

**EXHIBIT B**  
**FINAL DECISION**

BEFORE THE  
BOARD OF  
ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT  
SYSTEM STATE OF CALIFORNIA

In the Matter of the Calculation of Final  
Compensation of:

RICHARD LEWIS,

Respondent,

and

CITY OF SAN BERNARDINO,

Respondent.

Case No. 2014-0256

OAH No. 2014040945

**FINAL DECISION**

Mary Agnes Matyszewski, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, originally heard this matter in San Diego, California, on October 13, and 14, 2014, and February 25, and 26, 2015. The issues before the ALJ were whether certain settlement payments to respondent Lewis qualified as Temporary Upgrade Pay, a form of special compensation, and whether the value of related Employer Paid Member Contributions (EPMC) should be included in the calculation of respondent Lewis' pension. The parties' requests to submit written closing briefs and for additional time to file them were granted. The matter was submitted on June 15, 2015.<sup>1</sup>

Wesley Kennedy, Senior Staff Counsel, represented California Public Employees' Retirement System (CalPERS), State of California. John Michael Jensen, Attorney at Law, represented respondent Richard Lewis, who was present throughout the hearing. No appearance was made by or on behalf of respondent City of San Bernardino (Respondent City).

The ALJ issued her Proposed Decision on July 15, 2015. The Proposed Decision concluded that CalPERS shall include the settlement payments as Temporary Upgrade Pay, and the related EPMC payments, in the calculation of respondent's final compensation. At its meeting on October 21, 2015, the CalPERS Board of Administration declined to adopt the Proposed Decision and determined to decide the matter itself, based upon the record produced before the ALJ and such additional evidence and arguments that were presented by the parties. On November 18, 2015, the Board held a Full Board Hearing. All parties received notice of all

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<sup>1</sup> Mr. Lewis's Post-Hearing Brief was received as Exhibit A. CalPERS's Closing Brief was received as Exhibit B. CalPERS's Request for Official Notice was received as Exhibit C. Mr. Lewis's Objection to the Request for Official Notice and Declaration were received as Exhibit D. CalPERS's Response was received as Exhibit E. Mr. Lewis's Reply Brief was received as Exhibit F. CalPERS's Reply Brief was received as Exhibit G.

proceedings before the Board. At the November 18, 2015 hearing before the Board, Wesley Kennedy represented CalPERS and John Michael Jensen, Esq. represented respondent Lewis. There was no appearance by the City of San Bernardino.

## **ISSUE**

Shall "Temporary Upgrade Pay/Special Compensation" (TUP) and the value of Employer Paid Member Contributions (EPMC) be included in Mr. Lewis' final compensation calculation?

## **SUMMARY**

This case presents a unique and unusual set of facts. Mr. Lewis was a Fire Captain for the City of San Bernardino who allegedly was wrongfully passed over for promotion to Battalion Chief. Mr. Lewis filed a lawsuit against the City that was resolved via a settlement agreement. The terms of the agreement provided that Mr. Lewis was awarded back pay as if he had been promoted, was to be paid in the future at a Battalion Chief rate, and was to be compensated for any overtime at a Fire Captain's rate of pay. Moreover, although paid as a Battalion Chief, Mr. Lewis was not given the job title of "Battalion Chief" and was not promoted. After the settlement, CalPERS was contacted regarding how the City was to report Mr. Lewis' future earnings and provided direction to the City payroll department. Mr. Lewis asserted that since he performed Battalion Chief duties, the settlement agreement awarded him all benefits of a Battalion Chief, and because CalPERS was notified about the settlement agreement and directed the City how to report it, his retirement calculations should include his pay as Battalion Chief. CalPERS asserted that, because Mr. Lewis was not promoted to the position of Battalion Chief, was not required to perform any duties other than those of a Fire Captain, continued to be paid overtime at a Fire Captain rate, and was paid regardless of working in a upgraded position or for a limited duration of time, his settlement pay was not Temporary Upgrade Pay and did not qualify as special compensation. Therefore, it should not be included in the calculation of his final compensation.

## **FACTUAL FINDINGS**

### *Jurisdictional Matters*

1. On May 8, 2013, CalPERS notified Mr. Lewis that his compensation did not qualify as "Temporary Upgrade Pay" and that his EPMC did not qualify as "compensation earnable" for purposes of determining his final compensation calculation.

Mr. Lewis and the City of San Bernardino appealed that determination. On April 22, 2014, CalPERS filed its Statement of Issues, Mr. Lewis filed a notice of defense, and a hearing ensued.

As to the City of San Bernardino, upon proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default pursuant to Government Code section 11520.

### *Employment History*

2. Mr. Lewis was employed by the City of San Bernardino Fire Department from 1981 until 2012, when he retired. The City is a public agency contracting with CalPERS for

retirement benefits for its eligible employees. By virtue of his employment, Mr. Lewis was a local safety member of CalPERS.

Mr. Lewis promoted from fire fighter to engineer in 1986 and to Fire Captain in 1991. Mr. Lewis first took the examination for promotion to Battalion Chief in 2001 and made the eligibility list, but the list expired without him being promoted. Mr. Lewis took another examination in 2003 (for the last time) and again qualified for promotion to Battalion Chief. In 2004, Mr. Lewis purchased Additional Retirement Service Credit for \$133,717.34.

In 2005 Mr. Lewis and his union filed litigation against the City and the Fire Chief, Larry Pitzer, alleging that Mr. Lewis was wrongfully passed over for promotion to Battalion Chief. The matter was dismissed as to all causes of action against the City. In 2007, Mr. Lewis and the City entered into a settlement agreement to resolve Mr. Lewis' remaining causes of action against the Fire Chief. The City paid Mr. Lewis pursuant to the terms of that settlement agreement until Mr. Lewis retired in 2012.<sup>2</sup>

### *Settlement Agreement*

3. The "Settlement and General Release Agreement" entered into between the San Bernardino Professional Firefighters Union, Local 891 (the rank and file bargaining group) and Mr. Lewis, "on the one hand," and the City and Mr. Pitzer, "on the other hand," was signed by the parties in March 2007.

The agreement resolved the federal lawsuit filed by Mr. Lewis against Mr. Pitzer because he had been passed over for promotion to Battalion Chief. The reason for entering into the agreement was "to resolve all pending actions between" the parties. Pursuant to the agreement, the City agreed to pay Mr. Lewis a lump sum of \$75,000. Other "Substantive Terms of the Settlement" included:

a) Mr. Lewis will be paid back pay from the effective date of [when he should have been promoted] to the present, less required tax withholdings. The back pay shall consist of the difference between Mr. Lewis' actual pay as Captain for all regular hours and what Mr. Lewis would have been paid during such period for such hours had he been a Battalion Chief.

b) Mr. Lewis shall be compensated from the date of this Agreement forward as if he had been promoted to the position of Battalion Chief (including all current and/or future benefits granted to Battalion Chiefs) with the exception listed in subsection c, below.

c) Mr. Lewis shall be compensated for all future overtime hours at the Captain rate; to wit, time and one half (1.5) for regular rate of pay Mr. Lewis will receive for fire captains of Mr. Lewis' experience and length of service.

d) For a period of two years from the effective date

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<sup>2</sup> Currently, Fire Captains are in the Fire Safety bargaining unit, earning \$9, 127.70 monthly. Battalion Chiefs are in the Fire Management bargaining unit, earning \$12,202.90 monthly.

of this Agreement, the City shall not reassign Mr. Lewis from the station he is currently assigned to without his consent.

*Memos and Discussions Regarding Settlement Agreement*

4. On April 9, 2007, the attorney representing the City in the litigation sent a letter to Stephanie Easland in the City Attorney's office enclosing the settlement agreement.

5. After the settlement agreement was fully executed, on May 24, 2007, Laura King, Payroll Supervisor, San Bernardino Finance Department, sent Stephanie Easland, Assistant City Attorney, an interoffice memorandum regarding the settlement agreement, with a copy to Barbara Pachon, the City Finance Director, see King clarification of terms of the settlement agreement. Specifically, she wrote:

Please clarify the following [in subsection (a) of the agreement]:

Shall the back pay be CalPERS reportable or not reportable compensation? If reportable, should it be defined as monthly pay rate (reportable retirement purposes) or special compensation (in addition to and separate from the pay rate, e.g. acting pay)?

Should that pay for regular hours earned while on Industrial Disability Leave (4850-injury pay) be excluded from tax withholdings?

¶...¶

Please clarify the following [in subsection (b) of the agreement]:

The date of the agreement?

Shall all regular pay earned, based on the difference between the Captain and Battalion Chief rate, be CalPERS reportable or non-reportable compensation?

Define benefits (e.g., lower monthly health contribution, no sell-backs, admin. hours, straight time overtime as BC)?

In accordance with the Charter 186 increases, effective August 1 of each year, should compensation be adjusted to correspond?

Should sell-back or payoff of leave balances, if any, include the difference between the Captain and Battalion Chief rate?

¶...¶

Please clarify the following [in subsection (c) of the

agreement]:

Will any overtime hours worked by Mr. Lewis be in the capacity of a Battalion Chief and therefore, paid straight time?

6. A June 8, 2007, CalPERS's Customer Touch Point (CTP) entry documented contact between the CalPERS analyst and Ms. King. The CalPERS analyst documented: "per [employer] this member [Mr. Lewis] won a settlement per [employer] there is a retro lump sum and an ongoing pay rate increase for a promotion that the member will not be working in. [Employer] wants to know if this settlement is "persable" and how to report it. Please call and advise. Thank you."

7. A June 11 2007, CalPERS CTP entry documented contact between Carlous Johnson, CalPERS Compensation Review Analyst, Employer Services Division and Ms. King. Mr. Johnson documented "Left message with Laura [King] that we would have to review agreement in order to make a determination as to whether or not it qualifies as reportable compensation."

8. On June 13, 2007, Stephanie Easland, assistant City attorney, sent a City Attorney Inter Office Memorandum to Ms. King, responding to Ms. King's inquiry regarding the terms of Mr. Lewis' settlement agreement. Ms. Easland noted:

The back pay provision of the agreement is to compensate Captain Lewis as if he had been promoted to Battalion Chief; therefore, such back pay is part of Captain Lewis' monthly pay rate and is reportable to CalPERS for retirement purposes. That portion of back pay that would have been earned while on 4850 injury pay should be excluded from tax withholdings.

All future monthly pay rates will be at the rate of Battalion Chief and will be CalPERS reportable compensation. This monthly pay rate should be fixed annually on August 1 to correspond with Charter §186 adjustments for Battalion Chiefs. Any payoff of leave balances should be at Captain Lewis' monthly pay rate at the time of such payoff.

As to future overtime, the agreement provides for payment of such overtime at the rate of one and one half times the regular rate of pay a Captain of Richard Lewis' experience and length of service would receive at that time.

As to future benefits, Captain Lewis is to receive all current and future benefits granted to Battalion Chiefs, in lieu of those granted to Captains, except for the overtime provisions previously discussed. The implementation of this provision should be from March 23, 2007, the date the agreement was fully executed [by the parties and their attorney].

9. On June 19, 2007, Ms. King sent the City attorney's office the exact same memo she sent on May 24, 2007, referenced above in Finding of Fact No. 5. She later made notations on the memo based upon Ms. Easland's and CalPERS answers to her inquiry. The entries were

to assist the payroll department in the future regarding how to report and track Mr. Lewis's earnings.

10. On July 5, 2007, Mr. Johnson, CalPERS Compensation Review Analyst, Employer Services Division, wrote a letter to Ms. King responding to her inquiry concerning the settlement agreement. Mr. Johnson wrote,

The City has agreed to compensate Mr. Lewis at the Battalion Chief level retroactive back to October 2, 2004. Your specific question is - should this compensation be reported as regular base pay and earnings or as special compensation - temporary up-grade pay.

Since Mr. Lewis will retain his current position title of Fire Captain, the compensation at the Battalion Chief's position should be treated as temporary up-grade pay, and reported as special compensation.

CalPERS request [sic] the City report this compensation on a monthly or semi-monthly basis retroactive back to October 2, 2004.

11. San Bernardino Resolution No. 2007-345 established a management and confidential employee compensation and benefits plan. The resolution set forth the compensation for safety and non-safety classifications noting that the compensation for safety classified employees would be determined in accordance with Charter Section 186. The resolution contained a section outlining the provision of uniforms CalPERS contributions, and noted that in 2000 the City adopted a resolution "for paying and reporting the value of the Employer Paid Member Contribution (EPMC) under the guidelines of Government Code Section 20636 (c)(4) pursuant to Section 20691. The City will report the nine percent (9%) Employee Contribution as Special Compensation under the current CalPERS laws."

Section M of the resolution provided for acting pay, stating that the "Mayor may assign an employee to discharge the duties of a higher classification for additional compensation as provided herein, in the event of a vacancy or during the temporary absence of that employee." A safety employee assigned to acting duty "in writing by the Mayor shall receive acting duty pay" as "governed by Charter Section 186." There were no vacancies or temporary absences of a Battalion Chief during the time when Mr. Lewis was receiving the pay differential.

12. The San Bernardino Fire Safety Employees' Memorandum of Understanding, effective from January 1, 2003, to January 30, 2009, set forth the rights and remedies of firefighters, acknowledging that local 891, the union, was the exclusive representative of the rank and file employees in the ranks of firefighter, paramedic/firefighter, engineer, fire investigator and Fire Captain. Section 7, the retirement plan section, noted the City will continue to participate in CalPERS and that:

City will increase the base salary of all employees covered by this agreement by converting the nine percent (9%) Employer-Paid Member Contribution (EPMC) to base salary. This base salary is 'compensation earnable' as defined in section 20636 (c) of the California Government Code and shall be

reported to the Public Employees' Retirement System (hereinafter PERS). . . . The employee contribution to PERS shall be made through automatic payroll deductions for the base salary in accordance with PERS [sic] regulations.

For purposes of determining overtime compensation and other salary payments, including but not limited to, payoff of sick leave, vacation accruals, holiday accruals and comp time balances, the aforementioned nine percent (9%) base salary increase shall not be considered.

13. Mr. Lewis' CalPERS payroll detail report from 2003 to 2012 contained entries identified as regular payroll and special compensation, and showed retroactive salary adjustments had been made. The document clearly reflected the change in Mr. Lewis' CalPERS reported income following the settlement of his litigation.

14. The San Bernardino Human Resources and Job Descriptions identified the monthly payrate of a Fire Captain as \$9,037. The payrate reported on behalf of Mr. Lewis to CalPERS' reflected this amount both before and after he settled his lawsuit.

15. A January 1, 2008, Amendment to Contract between CalPERS and San Bernardino determined that fire fighters became members of the retirement system. The amendment set forth how final compensation was to be calculated and what contributions the City would provide.

16. A June 6, 2011, CTP entry documented Mr. Lewis's telephone call to CalPERS. The CalPERS analyst wrote: "inquiry on final comp used by our estimate and sent, called to IAA for further assistance, thanks." A CTP entry later that same day noted the following: "IAAL: [member received] SR estimate with \$9757 listed as [final compensation] member states his employer has history of misreporting pay rate and special compensation info and requesting a return call to clarify pay rate and special compensation as reported by [employer]-member is paid biweekly; 15th and 31st of each month and wants to confirm correct [employer] reporting. Please call and advise, thanks."

17. A June 20, 2011, CTP note contained the following entry: "Reviewed payroll reported through 5/11-1service period. SIC is FLSA [Fair Labor Standards Act], Chief Officer Pay, EPMC, and temporary upgrade. Okay to calc[ulate] from transcripts."

18. Thereafter, on June 23, 2011, a CalPERS analyst made the following CTP entry: "Spoke to Member [Mr. Lewis] and assured him that all of his special compensation was allowed to be used in his retirement calculation."

19. On October 9, 2012, Mr. Lewis signed a disability retirement election application. As before, he again identified his position title as a "Fire Captain."

20. On October 9, 2012, Mr. Lewis signed an application for disability retirement, checking off the box marked "Service Pending Industrial Disability Retirement." He identified his position title as "Fire Captain." Mr. Lewis testified at hearing that, pursuant to the settlement agreement, he would not get the title of Battalion Chief, just the benefits, so he listed his job title on the application as Fire Captain.



21. On October 26, 2012, CalPERS provided Mr. Lewis with an estimate of his industrial disability retirement. If Mr. Lewis retired on November 30, 2012, he would be 61 years old and have 30.272 total years of service credit. CalPERS advised Mr. Lewis that "[w]hile completing your estimate we noticed that you have special compensation involved in your payroll. Special compensation is additional income you might receive for uniform allowance, holiday pay, longevity pay, etc., and is reported separately from your base pay. Please be aware that we will only include compensation that has been reported by your employer to date. Any special compensation not yet reported by your employer has not been included in your estimate."

22. On November 27, 2012, a San Bernardino Disability and Rehabilitation Hearing Officer issued a Findings of Fact and Conclusions of Law determining that Mr. Lewis was hired by the City "as a Firefighter on March 30, 1981, was later promoted to the position of Fire Captain and remained in that position until he retired on November 1, 2012." During his career Mr. Lewis sustained 10 different injuries, with a current diagnosis of "Large B Cell lymphoma in remission, hypertension, history of pancreatitis and gallstones, history of gastric ulcer, and sleep disorder." The San Bernardino Human Resources Department, Risk Management Division recommended that Mr. Lewis' work restrictions caused him to be a "qualified injured worker and in need of vocational retraining" and that he could not continue his employment at the fire department because they did not have a permanent modified duty status. The Risk Management Division recommended Mr. Lewis for an industrial retirement. The hearing officer concluded that Mr. Lewis was incapacitated "for the performance of his usual duties as a Fire Captain" and that he was "incapacitated for performance of the usual duties of the position for other California public agencies in CalPERS." Similar positions were unavailable. As such, Mr. Lewis's effective date of industrial disability retirement was November 1, 2012.

23. On January 19, 2013, Lolita Lueras, CalPERS Compensation and Employer Review, sent the City an e-mail seeking information regarding the payroll reported for Mr. Lewis. The City provided her with the requested information. That information included information and direction on where to locate other pertinent information on the City's web page.

24. A January 19, 2013, CTP entry noted "compensation review pending BP response to inquiries sent 1/19/13 requesting documentation for temporary upgrade pay."

25. On January 29, 2013, CalPERS sent Mr. Lewis a letter advising him that "[i]n connection with your application for industrial disability retirement your employer has found you incapacitated for the performance of your duties as a Fire Captain. Your incapacity is industrial."

26. A February 13, 2013, CTP entry noted, "[Employer] provided incorrect information. DO NOT USE any special comp in the amount of \$1560.50 for Temporary Upgrade pay. This compensation is for a settlement and is not reportable. Pay rate and other special compensation okay to calc[ulate] as earned."

27. On May 8, 2013, CalPERS sent letters to Respondent City and Mr. Lewis advising that CalPERS had "recently completed a review of the compensation reported by the City" and "found compensation that does not comply with the California Public Employees Retirement Law (PERL)." CalPERS wrote: "The compensation in question has been identified as 'Temporary Upgrade Pay,' reported each pay period as special compensation in the amount

of \$1560.50." CalPERS noted that the City had provided the settlement agreement and internal City memoranda. The letter noted that the City sought direction from CalPERS on how to report that compensation during the settlement of Mr. Lewis' lawsuit, CalPERS instructed the City to treat it as Temporary Upgrade Pay and report it as special compensation, and that the City had followed CalPERS' instructions. The letter noted that, "[a]fter for [sic] the documentation provided by the City, it has been determined that the special compensation identified as 'Temporary Upgrade Pay' does not qualify as reportable compensation for retirement purposes." CalPERS letter cited to Government Code section 20160, that "addresses errors made by an employer and/or CalPERS," and Government Code section 20636 that defines compensation earnable. CalPERS noted that because Mr. Lewis was not working in the capacity of a Battalion Chief, but only receiving the benefits of that position, his "Temporary Upgrade Pay" did not satisfy Section 20636, subdivision (c)(3), criteria that special compensation shall be for "services rendered during normal working hours." Additionally, because the "settlement agreement suggested that the Temporary Upgrade Pay was indefinite" it violated California Code of Regulations, title 2, section 571, subdivision (a)(3), which requires the employee to work in the upgraded position/classification for a "limited duration." Accordingly, the compensation was not reportable. Additionally, CalPERS asserted that because Mr. Lewis received the value of Employer Paid Member Contributions (EPMC) pursuant to a City resolution, it could not be used in his retirement calculation because it was "not offered to his classification of Fire Captain." Thus, "Mr. Lewis's retirement calculation was completed excluding the Temporary Upgrade Pay and value of EPMC." CalPERS requested that the "City reverse out all Temporary Upgrade and EPMC payments from our payroll system to recover the contributions paid on these benefits." CalPERS advised the City and Mr. Lewis of their appeal rights.

28. In its June 5, 2013, letter appealing CalPERS' decision, the San Bernardino City Attorney wrote that as part of the settlement agreement: Captain Lewis was to receive the pay of a battalion chief as though he were promoted to that position even though he remained a Captain. The City corresponded with CalPERS to determine how this payment be reported. On July 5, 2007, CalPERS unequivocally instructed the City to report the extra pay as 'special compensation' pursuant to Government Code section 20636 so that it could be counted for retirement purposes. CalPERS went further and instructed the City report this compensation retroactive back to October 2, 2004 (the date Mr. Lewis should have been promoted). The City followed the instructions of CalPERS and has paid contributions at the battalion chief level.

In December 2007, nearly 6 months after CalPERS indicated the additional income to be reported was acceptable as 'special compensation,' the *Prentice v. Board of Administration (CalPERS)* (2007) 157 Cal.App4th 983 case was published. The *Prentice* case stands for the proposition that a City manager's approximate 10% increase in salary did not constitute special compensation because the increase was not reflected in the published salary range and was not available to other managers.

On May 8, 2013, CalPERS began second-guessing its 2007 decision to allow the additional compensation for Captain Lewis' retirement. The May 8, 2013, letter from CalPERS relies on Government Code section 20160 and argues that despite CalPERS' accord regarding the pay received by Captain Lewis, it is now taking the position that the agreed-upon designated special compensation would no longer be considered as such and would

be excluded from his retirement pay.

In the present case, in 2007 CalPERS was provided all pertinent information and data to make a determination on what to do with the increased pay. CalPERS took the data and instructed the City [to] report the increased pay as special compensation so that it could be recovered during Captain Lewis' retirement. CalPERS cannot now argue that it was suddenly put into a situation to its detriment without fault or negligence of its own. Sudden realization cannot reasonably occur six years after the decision is made. In 2007, CalPERS made a decision fully apprised of all facts.

At best, CalPERS could have argued the December 2007 *Prentice* case created surprise, but that argument needed to be made in 2008 soon after the case was published. Again, because six years has passed, it can no longer rely on mistake, inadvertence, surprise or excusable neglect because it is culpable in not using due diligence to correct any newly perceived error in the instructions for reportable compensation.

The City Attorney argued that even if Government Code section 20160 did apply, the applicable statute of limitations was three years under Code of Civil Procedure section 338, subdivision (a), governing actions based on statute, and expired in 2010; CalPERS could not claim that it did not realize the amount of money it was obligated to pay until Mr. Lewis retired, thereby tolling the statute of limitations until his retirement, because CalPERS was given all of that information in 2007; and that equitable estoppel precluded CalPERS from pursuing its current course of action. As the City Attorney noted,

In the present case, on July 5, 2007, CalPERS informed the City and Captain Lewis that the increased salary would be considered 'special compensation' for purposes of retirement calculation. The City paid contributions to CalPERS based on its instructions and the employee relied on CalPERS' statements that the money would be paid as promised, and did not test for the battalion chief position again. Both the City and Captain Lewis relied on CalPERS' instructions to their detriment and CalPERS is estopped from reversing its decision six years after it was issued.

Finally, the City Attorney asserted that the *Prentice* case should not be applied retroactively.

[That case] was published . . . Almost six months after CalPERS sent its letter instructing the City to report the increased pay as special compensation. Thus, it was not the law of the land at the time CalPERS instructed the City to report the increased pay. It can be distinguished because the pay schedule for Captain Lewis is actually published and is available to all individuals holding the position of battalion chief pursuant to the City's salary resolution, the labor agreement with the Fire union, and

the settlement agreement with Captain Lewis. Additionally, CalPERS permitted the City to report the special compensation unlike in *Prentice* where it prohibited the salary increase.

Furthermore, the *Prentice* case should not be applied retroactively because of the [City's] estoppel argument.

### *Witness Testimony at the Hearing*

33. Richard Lewis testified about his employment and work duties. He believed he was passed over for promotion to Battalion Chief even though he alleges he scored higher on certain parts of the exam than the individual who was promoted. Respondent Lewis sued the City and the Fire Chief. The lawsuit against the City was dismissed but a portion of the action against the Fire Chief persisted. A settlement was entered into whereby Mr. Lewis would not be promoted and would continue to receive certain benefits of a Fire Captain and the benefits of a Battalion Chief. Mr. Lewis would not be performing the duties of a Battalion Chief and would not be promoted to the position of a Battalion Chief or receive a title of Battalion Chief. Mr. Lewis testified he believed, he was assured that his retirement benefits would be at a Battalion Chief rate. Lewis testified that having his retirement calculated at the Battalion Chief rate was a "material term" for him to settle his lawsuit. Had he not been so informed, Mr. Lewis testified that he would never have agreed to settle. Mr. Lewis explained that, because of his deep involvement with the union and its contracts, he was extremely familiar with all the various benefits firefighters received and was very concerned about his retirement. Mr. Lewis communicated several times with both the City representatives and CalPERS to ensure that his benefits had been correctly reported and that special compensation would be included in the calculation of his pension. He was repeatedly assured by the City that those benefits were included. In fact, Lewis testified that he checked again on this issue with CalPERS when he and his wife were in CalPERS' office to submit his disability retirement. Mr. Lewis brought a payroll stub to that CalPERS meeting because he wanted to confirm that his Battalion Chief pay was counting towards his retirement. However, the evidence did not establish that he ever showed his pay warrants to anyone at CalPERS. He was assured that "special compensation" is included in the calculation of a member's retirement allowance. Mr. Lewis was not aware that CalPERS had instructed the City to report the pay increase as "Temporary Upgrade Pay," as it did not indicate that on his paystubs. However, he was assured by the CalPERS analyst that all "special compensation" pay counted towards his retirement. Again, because of all of his union work, Mr. Lewis was very familiar with the reporting process and knew that some items of pay are not "PERS-able," which was why he wanted to make certain that his increase in pay from his settlement agreement was included in his retirement calculations.

Mr. Lewis testified that after the settlement, he performed some duties of a Battalion Chief. He was referred to as "Chief," wore a Battalion Chief uniform on occasion, received the uniform allowance given to Battalion Chiefs, and drove a Battalion Chief vehicle, Mr. Lewis never reapplied for a Battalion Chief position because he was already acting as, and being paid as, a Battalion Chief. Mr. Lewis testified about all the duties he performed as a Battalion Chief. The anecdotal evidence of his performing duties as a Battalion Chief was rebutted by the fact that the duties referenced by Lewis were for the most part those also required of a Fire Captain. Evidence did not establish that Mr. Lewis performed the duties of a Battalion Chief.

34. Corey Glave, the attorney who represented Mr. Lewis in his lawsuit against the City, testified that retirement benefits were discussed when "all benefits" were discussed. The parties agreed that Mr. Lewis would retain the title of Fire Captain but have all the benefits of a

Battalion Chief. The parties agreed that overtime would be at the Fire Captain rate because Fire Captains had greater access to overtime pay. After the settlement, the parties discussed the difference in retirement benefits between a Battalion Chief and Fire Captain. The parties agreed to give Mr. Lewis back pay as if he had been promoted on the date when he should have been promoted, and all future earnings and retirement benefits would be at a Battalion Chief rate. The discussions centered on the fact that Mr. Lewis would receive all benefits that Battalion Chiefs received. The settlement agreement did not explicitly itemize all of the Battalion Chief benefits because Lewis believed the words "all benefits" meant all Battalion Chief benefits, including retirement benefits. Mr. Glave testified that it was important to Mr. Lewis that he be paid at a Battalion Chief rate. Mr. Glave further testified that if he or Mr. Lewis ever had a concern that retirement benefits were not included, they never would have settled.

During the negotiations it was discussed between the opposing counsel and their consultants that they could not place Mr. Lewis in the group and class of a Battalion Chief, nor did the current Fire Chief want Mr. Lewis on his Management Team. Alternative resolutions were discussed including calculating a lump sum pay off. However, that amount became "too huge" (a million dollars). So instead, it was decided that the settlement payment would be made as part of a pay warrant process over time. Mr. Glave made no attempt to reference in the agreement that the settlement payments would be included in Mr. Lewis' final compensation and he specifically did not contact CalPERS on that issue. He did speak to a CalPERS Board member about other issues. Mr. Glave did not participate in any closed session with the City Council concerning the settlement agreement. Mr. Glave expressly stated pertaining to the settlement agreement, "I don't think there is any provision in here that says he will be an acting Battalion Chief."

Regarding "acting" status, Mr. Glave was familiar with the practice in the City and indicated that a minimum of 5 shifts were required to be documented. In part, the purpose was for pay but also for promotional opportunities. However, Mr. Glave was very clear that the payments made to Mr. Lewis through the settlement agreement were NOT ACTING PAY. "He was to receive the BC pay whether he was in the acting capacity or not." In fact, Mr. Glave acknowledged that certain functions crossed over between a Battalion Chief and a Fire Captain without falling into the realm of "acting". According to Mr. Glave, an example of these similar duties was when a Fire Captain assumed control of a fire incident before a Battalion Chief arrived. This was not considered "acting" Battalion Chief duty, but was part of the Fire Captain's duties. It was Mr. Glave's understanding that Mr. Lewis' primary job duties after the settlement agreement would remain those of a Fire Captain.

35. Wendy McCammack, a licensed federal and state tax preparer, who owns three small businesses, served 13 years on the San Bernadino City Council. She was a council member during Mr. Lewis' litigation with the City. Ms. McCammack was extremely familiar with the policies and procedures of the fire department. She met with every single department head in the City before she took office, because she wanted to have an understanding of the workings of the City management and its employees. She served on several council committees and learned a lot of information regarding the personnel board and the different issues with the different departments. She was well aware of the issues surrounding Mr. Lewis' failure to be promoted, as well as being aware of several other promotion issues in the fire department.

The City attorney informed the council of a potential lawsuit when Mr. Lewis was passed over for promotion. Ms. McCammack testified that during the settlement negotiations

she asked why the City simply did not promote Mr. Lewis to Battalion Chief. It was her understanding that the City was going to resolve the litigation by promoting Mr. Lewis to Battalion Chief.

35. Ms. McCammack asked whether Mr. Lewis would receive Battalion Chief retirement benefits, and she said she was told he would receive Battalion Chief retirement benefits. She suggested the City contact CalPERS to make sure that CalPERS would accept the settlement agreement as counting towards a Battalion Chief retirement. Ms. McCammack specifically made this inquiry because there were occasions when CalPERS would accept salaries as submitted by the City and other times it would not. She testified as administrative hearsay that she was assured by the City Attorney and City Manager that the settlement payments would be "PERSable." Furthermore, she could not imagine that the settlement was not "PERS-able" because the City was paying into CalPERS for Mr. Lewis at the Battalion Chief rate and, if the City was doing so, Mr. Lewis' retirement would be no different than other employees for whom the City made contributions and the employee retired at that rate.

Ms. McCammack was uncertain and could not recall if the settlement agreement was ever approved by the City Council in an open session. She also testified there may have been public discussions regarding the City budget in which the settlement payments were mentioned. In her role on the City Council, Ms. McCammack had "constant discussions" regarding the number of Battalion Chiefs, Fire Captains, and Assistant Chiefs that were needed to serve the public. She was always concerned that there were a sufficient number of Battalion Chiefs because she wanted to make sure the City had the appropriate number of staff. Ms. McCammack asserted that she had personal knowledge that Mr. Lewis performed Battalion Chief duties because she attended as many fire incidents in her district as possible and Battalion Chiefs were not always present initially. Mr. Lewis' fire station was very close to her district and she observed him several times, at least once a month, performing in the capacity of a Battalion Chief for up to 45 minutes before a Battalion Chief arrived.

36. Laura King,<sup>3</sup> San Bernardino Payroll Manager, Finance Department, testified that her duties included implementing the agreed-upon resolutions and memoranda of understandings (MOUs) approved by the City Council. She drafted a memorandum to the City Attorney's Office because the Finance Department had questions regarding how to implement the terms of Mr. Lewis' settlement agreement. She explained that, as payroll manager, she would need to know how to accurately report the terms to CalPERS. Ms. King used the fire management MOU for Mr. Lewis. Battalion Chiefs are covered under the fire management MOU and the City Attorney's office advised that the benefits would be under the fire management MOU. However, the position of Fire Captain is a rank and file position and was included in a different MOU from the one covering Battalion Chiefs. The City pays contribution to CalPERS at the same percentage for both management and rank and file safety employees.

Ms. King contacted CalPERS before implementing the payroll to ensure that she did it correctly. Mr. Carlous Johnson, from CalPERS, provided Ms. King with CalPERS' response which she, and the City, considered was CalPERS' "final answer." Immediately following Mr. Johnson's letter, the City began implementing Mr. Lewis' compensation as directed by CalPERS and never heard anything further from CalPERS until 2013. Per CalPERS' direction, payroll reported Mr. Lewis' salary as the base pay of a Fire Captain plus "special

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<sup>3</sup> Laura King has since married and is now known as Laura Yavomicky. However, because all of the documents introduced at hearing bear her former name, she will be referred to in this decision as Laura King.

compensation," which was the difference between Fire Captain pay and Battalion Chief pay. Ms. King made the CalPERS code notations on her memorandum based on CalPERS' response to guide the payroll department with future reporting. She made the notations as a "tickler" to ensure that each year Mr. Lewis' salary adjustment was consistent with the terms of the settlement agreement.

Ms. King testified that Mr. Lewis' compensation arrangement was unusual and "challenging." His compensation other than base pay as a Fire Captain was controlled by the terms of the settlement agreement. Ms. King was not aware of any other Fire Captain employed by the City receiving a similar additional compensation arrangement as Mr. Lewis. The settlement agreement was unclear to Ms. King as to if, and how the additional compensation would be reported to CalPERS. She sought and was provided further clarification from the City Attorney's Office. Ms. King took notes of her discussions with the City Attorney's Office which indicated "Mr. Lewis will only be receiving the pay of Battalion Chief, he will not be working in the capacity of a Battalion Chief." That meant that Mr. Lewis' payrate/base salary was always that of a Fire Captain. However, the basis by which she determined how much San Bernardino was going to pay Mr. Lewis "was directly the result of the Settlement Agreement and instructions from the City Attorney's Office". Furthermore, Ms. King confirmed that the City had no publicly available pay schedule that would provide a fire Captain the amounts of compensation that respondent received through the terms of the settlement agreement. Ms. King testified that the City could pay Fire Captains who worked in an upgraded capacity as a Battalion Chief, if they worked 10 shifts or more. That the procedures within the City required that the request for upgraded pay be made pursuant to a personnel action form initiated by the Fire Department and passed through the Human Resources Department for approval.

37. Stephanie Easland, a former San Bernardino Senior Assistant City Attorney, from 1990 to 2012 was tasked with answering the Finance Department's memorandum. Ms. Easland's principal and longest running assignment was to work with the City's Human Resources Department, including matters related to labor law and "Charter section 186" issues (which control the pay for City personnel.) Ms. Easland testified as to her interpretation of the settlement agreement with Lewis and her answers to the questions posed pertaining to the language of the settlement agreement. Without specific recall, she testified that in answering the questions she probably researched applicable law, reviewed documents on the CalPERS website, and reviewed the Government Code and its annotations. The City's Attorney's Office did not have any other CalPERS specific information. Given that this was an issue the City had never addressed before, Ms. Easland may have put "more time" into researching it than usual. Ms. Easland testified that the City retained outside counsel for representation in Mr. Lewis' lawsuit and she may have contacted that attorney to ask him how the income was to be treated for retirement purposes as agreed to by the parties, but if she did, she does not recall receiving any response. Ms. Easland may have discussed her responses to the Finance Department with the City Attorney, but did not recall. She never contacted CalPERS. When asked if there was an inconsistency between the settlement agreement and CalPERS' determination regarding the additional payment to Mr. Lewis, Ms. Easland was unfamiliar with, and in fact never heard the term "Temporary Up-grade Pay." Ms. Easland did observe that the agreement did not specifically state that additional payment would be reported to CalPERS or be "PERSable." She was never asked by the City Council whether the payments made to Mr. Lewis under the settlement agreement would be included in the calculation of his retirement benefits.

Ms. Easland's interpretation of the settlement agreement was made three months after the settlement agreement was executed. Her interpretation was that Mr. Lewis was to be paid an amount equal to that of a Battalion Chief and she assumed it would be reported to CalPERS.

“How PERS ultimately treated that ... it was their decision”.. However, it was also her understanding that the settlement agreement was drafted in a manner such that it would not necessarily be a violation of the agreement should CalPERS not allow the additional payments to be reported or not allow the additional payments to be used in calculating Mr. Lewis’ retirement benefits. It was her understanding that Mr. Lewis agreed to a settlement that increased his salary which in turn would "ultimately increase his retirement." Had she ever learned that the increase in salary was not reportable she would have had to perform additional research to determine if that placed the City in violation of the settlement agreement. She did note that the settlement agreement gave him overtime pay, something Battalion Chiefs do not receive, but she concluded that he was receiving all other Battalion Chief benefits.

She acknowledged the *Prentice* case was decided after the settlement with Mr. Lewis was reached. After reviewing the court’s decision in that case, Ms. Easland’s opinion was that the settlement payment made to Mr. Lewis under the agreement would not be included in the calculation of his retirement benefits because they were not available to other Fire Captains in the fire department. Nor did Ms. Easland believe it would be lawful for the City to have paid a Battalion Chief overtime pay at the same rate as a Fire Captain, According to Ms. Easland, Mr. Lewis received compensation pursuant to the settlement agreement that were “out of the norms”, and “unique” compared to any other Battalion Chief or Fire Captain with the City.

Ms. Easland was aware of the requirements of the City for an employee to receive “acting pay.” She testified that to serve in an “acting” role, the Fire Chief had to certify to the Finance Department that the employee performed the duties of the higher position for a mandatory required amount of shifts. The Finance Department would then submit the request for higher pay for approval to the City Council and City Manager. Ms. Easland did not believe the process had changed during her tenure with the City. In order to qualify for “acting” pay Mr. Lewis would have been required to perform “all the duties of a Battalion Chief” during the required number of shifts. The “acting” pay would never be authorized for an indefinite period of time, but only during the time the employee continued to perform the duties of the higher position and only for a limited total period of time. The purpose of the procedures was to assure that the City was not “running around the competitive process” set through the City’s Civil Service Rules. Ms. Easland affirmatively concluded that nothing in the settlement agreement addressed Mr. Lewis’ duties. The settlement agreement, according to Ms. Easland, referenced the position of Battalion Chief only as a basis for calculating the settlement payments. Pursuant to Ms. Easland, nothing in the settlement agreement would serve as a certification that Mr. Lewis was acting in the capacity or performing the duties of a Battalion Chief. “it was the settlement of his lawsuit.” She does not recall Mr. Lewis ever being certified by the Fire Chief or getting approval of the City Council. The City Charter and the MOU control how “acting” roles are determined and carried out. Ms. Easland agreed that a purpose of designating an employee as "acting" is so the employee can receive the higher salary.

Ms. Easland believes the settlement agreement terms were discussed in closed session of the City Council, and did recall that it was never approved in open session by the City Council. She specifically commented that had the agreement been submitted for approval in an open session, it would have been by resolution. Ms. Easland was not aware of any such resolution. there was no documentary evidence introduced to indicate that the agreement was ever submitted for approval in an open session of the City Council. After being signed, the agreement was maintained in a file by the City Attorney’s Office with access by the City through the legal office. Ms. Easland does not recall there having ever been a request by the public to review the agreement.



38. Helen Tran, began her employment with the San Bernardino City Human Resources Division in 2006. At the date of the hearing, she was the Division Manager of the San Bernardino Human Resources Division. She was not involved with Mr. Lewis' litigation, settlement or any processing of the settlement through the City; although she was aware there was a lawsuit. Ms. Tran testified that if an MOU allowed an employee to perform duties in a higher acting capacity, the City's Civil Service procedures would require that a personnel action form would be generated and forwarded to the Human Resources Department for review for compliance with the relevant criteria. It would then be forwarded to the City Managers' office for approval and the Finance Department before the individual employee would receive the higher acting pay. Mr. Tran confirmed that acting pay would only be approved where there was a vacancy unfilled in the higher position. She had only briefly reviewed the settlement agreement "in a side discussion." The "acting pay" paperwork would be placed in the employee's Official Personnel File (OPF) which is maintained by Ms. Tran's office. After researching Mr. Lewis' OPF, Ms. Tran reported back at a subsequent appearance in this case, that she could not locate any documents in Mr. Lewis' OPF that would indicate he was approved for or receiving "acting pay". Neither did the file contain any certification by the Fire Chief that Mr. Lewis had ever performed the duties of a Battalion Chief, as required by the City's Charter. However there could be other documents, authorizing that situation, but she could not confirm this. In her tenure with the City, she had never been exposed to such an instance. In response to a direct question from the ALJ, Ms. Tran specifically stated that even if an employee was otherwise getting compensation equivalent to a higher position, if the pay were to compensate the employee for "acting pay", that too "should be documented" in the OPF. Ms. Trans confirmed that the position of Battalion Chief is a management classification and that Fire Captain is a rank and file classification. Based on her review of the City's records, Mr. Lewis' classification during and at the time of his separation was as a Fire Captain.

39. Lolita Lueras, CalPERS Retirement Program Specialist II, testified that compensation determinations are based on the applicable code sections and regulations. She explained that although employers report categories of earnings, CalPERS makes the final determination of whether the reported earnings are "compensation earnable." Her job duties include determining if compensation reported qualifies as compensation earnable (i.e., payrate or special compensation pursuant to the PERL.). Ms. Lueras also testified that an employer may report compensation to CalPERS, but that there are no filters on whether compensation reported qualifies as "compensation earnable". Accordingly the fact that an employer is permitted to tentatively report certain compensation does not mean it qualifies as "compensation earnable". Therefore, "it is not uncommon" that adjustments are made to the amounts reported to assure they conform with the PERL.

As Ms. Lueras explained, CalPERS offers a lot of education to our employers to understand the PERL and what items can be reported to the system. We have publications such as circular letters that contact the employers and let them know of any changes to statute or regulation. There are also educational opportunities, such as the educational forum that CalPERS presents annually. We also have a Call Center where the employer can contact CalPERS and ask questions and a CalPERS representative would be able to assist. These often verbal exchanges are not final determinations, but merely suggestive of how an employer may report compensation. The employer and employee are informed that any reporting of compensation pursuant to these informal responses are subject to further review and adjustment. Ms. Lueras pointed out that a response to the City by CalPERS staff member Carlous Johnson, provided after the settlement agreement was fully executed, wherein the City asked how it could report the settlement payments, was an informal and tentative response, not

a final determination of whether the settlement payments qualified as compensation earnable, and would be subject to further review by CalPERS.

Ms. Lueras testified that at the time that Mr. Lewis retired, she was assigned to undertake a review of his reported compensation to determine if it conformed with requirements of the PERL. In addition to review of the settlement agreement, she contacted and exchanged correspondence with representatives of the City regarding Mr. Lewis' positions. She reviewed all other pertinent documentation regarding Mr. Lewis's status and assignments, including Memoranda of Understanding (MOU) for various groups and classifications of employees, salary schedules, and a "huge amount of documents" on the City's Web site.

Based upon her review of the documents, Ms. Lueras determined that Mr. Lewis held the position of a Fire Captain, entitled to Fire Captain retirement benefits only. However, under the settlement agreement, Mr. Lewis received some benefits reserved for Fire Captains and an additional settlement payment that was equivalent to the difference between the salary of a Fire Captain and a Battalion Chief. Mr. Lewis was never promoted to the position of a Battalion Chief according to the settlement agreement. The communications and documentation provided by the City established that Mr. Lewis was not to perform the duties of a Battalion Chief. Accordingly, Ms. Lueras placed Mr. Lewis in the rank and file group or class of employment. Because he could not be in two groups or classes of employment concurrently, and because no other Fire Captain received or could receive the additional compensation provided under the settlement agreement, it was impermissible, under the PERL and relevant case law, to place him in the management group or class of employment.

Ms. Lueras specifically determined that the additional compensation provided through the settlement agreement would not qualify as "Temporary Upgrade Pay" or as any other type of special compensation. Ms. Lueras' research and review found that Mr. Lewis was not being compensated for special skills, nor specific knowledge of any kind, nor abilities, nor work assignment, nor work days or hours, which are the hallmarks of special compensation. Furthermore, based on her review, Ms. Lueras determined that the additional payments were not being paid pursuant to a "labor policy or agreement", but pursuant to a settlement agreement, which does not qualify as a labor policy or agreement. Nor were the additional payments being paid or made available to any other similarly situated members of Mr. Lewis' class of Fire Captain.

In addition, Ms. Lueras determined that under Title 2, California Code of Regulations, section 571, Mr. Lewis was not working in an "upgraded" position. In fact, the response from the City to Ms. Lueras inquiries was to the effect that "Mr. Lewis will only be receiving the pay of Battalion Chief; however, he will not be working in the capacity of a Battalion Chief."

Additionally, Mr. Lewis's salary increase obtained by his settlement agreement had not resulted in his pay rate being elevated. The increase in pay was reported as "Special Compensation" but that pay differential did not satisfy the requirements to qualify as "Special Compensation." Other factors Ms. Lueras relied on to make her determination were the fact that she was provided no materials from the Human Resources Department of the City documenting performance of duties in a higher position, and that Mr. Lewis had listed his position on his retirement application as a "Fire Captain."

Ms. Lueras testified that Mr. Johnson's July 5, 2007, letter to the City was not a final determination but merely confirmed that the settlement payments were clearly not payrate and if the City wished to report the payments they would need to do so as special compensation.

She acknowledged that her final determination was at odds with Mr. Johnson's letter, and the other analysts' opinions documented in the CTP. Mr. Johnson's initial response was based solely on a review of the settlement agreement. Ms. Lueras explained that she reached her conclusion after additional and further review of documents and information that Mr. Johnson did not have.

40. David Clement, CalPERS Senior Pension Actuary, calculated the difference in Mr. Lewis's retirement as a Battalion Chief and as a Fire Captain. He testified that allowing Mr. Lewis to receive Battalion Chief retirement benefits would cause an "unanticipated increase in liability" of \$509,668. He explained that this figure represented the additional liability the City would assume if Mr. Lewis won his appeal.

## LEGAL CONCLUSIONS

### *Burden and Standard of Proof*

1. An applicant for retirement benefits has the burden of proving that he is entitled to it. (*Greator v. Board of Administration* (1979) 91 Cal.App.3d 54).

2. In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

### *Applicable Code Sections*

3. Government Code section 20630 defines "compensation."

4. Government Code section 20636 defines "compensation earnable" as the "payrate and special compensation of the member as defined by subdivisions (b), (c), and (g) and as limited by section 21752.5."

5. Government Code section 20636, subdivision (b)(1), defines "Payrate" means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules. "Payrate," for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e).

6. Government Code section 20636, subdivision (c), "Special compensation" of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.

(2) "Special compensation" shall be limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate. If an individual is not part of a group or class, special compensation shall be limited to that which the board determines is received by similarly situated members in the closest related group or class that is in addition to payrate, subject to the

limitations of paragraph (2) of subdivision (e).

(3) "Special compensation" shall be for services rendered during normal working hours and, when reported to the board, the employer shall identify the pay period in which the special compensation was earned.

(4) "Special compensation" may include the full monetary value of normal contributions paid to the board by the employer, on behalf of the member and pursuant to Section 20691, if the employer's labor policy or agreement specifically provides for the inclusion of the normal contribution payment in compensation earnable.

(5) "The monetary value of a service or noncash advantage furnished by the employer to the member, except as expressly and specifically provided in this part, is not special compensation unless regulations promulgated by the board specifically determine that value to be "special compensation."

(6) "The board shall promulgate regulations that delineate more specifically and exclusively what constitutes "special compensation" as used in this section. A uniform allowance, the monetary value of employer-provided uniforms, holiday pay, and premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee under Section 201 and following of Title 29 of the United States Code shall be included as special compensation and appropriately defined in those regulations.

(7) "Special compensation" does not include any of the following:

(A) Final settlement pay.

(B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise.

(C) Other payments the board has not affirmatively determined to be special compensation.

(d) Notwithstanding any other provision of law, payrate and special compensation schedules, ordinances, or similar documents shall be public records available for public scrutiny.

(e) (1) As used in this part, "group or class of employment" means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related grouping. One employee may not be considered a group or class.

(2) Increases in compensation earnable granted to an employee who is not in a group or class shall be limited during the final compensation period applicable to the employees, as well as the two years immediately preceding the final compensation period, to the average increase in compensation earnable during the same period reported by the employer for all employees who are in the same membership classification, except as may otherwise be determined pursuant to regulations adopted by the board that establish reasonable standards for granting exceptions.

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

### *Regulatory Authority*

7. California Code of Regulations, title 2, section 570 defines “Final Settlement Pay” as:

...any pay or cash conversions of employee benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.

For example, final settlement pay may consist of severance pay or so-called “golden parachutes”. It may be based on accruals over a period of prior service. It is generally, but not always, paid during the period of final compensation. It may be paid in either lump-sum, or periodic payments.

Final settlement pay may take the form of any item of special compensation not listed in Section 571. It may also take the form of a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS...

8. California Code of Regulations, title 2, section 570.5 sets forth the criteria for a document to be considered a “Publicly Available Pay Schedule” as follows:

(a) For purposes of determining the amount of “compensation earnable” pursuant to Government Code Sections 20630, 20636, and 20636.1, payrate shall be limited to the amount listed on a pay schedule that meets all of the following requirements:

(1) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;

(2) Identifies the position title for every employee position;

(3) Shows the payrate for each identified position, which

may be stated as a single amount or as multiple amounts within a range;

(4) Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, bi-monthly, or annually;

(5) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;

(6) Indicates an effective date and date of any revisions;

(7) Is retained by the employer and available for public inspection for not less than five years; and

(8) Does not reference another document in lieu of disclosing the payrate.

(b) Whenever an employer fails to meet the requirements of subdivision (a) above, the Board, in its sole discretion, may determine an amount that will be considered to be payrate, taking into consideration all information it deems relevant including, but not limited to, the following:

(1) Documents approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer;

(2) Last payrate listed on a pay schedule that conforms to the requirements of subdivision (a) with the same employer for the position at issue;

(3) Last payrate for the member that is listed on a pay schedule that conforms with the requirements of subdivision (a) with the same employer for a different position;

(4) Last payrate for the member in a position that was held by the member and that is listed on a pay schedule that conforms with the requirements of subdivision (a) of a former CalPERS employer.

9. California Code of Regulations, title 2, section 571, provides: (a) The following list exclusively identifies and defines special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS if they are contained in a written labor policy or agreement:

[REDACTED] .. [REDACTED]

### (3) PREMIUM PAY

Temporary Upgrade Pay - Compensation to employees who are required by their employer or governing board or body to work in an upgraded position/classification of limited duration.

[REDACTED] .. [REDACTED]

(b) The Board has determined that all items of special compensation listed in subsection (a) are:

(1) Contained in a written labor policy or agreement as defined at Government Code section 20049, provided that the

document:

(A) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;

(B) Indicates the conditions for payment of the item of special compensation, including, but not limited to, eligibility for, and amount of, the special compensation;

(C) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;

(D) Indicates an effective date and date of any revisions;

(E) Is retained by the employer and available for public inspection for not less than five years; and

(F) Does not reference another document in lieu of disclosing the item of special compensation;

(2) Available to all members in the group or class;

(3) Part of normally required duties;

(4) Performed during normal hours of employment;

(5) Paid periodically as earned;

(6) Historically consistent with prior payments for the job classification;

(7) Not paid exclusively in the final compensation period;

(8) Not final settlement pay; and

(9) Not creating an unfunded liability over and above PERS' actuarial assumptions.

(c) Only items listed in subsection (a) have been affirmatively determined to be special compensation. All items of special compensation reported to PERS will be subject to review for continued conformity with all of the standards listed in subsection (b).

(d) If an items [sic] of special compensation is not listed in subsection (a), or is out of compliance with any of the standards in subsection (b) as reported for an individual, then it shall not be used to calculate final compensation for that individual.

### *Applicable Case Law*

10. The court in *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478-1479, summarized the general principles governing determination of a public employee's retirement allowance:

Under the PERL, the determination of what benefits and items of pay constitute 'compensation' is crucial to the computation of an employee's ultimate pension benefits. The pension is calculated to equal a certain fraction of the employee's 'final compensation' which is multiplied by a fraction based on age and length of service. . . . 'Final compensation' is the 'highest average annual compensation earnable by a member during the

three consecutive years of employment immediately preceding the effective date of his retirement' or other designated consecutive three-year period. . . . Both the employer and the employee are required to make contributions to the system, based on a percentage of 'compensation.'

#### *Authority to Correct an Error*

11. Government Code section 20160, subdivision (b) requires CalPERS to correct an error or omission of any active or retired member or any contracting agency:

(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time.

12. Government Code section 20164 provides that CalPERS' obligations to its members continue throughout their membership in CalPERS or throughout the life of retired members. The section sets forth limitations for the filing of civil actions.

#### *CalPERS 's Request for Official Notice*

13. CalPERS filed a Request for Official Notice attaching a CalPERS decision and excerpts from City documents.<sup>4</sup>

#### *Equitable Estoppel*

14. "Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: ( 1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury . . . . The doctrine of equitable estoppel may be applied against the government where justice and right require it." (*Driscoll v. City of Los Angeles* ( 1967) 67 Cal.2d 297, 305-306.) The party asserting the

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<sup>4</sup> Although the Request cites Exhibits 15 and 16, no such documents were attached. Instead, four documents labeled Exhibits A, B, C, and D were attached.



estoppel bears the burden of proof. (*Killian v. City and County of San Francisco* ( 1978) 77 Cal. App. 3d 1, 16.)

15. "The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." ( *City of Long Beach v. Mansell*, supra, 3 Cal.3d at 496-497.) The party asserting the doctrine of estoppel has the entire burden of proving each element. If there is a failure to establish any element, the doctrine will not be applied.

16. However, appellate courts have held that "estoppel is barred where the government agency to be estopped does not possess the authority to do what it appeared to be doing." (*Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864,870.) In *Medina*, the Court of Appeal found that estoppel was not available because the retirement board lacked authority to classify as "safety" members employees whose duties did not encompass being a police officer and did not otherwise meet the statutory definition of "safety" members. More specific to members' rights under the PERL, in *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, a trial court awarded increased retirement benefits to a CalPERS member based on the trial court's reading of the law and, alternatively, based on equitable estoppel. The Court of Appeal found that the trial court had misapplied the law and it also reversed the trial court's equitable estoppel ruling, explaining: "Because we disagree with the trial court's conclusion, and find section 20636 did at all times preclude CalPERS from treating Linhart's standby pay as pensionable compensation, we hold any award of benefits to Linhart based on estoppel is barred as a matter of law." (id. at page 543) The Board finds that *Medina* and *City of Pleasanton* are controlling here and therefore equitable estoppel cannot be applied to CalPERS in this case.

17. CalPERS's disallowance of EPMC benefits was voluntarily reversed after the hearing began, due to the receipt of further information found in City Council Resolutions.

18. Because the settlement payments did not qualify as payrate nor meet the criteria set forth in California Code of Regulations, title 2 section 571(a)(3) for Temporary Upgrade Pay a form of Special Compensation, the Board finds that they cannot be included in the computation of Respondent Lewis' final compensation.

### **ORDER**

Richard Lewis's appeal of CalPERS' decision regarding his final compensation is denied. CalPERS' determination that the settlement proceeds did not qualify as "Temporary Upgrade Pay I Special Compensation" and therefore must be excluded from the calculation of Mr. Lewis' final compensation calculation, is affirmed.