

**ATTACHMENT C**  
**RESPONDENTS' ARGUMENTS**

Attachment C

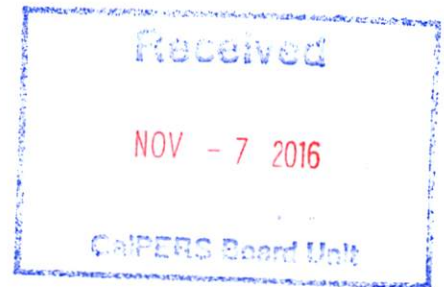
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November 4, 2016  
BY FAX AND BY MAIL

Cherie Swedensky  
Assistant to the Board  
CalPERS Executive Office  
P.O. Box 942701  
Sacramento, CA 94229-2701

Re: Desi Alvarez and Chino Basin Watermaster, Respondents  
CalPERS Case No. 2013-1113, OAH Case No. 2014080757



Dear Ms. Swedensky:

I represent respondent Desi Alvarez. Mr. Alvarez hereby submits his Respondent's Argument for consideration by the Board of Administration at its November 16, 2016 meeting regarding the *Proposed Decision* issued by ALJ Eric Sawyer on September 7, 2016.

Part of the *Proposed Decision* is correct, and part of it is incorrect.

Alvarez urges the CalPERS Board to uphold the correct findings of the ALJ that Alvarez is entitled to a full year of service credit at Chino Basin Watermaster ("Watermaster") from May 2011 until May 2012 because he was employed as a common law employee of Watermaster throughout that time.

However, Alvarez urges the CalPERS Board to request that ALJ Sawyer reconsider and revise the findings that Alvarez is not entitled to use the \$228,000 annual salary paid to him at Watermaster as his "final compensation" for purposes of calculating his retirement allowance, because the 2011-2012 salary schedule (moved into evidence as Exhibit S) was in fact publicly available, as the testimony in the record shows.

**I. Correct Part of the *Proposed Decision*: Alvarez Was a Common Law Employee for His Entire Year at Watermaster**

The *Proposed Decision* correctly finds that Alvarez remained a common law employee of Watermaster after being put on administrative leave half way into his first year of employment. The law is well reasoned and the evidence is well documented.

The *Proposed Decision* walks through the elements of "common law employment" articulated by the California Supreme Court in articulated in *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949, finds that Alvarez met both the principal and many of the secondary standards, and concludes that he is entitled to earn a full year of service credit for his entire Watermaster tenure. (See *Proposed Decision*, Legal Conclusions Nos. 7-14.)

Central to the *Proposed Decision's* common law employment finding is that even after

being placed on administrative leave and having the bulk of his former duties and responsibilities taken away, Alvarez remained firmly subject to the direction and control of Watermaster – it defined his duties, told who to report to, imposed limitations on his authority, instructed him to perform his duties from home rather than at Watermaster's facilities, etc.

Moreover, the ALJ found that Watermaster not only had *the right* to control Alvarez's performance, but *actually did so*. For example, the *Proposed Decision* points out that if Alvarez had truly been terminated, Watermaster would have no right to impose any restrictions on Alvarez's ability to undertake consulting work with others so long as it did not conflict with his Watermaster duties or cause a detriment to Watermaster.

The *Proposed Decision* also speaks to a number of the secondary factors articulated in *Tieberg*, most notably the fact that Alvarez and Watermaster believed they were creating an employment relationship and then set that forth in the written amendment to Alvarez's employment contract. Other secondary factors weighing in Alvarez's favor and established in the evidentiary record include the fact that the work he performed after being put on leave was not the type of work usually done by a specialist without supervision, that he was paid a salary and was given use of a Watermaster employee email address, and worked as part of the regular business of Watermaster.

In sum, the *Proposed Decision* firmly establishes that Alvarez was *not* terminated half way through his Watermaster tenure, but instead continued as a common law employee until his services ended in May 2012 and so is eligible for a full year of service credit for his Watermaster tenure. CalPERS cannot overturn this without blotting out essential factual findings based on the evidentiary record. Doing so would violate CalPERS' obligations under the administrative process.

After a careful review of the legal standards of common law employment, the *Proposed Decision* rejects CalPERS' contention that Alvarez's employment terminated half-way through the year and thus can only earn six months of service credit for his Watermaster service.

## **II. Standards For Review**

CalPERS cannot simply reject this correct legal determination about Alvarez's common law employment because it does not fit CalPERS' preferred determination. Once CalPERS retained the OAH to conduct the administrative hearing and take evidence, it thereby agreed to be bound by the evidentiary record established, including the elements highlighted by the *Proposed Decision* in its common law determination.

Further, CalPERS is legally bound to act pursuant to the *entire* record. It cannot decide to ignore credible factual evidence elicited during the proceedings, nor can it decide to focus only on isolated elements supporting CalPERS' preferred conclusion. (See *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4<sup>th</sup> 575, 585, discussing *Bixby v. Pierno* (1971) 4 Cal.3d 130 [parties and Court are bound by the administrative record].)<sup>1</sup>

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<sup>1</sup> Although *California Youth Authority* dealt with decisions at the court level, the basic point also applies where the dispute is still at the administrative level: The agency is bound to

This requirement is all the more important given CalPERS' constitutional and statutory fiduciary duties to its membership (*Cal. Const.*, art. XVI, §17(b); *Gov't Code*, §20151) and its obligations to ensure that administrative appeals provide full due process.

**III. Incorrect Part of the Proposed Decision: Alvarez Is Entitled to Use the \$228,000 Watermaster Salary in Calculating His Final Compensation**

CalPERS must reject and ask the ALJ to reconsider the *Proposed Decision's* factual and legal findings that Watermaster's salary schedule was not publicly available.

**A. Watermaster Did Have Such a Salary Schedule**

Watermaster had such a salary schedule for the 2011-2012 fiscal year (the period covering Alvarez's employment). It was moved into evidence by counsel for Watermaster as Exhibit S. Joe Joswiak, Watermaster's CFO today and throughout the relevant time period, testified extensively about the existence of that salary schedule, and demonstrated explicitly that it listed the position of CEO and contained a salary range including the \$228,000 paid to Alvarez as its third highest step.

The salary schedule (Exhibit S) is attached hereto. It is fully compliant with the requirements then in effect.

**B. Watermaster's Salary Schedule for 2011-2012 Was Publicly Available**

Joswiak also testified that the salary schedule was not only publicly available and would have been given to anyone who walked in and asked for it, but that it was actually produced in that fashion when requested by the Monte Vista Water District.

Moreover, testimony throughout the hearing repeatedly and consistently established that all of Watermaster's salary information was available to whomever wanted to know it, including the salary schedule applicable to Alvarez's tenure. The schedule and all the other important elements of Watermaster's hiring and compensation of Alvarez were fully transparent to anyone who wished to know what he was being paid.

**C. Public Availability is Not Dependent on How Many Individuals Request the Information, Their Status, or Other Irrelevant Factors**

The *Proposed Decision's* arguments that the applicable salary schedule did not meet "public availability" requirements are not consistent with the law.

First, the *Proposed Decision* says that the record contained testimony about only two individuals who requested information about Watermaster's compensation: reporter James Koren from *The Sun and Inland Valley Daily Bulletin* and Ms. Tracy from the Monte Vista Water District. It also claims that the requesters "were not members of the general public per se;

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review the entire matter, not simply rely on those parts of the record that support CalPERS' own preferred decision, including in the form of adopting an invalid *Proposed Decision*.



one was a member for the media and the other an employee of a fellow local water district. It is expected their requests received greater attention and cooperation than a request made by a member of the general public." (*Proposed Decision*, Legal Conclusion No. 22.C.4.)

There is nothing in the law which requires that there be X number of requesters for information before it meets the test of "public availability", nor any ground for excluding certain requesters because they are allegedly "special" based on who they work for.

Second, the *Proposed Decision* complains about the fact that Watermaster established a procedure for how individuals could request the information, including "explain[ing] the reason for the request", and that "Watermaster staff would decide whether to respond 'on a case-by-case basis' ". There was no testimony or other evidence that any request for information was declined, held up, or in any way obstructed, and the *Proposed Decision's* deprecating comments are unsupported and inappropriate.

Third, the *Proposed Decision* quotes *Randy G. Adams*, CalPERS' Precedential Decision No. 15-01, that "[t]he Legislature intended that a public employee's 'payrate' be readily available to an interested person without unreasonable difficulty." (Legal Conclusion No. 18.) There is nothing in the evidentiary record indicating that anyone suffered any "unreasonable difficulty" in obtaining requested information from Watermaster, nor does the *Proposed Decision* cite any basis for such a conclusion. Indeed, testimony from Watermaster's witnesses established that it had a policy and practice of providing employment and salary information to anyone who requested it.

Unsupported presumptions in the *Proposed Decision* such as the statement that "another view of the evidence is that [the reason only one individual requested Alvarez's salary information] is because Watermaster so tightly controlled access to the information that it could actually prove the exact people who received it" (Legal Conclusion No. 22.5) have no place in the *Proposed Decision*. There is no evidentiary foundation in the administrative record for this, nor is any cited, and it should be stricken as an unsupported hypothetical.

#### **IV. CalPERS' Errors Regarding the Salary Schedule: CalPERS Looked At Incorrect Salary Schedule, Did Not Request the Only Relevant Salary Schedule for the Correct Time Period**

CalPERS' sole argument in support of its determination not to utilize Alvarez's Watermaster salary in fixing his final compensation and calculating his pension allowance is that he was not paid pursuant to a publicly available pay schedule.

**However, the testimony of CalPERS' own witnesses undisputedly showed that CalPERS (1) failed to request 2011-2012 salary schedule from Watermaster, (2) did not have a copy during CalPERS' review, and (3) instead based its denial on an inapplicable schedule covering the period 2012-2013 after Alvarez had left Watermaster.**

CalPERS' staff's failure to even request the correct salary schedule for the correct time period not only undermines the credibility of CalPERS' contentions, it represents a fatal and fundamental flaw in the entire administrative process.

CalPERS' initial determination that Alvarez's compensation was allegedly non-compliant

was based on irrelevant and inapplicable evidence and shakes the foundations of the entire administrative process. It means in effect that CalPERS drastically reduced Alvarez's pension allowance, and then forced him to appeal that determination and spend two years in litigation, based on a falsehood. Yet this is never even mentioned in the *Proposed Decision*.

The administrative process must rest on competent evidence. The decision must be based on the facts admitted in the administrative process. Without the correct law being applied to the correct facts supported in the administrative record, due process is violated.

Alvarez urges the CalPERS Board to reject the arguments of CalPERS' staff (since they are admittedly based on invalid information), look at the evidence and testimony elicited in the hearing, and ask the ALJ to reconsider and to revise his *Proposed Decision* accordingly.

In other words, Exhibit S (i) was compliant and existed, (ii) was publicly available, and (iii) was actually provided to the public, but CalPERS did not ask for it. It was, however, admitted into the administrative process. Exhibit S and the testimony surrounding it satisfy the publicly available pay schedule requirement.

V. **Alvarez Should At Least Receive Credit for the \$228,000 Earned at Watermaster Before His Administrative Leave**

The *Proposed Decision* finds that after Alvarez was placed on administrative leave, "the inquiry becomes whether the position respondent actually held his last six months was established in a salary schedule or any other document made public. The answer is no." [Legal Conclusion No. 23.B.)

Assuming *arguendo* that this is true and that Alvarez is not entitled to use his \$228,000 Watermaster salary for calculating his entire final compensation amount, there is no basis to conclude that he is not entitled to use that salary for *any portion* of his final compensation.

In light of the other evidence showing that Alvarez's employment as CEO at an annual salary of \$228,000, he should at minimum be entitled to a final compensation based on his last six months at the City of Downey where he earned an annual salary of \$205,545.60 and the \$228,000 salary for his first six months at Watermaster.

VI. **Conclusion**

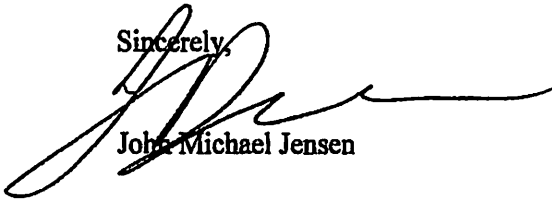
Firstly, the *Proposed Decision* correctly resolves the common law employment and awards Alvarez his full year of service credit for his May 2011 through May 2012 tenure at Watermaster. This should be upheld.

Secondly, the *Proposed Decision* incorrectly fails to recognize the existence of the publicly available pay schedule and therefore wrongly disallows Alvarez the right to utilize his \$228,000 Watermaster salary in the calculation of his final compensation and pension allowance. This incorrect portion should be rejected.

If the CalPERS Board is to uphold the due process rights of Alvarez, it must reject the arguments of CalPERS' staff and ask the ALJ to issue a revised *Proposed Decision* approving the \$228,000 salary as Alvarez's appropriate final compensation, or at minimum grant him a final

compensation based on his last six months at the City of Downey and his first six months at Watermaster.

Sincerely,

A handwritten signature in black ink, appearing to read "John Michael Jensen". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

John Michael Jensen

Exhibit S attached

CHINO BASIN WATERMASTER						
SALARY SCHEDULE						
2011/2012						
COLA for 2011/2012	0.000					
POSITION TITLE	STEP	ANNUAL	MONTHLY	BI-WEEKLY	WEEKLY	HOURLY
General Manager/CEO	A	170,137	14,178	6,543.73	3,271.87	81.80
	B	178,644	14,887	6,870.92	3,435.46	85.89
	C	187,576	15,631	7,214.46	3,607.23	90.18
	D	196,956	16,413	7,575.19	3,787.60	94.69
	E	206,809	17,234	7,953.95	3,976.98	99.42
	F	217,143	18,095	8,351.64	4,175.82	104.40
	G	228,000	19,000	8,769.24	4,384.62	109.62
	H	239,400	19,950	9,207.69	4,603.85	115.10
	I	251,370	20,947	9,668.07	4,834.04	120.85
Chief Financial Officer	A	97,109	8,092	3,734.96	1,867.48	46.69
	B	101,864	8,487	3,921.71	1,960.85	49.02
	C	107,063	8,922	4,117.80	2,058.90	51.47
	D	112,416	9,388	4,323.68	2,161.84	54.05
	E	118,037	9,886	4,539.89	2,269.93	56.75
	F	123,938	10,328	4,766.85	2,383.43	59.59
	G	130,135	10,845	5,005.23	2,502.60	62.57
Senior Engineer	A	98,500	8,208	3,788.47	1,894.24	47.36
	B	103,425	8,619	3,977.89	1,988.95	49.72
	C	108,697	9,050	4,176.79	2,088.39	52.21
	D	114,026	9,502	4,385.53	2,192.81	54.82
	E	119,728	9,977	4,604.91	2,302.46	57.56
	F	125,714	10,478	4,835.16	2,417.58	60.44
	G	132,000	11,000	5,076.91	2,538.46	63.45
Senior Environmental Engineer	A	97,784	8,149	3,780.99	1,890.46	47.01
	B	102,873	8,556	3,978.97	1,974.49	49.36
	C	107,807	8,984	4,176.42	2,073.21	51.83
	D	113,197	9,433	4,385.74	2,176.87	54.42
	E	118,857	9,905	4,604.91	2,285.71	57.14
	F	124,800	10,400	4,835.16	2,400.00	60.00
	G	131,040	10,920	5,076.91	2,520.00	63.00
Water Resource Engineer	A	63,689	5,307	2,449.58	1,224.79	30.62
	B	66,873	5,573	2,572.06	1,286.03	32.15
	C	70,217	5,851	2,700.66	1,350.33	33.76
	D	73,728	6,144	2,835.89	1,417.85	35.45
	E	77,414	6,451	2,977.48	1,488.74	37.22
GIS Specialist	A	58,182	4,848	2,237.75	1,118.88	27.97
	B	61,091	5,091	2,349.64	1,174.82	29.37
	C	64,146	5,345	2,467.12	1,233.56	30.84
	D	67,352	5,613	2,590.48	1,295.24	32.38
	E	70,720	5,893	2,720.00	1,360.00	34.00
Environmental Specialist	A	54,386	4,530	2,089.98	1,044.99	26.14
	B	57,084	4,757	2,195.53	1,097.76	27.44
	C	59,938	4,985	2,305.31	1,152.65	28.82
	D	62,935	5,245	2,420.57	1,210.29	30.26
	E	66,082	5,507	2,541.60	1,270.80	31.77



CHINO BASIN WATERMASTER SALARY SCHEDULE 2011/2012						
COLA for 2011/2012	0.000					
POSITION TITLE	STEP	ANNUAL	MONTHLY	BI-WEEKLY	WEEKLY	HOURLY
Executive Assistant	A	53,380	4,449	2,053.46	1,026.73	25.67
	B	56,060	4,672	2,156.13	1,078.07	26.95
	C	58,842	4,905	2,263.94	1,131.97	28.30
	D	61,806	5,150	2,377.14	1,188.57	29.71
	E	64,898	5,408	2,495.00	1,248.00	31.20
Accountant	A	43,560	3,630	1,675.38	837.69	20.94
	B	45,736	3,812	1,759.15	879.58	21.99
	C	48,034	4,003	1,847.46	923.73	23.09
	D	50,436	4,203	1,939.83	969.92	24.25
	E	52,957	4,413	2,036.80	1,018.41	25.46
Office Specialist	A	32,323	2,694	1,243.19	621.60	15.54
	B	33,939	2,828	1,305.35	652.68	16.32
	C	35,635	2,970	1,370.62	685.31	17.13
	D	37,418	3,118	1,439.20	719.60	17.99
	E	39,289	3,274	1,511.11	755.55	18.89

**Brownstein Hyatt  
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November 4, 2016

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**RE: Respondent's Argument, *In the Matter of the Calculation of Final Compensation of Desi Alvarez* (CalPERS Case No. 2013-1113, OAH Case No: 2014080757)**

Dear Board of Administration:

This letter brief is submitted on behalf of our client, Chino Basin Watermaster ("Watermaster"). The proposed findings and resulting decision issued on September 7, 2016 by Administrative Law Judge ("ALJ") Eric Sawyer ("Proposed Decision") conflict with uncontroverted and un rebutted evidence in a key respect and must be reversed by the California Public Employees' Retirement System ("CalPERS") Board of Administration ("Board"). The ALJ found that Watermaster's pay schedule listing Mr. Desi Alvarez's salary was not publicly available. However, uncontroverted evidence unequivocally demonstrates that it was. Consequently, Watermaster's payment to Mr. Alvarez must be included in the calculation of Mr. Alvarez's final compensation.<sup>1</sup>

Erroneous findings and conclusions on this issue would subject the Proposed Decision, if adopted, to reversal on appeal.

**I. The Finding That Watermaster's FY 2011-12 Pay Schedule Was Not "Publicly Available" Is Contrary to Uncontroverted Evidence Offered by Mr. Alvarez and Watermaster.**

**A. Uncontroverted evidence establishes that the FY 2011-12 pay schedule was readily available.**

The operative question for determining whether Mr. Alvarez's Watermaster salary should be included in the calculation of his final compensation is whether it was pursuant to a "publicly available pay schedule[]" as required by Government Code section 20636(a).<sup>2</sup> The Board has previously interpreted the phrase "publicly available" as synonymous with "readily available."<sup>3</sup> The word "available" has been defined as "[c]apable of being obtained or used," with synonyms including "acquirable," "attainable," "obtainable," or "procurable."<sup>4</sup> Public availability does not require **publication**, as illustrated by other statutory schemes aimed at facilitating the public availability of information.<sup>5</sup>

The Proposed Decision states that Watermaster paid Mr. Alvarez a salary of \$228,000 per year, that Watermaster reported this exact amount to CalPERS, that \$228,000 was listed as a salary step for Watermaster's "General Manager/CEO" on the FY 2011-12 Salary Schedule,<sup>6</sup> and that the FY 2011-12

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Salary Schedule "was in place when [Mr. Alvarez] worked as Watermaster's CEO."<sup>7</sup> These facts are uncontroverted.

The Proposed Decision further finds that Watermaster made the FY 2011-12 Salary Schedule available in response to an email inquiry and that Watermaster had previously furnished other executive compensation information to a journalist in response to a telephone call.<sup>8</sup> These facts, along with testimony by Watermaster staff and Watermaster's generally applicable policies, are in direct conflict with the Proposed Decision's conclusion that Watermaster's FY 2011-2012 Salary Schedule was not readily available. CalPERS did not claim or offer any facts showing that Watermaster's FY 2011-12 Salary Schedule was "unavailable," and the Proposed Decision references none.

1. *The applicable salary schedule was readily available through multiple avenues.*

All evidence offered in this case – including testimony at the April 11-13, 2016 hearing in this matter – establishes that, during the applicable time period through present, Watermaster had and continues to have policies and procedures in place to ensure the public availability of Watermaster Information. The entirety of Watermaster's existence and all of its functions are directly transparent to and reviewable by the San Bernardino Superior Court ("Court").

There is no general or special statute that created Watermaster as it is a special master whose authority arises exclusively from the judgment entered in *Chino Municipal Water District v. City of Chino* ("Judgment").<sup>9</sup> The highest level of scrutiny applies to Watermaster's actions as they are subject to direct and immediate review by the Court under its continuing jurisdiction. Court-approved Rules and Regulations require that its records be maintained and made available to the Court, to the parties to the Judgment, and "to the general public."<sup>10</sup>

In addition to the institutional accountability to the Court, the parties, and the public, the evidentiary record contains two Watermaster documents that specifically establish its policy of openness and transparency: Resolution No. 01-03, "Adopting Procedures, Guidelines and Fee Schedule for Release of Information and Documents" ("Resolution 01-03") and an associated "Information Request Form" posted on Watermaster's website.<sup>11</sup> These documents demonstrate the policies and procedures that ensure that Watermaster information will be readily available – not, as the Proposed Decision appears to conclude, that the availability of information to the public was inhibited. The ALJ has found that a process to make information available is evidence of non-availability. However, no evidence of any kind was presented that the process was excessive, overly burdensome, resulted in unreasonable delays, was confrontational, or inhibited the disclosure of requested information. Without any such evidence, the ALJ's ruling converts Watermaster's good faith effort to make information available into evidence of obstruction. This simply cannot be the case.

Moreover, the Proposed Decision's finding that "the **only** way to obtain compensation information" was to utilize the Information Request Form and that "Watermaster made no employee compensation information available to the public, unless a very specific procedure was carried out"<sup>12</sup> is contrary to the evidence in the record and is otherwise factually unsupported. To the contrary, direct and uncontroverted evidence in the record establishes that Watermaster's policy of transparency worked. The evidence demonstrates that on at least two instances, Watermaster made compensation information available **without** even needing to follow the process in place to ensure availability.

The first instance was in 2010 when Watermaster received a telephone inquiry from Mr. James Koren from *The Sun and Inland Valley Daily Bulletin*, who called Watermaster in the wake of the City of Bell scandal to inquire about Watermaster's executive compensation.<sup>13</sup> Mr. Koren spoke by phone with Watermaster's Chief Financial Officer (CFO), Mr. Joseph Joswiak, on multiple occasions in October 2010.<sup>14</sup> Mr. Joswiak

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testified that although he did not recall the precise timing of Mr. Koren's request, it would have been "towards the middle of October" and that he responded by sending Mr. Koren the information requested, as documented in the letter from Watermaster to Mr. Koren dated October 22, 2010.<sup>15</sup> The course of communication with Mr. Koren plainly contradicts the Proposed Decision's finding that information regarding Watermaster salaries was available "only" through the Information Request Form.<sup>16</sup>

In that regard, Watermaster's course of dealing stands in stark contrast to the facts as to the City of Bell's reluctance to disclose the employment agreement in question, which this Board found was not even "maintained in any file" and "was not available for public review without a public records request or some other demand such as a subpoena."<sup>17</sup> There is simply no analogy to be drawn between the facts in *Adams* and Watermaster's transparent response to Mr. Koren.

Any final decision by CalPERS should also take into account the uncontroverted record evidence that Watermaster staff provided the FY 2011-12 Salary Schedule in response to a simple email inquiry.<sup>18</sup> This evidence is particularly significant because it shows that the salary schedule for the precise time period at issue – FY 2011-12 – was readily available. The Proposed Decision indeed finds that Watermaster emailed a copy of the FY 2011-12 Salary Schedule to Ms. Tracy Tracy based on her email inquiry to Watermaster staff, which did not include an Information Request Form.<sup>19</sup> Accordingly, the Proposed Decision's conclusion that the FY 2011-12 Salary Schedule could only be obtained by following a "bureaucratic process"<sup>20</sup> is unsupported by the record evidence. There is no evidence that the requesting parties had to follow a particular process or that the process provided was unresponsive. Again, Watermaster's responsiveness and transparency was not limited to providing information through its established procedures. The evidence is uncontroverted that, on at least two instances, Watermaster promptly responded to requests for information that were not made in accordance with its judicially reviewable administrative process.

Nor does the record include any evidence supporting the Proposed Decision's inference that Mr. Koren and Ms. Tracy would have prompted heightened "cooperation and attention from Watermaster staff."<sup>21</sup> As for the absence of evidence of other requests for the FY 2011-12 Salary Schedule, it is unsurprising that the one inquiry in the record came from a water district. As the Proposed Decision recognizes, "Watermaster is not a water utility, it does not have customers, and it does not sell water."<sup>22</sup> The parties to the Judgment<sup>23</sup> – namely, the groundwater producers impacted by Watermaster's management of groundwater resources – include public agency, retail water providers who represent the interests of their ratepayers, who in turn hold Watermaster accountable to the same high standards of public transparency that they are required to maintain, as does the Court. There is simply no record evidence to support a finding or even an inference that the absence of evidence of other requests for the FY 2011-12 Salary Schedule was attributable to anything other than public disinterest – much less to Watermaster's purported attempts to "tightly control[] access to information."<sup>24</sup> In fact, the entire record suggests the contrary.

Watermaster is subject to ongoing judicial administration. All of its actions are reviewable by the Court.<sup>25</sup> There is no "tight control" of information. All evidence points to an entity that has secured the confidence of the Court, the parties to the Judgment, and the public for operating with transparency in all of its actions.

2. *The Information Request Form facilitated rather than inhibited access to information.*

The Proposed Decision additionally includes an erroneous finding that a person requesting an employee's salary information needed to first obtain a signed release.<sup>26</sup> To the extent this finding contributed to the finding that Watermaster's information availability policies are a barrier to the ready availability of that information, and informed the proposed disposition of this matter, the Board must reverse the Proposed Decision. This conclusion appeared to result from a misinterpretation of Resolution 01-03, which helped

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inform the public about the types of documents that are “generally” not made available, including discussion of ongoing litigation matters, references to pending contract negotiations, and personnel or personal information regarding Watermaster employees.<sup>27</sup> Resolution 01-03 then states that “certain” information and documents on that list would require a signed release.<sup>28</sup>

Resolution 01-03, in language that is not quoted in the Proposed Decision, contains further context on this protocol:

Signed Release If a request is made specifically relating to a particular individual, company or agency that would require a release for information which has not previously been made public or which contains the status or operations of a particular individual, company or agency, the Requestor must provide a “signed release” form from the individual, the company or the agency allowing Watermaster to release the information being requested.<sup>[28]</sup>

This language shows that the release requirement applied only to situations in which Watermaster was unable to release information absent a third-party’s consent. It is not Watermaster’s policy that a signed release is required for executive compensation information, given that disclosure of such information is required by the Public Employees’ Retirement Law.<sup>30</sup> Moreover, it is similarly not Watermaster’s practice, as demonstrated by uncontroverted evidence that Watermaster indeed did not require a signed release on two documented occasions during the general time period in question when two individuals obtained the documents, Mr. Koren in 2010 and Ms. Tracy in 2011.<sup>31</sup>

**II. The Proposed Decision Erroneously Concludes That Regulation 570.5<sup>32</sup> Was Merely “Clarifying” and Could Therefore Be Applied Retroactively.**

As a general rule, regulations will not be given retroactive effect.<sup>33</sup> In concluding that Regulation 570.5 may be applied retroactively, the Proposed Decision relies on an exception to this rule for clarifying amendments to statutes. However, this exception only applies where “the true meaning of the law remains the same.”<sup>34</sup> This exception is not appropriate where a change “upsets expectations based in prior law,”<sup>35</sup> such as here, where Regulation 570.5 imposed plainly substantive criteria for “compensation earnable.”

CalPERS’ circulars describing Regulation 570.5 as “clarifying” do not prove or even suggest otherwise. A court cannot accept a declaration that “an unmistakable change in the statute is nothing more than a clarification.”<sup>36</sup> Moreover, other statements in the circulars demonstrate that the “true meaning” of Government Code section 20636 could not possibly have remained the same after the adoption of Regulation 570.5. For instance, CalPERS’ August 2011 letter notes that the Board adopted Rule 570.5 to “make specific the requirements for publicly available pay schedule[s]” and that the “regulation also contains criteria for ensuring the pay schedule is publicly available.”<sup>37</sup> A subsequent letter circulated in October 2012 similarly sought to remind employers “of the criteria for reporting compensation earnable” – criteria that were not contained within Government Code section 20636’s four-word phrase, “publicly available pay schedules.”<sup>38</sup>

The eight detailed criteria enumerated in Regulation 570.5(a) demonstrate that it would indeed implicate due process concerns and upset the expectations of the parties to apply it retroactively.<sup>39</sup> For example, it is not obvious as a matter of statutory construction that requiring the public to navigate a labyrinth of a website or travel to an agency’s office renders a document more “publicly available” than a documented procedure ensuring that agency staff will personally retrieve and transmit the document upon request.<sup>40</sup> It is the Board’s prerogative to determine as a matter of policy how public availability should be ensured. But

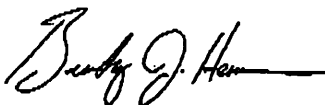
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such a policy, however meritorious, cannot be recast as merely "clarifying" in order to retroactively modify the scope of what constitutes "compensation earnable."<sup>41</sup>

### III. Conclusion

Watermaster respectfully requests that the Board reject the Proposed Decision's findings and conclusions as to whether Mr. Alvarez's payrate was pursuant to a "publicly available pay schedule"<sup>42</sup> and that the Board adopt a decision that corrects the erroneous conclusions described herein, and if necessary remand to the ALJ for further factual findings.

Sincerely,



Bradley J. Herrema

<sup>1</sup> Watermaster supports the conclusions of the Proposed Decision as to whether the period from November 10, 2011 through May 3, 2012 should be included for the purpose of calculating Mr. Alvarez's service credit. Accordingly, this brief does not further address this issue.

<sup>2</sup> The Proposed Decision also cites to section 20636, subdivision (d) of the Government Code. For the same reasons Mr. Alvarez's payrate was "publicly available" under section 20636(a), it was also a "public record[]" available for public scrutiny."

<sup>3</sup> *Randy G. Adams ("Adams")*, Prec. Dec. No. 15-01, effective Jan. 16, 2013, Case No. 2011-0788, p. 20.

<sup>4</sup> *Roget's Thesaurus (American Heritage 2013)*, at p. 55.

<sup>5</sup> See, e.g., Health and Safety Code § 10187 (governing "availability" of records and requiring that records be available to the public for inspection upon request).

<sup>6</sup> Any differences between Watermaster's FY 2011-12 Salary Schedule and FY 2011-12 Salary Matrix were irrelevant because Mr. Alvarez's salary of \$228,000 was listed on both documents. (See Proposed Decision, p. 8, ¶ 38.) This was equivalent to a monthly salary of \$19,000. (See Proposed Decision, p. 2, ¶ 7; Exh. S [Step G, "Monthly" column for "General Manager/CEO"].)

<sup>7</sup> Proposed Decision, p. 2, ¶ 7; p. 7, ¶ 33.

<sup>8</sup> Proposed Decision, p. 7, ¶ 36; p. 8, ¶ 37.

<sup>9</sup> See Exh. A.

<sup>10</sup> Exh. D, Watermaster Rules and Regulations §2.1.

<sup>11</sup> Exhs. N, O; Transcript of the April 11-13, 2016 Hearing (hereinafter, "Tr.") Vol. III, p. 52:4-52:14.

<sup>12</sup> See Proposed Decision, p. 19, ¶ 4 (emphasis added).

<sup>13</sup> Exh. F; Tr. Vol. III, p. 99:2-99:20.

<sup>14</sup> Tr. Vol. III, p. 99:2-99:20.

<sup>15</sup> Tr. Vol. III, p. 992-101:5; see Exh. F. Although the precise timing of Watermaster's response may not be dispositive to the issue of "public availability," this evidence also shows that Watermaster indeed responded to Mr. Koren within 10 days of his request for information. (See Proposed Decision, p. 7, ¶ 36.)

<sup>16</sup> See Proposed Decision, p. 19, ¶ 4.

<sup>17</sup> *Adams, supra*, at p. 10, ¶¶ 20-21.

<sup>18</sup> See Proposed Decision, p. 8, ¶ 37.

<sup>19</sup> See Exhs. R, S.

<sup>20</sup> See Proposed Decision, p. 19, ¶ 4.



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<sup>21</sup> See Proposed Decision, p. 7, ¶ 35.

<sup>22</sup> Proposed Decision, p. 4, ¶ 20.

<sup>23</sup> See Exh. A.

<sup>24</sup> See Proposed Decision, p. 20, ¶ 5.

<sup>25</sup> Exh. Q, Restated Judgment, ¶¶ 15, 31.

<sup>26</sup> Proposed Decision, p. 5, ¶ 24.

<sup>27</sup> Exh. N, p. 2.

<sup>28</sup> Exh. N, p. 2.

<sup>29</sup> Exh. N, p. 3 (emphasis added).

<sup>30</sup> See Gov. Code § 20636(d).

<sup>31</sup> The Proposed Decision erroneously concluded that Mr. Alvarez's employment agreement omitted his base salary. Because there was a salary schedule in place listing Mr. Alvarez's payrate for the time period in question, it was unnecessary to even examine whether another document such as an employment agreement might serve as a proxy for a "publicly available pay schedule[]" fulfilling the requirement of Government Code section 20636. (Cf. *Adams, supra*, at p. 10 [noting that there was no pay schedule that set forth a salary or salary range for the employee in question, and looking instead to employment agreements].) If the contents of Mr. Alvarez's employment agreement were dispositive, however, this too would be grounds for remand for the correction of the erroneous factual finding that the employment agreement "did not isolate the rate of pay or base pay for the position of CEO." (See Proposed Decision, p. 7, ¶ 34.) Section 5a of Mr. Alvarez's employment agreement, entitled, "Base Salary," states, "Watermaster shall pay Executive an annual Base Salary of [\$228,000] per annum." (Exh. 11, p. 2.)

<sup>32</sup> California Code of Regulations, tit. 2, § 570.5.

<sup>33</sup> *McKeon v. Hastings College* (1986) 185 Cal.App.3d 877, 887.

<sup>34</sup> *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, quoting *Cal. Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 214.

<sup>37</sup> Exh. 266 (emphasis added).

<sup>38</sup> Exh. 267 (emphasis added).

<sup>39</sup> See *Carter, supra*, 38 Cal.4th at 930.

<sup>40</sup> See Regulation 570.5(a)(5).

<sup>41</sup> Even if Regulation 570.5 did provide the relevant standard, reconsideration would be warranted to correct erroneous factual findings as to whether Watermaster's FY 2011-12 Salary Schedule met its requirements. First, Regulation 570.5(a)(1) only requires approval of a pay schedule in accordance with "applicable public meetings laws." Although Watermaster has since modified its procedure at the suggestion of CalPERS staff, (see Tr. Vol. I, pp. 93:18-94:8; Exh. 14, p. 2; Exh. 16, Exh. 18, p. 5), its "applicable public meetings laws" – i.e., its Rules and Regulations approved by the San Bernardino Superior Court – did not require that salary schedules be formally adopted by the Watermaster Board. (See Proposed Decision, p. 20, ¶D.1; Exhs. D, E.) Finally, testimony from Watermaster's CFO that a member of the public who "walked in" to Watermaster's office would have been provided a copy of the FY 2011-12 Salary Schedule upon request contradicts the Proposed Decision's conclusion that the FY 2011-12 Salary Schedule was not available "for public review during normal business hours" in accordance with Regulation 570.5(a)(5). (See Proposed Decision p. 20, ¶D.2; Tr. Vol. III, p. 80:12-14.) The Proposed Decision therefore reached an erroneous conclusion as to whether the FY 2011-12 Salary Schedule satisfied Regulation 570.5.

<sup>42</sup> If the Board disagrees and adopts the Proposed Decision, the portion of the decision analyzing whether Watermaster's FY 2011-12 Salary Schedule was "publicly available" should not be precedential because it does not contain a significant legal or policy determination of general application that is likely to recur. (See Gov. Code § 11425.60(b).) A determination on these facts would not be generally applicable given the lack of evidence that the FY 2011-12 Salary Schedule was unavailable and the ambiguity in the Proposed Decision as to whether Regulation 570.5 should apply.