treated it as temporary upgrade pay and they
24 reported it as special compensation.

25 They didn't make it up. The city didn't make it

1 up. The city called CalPERS and relied on it. The
2 decision bases on equitable estoppel. CalPERS says
3 equitable estoppel doesn't apply, because it's something
4 in excess of statute. We've kind of litigated this issue,
5 and actually we believe that both CalPERS and the city are
6 entitled to treat him as a BC. And therefore, that
7 argument against equitable estoppel doesn't fit into this.
8 And they -- CalPERS is actually equitably estopped.

9 And he should have the -- it should be treated as
10 pensionable compensation, whether it's pay rate or
11 something else. So the equitable estoppel would apply to
12 temporary upgrade pay.

13 But CalPERS keeps looking at this as settlement
14 pay. It wasn't settlement pay monies. It was that he was
15 given what he was entitled to. He was given what he
16 earned, and what they denied him. They gave him the
17 position. And it wasn't payment pursuant to the
18 settlement agreement in that way. What they did is they
19 say, oh, yeah, you were entitled to being a BC. Sure,
20 we'll pay you what you earned, and they paid him for the
21 rest of his tenure in that until he stopped working.

22 When Mr. Kennedy refers to the period that he
23 would be the -- get the BC pay even if he wasn't working.
24 Well, unfortunately, Mr. Lewis was injured on the job and
25 he had went out on 4850 time for a year, and went out, and

1 so he wasn't working, but that's just because he was
2 injured.

3 So it wasn't as though he was going to get the
4 pay if he stopped working. This was just a -- basically,
5 this was a way of dealing with a labor problem, and giving
6 somebody what they're entitled to. And the reason this
7 whole problem arose is because of CalPERS wrong advice to
8 them.

9 So now we're in the back-end of this. They come
10 back and they look at it and they're trying to say it's
11 settlement pay, like -- that it was basically a lump sum
12 payment and settlement of a dispute. But really what it
13 was, was the city recognized it was inappropriate and it
14 should have promoted him, but there wasn't a position.

15 So when Mr. Kennedy says they took their chances,
16 I don't know what he's talking about, because the city and
17 the individual presented this information to CalPERS and
18 CalPERS gave them advice. I don't know if you want your
19 employers to rely on the advice that the compensation
20 review unit gives to people. If you don't want it, then
21 you should instruct them not to give the advice, because
22 that's the only reason they should give it.

23 And as far as the windfall, it's just totally
24 inappropriate. I mean, he worked for his whole career for
25 the City of San Bernardino. So I know the City of San

1 Bernardino has some problems. They're in bankruptcy, but
2 the City of San Bernardino would be responsible for all of
3 the actuarial cost of this. And they've accepted it.
4 They initially, in their initial briefs, they supported
5 Mr. Lewis's -- whatever -- his position.

6 But I think it's just to sort of address some of
7 his other issues, there were no side payments, okay? The
8 only side payments were as a result of CalPERS advising
9 them to treat it as temporary upgrade pay, and that was
10 treated as special comp was in addition to his pay rate.
11 So to treat that as quote a side payment is incorrect.

12 And as far as when we first raised the issue that
13 it qualifies as pay rate for the Battalion Chief. Well,
14 we raise that from the very beginning. We don't have
15 control over what the statement of issues of what CalPERS
16 puts in there, but we're entitled to add in our arguments
17 in contrary to them in their notice of defense. I believe
18 we did that then.

19 But anyway, to get back to this very basic issue.
20 The facts are that this person was wrongly denied
21 something that he was entitled to, both the pay and the
22 title. Because the city fire management refused to give
23 him the title, he -- and there was no open BC position,
24 then he continued to perform the duties of a BC. The city
25 gave him all of the responsibilities associated with being

1 a BC, including, you know, appearing in a BC uniform and
2 driving a BC vehicle, fire sport utility vehicle.

3 And, you know, as far as this agreement between
4 Mr. Lewis and the city being fully integrated, CalPERS was
5 not a party to that agreement. And the agreement was very
6 clear -- well, clearly that it resolved an inappropriate
7 labor action. And I think that this case should have been
8 resolved by them not discriminating against Mr. Lewis
9 because of his union activities, but because that didn't
10 happen. And it could have been resolved that there was an
11 open BC position, but that didn't happen. And it could
12 have been resolved that the CalPERS correctly advised the
13 city on how to characterize this as pay rate, but that
14 didn't happen.

15 So now we're in this position where we have a
16 deserved client who is not doing anything wrong, who was
17 the wronged party. We have a city trying to file --
18 follow CalPERS advice. Everything was reported. There
19 was nothing, you know, underhanded about any of this, and
20 they're just trying to correct something that is wrong,
21 and that everyone knows that -- well, not everyone
22 knows -- that he was entitled to.

23 So with that, I mean, I look forward to rebuttal
24 of this, but I guess I just suggest that you look at this
25 administrative record, look at the proposed decision, look

1 at the facts. If he was performing the BC duties, and he
2 was paid pursuant to the BC pay rate, and the only thing
3 that was missing was the title that the city controls,
4 that's not a PERL issue. He's entitled to the BC pay
5 rate. Thanks.

6 PRESIDENT FECKNER: Thank you.

7 Mr. Kennedy, do you have rebuttal?

8 SENIOR STAFF COUNSEL KENNEDY: I joined Mr.
9 Jensen --

10 PRESIDENT FECKNER: Microphone, please.

11 SENIOR STAFF COUNSEL KENNEDY: I join with Mr.
12 Jensen, but perhaps for other reasons than he.

13 If the Board looks at the record and the
14 testimony of every client, every witness that was called,
15 other than Mr. Lewis himself, even, in fact, up to and
16 including the attorney that represented him in his civil
17 action below, they will find there is absolutely no
18 testimony nor evidence supporting the accusation that he
19 performed duties as a BC, that he was promoted as a BC,
20 that his pay, that the settlement agreement was for
21 services performed as a BC. It just doesn't exist. There
22 was no promotion. There was no compliance with the
23 charter. There was no compliance with the civil service
24 rules. There was no compliance with the MOUs. He was not
25 a member of the management and administrative MOU.

1 There was a comment that -- and where he gets
2 that is a comment in the discussion -- a side discussion
3 in the office of the fiscal director when they're talking
4 about what kind of compensation they're going to -- you
5 know, what the -- how they're going to divide up the
6 compensation, compensation from the Fire Captain less --
7 you know, detracting that from a Fire Chief.

8 And he relates to that conversation as being I
9 was deemed then to be a member of the administrative and
10 management confidential unit.

11 So I do implore the court -- I mean, the Board to
12 actually read the facts in this case. They are all
13 entirely -- as well as the documents, entirely in favor of
14 CalPERS's determination.

15 I would also indicate again that Mr. Lewis --
16 this is not a case where Mr. Lewis is relitigating his
17 labor claims. He had that opportunity. He fully
18 litigated it. He was fully represented, and he entered
19 into a fully integrated settlement agreement, in which he
20 states that the city, and cites the city performed -- was
21 performing no improper or unlawful conduct towards him.

22 I would just again mention that even if he had
23 been working as a BC -- and, you know, I don't necessarily
24 think that driving a Tahoe truck is -- necessarily means
25 that you're a BC or a certain status.

1 Actually, the primary duty that he is alluding
2 to, which the evidence will show you, that brings him up
3 to a BC is he was a -- when he first responded to a fire
4 incident, he would assume the higher duties. He would
5 assume a lead role there until a Battalion Chief arrived.
6 That obligation was, in fact, part of the duties of a Fire
7 Chief -- I mean, Fire Captain. So he was always
8 performing a Fire Captain.

9 And his own -- his own counsel said there's
10 nothing in this agreement that recognizes, denotes, or
11 even requires him to serve in any kind of acting role or
12 anything close to what a TUP would be. And his pay rate
13 was constantly and always, actually as stipulated by him
14 in his agreement, that of a Fire Captain.

15 Thank you.

16 PRESIDENT FECKNER: Thank you.

17 Mr. Jensen.

18 MR. JENSEN: Thank you. I think you can
19 disregard Mr. Kennedy's testimony about how San Bernardino
20 treats the fire -- the Battalion Chiefs and their use of
21 Tahoes. I mean, it might be interesting for him to
22 testify, but it's not really in this case.

23 But there is testimony in the record. There's
24 the testimony not only of Richard Lewis, but look at the
25 testimony of the city council woman. And she says that

1 she saw Mr. Lewis acting in the role of BC. And Mr.
2 Kennedy is misconstruing, I believe -- give him the
3 benefit of the doubt -- of the testimony of the others.

4 There was times when Mr. Lewis was first on the
5 scene. But I believe he remained as BC in those fires,
6 where there was large fires. He didn't step down when
7 another BC came in.

8 So it is probably important, not just to look at
9 the proposed decision, but actually probably look at the
10 underlying administrative record, because those are the
11 facts that you're supposed to look at, and the facts that
12 you're actually supposed to read, even if it takes an
13 incredible amount of effort, so -- and time. And we've
14 had this discussion before.

15 But I guess the thing is if Mr. Kennedy is
16 looking at whether the city followed its charter or
17 whether the city followed its civil service rules, I think
18 there's testimony that the city believed that he's
19 entitled to the BC pay. And I think that really what the
20 city determined was -- the city law determined is that the
21 Fire Chief is the one who designates duties.

22 And in this case, the Fire Chief had Mr. Lewis
23 perform the duties of a BC. And if that's the main
24 criteria for group or class is performing the duties of
25 similarly situated people, then Mr. Lewis satisfies that

1 group of class of other BCs. He's entitled to the pay
2 rate and special compensation of other BCs, and his
3 pension -- and is fully compliant with the PERL, fully
4 compliant.

5 It may not be compliant under the first piece of
6 advice given by CalPERS, but it's fully compliant as pay
7 rate. And I just want to urge you to look at that. And
8 if you want us to come back and reargue this or re-brief
9 it, I think it's -- we'd be willing to do that. But it is
10 all in the record, and it is pretty clear. And this is
11 not a -- this is not a spiking issue. This is not a
12 windfall issue. This is not a actuarial issue. It's a
13 fairness issue. It's about giving somebody what they
14 deserve, what they've earned, what was wrongly taken from
15 them. And it's all compliant with the PERL, as well as
16 that.

17 PRESIDENT FECKNER: All right. Thank you.

18 It's now time for the Board's Q&A.

19 Any questions or comments from the Board?

20 Mr. Costigan.

21 BOARD MEMBER COSTIGAN: Thank you, Mr. Feckner.

22 Mr. Jensen, I have a few concerns. No one is
23 entitled to anything. Your constant use of Mr. Lewis
24 being entitled to it, and you want to talk about beliefs
25 versus the record. What's clear in the record is that the

1 appointing authority did not make him a Battalion Chief.
2 It doesn't matter what they believe. Your argument that
3 there was no position, the city had the ability to create
4 a position. So for five years, the city took no action.
5 And to sit here and say, well, there was no position.

6 What I look at is the record and the actions of
7 the city. They didn't promote him. The settlement
8 agreement makes it clear that he stays as Fire Captain.

9 So please explain to me how a belief creates a
10 classification that otherwise the appointing authority did
11 not create?

12 MR. JENSEN: Gladly. And I think the situation
13 that you're -- what you're basically saying is that the
14 city should have created another BC position.

15 BOARD MEMBER COSTIGAN: I'm not saying the city
16 should have created. You're making the argument that
17 the -- that he was a BC. There is no position for that.
18 The city was under no obligation to create a Battalion
19 Chief position.

20 MR. JENSEN: Well this is what's kind of
21 interesting, is that what is the BC position? Is the BC
22 position performing the duties and responsibilities of the
23 BC in the same group or class as other BCs, or is it
24 having the title?

25 In this case, the city actually did create

1 another BC position in reality. They required Mr. Lewis
2 to perform the duties and responsibilities of a BC on a
3 day-to-day basis. That's what they did. In fact --

4 BOARD MEMBER COSTIGAN: Mr. Jensen, he's either
5 working out of class, for which he'd have another claim,
6 which I don't see anywhere in the record. So whether
7 that's true or not, there isn't -- there is a -- there is
8 a remedy available. And again, the appointing authority
9 did not appoint him to the Battalion Chief.

10 I mean, the record is clear on that. He can
11 argue -- I can say I'm the CEO of CalPERS and be an office
12 tech, because I perform some issues as a CEO, and I
13 believe that. But if the appointing authority doesn't do
14 it, the record is void of that.

15 MR. JENSEN: Okay. Can I just address that?

16 BOARD MEMBER COSTIGAN: Yes.

17 MR. JENSEN: Because I want to just turn your
18 attention to his treatment under the management MOU.
19 Okay. There's clear testimony in the record that Mr.
20 Lewis was treated in the management MOU. And the only way
21 you get to be treated as a management MOU by the city, in
22 this case, would be as a Battalion Chief or Fire Captain,
23 so -- and they actually had him perform the duties.

24 So in a certain way -- and I don't want to argue
25 semantics with you, because that's kinds of what this ends

1 up, is they didn't create a separate position with the
2 title of BC, but what they did, and I think which is
3 compliant with the PERL, is they made a position -- they
4 had a job that performed the duties of the management --
5 of the Battalion Chief on a day-to-day basis, and they had
6 him pursuant to the management and confidential MOU, okay?
7 There wasn't the title. I agree with you. They did not
8 promote him to a title. Mr. Lewis never had the formal
9 title of BC.

10 But now the question really is, and I think it's
11 important for -- to sort of develop this is, is that what
12 a job is, a title or is a job day-to-day performing the
13 duties?

14 BOARD MEMBER COSTIGAN: The job is the job
15 description, and in civil service it's what you're
16 appointed to. And if you're not appointed to that
17 position, you have a remedy.

18 MR. JENSEN: But they did -- he -- they did do
19 the remedy. That's what this was, was they provided him
20 with this remedy.

21 BOARD MEMBER COSTIGAN: And that's not -- you
22 may --

23 MR. JENSEN: Now, you may not agree with the
24 remedy they provided him, but it's compliant with the
25 PERL. And that's really the issue is that -- I mean, you

1 may say that the city itself should have done its civil
2 service duties differently, and if you were a city council
3 member of the City of San Bernardino, you would have done
4 this, that, and the other. And we actually had some of
5 the city council people testify.

6 But here, now in front of the Board, the CalPERS
7 Board, we're not talking about what the City of San
8 Bernardino should have done. I mean, it's -- there's many
9 different -- in retrospect, there's many different ways of
10 looking at this. But for these purposes, group or class
11 is really about the duties and responsibilities of the
12 position and which management -- which bargaining unit,
13 which collective bargaining agreement applies to an
14 individual.

15 BOARD MEMBER COSTIGAN: And I'm not disagreeing
16 with you. That should have been his remedy before doing
17 this. His remedy should have been I'm working out of
18 class.

19 PRESIDENT FECKNER: Do you have a question, Mr.
20 Costigan?

21 BOARD MEMBER COSTIGAN: You don't like my
22 soliloquies, Mr. Feckner?

23 (Laughter.)

24 MR. JENSEN: I would like to --

25 PRESIDENT FECKNER: I just don't give others.

1 MR. JENSEN: Can I just address -- Can I just
2 address that one thing --

3 BOARD MEMBER COSTIGAN: Thank you, Mr. Feckner.

4 MR. JENSEN: -- there was some testimony. And I
5 think what you're getting at is was somebody in an acting
6 capacity? I mean, that's the way the City of San
7 Bernardino addresses it, whether someone was in an acting
8 level -- acting BC. And in this case, there was -- if you
9 look at the record, there actually is testimony that the
10 Fire Chief determines whether someone is in an acting
11 capacity. And in this case, the Fire Chief actually
12 established that -- excuse me -- Mr. Lewis was in an
13 acting BC position.

14 Now, the documentation of the City of San
15 Bernardino is maybe different than what you might see in
16 some place else, and especially with the fire department,
17 where the fire -- whatever that is. They don't have
18 extensive documentation of having someone in an acting
19 capacity.

20 That's Sort of what you're asking for. And I
21 think if you're asking for -- according to the City of San
22 Bernardino, he would satisfy the acting capacity to give
23 him the BC pay under the PERL. And so that's in the
24 record, and I encourage you to look at it.

25 PRESIDENT FECKNER: Ms. Hollinger.

1 BOARD MEMBER HOLLINGER: Thank you.

2 This is for Chirag Shah. Chirag, upon reading
3 the trial or the transcripts, or everything that we had, a
4 couple of things I just wanted you to confirm for me. It
5 appears that they paid him the compensation, is it
6 correct, at the BC rate, and they deducted those
7 appropriate contributions for five years?

8 MR. SHAH: That's my understanding from the
9 record, yes.

10 BOARD MEMBER HOLLINGER: Okay. And also, he also
11 contacted CalPERS, or they contacted CalPERS, during this
12 time period. And it seemed that CalPERS, is it correct or
13 not, that CalPERS, let's say, gave him wrong advice at
14 that time?

15 MR. SHAH: There was -- there were two instances
16 -- two instances when the member or the city contacted
17 CalPERS staff.

18 BOARD MEMBER HOLLINGER: Yeah, and --

19 MR. SHAH: Once there was advice that was given
20 in writing, which related to how the item should be
21 reported -- that was reporting. And the second time was a
22 conversation that the member had, and that was an oral
23 advice that was provided.

24 BOARD MEMBER HOLLINGER: Right, where CalPERS
25 apparently confirmed to him that his pay -- that that

1 affirming to him that the BC pay rate that they were
2 contributing was PERSable?

3 MR. SHAH: That's correct. That's my
4 understanding.

5 BOARD MEMBER HOLLINGER: Okay. So what I'm
6 understanding -- what I'm getting, would you agree or not
7 that it was the intent of the parties at the time of this
8 settlement that they agreed to afford him the BC rate and
9 this was -- and through, I don't know, bad advice, a set
10 of circumstances, which maybe is not made clear to people
11 when they settle about how to enforce properly or
12 improperly, you know, what they're trying to accomplish,
13 vis-à-vis a settlement?

14 MR. SHAH: Yeah, I think it would be
15 inappropriate for me to determine, you know, what kind of
16 advice they got from their lawyers.

17 BOARD MEMBER HOLLINGER: Right.

18 MR. SHAH: But clearly, the understanding of the
19 member was that all of this pay would be included in
20 compensation, which was incorrect at the time.

21 BOARD MEMBER HOLLINGER: Correct. Okay. Thank
22 you.

23 PRESIDENT FECKNER: Mr. Jelincic.

24 BOARD MEMBER JELINCIC: Mr. Jensen, during the
25 time between the settlement and his retirement, was there

1 ever a BC vacancy?

2 MR. JENSEN: My understanding is there was not a
3 BC vacancy.

4 BOARD MEMBER JELINCIC: Okay. And then this is
5 Mr. Kennedy. You said that the parties clearly understood
6 the whole agreement and what they were attempting to do.
7 My understanding is that the parties intended that Mr.
8 Lewis get all the benefits of BC. Was that your
9 understanding as well?

10 SENIOR STAFF COUNSEL KENNEDY: Mr. Jelincic, the
11 agreement which again is a fully integrated agreement, it
12 sets forth all the permissible understandings and
13 expectations of the party, calculated the compensation to
14 be paid as the delta between the non- -- between the
15 benefits of a Fire Captain and that of a Battalion Chief,
16 always retaining Mr. Lewis in a position of a Fire
17 Chief -- Captain -- excuse me, Fire Captain.

18 And in addition to that, also retained for him,
19 at his request, the opportunity to continue to accrue
20 overtime pay unavailable to BCs -- at a rate unavailable
21 to BCs, because Fire Captains accumulate much more and
22 faster overtime pay than the BCs do, who are locked down
23 on that.

24 And I'd also like to comment too that if there's
25 any ambiguity as to what is occurring here, this is not

1 Mr. Lewis representing himself. In fact, Mr. Lewis was
2 represented in the civil action, and in the drafting of
3 this agreement by a civil attorney, who, for over 20
4 years, served also as the counsel for the rank and file
5 bargaining unit with fire safety with the city of San --
6 well, for the City of San Bernardino. This was not
7 somebody that he went down and, you know, dialed up 1-800
8 get me an attorney. This was a very seasoned veteran who
9 was well aware of all the procedures and protocols that
10 the city goes through.

11 Had they wanted to express an intent that the BC
12 pay is what they were trying to give Mr. Lewis, that they
13 were trying to make him a de facto BC, they could have
14 very well put that in the agreement, if that had been
15 their expectations, but they did not do that.

16 And had they done so, then perhaps Mr. Lewis
17 would today still have the opportunity to do what was
18 appropriate and what Mr. Costigan was referring to, and
19 that is to go back to the city and say, look, we all
20 understood when we entered into this, and there's
21 testimony to this effect in the record, that, yes, I can
22 report this.

23 And what CalPERS told Mr. -- told the city
24 initially after the settlement agreement had already been
25 executed -- nobody contacted CalPERS before executing it,

1 but after the agreement had been executed contacted
2 CalPERS and said, look, we're going to report this. How
3 do you want us to do it?

4 And they were told, and interestingly now,
5 because now Mr. Lewis has abandoned essentially his TUP
6 argument was, you know, confirmed with the city, well,
7 this clearly is not pay rate, right? So the only way you
8 can do this is report it as special compensation, because
9 the only way they report earnings is either pay rate or
10 special compensation. And since he's never been put in
11 the position of Battalion Chief, at which point the city
12 could have said, well, wait a second, you know, he is, you
13 know, but they didn't, you know. And so they reported it
14 as special comp.

15 So, yes, in a sense, there's a distinction there.
16 The calculus is if you look at the warrants that you have
17 in record, you will see on the warrant that says regular
18 pay -- regular pay rate, the normal base pay, it will be
19 Fire Captain. And it will say that. And off to the side,
20 you will see some payment called BC pay, which, as
21 testified by the fiscal director, as testified by the HR
22 director was not available and was dissimilar from any
23 other employee that worked for the City of San Bernardino.
24 Nobody else got that. And to even say that you were
25 deemed -- say for a second, put him in a BC position. Did

1 any BC get that? No, that was a totally challenging
2 arrangement for even BCs.

3 They had a pay rate that paid them a BC pay rate.
4 Had he been a BC and had the city actually acknowledged
5 him as a BC, then his base pay, his regular pay would have
6 been that of a BC. It was always that of a Fire Captain.

7 BOARD MEMBER JELINCIC: Okay. Well, let me ask
8 my question again. Was the intent of the parties that
9 he -- be that he gain the benefits of having been a BC?

10 SENIOR STAFF COUNSEL KENNEDY: There was language
11 in the settlement agreement that ambiguously states that
12 he shall be -- he shall receive payments of a BC -- or
13 basically his -- the full benefits of a BC, okay?

14 BOARD MEMBER JELINCIC: Okay. You had said
15 earlier that part of what the city was trying to do was
16 use the pension fund to finance the settlement of the
17 lawsuit, at least that's what I understood you to say. If
18 they had actually promoted him, wouldn't what they have
19 paid in be the same, because they were reporting both the
20 Fire Captain pay plus the additional pay and paying
21 contributions on both?

22 SENIOR STAFF COUNSEL KENNEDY: Well, that's an
23 interesting -- that's an interesting notion, and because
24 there's -- for the first time you see in the argument --
25 the written argument offered by Mr. Lewis, you see a

1 comment that, you know, all BC positions with the city
2 were filled. I mean, I take that to also mean that
3 therefore the city -- that all the duties that the city
4 needed to be required in the BC categories were being
5 performed by legitimate people with -- that have been
6 promoted to BCs.

7 But as Mr. Costigan said, they could have -- you
8 know, they could have created another BC, a special BC
9 position. In fact, counsel says they did. They created a
10 unique special BC position for Mr. Lewis, unique, he uses
11 the word. And --

12 MR. JENSEN: Mr. Jelincic, can I answer your
13 question?

14 PRESIDENT FECKNER: No.

15 SENIOR STAFF COUNSEL KENNEDY: Unique. And by
16 having a unique -- and I'm sure that Mr. Jelincic, you're
17 aware that too if you have a unique, one-time only, no
18 predecessor, or no tail situation, where now suddenly you
19 are taking an employee and you are spiking up their
20 income, their pension for a brief period of time, those
21 contributions do not, cannot, and will not be sufficient
22 to satisfy the liability that is created as a result of
23 that for a lifetime of pensions at a higher level, because
24 there is no tail coming in.

25 If somebody -- if he were promoted to a BC, there

1 would be -- in a position, there would be another BC
2 following him who would also pick up that pay and those
3 contributions be made. That is not the case here.

4 BOARD MEMBER JELINCIC: Okay. Let me ask my
5 question again. Would the city's contributions into
6 CalPERS have any different, if they had promoted him than
7 they were under the practice they adopted?

8 SENIOR STAFF COUNSEL KENNEDY: The city paid nine
9 percent contribution rate at that time for both -- for all
10 employees -- both the Fire Captain and the Battalion
11 Chief. And had they promoted him, the contributions that
12 were paid during the tenure -- and, by the way, he retired
13 at 30 years, so he was capped out as a Battalion Chief,
14 and further employment would have made no difference to
15 him as far as any benefits.

16 But, yes, the amount that would have been paid
17 in, based upon the gross amount, which was calculated as
18 his Fire Captain pay plus this supplement side agreement
19 paid, was nine percent.

20 BOARD MEMBER JELINCIC: So it was the same as if
21 he had actually been promoted.

22 SENIOR STAFF COUNSEL KENNEDY: As if he had
23 actually been promoted, yes.

24 PRESIDENT FECKNER: Last question, and we'll come
25 back to you. There's four other people.

1 BOARD MEMBER JELINCIC: Okay. I'll come back.

2 PRESIDENT FECKNER: Ms. Taylor.

3 BOARD MEMBER TAYLOR: Yes. This is for Mr.
4 Kennedy. My question is, as I was reading through the
5 work here, it's pretty clear to me that this is a
6 settlement. And under PERL, as I'm reading this, is it
7 correct that settlements are not considered compensatable
8 pay for pension purposes, is that correct?

9 SENIOR STAFF COUNSEL KENNEDY: Essentially, all
10 case law -- published case law, including the precedential
11 decisions of this Board confirm that statement.

12 BOARD MEMBER TAYLOR: Okay. And then I wanted
13 you to repeat the question that J.J. asked, which is is
14 there language in the settlement agreement between San
15 Bernardino and Mr. Lewis that states he is to receive
16 compensation and all benefits of a Battalion Chief?

17 SENIOR STAFF COUNSEL KENNEDY: I am trying to
18 find that precise language now, but there is language that
19 approximates that, what you've just mentioned.

20 BOARD MEMBER TAYLOR: So there was an expectation
21 then that he would receive retirement at that level?

22 SENIOR STAFF COUNSEL KENNEDY: That's not -- that
23 is not stated. In fact, according to the testimony of the
24 city attorney, the former city attorney at the time, who
25 testified at the hearing, the settlement agreement was

1 drafted specifically, in their minds, so that if CalPERS
2 later -- because they all understood that just reporting
3 it would not mean it was comp earnable and that CalPERS
4 had a duty to review and correct at a later time, they
5 drafted the agreement in such a manner that if CalPERS, in
6 its independent judgment, because it is the exclusive
7 authority that can make that determination, were to adjust
8 out that settlement pay and not include it in final
9 settlement, that they were trying -- that they had felt
10 that they had drafted the agreement sufficiently to block
11 Mr. Lewis from coming back and suing them for breach of
12 contract.

13 BOARD MEMBER TAYLOR: Okay.

14 SENIOR STAFF COUNSEL KENNEDY: So the expectation
15 that it be PERSable, they felt they had fully complied
16 with everything that they were required to do by simply
17 arranging to report their earnings to CalPERS.

18 BOARD MEMBER TAYLOR: Even though there's vague
19 language based on what you're telling me that says that
20 there was an expectation of benefits at that level.

21 SENIOR STAFF COUNSEL KENNEDY: Yes, but, Ms.
22 Taylor, the benefit -- there was much discussion at the
23 hearing as to what benefits meant. Benefits means he got
24 to drive a Tahoe, okay, he got a uniform allowance.
25 There's speculation or argument by Mr. Lewis that, well, I

1 thought that also meant that I would have a PERS
2 retirement at that level. That I was being promised a
3 PERS retirement at that level, but there was no indication
4 in the settlement agreement.

5 And it would have been a very simple matter to
6 have written into the settlement agreement a -- that
7 expectation, which then would have allowed it to be argued
8 in spite of the fact that it's a fully integrated
9 agreement.

10 BOARD MEMBER TAYLOR: Okay. All right. Thank
11 you.

12 PRESIDENT FECKNER: Mr. Slaton.

13 BOARD MEMBER SLATON: Thank you, Mr. President.

14 This question maybe is for Mr. Shah. Following
15 up on this line of questioning about it being a
16 settlement. And settlements are -- there's enough case
17 law that says that those aren't pensionable, so both
18 parties came to the settlement. There was a lawsuit
19 involved. They came to the settlement as -- in an
20 independent fashion. Maybe they would reach agreement,
21 maybe they wouldn't reach agreement. But each side had
22 the responsibility to draft whatever they wanted in that
23 settlement agreement, and there's no rules about that.
24 They could have said anything in that settlement
25 agreement.

1 So Mr. Lewis had the option of putting in the
2 settlement agreement, if this is not PERSable, then I want
3 X. I mean, that could have happened, is that correct?

4 MR. SHAH: Presumably. It depends on the
5 settlement negotiations obviously.

6 BOARD MEMBER SLATON: Well, of course. But I am
7 saying that there was no rules -- there was no overarching
8 body to that settlement agreement. It was two independent
9 parties deciding on what they were -- what they were going
10 to agree to.

11 MR. SHAH: To our knowledge, there were no legal
12 impediments to doing that.

13 BOARD MEMBER SLATON: Okay. So I understand that
14 one. Now, let me move to something that Mr. Kennedy said
15 about overtime pay, and overtime pay for a Fire Captain
16 versus for a Battalion Chief. And I think what was
17 alluded to is that the -- either the overtime -- the
18 ability to get over time or the rate of overtime is
19 different for those two positions, is that accurate, Mr.
20 Kennedy?

21 SENIOR STAFF COUNSEL KENNEDY: That is correct.

22 BOARD MEMBER SLATON: Okay. Did Mr. Lewis get
23 overtime during this period of time at a rate or terms
24 different from if he had been a Battalion Chief?

25 SENIOR STAFF COUNSEL KENNEDY: That would be the

1 agreement -- that would be the understanding. Mr. Lewis
2 was not entitled to accumulate the overtime at the rate of
3 a Battalion Chief. He was retained and specifically
4 negotiated retention of the right to accumulate and be
5 paid over time as a Fire Captain.

6 BOARD MEMBER SLATON: Okay. Was he paid overtime
7 as a Fire Captain?

8 SENIOR STAFF COUNSEL KENNEDY: I would have to
9 check the warrants to be sure, your Honor -- I mean, to be
10 sure.

11 BOARD MEMBER SLATON: Mr. Shah.

12 SENIOR STAFF COUNSEL KENNEDY: But off the top of
13 my head right now, I can't recall that -- whether during
14 the -- it was a several year period. I don't know if he
15 actually performed any overtime during that period.

16 BOARD MEMBER SLATON: Mr. Shah, you had a comment
17 about that.

18 MR. SHAH: I believe the record reflects that Mr.
19 Lewis did receive overtime pay at the Fire Captain rate
20 during that time period.

21 BOARD MEMBER SLATON: Okay. So that tells me
22 that he had a custom agreement, that it was not a
23 Battalion Chief position. He was in a hybrid position
24 with different opportunities than a Battalion Chief,
25 because I don't think they would agree that a Battalion

1 Chief could have a different overtime provisions than
2 other Battalion Chiefs, would that be fair?

3 MR. SHAH: I think that's an accurate statement.

4 BOARD MEMBER SLATON: Okay. So counsel for Mr.
5 Lewis, do you have a comment about what I just said?

6 MR. JENSEN: Yes. I don't know -- I don't recall
7 offhand whether he did receive overtime. I expect that he
8 did. But there are some BCs who are entitled to overtime.
9 And I'm not sure if their entitlement to overtime is
10 equivalent to the Fire Chief's. It would be at a
11 different rate.

12 But I think what is important for these purposes
13 also is that, you know, this overtime was not reported to
14 CalPERS. It's not PERSable. It's not part of his pension
15 calculation. So, you know, in a certain way to say that
16 his -- you know, his position was different because there
17 was a -- and I don't recall the actual terms of the
18 overtime, because it wasn't something that we focused on,
19 because it wasn't PERSable, but I expect that there was
20 some payments of overtime.

21 But again, one of the -- one of the problems with
22 this in the real world was that he was performing the
23 duties of the BC, and I believe some of the BCs had
24 overtime rates when they were on a fire scene or something
25 like that and some didn't. And so it is a level of

1 complexity, even within the BCs that we didn't focus on.

2 So to say that it's a hybrid because he's -- he
3 has overtime pursuant to maybe a Fire Chief rate -- I
4 mean, a Fire Captain rate, wouldn't necessarily, I think,
5 put him in anymore of a hybrid than these other BCs, which
6 have differing overtime within them. But again it's sort
7 of a factual question that -- and I -- having litigated
8 this case, I don't remember, so --

9 BOARD MEMBER SLATON: Thank you.

10 PRESIDENT FECKNER: Ms. Mathur.

11 BOARD MEMBER MATHUR: Thank you, Mr. President.

12 Mr. Jensen, several times you have claimed that
13 the record supports that Mr. Lewis was -- that we're --
14 that CalPERS staff is relying too heavily on the title of
15 Battalion Chief, but that the record supports that Mr.
16 Lewis actually performed the duties of Battalion Chief,
17 and not of Fire Captain.

18 I don't see that in the record. I see Ms. Ms.
19 McCammack's testimony. I think she's -- I think that's
20 the testimony that you're relying upon, unless I'm
21 mistaken. And I don't see her testimony as very
22 persuasive or credible frankly from -- in my reading of
23 it. I don't see any testimony by the Fire Chief who
24 actually assigned duties. Am I missing something? Is
25 there --

1 MR. JENSEN: Well, I do believe the city council
2 woman is credible. I mean she testified -- I mean, I have
3 no reason that -- her credibility has never been
4 challenged. Mr. Kennedy had plenty of opportunity to
5 bring in adverse witnesses to challenge her credibility,
6 and none of that was done. And there's no finding by the
7 ALJ that she wasn't credible. So I think there's no --
8 there's no evidence to support a lack of credibility.

9 But let me just address -- she did -- I think her
10 testimony is very clear that she saw him on several
11 occasions performing BC duties. But the only person who
12 would -- I mean, who really knows if he's performing it
13 would be Mr. Lewis.

14 BOARD MEMBER MATHUR: I would expect his chief
15 would know it.

16 MR. JENSEN: Well, I think his chief --

17 BOARD MEMBER MATHUR: Isn't his chief the one who
18 assigns the duties, as have -- that's what you have said.

19 MR. JENSEN: Yes. And I think the -- I guess
20 what I would say is that the -- you know, the use of a
21 Tahoe vehicle for a BC is not really a benefit. It's sort
22 of an incident of the job. His appearance in the BC
23 uniform at a city council meeting. I mean, those are sort
24 of -- I mean, I wasn't there, but there is no reason to
25 disbelieve those.

1 And, you know, you may say that Mr. Lewis's
2 testimony was self-serving, but in a certain way there is
3 nobody else who would know what an individual is doing,
4 even on a day-to-day basis. You might say the Fire Chief
5 assigned him to those positions, but I think if you look
6 at the testimony, you'll see that Mr. Lewis was assigned
7 to a different fire station than the others. There was
8 maybe three or four fire stations, and Mr. Lewis was
9 assigned to one where he was in charge of, and he was the
10 highest ranking officer at that. And in those periods, he
11 had the use of the BC vehicle. So all of the incidents of
12 his performing duties in the BC position are clear and
13 consistent with his testimony.

14 BOARD MEMBER MATHUR: So you are now saying that
15 he assigned himself the BC job.

16 MR. JENSEN: No, I don't think ever said that. I
17 mean, he was -- he's a Fire Chief's --

18 BOARD MEMBER MATHUR: So are you saying that
19 there is no Fire Chief who assigned his duties.

20 MR. JENSEN: No, I'm saying the Fire Chief did
21 assign him to that. See my understanding, Ms. Mathur, is
22 that the Fire Chief assigns duties and assigns positions.
23 And in these executive level positions, when you're
24 assigned to a fire station, and there's -- people probably
25 know better than I do, they are in charge of that station,

1 and the Fire Chief is not in the same building with them.
2 So the Fire Chief wouldn't have personal knowledge of what
3 the highest ranking management did at that station.

4 BOARD MEMBER MATHUR: But the person who was --
5 but he was assigned to the job of Fire Captain not
6 Battalion Chief.

7 MR. JENSEN: Well, you're not -- now you're
8 looking at a title again.

9 BOARD MEMBER MATHUR: Well, but you're saying
10 that he assigns him -- you're basically saying that he
11 assigned himself the duties.

12 MR. JENSEN: Well, if -- okay. --

13 BOARD MEMBER MATHUR: I mean, let me just ask
14 this questions. Why did you not call the Fire Chief to
15 testify?

16 MR. JENSEN: I didn't think we needed to. And
17 first of all, he was the individual who was very hostile
18 to the union. And he remained, Mr. -- Fire Chief Pitzer
19 remained, I believe, the Fire Chief through most of this
20 period. So, you know, there is some animosity between
21 this individual, I believe. My understanding is that
22 there is some very anti-union feelings -- and I don't know
23 for certain, so I'm just characterizing the record -- of
24 this individual and they -- he was sued. So I wouldn't
25 expect him to be without bias or without -- to be free of

1 personal feelings about it.

2 So, you know, in a certain way, you don't call
3 the person who is -- who is -- at least signed an
4 agreement that settled the lawsuit that -- because Mr.
5 Pitzer who was the Fire Chief who signed that settlement
6 agreement acknowledging all these terms. So in that way
7 just the signing of that settlement agreement is -- you
8 know, there's no pure admission of wrongdoing, but there's
9 a payment and there's an arrangement consistent with a
10 recognition that this shouldn't have happened.

11 And so I could have called him. I mean, it just
12 didn't -- it wouldn't -- I don't think it would have
13 helped, because the same credibility -- not credibility,
14 but the same bias issues would be probably even more
15 apparent in that. And I don't think it would lead to any
16 more credible fact finding.

17 BOARD MEMBER MATHUR: I guess I'm just hearing a
18 very circular argument that the Fire Chief assigns the
19 duties. That, in this case, the duties that were assigned
20 were Battalion Chief, even though the title that was
21 assigned was Fire Captain, but that actually Mr. Lewis
22 determined his own duties, and that the Fire Chief has no
23 knowledge of what he actually -- the duties he actually
24 performed.

25 MR. JENSEN: No, no, no, that's not correct.

1 BOARD MEMBER MATHUR: I'm finding this very --

2 MR. JENSEN: Yeah, So let me just clarify.

3 BOARD MEMBER MATHUR: -- very challenging logic.

4 MR. JENSEN: The Fire Chief had clear knowledge.

5 He signed the agreement and he had signed him to the fire
6 station. Mr. Lewis was responsible for the Fire Chief at
7 all times. But as in management, you don't -- the Fire
8 Chief does not have obvious day-to-day, moment-to-moment
9 supervision over the Battalion Chief.

10 BOARD MEMBER MATHUR: But you want us to rely on
11 the council woman's account, and she clearly does not have
12 day-to-day knowledge of what the Fire Captain or Battalion
13 Chiefs are performing.

14 MR. JENSEN: Yeah, but she wasn't -- she also
15 wasn't a biased witness and involved in, you know, trying
16 to discriminate -- or the allegations of discrimination
17 against union activity, so that was why she was called.

18 BOARD MEMBER MATHUR: Okay.

19 PRESIDENT FECKNER: Mr. Jelincic, do you want to?

20 BOARD MEMBER JELINCIC: No my question got
21 answered.

22 PRESIDENT FECKNER: Thank you.

23 Ms. Taylor, your light is on. Do you have
24 another question?

25 BOARD MEMBER TAYLOR: I do. I have one more. As

1 I understand what I'm reading in the settlement
2 agreement -- or about the settlement agreement, Mr.
3 Jensen, is that it was very apparent that he was going to
4 be paid as Battalion Chief, but remain as Fire Captain.
5 Now, if he chose to do the duties, he didn't have to.
6 According to what I'm reading, that was his choice. He
7 could remain as a Fire Captain doing those duties. And if
8 he had a structured settlement to the degree in which
9 where he wanted to make sure that he had Fire Captain
10 overtime, then it seems to me that Ms. Mathur's confusion
11 is my confusion. If he's doing the -- actually, it's not
12 even confusion. I'm asking you if he's doing the duties,
13 and the Captain -- or, I'm sorry, the Fire Chief doesn't
14 know, then it sounds to me like he's made the choice to do
15 those duties. And there's nowhere in the settlement that
16 says that he has to do them or he has to perform them, am
17 I correct?

18 MR. JENSEN: Okay. So let me just address it.
19 The Fire Chief knew what Lewis was doing. Okay. There's
20 no evidence, no testimony that the Fire Chief didn't know.

21 BOARD MEMBER TAYLOR: There's not testimony
22 stating he does.

23 MR. JENSEN: Well, just look at the settlement
24 agreement that you're actually looking at. It is -- it is
25 a recognition that Mr. Lewis was entitled to the BC

1 position, and that there was no problems with him
2 performing those duties. And there is an implicit --

3 BOARD MEMBER TAYLOR: No, it doesn't say that.
4 It says that his position is Fire Captain. That he is
5 going to receive back-pay and future pay --

6 (Thereupon a phone rang.)

7 MR. JENSEN: That's a nice one.

8 BOARD MEMBER TAYLOR: -- as a Battalion Chief,
9 but that his position remains Fire Captain. And I can
10 only assume that there was a reason for that.

11 MR. JENSEN: So -- but let's not make
12 assumptions. Okay. So if you look at the background
13 allegations of the complaint, which I think are in the
14 record, all right those were the allegations that was --

15 BOARD MEMBER TAYLOR: That he was passed over
16 for --

17 MR. JENSEN: -- pursuant to the -- they were
18 pursuant to the settlement agreement. You can't look at
19 the settlement agreement outside of the claims that were
20 raised in the complaint. And the only -- since it wasn't
21 a gift of public funds, the only reason that the city
22 would have settled it was because there was legitimate
23 concerns raised, and the Fire Chief signed off on that.
24 So that's historically of what happened.

25 Now, what the Fire Chief knew and understood is

1 the Fire Chief is in charge of all of the assignments in
2 the City of San Bernardino, as I understand, which means
3 that he's in charge of, you know, whether Mr. Lewis drives
4 a Tahoe or not, whether Mr. Lewis appears before the city
5 council in a BC uniform, those are all under his
6 supervision. But it's not like that there's a written
7 order for people to do certain things.

8 BOARD MEMBER TAYLOR: Yes, there is.

9 MR. JENSEN: But that's not -- but now what
10 you're -- now what you're basically delving into is the
11 way the City of San Bernardino Fire Department works. And
12 the City of San Bernardino Fire Department, there's clear
13 testimony in the record that --

14 BOARD MEMBER TAYLOR: Well, Mr. Jensen, is the
15 City of San Bernardino run as a public office --

16 MR. JENSEN: Sure, of course, it is.

17 BOARD MEMBER TAYLOR: -- as most public offices?

18 So getting back to Mr. Costigan's questions, my
19 question is then they -- why wouldn't he -- if he was
20 doing all of this, right, outside of the agreement --
21 because as an employee, I would think an agreement that
22 says my position is still the same, but I'm going to give
23 you the pay, I'm going to -- I'm not going to be doing
24 those duties. My position is this position. So I'm a
25 little confused as to why he would do those duties and

1 then -- and then you're saying that the Captain knew, but
2 he didn't know. Because at one point you said that he
3 didn't know what goes on in that other office. So there's
4 where I'm getting really confused.

5 MR. JENSEN: Okay. So let me just address Mr.
6 Costigan's remarks and your remarks together. The way
7 that the City of San Bernardino has people work out of
8 class, or whatever, is this acting pay. But the only
9 reason the city -- and the test -- this is just testimony
10 I'm reciting. The only reason the City of San Bernardino
11 requires documentation of acting pay is when there is a
12 higher payment made associated with that acting position.
13 But because Mr. Lewis was always paid the BC rate, there
14 is no documentation of him in this acting role, okay?
15 That's to address Mr. Kennedy's response.

16 So that's just the testimony, because he was paid
17 it, and the Fire Chief knew what he was -- knew what Lewis
18 was doing, at all times knew where he was assigned.
19 Didn't know his day-to-day activities, okay? It's very
20 different.

21 BOARD MEMBER TAYLOR: How did he not know your
22 day-to-day activities?

23 MR. JENSEN: Well, I mean, nobody --

24 PRESIDENT FECKNER: Ms. Taylor, let him answer
25 the question, please.

1 MR. JENSEN: I mean, it's just that unless you're
2 in the office watching somebody, you don't know what
3 they're doing all day, right? So you know what they're
4 assigned to do, but you don't know how they fill out their
5 assignment. I mean, does that make sense? I mean, for
6 all of you people that -- not -- for all of us who have
7 employees, we assign them tasks, and we tell them what to
8 do, but we don't sit there over their shoulder and watch
9 them do it. That's basically what I'm saying.

10 So Mr. Lewis had -- was assigned the duties and
11 responsibilities of the BC position, was paid the BC
12 position with knowledge of the Fire Chief, to my
13 understanding, and that's -- the only thing he didn't have
14 was the title. And the reason he didn't have the title
15 was because there wasn't an open position, so that's
16 what -- that hopefully is a better explanation of it.

17 So the Fire Chief understood what Mr. Lewis was
18 doing, assigned him those duties that were the duties
19 consistent with the BC, paid him the BC rate, even though
20 it was in two different forms according to CalPERS advice,
21 and he was recognized for performing those duties,
22 including pursuant to the management -- fire management
23 collective bargaining agreement.

24 So those -- there really isn't a lack of clarity
25 about what the person was -- what the arrangement was and

1 what the responsibilities was, the only thing is unusual
2 part of this is he wasn't given the title, and that's
3 really it.

4 And this -- let me just finally address the
5 settlement issue. I litigated that Molina case that's the
6 settlement case. And Molina was very different, because
7 there was this one lump sum payment. In this, there's not
8 a one lump sum payment. This is basically a change -- I
9 mean it really is. It's kind of a revision, the creation
10 of a de facto BC position that Mr. Lewis was put in.

11 That's what the settlement agreement does, is it
12 puts him in that position pays him like that, and gives
13 him the duties and responsibilities of it, but doesn't
14 give him the title. So, you know, it's not a settlement,
15 because it's not a lump sum. It's not a structured
16 payment. It's that you're entitled -- you earned this,
17 and as long as you work, you'll be -- you should be paid
18 that. If a BC position opens, maybe you can go get that
19 one too. So anyway. Thank you.

20 PRESIDENT FECKNER: Thank you.

21 Seeing no other requests to speak, the public
22 part of this hearing is over. We will -- just to show
23 everybody what we're going to be doing, we're going to
24 take a five minute break. Then we're going to convene the
25 second hearing. At the end of that hearing, the Board

1 will go into closed session to discuss both matters. Then
2 we will come out and make a public decision on both
3 issues. So we're going to be taking a five-minute recess.

4 MR. JENSEN: Thank you.

5 (Off record: 11:12 AM)

6 (Thereupon a recess was taken.)

7 (On record: 11:20 AM)

8 PRESIDENT FECKNER: Good morning. Now, we turn
9 to Agenda Item 11b, and open the record for the full Board
10 hearing in the appeal of Ms. Christine Londo, CalPERS case
11 number 2014-0681. Let us first take roll.

12 BOARD SECRETARY BUCHANAN: Rob Feckner?

13 PRESIDENT FECKNER: Good morning.

14 BOARD SECRETARY BUCHANAN: Henry Jones?

15 PRESIDENT FECKNER: Excused.

16 BOARD SECRETARY BUCHANAN: Michael Bilbrey?

17 BOARD MEMBER BILBREY: Good morning.

18 BOARD SECRETARY BUCHANAN: Grant Boyken for John
19 Chiang?

20 ACTING BOARD MEMBER BOYKEN: Here.

21 BOARD SECRETARY BUCHANAN: Richard Costigan?

22 BOARD MEMBER COSTIGAN: Here.

23 BOARD SECRETARY BUCHANAN: Katie Hagen for
24 Richard Gillihan?

25 ACTING BOARD MEMBER HAGEN: Here.

1 BOARD SECRETARY BUCHANAN: Dana Hollinger?

2 BOARD MEMBER HOLLINGER: Here.

3 BOARD SECRETARY BUCHANAN: J.J. Jelincic?

4 BOARD MEMBER JELINCIC: Here.

5 BOARD SECRETARY BUCHANAN: Ron Lind?

6 PRESIDENT FECKNER: Excused.

7 BOARD SECRETARY BUCHANAN: Priya Mathur?

8 BOARD MEMBER MATHUR: Here.

9 BOARD SECRETARY BUCHANAN: Bill Slaton?

10 BOARD MEMBER SLATON: Here.

11 BOARD SECRETARY BUCHANAN: Theresa Taylor?

12 BOARD MEMBER TAYLOR: Here.

13 BOARD SECRETARY BUCHANAN: And Lynn Paquin for
14 Betty Yee?

15 ACTING BOARD MEMBER PAQUIN: Here.

16 PRESIDENT FECKNER: Thank you.

17 The proposed decision is this case was originally
18 considered by the Board at the October 2015 Board meeting.
19 At that meeting, the Board rejected the proposed decision
20 and scheduled this matter for a full Board hearing, as
21 argued by staff, on a question of whether the \$5,000
22 compensation at issue should be included in Ms. Londo's
23 final compensation calculation. I note for the record
24 that all parties have received notice of this full Board
25 hearing along with copies of the Statement of Policy and

1 Procedures for full Board hearings before the Board.

2 In addition, all parties have been informed in
3 writing that oral argument will be limited to 10 minutes
4 for each position, and rebuttal will be limited to three
5 minutes for each position. Would counsel please take a
6 moment to introduce themselves starting with staff
7 counsel, then Ms. Londo's counsel.

8 SENIOR STAFF COUNSEL KENNEDY: Good morning, Mr.
9 President, members of the Board. My name is Wesley
10 Kennedy. I am still Senior Staff Counsel with the
11 California Public Employees' Retirement System.

12 MR. SILVER: Good morning, Board members. My
13 name is Stephen Silver. I'm representing Christine Londo.

14 PRESIDENT FECKNER: Thank you.

15 Let the record also reflect that Chirag Shah from
16 the Los Angeles based law firm of Shah & Associates, the
17 Board's independent counsel on full Board hearings and
18 proposed decisions from the Office of Administrative
19 Hearings is here now and will be in attendance throughout
20 the hearing.

21 Mr. Shah will be advising members of the Board on
22 procedural as well as substantive issues that arise in
23 this proceeding should Board members have questions. Mr.
24 Shah will also provide a brief summary of the case before
25 we begin oral arguments.

1 As stated previously, each position will have 10
2 minutes for oral argument. Mr. Kennedy will have 10
3 minutes to present staff's argument. After that, Mr.
4 Silver will have 10 minutes to present argument on behalf
5 of Ms. Londo.

6 Neither side is compelled to use the full 10
7 minutes. However, if you conclude your argument in less
8 than the time allotted, you do not get to roll-over any
9 remaining time for your rebuttal, or any other portion of
10 this proceeding, so it's a use it or lose it.

11 After both sides have presented oral arguments,
12 each side will be given three minutes for rebuttal
13 arguments in the same order as the original presentation,
14 first Mr. Kennedy, then Mr. Silver. Here, too, you may,
15 but do not have to, use the entire time allocated to you
16 for the rebuttal. But if you decide to use less time, you
17 will not have another opportunity to use any time
18 remaining in your rebuttal.

19 There is a timer in this room which will be set
20 for 10 minutes for initial argument, and three minutes for
21 rebuttals. The timer will begin when you first start to
22 speak. Please pay close attention to the timer as you
23 make your presentations in order to avoid going over your
24 allotted time. When the timer turns red, your time will
25 have expired.

1 After all sides arguments and rebuttals are
2 concluded, the Board will -- may ask questions of any of
3 the parties to this proceeding, as well as our independent
4 counsel. The alternatives available to the Board are set
5 forth in Agenda Item 11b.

6 Are there any questions so far? Do all parties
7 understand the question?

8 Mr. Kennedy.

9 SENIOR STAFF COUNSEL KENNEDY: Wes Kennedy for
10 CalPERS. Yes, Mr. President.

11 PRESIDENT FECKNER: Thank you.

12 Mr. Silver?

13 MR. SILVER: I have no questions.

14 PRESIDENT FECKNER: Thank you.

15 Now the, Mr. Shah, please proceed with a brief
16 summary of the case.

17 MR. SHAH: Good morning, Mr. President and
18 members of the Board. As you said, my name is Chirag
19 Shah. I and the Board's independent counsel on full Board
20 hearings. My summary is going to be extremely brief this
21 morning, so that we can let the parties get on with what
22 they came here to do, which is to argue their positions.

23 Mr. President, this is another dispute over the
24 Calculation of final compensation under Section 20636 of
25 the Public Employees' Retirement Law, PERL.

1 The case originally came to the Board in March of
2 2015 when the Board remanded the matter back to the Office
3 of Administrative Hearings for consideration of the
4 Board's precedential decision in the Ramirez case, which
5 had been overlooked. After considering the Ramirez case,
6 the ALJ issued a new decision, which just like the
7 original decision, as pointed out by Ms. Londo's counsel
8 in her argument, is also favorable to Ms. Londo -- Ms.
9 Londo.

10 In the proposed decision after remand before the
11 Board today, the ALJ finds that although the disputed item
12 does not satisfy the definition of pay rate, it should
13 nonetheless be included in her retirement calculation as
14 an item of special compensation pursuant to the temporary
15 upgrade pay regulation of PERL.

16 Now, for some quick background facts. The member
17 is a former finance director/city treasurer with the City
18 of Walnut. She commenced her employment with the city in
19 1988. Prior to that, she worked with the City of West
20 Covina, which is also a participating local agency in
21 CalPERS. Member retired with -- from a distinguished
22 clear in public service in May of 2013 with 35.727 years
23 of service credit. From 2005 to 2006, Ms. Londo served as
24 interim city manager for the City of Walnut and received
25 compensation in the amount of \$5,000 per month.

1 The central question in this case is whether the
2 \$5,000 that she received -- that she earned during that
3 service should be included in her final compensation.
4 Staff argues that this item cannot not be included in
5 her -- in Ms. Londo's final compensation because the item
6 does not satisfy the definition of pay rate or special
7 compensation, including temporary upgrade pay.

8 Ms. Londo obviously argues that the item is
9 entirely includable in her final compensation calculation
10 as correctly found by the administrative law judge. She
11 also argues that the item can be classified as pay rate
12 under PERL.

13 With that, Mr. President, I conclude my brief
14 summary of the case.

15 Thank you.

16 PRESIDENT FECKNER: Thank you, Mr. Shah.

17 Now, let us turn to preliminary evidence --
18 preliminary evidentiary issues. As all parties are aware,
19 we are not here to relitigate factual issues or resubmit
20 evidence into the administrative record. However, in rare
21 circumstances, in the interest of achieving a just result,
22 may require consideration of newly discovered relevant
23 documentary evidence, which could not, with reasonable
24 diligence, have been discovered and produced at the
25 hearing before the administrative law judge, and which

1 therefore is not part of the administrative record.

2 Under no circumstance may the Board accept new
3 witness testimony or any kind of examination or
4 cross-examination of anyone, including Board members, in
5 today's proceeding. Under the Board's procedure, requests
6 to introduce newly discovered documentary evidence must
7 have been submitted in writing to the Board's secretary no
8 later than the due date for written argument, which in
9 this case was December 4, 2015.

10 In order to avoid interruptions during each
11 party's respective time today, please let us know now if
12 any of the parties has any relevant newly discovered
13 evidence which could not have been discovered and produced
14 at the hearing that it seeks to be admitted into the
15 administrative record today, as to which a timely written
16 request was submitted to the Board.

17 Do either of you have any such evidence to offer
18 today as to which you have submitted a prior written
19 request by the due date for argument.

20 Mr. Kennedy.

21 SENIOR STAFF COUNSEL KENNEDY: CalPERS has none.

22 PRESIDENT FECKNER: Thank you.

23 Mr. Silver.

24 MR. SILVER: Ms. Londo has none.

25 PRESIDENT FECKNER: Thank you.

1 Seeing there are no requests to submit newly
2 discovered evidence, let us begin with oral arguments.

3 Mr. Kennedy, please present staff's arguments.
4 Please start the clock for 10 minutes when Mr. Kennedy
5 begins his argument.

6 SENIOR STAFF COUNSEL KENNEDY: Thank you.

7 Good morning, Mr. President and members of the
8 Board. I am Wesley Kennedy, Senior Staff Counsel with
9 CalPERS. Staff recommends briefly that the Board adopt
10 the decision of the ALJ regarding the issue of pay rate.
11 It disagrees, in part, with the court's analysis -- the
12 ALJ's analysis of overtime, and feels that pursuant to the
13 Ramirez precedential decision that the compensation is
14 also excluded as overtime, since it was a -- not a
15 permanent position, and as part-time pay, should be
16 excluded in lieu of the full-time pay that -- as Finance
17 Director.

18 That being said, we do disagree respectfully with
19 the findings of the ALJ concerning whether Ms. Londo's pay
20 constituted special compensation, specifically temporary
21 upgrade pay. Title -- Code of Regulations, Title 2,
22 section 571 exclusively defines what may or may not be
23 included as special compensation, and conditions -- any
24 qualification for special compensation on the fact that
25 the item was included in a written policy or agreement.

1 Written policy agreement that a pay item is paid
2 pursuant or is in compliance with a written labor poly or
3 agreement is so significant to the PERL that it's
4 mentioned at least in three separate occasions concerning
5 final compensation. It's mentioned in the statute as a
6 prerequisite -- one of the minimum prerequisites for
7 compensation earnable there. And it's mentioned both in
8 the beginning of 571 and as a special condition at the end
9 of 571. So I -- the PERL relies heavily on this concept
10 of labor policy and agreement.

11 Unfortunately -- oh, in fact, also in 20049 of
12 the PERL, we find the definition of a labor policy and
13 agreement.

14 Unfortunately at paragraph 5, page 3 of 13 of the
15 ALJ's decision, he analyzes mistakenly unfortunately the
16 definition of labor policy and agreement. He equates it
17 to more like a publicly available pay schedule, in that he
18 believes that since the memoranda that sort for the -- Ms.
19 Londo's position and provided her the additional \$5,000 in
20 compensation for taking on some duties as a City
21 Manager -- interim City Manager that that met the
22 definition of a labor policy and agreement.

23 I again would like to read to the court the
24 definition of labor policy and agreement as set forth in
25 controlling precedential case law by the court of appeal

1 in Prentice v. Board of Education and this first item that
2 Prentice indicates is that, "A written employment
3 agreement with an individual employee is not a labor
4 policy and agreement within the meaning of the regulation,
5 referring to the PERL", referring to 571.

6 The court goes on to say that as used in the
7 regulation the term "labor" modifies policy and agreement,
8 and implicitly restricts the referenced policies and
9 agreements to either policies, which cover a whole class
10 of employees or a collective bargaining agreement. And it
11 states further that, "The restriction is necessary because
12 a more literal reading..." -- no, "...a literal reading is
13 required because the broad interpretation offered by
14 Prentice in that case would essentially provide no limit
15 to the compensation a local agency could provide
16 individual employees by way of individual agreements".

17 So unfortunately the ALJ in this just simply got
18 the law wrong. He misinterpreted and misdefined what a
19 labor policy and agreement is. And under 571, the item of
20 pay, even if it's acknowledged under -- as TUP -- if it
21 qualifies -- otherwise qualifies as temporary upgrade pay
22 must not be -- or not cannot be accepted as special
23 compensation if it is not part of a labor policy and
24 agreement, which this clearly was not. So for that reason
25 alone, the TUP payment here fails as compensation

1 earnable.

2 However, in addition to failing as compensation
3 earnable, because it's not part of a labor policy and
4 agreement, there are other reasons. The 571 states that,
5 the payment of a special compensation under 571(b) may not
6 be for a -- paid exclusively within the final compensation
7 period. And in this case, the \$5,000 was paid for one
8 year and one year only, and it was paid -- and one year to
9 Ms. Londo. In fact, she continued to work and to get to
10 that period, she reached back in her work history and
11 pulled out that one final comp period where the increased
12 pay was paid. That fact alone would also disqualify the
13 final -- the TUP as being PERSable and be included in
14 final compensation.

15 Finally, it's very clear in this case that the --
16 that Ms. Londo was the only member of her group and class
17 that would be entitled to the \$5,000 increase in pay. In
18 order to qualify as special compensation, 571(b) again
19 requires that the type of pay being made has to be
20 available to all similarly situated members in the group
21 and class. If we were to expand the class that Ms. Londo
22 is in, and say it's either department heads or even
23 management, regardless of what class you chose to pick
24 from the City of Walnut, no other individual in that city
25 would be entitled to that pay, and a third reason why, in

1 and of itself, the 571 -- or the \$5,000 could not qualify
2 as special compensation.

3 And it may not need repeating, we agree with the
4 analysis of the ALJ in denying this pay as pay rate, but
5 it is clear here that there is no publicly available pay
6 schedule, no pay schedule whatsoever as for the position
7 of interim city manager that Ms. Londo filled for that one
8 year. And her agreement, no matter how public, her
9 memorandum -- her individual employment agreement, no
10 matter how public, cannot constitute a publicly available
11 pay schedule for the position, because there simply was no
12 position as interim city manager.

13 And for all the reasons above stated, the CalPERS
14 staff believes that the Board cannot, without violating a
15 number of PERL provisions in this matter, make a finding
16 that the payments made to Ms. Londo can be considered
17 compensation earnable.

18 And with that, President Feckner, I will conclude
19 my comments.

20 PRESIDENT FECKNER: Thank you.

21 Mr. Silver.

22 MR. SILVER: Yes. Thank you very much.

23 I want to emphasize that today you people are
24 acting as judges. That means that your decision is
25 confined to the law as it existed at the time of the pay

1 in question and the facts that were received in evidence
2 at the administrative hearing. Unlike many of the other
3 tasks you perform, this is not a policy-making function.
4 This is not a situation where you're legislating, you're
5 not in a position where you can decide what you think the
6 right result should have been. Maybe the law should have
7 been better. You have to confine yourself to the law and
8 the facts.

9 Talking about the facts, I think it's really
10 important that you look at the transcript - it's a very
11 short transcript - of the administrative hearing, and not
12 really upon the facts that I've been hearing or reading
13 that have been asserted by the CalPERS staff.

14 It's interesting, because in our argument we
15 actually submitted citations to factual matters -- excuse
16 me -- that we alleged in our statement of facts and we
17 asserted. I didn't see any such citations in their brief.
18 And the way I read their description of the facts and what
19 I've heard this morning for the first time, I might add,
20 lots of liberties have been taken with the facts. So I
21 urge you to read the transcript very carefully and don't
22 rely upon Mr. Kennedy's description of the facts, or the
23 staff's argument.

24 Now, I think it's important that you also
25 appreciate that the administrative law judge, who is a

1 professional adjudicator. That's what this person does
2 for a living. It conducts hearings and makes judicial
3 type decisions. This person conducted the hearing,
4 observed the demeanor of the witnesses, and applied the
5 law. And I think that if you're going to -- I guess the
6 reason I say this is while I have a lot of respect for
7 your independent counsel, who's a very well regarded
8 attorney, twice you have made decisions based upon his
9 recommendation.

10 And I'm just concerned that in this particular
11 case, it's not his job to recommend what the decision
12 should be. It is your job. And if you're going to rely
13 upon any independent professional, it should be the
14 administrative law judge who heard the case, not somebody
15 who didn't.

16 Now, in terms of the argument presented, I'm a
17 little bit taken aback, because the arguments presented by
18 Mr. Kennedy today have never been raised before. This
19 whole business of not being in a labor policy agreement,
20 that's not in any of -- that was presented at the hearing.
21 It wasn't -- I don't have it in front of me, but I bet it
22 wasn't even in the accusation. It wasn't in the argument.

23 What's happened in this case is that at every
24 stage a new quote "gotcha" unquote has been asserted by
25 the staff to try to find a way to justify denying Ms.

1 Londo's inclusion of the \$5,000 extra she received when
2 she served as interim city manager.

3 Now, I think it's really important for you to
4 appreciate that not all quote "spikes" unquote are
5 unlawful or inappropriate in determining what should be
6 compensation earnable. A perfect example of an
7 appropriate spike is if somebody was legitimately promoted
8 shortly before retirement. It was a legitimate promotion.
9 That person is going to get a much higher salary and
10 there's going to be some underfunding, but that's --
11 that's certainly allowable and it's understandable.

12 Really, what happened in this case is virtually
13 the same as a promotion. It just was a temporary
14 promotion, rather than a permanent promotion. And I think
15 what's most important is that this wasn't something like
16 you've seen in Vernon or Bell or some of these other
17 cities where there was a manipulation of the whole process
18 to try to significantly expand somebody's retirement, you
19 know, right shortly before retirement.

20 This was something that occurred seven to eight
21 years before Ms. Londo retired. As the administrative law
22 judge's decision says, retirement was nowhere in sight
23 when this happened. This was only done to help the city
24 out. As -- again, if you've read the transcript, you'll
25 know that several years earlier Ms. Londo, as the Finance

1 Director was asked to help serve as City Manager for a
2 short period of time until they found a successor. And
3 she did that for a couple of months. They found a
4 successor. They were really pleased. So in 2005 when the
5 City Manager left, they wanted her to do it again. And
6 this time it was for a longer period of time.

7 And the only reason that she did this was so that
8 she could help the city out and perform the job of City
9 Manager during this interim period until they found a
10 success -- a successful replacement. It was not done to
11 impact her retirement. Nobody was even thinking about
12 retirement eight years before she eventually retired.

13 This -- I mean, this clearly constitutes
14 temporary upgrade pay. I mean, this is a situation where
15 the city agreed, she -- excuse me, the city asked her to
16 do it. She agreed. She did it for a year. There was
17 no -- the evidence is clear, if you read the transcript,
18 as Judge Flores found that 90 plus percent of her work was
19 a city manager. She didn't do -- she did very little work
20 as Finance Director, because she had a very competent
21 staff, and all she did was review the -- certain things
22 that that was done, but that was a small percentage of her
23 time. Her hours of work did not increase. The testimony
24 is uncontradicted as far as that's concerned.

25 And what's interesting, and I urge you to look at

1 page 59 of the transcript, where the PERS witness who
2 really didn't contradict anything Ms. Londo said, was
3 asked a question by me, which is if a police officer,
4 somebody serving in a classification of police officer,
5 was asked by the City to serve for an interim period of
6 time as a Police Sergeant, which would get that person
7 higher pay, and the police officer agreed, would that
8 extra compensation that the police officer received while
9 acting for a temporary period of time as a Sergeant be
10 treated as pensionable income? And again, the transcript
11 isn't that clear, but when you read it, it's apparent that
12 the answer was yes. And that this situation is no
13 different than that situation, except that this occurred
14 seven to eight years earlier, rather than the situation in
15 my example, which was one year earlier.

16 Now, a lot of talk has been made -- I see I'm
17 running out of time. A lot of talk has been made about
18 the Ramirez case. As the -- as Judge Flores pointed out,
19 this case is distinguishable from Ramirez on several
20 grounds. One is that unlike Ramirez who's pay as the
21 acting City Manager was much higher than the previous City
22 Manager, Ms. Londo's pay was commensurate with that of her
23 predecessor.

24 Two, she didn't have any extra hours like Ramirez
25 did. She basically worked the same amount of hours she

1 did as Finance Director.

2 Three, there was no evidence in this case of any
3 underfunding, because it wasn't done at the last minute.
4 There were seven or eight years for the actuaries to work
5 out this situation.

6 Four, in Ramirez, there was a -- the decision
7 refers to the combining of safety retirement and
8 miscellaneous retirement, because he was the Chief of
9 Police and the City Manager. Here, there's no combining.
10 This is all miscellaneous or non-safety retirement.

11 And in Ramirez, the agreement that produced all
12 this occurred after the fact. It occurred after Ramirez
13 had retired. Here the agreement was, as I said before,
14 seven to eight years before she retired.

15 But even more importantly than that, what's --
16 why Ramirez is of no value is that in Ramirez the issue of
17 temporary upgrade pay was never addressed, let alone
18 decided. Ramirez did not decide that the individual in
19 that case did not qualify -- the pay did not qualify as
20 temporary upgrade pay, because that issue was never
21 presented. I would venture to say that had that issue
22 been raised and a court had decided this case, the court
23 probably would have determined that Ramirez did get
24 temporary upgrade pay.

25 But the fact of the matter is is that the

1 decision is of no precedential value because the matter
2 was -- the issue of temporary upgrade pay was never
3 presented in that case.

4 Finally, the -- Judge Flores never addressed the
5 issue of promissory estoppel, which a lot of time was
6 spent on the previous case, because he didn't have to,
7 since he found that it was temporary upgrade pay.

8 But here's a situation where Ms. Londo --
9 evidence will show Ms. Londo applied for -- or questioned
10 CalPERS about her retirement. They're the ones who picked
11 this time period as her final compensation period. She
12 didn't say this is what I chose. This is what they told
13 her twice. You look at Exhibits A and Exhibit B. They
14 told her this would be her final compensation. She relied
15 upon that. She could have stayed and worked longer had
16 she known that this was the position CalPERS was taking
17 and worked the extra period of time to get the same amount
18 of income, but by the time she found out about it, she'd
19 already retired. They didn't tell her until then.

20 PRESIDENT FECKNER: Your time is exhausted, Mr.
21 Silver. Thank you.

22 MR. SILVER: Thank you.

23 PRESIDENT FECKNER: Mr. Kennedy, your three
24 minute rebuttal.

25 SENIOR STAFF COUNSEL KENNEDY: Thank you, Mr.

1 President.

2 Just as to the notion that the fact that there
3 was not a labor policy or agreement, if -- again, I
4 directed your -- the Board's attention specifically to the
5 paragraph in the proposed decision that's on page five,
6 paragraph -- I'm sorry page 13, paragraph 5, where the ALJ
7 goes into discussion as to whether or not this pay
8 constitutes special comp.

9 In that, he leads off on the second paragraph, I
10 believe, of that discussion with a whole paragraph
11 discussing the fact that this pay, in his mind, meets the
12 definition of a labor policy and agreement. That was a
13 pivotal finding for him in making his determination. He
14 was simply wrong on the law in that regard.

15 That requirement and 57 -- and the requirements
16 that I'll also mention about, similarity and also about
17 not being paid in the exclusive -- during the --
18 exclusively during the final compensation period are part
19 of the regulations under 571(b). And 571(b) specifically
20 indicates that regardless of an item being identified in
21 part A of that regulation, if it violates this short
22 litany of other criteria, it will be stricken as special
23 compensation and cannot be used for any purposes as
24 special compensation.

25 To allow this item pay to be special compensation

1 would directly and immediately violate the provisions of
2 that regulation, as well as Section 20636 of the
3 Government Code.

4 I don't want to belabor the point, but the pay
5 that Ms. Londo received was \$10,000 was created
6 specifically and expressly as \$10,000 for Finance Director
7 and another \$5,000 for doing the interim City Manager, the
8 fact that that cumulative was 5,000 -- \$15,000 was
9 approximate to what the City Manager made I think is
10 really an irrelevant fact. It's she wasn't being paid as
11 a City Manager, and there was no position for interim City
12 Manager.

13 And as far as the requirement on estoppel or even
14 fiduciary duty, I just bring the Board back to the recent
15 court decision in Pleasanton versus Board of
16 Administration, which concluded that neither an allegation
17 of the breach of fiduciary duty or estoppel renders
18 CalPERS an insurer of every promise made by an employer,
19 nor can it compel -- nor can it compel CalPERS to provide
20 a level of benefit not in conformity with the PERL. And
21 this benefit that is being sought here is not in
22 conformity with the PERL.

23 And again, there is no case law in the State of
24 California that allows a court to invoke estoppel to
25 overturn an affirmative statute or regulation, such as we

1 have here.

2 Estoppel cannot directly --

3 PRESIDENT FECKNER: Time is up, Mr. Kennedy.

4 Thank you.

5 Mr. Silver, your three minutes.

6 MR. SILVER: Yes. Again, I apologize for being
7 so emotional about this, and I hope you don't hold it
8 against my client, but I'm -- as I said, this is appalling
9 to me that the two arguments that Mr. Kennedy talks about
10 in his rebuttal have never been raised before. They're
11 not in staff's arguments, they were never presented at the
12 hearing. This business about this agreement that
13 everybody accepted as being true, it was an agreement
14 between Ms. Londo and the city does not satisfy the
15 requirements of the CalPERS regulations has never -- the
16 first time I heard it was today, okay?

17 So I apologize if I can't respond that well. But
18 I can tell you this much, Ms. Londo -- it couldn't have --
19 she couldn't have entered into a collective bargaining
20 agreement because she wasn't in a bargaining unit. She
21 was a management employee. She was in a position where
22 there was only one person in her group or class, namely
23 herself.

24 And Ms. Londo entered into an agreement. And I
25 haven't had a chance to read the authorities Mr. Kennedy

1 has dumped on me today, but I would be astonished to say
2 that and agreement between Ms. Londo and the city isn't
3 valid, and that that somehow would disqualify her pay as
4 pensionable income.

5 What's -- it's clearly a legitimate agreement and
6 you're talking about a group or class of one. And there's
7 no evidence in the record, as Mr. Kennedy insinuates, that
8 other people in -- who are managers, let's say who are not
9 in represented positions, other department heads, could
10 not have gotten temporary upgrade pay just like Ms. Londo
11 did, had they assumed a higher paying position on an
12 interim basis. There's no evidence that that wouldn't
13 have happened.

14 Okay. The other point he raised, which is
15 571(b). I'm not even sure I understand that particular
16 argument. But he -- what I heard him say, or thought I
17 heard him say, was that this doesn't count because it
18 didn't occur during her final compensation measurement
19 period. Well, of course, it occurred during her final
20 compensation measurement period. We wouldn't be here if
21 it wasn't during her final -- it wasn't her last year, but
22 that wasn't the year that CalPERS or Ms. Londo selected as
23 her final compensation measurement period. So I guess
24 that's the only response I can give to that argument.

25 I have nothing further. I would love to hear any

1 questions that you have. And this will not be as
2 complicated as the last case, I assume.

3 PRESIDENT FECKNER: Thank you.

4 Now, we turn to the question and answer period.
5 Ms. Taylor.

6 BOARD MEMBER TAYLOR: Mr. Kennedy, I just wanted
7 to know, what constitutes -- where did I write that? --
8 the difference -- what is exactly constitutes into a labor
9 policy agreement? What is it that you would say would
10 qualify?

11 SENIOR STAFF COUNSEL KENNEDY: I would just
12 direct you back to the district court of appeals decision
13 interpreting the PERL definition of a labor policy and
14 agreement. And it states that it is an agreement that
15 covers all employees within a group or class or is a MOU
16 or bargaining agreement. It is clearly not -- and they
17 specify at the beginning that it is not an employment
18 agreement or a one-off agreement with a particular
19 employee. It starts the definition by asserting that that
20 is certainly not the case.

21 I am not contending, and CalPERS is not
22 contending, that Ms. Londo did not have a lawful agreement
23 with the city for the payment of the \$5,000. But under
24 the definition as provided by the prevailing California
25 case law interpreting the very specific provision 20049 of

1 the PERL, it has to be a bargaining agreement, or at least
2 at the very minimum, an agreement -- that agreement itself
3 covers all employees within a group or class. And this
4 was a one-time one offer to Ms. Londo.

5 BOARD MEMBER TAYLOR: So does that agreement --
6 so I'm confused then. So does that agreement mean like --
7 because otherwise you're saying managers don't get the
8 agreement. So is that agreement like State -- an actual
9 stated salary, is that what it is?

10 SENIOR STAFF COUNSEL KENNEDY: No. I think that
11 the Prentice decision says that if I have an agreement
12 that covers all individuals within a group or class of
13 employees, then that will suffice. So if I had an
14 agreement that said that all managers would be able to get
15 this \$5,000 pay, then that may satisfy the definition of a
16 labor policy and agreement.

17 The ALJ in this case seemed to indicate that just
18 because there was a agreement that was approved by the
19 city council for Ms. Londo, that it qualified as an
20 agreement. And I think he just made an understandable
21 misunderstanding as to the term agreement after labor
22 policy. And the court of appeal just said, labor policy
23 and agreement qualify -- labor policy qualifies the
24 agreement too. It's not simply a single agreement as
25 memorandum, which I believe is what happened here, a

1 single memorandum granting \$5,000 approved by the city
2 council and paid to Ms. Londo. So management could have a
3 labor policy and agreement under the definition of
4 Prentice.

5 BOARD MEMBER TAYLOR: Okay. So management can
6 have it - let me get this clear - by having a stated
7 position that has a salary attached to it that's publicly
8 published, is that correct? Is it a published -- for
9 example, if I use the State of California for an example,
10 their positions all the way up through management have a
11 description and a salary.

12 SENIOR STAFF COUNSEL KENNEDY: Correct.

13 BOARD MEMBER TAYLOR: And they're all set, most
14 of them. So is that what you mean?

15 SENIOR STAFF COUNSEL KENNEDY: No, that would be
16 a pay schedule.

17 BOARD MEMBER TAYLOR: Well, the position has a
18 description as well. So that's where I'm getting a little
19 bit --

20 SENIOR STAFF COUNSEL KENNEDY: I don't believe
21 they're referring to individual -- I think that what
22 you're describing is most certainly -- most probably
23 derivative of a labor policy and agreement. It is the
24 manifestation of a labor policy and agreement where we
25 have a position, we have a duty statement, we have the

1 amount that's paid for that position. Those are
2 manifestations of a labor policy and agreement in the
3 State, not the labor policy and agreement itself.

4 BOARD MEMBER TAYLOR: Okay.

5 SENIOR STAFF COUNSEL KENNEDY: And in this case,
6 there was -- that wasn't the case. All there was was this
7 agreement.

8 BOARD MEMBER TAYLOR: Okay. So in the City of
9 Walnut, are we looking at City Manager having the
10 manifestations of a labor policy agreement? Do they have
11 their job specifications that are aligned with a specific
12 salary? And was her salary commensurate -- actually, from
13 what I'm reading it was, but was her salary commensurate
14 with that?

15 SENIOR STAFF COUNSEL KENNEDY: I'm certain that
16 the City of Walnut had either by general law or charter
17 provisions covered -- or provisions covering the
18 appointment, hiring, and compensation of a City Manager.

19 In this case, it had no such for an interim --
20 position of interim City Manager. And I would also again
21 just note that her -- two-thirds of her compensation were
22 specifically and exclusively paid and documented as being
23 for the Finance Director. The City Manager did make
24 \$15,000, which was equivalent to her gross pay. But for
25 doing those duties, she was only paid \$5,000. So that

1 wasn't pursuant to the same type of labor policy and
2 agreement that was available for the City Manager.

3 BOARD MEMBER TAYLOR: All right. Thank you.

4 PRESIDENT FECKNER: Thank you.

5 Ms. Mathur.

6 BOARD MEMBER MATHUR: Thank you.

7 Mr. Silver, you are articulated that this was the
8 first time you'd heard about this question of whether this
9 temporary upgrade paid had to be available to all those in
10 a group or a class.

11 MR. SILVER: Correct.

12 BOARD MEMBER MATHUR: But you directed us to page
13 59 of the OAH hearing transcript of November 5th, 2014.
14 And in that you specifically asked that question or
15 somebody did -- I'm not sure --

16 MR. SILVER: That was me. It was I. It was I.

17 BOARD MEMBER MATHUR: -- of the staff. And the
18 staff actually said, "So long as all the rest of the
19 regulations are satisfied. It would have to be in the
20 MOU. It would have to be available to others in a group or
21 class of employment".

22 MR. SILVER: Well, first of all, had this issue
23 been raised in the statement of issues or the accusation,
24 we would have -- I can represent, Ms. Londo just told me,
25 that the City of Walnut's personnel rules do have

1 provisions for acting pay, which this is really -- that's
2 what temporary upgrade pay is. And we could have easily
3 have put that into the record, and it would be -- the only
4 reason it wasn't available to anybody else is nobody else
5 was asked to do it. Had -- we had other examples of
6 people being asked to serve in a upgraded position for a
7 temporary period of time, we would have presented it. But
8 it was available to everybody, it just wasn't taken
9 advantage of by everybody. Anybody could have gotten
10 acting pay.

11 BOARD MEMBER MATHUR: But there is nothing in the
12 record that I have seen that documents that it -- that
13 this type of temporary upgrade pay was available to
14 everyone in the same group or class.

15 MR. SILVER: Well, I'm not sure what the group or
16 class is. I would argue, first of all, that it's a group
17 or class of one, okay? You only have one City Manager at
18 any one time, okay? And I would suspect that -- I guess
19 to me it's the opposite. You should be looking at it the
20 other way. There is no evidence in the record that says
21 that it wouldn't be available to the -- had the Police
22 Chief been named interim City Manager, had the Department
23 of -- whatever you -- Public Works Department had been
24 named interim City Manager. And of those people would
25 have gotten the same arrangement. There's no evidence

1 that they wouldn't have. And this is just a gotcha.

2 BOARD MEMBER MATHUR: That's not how the PERL
3 works

4 MR. SILVER: This is a ridiculous gotcha that
5 you're doing. No, seriously.

6 BOARD MEMBER MATHUR: I mean, I can see your
7 emotion, but that is not how the PERL works.

8 MR. SILVER: Wait, wait. Go ahead.

9 BOARD MEMBER MATHUR: I mean -- you know, anyway,
10 I -- it's pretty --

11 MR. SILVER: Well, I'd like to say one more
12 thing, during oral communications you had a person come up
13 here who was very upset about the fact that a quote gotcha
14 was employed against her, laches, because she didn't raise
15 an argument promptly. Well, I think the same thing would
16 apply here. If you're going to apply it against
17 individuals who are not experts in the law, you should
18 apply it against your own staff and this is a gotcha.
19 This is a laches thing. They did not raise this
20 particular point at all until right now. Okay. They
21 didn't raise it as a legal argument. And for them to do
22 it at this late date where the record is closed, the
23 evidentiary record is closed is really a -- prejudicial to
24 Ms. Londo, and therefore they should be barred by laches
25 from being allowed to do this.

1 PRESIDENT FECKNER: Mr. Jelincic.

2 BOARD MEMBER JELINCIC: Mr. Kennedy, the -- my
3 understanding from the record is that the city council
4 adopted this position description for the -- for -- I'm
5 sorry, Ms. Londo that says you're going to do these duties
6 and these duties. And so they adopted that in apparently
7 open session, and they adopted -- and they said and we're
8 going to pay you this much. My understanding is the staff
9 had said that because they failed to dis -- to give a
10 duty -- or a title to those duties, no position existed.
11 So that's the first part of the question. What am I
12 missing? If they said these are -- this is what the
13 position does, but we're not giving it a title, therefore
14 the position doesn't exist, and we've -- the city council
15 also said and this is the salary, and the deficiency in
16 the salary, as I understand staff's position, is that they
17 tied it to another position. If they had simply said the
18 salary for this position is 15, it would have been fine.
19 But because they said it's 5 more than this other
20 position, it's not fine. And so are we arguing about form
21 over substance?

22 SENIOR STAFF COUNSEL KENNEDY: Absolutely not,
23 sir. The memorandum -- the position of interim City
24 Manager was the creature of a agreement with Ms. Londo
25 with the city attorney who wrote a memoranda, who put it

1 before the board and stated that in the position -- that
2 she will serve in a function of an interim City Manager
3 for \$5,000, not \$15,000 for \$5,000, and will continue to
4 be paid her pay rate as Fiscal Director at \$10,000.

5 I don't -- I'm not attesting that I know
6 succinctly what the civil service rules are for the City
7 of Walnut, but can the City of Walnut agree to pay one of
8 its employees in a position that does exist an additional
9 amount of money for performing some services? Maybe so.

10 Was that done? Yes.

11 Did that create an interim manager position under
12 the City of Walnut? No.

13 And did it provide a salary for the City
14 Manager -- the interim City Manager of \$15,000? No. It
15 provided \$5,000 additional payment for a one-year period
16 for the Fiscal Director to perform those services.

17 And I would like to point out just in response to
18 part of what Mr. Londo's counsel indicated is that the
19 similar situated, and the law that we are arguing today,
20 is fully set forth in the statement of issues in this
21 case.

22 BOARD MEMBER JELINCIC: The -- yeah, I'll throw
23 the same question to you. I mean, when we say this is the
24 job, does that not create a job even if we don't have a
25 title?

1 MR. SILVER: The -- Judge Flores did not find
2 that her pay rate was \$15,000, so that's really an
3 irrelevant thing. Judge Flores found that her pay rate
4 was \$10,000 and she got \$5,000 in temporary upgrade pay.
5 Simple as that.

6 BOARD MEMBER JELINCIC: Okay. And then the other
7 question, again to Mr. Kennedy, is the whole issue of
8 what's a labor policy or agreement. The statute 20049
9 says that labor policy or agreement means any written
10 policy agreement, memorandum of understanding, legislative
11 action of the elected or appointed body governing the
12 employer or any other document used by the employer to
13 specify the pay rate, special compensation and benefits of
14 representative and unrepresented employees. How can this
15 not be subject to a labor agreement, if it was subject to
16 the legislative action of the elected body?

17 SENIOR STAFF COUNSEL KENNEDY: It is -- not every
18 action of a legislative body is a labor agreement. Not
19 every contract that a legislative body enters into is a
20 labor agreement. And the court of appeal in Prentice has
21 specifically so defined and identified and clarified the
22 language of 20049, specifically to exclude a written
23 employment agreement with an individual employee is not a
24 labor policy or agreement within the meaning of the
25 regulation.

1 It specifically -- I mean, if it would have put
2 Londo -- the agreement with Ms. Londo is not -- instead of
3 a written employment agreement with an individual in place
4 of that language, it couldn't have been more clearer.
5 20049 is not a specific agreement with an individual
6 employee for payment of their services. It is not a labor
7 policy and agreement by definition of the law.

8 BOARD MEMBER JELINCIC: Well, when I read the
9 plain language of the law, I kind of, huh, so.

10 MR. SILVER: Can I respond to that for one
11 second?

12 BOARD MEMBER JELINCIC: Sure.

13 MR. SILVER: What you read was the definition of
14 a labor policy. I underline the word policy or agreement.
15 And the definition you read doesn't -- isn't confined to
16 an agreement like Mr. Kennedy is arguing. It could be a
17 policy, and it was a legislative enactment just like you
18 point out. I mean, to me this is clearly -- what the city
19 council did in this case clearly fell within the
20 definition of what you read. I mean, it's not even close.

21 BOARD MEMBER JELINCIC: Thank you.

22 PRESIDENT FECKNER: Mr. Boyken.

23 ACTING BOARD MEMBER BOYKEN: Thank you, Mr.
24 President. This question is for our independent counsel,
25 Chirag Shah. I'm just raising this, because I think the

1 question of whether the system can be equitably estopped
2 has been raised. And so I just wanted to ask, if this
3 Board, in a hearing like this, finds that a piece of
4 compensation cannot be counted as pensionable
5 compensation, regardless of unfortunate agreements that
6 might have taken place between an employer and an
7 employee, and even in the case of possibly
8 miscommunication from CalPERS staff, is there any case in
9 which, despite that when we find that compensation should
10 not be pensionable, that we could nonetheless provide that
11 in a ruling?

12 MR. SHAH: This short answer of that is no. It's
13 been pretty settled in equitable estoppel juris prudence
14 that an administrative body cannot enlarge its powers and
15 give a benefit to which it does not have the authority to
16 permit.

17 ACTING BOARD MEMBER BOYKEN: Thank you.

18 PRESIDENT FECKNER: All right. Seeing no other
19 requests, then this hearing is done. The Board is going
20 to go into the back room into closed session to
21 deliberate. Then we will be back out to make a public
22 decision on both cases. So we are currently in recess to
23 closed session in the back room.

24 (Off record: 12:08 PM)

25 (Thereupon the meeting recessed)

1 into closed session.)

2 (Thereupon the meeting reconvened
3 open session.)

4 (On record: 12:44 PM)

5 PRESIDENT FECKNER: We're going to reconvene the
6 Board meeting. Please call the roll for us again.

7 BOARD SECRETARY BUCHANAN: Rob Feckner?

8 PRESIDENT FECKNER: Good afternoon.

9 BOARD SECRETARY BUCHANAN: Henry Jones?

10 PRESIDENT FECKNER: Excused.

11 BOARD SECRETARY BUCHANAN: Michael Bilbrey?

12 BOARD MEMBER BILBREY: Here.

13 BOARD SECRETARY BUCHANAN: Grant Boyken for John
14 Chiang?

15 ACTING BOARD MEMBER BOYKEN: Here.

16 BOARD SECRETARY BUCHANAN: Richard Costigan?

17 BOARD MEMBER COSTIGAN: Here.

18 BOARD SECRETARY BUCHANAN: Katie Hagen for
19 Richard Gillihan?

20 ACTING BOARD MEMBER HAGEN: Here.

21 BOARD SECRETARY BUCHANAN: Dana Hollinger?

22 BOARD MEMBER HOLLINGER: Here.

23 BOARD SECRETARY BUCHANAN: J.J. Jelincic?

24 BOARD MEMBER JELINCIC: Here.

25 BOARD SECRETARY BUCHANAN: Ron Lind?

1 PRESIDENT FECKNER: Excused.

2 BOARD SECRETARY BUCHANAN: Priya Mathur?

3 BOARD MEMBER MATHUR: Here.

4 BOARD SECRETARY BUCHANAN: Bill Slaton?

5 BOARD MEMBER SLATON: Here.

6 BOARD SECRETARY BUCHANAN: Theresa Taylor?

7 BOARD MEMBER TAYLOR: Here.

8 BOARD SECRETARY BUCHANAN: Lynn Paquin for Betty
9 Yee, sorry?

10 ACTING BOARD MEMBER PAQUIN: Here.

11 PRESIDENT FECKNER: Very good. Thank you.

12 We're on Item 13a, Richard Lewis, announcement of
13 action -- or taking action on the full Board hearing.

14 Mr. Slaton.

15 BOARD MEMBER SLATON: Thank you, Mr. President.

16 I move to deny this appeal and revise the
17 proposed decision as argued by staff.

18 BOARD MEMBER MATHUR: Second.

19 PRESIDENT FECKNER: It's been moved by Slaton,
20 seconded by Mathur.

21 Any discussion on the motion?

22 Seeing none.

23 All in favor say aye?

24 (Ayes.)

25 PRESIDENT FECKNER: Opposed?

1 (Noes.)

2 PRESIDENT FECKNER: Motion carries.

3 Item 13b, Londo. Ms. Mathur.

4 BOARD MEMBER MATHUR: Thank you, Mr. President.

5 I move to deny the appeal and revise the proposed
6 decision after remand as argued by staff.

7 BOARD MEMBER COSTIGAN: I'll second.

8 PRESIDENT FECKNER: It's been moved by Mathur,
9 seconded by Costigan.

10 Any discussion on the motion?

11 Seeing none.

12 All in favor say aye?

13 (Ayes.)

14 PRESIDENT FECKNER: Opposed, no?

15 (Noes.)

16 PRESIDENT FECKNER: Motion carries.

17 All right.

18 Let's do a roll call, please on both of them.

19 This is on 13a

20 (Thereupon an electronic vote was taken.)

21 PRESIDENT FECKNER: All right. Motion carries.

22 Please clear the machine. We'll vote on 13b.

23 (Thereupon an electronic vote was taken.)

24 PRESIDENT FECKNER: Motion carries.

25 Okay. That bring us to Agenda Item 15, Summary

1 of Board Direction.

2 SENIOR STAFF COUNSEL KENNEDY: President Feckner,
3 may I have just a -- this Wes Kennedy. May I have a short
4 moment of personal privilege.

5 This will be my --

6 PRESIDENT FECKNER: Well, I guess, since you're
7 retiring, we can let you speak, Mr. Kennedy.

8 SENIOR STAFF COUNSEL KENNEDY: Thank you.

9 That's what I was going to say. I will be
10 retiring at the end of this month. I have been at CalPERS
11 for nearly 10 years. It has been my honor and privilege
12 to serve the Board and to work with all the fine people
13 and talented people that I've met here at CalPERS.

14 PRESIDENT FECKNER: Thank you, Mr. Kennedy.
15 Appreciate your service.

16 Ms. Stausboll, anything that you can think of on
17 the summary of Board direction? I don't think there was
18 any.

19 CHIEF EXECUTIVE OFFICER STAUSBOLL: No, not this
20 morning. Thank you.

21 PRESIDENT FECKNER: Very good. Thank you.

22 Brings us to -- we've already done Public
23 Comment. So now we're at Item 17, litigation matters, is
24 closed session. So, at this point, we are going to
25 adjourn the open session and move into closed session for

1 Item 17. If we could please clear the room.

2 Thank you, everyone. Enjoy your holidays. We'll
3 see you next year.

4 (Thereupon the California Public Employees'
5 Retirement System, Board of Administration
6 open session meeting adjourned at 12:47 PM)

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1 C E R T I F I C A T E O F R E P O R T E R

2 I, JAMES F. PETERS, a Certified Shorthand
3 Reporter of the State of California, do hereby certify:

4 That I am a disinterested person herein; that the
5 foregoing California Public Employees' Retirement System,
6 Board of Administration open session meeting was reported
7 in shorthand by me, James F. Peters, a Certified Shorthand
8 Reporter of the State of California.

9 That the said proceedings was taken before me, in
10 shorthand writing, and was thereafter transcribed, under
11 my direction, by computer-assisted transcription.

12 I further certify that I am not of counsel or
13 attorney for any of the parties to said meeting nor in any
14 way interested in the outcome of said meeting.

15 IN WITNESS WHEREOF, I have hereunto set my hand
16 this 21st day of December, 2015.

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20 

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24 Certified Shorthand Reporter
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