

**ATTACHMENT D**

**NOVEMBER 16, 2016 BOARD AGENDA ITEM**



**California Public Employees' Retirement System**  
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Ref. No. 2013-1113

November 10, 2016

**TO:** ALL PARTIES AND THEIR ATTORNEY OF RECORD

**SUBJECT:** In the Matter of the Calculation of the Final Compensation of DESI ALVAREZ, Respondent, and CHINO BASIN WATERMASTER, Respondent.

Attached is a copy of the agenda item to be presented to the Board of Administration, California Public Employees' Retirement System at its meeting scheduled for November 16, 2016.



## Board of Administration Agenda Item 9d

November 16, 2016

**Item Name:** Proposed Decision – In the Matter of the Calculation of the Final Compensation of DESI ALVAREZ, Respondent, and CHINO BASIN WATERMASTER, Respondent.

**Program:** Employer Account Management Division

**Item Type:** Action

### **Parties' Positions**

Staff argues that the Board of Administration should adopt in part and decline in part the Proposed Decision.

Respondent Desi Alvarez (Respondent Alvarez) argues that the Board of Administration should decline to adopt the Proposed Decision.

### **Strategic Plan**

This item is not a specific product of either the Strategic or Annual Plans. The determination of administrative appeals is a power reserved to the Board of Administration.

### **Procedural Summary**

Respondent Chino Basin Watermaster (Respondent Watermaster) entered into an "at will" employment agreement with Respondent Alvarez effective May 3, 2011, as the Chief Executive Officer (CEO) of Respondent Watermaster. Respondent Alvarez, however, was terminated as CEO as of November 9, 2011, and received "severance compensation" from November 9, 2011 to May 4, 2012. Respondent Watermaster reported an annual salary of \$228,000, which calculates to a monthly salary of \$19,000, from May 3, 2011 through May 4, 2012.

CalPERS determined the reported compensation, for the entire year, did not qualify as "payrate" because the compensation was not provided pursuant to a publicly available pay schedule. CalPERS used the payrate for Respondent Alvarez's previous employer to calculate the amount of his final compensation. CalPERS also determined the "severance compensation," paid from November 9, 2011 to May 4, 2011, did not qualify as "compensation earnable" and is not reportable because it constitutes "final settlement pay."

Respondent Alvarez appealed this determination and the matter was heard by the Office of Administrative Hearings on April 11, 12 and 13, 2016. A Proposed Decision was issued on September 7, 2016, agreeing that the \$228,000 reported as annual compensation did not

qualify as “payrate” because it was not provided pursuant to a publicly available pay schedule, and denying that part of the appeal. The Proposed Decision, however, also held that Respondent Alvarez remained an employee after November 11, 2011, thereby granting that part of the appeal.

### **Alternatives**

A. For use if the Board decides to adopt the Proposed Decision as its own Decision:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own Decision the Proposed Decision dated September 7, 2016, concerning the appeal of Desi Alvarez; RESOLVED FURTHER that this Board Decision shall be effective 30 days following mailing of the Decision.

B. For use if the Board decides not to adopt the Proposed Decision, and to decide the case upon the record:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, after consideration of the Proposed Decision dated September 7, 2016, concerning the appeal of Desi Alvarez, hereby rejects the Proposed Decision and determines to decide the matter itself, based upon the record produced before the Administrative Law Judge and such additional evidence and arguments that are presented by the parties and accepted by the Board; RESOLVED FURTHER that the Board's Decision shall be made after notice is given to all parties.

C. For use if the Board decides to remand the matter back to the Office of Administrative Hearings for the taking of further evidence:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, after consideration of the Proposed Decision dated September 7, 2016, concerning the appeal of Desi Alvarez, hereby rejects the Proposed Decision and refers the matter back to the Administrative Law Judge for the taking of additional evidence as specified by the Board at its meeting.

D. Precedential Nature of Decision (two alternatives; either may be used):

1. For use if the Board wants further argument on the issue of whether to designate its Decision as precedential:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System requests the parties in the matter concerning the appeal of Desi Alvarez, as well as interested parties, to submit written argument regarding whether the Board's Decision in this matter should be designated as precedential, and that the Board will consider the issue whether to designate its Decision as precedential at a time to be determined.

2. For use if the Board decides to designate its Decision as precedential, without further argument from the parties.

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, hereby designates as precedential its Decision concerning the appeal of Desi Alvarez.

**Budget and Fiscal Impacts:** Not applicable

**Attachments**

Attachment A: Proposed Decision  
Attachment B: Staff's Argument  
Attachment C: Respondent(s) Argument(s)



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DONNA RAMEL LUM  
Deputy Executive Officer  
Customer Services and Support

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the First Amended Statement  
of Issues (Calculation of Final Compensation)  
Against:

DESI ALVAREZ and CHINO BASIN  
WATERMASTER,

Respondents.

Case No. 2013-1113

OAH No. 2014080757

**PROPOSED DECISION**

This matter was heard by Administrative Law Judge (ALJ) Eric Sawyer, Office of Administrative Hearings, State of California, on April 11-13, 2016, in Glendale.

Preet Kaur, Senior Staff Counsel, represented petitioner California Public Employees' Retirement System (PERS).

John Michael Jensen, Esq., represented respondent Desi Alvarez.

Bradley J. Herrema, Esq., and Jessica L. Diaz, Esq., represented respondent Chino Basin Watermaster.

The record remained open after the hearing in order for the parties to submit closing briefs. The briefs received and events that transpired while the record was held open are described in the ALJ's prior orders marked as exhibits 28, 29 and 31. The record was closed and the matter submitted for decision upon receipt of the last brief on August 8, 2016.

**FACTUAL FINDINGS**

*Parties and Jurisdiction*

1. On April 11, 2014, a Statement of Issues was filed on behalf of PERS by Karen DeFrank, in her official capacity as Chief of the Customer Account Services Division. (Ex. 1.)

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED September 12 20 16

Maureen M. [Signature]

2. Respondent Desi Alvarez (respondent) was employed by several public agencies and, at the end of his career, Chino Basin Watermaster as its Chief Executive Officer (CEO). By virtue of his employment, respondent was a local miscellaneous member of PERS.

3. On May 2, 2012, respondent signed an application for service retirement. (Ex. 9.) Respondent retired from service, effective July 2, 2012, with 31.427 years of service credit. (Ex. 1.) He has been receiving his retirement allowance from that date. (*Ibid.*)

4. Respondent Chino Basin Watermaster (Watermaster) is a local public agency that contracts with PERS for retirement benefits for its eligible employees. (Ex. 19.) The contract between PERS and Watermaster incorporates the definitions of words and terms set forth in the Public Employees Retirement Law (PERL). (*Ibid.*) As such, the provisions of the Watermaster's contract with PERS are contained in the PERL, which is set forth at Government Code section 20000 et seq.

5. PERS is a defined benefit plan. Benefits for its members are funded by member and employer contributions and by interest and other earnings on those contributions. The amount of a member's contribution is determined by applying a fixed percentage to the member's compensation. A public agency's contribution is determined by applying a rate to the member compensation as reported by the agency. Using certain actuarial assumptions specified by law, the PERS Board of Administration (Board) sets the employer contribution rate on an annual basis.

6. The amount of a member's service retirement allowance is calculated by applying a percentage figure based upon the member's age on the date of retirement to the member's years of service and the member's "final compensation." In computing a member's retirement allowance, PERS staff may review the salary reported by the employer for the member to ensure that only those items allowed under the PERL will be included in the member's final compensation for purposes of calculating the retirement allowance.

7. After respondent submitted his retirement application, PERS staff reviewed his reported compensation. The Watermaster had reported to PERS an annual salary of \$228,000 for respondent, which calculates to a monthly salary of \$19,000, for the period of May 3, 2011, through May 4, 2012. After reviewing available information, PERS staff believed those reported payments were not pursuant to a publicly available pay schedule and therefore did not qualify as compensation earnable. PERS staff concluded respondent's compensation reported for that period was not eligible to be included in the calculation of his final compensation for purposes of his retirement benefit.

8. By a letter dated February 20, 2013, respondent and Watermaster were notified of PERS's determination described above, and were advised of their right to appeal that determination. (Ex. 4.)



9. On or about April 19, 2013, both respondent and Watermaster submitted separate written appeals of PERS's above-described determination. (Exs. 7 & 8.)

10. By a letter dated June 17, 2013, PERS issued an amended determination to respondent and Watermaster. In that letter, the parties were advised PERS had also determined that, in light of a "Confidential Separation Agreement" executed by respondent and Watermaster, respondent had essentially received severance pay for his last six months of service with the Watermaster, which was not reportable compensation. The contents of PERS's February 20, 2013 letter were reiterated. For all those reasons, PERS advised the parties that respondent's compensation as CEO of Watermaster, from May 3, 2011, through May 4, 2012, would not be accepted as his final compensation for purposes of his retirement benefit. In that regard, PERS instead would accept respondent's compensation of \$15,860 per month in his final year of employment with the City of Downey as his final compensation. The parties were again advised of their appeal rights. (Ex. 5.)

11. By a letter dated February 12, 2015, respondent and Watermaster were advised of PERS's supplemental determination that, under the terms of the Confidential Separation Agreement described above, on and after November 9, 2011, respondent could not be considered an employee under the common law employment test. Moreover, PERS deemed respondent's pay the last six months to be severance pay. For those reasons, PERS did not deem respondent's compensation from Watermaster to be reportable. (Ex. 6.)

12. On or about February 12, 2015, the First Amended Statement of Issues was filed on behalf of PERS by Renee Ostrander, Assistant Division Chief of the Customer Account Services Division. (Ex. 3.)

### *Respondent's Background and Interest in Working for Watermaster*

13. Respondent first commenced PERS-covered employment as an Assistant Professor in 1977. He then worked for the City of Santa Monica as City Engineer from approximately June 1986 to April 1990; for the East Bay Municipal District; for the City of Redondo Beach as Director of Public Works/City Engineer from January 1992 through April 1996; and the City of Glendale as City Engineer.

14. Respondent later moved on to work for the City of Downey (Downey) as Director of Public Works and then as Deputy City Manager, accruing 13 years of service credit and also purchasing five years of airtime. As Deputy City Manager for Downey, respondent's salary was \$15,860 per month.

15. Although respondent was happy and productive working for Downey, he always had a strong interest in groundwater issues. Respondent could have remained employed at Downey in his position indefinitely, as he was well regarded by his supervisors and colleagues there.

16. In early 2011, respondent learned of the CEO opening at Watermaster. He was 57 years old at the time and planned to work another five to ten years. Respondent was intrigued with the Watermaster position because it involved groundwater issues, was the head executive position of a public agency and paid more. After mulling it over, he decided to apply for the Watermaster position. While increasing his retirement allowance was one of many reasons to apply for the new position, it was not the primary reason. No evidence presented suggests respondent was interested in working for just one year or so in order to “spike” his pension benefits and then retire. If hired by Watermaster, respondent intended to continue working in that position indefinitely.

17. Watermaster’s CEO recruitment process took place in the spring of 2011. Watermaster received numerous responses. Respondent applied based on the public notice he saw and submitted his qualifications. Many other people also applied. At least three or four rounds of interviews were held at the Watermaster office by its Board. Watermaster was interested in hiring someone to fill that job indefinitely. Until it received respondent’s application, no evidence suggests anyone at Watermaster knew respondent or vice versa.

#### *Watermaster’s Background*

18. The Watermaster arose from litigation in the Superior Court of the State of California, San Bernardino County (Superior Court), concerning longstanding water right disputes among various property owners in the Chino Basin. The parties to the litigation are the entities that were producing groundwater at the time and those thereafter found to have a continuing right.

19. On January 27, 1978, the Superior Court adopted a Judgment establishing the Chino Basin Municipal Water District to oversee implementation of the Judgment on an on-going basis. In 1998, the Superior Court appointed the Watermaster to the position and established a board of directors (Watermaster Board) to run Watermaster pursuant to the Superior Court’s Judgment.

20. The role of the Watermaster is to enforce provisions of the Judgment. That role later expanded to include the implementation of the optimum Basin Management Program. Watermaster is not a water utility, it does not have customers and it does not sell water. The Judgment also empowered Watermaster to make and adopt, after public hearing, appropriate rules and regulations for conduct of Watermaster affairs. The Superior Court approved rules and regulations that were later memorialized and approved as the “Chino Basin Watermaster Rules and Regulations, June 2001” (Rules and Regulations).

21. The Judgment mandated that the Superior Court have continuing supervision over Watermaster. The Superior Court approved Watermaster's Rules and Regulations, including meeting schedules and procedures. By such, Watermaster was required to maintain records for the purposes of allocating the costs of administration and personnel.

22. All actions, decisions, or rules of Watermaster are subject to review by the Superior Court on its own motion or on timely motion by any party, the Watermaster (in case of mandated action), and certain Watermaster committees.

23. Rules and Regulations section 2.1 states, "Watermaster Staff shall publish those records [minutes and 'other records'] and other matter that it deems to be of interest to the parties to the Judgment, the general public or the Court on its website." Rules and Regulations section 2.2 specifies, "As a matter of policy, Watermaster shall generally operate in accordance with the provisions of the California Open Meetings Law (Brown Act). However, in the event of conflict, the procedures set forth in these Rules and Regulations shall control." (Ex. D, p. 18.)

24. Anyone may use a "Request for Information Form" found on Watermaster's website to request information. However, there are restrictions placed on the provision of information. Watermaster Board Resolution No. 01-03, adopted February 15, 2001, specifies Watermaster policy in releasing information and documents. First, staff shall attempt to respond within 10 days of a request. Second, staff will consider requests "on a case-by-case basis, subject to guidelines." (Ex. N, p. 2.) The aforementioned request form is to be used, on which the requestor is required to provide a "signed release" and "provide staff with the reason or purpose for their request for information." (*Ibid.*) Third, the guidelines specify the types of information and documents that "should" be produced and that which "generally will not be available." (*Ibid.*) While employee compensation, salary and benefits are not specifically listed in either category, the guidelines do specify that staff will generally not make available "Personnel, or personal information regarding Watermaster members, staff and/or employees." (*Ibid.*)

25. The Watermaster Board meets monthly, pursuant to notice. (Rules and Regulations, § 2.7.) The Rules and Regulations are available to the public and posted on the Watermaster's website. (*Ibid.*) The Rules and Regulations allow the Board to hold confidential sessions, including discussion of personnel matters of Watermaster employees in closed session. (Rules and Regulations, § 2.6.)

26. According to the Rules and Regulations, Watermaster documents, notice, and minutes are required to be made available to each active party and each person who has requested a copy of the minutes and notice. Information is provided to the parties as part of agenda packages and then posted on the Watermaster website.

27. Watermaster's website posts legal documents, filings with or orders of the Superior Court, information related to the budget, and annual audits of Watermaster. It also contains notices of meetings and agendas for all the meetings of the three pools, the advisory committee, and the Board. It contains the minutes after they are approved and the recordings of each meeting, as well as any handouts and presentations that are given out at any meeting.

### *Watermaster Hires Respondent*

28. On March 31, 2011, the Watermaster Board held a closed session conference to discuss the open Watermaster CEO position. During that closed session, the Board authorized Watermaster's general counsel to extend a binding term sheet to hire respondent as CEO and prepare a binding contract for execution by Watermaster's Board Chair. Watermaster's hiring of respondent was reported in open session by general counsel.

29. On April 28, 2011, the Watermaster Board held a public meeting where it approved the minutes of the Watermaster Board meeting held on March 31, 2011.

30. Respondent and Watermaster executed a written employment agreement, effective May 3, 2011. Pertinent provisions included the following:

A. Section 5.e., with the subheading Administrative Leave, provided:  
"Executive [respondent] shall be allowed twelve days per year of administrative leave ("Administrative Leave"), to be used as the Executive's discretion. Unused Administrative Leave shall not accrue to the following year."

B. Section 9.a., with the subheading Termination without Cause, provided:  
"In the event Executive's employment is terminated without cause prior to the end of the first year of the Employment Term, Watermaster will pay Executive the full salary amount for the first year of the Employment Term plus provide for the health and other benefits that were being provided to Executive for the remaining portion of such first year of the Employment Term, minus the amount of any salary already paid during that first year of the Employment Term. After the first year of the Employment Term, Executive shall not be entitled to any other payment of salary under this Agreement for a termination without cause, except for payments owed through the date of termination."

### *Public Availability of Information Pertaining to Watermaster Employee Compensation*

31. Watermaster staff created a "Salary Matrix" that the Chief Financial Officer (CFO) would use to develop and create the annual budget. Watermaster staff also created a "Salary Schedule," in which salary for its various staff positions was listed by steps. Both documents were spreadsheets which contained all the budgeted positions, job titles, as well as the hourly, weekly and monthly salary by steps. Those documents, however, were not attached to the budgets presented to the Watermaster Board or discussed in closed session. While the approved budget was announced in open session of Board meetings, it was not established that the salary schedules or salary matrixes were published or made available to those attending the meetings or that either the Board's agendas or minutes available for public review contained the employee salary information stated on the salary schedules or matrixes.

32. Salary matrices created for the fiscal years (FY) 2004/2005 through 2010/2011 were presented in evidence. (Ex. 15.) Those salary matrices all list the position of "General Manager-C.E.O.," as well as the compensation for the position. The compensation for that position for all of those fiscal years was less than what respondent was paid pursuant to his contract. For example, the last salary matrix in that series, for the FY 2010/2011, lists the salary for "Ken, General Manager-C.E.O." (referring to the then CEO Kenneth R. Manning) at the rate of \$18,081 per month and \$216,972 per year. (Ex. 15, p. 8.)

33. Respondent was paid \$228,000 per year, pursuant to his contract of May 3, 2011. That amount is listed on the FY 2011-2012 Salary Schedule as "Step G" for the position of "General Manager/CEO." (Ex. S, p. 1.) The FY 2011-2012 Salary Schedule was used by the CFO in early 2011 to create the budget for the FY 2011-2012 that was later adopted by the Board in late May 2011. That salary schedule was in place when respondent worked as Watermaster's CEO during the FY 2011-2012. As was the case with the prior salary schedules and matrices, the FY 2011-2012 Salary Schedule was not discussed in open session of board meetings or otherwise made available to those attending the meetings.

34. Respondent's contract did not isolate the rate of pay or base pay for the position of CEO. It states only the amount Watermaster had agreed to pay to respondent for his services as CEO, which was \$228,000 per year. No evidence indicates respondent's contract was ever publicly announced during a Board meeting or made available to the public, upon request or otherwise.

35. The record presented shows Watermaster only considered providing compensation information to the public after being specifically requested. Employee salary information was not posted on the Watermaster's website at the times in question, and the evidence does not show the information was posted in a public place at the Watermaster's office. The various Watermaster employees who testified in this matter uniformly stated that employee salary information would be, and was, provided when requested. However, there was only evidence showing two requests for such information. Neither requestor was a member of the general public, but instead had some special affiliation that would have likely prompted a greater level of cooperation and attention from Watermaster staff, as explained in more detail below.

36. The first such request occurred in or about October 2010. Watermaster received a telephone inquiry from James Koren, a journalist with *The Sun and Inland Valley Daily Bulletin*, regarding compensation information for Watermaster's then CEO Mr. Manning and its Board members. Watermaster's CFO, Mr. Joswiak, testified this request came after news broke of the City of Bell compensation scandal. On or about October 22, 2010, Watermaster provided Mr. Koren a copy of the employment agreement for Mr. Manning and the amount of compensation received by board members. It was not established that Watermaster's response was within 10 days receipt of the request.

37. The second such request was made by Tracy Tracy, an executive assistant of the Monte Vista Water District, a nearby water district, who requested such information in an e-mail sent to Watermaster on September 8, 2011. She specifically requested Watermaster's "Employee Salary Ranges," among other information. The Watermaster staff member who initially received the request yielded the matter to Mr. Joswiak. Eight days later, Mr. Joswiak provided a copy of the FY 2011-2012 Salary Schedule to Ms. Tracy. That salary schedule showed respondent's compensation as CEO.

38. In May 2013, as a result of the dispute at issue between the parties in this case, the Watermaster Board approved versions of the 2011/2012 and 2012/2013 Salary Matrices in open session. (Ex. 16.) A staff report indicates that gesture was done to "ensure compliance with CalPERS regulations." (Ex. 16, p. 118.) This was well after respondent retired. The 2011/2012 Salary Matrix approved by the Board in open session lists the salary of the "Chief Executive Officer," but does not specify any steps; it also lists respondent's level of compensation as the highest, whereas in the FY 2011/2012 Salary Schedule (ex. S), there were two steps for that position with higher levels of compensation. (Ex. 16, p. 119.) In this regard, the Salary Matrix approved by the Board in open session in May 2013 is different from the Salary Schedule sent to Ms. Tracy in September 2011, though both contain the compensation level respondent was paid while he was CEO.

*Respondent is Removed as CEO*

39. Respondent started working as Watermaster CEO on May 3, 2011. He worked in the office on a daily basis, but he did not have set business hours. Respondent was paid in biweekly payroll, at \$19,000 a month. Watermaster made PERS contributions biweekly on respondent's paid salary.

40. As Watermaster CEO, respondent was responsible for its daily operations. Respondent testified that while acting as the CEO from May through early November 2011, he did things like budgeting, overseeing personnel, correspondence and actively representing Watermaster before its Board and committees. Respondent's duties as CEO were specified in section 3 of his employment agreement. (Ex. 11, p. 1.) Respondent performed those duties from May through early November 2011.

41. On November 9, 2011, respondent was given his six-month evaluation with Watermaster's general counsel, Scott Slater. At that evaluation, Mr. Slater advised respondent that Watermaster was placing him on paid administrative leave, effective immediately. Respondent was not told why the move was happening, nor has it ever been disclosed.

42. Watermaster employee Danielle Maurizio assumed many of respondent's functions when respondent was placed on administrative leave. In January 2012, Ken Jeske became the interim CEO and took over the functions and duties respondent had previously performed.

43. In August 2011, PERS circulated a letter to its member agencies notifying them of the adoption of a regulation that clarified existing provisions of the PERL concerning what constitutes publicly available pay schedules. (Ex. 266.)

44. Respondent and Watermaster executed the Confidential Separation Agreement, effective on January 23, 2012, which provided, inter alia, as follows:

1. Termination of Active Employment.

Executive's [respondent's] employment in the capacity of Chief Executive Officer of the Watermaster with all of the powers and duties associated therewith ceased on November 9, 2011, and the Employment Agreement is hereby modified effective as of that date. Executive acknowledges and agrees that he has received all compensation accrued and owing pursuant to the Employment Agreement as of the date of execution of this Agreement, including, but not limited to, accrued but unpaid base salary, incentive compensation, and accrued vacation (all as set forth in Section 5 of the Employment Agreement) and expense reimbursement.

2. Transition Period.

A. Term

As partial consideration for this Separation Agreement, Executive shall be continued to be employed with the Watermaster until May 3, 2012 (the "Transition Period"). At the conclusion of the Transition Period, Executive's employment shall be terminated (the "Separation Date") and such termination shall be designated "without cause."

B. Duties.

During the Transition Period and thereafter, Executive shall have no actual or implied authority to act on behalf of the Watermaster or enter into any agreements on behalf of the Watermaster, and he shall not hold himself out as having any authority to act on behalf of the Watermaster. Executive acknowledges and understands that he does not have authority to speak on behalf of or bind the Watermaster in any manner during the Transition Period or thereafter. Executive's sole duty during the Transition Period shall be to assist and provide information to the Watermaster as requested with respect to pending projects and the transition of his duties. Executive shall endeavor to respond promptly, fully, accurately and in a professional manner to inquiries and requests made by the Watermaster during the Transition Period. Notwithstanding any limitations to the contrary in the Employment Agreement, Executive forthwith may undertake consulting work on his own account and may pursue any other business, provided that he does not act to

the detriment of the Watermaster or in violation of his continuing duties thereto.

### C. Compensation and Benefits.

During the Transition Period, Executive shall continue to receive his base salary, less applicable withholdings, at the rate in effect on November 9, 2011, paid in accordance with the Watermaster's normal payroll system. Executive shall continue to accrue vacation at the rate of twenty (20) days per year, accruing pro rata on a bi-weekly basis. In addition, the Watermaster shall permit Executive to continue to participate as an employee in any insurance plans, deferred compensation plans, and retirement plans in which he was a participant prior to the Transition Period, on the same terms and conditions as under the Employment Agreement. The compensation and benefits provided hereunder shall be referred to as the "Severance Compensation." Executive agrees that the Severance Compensation, along with any entitlement to benefits under the California Public Employees' Retirement System ("CalPERS") pursuant to the terms thereof on or after the Separation Date, constitute the entire amount of consideration due to him, and Executive is not entitled to any further or other amounts, including severance and other benefits, whether under the Employment Agreement or any other agreement, or any benefit plan, policy or practice of the Releases, as defined below. Executive agrees that he will not seek any further compensation for any other claimed damage, costs, severance, income, or attorneys' fees. Executive acknowledges that the severance Compensation constitutes good and valuable consideration to which he otherwise would not have been entitled.

45. After being placed on administrative leave, as well as signing the Confidential Separation Agreement, respondent was no longer responsible for the daily responsibilities of the Watermaster. He no longer reported for work at the office. No employees reported to him. He served no function other than to respond to inquiries from the Board.

46. Before being placed on administrative leave, respondent had initiated a \$20 million effort to buy water for Watermaster that had not closed by November 2011. Respondent was one of the few people familiar with the "loose ends" of the water deal after November 2011. Respondent testified he got "some" calls from Board members regarding that transaction. It was not established that respondent received more than a handful of inquiries from the Board while on leave. The only corroboration of respondent's testimony was Watermaster Board member Bob Kuhn, the Board's chair during the majority of this period, who testified that he and respondent communicated during this period regarding matters before Watermaster.

47. Mr. Kuhn also testified respondent's powers as CEO ceased in November 2011 and that the only duty he could remember respondent kept was "to answer questions (of the Board) as best he could." In fact, Mr. Kuhn testified that although he believed



respondent was still employed by Watermaster, he did not believe respondent still had the title of CEO on and after November 2011; as chair of the Board, Mr. Kuhn did not recognize respondent as the CEO on or after November 2011.

48. Respondent still maintained a Watermaster e-mail address while he was on administrative leave. While respondent had access to his e-mail account, so did Sherri Molino, Watermaster administrative assistant, who monitored e-mails sent to respondent to determine whether any needed action by someone other than respondent.

49. Respondent continued to receive his Watermaster salary according to Watermaster's regular payroll schedule, and Watermaster continued to pay respondent's PERS contributions. This continued until May 3, 2012, when respondent was formally terminated pursuant to the Confidential Separation Agreement. Respondent and Watermaster staff uniformly testified they believed respondent was still an employee during his "transition period" on and after November 2011.

#### *Respondent's Decision to Retire*

50. As May 3, 2012 approached, respondent looked for employment elsewhere. A couple of positions came to respondent's attention that he wanted to pursue. At that time, respondent did not intend to retire. After pursuing those two positions but not being invited for an interview with either one, respondent believed he would have difficulty finding commensurate employment elsewhere because of what happened at Watermaster. He was not interested in a position lower than general manager or one that paid less than what he made at Downey. He decided to retire when his contract with Watermaster expired.

## LEGAL CONCLUSIONS

### *Burden and Standard of Proof*

1. The person against whom a statement of issues is filed generally bears the burden of proof at the hearing regarding the issues raised. (*Coffin v. Department of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 471, 476.) In the absence of a contrary statutory provision, an applicant for a benefit has the burden of proof as the moving party to establish a right to the claimed entitlement or benefit, and that burden is unaffected by the general rule that pension statutes are to be liberally construed. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.) In this case, respondents bear the burden of proof.

2. In *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 and footnote 5, the court found "the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence." In this case, the parties agree the standard of proof is the preponderance of the evidence.

3. Based on the above, respondent and Watermaster have the burden of establishing by a preponderance of the evidence that respondent is entitled to an amount of final compensation based on the amount of \$19,000 per month he was paid by Watermaster from May 3, 2011, through May 4, 2012.

### *Jurisdiction*

4. A. Respondent argues PERS has no jurisdiction to decide his pension compensation because the Watermaster is a creature of the Superior Court, which he contends has sole jurisdiction to approve or regulate Watermaster decisions and actions. That argument, taken to its logical end, leads to the proposition that the PERL does not apply to this case. Watermaster does not make this argument.

B. The contract between PERS and Watermaster incorporates the definitions of words and terms set forth in the PERL. (Factual Finding 4; Gov. Code, § 20000 et seq.) Government Code section 20506<sup>1</sup> provides that “[a]ny contract heretofore or hereafter entered into shall subject the contracting agency and its employees to all provisions of this part [the PERL] and all amendments thereto applicable to members, local miscellaneous members, or local safety members except those provisions that are expressly inapplicable to a contracting agency until it elects to be subject to those provisions.”

C. The PERL is a comprehensive statutory scheme and the Legislature has expressly vested PERS with the sole authority to determine the type and level of benefits paid under the system. (§§ 21023-20125.) Because of the need for statewide uniformity in its application, the Board has been vested with the sole authority to determine “who are employees and the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this System.” (*Metropolitan Water Dist. of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 503–505; *City of Los Altos v. Board of Administration* (1978) 80 Cal.App.3d 1049, 1051.) Neither the member nor his employer has authority to enter into agreements that bind PERS’s determinations as to what constitutes compensation earnable. (*Molina v. Board of Admin., California Public Employees’ Retirement System* (2011) 200 Cal.App.4th 53, 61–69.) Thus, in the event of a conflict with a local law, the PERL provisions regarding retirement benefits would prevail. (*City of Los Altos v. Board of Administration, supra*, 80 Cal.App.3d at 1052.)

D. In this case, Watermaster and PERS entered into a contract whereby Watermaster agreed to participate in the PERS system and subject itself and participating employees to the provisions of the PERL without reservation or modification. Based on the authorities cited above, it is the PERL that determines a retiree’s benefits, not the judgments or orders of the Superior Court in establishing a local public agency governing local water rights. Respondent fails to cite any statute, regulation or law indicating that PERS lacks authority or jurisdiction to proceed in this case, or that the Superior Court has exclusive jurisdiction over the issues raised by the First Amended Statement of Issues.

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<sup>1</sup> Further statutory references are to the Government Code.

### *General Provisions of PERL*

5. A member's retirement allowance is based on factors of age, length of service and final compensation. "Compensation" is defined under the PERL as "remuneration paid out of funds controlled by an employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work." (§ 20630.) "Final compensation" is the member's highest average compensation earnable paid during a consecutive twelve month period. (§§ 20037, 20042.)

6. Compensation earnable is not simply the amount of remuneration received by a member. It is "exactly defined to include or exclude various employment benefits and items of pay." (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198; citing former Gov. Code, § 20020 (currently § 20630).) The principal purpose for these rules and the strict enforcement is "[p]reventing local agencies from artificially increasing a preferred employee's retirement benefits by providing the employee with compensation increases which are not available to other similarly situated employees." (*Prentice v. Board of Admin., California Public Employees' Retirement System* (2007) 157 Cal.App.4th 983, 993.)

### *The Common Law Employment Test*

7. The parties agree that in order for respondent's service with Watermaster to qualify for purposes of establishing his retirement benefit, he must be deemed an employee of Watermaster during the entire 12 month period. However, PERS argues respondent is not entitled to count his year of service with Watermaster because his employment was terminated in November 2011 and his work during the final six months was not as an employee but as an independent contractor.

8. Under section 20069, subdivision (a), "[s]tate service" means "service rendered as an employee or officer" of a contracting agency. An employee is "[a]ny person in the employ of any contracting agency." (§ 20028, subd. (b).) The California Supreme Court has held that the PERL's provisions concerning employment by a contracting agency incorporate the common law test for employment. (*Metropolitan Water Dist. of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 500.) The parties agree that the common law employment test applies to this case.

9. The common law employment test was articulated by the California Supreme Court in *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949. Under that test, "the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists." (*Ibid.*) If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*Id.* at p. 946-947.)

10. *Tieberg* noted the following other factors may be taken into account, which it characterized as secondary to the primary test articulated above:

(a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. (*Id.* at p. 949.)

11. The *Tieberg* court noted one of the most important of those secondary factors is “whether the parties believe they are creating the relationship of employer-employee,” especially as specified in a written agreement. (*Id.* at p. 949.)

12. The burden of establishing an independent contractor relationship is upon the party attacking the determination of employment. (*Southwest Research Institute v. Unemployment Ins. Appeals Bd.* (2000) 81 Cal.App.4th 705, 708.)

13. A. In this case, despite the general discussion in Legal Conclusions 1-3 concerning burdens of proof, PERS has the burden on the limited issue of establishing that respondent was an independent contractor his last six months at Watermaster and not an employee. PERS failed to meet its burden.

B. The facts in this case meet the primary test of employment described in *Tieberg*. By the terms of the Confidential Settlement Agreement, Watermaster maintained the right to control the manner and means of respondent’s continuing duties at work. Although his duties were drastically limited, that limitation was placed on him by Watermaster. Respondent was not to report to the office and was not to have other employees report to him. He was told to whom he could report. Thus, it cannot be concluded that respondent worked on his own time, at his own expense, in his own way, with his own instrumentalities, and at a place of his selection. Those were all decisions made for him by Watermaster, who directed when and how it wanted information from him. Although respondent was allowed under the Confidential Settlement Agreement to undertake consulting work with others, he could not do so if it conflicted with his Watermaster duties or caused a detriment to Watermaster. This is another sign of Watermaster’s right to control respondent’s activities and production.

C. Application of the secondary factors articulated in *Tieberg* also support a finding that respondent was an employee the entire time he was with Watermaster. As *Tieberg* emphasized, the most important of these secondary factors is whether the parties believe they are creating an employment relationship, especially if specified in a written agreement. In this case, it is clear from their testimony that both respondent and staff from Watermaster believed respondent was still an employee on and after November 2011. That belief was incorporated into the Confidential Settlement Agreement, where it was expressly stated that respondent continued to be an employee of Watermaster during that period. In addition, a number of the less important secondary factors also suggest an employment relationship. For example, it cannot be concluded that respondent was engaged in a distinct occupation by answering inquiries of the Board based on information he obtained while acting as CEO, or that his duty to do so was the kind of work usually done by a specialist without supervision. No particular skill in fulfilling that duty is noted. Respondent was not given an express or specified time to perform the service. He was paid a salary as other employees and not per consultation with the Board. His work was part of the regular business of Watermaster. These are all signs of employment.

D. Finally, it must be noted that respondent continued to receive benefits and trappings not normally associated with independent contracting. For example, he continued to receive his monthly salary, made in biweekly payments. Watermaster continued to make contributions to PERS for him and respondent continued to receive health insurance benefits. He also was still allowed access to an internal e-mail account used by other employees.

14. Based on the above, respondent was an employee of Watermaster during the entire 12 months he worked there. PERS failed to establish respondent was an independent contractor during any of that period. (Factual Findings 1-50; Legal Conclusions 1-13.)

### *Compensation Earnable*

15. PERS next contends respondent's salary while working at Watermaster was not made publically available for purposes of the PERL and thus cannot qualify as compensation earnable that can be the basis of calculating his retirement benefit.

16. Compensation earnable is a combination of a "payrate" and "special compensation." (§ 20636, subd. (a).)

17. A. Pursuant to section 20636, subdivision (b)(1), "payrate" means:

[T]he 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). (Emphasis added.)

B. Pursuant to section 20636, subdivision (d), “Notwithstanding any other provision of law, payrate and special compensation schedules, ordinances, or similar documents *shall be public records available for public scrutiny.*” (Emphasis added.)

18. The PERL requires a “publicly available pay schedule for services rendered on a full time basis during normal working hours.” (*Molina v. Board of Admin., California Public Employees’ Retirement System, supra*, 200 Cal.App.4th at pp. 66-67.) Generally, disclosing a public employee’s salary in an annual budget does not render that information publicly available, because there is no assurance that what was stated in the budget is the same as what the employee(s) in question actually received based on a published schedule applicable to all similarly situated employees. (*Prentice v. Board of Admin., California Public Employees’ Retirement System, supra*, 157 Cal.App.4th 983, 994.) For the same reason, settlement proceeds received in a negotiated resolution of a wrongful termination case were not paid in accordance with publicly available pay schedules. (*Molina v. Board of Admin., California Public Employees’ Retirement System, supra*, 200 Cal.App.4th at p. 67.) “The Legislature intended that a public employee’s ‘payrate’ be readily available to an interested person without unreasonable difficulty.” (*Randy G. Adams*, Prec. Dec. No. [unassigned], effective Jan. 16, 2013, Case No. 2011-0788, p. 20 [*Adams*].)<sup>2</sup> Public employee compensation should be “approved in a public manner, and that is not subject to public disclosure except through formal public records request, subpoena, or other legal process.” (*Ibid.*)

19. The PERS Board has promulgated regulations to implement the PERL. The regulations relevant to this matter are found at Title 2 of the California Code of Regulations (Regulation).

20. Regulation 570.5 provides 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;

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<sup>2</sup> An agency may designate as precedent a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. (Gov. Code, § 11425.60, subd. (b).) The Board designated *Adams* as a decision that may be relied upon as precedent.

- (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.

21. A. The requirements for a pay schedule set forth in Regulation 570.5 apply to respondent and Watermaster in this case. The regulation became effective on August 10, 2011, which was after respondent's initial employment agreement with Watermaster, but before he was placed on administrative leave; before execution of his Confidential Settlement Agreement in January 2012; and before the date his employment ended with Watermaster in May 2012. In fact, PERS circulated a letter in August 2011 notifying its member agencies of the adoption of Regulation 570.5 and explaining that the regulation clarified existing provisions of the PERL concerning what constitutes publicly available schedules. Since Watermaster had notice of this regulation, it had time to react and adjust accordingly.

B. Even if not, Regulation 570.5 can be applied to this situation because the regulation simply clarified section 20636. (*Adams*, p. 14.) The purpose of the regulation was to ensure consistency between PERS employers as well as enhance disclosure and transparency of public employee compensation. (*Ibid.*) Amendments to statutes that are matters of clarification may be applied retroactively. (*Prentice v. Board of Admin., California Public Employees' Retirement System, supra*, 157 Cal.App.4th 983, 990, fn. 4.) That statutory rule of construction applies equally to administrative regulations. (*People ex rel. Deukmejian v. CHE, Inc.* (1983) 150 Cal.App.3d 123, 135.) Such clarifying amendments have no retrospective effect because the true meaning of the law remains the same. (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922.) Respondent and Watermaster cite several sources for support of the contention that the adoption of the regulation after respondent executed his initial employment agreement cannot be applied retroactively. As noted above, this contention is not convincing.

22. A. In this case, it was not established that respondent's pay with the Watermaster was publicly available for purposes of the PERL.

B. Generally, the PERL has been interpreted to require public employee compensation be readily available to an interested person without unreasonable difficulty. In this case, Watermaster made no employee compensation information available to the public, unless a very specific procedure was carried out. That procedure required the requestor of information to sign a specific form, explain the reason for the request and then wait up to 10 days for a response. Based on Watermaster's Rules and Regulations, Watermaster staff would decide whether to respond "on a case-by-case basis." The same Watermaster regulation did not specify that employee compensation was the sort of information that would be produced to the public; another part of that regulation indicated "personnel information" would not be produced. While not exactly the same, the Watermaster's procedure here parroted a Public Records Act request process in many ways. (See Gov. Code, § 6250 et seq.) But in *Adams*, PERS's Board has clearly stated that "publicly available" does not include when public disclosure is only made through formal public records request, subpoena, or other legal process. It cannot be concluded that Watermaster's employee compensation information was readily available to interested persons without unreasonable difficulty.



C. Under the definition of payrate provided by the PERL, public employee compensation information should be included in public records available for public scrutiny. A summary of the evidence presented in this case shows that the proliferation of employee compensation by Watermaster at the time in question cannot be viewed as being contained in records available for public scrutiny.

1. Watermaster Rules and Regulations section 2.1 indicates the Watermaster could post information of interest to the general public on its website. No information on employee compensation was posted on its website during the time in question.

2. Rules and Regulations section 2.2 directs the Watermaster Board to generally operate in accordance with the California Open Meetings Law, which it referred to as the "Brown Act," indicating application of the Ralph M. Brown Act that applies to local government agencies. The Brown Act is to apply unless doing so conflicted with another provision of the Rules and Regulations. No cited provision of the Rules and Regulations prevented employee compensation from being discussed during Board meetings in open session or otherwise proliferated to the public. The Board was only expressly allowed to discuss in closed session "personnel matters of Watermaster employees involving individual employees." (Rules and Regulations, § 2.6(1)(ii).) While the Brown Act similarly allows public agencies to discuss individual personnel matters in closed session (Gov. Code, § 54957), the Brown Act provides that discussion of "salary, salary schedules or compensation paid in the form of fringe benefits" may not be held in a special session (Gov. Code, § 54956) and it has no provision allowing for the discussion of such matters in closed session. This means there was no California Open Meeting Law providing for discussion of employee compensation in closed Watermaster Board meetings, nor any Watermaster Rules and Regulations prohibiting or preventing the proliferation of such information.

3. It is not clear that employee compensation information was expressly provided to parties to the Judgment or those attending Board meetings. Only Board members, in closed session, were privy to the compensation information, and even that was generally folded into overall budget information.

4. As discussed above, the only way to obtain compensation information was to specifically request it from Watermaster staff, pursuant to the aforementioned bureaucratic process, and subject to staff discretion on whether to release it. While the evidence shows two people requested such information and were provided it after a delay of a week or more, it must also be remembered the two requestors were not members of the general public per se; one was a member of 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. Moreover, those two still had to ask for specific information and had to wait a number of days before being provided it. It cannot be concluded the information was readily available, as discussed above.

5. An analysis of the information actually provided in response to the two requests in question is revealing. The media member received a copy of the then CEO's contract and Board member compensation. He did not receive the pay schedule for Watermaster employees at that time. The second requestor did receive the salary schedules for the FY 2011-2012, which would have included respondent's information. Thus, the evidence shows only one person actually received salary schedules during the relevant time in question. Watermaster argues that is because only one person requested the information; another view of the evidence is that this is because Watermaster so tightly controlled access to the information that it could actually prove the exact people who received it. Under either argument, this sparse proliferation of information cannot be viewed as making employee compensation information available for public scrutiny.

6. The above also indicates that while Watermaster generally had directives to make public information concerning its operations and had the discretion to publicize employee compensation information, Watermaster decided not to do so.

D. Based on the above, it similarly cannot be concluded that the salary schedules concerning respondent's compensation as CEO meet the definition of public availability contained in Regulation 570.5. While all the criteria in Regulation 570.5, subdivision (a), must be met to comply, not all were established in this case.

1. For example, Watermaster pay schedules were not approved and adopted by the Watermaster Board in accordance with applicable public meeting laws, as required by subdivision (a)(1). As discussed above, Watermaster Rules and Regulations allowed adoption of salary schedules in open session and generally required Board meetings to be held in accordance with the Brown Act. No salary schedule was approved or adopted by the Board in open session while respondent was employed. In fact, while the Board approved the annual budget, it is not clear the Board saw, approved or adopted the salary schedule applicable to respondent while he was employed there.

2. The pay schedules or similar information were not posted at the Watermaster office while respondent was employed there, immediately accessible and available for public review during Watermaster's normal business hours or posted on the Watermaster website, as required by subdivision (a)(5).

3. It was not established the schedules in question showed an effective date or date of any revisions, as required by subdivision (a)(6).

4. The salary schedule applicable to respondent's employment was approved and adopted by the Watermaster Board after respondent's employment was terminated and he left Watermaster. However, section 20636 and Regulation 570.5 do not support such retroactive application, in that doing so would defeat the very purpose of those laws. Moreover, Regulation 570.5, subdivision (b), the savings clause, premises relief on conforming documents before the events in question, not after.

E. In addition, the aforementioned savings clause of Regulation 570.5, subdivision (b), is not available to respondent. There were no salary schedules or similar compensation documents approved by the Watermaster in accordance with public meetings law, as required by subdivision (b)(1), before the events in question.

23. A. An even larger problem prevents respondent from meeting the definition of payrate as defined by section 20636. This problem persists even assuming arguendo that Regulation 570.5 has no application to this case and that a retroactive approval and adoption of a salary schedule by the Watermaster Board can be considered. The problem is that no salary schedule or any other document ever created by Watermaster shows the position and payrate for the position respondent occupied in his last six months at Watermaster.

B. The evidence clearly established that, as of early November 2011, respondent was no longer CEO of Watermaster. He no longer had those duties, was no longer seen by the Watermaster Board as CEO, and he had been replaced by two other people who performed his former duties while he was on leave. Respondent's only duty was to answer inquiries of the Board. Whatever position and/or title respondent held his last six months, it was not Watermaster CEO. In light of the fact that other individuals held the CEO position during respondent's last six months at Watermaster, 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.

C. Thus, even assuming the facts and legal interpretations most favorable to respondent, it cannot be established that any pay schedule or similar document was ever made public showing the position respondent held his last six months at Watermaster.

24. Finally, PERS argues the compensation respondent received his final six months at Watermaster was severance compensation or final settlement pay that is excluded from the definition of payrate pursuant to section 20636, subdivision (f). While a decision on this issue is unnecessary given the above conclusions, this issue was raised by PERS in its denial letters and is therefore considered herein. Respondent was employed those final six months and carried out a duty, though very limited. If his pay the final six months was severance or final settlement pay, he would have had no duty and his employment would have been terminated immediately. Nor does the evidence establish that his pay during the final six months was of the golden-handshake variety expressly excluded by Regulation 570. When respondent signed his first employment agreement with Watermaster, the parties clearly intended for him to be employed there indefinitely. Something happened in the midst of his first year that changed that thinking; but it was not a golden-handshake.

*Respondent's Claims of Estoppel, Breach of Fiduciary Duty and Laches*

25. A. Estoppel. At the end of his closing brief, respondent argues PERS is estopped from asserting he is not entitled to base his retirement compensation on his service with the Watermaster. Neither of the other parties discusses this issue; in any event, the argument is unpersuasive and rejected.

B. The requisite elements for estoppel are the same whether applied against a private party or the government: (1) the party to be estopped was apprised of the facts, (2) the party to be estopped intended by conduct to induce reliance by the other party, or acted so as to cause the other party reasonably to believe reliance was intended, (3) the party asserting estoppel was ignorant of the facts, and (4) the party asserting estoppel suffered injury in reliance on the conduct. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.)

C. In this case, respondent argues PERS “should have known that it promised pension benefits to Watermaster employees even though PERS would later claim it was unauthorized to provide those benefits because of the manner in which Watermaster approves the hiring of personnel.” (Ex. 268, p. 34.) This fanciful argument has no evidentiary support. PERS made no promise to either respondent, direct or implied, that the pay pursuant to either of respondent’s employment contracts was the proper compensation as legally defined for use in the formula to determine his retirement benefit. PERS has no way to predict when a member will file for retirement benefits and its duty to review and determine the appropriate components to use in the formula arises only when retirement occurs. PERS did not mislead respondent in any way, nor is there any evidence present indicating that respondent relied on PERS to any extent.

D. Nor is this claim viable as a matter of law. If section 20636 and/or Regulation 570.5 preclude a portion of pay from being considered, PERS cannot be ordered to pay a pension based on the excluded portion, notwithstanding any failure to timely notify the member of a problem or promises made by the employer. (*City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System* (2012) 211 Cal.App.4th 522, 543–544.) Nor will these theories justify forcing PERS to violate the mandates of the PERL. (*Chaidez v. Board of Administration of California Public Employees' Retirement System* (2014) 223 Cal.App.4th 1425, 1431–1432, *as modified* (Feb. 27, 2014), *review denied* (May 14, 2014).) Finally, for estoppel to apply against a government agency that had no legal authority to do what it is requested to do, it must be shown that “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 462 at pp. 496-497.) In this case, respondent failed to establish that an injustice would result if his final compensation is not based on compensation that was not made publicly known by an available pay schedule.

26. Fiduciary Duty. While respondent cites the elements for breach of fiduciary duty, he simply states PERS breached its fiduciary duty to him, without any explanation of how or when that happened and no citation to any evidence in the record. The failure to cite to any part of the record supporting this claim means respondent has waived his argument. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545–546.)

27. Laches. Respondent argues the doctrine of laches applies to this case, but he does not cite the elements of laches in his closing brief. In a prior appellate case against PERS, it was held that the “defense of laches requires unreasonable delay plus either

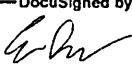
acquiescence in the act about which [petitioner] complains or prejudice to the [respondent] resulting from the delay.” (*City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 51.) In this case, neither element was demonstrated by respondent. He argues PERS has known since the inception of its contract with the Watermaster “that it might later disallow the use of Watermaster salaries approved in confidential session of the Watermaster Board.” (Ex. 268, p. 35.) That argument is beyond fanciful and has no evidentiary support in the record whatsoever. Moreover, respondent completely fails to describe how the alleged delay caused him prejudice. “The failure to provide an explicit prejudice analysis also results in a waiver.” (*City of Oakland v. Public Employees' Retirement System, supra*, 95 Cal.App.4th at 52.)

28. Based on the above, respondent and Watermaster failed to meet their burden of establishing by a preponderance of the evidence that respondent’s compensation during his one year of employment by Watermaster qualifies as compensation earnable that can be used in calculating respondent’s retirement benefit. PERS’s determination, in this regard only, was correct. Respondent proved no legally viable defense or claim that would obviate PERS’s determination, as he failed to establish the elements of estoppel, laches, breach of fiduciary duty or any other argument made by respondent in his briefs. (Factual Findings 1-50; Legal Conclusions 1-27.)

### ORDER

The appeals of respondents Desi Alvarez and Chino Basin Watermaster are denied. The determination of complainant is affirmed.

DATED: September 7, 2016

DocuSigned by:  
  
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ERIC SAWYER  
Administrative Law Judge  
Office of Administrative Hearings

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT IN PART AND DECLINE IN PART THE PROPOSED DECISION**

### **Overview**

Staff recommends the Board adopt the Proposed Decision, in part, as to the burden of proof, jurisdiction, final compensation, equitable estoppel, laches, and fiduciary duty findings and legal conclusions. Staff recommends this adoption without a Full Board Hearing concerning these issues.

Staff recommends the Board decline to adopt the Proposed Decision, in part, as to Respondent Desi Alvarez's (Respondent Alvarez) employment status after November 9, 2011, in favor of its own decision. Staff recommends this declination so the Board may hold a Full Board Hearing concerning this issue.

Staff's recommendation, that the Board decline to adopt the Proposed Decision, in part, is based upon the following:

- I. The Proposed Decision acknowledges but fails to properly apply the common law employment test to determine whether Respondent Desi Alvarez remained an employee of the Chino Basin Watermaster (Respondent Watermaster) after November 9, 2011; and
- II. The Proposed Decision fails to apply the applicable California Public Employees' Retirement Law (PERL) governing "compensation earnable" and "final settlement pay."

All parties agree that Respondent Alvarez worked for Respondent Watermaster as an employee from May 3, 2011 to November 9, 2011, and was eligible for CalPERS' membership for that service. The parties disagree about whether Respondent Alvarez remained an employee from November 9, 2011 to May 4, 2012.

If Respondent Alvarez continued to remain an employee of Respondent Watermaster, as he contends, then he is eligible for membership and would accrue service credit for the period of November 9, 2011 through May 4, 2012. If Respondent Alvarez was no longer an employee after November 9, 2011, then he is ineligible for membership and accrues no service credit for the period of November 9, 2011 through May 4, 2012 pursuant to Government Code section<sup>1</sup> 20300, subdivision (b). Additionally, if Respondent Alvarez is found to be an employee, a second issue is whether the payments made from November 9, 2011 to May 4, 2012, constitute "compensation earnable" under section 20636 and are reportable to CalPERS.

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<sup>1</sup> All further references are to the Government Code unless specified otherwise

### **Background Facts**

Respondent Alvarez entered an Employment Agreement with Respondent Watermaster, effective May 3, 2011, as a Chief Executive Officer (CEO). Pursuant to the Employment Agreement Respondent Alvarez's normal hours of work were generally from "8:00 a.m. Monday through Friday." Respondent Alvarez was only allowed twelve days of administrative leave per year. The Employment Agreement provided a generous severance package, entitling Respondent Alvarez to the full salary and benefits for the first year of the Employment Term "in the event employment is terminated without cause prior to the end of the first year of the Employment Term."

On January 23, 2012, Respondent Alvarez executed a "Confidential Separation Agreement," which terminated his employment as a CEO as of November 9, 2011, ceasing all duties and powers associated with the Employment Agreement. The termination was designated as a "without cause" termination, providing a "transition period" from November 10, 2011 to May 4, 2012, whereby Respondent Alvarez's sole responsibility was to provide advice to the Watermaster Board upon request. Pursuant to the "Confidential Separation Agreement," Respondent Alvarez was provided "Severance Compensation" during this time period. Respondent Alvarez did not assume another employment position with Respondent Watermaster.

Despite separating Respondent Alvarez from employment, Respondent Watermaster continued to report his earnings to CalPERS. Respondent Watermaster reported an annual salary of \$228,000, which calculates to a monthly salary of \$19,000, from May 3, 2011 through May 4 2012.

### **Staff's Determination**

CalPERS determined the "Severance Compensation" provided to Respondent Alvarez from November 9, 2011 to May 4, 2012 constitutes "final settlement pay" under section 20636(f), and therefore is not "compensation earnable." CalPERS also determined that Respondent Alvarez was no longer an employee after November 9, 2011, under the common law employment test and the California Public Employees' Retirement Law (PERL). Therefore, Respondent Watermaster should not have reported any pay for Respondent Alvarez after November 9, 2011.

### **Proposed Decision**

The Proposed Decision finds Respondent Alvarez was an employee of Respondent Watermaster from November 9, 2011 to May 4, 2012. The Proposed Decision held that, under the *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal. 3d 943 common law employment test (also known as the common law control test), CalPERS failed to establish that Respondent Alvarez was no longer an employee after November 9, 2011.



**Why the Proposed Decision Should Be Rejected, In Part, As To Respondent Alvarez's Employment Status After November 9, 2011**

First, the Proposed Decision acknowledges but fails to correctly apply the common law employment test to determine whether Respondent Alvarez was an employee from November 9, 2011 to May 4, 2012. Next, the Proposed Decision completely fails to apply the applicable provisions of the PERL to determine whether the payments are reportable as "compensation earnable" or must be excluded as "final settlement pay."

**I. The Applicable Common Law Control Test Was Incorrectly Applied To Determine Employee Or Independent Contractor Status.**

The California Supreme Court in *Metropolitan Water District of Southern California v. Superior Court* (2004) 32 Cal.4<sup>th</sup>, 491 (also known as "Cargill") and the Board have determined that the common law "right to control test" is to be utilized when determining whether an individual is an employee of a contracting agency. The most important factor under the common law control test to determine employee status is the right of the employer to control the manner and means of accomplishing the result desired, regardless of whether that right is exercised with respect to all details.

The Proposed Decision acknowledges but fails to correctly apply the common law control test and the factors used in determining a worker's status for purposes of the PERL.

After November 9, 2011, Respondent Alvarez did not report to work, did not supervise any employees, was relieved of all of his duties and powers as a CEO, was no longer responsible for the daily responsibilities of Respondent Watermaster, did not attend Watermaster Board meetings, and had no authority to act on behalf of Respondent Watermaster. In addition, Respondent Alvarez was not required to forgo any other work during the relevant time period. There is no evidence Respondent Watermaster had the right to control the manner or means of accomplishing any services performed, and there is no evidence that control was actually exercised by Respondent Watermaster. Respondent Alvarez merely answered a "handful of inquiries," over the phone, when he was contacted by the Watermaster Board.

There is no evidence demonstrating that Respondent Watermaster furnished any equipment, supplies, or other materials to Respondent Alvarez after November 9, 2011. Respondent Alvarez was to be paid the same amount each month, regardless of whether he performed any work. As a CEO of Respondent Watermaster, Respondent Alvarez's employment had been "at will," as would be the case with an employee. However, the November 9, 2011 "Confidential Separation Agreement," had a specific end date, as would be the case with an independent contractor.

The facts in this case are very similar to that of *In the Matter of the Appeal of Denial of CalPERS Membership of Robert C Wilson*, Case No. 6495, OAH No. 200501220 (Wilson), where respondent was terminated as the executive director but continued being compensated as an "Out-Of-Office Consultant" to provide "consulting services, advice, guidance and training to the New Executive Director." Following a Full Board Hearing, the CalPERS Board issued a Final Decision stating Mr. Wilson was not an employee after the termination of his employment agreement and the payments did not constitute "compensation" because they were not paid for services rendered, and were not reportable, as they were "final settlement pay."

Similarly, a new Board Decision should be issued finding that Respondent Alvarez, under the common law control test, was not an employee of Respondent Watermaster from November 9, 2011 to May 4, 2012.

## **II. The PERL Statutes Were Not Correctly Applied To Determine Whether The Payments To Respondent Constituted "Compensation Earnable" And Are Reportable To CalPERS.**

The Proposed Decision fails to apply or address the PERL's definitions of "compensation earnable."

For employee compensation to be reportable to CalPERS for retirement purposes, it must constitute "compensation earnable" as defined in section 20636. "Compensation earnable" is a combination of a "payrate" and "special compensation." (Gov. Code §20636, subd. (a); Title. 2, Cal.Code Regs., § 570.) Under section 20636, subdivision (b)(1): " '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." "Special Compensation" of a member includes a "payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions."<sup>2</sup>

CalPERS' staff believes the payments do not constitute "payrate" or "special compensation" because the pay was not for services rendered since Respondent Alvarez performed no services after November 9, 2011. Furthermore, the payments do not constitute "special compensation" generally, as the payments were not made for services performed for special skills, abilities, work assignment or the like, and were instead paid in anticipation of Respondent Alvarez's separation from employment.

Section 20636, subdivision (f), also provides another basis for excluding the payments made to respondent Alvarez, as the "Severance Compensation" was provided merely to buy out Respondent Alvarez's contract. It is clear, by the unambiguous language of the "Confidential Separation Agreement," that Respondent Watermaster was paying the salary under the "Confidential Separation Agreement" in anticipation of Alvarez's

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<sup>2</sup> Gov. Code, §20636, subd. (b)(1).

separation from employment as of November 9, 2011. Therefore, the payment was made to secure the peaceful separation from all employment relationships of any kind.

**Recommendation**

Based on the analytical flaws of the Proposed Decision with regard to Respondent Alvarez's work status after November 9, 2011, CalPERS staff urges the Board to reject that part of the Proposed Decision and hold a Full Board Hearing concerning only the employment and "compensation earnable" issues, which arose during the timeframe of November 9, 2011 to May 4, 2012.

November 16, 2016



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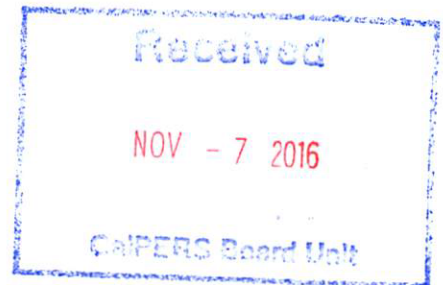
PREET KAUR  
Senior Staff Attorney

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

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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,

  
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	107,053	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	108,597	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	4,571.43	2,285.71	57.14
	F	124,800	10,400	4,800.00	2,400.00	60.00
	G	131,040	10,920	5,040.00	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	2,099.98	1,049.49	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

Ex. S

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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VIA FACSIMILE TO (916) 795-3972

CalPERS Board of Administration  
c/o Cheree Swedensky, Assistant to the Board  
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, 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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CalPERS Board of Administration  
November 4, 2016  
Page 2

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



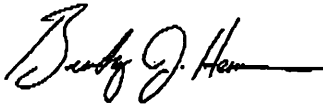
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such a policy, however meritorious, cannot be recast as merely "clarifying" in order to retroactively modify the scope of what constitutes "compensation earnable."<sup>41</sup>

**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.