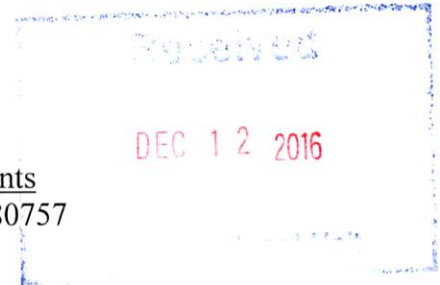


ATTACHMENT B
RESPONDENTS ARGUMENTS

Law Offices of John Michael Jensen
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December 9, 2016
BY FAX AND BY MAIL

Cheree 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:

Attached please find Desi Alvarez's *Respondent's Argument* for consideration by the Board of Administration at its December 21, 2016 meeting concerning its Full Board Hearing on Mr. Alvarez's appeal.

This *Respondent's Argument* is being filed by December 9, 2016, pursuant to the November 18, 2016 *Notice of Full Board Hearing*.

Should you have any questions or need further information, please do not hesitate to contact me.

Sincerely,

John Michael Jensen

JMJ:gm
Enclosure
cc: Matthew G. Jacobs, CalPERS General Counsel

Desi Alvarez's Respondent's Argument
CalPERS Case No. 2013-1113, OAH Case No. 2014080757

Respondent Desi Alvarez files this *Respondent's Argument* before the Full Board Hearing scheduled for December 21, 2016. Mr. Alvarez incorporates herein all arguments that he made in his pleadings in the administrative record.

Mr. Alvarez is entitled to (i) the higher pay rate associated with the \$228,000 salary that he earned at Watermaster and (ii) a full year of service credit. As found in the *Proposed Decision*, Mr. Alvarez is entitled to earn service credit for the full years and have it used in the calculation of his pension allowance, including for that final six-month time period.

The Board previously rejected the *Proposed Decision* in the administrative proceeding issued by Administrative Law Judge Eric Sawyer on September 7, 2016, and ruled to decide the matter itself on the administrative record.

I. Mr. Alvarez Reserves All Rights, Does Not Waive Any Argument or Defense, Incorporates Prior Pleadings and Arguments by Reference

Mr. Alvarez challenges all factual findings and legal conclusions in the *Proposed Decision* other than the findings that he was a common law employee of Chino Basin Watermaster ("Watermaster") for his final six months at Watermaster from November 9, 2011 through May 4, 2012 .

Mr. Alvarez reserves all rights to contest and appeal all other findings and conclusions in the *Proposed Decision* and in any *Final Decision* reached by CalPERS at its Full Board Hearing. For purposes of illustration and not limitation, Mr. Alvarez contests and appeals the findings and conclusions that he is not entitled to have the \$228,000 annual salary he earned at Watermaster for use in calculating his final compensation and pension allowance.

Mr. Alvarez incorporates all arguments made and pleadings in the administrative record in this written argument to the Board before the Full Board hearing. The Board must review all of the evidence in the whole administrative record before reaching its *Final Decision*. The Board must weigh the evidence, including the persuasive evidence that Alvarez was hired in an open managerial position for a salary of \$228,000 listed on a publicly available pay schedule in an arm's length recruitment.

Regarding legal issues, the Board should review Alvarez's arguments made in his closing briefs and the November 4, 2016 *Respondent's Argument*.

II. Service Credit: The ALJ's Finding That Mr. Alvarez was a Common Law Employee of Watermaster from November 2011 through May 2012 is Correct

CalPERS' staff argued at the administrative hearing, *inter alia*, that Mr. Alvarez either (1) was terminated by Watermaster effective November 7, 2011, ending his right to accrue service credit with CalPERS after that point, or (2) that he continued to perform services for Watermaster from November 9, 2011 through May 4, 2012, but that he did so as an independent contractor and therefore was also not entitled to accrue service credit with CalPERS for that time

period. Both of CalPERS arguments are incorrect and without factual support.

Testimony was taken under oath and documents were admitted into evidence at the administrative hearing on these issues. After weighing all of the testimony and evidence, the ALJ made detailed findings on Mr. Alvarez's common law employee status during his final six months at Watermaster (see Factual Findings Nos. 1-50 and Legal Conclusions Nos. 7-13) and concluded that Mr. Alvarez "was an employee of Watermaster during the entire 12 months [May 2011 through May 2012] he worked there" (see Legal Conclusion No. 14).

Watermaster did not terminate Alvarez. Watermaster's July 17, 2013 *Amended Appeal*¹ (Exhibit 262, pg. 3) states explicitly that Alvarez was not terminated but remained an employee of Watermaster from November 9, 2011 through May 3, 2012 (the "transition period").²

The testimony consistently demonstrated that Alvarez continued to carry out duties assigned to him by Watermaster during the transition period: After November 9, 2011, Alvarez remained available at the pleasure of the Board and had conversations with various Board members during that period of time to address some of their questions. Bob Kuhn, a member of the Board (and Board chair during most of the period from November 9, 2011 through May 3, 2012), said he communicated with Alvarez during the transition period about matters of interest to Watermaster. (Kuhn, 4/11/15, 180:11-23, 194:23-25.)

Mr. Alvarez became a member of CalPERS in 1977, had a break in service, and then maintained continuous active CalPERS membership from 1986 through the end of his employment by Watermaster. Pursuant to *Government Code* section 20281, CalPERS was required to enroll Mr. Alvarez and grant him the service credit he accrued from his first day of employment at Watermaster through his last.

Further, pursuant to *Metropolitan Water Dist. of Southern Calif. v. Superior Court* (2004) 32 Cal.4th 491, CalPERS is required to enroll and provide service credit and other pension benefits to all common law employees of contracting agencies, such as Watermaster.

III. Pay Rate, \$228,000 Salary, Publicly Available

Alvarez and Watermaster proved that Alvarez's compensation qualifies as "payrate" under the PERL, including as it was paid pursuant to a publicly available pay schedule. Alvarez and Watermaster also proved that Watermaster had a pay schedule for 2011-2012 that listed the CEO position at the annual payrate of \$228,000 and was publicly available. Watermaster's pay schedule satisfies the *factual* requirements of *Tanner, Adams, et al.* In fact, Watermaster's pay schedule isolates a rate of base pay for CEO, etc. and was "readily available" to the public, etc.

Watermaster had a publicly available salary schedule for the 2011-2012 fiscal year (the

¹ For some reason CalPERS included Watermaster's initial April 19, 2013 *Appeal* in the jurisdictional documents offered as evidence in the hearing, but failed to include the *Amended Appeal* filed after CalPERS issued an *Amended Statement of Issues* questioning Alvarez's common law employee status.

² While Watermaster *could* have chosen to terminate Alvarez in November 2011, it instead chose to place him on paid leave while remaining a Watermaster employee.

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, that it was publicly available, 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) was fully compliant with the requirements then in effect. 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. Exhibit S and the testimony surrounding it satisfy the publicly available pay schedule requirement.

As far as public availability, Joe Joswiak, Watermaster's CFO today and throughout the relevant time period, testified extensively about the existence of Watermaster's 2011-2012 Salary Schedule (Exhibit S). He demonstrated explicitly that it was publicly available and listed the position of CEO and contained a salary range including the \$228,000 paid to Alvarez as its third highest step. (Joswiak, 4/13/16, 102:19-103:5.)

Testimony throughout the hearing repeatedly and consistently established that all of Watermaster's salary information was available to whomever wanted to know it. Watermaster's Rules and Regulations set forth how information is made available to the public. (Exhibit D.) Watermaster has a Request for Information form on its website that anyone may use. They will get the information they request unless it's involved in litigation. (Kavounas, 4/13/16, 47:8-13.)

As far as public availability, Joswiak also testified that the salary schedule would have been given to anyone who walked in and asked for it (*Id.*, 80:8-14), and that it was actually produced in that fashion when Ms. Tracy of the Monte Vista Water District requested it (*Id.*, 79:10-80:7; see also Joswiak, 4/11/16, 110:17-111:10; Exhibit R).

Further, salary schedules and salary matrices maintained by Watermaster were available to anyone from the public who requested them. (Joswiak, 4/13/16, 78:18-19.) The salary information is available on the website. (Kavounas, 4/13/16, 71:15-16.) Watermaster provided James R. Koren of the Inland Valley Daily Bulletin with a copy of the employment agreement for the then-current CEO. (*Joswiak*, 82:1-10.)

Moreover, CalPERS' witness Angel Gutierrez—the analyst who made the determination that Alvarez's salary did not qualify as "final compensation" because there was allegedly no publicly available pay schedule—told Watermaster during the review process that "There's a requirement that salary information be publicly available. How you go about doing that is up to the agency." (Exhibit 259, pg. 1.) Nicole Horning, Gutierrez's manager, agreed that there are "multiple options to make it publicly available." (Horning, 4/13/16, 188:15-24.)

Thus, the 2011/2012 Salary Schedule was publicly available. It satisfies the *Tanner* requirements that salary be on a publicly available pay schedule; and the *Adams* requirements that it be "readily available ... without unreasonable difficulty".

Perhaps the most important fact that came out in the hearing was that CalPERS made its determination without reviewing or even requesting a copy of the 2011-2012 Salary Schedule (Exhibit S), the one covering the time period Alvarez was Watermaster's CEO.

CalPERS' case hinges on the determination that "upon reviewing the compensation that was reported [by Watermaster for Alvarez], CalPERS determined that the reported payments were not pursuant to a publicly available pay schedule and did not qualify as comp earnable." (CalPERS' Opening Statement, 4/11/16, 25:6-10.)

But Watermaster's CFO Joswiak testified that he never provided the 2011-2012 Salary Schedule (Exhibit S) to CalPERS *because CalPERS never even requested it.* (Joswiak, 4/13/16, 82:13-83:2.) CalPERS itself elicited the same testimony on cross examination:

Q. And I'm looking at Exhibit S. Was this exhibit, this Exhibit S, the salary schedule for the year – well, it states "salary schedule" and then underneath that, it states "2011/2012". Was that provided to CalPERS by you?

THE WITNESS: No one from CalPERS has ever asked for this.

BY MS. KAUR:

Q. Did you ever provide it?

A. No one has ever asked from CalPERS.

Q. So my question is, did you provide this to CalPERS?

A. No, no one [at CalPERS] has ever asked.

(Joswiak, 4/13/16, 90:20-91:12.)

CalPERS did not request a copy of the only relevant Watermaster document. The two CalPERS' employees directly involved in making the determination did not see it: Horning cannot confirm she asked for it and suggests her staff did (Horning, 4/13/16, 182:4-8), while Gutierrez admits that CalPERS didn't even have the document (Gutierrez, 4/12/16, 40:8-41:10).

Instead, CalPERS relied on *the 2012/2013 salary information*, when Alvarez was already gone from Watermaster. Horning's February and March 2013 emails to Watermaster requested the pay schedule for 2012/2013 (Horning, 4/13/16, 183:23-184:20). Horning testified that she relied on the documentation in Exhibit 18, the wrong time period (*Id.*, 186:20-22). Gutierrez admitted that the 2012-2013 salary matrix used in the determination would "not apply to Mr. Alvarez at all." (Gutierrez, 4/12/16, 32:9-23.)

As Gutierrez concisely summed up, "I think that we didn't have the 2011/2012 pay schedule, so we just used what we had to make our determination." (*Id.*, 91:17-19.)

As another example of its confusion, CalPERS mixes the terms "salary matrix" and "salary schedule" interchangeably. CalPERS argues that the matrixes are "*merely*" used to develop and create the final budget for any position that's listed or that's currently filled at Watermaster." (CalPERS' *Brief*, 15:7-8.) The impression is that salary matrixes were used solely for budgeting purposes, with the implication that they were not publicly available or subject to Watermaster's transparency requirements. In fact, the word "merely" is never used or implied in the testimony of witness Joe Joswiak (Joswiak, 4/11/16, 99:3-11); CalPERS has simply made this up.

Once it has dismissed the salary matrixes, CalPERS incorrectly refers to the 2011/2012 Salary Schedule (Exhibit S) as a "Salary Matrix" (CalPERS' *Brief*, 16:10) when it is clearly labeled "Salary Schedule", and then argues that "[t]he version that was eventually noticed by the Watermaster, after the fact in 2013, was different from the one provided to 'Tracy Tracy' [of Monte Vista Water District].³ (See Exh. 16.)" In fact, it was a 2011/2012 salary matrix that was approved by the Watermaster Board in 2013 (at the specific request of CalPERS), while the 2011/2012 salary schedule was produced to Ms. Tracy in 2011.

As another example of its confusion, CalPERS questions the process of providing the 2011/2012 Salary Schedule (Exhibit S) to Ms. Tracy, arguing that "even the Watermaster staff was unable to provide the document as they had to ask Joe Joswiak, the CFO, to provide the matrix." (CalPERS' *Brief*, pg. 16:20-22.) Joswiak says nothing of the sort, only that his assistant passed the request on to him and could easily have accessed the document herself. (Joswiak, 4/13/16, 87:4-88:18.) Moreover, Joswiak himself is part of the very "Watermaster staff" that CalPERS alleges had no access to the document.

As a further example, CalPERS questions whether Exhibit S had an "effective date" or "revision date" are similarly irrelevant and apparently designed to imply the document did not exist during the period it was applicable. Exhibit S clearly lists the period "2011/2012", referencing CalPERS' fiscal year of July 1, 2011 through June 30, 2012.

Once again, CalPERS' denial of Mr. Alvarez's Watermaster compensation is based on CalPERS' review of the *wrong and inapplicable* 2012-2013 salary information.

A. Alvarez's Compensation Was Not "Final Settlement Pay"

CalPERS also denies Alvarez the salary earned during the transition period on the grounds that it constitutes "final settlement pay" but was not "in excess of compensation earnable" because Alvarez was entitled to and actually earned it from his Watermaster employment. At that date, Alvarez has conclusively demonstrated at hearing that he had no intention of retiring when he took the Watermaster job or even later. (*Alvarez*, 4/13/16, 130:9-10.) Only later, after the end of CEO job did he find that it would make it virtually impossible to obtain a similar executive level position and he reluctantly decided to retire, rather than continue working another 5-10 years as he had always planned. (*Id.*, 146:18-147:21.)

IV. CalPERS Is Bound By the Administrative Record and Cannot Now Change the Findings Re Common Law Employment

In conducting its own Full Board Hearing, CalPERS is required to ensure that a *Final Decision* is based on the correct law and consistent with the full and complete evidentiary record.

Moreover, the Board is required to do so based on the *entire* record, not simply isolated evidence supporting CalPERS' staff's findings or opinions while disregarding conflicting relevant evidence. (See *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575,

³ CalPERS never explains why it repeatedly puts Ms. Tracy's name in quotation marks, but it seems aimed at raising doubts about whether she even exists.

585, discussing *Bixby v. Pierno* (1971) 4 Cal.3d 130 [parties and Court are bound by the administrative record].⁴

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.)

Inasmuch as the CalPERS Board has elected to consider Mr. Alvarez's appeal based on the administrative record without taking any new evidence or testimony, it must also act pursuant to the findings in the administrative record and is not permitted by law to make new findings that are not based on the full record.

Therefore, regardless of what other findings the Board makes as a result of the Full Board Hearing, it is bound by the findings of the ALJ in the *Proposed Decision* concerning Mr. Alvarez's common law employment status from November 9, 2011 through May 4, 2012. The Board must also reject CalPERS' staff's unsupported and improper arguments denying Mr. Alvarez credit for that final six months at Watermaster, and must find that Mr. Alvarez is entitled to accrue full service credit for that final six-month period of employment and have that utilized in the calculation of his pension allowance.

I. Conclusion

Based on the foregoing, including Mr. Alvarez's reservation of all rights, the fact that he has not waived any claims, and his incorporation of all arguments made in the administrative proceedings, Mr. Alvarez urges the Board to find (1) that he is entitled to use the \$228,000 annual salary he earned at Watermaster as his highest one-year period of earnings and have it utilized to calculate his pension and (2) that he was a common law employee of Watermaster during his final six month tenure from November 9, 2011 through May 4, 2012, and is entitled to have the full service credit he accrued utilized in calculating his pension.

In the alternative, although Alvarez reserves all rights, the Board may consider using a "blended" highest compensation of his highest compensation during his final six months at the City of Downey (\$15,860 per month) and his \$228,000 annual salary during his first six months at Watermaster, as well as giving a full years of service credit.

Dated: December 9, 2016



John Michael Jensen, Attorney for Respondent

⁴ 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 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*.



Fax Cover Sheet

DATE: December 9, 2016

TO:	Cheree Swedensky Assistant to the Board	FAX NO.:	(916) 795-3972
FROM:	Bradley Herrema Jessica Diaz		(805) 965-4333
RE:	Calculation of Final Compensation of Desi Alvarez CalPERS Case No. 2013-1113		
TRANSMITTING:	Respondent's Argument for the December 21, 2016 full Board hearing		

No. of Pages With Cover Page: 7

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**Brownstein Hyatt
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December 9, 2016

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VIA FACSIMILE TO (916) 795-3972

CalPERS Board of Administration
c/o Board Secretary
CalPERS Executive Office
PO Box 942701
Sacramento, CA 94229

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, the Chino Basin Watermaster ("Watermaster"), for the California Public Employees' Retirement System ("CalPERS") Board of Administration ("Board") hearing on December 21, 2016 in the above-referenced matter. The proposed decision issued on September 7, 2016 by Administrative Law Judge ("ALJ") Eric Sawyer ("Proposed Decision") erroneously concluded that Watermaster's pay schedule listing Mr. Desi Alvarez's salary was not publicly available. However, uncontroverted record evidence unequivocally demonstrates that this is not the case. The ALJ's conclusion was based solely on a counterfactual application of the Public Employees' Retirement Law ("PERL") that is unnecessary to effectuate the PERL's important policies of transparency and public accountability.

Consequently, we urge a determination by the Board that Watermaster's payment to Mr. Alvarez must be included in the calculation of Mr. Alvarez's final compensation. In applying the PERL to this matter, the Board must render a determination only after reviewing the entire administrative record, and based on the evidence in that record. A determination that Mr. Alvarez's salary was not pursuant to a publicly available pay schedule is contrary to the uncontroverted record evidence and would be subject to reversal on appeal.

Watermaster supports the Proposed Decision's conclusions that Mr. Alvarez was employed by Watermaster and that the period from November 10, 2011 through May 4, 2012 should be included for the purpose of calculating Mr. Alvarez's service credit. Watermaster reserves all rights to contest and appeal all other findings and conclusions in the Proposed Decision and in any final decision reached by the Board following the full hearing. We submit this brief without waiving any additional claims, and hereby incorporate our prior arguments and pleadings in the administrative record.

* If the Board disagrees, 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. 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.

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Respondent's Argument
December 9, 2016
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I. The Conclusion That Watermaster's FY 2011-12 Pay Schedule Was Not "Publicly Available" Is Contrary to Uncontroverted Facts.

A. Uncontroverted facts establish 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).¹ The Board has previously interpreted the phrase "publicly available" as synonymous with "readily available."² The word "available" has been defined as "[c]apable of being obtained or used," with synonyms including "acquirable," "attainable," "obtainable," or "procurable."³ Public availability has never been found to require publication, which could have been expressly included in the PERL, as illustrated by other statutory schemes aimed at facilitating the public availability of information.⁴

The Proposed Decision correctly 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,⁵ and that the FY 2011-12 Salary Schedule "was in place when [Mr. Alvarez] worked as Watermaster's CEO."⁶ 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.⁷ These facts, along with testimony by Watermaster staff and Watermaster's generally applicable policies, directly contradict the 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").

Watermaster is a special master whose authority arises exclusively from the judgment entered in *Chino Municipal Water District v. City of Chino* ("Judgment").⁸ 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."⁹

In addition to Watermaster's institutional accountability to the Court, the parties, and the public, Watermaster also has specific policies ensuring 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.¹⁰ These documents, included in the evidentiary record, provide assurances that Watermaster information is readily available – not, as the Proposed Decision appears to conclude, that the availability of information to the public is inhibited. The Proposed Decision characterizes a process to make information available as evidence of non-availability. The record before the Board contains no evidence of any kind that the

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process was excessive, overly burdensome, resulted in unreasonable delays, was confrontational, or inhibited the disclosure of requested information. Without any such evidence, the Proposed Decision misconstrues Watermaster's good faith effort to make information available as evidence of obstruction. This simply cannot be the case. Allowing such a result to stand would be contrary to CalPERS' policy of encouraging rather than disincentivizing transparency.

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"¹¹ is contrary to the evidence in the record and is otherwise factually unsupported. To the contrary, the facts demonstrate 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.¹² Mr. Koren spoke by phone with Watermaster's Chief Financial Officer (CFO), Mr. Joseph Joswiak, on multiple occasions in October 2010.¹³ Mr. Joswiak 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, 2010.¹⁴ 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.¹⁵

This Board's decision 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.¹⁶ 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.¹⁷ Accordingly, the Proposed Decision's conclusion that the FY 2011-12 Salary Schedule could only be obtained by following a "bureaucratic process"¹⁸ 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, in at least two instances, Watermaster promptly responded to requests for information that were not made in accordance with its judicially reviewable administrative process.

In this regard, Watermaster's course of dealing stands in stark contrast 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."¹⁹ There is simply no analogy to be drawn between the facts in *Adams* and Watermaster's transparent responses to Mr. Koren and Ms. Tracy.

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."²⁰ 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."²¹ The parties to the Judgment²² – 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

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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."²³ In fact, the entire record suggests the contrary.

Watermaster is subject to ongoing judicial administration. All of its actions are reviewable by the Court.²⁴ 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 includes an erroneous conclusion that a person requesting an employee's salary information needed to first obtain a signed release.²⁵ This conclusion appeared to result from a misinterpretation of Resolution 01-03, which helped 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.²⁸ Resolution 01-03 then states that "certain" information and documents on that list would require a signed release.²⁷

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.^[28]

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 PERL.²⁹ Moreover, it is similarly not Watermaster's practice to require a signed release to obtain salary information. This is demonstrated by uncontroverted evidence that Watermaster indeed did not require a signed release when Watermaster provided salary information to Mr. Koren in 2010 and Ms. Tracy in 2011 – the same general time period at issue in this dispute.³⁰ To the extent this erroneous conclusion was foundational to the Proposed Decision's determination as to public availability, the record evidence cannot support such a determination.

II. Regulation 570.5³¹ Is Not Merely "Clarifying" and Therefore Cannot Be Applied Retroactively.

As a general rule, regulations will not be given retroactive effect.³² 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."³³ This exception is not appropriate where a change "upsets expectations based in prior law,"³⁴ 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

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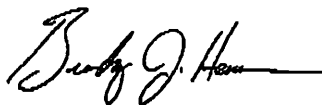
clarification."³⁵ Moreover, other statements in the circulars demonstrate that the "true meaning" of Government Code section 20636 could not possibly have remained the same after the adoption of Regulation 570.5. For instance, CalPERS' August 2011 letter notes that the Board adopted Rule 570.5 to "make specific the requirements for publicly available pay schedule[s]" and that the "regulation also contains criteria for ensuring the pay schedule is publicly available."³⁶ 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."³⁷

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.³⁸ 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 a document upon request.³⁹ It is the Board's prerogative to determine as a matter of policy how public availability should be ensured. But such a policy, however meritorious, cannot be recast as merely "clarifying" in order to retroactively modify the scope of what constitutes "compensation earnable."⁴⁰ Such an application of Regulation 570.5 would be subject to challenge under the well-established rule that regulations are not given retroactive effect.⁴¹

III. Conclusion

Watermaster respectfully requests that the Board adopt a decision reflecting the fact that Mr. Alvarez's payrate was pursuant to a "publicly available pay schedule."

Sincerely,



Bradley J. Herrema

¹ 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."

² Randy G. Adams ("Adams"), Prec. Dec. No. 15-01, effective Jan. 16, 2013, Case No. 2011-0788, p. 20.

³ Roget's Thesaurus (American Heritage 2013), at p. 55.

⁴ 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).

⁵ 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"].)

⁶ Proposed Decision, p. 2, ¶ 7; p. 7, ¶ 33.

⁷ Proposed Decision, p. 7, ¶ 36; p. 8, ¶ 37.

⁸ See Exh. A.

⁹ Exh. D, Watermaster Rules and Regulations §2.1.

¹⁰ Exhs. N, O; Transcript of the April 11-13, 2016 Hearing (hereinafter, "Tr.") Vol. III, p. 52:4-52:14.

¹¹ See Proposed Decision, p. 19, ¶ 4 (emphasis added).

¹² Exh. F; Tr. Vol. III, p. 99:2-99:20.

¹³ Tr. Vol. III, p. 99:2-99:20.

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¹⁴ 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.)

¹⁵ See Proposed Decision, p. 19, ¶ 4.

¹⁶ See Proposed Decision, p. 8, ¶ 37.

¹⁷ See Exhs. R, S.

¹⁸ See Proposed Decision, p. 19, ¶ 4.

¹⁹ *Adams, supra*, at p. 10, ¶¶ 20-21.

²⁰ See Proposed Decision, p. 7, ¶ 35.

²¹ Proposed Decision, p. 4, ¶ 20.

²² See Exh. A.

²³ See Proposed Decision, p. 20, ¶ 5.

²⁴ Exh. Q, Restated Judgment, ¶¶ 15, 31.

²⁵ Proposed Decision, p. 5, ¶ 24.

²⁶ Exh. N, p. 2.

²⁷ Exh. N, p. 2.

²⁸ Exh. N, p. 3 (emphasis added).

²⁹ See Gov. Code § 20636(d).

³⁰ 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.)

³¹ California Code of Regulations, tit. 2, § 570.5.

³² *McKeon v. Hastings College* (1986) 185 Cal.App.3d 877, 887.

³³ *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922.

³⁴ *Ibid.*

³⁵ *Ibid.*, quoting *Cal. Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 214.

³⁶ Exh. 266 (emphasis added).

³⁷ Exh. 267 (emphasis added).

³⁸ See *Carter, supra*, 38 Cal.4th at 930.

³⁹ See Regulation 570.5(a)(5).

⁴⁰ Even if Regulation 570.5 did provide the relevant standard, there is sufficient evidence in the record to show that Watermaster's FY 2011-12 Salary Schedule met the applicable 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, 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. In addition, 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). The Proposed Decision therefore reached an erroneous conclusion as to whether the FY 2011-12 Salary Schedule satisfied Regulation 570.5.

⁴¹ See *McKeon v. Hastings College* (1986) 185 Cal.App.3d 877, 887 ("The general rule that statutes will not be given retroactive operation has been followed from the earliest days of California's statehood to the present. . . . If being the rule that administrative regulations are subject to the same treatment as statutes, a comparable disinclination to apply regulations retroactively has also evolved." [citations omitted].)