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BEFORE THE BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA
ERIC C. SAWYER, ADMINISTRATIVE LAW JUDGE

In the Matter of the Statement of)
Issues of:)
DESI ALVAREZ,) CASE NO. 2012-1113
and) OAH NO. 2014080757
CHINO BASIN WATERMASTER,) VOLUME II
Respondents.)
_____)

TRANSCRIPT OF PROCEEDINGS
Los Angeles, California
Tuesday, April 12, 2016

Reported by:
CLAUDETTE A. HENRY
Hearing Reporter
Job No. :
96980AH

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CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
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ERIC C. SAWYER, ADMINISTRATIVE LAW JUDGE

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TRANSCRIPT OF PROCEEDINGS, taken at
655 North Central Avenue, Suite 1400, Glendale,
California, commencing at 9:00 a.m.
on Tuesday, April 12, 2016, heard before
ERIC C. SAWYER, Administrative Law Judge,
reported by CLAUDETTE A. HENRY, Hearing Reporter.

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APPEARANCES:

For the BOARD: PREET KAUR
CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
400 Q Street
Sacramento, California
95811

For the RESPONDENTS: JOHN MICHAEL JENSEN
LAW OFFICES OF
JOHN MICHAEL JENSEN
11500 West Olympic Boulevard
Suite 550
Los Angeles, California
90064

BRADLEY J. HERREMA
BROWNSTEIN HYATT FARBER SCHRECK
2049 Century Park East
Suite 3550
Los Angeles, California
90067

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I N D E X

BOARD'S: Witnesses:	Direct	Cross	Redirect	Recross
Angel Gutierrez	6	33 66		
Ronald Gow	143	150 177 188		

E X H I B I T S

BOARD'S:	Marked for Identification	Received in Evidence
4 - Determination Letter		33
5 - Letter Dated 6/7/13		33
6 - Letter Dated 2/12/15		150
 RESPONDENT'S:		
258- Unidentified		141
259- E-mails Dated 11/15/12		65
266- Circular Letter Dated 8/19/11		140
267- Circular Letter		140
S - 2011-12 Salary Schedule	47	

1 THE COURT: For the record would you state and spell
2 your name.

3 THE WITNESS: My name is Angel Gutierrez. It is
4 A-N-G-E-L, G-U-T-I-E-R-R-E-Z.

5 THE COURT: Okay. Thank you. Ms. Kaur, when you
6 are ready.

7 MS. KAUR: Thank you, your Honor.

8

9 DIRECT EXAMINATION

10 BY MS. KAUR:

11 Q Are you prepared to testify today,
12 Mr. Gutierrez?

13 A Yes.

14 Q And where do you currently work?

15 A I work in the compensation and employer review
16 unit of CalPERS.

17 Q What is your current position title?

18 A My current position title is retirement
19 program specialist II.

20 Q And how long have you held that position?

21 A I have held this position for about ten years.

22 Q As a program specialist II?

23 A Yes.

24 Q What are your job duties as a retirement
25 program specialist II?

1 A As a retirement program specialist II in the
2 compensation review unit, we -- I will review member
3 account when they retire in order to ensure that their
4 retirement benefits are calculated pursuant to CalPERS
5 law.

6 Q When you review a member's account, what
7 exactly are you doing as part of your review?

8 A We are verifying that the reported payrate and
9 special compensation are reported pursuant to CalPERS
10 law.

11 Q When you say CalPERS law, what sort of law are
12 you referring to?

13 A I'm referring to the Government Code and to the
14 California Code of Regulations.

15 Q Did you work on the determination of Desi
16 Alvarez?

17 A Yes.

18 Q How did you get involved in this case?

19 A This came during a routine review as
20 Mr. Alvarez was retiring, and so we reviewed his reported
21 compensation.

22 Q You said "routine review." What does that mean?

23 A Cases come up for review. We try to review
24 100 percent of the retirement members. But obviously
25 that is not -- that doesn't -- it would take -- it would

1 take a lot more manpower than what we have in order to
2 do that.

3 Q So --

4 A We actually review a percentage of retirement
5 members accounts.

6 Q What did you first do when you first reviewed
7 the case?

8 A I contacted the employer in order to request
9 documents regarding the reported compensation.

10 Q And who did you contact?

11 A I believe it was Mr. Joswiak -- Joswick (sic).

12 Q And did you receive additional documents?

13 A Yes, we did.

14 Q There was eventually a determination made
15 concerning Mr. Alvarez's final compensation; is that
16 correct?

17 A That's correct.

18 Q If you can turn to Exhibit 4 in the CalPERS
19 binder before you.

20 Can you tell us what this document is?

21 A This is the determination letter that was sent
22 to Mr. Joswiak concerning Mr. Alvarez's final
23 compensation.

24 Q Was a letter also sent to Mr. Alvarez?

25 A Yes. It would have been basically the same

1 information.

2 Q And if you could turn to page 5 of this
3 document. This is signed by Tomi Jimenez.

4 Who is Tomi Jimenez?

5 A Tomi Jimenez was the manager of the
6 compensation review section.

7 Q Was she your manager?

8 A Yes.

9 Q Did you prepare this letter for her?

10 A Yes, I did.

11 Q And you testified earlier that there is a --
12 compensation are reported by Watermaster on behalf of
13 Mr. Alvarez. How much was that compensation?

14 A It was \$19,000 per month.

15 Q And do you recall the time frame?

16 A Yes. Well, I'm looking at the letter and it's
17 from May 3rd, 2011.

18 Q Until?

19 A Through -- the letter says through May 4th,
20 2012.

21 Q And CalPERS determined that the reported
22 compensation didn't qualify as final compensation. Why
23 is that?

24 A It didn't qualify as final compensation because
25 it was not reported pursuant to publicly available pay

1 schedule, pursuant to Government Code Section 20636.

2 And also looking at this letter, there is actually --

3 Q Are you on Exhibit 4?

4 A Oh, I was on Exhibit 5.

5 Q If you could turn to Exhibit 4. This is
6 Exhibit 4.

7 Can you tell us what this document, Exhibit 4
8 is, just to clarify?

9 A This is the determination letter that was sent
10 to Mr. Joswiak. It is the first determination letter
11 that went out.

12 Q And your February 20th, 2013, determination
13 letter; is that correct?

14 A Correct.

15 Q And I was asking why CalPERS determined that
16 the compensation reported by the Watermaster didn't meet
17 the definition of final compensation, if you could
18 answer that question.

19 MR. HERREMA: Just an objection on the vagueness of
20 what the definition of final compensation being referred
21 to.

22 THE COURT: I'm not sure I'm following the
23 objection.

24 MR. HERREMA: She asked him to explain why CalPERS
25 found that the compensation reported by Watermaster

1 didn't meet the definition of final compensation. I
2 don't know what definition of final compensation she's
3 referring to.

4 THE COURT: Do you understand the question,
5 Mr. Gutierrez?

6 THE WITNESS: Yes.

7 THE COURT: All right. Tell us first what
8 definition you are referring to, then you can answer the
9 question.

10 THE WITNESS: I'm referring to the final
11 compensation as defined by CalPERS.

12 THE COURT: Okay.

13 BY MS. KAUR:

14 Q Are you referring to a particular -- is there a
15 particular code section?

16 A For definition of final compensation?

17 Q Let me just refer you to the first page of the
18 letter. It states the reported -- this is the third
19 paragraph. It states, "The reported payrate does not
20 meet the definition of the, quote, "payrate" defined in
21 the Government Code Section, GC-20636 (b)(1)."

22 Why did the reported payrate not meet the
23 definition of 20636 (b)(1)?

24 A Because it was not reported pursuant to a
25 publicly available pay schedule.

1 Q If you could turn to the second page. Did
2 CalPERS also determine that the reported payrate did not
3 meet the definition of California Code of Regulation
4 570.5?

5 A That's correct.

6 Q Why was that determination made?

7 A Because there was not a publicly available pay
8 schedule that was -- that met all the criteria contained
9 in 570.5.

10 Q Which criteria did it not meet in 570.5?

11 A It was not duly approved and adopted in the
12 employer's government body in accordance with the public
13 meeting laws, and it -- and it was not posted at the
14 office of the employer or immediately accessible and
15 available for public review from the employer during
16 normal business hours or posted on the employer's
17 website.

18 Q If you could turn to page 3 of this document.
19 The second paragraph there is a discussion concerning
20 the agreement. Which agreement is this in reference to?

21 A This is in reference to the employment
22 agreement between the Chino Basin Watermaster and
23 Mr. Alvarez. I believe it is part of the exhibit.

24 Q Is it Exhibit 11? Is that what it is in
25 reference to?

1 A Yes.

2 Q Did you review the employment agreement?

3 A Yes, I did.

4 MR. JENSEN: Objection.

5 BY MS. KAUR:

6 Q Does the employment agreement qualify as a
7 publicly available pay schedule?

8 A No, it does not.

9 Q Why is that?

10 A Because it does not list all of the positions
11 and salary ranges for all positions within the employer.
12 It does -- it is not posted. It is not publicly
13 available. And it is -- it is -- it is more of an --
14 well, that's -- those are the main reasons. That is
15 pursuant to Government Code Section 20636 and California
16 Code of Regulation Section 570.5.

17 Q In this same paragraph the last sentence in
18 that paragraph, I'm looking at Exhibit 4, page 3. And I
19 will read the last sentence which says -- the paragraph,
20 the last sentence says -- the agreement is signed by
21 Kenneth Willis. "As of March 31, 2011, the agency board
22 the agreement was approved in confidential session at a
23 closed session special meeting."

24 After hearing the testimony yesterday, is it
25 still your understanding that's the agreement in the

1 confidential session on March 31st of 2011?

2 A No.

3 Q Why is that?

4 A Because reading the -- and looking more closely
5 at the minutes, the agreement was not approved on
6 March 31st, 2011.

7 Q And did you also review this salary matrix for
8 2011/2012?

9 A Yes.

10 Q Does the salary qualify as a publicly available
11 pay schedule? I'm referring to the 2011/2012 salary
12 matrix.

13 A The 2011/2012 salary matrix did not -- did not
14 -- did not qualify under all the criteria contained in
15 570.5. It was not a publicly available document. And,
16 therefore, it was not used to validate Mr. Alvarez's
17 reported compensation.

18 Q There was some testimony concerning the
19 2011/2012 salary matrix yesterday about how it was
20 adopted in the March 2013 open session.

21 MR. HERREMA: Objection. Misstates the testimony.
22 May 2013 was the board meeting.

23 MS. KAUR: I will correct that. May 23rd, 2013, not
24 March. So there was testimony yesterday concerning the
25 adoption of the 2011/2012 salary matrix during open

1 session board meeting in May 2013.

2 Considering this salary matrix for 2011/2012
3 was adopted in open session in May 2013, does that
4 change your determination concerning Mr. Alvarez's
5 compensation in any way?

6 MR. JENSEN: Objection to the question. I believe
7 that we determined the motion was adopted previously and
8 just refer to the minutes themselves. Mr. Herrema, say
9 -- do you recall that testimony?

10 MS. KAUR: It was adopted previously in open
11 session.

12 MR. JENSEN: It was adopted previously and then
13 confirmed or whatever in open session. That's what I
14 recall, but I will look at the minutes.

15 MS. KAUR: I recall the witness testifying that it
16 was adopted in open session on May 23rd.

17 MR. HERREMA: I think he testified it was approved,
18 then adopted the matrix.

19 MR. JENSEN: I believe that's correct.

20 MR. HERREMA: And then the matrix themselves
21 concern --

22 MR. JENSEN: The previously adopted versions were
23 approved, I believe is the language.

24 THE COURT: Agree or disagree?

25 MS. KAUR: I can restate my question.

1 THE COURT: Okay.

2 BY MS. KAUR:

3 Q If you can turn to Exhibit 16. Have you
4 reviewed this document? This is the staff report for
5 the Chino Basin Watermaster dated May 23rd, 2013?

6 A Yes.

7 Q And on the document there is a recommendation
8 to approve the adopted Chino Basin Watermaster salary
9 matrix schedule for the periods of the fiscal year
10 2011/2012 and fiscal year 2012/2013.

11 And based on the testimony and if you also turn
12 to Exhibit 14, this recommendation was taken up and this
13 salary matrix for 2011/2012 was approved by the Board on
14 May 23rd, 2013?

15 MR. HERREMA: I'd like to object to the vagueness on
16 "testimony."

17 THE COURT: Which witness are you referring to,
18 Ms. Kaur, from yesterday?

19 MS. KAUR: Mr. Joswiak.

20 THE COURT: Okay.

21 BY MS. KAUR:

22 Q Do these facts that the 2011 and 2012 salary
23 matrix was approved by the Board on May 23rd, 2013, in
24 open session change your determination concerning
25 Mr. Alvarez's final compensation in any way?

1 A No.

2 Q Why not?

3 A Because it still was not -- it was after the
4 fact, after Mr. Alvarez had already retired, so we
5 couldn't go back retroactive and approve it and --
6 because it was -- it was done after he retired.

7 Q So are you saying even though this salary
8 matrix for 2011-2013 was approved in open session in May
9 2013, it does not qualify as a publicly available pay
10 schedule for the purposes of Mr. Alvarez's final
11 compensation?

12 A That's correct.

13 Q Assuming that Regulation 570.5 did not exist at
14 the time you reviewed Mr. Alvarez's salary or the
15 compensation, would your determination be any different?

16 MR. JENSEN: Objection. Calls for speculation. Ask
17 for legal interpretation. It is not the basis of this
18 case.

19 THE COURT: I'm not sure I'm following your
20 question. What -- why assume the regulation doesn't
21 exist?

22 MS. KAUR: Well, Mr. Jensen has been arguing all
23 along that the regulation doesn't apply to Mr. Alvarez.
24 So I just want his opinion in terms of when he reviewed
25 the documents, when he reviewed the information

1 provided, what determination would he come up with even
2 if he's not looking at 570.5.

3 MR. JENSEN: Your Honor, the issue is that
4 Mr. Alvarez was hired, I believe, in March 2011. He
5 started May 2011. This regulation was put into effect
6 after he was hired, and the witness just testified he
7 wouldn't go back and approve or disapprove it.

8 And so we take the position this regulation,
9 which came into effect after he was hired, doesn't apply
10 in this case.

11 THE COURT: I see. All right.

12 MR. JENSEN: And I can anticipate and represent it
13 was a clarification of an existing law and not new
14 substantiative matter. We have other cases and -- and
15 if we look at the two regulations, it is comparing them.
16 There is a level of specificity in 570.5 and the prior
17 regulation in the Prentice case which denies having
18 those requirements.

19 THE COURT: I see. Why don't we just give the
20 question to -- assuming Regulation 570.5 did not apply.

21 MS. KAUR: Yeah.

22 BY MS. KAUR:

23 Q Assuming Regulation 570.5 did not apply to
24 Mr. Alvarez, would your determination be any different?

25 A No.

1 Q Why not?

2 A Because we would start with 20636, which states
3 that it has to be pursuant to a publicly available pay
4 schedule. And -- and there was not publicly available.

5 Q And if you could turn to page 2 of your
6 determination. This is CalPERS's determination?

7 A Exhibit 4?

8 Q Exhibit 4.

9 A Page 2?

10 Q Page 2. And so Regulation 570.5 states under
11 (a)(1) and -- it states, "That the payrate has to be duly
12 approved and adopted by the employer of a governing body
13 with the requirements of the public meeting laws."

14 Assume that the public meeting laws was
15 followed by the Watermaster and also for the purposes of
16 this question. So assume that public meeting laws was
17 followed by the Watermaster to allow approval or adoption
18 of the salary schedule in the closed session. Would
19 your determination be any different under those facts
20 and your determination concerning Mr. Alvarez?

21 MR. JENSEN: Objection. She is asking his opinion
22 and applying without laying sufficient groundwork to say
23 whether he is qualified to do that. And I believe his
24 qualifications are about applying the PERL and the
25 regulation and not about the public meeting laws with

1 the applicable meeting with Watermaster.

2 So what I think she is doing is presenting an
3 incomplete hypothetical for an expert who hasn't been
4 qualified as an expert in this area. And I think it is
5 inappropriate expert opinion.

6 THE COURT: All right. My understanding is for him
7 to know -- for him to assume that whatever the public
8 meeting laws apply to Watermaster allowed the adoption
9 of the pay schedule in the closed session. So just
10 assuming the predicated part of the regulation, which in
11 his position general interpretations can be utilized.

12 MR. JENSEN: I understand what you are saying.

13 THE COURT: I'm not sure what else we could assume
14 when the subject matter area or concern -- and then the
15 rest of the answer would be just what does the
16 regulation capacity. So what Ms. Kaur shows -- what the
17 witness would need --

18 MR. JENSEN: The question is, basically, if the
19 Watermaster's publicly available rules allowed the
20 approval of his pay and compensation in a closed
21 session, I guess the subsequent part of the hypothetical
22 afterwards they announced it in open session. The
23 result of it, too, which I believe is the testimony here.
24 And I think that is correct.

25 THE COURT: That would be a fair addition in your

1 assumption that it was adopted in closed session, that
2 the action was announced in public session. I believe
3 that is their requirement of the law. And it sounds so
4 far that is how they had been handling things. That
5 would be a fair scenario.

6 MS. KAUR: The matrix was never adopted in closed
7 session. I didn't hear any testimony of it being
8 adopted in closed session.

9 MR. JENSEN: The contract was.

10 MS. KAUR: I didn't hear any testimony of the
11 contract being adopted in closed session, either.

12 MR. HERREMA: The action taken in closed section was
13 taken. It authorized to go and draft a contract.

14 MS. KAUR: Go and draft a contract or adopt it. I
15 remember Mr. Joswiak testified about --

16 MR. JENSEN: Goes to the legal issue. All of the
17 terms have already been agreed to; then isn't that a
18 contract itself?

19 MS. KAUR: Well, you are just reading into that.
20 I'm talking about testimony.

21 MR. JENSEN: That is sort of legal. All of the
22 terms was adopted, and I don't have the record or
23 just --

24 THE COURT: I think Ms. Kaur is entitled to
25 formulate the hypothetical. I just want to make sure

1 it's fair. But they might have conflict over what the
2 evidence will show. That's fine. You can each
3 formulate your own hypothetical. I will translate and
4 make a decision based on the evidence.

5 MR. HERREMA: My only concern with the hypothetical
6 is she says assuming -- asking the witness to assume, you
7 know, one thing is different. But I don't know the
8 second part of the hypothetical is accurate as to what
9 happened -- what was CalPERS's determination. It is really
10 hard to follow, which is the one variable being changed
11 in these hypotheticals.

12 THE COURT: Why don't we let Ms. Kaur ask for --
13 restate the question, then we will take it from there.

14 MS. KAUR: Can I just ask my same question? Is
15 that -- I'm not sure.

16 THE COURT: Ask whatever question you want to ask.
17 I'm not sure you were finished with the question. I'm
18 not sure.

19 MS. KAUR: I have.

20 THE COURT: Okay. Then re-ask it just to make sure
21 I followed. Maybe I got it wrong.

22 BY MS. KAUR:

23 Q Assume the public meeting law was followed by
24 the Watermaster, allowed approval of the salary schedule
25 in the closed session, would your determination be any

1 different under those circumstances concerning
2 Mr. Alvarez's final compensation?

3 MR. JENSEN: I reiterate the same objection.

4 MR. HERREMA: My concern is Ms. Kaur said no one
5 testified the salary schedule was approved in closed
6 session. I'm not sure what the hypothetical is.

7 MR. JENSEN: The bigger problem is we have no
8 ability to know what was approved in closed session and
9 what was discussed, so it will all be privileged and
10 confidential.

11 THE COURT: Okay. You are saying the evidence
12 indicates the salary schedule was only approved in
13 closed session?

14 MS. KAUR: I'm asking him to assume that the laws
15 allow the Watermaster to approve the salary schedule in
16 closed session. I'm not saying anyone testified that it
17 was approved in closed session -- that the salary
18 schedule was approved in closed session.

19 I'm just asking him to assume that the law or
20 regulation or whatever is applicable is -- whatever is
21 followed by Watermaster allows them to approve the salary
22 schedule in closed session. Just assume that.

23 THE COURT: Why would we assume that, not tracking
24 the facts presented?

25 MS. KAUR: Because Mr. Jensen has presented the

1 argument that the Watermaster is allowed to approve
2 their salary schedule and adopt it in closed session.
3 So I'm just asking him -- okay. If that is -- assume
4 those facts are true, would your determination change in
5 any way?

6 THE COURT: All right. I guess one problem I'm
7 having is I really want PERS -- I want you to focus on
8 explaining why the decision that was made was made not
9 also pre-staging what their arguments were. And one of
10 the reasons it is hard for me is because he hasn't
11 really made arguments.

12 I'm not sure they are arguing that or not.
13 Maybe you can wait until redirect or -- or rebuttal.
14 That might help me figure out how to handle some of the
15 objections.

16 Let me ask, Mr. Jensen. Is that an argument you
17 anticipate, what Ms. Kaur just described?

18 MR. JENSEN: Our argument would be the applicable
19 public meeting rules are with Watermaster rules because
20 in the Supreme Court are being -- or the Brown Act. So
21 it is, you know -- and, again, I don't know what
22 Watermaster -- so I'm saying that the action that we did
23 get in testimony from Mr. Joswiak, everything that they
24 did was pursuant and within that rule.

25 And they do have provisions about public

1 availability and about access to that information.
2 My argument is, again, deferring a little bit to them,
3 but the Watermaster hired and paid Mr. Alvarez
4 consistent with the applicable public meetings laws that
5 applied to it.

6 As far as this testimony, this is the first I
7 heard this testimony. So it is hard for me to know what
8 the facts are, so --

9 THE COURT: All right. Ms. Kaur, is it workable to
10 focus right now on direct on why these letters went out,
11 why PERS is including Watermaster pay? And then after
12 cross when you do redirect, you can clear up any area
13 that they bring up.

14 MS. KAUR: Yes. That's workable, your Honor.

15 THE COURT: Okay. Thank you.

16 BY MS. KAUR:

17 Q If you could turn to page 3 of Exhibit 4. Can
18 you tell us what the final compensation period of -- was
19 ultimately used for Mr. Alvarez?

20 A Yes, it was October 22nd, 2007, through April
21 30th, 2011.

22 Q Was the city -- was that one provided by the
23 City of Downey?

24 A That's correct.

25 Q And this letter provided for appeal rights; is

1 that correct?

2 A Yes.

3 Q Did the Watermaster appeal?

4 A Yes.

5 Q And if you could turn to Exhibit 5. Can you
6 tell us what this is?

7 A This is an amended determination letter that
8 went out on June 17th, 2013, to Mr. Alvarez, and a
9 similar letter was drafted and sent to Watermaster as
10 well.

11 Q Was this letter issued after the appeal that
12 was received from Watermaster?

13 A That's correct.

14 Q And can you tell us why this determination --
15 this amended determination was issued?

16 A Yes, because there was information provided to
17 CalPERS in the Watermaster's appeal that changed our
18 determination.

19 Q How did it change CalPERS's determination?

20 A There was additional information that
21 Mr. Alvarez was -- his -- separated on November 9th,
22 2011. And so we -- so we updated our determination
23 letter to include that information in our determination.

24 Q What was the -- was there anything -- so if you
25 could turn to page 2 of this determination letter. Page

1 2. On page 2 the determination states that all
2 compensation reported from November 9th, 2011, to May 4th,
3 2012, could not be used to calculate Mr. Alvarez's
4 retirement benefit.

5 Why was that determination made?

6 MR. HERREMA: Objection. I don't see that on page 2.

7 BY MS. KAUR:

8 Q Actually, on the very top of page 3. I will
9 just read the first paragraph. It says, "The service
10 credit associated with the severance pay awarded to you
11 from November 9th, 2011, to May 4th, 2012, will be
12 rescinded from your total service credit and will not be
13 used to calculate the retirement benefit."

14 Why was that determination made?

15 A That determination was made because information
16 provided by Watermaster indicated that he was --
17 indicated he was on administrative leave effective
18 November 9th, 2011, and he would be on leave through --
19 through the end of his contract.

20 However, when we took that information and
21 reviewed his employment agreement, it states that he was
22 only eligible for 12 days' administrative leave. So
23 there was also information stating that Mr. Alvarez --
24 or highlighting the fact that Mr. Alvarez secured a full
25 year of salary even if he was terminated without cause.

1 And so when we looked at that part of his
2 employment agreement, it did state that even if he was
3 terminated without cause, he would be paid for an entire
4 year. And so we determined that he was being paid
5 pursuant to that particular part of his contract or
6 employment agreement.

7 And because he was -- his employment
8 relationship with Watermaster was effectively separated,
9 he didn't have any -- there was no intention for him to
10 return after November 9th, 2011.

11 That was the date that we determined that he
12 was separated and no longer -- or at least we determined
13 that any pay after November 9th, 2011, would qualify as
14 final settlement pay because it was granted in
15 connection with a separation from employment.

16 And severance pay is not reportable to CalPERS.
17 And so we asked Watermaster to reverse that pay out of
18 our system. And that's doing with -- eliminate the
19 service credit that was granted for that particular pay.

20 Q At the time that this amended letter was
21 issued -- and let me actually just go this letter. If
22 you could turn to the last page of this letter.

23 A Of Exhibit 5?

24 Q Yes. This is also signed by Tomi Jimenez.
25 Did you draft this letter for her?

1 A Yes.

2 Q And when this letter was issued, had you seen
3 the confidential separation agreement and reviewed it?

4 A No.

5 Q Have you reviewed the confidential separation
6 agreement as you sit here today?

7 A Yes.

8 Q Was it reviewed after this amended
9 determination was issued under Exhibit 5?

10 A Yes.

11 Q Does the separation agreement -- anywhere in
12 there, does it say that Mr. Alvarez was placed on
13 administrative leave?

14 A I did not see that in the separation agreement.
15 Can I turn to it real quick?

16 Q Yeah. That's Exhibit 12.

17 A No, it says he was being terminated from active
18 employment effective November 9th, 2011.

19 MR. JENSEN: Objection. The document doesn't say
20 that he was terminated from active employment.

21 THE COURT: I think that's his interpretation. I
22 will give it the weight I think -- I will certainly
23 review the document. I will make my own decision.

24 Go ahead, Ms. Kaur.

25 ///

1 BY MS. KAUR:

2 Q And your interpretation that he was being
3 terminated from active employment, is that based on item
4 one, which states -- labeled termination of active
5 employment?

6 A Correct.

7 Q After reviewing the separation agreement, does
8 it change your determination in any way concerning
9 Mr. Alvarez? Does it change your determination in any
10 way?

11 A No.

12 Q Just going back a little bit. Did you also
13 review the salary matrix for 2012 and 2013?

14 A Yes.

15 Q And does that salary matrix qualify as a
16 publicly available pay schedule under 20636?

17 A No, it does not.

18 Q I'm asking for the purposes of Mr. Alvarez's
19 compensation. Is that your same response?

20 A Correct.

21 Q Why is that?

22 A Because the document did not have Mr. Alvarez's
23 position of chief executive officer on the document, and
24 it did not provide for the salary of \$228,000. And it
25 was -- at the time of our determination, we believed it

1 was approved in the confidential session of the closed
2 meeting.

3 Q And was the salary schedule that was approved
4 in open session by the Board on May 23rd, 2013, and I'm
5 referring to the salary schedule for 2012/2013. Does
6 that qualify as a publicly available pay schedule for
7 the purpose of Mr. Alvarez's pay compensation?

8 A Let me go back.

9 Q I'm looking at Exhibit 14. The salary schedule
10 is attached to Exhibit 16. It is page 4 on Exhibit 16.
11 If you could turn to page 4 of Exhibit 16, that's where
12 the salary schedule is attached, 2012/2013 salary
13 schedule.

14 A Page 4.

15 MR. JENSEN: Objection. If he can clarify.

16 MS. KAUR: If he could clarify.

17 MR. JENSEN: I don't know what he is looking at.

18 BY MS. KAUR:

19 Q If you could clarify?

20 A I'm looking at the salary matrix schedule for
21 the fiscal year -- the salary matrix for 2012/2013.

22 MR. JENSEN: Which exhibit?

23 THE COURT: Exhibit 16, page 120, down at the
24 bottom.

25 MR. JENSEN: Page 120 or 119?

1 MS. KAUR: 120.

2 MR. JENSEN: Okay. So 2012/2013.

3 MS. KAUR: That's what I have.

4 MR. JENSEN: I thought he was referring to the prior
5 page, page 119.

6 MS. KAUR: No.

7 MR. JENSEN: Okay.

8 BY MS. KAUR:

9 Q So this salary schedule was approved in open
10 session on May 23rd, 2013, and this is the salary
11 schedule for 2012/2013.

12 And does this qualify as a publicly available
13 pay schedule for the purposes of Mr. Alvarez's final
14 compensation?

15 A Well, no, it doesn't because Mr. Alvarez was
16 the CEO and not the general manager. Also, he was the
17 CEO from May 2011 through May 2012. And this is the
18 2012/2013 salary matrix, so this would have been
19 effective July 1st, 2012, which is after his
20 employment -- well, his contract period.

21 And so this would have been a salary matrix
22 after he was -- after his contract period. So, no, it
23 would not apply to Mr. Alvarez at all.

24 MS. KAUR: I don't have any further questions at
25 this time, your Honor.

1 THE COURT: Okay. Thank you. Do you want to do
2 anything with Exhibits 4 and 5?

3 MS. KAUR: Yes, I'd liked to have them admitted into
4 evidence.

5 THE COURT: Okay. Any objection by either side of
6 Exhibits 4 and 5?

7 MR. JENSEN: No objection, your Honor.

8 MR. HERREMA: No objection.

9 THE COURT: Okay. I will admit Exhibits 4 and 5.

10 (Complainant's Exhibit 4 and 5 were received
11 in evidence by the Court.)

12 MR. JENSEN: If we could have a brief recess.

13 THE COURT: We will go off the record for five
14 minutes.

15 (Recess)

16 THE COURT: My understanding Respondents have agreed
17 to have Mr. Herrema proceed with the next questions, so
18 when you are ready.

19 MR. HERREMA: Thank you, your Honor.

20

21 CROSS-EXAMINATION

22 BY MR. HERREMA:

23 Q Good morning, Mr Gutierrez.

24 A Good morning.

25 Q You mentioned when Ms. Kaur was asking what you

1 did, and you said that CalPERS only reviewed a
2 percentage of the files for retiring members in terms of
3 verifying their present compensation rate; is that
4 correct?

5 A That's correct.

6 Q And do you have an estimate of what percentage
7 CalPERS reviews?

8 A I'd be guessing.

9 THE COURT: Don't guess. If it's a fair estimate,
10 you can provide that. But don't guess or speculate.

11 THE WITNESS: I can't really say right now. I don't
12 really know the number.

13 BY MR. HERREMA:

14 Q When you testified I think you said CalPERS
15 reviewed a percentage of the retirement application. Do
16 you have an estimate what percentage that it was?

17 MS. KAUR: Objection. Asked and answered.

18 THE COURT: Overruled. I will give a little
19 latitude on cross. Go ahead.

20 THE WITNESS: We don't review all of them, is what I
21 was trying to get at there.

22 BY MR. HERREMA:

23 Q Are there any criteria that CalPERS use to
24 determine which files to review?

25 A I think, yes, there -- I believe there -- well,

1 not criteria, but we look at -- we definitely look at --
2 well, I mean we -- basically, we try to review all of
3 them. But we just don't have the resources to review
4 every single retirement application that comes to us.

5 Q Are there any criteria that CalPERS use to
6 decide which cases that they will review and which cases
7 it won't?

8 A There is a system that it runs through and
9 just -- it kind of sorts them out and assigns them out
10 to the unit to review. So the system basically does
11 that. I don't have the exact criteria. I don't know
12 the exact criteria used by the system.

13 Q Are you aware of what some of the criteria may
14 be?

15 A Yes. So, yeah. Basically, if there is any
16 change in the compensation, whether it is increased by a
17 percentage or decreased by a percentage, then we look at
18 it.

19 Q Is that the only criteria you are aware of?

20 A Yes.

21 Q Do you know what the percentages are in terms
22 of increase or decrease in salary?

23 A I'm not sure of the exact criteria at this
24 point.

25 Q Okay. One of the last things that you said

1 speaking with Ms. Kaur was the Watermaster 2012 salary
2 matrix would not be reliable for Mr. Alvarez's pay
3 because his employment had ended before July 1st, 2012;
4 is that correct?

5 A That's correct.

6 Q Could I draw your attention to page 3 of
7 CalPERS Exhibit 4. And the second full paragraph of
8 the page, the second sentence says, "The agency, which
9 is referring to Watermaster provided a document titled
10 Watermaster salary matrix 2012."

11 Do you see that sentence?

12 A Yes.

13 MS. KAUR: You are looking at page 3?

14 MR. HERREMA: Page 3 of CalPERS Exhibit 4.

15 THE COURT: Second full paragraph.

16 MS. KAUR: Okay.

17 BY MR. HERREMA:

18 Q Do you see that sentence?

19 A Yes.

20 Q You testified that page 3 of Exhibit 4 was the
21 initial CalPERS's determination letter on Mr. Alvarez's
22 retirement compensation; is that correct?

23 A Can you restate the question?

24 Q What is Exhibit 4?

25 A What is Exhibit 4? It is the determination

1 letter that was sent to Mr. Joswiak.

2 Q What determination?

3 A Determination regarding Mr. Alvarez's
4 compensation.

5 Q And you testified earlier that the 2012 salary
6 to his -- Mr. Alvarez was payrate; correct?

7 A Correct.

8 Q But this says that's what Watermaster had
9 provided to you; is that correct?

10 A That's correct.

11 Q So the basis for this determination letter,
12 what salary matrix was it?

13 A This letter we reviewed -- or the salary matrix
14 that was provided to CalPERS was 2012/2013 salary
15 matrix.

16 Q But you testified it isn't relevant to the
17 determination of Mr. Alvarez's payrate; correct?

18 MS. KAUR: He never testified it was not relevant.

19 MR. HERREMA: I believe he said it wasn't applicable
20 to the report.

21 THE COURT: There is a difference in my mind between
22 applicable and relevant.

23 BY MR. HERREMA:

24 Q I don't -- it wouldn't apply to Mr. Alvarez?

25 A Yes.

1 Q Final payrate?

2 THE COURT: I don't think he said relevant. I think
3 that is the problem that Ms. Kaur has.

4 MR. HERREMA: I will withdraw and restate the
5 question.

6 BY MR. HERREMA:

7 Q You stated that the 2012/2013 matrix wasn't
8 applicable to Mr. Alvarez's payrate because his
9 employment ended prior to July 1st, 2012; is that
10 correct?

11 MS. KAUR: July 1st, 2000.

12 MR. HERREMA: Yes.

13 THE WITNESS: It wouldn't validate his reported
14 compensation.

15 BY MR. HERREMA:

16 Q I don't think that's what you said. I think
17 you said it wouldn't be applicable.

18 A Well, it wouldn't validate his reported
19 compensation.

20 Q Do you think now that it is applicable, that
21 payrate?

22 A I don't think it validates his reported
23 compensation.

24 Q I don't think you are answering my question.

25 MS. KAUR: He's answered the question.

1 THE COURT: Do you recall what he is asking you?
2 As you are sitting here today, do you still believe that
3 the 2012/2013 matrix?

4 BY MR. HERREMA:

5 Q I was just confirming his testimony that the
6 2012/2013 salary matrix to May to what Mr. Alvarez's
7 final payrate would be.

8 A So my answer is that it doesn't validate his
9 reported compensation. Is that not answering your
10 question?

11 Q I don't believe you answered the question.

12 MS. KAUR: I believed he answered the question.

13 MR. HERREMA: Maybe that is answering it in and of
14 itself.

15 THE COURT: Okay.

16 BY MR. HERREMA:

17 Q At this time this letter was sent, February of
18 2013, you had reviewed the 2011/2012 pay schedule, have
19 you?

20 A It is not stated in the letter that we received
21 the 2011/2012 matrix.

22 Q So the determination letter was based on the
23 2011/2012 matrix, was it?

24 A No.

25 Q So how did you form the conclusion about the

1 2011/2012 pay schedule matrix that Ms. Kaur had asked
2 you about earlier?

3 MS. KAUR: Objection. Vague.

4 THE COURT: Do you understand what he's asking you?

5 THE WITNESS: I'm not sure exactly.

6 THE COURT: Can you rephrase it?

7 BY MR. HERREMA:

8 Q Your response to one of Ms. Kaur's questions
9 earlier was that the 2011/2012, Watermaster matrix wasn't
10 a publicly available pay schedule; is that correct?

11 A I believe I did, yes.

12 Q And how did you form that conclusion?

13 A By reviewing it for this proceeding.

14 Q When you say this proceeding, what are you
15 referring to?

16 A I'm referring to this hearing today.

17 Q Okay. But you hadn't reviewed the 2011/2012
18 matrix of this February 2013 determination letter; is
19 that correct?

20 A That's correct.

21 Q Do you remember when you first reviewed the
22 2011/2012 pay matrix?

23 A I don't recall.

24 Q I think you just testify -- well, do you agree
25 that the pay matrix is applicable in determining

1 Mr. Alvarez's payrate from Watermaster?

2 A I'm not sure -- do you mean -- what you mean by
3 applicable?

4 Q I don't think you got -- had a problem
5 understanding when you had the question before.

6 Is the '11/'12 Watermaster pay salary matrix
7 something that would be applicable to your determination
8 of Mr. Alvarez's Watermaster payrate?

9 A I believe it was not provided for our
10 determination at the time of our determination.

11 Q I think we have established it is something to
12 determine what it is. The Watermaster 2011/12 pay
13 matrix, is that something that is applicable to the
14 determination Mr. Alvarez's Watermaster payrate?

15 MS. KAUR: Objection. Asked and answered.

16 THE COURT: Overruled. You can answer.

17 THE WITNESS: Let me -- what document exactly are
18 you referring to?

19 BY MR. HERREMA:

20 Q This is a copy of page 3 of Exhibit 16. It is
21 salary matrix for 2011/2012. You previously testified
22 that you analyzed the 2011/2012 matrix. Which 2011/2012
23 matrix did you review?

24 A This is the '11/'12 matrix that I reviewed.

25 Q And the '11/'12 matrix, is that what would be

1 applicable to Mr. Alvarez's payrate at Watermaster?

2 A Not this one because it was approved after
3 Mr. Alvarez was already retired.

4 MR. JENSEN: Objection. Misstates Watermaster's
5 testimony.

6 THE COURT: Overruled.

7 BY MR. HERREMA:

8 Q But if there was -- this is a hypothetical.

9 If you -- there was a defined publicly
10 available 2011-12 salary matrix, would that be
11 applicable to determining Mr. Alvarez's pay rate?

12 A If there was a publicly available salary matrix
13 for 2011/2012 that met the criteria contained in 570.5
14 and Government Code Section 20636, then we would
15 definitely review that in order to make a determination
16 if it was approved and adopted in open session.

17 Q So would it be applicable to the determination
18 of the payrate?

19 MS. KAUR: Objection. Vague. What do you refer to
20 it would be applicable?

21 THE COURT: Sustained.

22 MR. HERREMA: I've asked him whether -- if he found
23 in '11/'12 Watermaster salary matrix that met all of the
24 requirements of being publicly available, would that be
25 applicable to the determination of Mr. Alvarez's

1 Watermaster payrate. He said he would.

2 BY MR. HERREMA:

3 Q Does that mean that it would be applicable?

4 A If it met all the criteria and the Government
5 Code, yes.

6 Q Okay. You were present during all of the
7 testimony of April 11th; is that correct?

8 A Yes.

9 Q April 11th, 2016, in this Matter; is that
10 correct?

11 A Yes.

12 Q Were you present when Mr. Joswiak was
13 testifying about information that was sent to the water
14 district in September 2011?

15 A Yes.

16 Q Do you recall what Mr. Joswiak indicated that
17 he had sent to Monte Vista Water District?

18 A I would have to review the documents, but I
19 do -- I recall that he sent an e-mail that included a
20 tax matrix.

21 Q If I could direct your attention to Watermaster
22 Exhibit R. Do you have it before you?

23 A Yes.

24 Q Can you review that e-mail? It is Exhibit R.
25 Do you see that Mr. Joswiak has told Ms. Tracey from the

1 Monte Vista Water District he is sending information in
2 response to the Watermaster employee salary matrix?

3 A Yes.

4 Q And then are you able to read at the top what
5 the attachments are that was sent?

6 A The title of the attachment, yes.

7 Q Is one of those salary for 2011/2012?

8 A Yes.

9 Q And what is the date of this e-mail?

10 A September 5th, 2011.

11 Q Do you say that if a salary schedule existed at
12 that time for 2011/2012, it is shared with the person who
13 requested it and Watermaster, that it is a publicly
14 available pay schedule?

15 MS. KAUR: Objection. Assumes facts not in
16 evidence. There is assumption this salary schedule for
17 2011/2012 is the same as the one under Exhibit 16.

18 MR. HERREMA: I have not assumed that. I'm asking a
19 question. If a 2011/2012 salary schedule was provided
20 to the requesting entity, would that be considered a
21 publicly available pay schedule?

22 MS. KAUR: But what is the 2011/2012 salary
23 schedule? We don't know. Hasn't seen the information
24 that the one under Exhibit 16 has.

25 MR. HERREMA: We haven't talked about the details

1 yet. Let me finish my line of questioning. At this
2 point I'm asking specifically if there was a salary
3 schedule, 2011/2012, that was provided through this
4 e-mail, would he consider that to be a publicly
5 available pay schedule?

6 THE COURT: That particular document that was
7 attached to the e-mail and sent to the person requesting
8 it?

9 MR. HERREMA: Correct.

10 THE COURT: Do you understand?

11 THE WITNESS: I understand.

12 THE COURT: Okay. You can answer.

13 THE WITNESS: No, it is not.

14 BY MR. HERREMA:

15 Q Why is that?

16 A Because there was no evidence it was approved,
17 that it was available for public scrutiny, that there
18 was any public action or consent on it. And it is --
19 there is no evidence that there is -- that it is even a
20 salary schedule other than any of the attachments.

21 Q I'd like to unpack what you said, so just --
22 I'm not asking a question. I'm helping me recall what
23 you just said.

24 MS. KAUR: I'm sorry. I did not hear what you said.

25 MR. HERREMA: This isn't a new question. I want to

1 unpack what he said. I need a little help with the
2 multiple list, so I just want to clarify what those
3 factors were. It may be sufficient to have the reporter
4 read back the answer.

5 (Record read)

6 BY MR. HERREMA:

7 Q So the factors were there was no evidence it
8 was available for public review, there was no public
9 action, and there -- other than the name of the
10 attachment on the e-mail, you don't know that salary
11 existed.

12 Did I summarize your factors, correctly?

13 A Basically, generally there is -- obviously,
14 there is some -- I believe what I said there was -- let
15 me. Yes.

16 Q And so the fact that there is -- well, why
17 don't we first introduce S. This is a copy of the
18 2011/2012 salary schedule that was attached to this
19 e-mail.

20 MR. HERREMA: And I just want to represent to the
21 parties that this is part of a subsidized document
22 that had been designated and identified previously as
23 Mr. Alvarez's Exhibit 264, which was withdrawn
24 yesterday.

25 But these are pages that were part of that

1 exhibit, some designated and included in all of the
2 binders. It is probably easier to separately mark it.

3 MR. JENSEN: I will just represent the two pages
4 that we went over was the second part because it was a
5 draft.

6 THE COURT: Okay. Thank you. So marked.

7 (Respondent's Exhibit S was marked for
8 identification by the Court.)

9 MS. KAUR: I object. It lacks foundation.

10 THE COURT: Object to questions about it? It has
11 not been offered yet. Are you offering it now?

12 MR. HERREMA: I asked it be identified.

13 THE COURT: Okay. Done that. Is there an objection
14 to questions, or is the objection to offering it,
15 Ms. Kaur?

16 MS. KAUR: There is objection to questions that even
17 if -- when it is offered, the lack of foundation. There
18 is no foundation to set in terms whether it was actually
19 accepted or existed in 2011.

20 THE COURT: Okay.

21 MR. HERREMA: Mr. Joswiak can testify to that. It
22 is kind of out of order here.

23 THE COURT: Okay.

24 MR. HERREMA: So when he testifies he is going to
25 say it was part of the attachment to Exhibit R.

1 THE COURT: I will let him connect the dots later.
2 If he doesn't, you can move to strike.

3 MS. KAUR: Thank you.

4 THE COURT: Go ahead, Mr. Herrema.

5 BY MR. HERREMA:

6 Q Mr. Gutierrez, you have been provided with a
7 copy of Exhibit S, which is titled Chino Basin
8 Watermaster salary schedule 2011/2012. And I will
9 represent to you there will be testimony to indicate
10 that this was attached to Exhibit R, the e-mail salary
11 schedule 2011-'12.

12 Do you have Exhibit S before you?

13 A Yes.

14 Q Were you present yesterday when Mr. Joswiak
15 was testifying about how the Watermaster salary
16 schedules from 2011, '12, '13 were used by Watermaster?

17 A Yes.

18 Q Do you recall that he said that the salary
19 schedule was put together as part of the budget process
20 for the second quarter of the year in preparing of the
21 budget for the next fiscal year?

22 A Yes.

23 Q I think the three factors you used to not being
24 able to use the salary schedule attached to this e-mail
25 was the salary schedule not being used to determining

1 Mr. Alvarez's payrate were -- wasn't available for
2 public review, there wasn't -- there is no evidence of
3 salary schedule.

4 If the testimony that I told you is forthcoming
5 from Mr. Joswiak about the salary schedule attached to
6 the e-mail, would that satisfy your third concern?

7 A No, because my recollection of the testimony
8 was that it was -- the budget was used to formulate
9 this, but that this salary schedule was never actually
10 attached to the budget and was not approved.

11 Q The third factor you mention was that it might
12 not actually be the salary schedule we just have
13 referred to, the attachment here?

14 A Right.

15 Q So the fact that you have seen this salary
16 schedule now, that doesn't satisfy your concern that it
17 was actually the salary schedule?

18 A There is a document, yes, that would be what
19 the attachment, salary schedule 2011/2012, that would be
20 the Excel file.

21 Q And this is the document that was sent to
22 Ms. Tracey from the Monte Vista Water District attached
23 to the September 15, 2015. That is Exhibit R.

24 Would that satisfy your concern that
25 Mr. Alvarez's salary schedule might have been available

1 for public review?

2 A No. Because it wasn't posted at the employer's
3 place of business or it wasn't on the employer's
4 website.

5 Q These factors that you cited posted at the
6 employer's place of business or available for review,
7 where are these factors coming from?

8 A Well, they are specific to Government Code -- I
9 mean, California Code of Regulation 570.5. But it is
10 also part of the Government Code Section 20636, which
11 states that they have to be publicly available.

12 Q So sending this document out to a requested
13 entity doesn't satisfy the public availability
14 requirement in your mind?

15 A No.

16 Q Why is that?

17 A Because it is clear to me that it would have to
18 be available to -- not just to Tracy Tracey but the public
19 at large.

20 Q Do you have information that it wasn't
21 available to the public at large?

22 A It wasn't posted at the employer's place of
23 business, and it wasn't included on the -- it wasn't
24 located on the employer's website.

25 Q How do you know that?

1 A Because when I went to look for the publicly
2 available pay schedule in reviewing Mr. Alvarez's
3 compensation, I was unable to find it.

4 Q Did you go to Watermaster's office to see if it
5 was posted at the office?

6 A No, I did not.

7 Q What did you look at?

8 A I looked at the employer's website.

9 Q Turn your attention to 570.5. Do you have that
10 in front of you?

11 A Yes.

12 Q It says, "To be posted at the office of the
13 employer or immediately accessible and available for
14 public review from the employer during normal business
15 hours or posted on employer's internet website."

16 Did I read that accurately?

17 A Yes.

18 Q There are three different criteria there that
19 can satisfy this 570.5?

20 A That is correct.

21 Q So when you are reading that, all three of
22 those wouldn't need to be satisfied; isn't that correct?

23 A That's correct.

24 Q So it wouldn't need to be posted at the office
25 and posted at the employer's internet website and

1 immediately accessible and available for public review;
2 is that correct?

3 MS. KAUR: Asked and answered.

4 THE COURT: Overruled. You can answer.

5 THE WITNESS: Yes.

6 BY MR. HERREMA:

7 Q So the fact that this document was provided
8 after request wouldn't satisfy your concern that it
9 would be immediately accessible and available for public
10 review?

11 A That's correct.

12 Q Just -- we were looking at 570.5. Watermaster
13 has taken the position in these proceedings it is not
14 applicable to Mr. Alvarez's payrate because it wasn't in
15 effect.

16 Do you know when it became effective?

17 A Mr. Alvarez's payrate?

18 Q No, 570.5.

19 A 570.5 became effective August 10, 2011.

20 Q And would it have been applicable to payrates
21 and publicly available pay schedules that were in
22 existence at the time they were in effect?

23 MS. KAUR: Objection. Calls for a legal conclusion.

24 THE COURT: Generally by virtue of the letter, that
25 has been accepted opinions. I think it's pretty clear

1 he already made that decision. I think it is fair for
2 him to explain now why. I mean, he is telling us he
3 drafted this letter and he's applying the regs. So
4 Mr. Herrema is basically asking him why in light of when
5 it was -- the effective date.

6 I will overrule. You can answer.

7 THE WITNESS: It was a clarifying reg, so these
8 were -- these requirements were always in place.

9 BY MR. HERREMA:

10 Q So I just want to turn your attention back to
11 CalPERS Exhibit Number 4. The first page, the very
12 bottom there is a definition of payrate, Government Code
13 Section 20636. Do you see that there?

14 MS. KAUR: Which page? I'm sorry.

15 MR. HERREMA: The first page.

16 THE COURT: Mr. Herrema, let me just ask. We are at
17 our midmorning break. Is this a good time or is there
18 a better time? I don't want to interrupt.

19 MR. HERREMA: Can I just ask this question and then
20 one follow up and we could break?

21 THE COURT: Sure.

22 BY MR. HERREMA:

23 Q Do you see at the bottom of page 1 of Exhibit 4
24 the definition of payrate from Government Code Section
25 20636?

1 A Yes.

2 Q If you turn to the second page. At the very
3 bottom can you read that first sentence?

4 A "Payrate must also meet specific provisions in
5 the California Code of Regulation Section 570.5."

6 Q 570.5 isn't really clarifying what 20636
7 already says, is it?

8 A I believe it is.

9 Q The language there also meets this specific
10 requirements. You think it is just a clarification of
11 what 20636 already said?

12 MS. KAUR: Objection. Vague.

13 THE COURT: You can answer.

14 THE WITNESS: Can you restate the question, please?

15 MR. HERREMA: Can you read it back? Can the
16 reporter read it back?

17 THE COURT: Yes.

18 (Record read)

19 THE WITNESS: I'm still -- I'm not -- can you
20 restate it again?

21 THE COURT: Can you clarify?

22 BY MR. HERREMA:

23 Q In your opinion all the specific provisions
24 this letter says the payrate must also meet -- also meet
25 the additions listed on page 12, 20636, you think that's

1 a clarification that was already 20636; is that correct?

2 A I believe so.

3 MR. HERREMA: We can break now.

4 THE COURT: Okay. Thank you. We will take a
5 ten-minute recess and restart again at 10:50. We are
6 off the record.

7 (Morning recess)

8 THE COURT: Mr. Herrema.

9 BY MR. HERREMA:

10 Q I'd like to -- Mr. Gutierrez, I'd like to turn
11 your attention to the exhibit that has been designated
12 as Alvarez 259. It should be in the real big binder in
13 front of you on your left.

14 A Okay.

15 Q Do you recognize that -- what is behind Exhibit
16 259?

17 A I'm reading it. I'm assuming that this was
18 sent to me. It is an e-mail from Mr. Joswiak to me.

19 Q The entire exhibit is a chain of e-mails
20 between you and Mr. Joswiak between Thursday, November
21 15, to Friday, November 16, 2012?

22 A Correct.

23 Q Based on the name on the upper right-hand
24 corner, it looks like you presented or it was presented
25 from your account; is that correct?

1 A Correct.

2 Q Turn your attention to the very bottom of page
3 3. You asked Mr. Joswiak a question. There is a
4 question whether Mr. Alvarez's salary was ever made
5 public during a public records -- I'm sorry -- a public
6 request act or were there any publication due to a
7 Public Records Act at any point.

8 Do you see that question?

9 A Yes, I do.

10 Q So why was that important to you at this point
11 in time?

12 A At this point in time we were just trying to
13 find out any type of public action taken and noticed
14 to -- to try to review M.R. -- review Mr. Alvarez's and
15 the Watermaster's reported compensation.

16 Q That's not what that question says. It is not
17 asking about public agency. It is asking about the
18 public availability, isn't it?

19 A It is asking if we -- if Watermaster ever made
20 public due to a Public Records Act or through any
21 publication or just happened to be published at any
22 point. That's what we were asking.

23 Q That doesn't have to do with a publication, it
24 has to do with the public review credibility -- public
25 availability? I'm sorry.

1 A Yes, public availability.

2 Q In your mind this e-mail from Mr. Joswiak to
3 Monte Vista Water District with the 2011-12 salary
4 schedule wouldn't be public availability?

5 A I'm sorry. Could you repeat the question?

6 Q In your mind -- actually, let me ask you a
7 question first.

8 Could you turn to what has been marked as
9 Exhibit S, Watermaster Exhibit S. Do you have that
10 before you?

11 A Yes.

12 Q Can you turn your attention to the top. There
13 is a list of positions running down the left-hand side
14 of the page.

15 What is the first position title that is listed
16 there?

17 A General manager slash CEO.

18 Q Looking at the salary listed at step G, what is
19 that?

20 A It is 228,000.

21 Q What is the monthly salary under step G?

22 A 19,000.

23 Q Have you reviewed if Mr. Alvarez was paid
24 pursuant to the agreement with Watermaster?

25 A Yes. It was 19,000 per month.

1 Q Same as what is shown in this schedule; is that
2 correct?

3 A That's correct.

4 Q And you testified earlier that this is the
5 salary that Watermaster reported to CalPERS; is that
6 correct?

7 A That's correct.

8 Q And going back to my prior question in regards
9 to your question to Mr. Joswiak on the bottom of page 3
10 of 259, the e-mail that was sent from Mr. Joswiak to
11 Monte Vista Water District attached to the salary
12 schedule, that would constitute public availability of
13 the salary schedule?

14 I was holding in my hand Exhibit S, the 2011-12
15 salary schedule.

16 A I'm sorry. Can you restate that?

17 Q The fact that Exhibit S was sent by Mr. Joswiak
18 through the e-mail that is labeled R to the Monte Vista
19 Water District September 2011, would not constitute
20 public availability of that salary schedule in your
21 mind; is that correct?

22 A That's correct.

23 Q Why is that?

24 A Because it was requested and had to be
25 requested. It wasn't immediately available. And,

1 again, I don't see anywhere where this was publicly
2 approved.

3 MR. HERREMA: I'm going to object to that part of
4 the answer as being nonresponsive. I asked a question
5 about public availability.

6 THE COURT: I think that is part of his answer. You
7 are just going to have to deal with it. I think it is
8 responsive. Whether or not you agree or it is correct,
9 that is something I will decide.

10 MR. HERREMA: Okay.

11 BY MR. HERREMA:

12 Q How do you know that the salary schedule in
13 Exhibit S wasn't immediately publicly available?

14 A Because it wasn't on the employer's website and
15 it wasn't -- it is immediately -- immediate means that
16 someone can see it. Immediately just means that it is
17 immediate right then and there.

18 Q How do you know it wasn't immediately
19 available?

20 A There is no evidence that it was immediately
21 available.

22 Q Do you have evidence it wasn't immediately
23 available?

24 MS. KAUR: Objection. Asked and answered.
25 Argumentative.

1 THE COURT: Overruled. You can answer.

2 THE WITNESS: I'm sorry. Can you repeat the
3 question?

4 BY MR. HERREMA:

5 Q Do you have any evidence that the salary
6 schedule, that is Exhibit S, was not immediately
7 available?

8 A I don't know. I'm not sure how to -- I'm not
9 sure. I don't have -- so my response before was I don't
10 have any evidence that it was immediately available.
11 And so that's not responsive to your question?

12 Q I think I asked if it was immediately available
13 and you said it wasn't. You said -- what evidence do
14 you have that it wasn't immediately available?

15 A Well, looking at this e-mail, it looks like it
16 was requested on September 8th and so it wasn't provided
17 until September 15th. So I don't know if that was only
18 the first time that she asked for that information, or --
19 so I guess my answer would be that seven days minimum
20 would not be immediate.

21 Q You don't have any evidence it couldn't have
22 been made available prior to seven days later, do you?

23 MS. KAUR: Objection. Speculation.

24 THE COURT: Sustained.

25 MR. HERREMA: I asked if he had any evidence.

1 THE COURT: I think he answered your last question
2 that you asked. I agree with the objection Ms. Kaur
3 made. You can rephrase it or try again.

4 BY MR. HERREMA:

5 Q When you are using the term immediately
6 available, are you paraphrasing the language in
7 Regulation 570.5 (a)(5)?

8 A Yes. I would say that. I believe that's what
9 we talked about previously.

10 Q Where does that concern about immediately
11 available -- where does that come from?

12 MS. KAUR: Objection. Vague. Calls for
13 speculation.

14 THE COURT: Do you understand what he's asking?

15 THE WITNESS: Yes.

16 THE COURT: Overruled. You can answer.

17 THE WITNESS: I think ultimately it stems from
18 Government Code Section 20636 that it must be publicly
19 available.

20 BY MR. HERREMA:

21 Q Regulation 570.5 (a)(5) says, "Is posted at the
22 office of the employer or immediately accessible and
23 available for review from the employer during normal
24 business hours or posted on an internet website"; is
25 that correct?

1 A That's correct.

2 Q So that immediate availability, is that coming
3 from 570.5?

4 MS. KAUR: Objection. Asked and answered.

5 THE COURT: Overruled. I will give some latitude on
6 cross. You can answer.

7 THE WITNESS: I don't think the concept comes from
8 570.5.

9 BY MR. HERREMA:

10 Q Where do you think the concept comes from?

11 MS. KAUR: Same objection. Asked and answered.

12 THE COURT: Overruled. You can answer.

13 THE WITNESS: From 20636 (b)(1).

14 THE COURT: I'm sorry?

15 THE WITNESS: Government Code Section 20636 (b)(1).

16 THE COURT: Thank you.

17 BY MR. HERREMA:

18 Q Are the words immediately available in
19 20636 (b)(1)?

20 A No.

21 Q So how do you read those words into that
22 language from 20636 (b)(1)?

23 A I think it is part of the public availability.

24 Q You interpret -- absent 570.5, you interpret
25 20636 (b)(1) is the requirement of publicly available pay

1 schedule to mean immediately available; is that correct?

2 A Correct.

3 Q You testified earlier that upon the
4 determination that Mr. Alvarez's pay after the November
5 9, 2011, was severance pay that you asked Watermaster to
6 reverse Mr. Alvarez's pay; is that correct?

7 MS. KAUR: Objection. Vague as to the term
8 determination. There are two determinations here.

9 THE COURT: I'm sorry. I didn't hear.

10 MS. KAUR: Vague as to the term determination.
11 There were at least two determinations made by CalPERS.

12 MR. HERREMA: I'm specifically referring to the
13 determination about the severance pay.

14 THE COURT: Was there more than one and is that in
15 the amended statement?

16 MR. HERREMA: Yes, it is in Exhibit 5.

17 THE COURT: Okay. You can answer.

18 THE WITNESS: Can you restate? I'm sorry.

19 BY MR. HERREMA:

20 Q You testified that upon CalPERS's determination
21 pursuant to Exhibit 5 regarding the severance pay to
22 Mr. Alvarez, that CalPERS asked Watermaster to reverse
23 its pay to Mr. Alvarez; is that correct?

24 A Can I clarify?

25 Q I believe that's what you testified. Is that

1 what you testified?

2 A I'm not sure without going back and reading
3 word-for-word. But I want to get it right. So I just
4 want to clarify what we are talking about.

5 Q Okay.

6 A So I apologize. The -- we requested the
7 Watermaster to reverse the payroll reported after
8 November 9, 2011 -- from November 9, 2011 through May 4,
9 2012.

10 Q Where is that documented?

11 A I will go back to 4.

12 Q I found it. Exhibit 4. It was not clear to me
13 that was something that happened after the severance pay
14 as you previously testified.

15 MS. KAUR: You found it on Exhibit 4?

16 MR. HERREMA: But not in regards to severance pay
17 but in regards --

18 MS. KAUR: There is also on page 5 regarding
19 severance, of Exhibit 5 at the very bottom. It is the
20 last sentence.

21 BY MR. HERREMA:

22 Q That was requested by the City of Downey?

23 A Yes, that was meant to be Watermaster.

24 MR. HERREMA: I have no further questions, your
25 Honor.

1 THE COURT: Okay. Did you want to offer any of the
2 exhibits that you identified? S is one. Do you want to
3 offer that one, or is there more foundation that you
4 need for that?

5 MR. HERREMA: If the parties want additional
6 foundation, that will be provided. It can be provided
7 by Mr. Joswiak.

8 THE COURT: Is there any objection? Do you need
9 foundation?

10 MS. KAUR: Yes.

11 THE COURT: Okay. Do you understand that you are
12 going to need to ask questions about it? 259, are you
13 offering it at this time?

14 MR. HERREMA: Yes.

15 THE COURT: Any objection to 259?

16 MS. KAUR: No objection, your Honor.

17 MR. JENSEN: No objection.

18 THE COURT: Okay. I will admit 259. Were there any
19 other exhibits?

20 (Respondent's Exhibit 259 was received in
21 evidence by the Court.)

22 MR. HERREMA: Nothing new.

23 THE COURT: Okay. Mr. Jensen, are you ready?

24 MR. JENSEN: We are going to 12:00 about?

25 THE COURT: Yes.

1 BY MR. JENSEN:

2 Q Good morning, Mr. Gutierrez.

3 A Good morning.

4 Q I had previously examined you in an
5 administrative hearing; is that correct?

6 A That is correct.

7 Q Do you recall what it was?

8 A I do not recall the specifics of the case.

9 Q So, Mr. Gutierrez, you worked in the -- what is
10 called the compensation review unit?

11 MS. KAUR: Objection. Vague as to testified. Are
12 you referring to his testimony today or previous
13 hearing?

14 MR. JENSEN: It's the same.

15 BY MR. JENSEN:

16 Q You work in the compensation review unit?

17 A Yes.

18 Q And you testified you worked there for ten
19 years; is that correct?

20 A That's correct.

21 Q How long have you been testifying for CalPERS
22 in the aspect of representation of the compensation
23 review unit?

24 A Well, for most of those ten years. I started
25 out pretty quickly.

1 Q And how many times have you testified for
2 CalPERS?

3 A I want to say anywhere around six or seven
4 times that I can distinctly remember.

5 Q Over those ten years?

6 A Yes.

7 Q What was the date of the first time you
8 testified for CalPERS?

9 MS. KAUR: Objection. Irrelevant.

10 THE COURT: How is that relevant?

11 MR. JENSEN: Can I develop the testimony and then I
12 will describe the relevance of it? Give me a little
13 leeway.

14 THE COURT: Okay. A little.

15 MR. JENSEN: A little.

16 BY MR. JENSEN:

17 Q What was the date of it?

18 A I don't recall.

19 Q Did the matter involved a publicly available
20 pay schedule?

21 A I don't recall.

22 Q Do you remember the first time you testified
23 for CalPERS in a matter involving a publicly available
24 pay schedule?

25 A No.

1 Q Have you ever testified before for CalPERS
2 regarding publicly available pay schedule?

3 A Not sure.

4 Q What are the principal issues that arise in the
5 compensation review unit typically?

6 MS. KAUR: Objection. Vague.

7 THE COURT: Sustained.

8 BY MR. JENSEN:

9 Q What issues do you identify as problems most
10 often in the compensation review unit?

11 MS. KAUR: Same objection.

12 THE COURT: Overruled. You can answer.

13 THE WITNESS: Reporting compensation that doesn't
14 comply with the Government Code.

15 BY MR. JENSEN:

16 Q What aspects of reporting compensation doesn't
17 comply with the Government Code?

18 A Well, there is two aspects, payrate and special
19 compensation.

20 Q And what about reporting in particular are
21 problems that are often identified?

22 MS. KAUR: Objection. Vague as to reporting.

23 THE COURT: Do you understand what he's asking?

24 THE WITNESS: No.

25 THE COURT: Can you clarify?

1 BY MR. JENSEN:

2 Q You just testified that the compensation review
3 unit looks for problems with reporting; is that correct?

4 A Well, it's problem with -- with compliance.

5 Q And what other common problems with compliance
6 that are identified in the compensation review unit?

7 A Compensation that is reported that is out of
8 compliance.

9 Q What are the problem areas that are out of
10 compliance that you find often in the compensation
11 review unit?

12 A I missed the first part of it.

13 Q What are the compliance problems that you often
14 identify in your job?

15 A That they are out of compliance.

16 Q How are they out of compliance?

17 A Well, they don't meet the definitions contained
18 in the Government Code.

19 Q And how many of those are related to publicly
20 available pay schedules?

21 MS. KAUR: Objection. Vague.

22 THE COURT: Overruled. Do you understand what he's
23 asking?

24 MR. JENSEN: I can restate.

25 THE COURT: Okay.

1 BY MR. JENSEN:

2 Q How many of the compliance problems are related
3 to publicly available pay schedules?

4 A Do you want, like, a number or -- I don't really
5 know for sure.

6 Q A frequency. How often?

7 A I would say pretty frequent.

8 Q So it is a frequent matter that you testified
9 to as well?

10 A I don't recall.

11 Q Let me ask you a question. Are you aware of
12 when the publicly available requirement was added to
13 20636?

14 MS. KAUR: Objection. Calls for speculation.

15 THE COURT: All right. Don't guess or speculate.
16 If you know.

17 THE WITNESS: I do not know.

18 BY MR. JENSEN:

19 Q And if I hand you a copy of the PERL, would you
20 be able to tell from the language or the amendment to
21 20636 about when the PERL was last revised?

22 MS. KAUR: Objection. Calls for legal conclusion.

23 MR. JENSEN: When that section of the PERL was last
24 revised?

25 MS. KAUR: Objection. Calls for legal opinion,

1 legal conclusion.

2 MR. JENSEN: I'm asking if he can determine when the
3 PERL was revised based on that document.

4 THE COURT: That the publicly available payrate was
5 added to 20636?

6 MR. JENSEN: When -- I'm just asking him when it was
7 last revised.

8 MS. KAUR: When was that last revision?

9 BY MR. JENSEN:

10 Q I have in my hand here a 2012 copy of the PERL,
11 CalPERS Employees' Retirement Law. I believe if you
12 turn to 20636, there will be an indication of when it
13 was revised previous to that date in the amendment
14 provisions.

15 Are you familiar with what I'm talking about?

16 A Vaguely.

17 MR. JENSEN: Your Honor, may I approach?

18 THE COURT: With the PERL book that you have?

19 MR. JENSEN: Yes.

20 THE COURT: Okay. Yes.

21 MR. JENSEN: I'm just going to show your Honor the
22 issue is here. This is what I'm going to question him
23 about.

24 THE COURT: Okay.

25 MS. KAUR: Can I also have a copy because I don't

1 have a copy.

2 MR. JENSEN: I will just show counsel.

3 MS. KAUR: Can you just --

4 MR. JENSEN: This is the only copy I have. If you
5 want to look with --

6 MS. KAUR: I don't have that copy.

7 MR. JENSEN: I can just make a copy if you want to
8 do that.

9 THE COURT: If necessary, it might be. It goes -- I
10 think we are using it trying to refresh his
11 recollection. I don't want a legal extrapolation. I
12 can look at the statute history.

13 MR. JENSEN: I just have a question to follow up on
14 the testimony. It shouldn't be a legal question.

15 THE COURT: Okay.

16 BY MR. JENSEN:

17 Q Mr. Gutierrez, I'm going to ask you to refer to
18 this section at the end of 20636. If you want to take a
19 moment and familiarize yourself with it.

20 MS. KAUR: That is the 2012 copy of the PERL?

21 MR. JENSEN: That's the 2012 copy.

22 THE WITNESS: Okay.

23 BY MR. JENSEN:

24 Q Does that refresh your recollection on when the
25 PERL was last -- that 20636 was revised prior to the

1 date in question in this case?

2 A No.

3 Q Can you turn to the very last part of that
4 where it says "revised" -- let me approach. Last revised
5 by statute 2007, chapter 130.

6 Do you see that?

7 A Yes.

8 Q Does that have any meaning to you?

9 A Not that I am familiar with or that I know. I
10 don't know what that means, no.

11 Q You don't know what that means?

12 A No.

13 Q Has the PERL changed over time, in particular
14 20636?

15 MS. KAUR: Objection. Vague.

16 THE COURT: Overruled. You can answer if you know.

17 THE WITNESS: The PERL hasn't changed much since --
18 since I was there, since I began using it.

19 BY MR. JENSEN:

20 Q So over the last ten years, the PERL hasn't
21 changed much?

22 A No.

23 Q When you testified earlier --

24 MS. KAUR: I'm sorry. I have a late objection. Are
25 you referring to the code section, or are you referring

1 to the PERL in general?

2 MR. JENSEN: That was his testimony.

3 THE COURT: I took it as his general, nothing
4 specific. Was that what you were saying?

5 THE WITNESS: Yes.

6 BY MR. JENSEN:

7 Q The reason I'm asking this question is that
8 your testimony today was that the Regulation 570.5 has
9 always been there. Is that your testimony?

10 MS. KAUR: Objection. Misstates the testimony.

11 BY MR. JENSEN:

12 Q That sentence has always been in the PERL?

13 MS. KAUR: Same objection. Misstates testimony.

14 THE COURT: Sustained.

15 BY MR. JENSEN:

16 Q Let me clarify. What was your testimony
17 regarding 570.5 with respect to their inclusion prior to
18 the date of -- the effective date of 570.5?

19 MS. KAUR: Objection. Vague.

20 THE COURT: Do you understand what he's asking?

21 THE WITNESS: The last --

22 BY MR. JENSEN:

23 Q So 570.5 effective date of -- I think
24 August 2011?

25 A Correct.

1 Q Is that the date that you started and were
2 those terms or the requirements of public availability
3 in 570.5 -- were those requirements in existence prior
4 to the regulation?

5 MS. KAUR: Objection. Compound. Vague.

6 THE COURT: Overruled. You can answer.

7 THE WITNESS: I believe they clarified the
8 Government Code.

9 BY MR. JENSEN:

10 Q And so in clarification those terms must have
11 previously existed; is that correct?

12 A The -- I think I said that the context is from
13 20636.

14 Q What do you mean the context is from 20636?

15 A I believe the specifics are derived from the
16 Government Code.

17 Q What do you mean the specifics are derived from
18 the Government Code?

19 A The language contained in 570.5.

20 Q There were certain requirements that you listed
21 earlier today about, say, posted on the website. Let's
22 just take that.

23 Where do you see that in the language of 20636?

24 A I think it speaks to the public availability.

25 Q And my question is, when does the -- well,

1 first of all, in 2006 or 2007 when 20636 was revised
2 prior to 2012 -- in 2006 did CalPERS require employers
3 to post salaries on their website?

4 MS. KAUR: Objection to the extent it calls for
5 speculation.

6 THE COURT: Okay. If you know.

7 THE WITNESS: I don't recall.

8 BY MR. JENSEN:

9 Q Do you recall the first time CalPERS required
10 employers to post salary information on their website?

11 MS. KAUR: Same objection. To the extent it calls
12 for speculation.

13 THE COURT: Mr. Gutierrez, you don't know; is that
14 right?

15 THE WITNESS: Yes.

16 BY MR. JENSEN:

17 Q When was the first time that you recall that
18 employers were required to post on website about
19 salaries?

20 A I don't know.

21 Q And is there written rules in the compensation
22 review unit that specify how to apply this Regulation
23 570.5?

24 A I'm not aware of any written rules.

25 Q So is it fair to say you are allowed to your

1 discretion how to apply 570.5 in these matters?

2 A I would say yes.

3 Q And now let me turn your attention back to the
4 prior -- to the e-mail where you asked Mr. Joswiak
5 whether they had sent the salary information -- just let
6 me get the e-mail. It is in Exhibit 259.

7 Were you exercising your discretion here when
8 you asked whether the salary information had been made
9 public pursuant to Public Request Act? I believe it is
10 supposed to be Public Records Act.

11 A I believe I was just trying to get more
12 information.

13 Q And would it have been in your discretion, as
14 in some discretion allowed as to RPS-2 to determine a
15 public availability -- it had been provided due to the
16 Public Request Act through publication or happened to be
17 published at that point?

18 MS. KAUR: Objection. Vague.

19 THE COURT: Overruled. You can answer.

20 THE WITNESS: No.

21 BY MR. JENSEN:

22 Q And why not?

23 A Because these -- this not -- it doesn't meet
24 the requirements of public availability.

25 Q And that is in your discretion?

1 MS. KAUR: Objection. Vague as to discretion.

2 BY MR. JENSEN:

3 Q That's a determination in your discretion;
4 correct?

5 MS. KAUR: Same objection.

6 THE COURT: Overruled. You can answer.

7 THE WITNESS: Not in my sole discretion, no.

8 BY MR. JENSEN:

9 Q Is it within the discretion at least 'cause --
10 do you have a supervisor?

11 A Yes.

12 Q And your discretion has to -- so how does that
13 work? Tell me how does it work when you are exercising
14 your discretion. Tell me that process in particular
15 with approval by your supervisor?

16 MS. KAUR: Same objection. Vague as to the term
17 discretion.

18 THE COURT: Overruled. You can answer.

19 THE WITNESS: Yes, everything has to go the
20 supervisor.

21 BY MR. JENSEN:

22 Q So let me ask you about the process. How many
23 cases did you have actually during this period? How
24 many cases did have you in the compensation review unit
25 approximately?

1 MS. KAUR: Objection as to period. What time period
2 are you referring to?

3 MR. JENSEN: Let me ask him.

4 BY MR. JENSEN:

5 Q Mr. Gutierrez, when did you review this case?

6 A I don't recall the exact date, but judging from
7 these e-mails around November 2012.

8 Q And how many cases approximately did you have
9 on your desk at this time?

10 A I'm not really sure. I'd be guessing.

11 Q But I'm entitled to your best estimate.

12 A Anywhere from 20 to 100.

13 Q How long did these cases typically take to
14 resolve?

15 A We are supposed to complete five cases per day.

16 Q Five cases per day?

17 A Yes.

18 Q And so if you have 100 cases, that's 20 days'
19 work at least; correct?

20 A If it is 100 cases, correct.

21 Q Do you typically accomplish your five cases per
22 day allowance?

23 A As my job performance -- I'm sorry. Not
24 typically, no.

25 Q How many do you typically do a day?

1 A Typically, especially during this time period
2 it would probably be around three cases.

3 Q And how much -- so how many of those do you
4 resolve each issue, each case in the process by which
5 you seek information and seek to resolve them?

6 MS. KAUR: Objection. Vague as to the term resolve.

7 THE COURT: Sustained.

8 BY MR. JENSEN:

9 Q Tell me your typical -- actually, tell me your
10 process in this case what did you do?

11 A I can't recall the specifics. This was back in
12 2012.

13 Q To the best of your recollection.

14 MS. KAUR: I have a belated objection to that
15 question. Vague.

16 THE COURT: Sustained.

17 BY MR. JENSEN:

18 Q Do you recall if there was any flags or any
19 indication of what to look for when this case arrived on
20 your desk?

21 A I don't recall.

22 Q How did you start under -- when did you start
23 your review of this case?

24 A It was assigned to me.

25 Q Was it assigned to you with a particular

1 problem?

2 A Not particularly.

3 Q And so what did the -- what did the person who
4 assigned the case to you say to do with it?

5 MS. KAUR: Objection. Assumes facts not in evidence
6 that it was assigned by a person.

7 MR. JENSEN: I can --

8 THE COURT: Sustained.

9 BY MR. JENSEN:

10 Q How are the cases assigned to you?

11 A By our system.

12 Q And what is your system?

13 A MyCalPERS.

14 Q And so it is a computer system?

15 A Yes.

16 Q And is there any indication from the computer
17 of what to look for when you are assigned a case?

18 A I'm not aware of that.

19 Q So it is just random? What does the computer
20 system do when assigning you a case?

21 A It drops it in a bucket and we go out and look
22 at it.

23 Q So what do you do when you look at them? What
24 is in the bucket?

25 A Just the name and the CID, the retirement date,

1 and the received date and the requested completion date.
2 And then we go in and look at the actual -- like the
3 complete file after it is assigned.

4 Q So how do you go look at the complete file?

5 A We click through the system to see what's
6 reported, what they -- look at their retirement
7 application.

8 Q What was the first thing that you saw that was
9 -- you thought was out of compliance?

10 A I didn't know for sure if anything was out of
11 compliance when I first looked at it. There was
12 definitely a change in payrate in the final year that I
13 noticed.

14 Q And had the computer indicated that there was a
15 change in the final year?

16 A I don't think so.

17 Q Is that -- in the compensation review unit, are
18 you trained to look for specific things in your review?

19 A Yes.

20 Q And what are those things?

21 A Any increase in compensation in the final year.

22 Q What was the increase in Mr. Alvarez's
23 compensation in the final year?

24 A I believe he had a payrate of about 15,000 per
25 month and then he went to 19,000 per month.

1 Q And did he switch employers?

2 A Yes, he did.

3 Q And was switching employers a problem?

4 A No.

5 Q Was the increase was the issue that drew your
6 attention?

7 A At first, the increase in pay did. I didn't
8 know that he switched employers until after reviewing
9 it.

10 Q First you were focused on the increase in pay;
11 is that correct?

12 A That's correct.

13 Q And then what did you do?

14 A And then I pulled up his account and reviewed
15 it. And then I did notice that he had a change in
16 employer. And then I started my review by contacting
17 agencies, looking up -- looking for pay schedules on
18 websites.

19 Q And why did you to that? Why did you start
20 inquiring in new employer's information?

21 A Because I would have to. It was assigned to me
22 so I would have to verify it.

23 Q Is that a part of the process in the
24 compensation review unit? What did do you to get
25 additional information?

1 A I believe -- I don't recall exactly my --
2 exactly what I did. I don't recall.

3 Q And -- and you had -- you were -- still had --
4 working your five cases a day; correct?

5 A Correct.

6 Q And so the e-mail chain of November 15, 2012,
7 is part of your outreach to the employer?

8 A I would assume so, yes.

9 Q Why do you say assume so?

10 A I don't recall, actually.

11 Q Did you ever ask the Chino Water Basin for the
12 pay schedule for 2011/2012?

13 A I would assume, yes, because that was part of
14 the -- that would be part of the process.

15 Q Why do you assume that?

16 MS. KAUR: Objection. He just answered.

17 MR. JENSEN: I asked him why he assumed it.

18 THE COURT: Overruled. I will give him latitude on
19 cross.

20 THE WITNESS: Because that is part of the process.

21 BY MR. JENSEN:

22 Q Your testimony here -- pointed out your final
23 determination was based on the 2012/2013 pay schedule?

24 A Because that was what was provided to us.

25 Q And do you have a -- is that part of your job

1 also, asking them to provide the correct time period and
2 pay schedule for the person you are reviewing?

3 A Yes.

4 Q Did you do that?

5 A I believe so, but I don't -- I don't recall
6 exactly.

7 Q So let me just ask you a question about that
8 pay schedule, Exhibit S. That is the exhibit which we
9 have not quite laid a full foundation for.

10 But if Watermaster had sent this pay schedule
11 back to you if you had requested, CalPERS -- if you had
12 requested the 2011/2012 pay schedule and that Watermaster
13 had sent back this document in response to your inquiry,
14 would that document satisfy a pay schedule? Just the
15 pay schedule part of it.

16 MS. KAUR: Objection. Vague as to the term pay
17 schedule. I don't know if he is referring to a publicly
18 available pay schedule or using it completely as a
19 different term. If you could define it. Otherwise, it
20 is vague if you are saying pay schedule.

21 MR. JENSEN: I can clarify.

22 BY MR. JENSEN:

23 Q Are there requirements for pay schedules outside
24 of the publicly available part of it?

25 MS. KAUR: Objection. Vague.

1 THE COURT: Overruled.

2 THE WITNESS: Not outside of 20636.

3 BY MR. JENSEN:

4 Q Does the pay schedule, according to the most
5 recent regulation, have a list of every position and
6 payrate on it for one schedule?

7 MS. KAUR: Objection. Vague as to most recent
8 regulation.

9 THE COURT: Sustained.

10 BY MR. JENSEN:

11 Q Under 570.5, does a pay schedule have to list
12 every position and the pay for that?

13 A There is a listed criteria in 570.5.

14 Q I'm trying to get the pay schedule part of it
15 outside of the publicly available.

16 MS. KAUR: To that inquiry, I have an objection as to
17 relevancy. As well as aside from the fact that that
18 term has been identified, it is vague.

19 THE COURT: Okay. The question is just, is there a
20 requirement that there is pay schedule outside of
21 whether it is publicly available or not? Is that where
22 we are going with that?

23 MR. JENSEN: I think what I will do is walk through
24 the criteria and then satisfy that it is clear.

25 ///

1 BY MR. JENSEN:

2 Q Mr. Gutierrez, can you turn your -- if you keep
3 Exhibit S in front of you and then turn to your
4 determination letter in Exhibit 5. It lists the
5 criteria in 570.5, or you may know what it is.

6 A Can I look at my law book?

7 Q Can I look on with you?

8 A Sure.

9 MR. JENSEN: Your Honor, may I approach?

10 THE COURT: Yes.

11 BY MR. JENSEN:

12 Q Mr. Gutierrez, I'm just going to ask you --
13 there is certain requirements in here and you have
14 actually highlighted some of them. I don't want to look
15 at your work. I'm going to ask you about these
16 requirements in here.

17 MS. KAUR: Are you referring to the 570 requirement,
18 Section A, 1 through 8?

19 MR. JENSEN: Let the record reflect that I'm referring
20 to 570.5.

21 BY MR. JENSEN:

22 Q Just with reference to exhibit -- to Exhibit S,
23 does it identify the type of position and title for the
24 employee's position?

25 A I'm assuming so.

1 Q Does it show the payrate of each identified
2 position?

3 A Yes.

4 Q Does it show time base? Hourly, daily,
5 monthly, annually?

6 A Yes.

7 Q Does it indicate an effective date?

8 A Well, it doesn't say when it is effective. But
9 it says 2011/2012, so I would say that it is effective.
10 So saying that it is effective July 1st, 2011.

11 Q So would it be fair to characterize your issues
12 with this document, Watermaster document as referring
13 only to the public availability of the document rather
14 than the document itself?

15 MS. KAUR: Objection. Vague.

16 THE COURT: Overruled. You can answer.

17 THE WITNESS: I'm not sure I would go that far with
18 that. I don't see that it is available for public
19 inspection and if it was approved and adopted by the
20 employer governing body.

21 BY MR. JENSEN:

22 Q Those are the three problems you have; is that
23 correct?

24 A Just looking at this and the wording of 570.5.

25 Q Any other problem you have with it?

1 A Just looking at it here and also the e-mail
2 that was sent, it is showing that it was an Excel file.
3 So it could be changed at any point, so I don't know if
4 this was actually approved and adopted in this form.

5 Q Let me ask you. Is there -- is there any
6 indication there has been any documents that were hidden
7 or any documents that were changed, any fraud
8 perpetrated on CalPERS?

9 A I am not saying that, no. But when we
10 asked -- and I'm assuming we asked for this and it
11 wasn't provided when we asked for it.

12 Q You are assuming you asked for it?

13 A From the record it did not contain the CEO
14 position.

15 Q What record?

16 A From the e-mail that was -- that was referenced
17 in the CalPERS exhibits.

18 Q Show me. Tell me.

19 A 18.

20 THE COURT: I'm sorry? Which?

21 THE WITNESS: 18.

22 THE COURT: 18. Thank you.

23 BY MR. JENSEN:

24 Q Is there a particular page you are looking at?

25 A Yes. Page 3 in this folder.

1 MS. KAUR: Can we go to page 8 since that is the
2 complete e-mail?

3 BY MR. JENSEN:

4 Q What about that e-mail?

5 A Right here at the bottom, the second to last
6 paragraph it says that it did not include the CEO
7 position.

8 Q What did you think that meant?

9 A That it was not on the pay schedule.

10 Q At what pay schedule do you think they are
11 referring to?

12 A The 2000 -- I believe the 2011/2012.

13 Q Did they provide the 2011/2012 pay schedule to
14 you prior to your determination?

15 A Prior to the determination, I don't recall.

16 Q Prior to this date that you received the
17 2011/2012?

18 A This is February 20, 2013. I don't recall.

19 Q So they might have -- isn't it that they
20 provided the 2012/2013 pay schedule which had the
21 general manager's position on there?

22 MS. KAUR: Are you asking a question?

23 MR. JENSEN: Yeah, I am.

24 THE WITNESS: Sorry. Let me refer back to my
25 letter.

1 THE COURT: You are looking at Exhibit --

2 THE WITNESS: 4.

3 THE COURT: Thank you.

4 THE WITNESS: So this is February 20, 2013, and we
5 had not received the 2011/2012 pay schedule. And -- but
6 this is 2000 -- this February 22, 2013.

7 BY MR. JENSEN:

8 Q So two days later?

9 A Yes.

10 Q Isn't it because you are talking about two
11 different things, 2011/2012 had CEO, 2012/2013 changed
12 the position to general manager; isn't that correct?

13 A I don't think so.

14 Q You don't think that's what happened?

15 A No, I don't.

16 Q What do you think happened?

17 A I think that we didn't have the 2011/2012 pay
18 schedule, so we just used what we had to make our
19 determination.

20 Q Did you ask for the 2011/2012 pay schedule in
21 this period?

22 MS. KAUR: Objection. Vague as to "this period."

23 BY MR. JENSEN:

24 Q This time; February 2013?

25 A I believe we asked for it, but I don't -- I

1 can't tell you exactly what date we asked for it.

2 Q Do you think that Watermaster was now
3 generating a pay schedule after the fact to provide
4 documentation to support his payrate?

5 MS. KAUR: Objection to the extent it calls for
6 speculation.

7 THE COURT: Overruled. You can answer.

8 THE WITNESS: I don't know.

9 BY MR. JENSEN:

10 Q What do you think?

11 A I don't know.

12 MS. KAUR: Objection. Argumentative. Asked and
13 answered.

14 THE COURT: Sustained.

15 MR. JENSEN: I apologize to Mr. Gutierrez. It was,
16 but I didn't mean to be. Okay.

17 BY MR. JENSEN:

18 Q Do you think it would be your -- part of your
19 duties to specifically request the 2011/2012 pay
20 schedule in February, but you thought that there was a
21 CEO position that wasn't listed?

22 A Yes.

23 Q Is there any document in here anywhere that
24 says when you specifically requested that document?

25 A Not in our exhibits. I have not gone through

1 that binder, so I don't know.

2 Q How much time did it take you on this case
3 during this period?

4 MS. KAUR: Objection. Vague.

5 BY MR. JENSEN:

6 Q February 2013.

7 MS. KAUR: Objection. Vague as to how much time.

8 THE COURT: Sustained.

9 BY MR. JENSEN:

10 Q How many hours did you work on Mr. Alvarez's
11 Watermaster case during February 2013?

12 A I don't know.

13 Q Can you give me your best estimate?

14 MS. KAUR: Objection. He provided an answer. Asked
15 and answered.

16 THE COURT: Okay. Overruled. Answer it again.

17 THE WITNESS: I don't know.

18 BY MR. JENSEN:

19 Q Just one before the break. I just want to turn
20 your attention back to Regulation 570.5. And the first
21 section of it, it says -- beginning -- we don't think it
22 applies to it.

23 MS. KAUR: I'm sorry. I didn't hear you.

24 MR. JENSEN: I said I don't think 570.5 applies, but
25 I just want to get your thought on this Section (a)(1),

1 "Has been duly approved and adopted by the employer's
2 governing body in accordance with requirements of
3 applicable public meetings laws."

4 What are the applicable public meeting laws to
5 Watermaster?

6 MS. KAUR: Objection. Calls for speculation. Calls
7 for legal conclusion. Legal opinion.

8 BY MR. JENSEN:

9 Q What did you use for evaluating whether
10 Watermaster governing body had adopted the pay schedule
11 in accordance with the requirement of applicable public
12 meeting laws?

13 MS. KAUR: I have the same objection.

14 THE COURT: Overruled. You can answer.

15 THE WITNESS: That it was approved in open session.

16 BY MR. JENSEN:

17 Q And where does the open session reference come
18 from?

19 A Public availability.

20 Q Does -- are you referring to the Brown Act?

21 A I'm -- not specifically, I don't think.

22 Q Did you ever request Watermaster's rules and
23 regulations?

24 A No, I did not specifically.

25 Q Did you ask Watermaster what applicable public

1 meeting laws apply to Watermaster?

2 A I don't think I did.

3 Q Would that have been an important question to
4 ask?

5 A I'm not sure. Yeah, I mean, that could be a
6 question to ask.

7 Q Do you ever consult with -- did you ever
8 consult with legal counsel or anyone else at CalPERS
9 regarding public meeting laws as it applies to
10 Watermaster?

11 MS. KAUR: Objection. Calls for legal -- attorney
12 communication.

13 THE COURT: Just answer yes or no and leave it at
14 that.

15 THE WITNESS: Can you restate the question?

16 BY MR. JENSEN:

17 Q Let me separate it. Did you ever ask CalPERS
18 attorneys which public meeting laws apply to
19 Watermaster?

20 MS. KAUR: Objection. Vague as to time.

21 BY MR. JENSEN:

22 Q At any time.

23 A Yes.

24 Q Do you ever ask anyone else other than the CalPERS
25 attorney which public meeting laws apply to Watermaster?

1 MS. KAUR: Same objection. Vague as to time.

2 BY MR. JENSEN:

3 Q At any time.

4 A No.

5 Q Does your determination that you wrote include
6 information that you received from counsel?

7 MS. KAUR: Objection. It goes to attorney/client
8 privilege.

9 MR. JENSEN: It probably does. I will withdraw the
10 question. I think it probably does. It is lunchtime.
11 It is 12:00 on the nose.

12 THE COURT: Good timing. We will take our lunch
13 recess. We will resume at 1:30.

14 (Lunch recess)

15 THE COURT: We are back from our lunch break.

16 Mr. Jensen, you may continue.

17 MR. JENSEN: Thank you.

18 BY MR. JENSEN:

19 Q Good afternoon, Mr. Gutierrez.

20 A Good afternoon.

21 Q Was there any regulation about publicly
22 available pay schedules prior to the regulation adopted
23 570.5?

24 A Regulations that -- I do not believe so, no.

25 Q If there were one?

1 A I'm not aware of.

2 Q I have put in front of you a document that is
3 marked as Exhibit 266. It is a two-page circular letter
4 dated August 19, 2011.

5 Do you have that document in front of you?

6 A Yes.

7 Q Do you recognize this document?

8 A Yes.

9 Q What is this document?

10 A It is a circular letter sent to all CalPERS
11 employers. And it is noticing -- the subject is
12 adoption of California Code of Regulations Title to
13 Section 570.5 and Amended CCR 571 Subdivision.

14 Q And what are circular letters?

15 A Circular letters are sent out to appropriate
16 parties to put the information out.

17 Q Who sends them out?

18 A CalPERS.

19 Q When you say appropriate information, can you
20 elaborate on that?

21 A Appropriate, I said appropriate parties to put
22 information out.

23 Q Can you tell us what kind of information
24 typically resides in the circular letter?

25 A Typical circular letters go out -- one goes out

1 every year stating the compensation limits for reporting
2 to CalPERS, put out circular letters just to provide
3 additional information if we think there is a need.

4 Q Have you seen this circular letter before?

5 A Yes, I have. Yes.

6 Q Are you aware of whether this was sent out
7 after Mr. Alvarez was hired by Watermaster or before?

8 A Based on the dates, it would be after he was
9 hired.

10 Q And there were some discussions prior to the
11 break where you indicated that the regulation clarified
12 existing law; is that correct?

13 A Yes.

14 Q Can I turn your attention to the second long
15 sentence in the first paragraph? It says, "April 13,
16 2011, the CalPERS Board of Administration adopted the
17 proposition and regulatory amendment clarify existing
18 laws and make specific the requirement for publicly
19 available pay schedule as a definition labor agreement
20 as used in the definition specification."

21 Do you see the words "and make specific the
22 requirements"?

23 A Yes.

24 Q Do you think that it was two separate things as
25 the additional requirements above clarifying existing

1 law?

2 MS. KAUR: Objection. Calls for a legal
3 interpretation and opinion. He also testified he is not
4 the author of the letter.

5 THE COURT: I will sustain as phrased.

6 BY MR. JENSEN:

7 Q Have you used this circular letter in your
8 evaluation or interpretation of Section 570.5?

9 A This document, no, I don't.

10 Q Did you testify earlier there were guidelines
11 in the compensation review unit for performing your
12 position?

13 MS. KAUR: Objection. Misstates prior testimony.

14 THE COURT: Okay. He is asking if he did or not.
15 Do you recall if you testified on that?

16 THE WITNESS: I don't -- I would have to ask for it
17 to be read back.

18 MR. JENSEN: I can rephrase it.

19 BY MR. JENSEN:

20 Q Are there any written guidelines that guides in
21 your determination of compensation review?

22 MS. KAUR: Objection. Vague as to "written
23 guidelines."

24 MR. JENSEN: I can rephrase it.

25 ///

1 BY MR. JENSEN:

2 Q Is there any written material you consult for
3 reference in your position in the compensation review
4 unit?

5 A Yes.

6 Q What is the written material?

7 A The California Public Employees' Retirement
8 Law.

9 Q Do you refer to circular letters in written
10 materials in performing your position?

11 MS. KAUR: Objection. Vague as to "refer."

12 THE COURT: Overruled.

13 THE WITNESS: In some instances we would, yes.

14 BY MR. JENSEN:

15 Q In this instance did you refer to this circular
16 letter in determining the publicly available pay
17 schedule requirements?

18 A I do not recall if I used this particular
19 circular letter in this particular determination.

20 Q In reading that sentence that starts on
21 April 13, 2012, where it clarifies the existing law and
22 make specific requirements for publicly available pay
23 schedule.

24 Does that change your opinion that 570.5 only
25 clarified existing law?

1 A No.

2 Q And why not?

3 A I think it is just making it more clear of what
4 publicly available and -- publicly available pay
5 schedule means.

6 Q Let me turn your attention to the second
7 paragraph where it says, "The additional Section 570.5
8 amend 571 subdivision B will ensure consistency between
9 CalPERS employers and enhance disclosure and
10 transparency of public employees' compensation," and
11 goes on.

12 Do you see that sentence?

13 A Yes.

14 Q What does that word "enhance" mean to you in
15 that paragraph?

16 A I think in this paragraph it means that the
17 disclosure will be increased.

18 Q Is an increase a clarification or new
19 requirement?

20 MS. KAUR: I'm sorry. Can you repeat your question?

21 BY MR. JENSEN:

22 Q Is an increase a clarification or a new
23 requirement?

24 A I think it is a clarification.

25 Q Let me turn your attention to the second page,

1 which is on the back of that. The first paragraph on
2 the top. And it says, "This amended clarify by ensuring
3 greater instance in disclosure of special compensation
4 item."

5 But are there any special compensation of this
6 case?

7 A In the case of Mr. Alvarez, no, there is no
8 special compensation.

9 Q So that would not apply to him?

10 MS. KAUR: Objection. Vague as to the term "that."

11 MR. JENSEN: I will withdraw that question.

12 THE COURT: Okay.

13 BY MR. JENSEN:

14 Q I'd like to turn your attention to 267.
15 Actually, before we get to 267, I'd like to turn your
16 attention to 259. Before you get there, let me ask you:
17 Is it up to the employer how they go about making salary
18 information publicly available?

19 A In some respect, possibly, yes.

20 Q In a certain way, have you instructed the
21 Watermaster? In fact, it is up to their discretion how
22 they go about making it publicly available as long as
23 they also satisfy 570.5?

24 MS. KAUR: Objection. Vague.

25 THE COURT: Overruled. You can answer.

1 THE WITNESS: I'm sorry. Could you repeat?

2 BY MR. JENSEN:

3 Q Did you previously instruct the Watermaster how
4 they go about making salary information publicly
5 available? It is up to their discretion as long as they
6 also satisfy 570.5?

7 A I don't recall what was exactly said to
8 Watermaster regarding --

9 Q So let me turn your attention to 259 on that
10 first page, the second paragraph of it. It is an e-mail,
11 I believe, from you and just refer to the first paragraph
12 there.

13 A Okay.

14 Q Is it still your opinion today that there is no
15 requirement the salary information be made publicly
16 available but how the Watermaster goes about doing that
17 is up to the agency?

18 A Yes.

19 Q And so let me turn your attention to -- back to
20 Exhibit 18. And a couple -- I guess our internally
21 paginated page 7, which is Alvarez 199. There seems to
22 be a -- and I'm looking at -- from -- an e-mail from
23 Joswiak, which it starts "Nicole," and then there is
24 discussion about information that was provided to a
25 newspaper, Daily Bulletin.

1 MS. KAUR: Which e-mail are you referring to?

2 MR. JENSEN: It is internally paginated 7 Alvarez
3 199. It is from Joswiak to Nicole Horning.

4 MS. KAUR: Is that the March 19, 2013?

5 MR. JENSEN: Yes.

6 BY MR. JENSEN:

7 Q In this e-mail he explains that if anyone asks
8 for information, there is a form on the website, and it
9 is provided in that way.

10 Would that be a sufficient way of -- for an
11 agency to provide it within their discretion and make it
12 publicly available?

13 MS. KAUR: Objection. Vague.

14 THE COURT: Sustained.

15 BY MR. JENSEN:

16 Q Would an agency having forms on their website
17 to respond to request for salaries and other information
18 be a sufficient way to make the information publicly
19 available?

20 MS. KAUR: Same objection.

21 THE COURT: Overruled. You can answer.

22 THE WITNESS: No.

23 BY MR. JENSEN:

24 Q And why not?

25 A Because it is not immediately available for

1 public review. And the public doesn't have an
2 opportunity for -- or able to provide feedback or
3 consent on that document. It is at request and they
4 have to make a special request as opposed to it being
5 posted publicly where anybody can just go look at it
6 whenever they feel like looking at it.

7 Q So it is more than making it publicly
8 available. They have to make it -- they affirmatively
9 distribute it to individuals; is that what you are
10 saying?

11 A No, I think that is part of what I said. My
12 testimony goes into what is publicly available.

13 Q Your -- is that out of the growth of the
14 enhanced requirement in 570.5?

15 MS. KAUR: Objection. Vague as to out of the
16 growth.

17 THE COURT: Sustained.

18 BY MR. JENSEN:

19 Q Is your testimony public availability
20 requirements of out of the growth of the regulation in
21 570.5?

22 MS. KAUR: I have the same objection.

23 THE COURT: Overruled.

24 THE WITNESS: It is an outgrowth of, my
25 understanding of publicly available.

1 BY MR. JENSEN:

2 Q Is there any other authority that you have
3 regarding this immediate access requirement --

4 MS. KAUR: Objection.

5 BY MR. JENSEN:

6 Q -- for publicly available.

7 MS. KAUR: Objection. Vague.

8 THE COURT: Do you understand what he's asking?

9 THE WITNESS: I'm not sure.

10 BY MR. JENSEN:

11 Q What other authority other than 570.5 requires
12 that it must be immediately available, in other words,
13 be publicly available?

14 A I would refer back to Government Code Section
15 20636.

16 Q So let me ask you to look at the other circular
17 letter, 267, and turn to the third page.

18 Did you apply this Section 570.5 in this
19 Matter?

20 A Did I apply it? Is that what you are asking?

21 Q In the process or this determination, was it
22 used in Mr. Alvarez's case?

23 A In the process of making the determination as a
24 unit, we made this -- we used this to -- to make a
25 determination in the case.

1 Q You used 570.5(b) as well?

2 A Yes.

3 Q And --

4 A I believe so. I'm -- I'm assuming.

5 Q Well, do you have any personal knowledge of the
6 application of 570.5(b) in this case?

7 A I don't recall saying we are going to use
8 570.5(b) to determine the case. I'm -- I just don't
9 recall the specifics.

10 Q Let me just ask you this: In determining his
11 amount maybe Mr. Alvarez's payrate, did CalPERS look at
12 other documents approved by the governing employer --
13 governing body?

14 MS. KAUR: Objection. Vague as to "other documents."

15 MR. JENSEN: I'm just reading what it says here in
16 your regulation.

17 MS. KAUR: It says a lot of stuff. Don't know what
18 you are referring.

19 THE COURT: Which?

20 MR. JENSEN: 570.5(b)(1). It says, "Whenever an
21 employer fails to meet the requirement of publicly
22 available pay schedule above, the board in its sole
23 discretion may determine an amount that will be
24 considered to be payrate, taking into consideration all
25 information it deems relevant including but not limited

1 to the documents approved by the employer's governing
2 body in accordance with requirements of public meeting
3 laws and maintained by the employer."

4 BY MR. JENSEN:

5 Q That step alone, did you do that? Did CalPERS
6 do that in the determination of Mr. Alvarez's payrate?

7 A I believe the -- I believe -- can you restate
8 your question?

9 Q I'm just asking if you did anything under this
10 Regulation 570.5(b), applied to Mr. Alvarez's payrate?

11 MS. KAUR: I have an objection. Asked and answered.
12 I think he testified he couldn't recall. Maybe you
13 could refer to the document where -- maybe the
14 determination letter or something to refresh his
15 recollection.

16 MR. JENSEN: Let me just ask him a different way.

17 BY MR. JENSEN:

18 Q If it doesn't -- if in your determination a
19 payrate doesn't satisfy publicly available pay schedule,
20 do you next apply 570.5(b)?

21 A Yes, that would be.

22 Q Did you do that in this case?

23 A Yes, I believe we did.

24 Q How did do you that?

25 A We determined that the most applicable

1 provision was number 4.

2 Q And did you at any time consider any of the
3 other three items, the first three items?

4 A I believe we did.

5 Q And why was the payrate, for example, number 3.
6 It says, "Last payrate for the member that is listed on
7 pay schedule that conforms with the requirements of
8 subdivision A for the same employer for a different
9 position." In this Mr. -- Watermaster has a publicly
10 available payrate for general manager position that
11 satisfies all of the requirements.

12 Why didn't you use that for Mr. Alvarez's
13 payrate?

14 MS. KAUR: Objection. Assumes facts not in
15 evidence. Also vague as to time.

16 THE COURT: I believe you are referring to the
17 payrate in conformity with the rule regarding GM
18 position was established. Is that what you are --

19 MS. KAUR: I don't know exactly what payrate he is
20 referring to that qualifies with provisions that are in
21 20636.

22 MR. JENSEN: 20636 and 570.5(a). Let me.

23 BY MR. JENSEN:

24 Q Is the general manager position for 2012/2013
25 satisfy all of the provisions of 570.5(a).

1 MS. KAUR: Objection. Vague and unclear.

2 THE COURT: Do you know what he is referring to,
3 Mr. Gutierrez?

4 MR. HERREMA: Objection. Relevancy. Beyond
5 application of this particular matter.

6 MR. JENSEN: I'm just trying to get this testimony
7 here. According to this, Mr. Alvarez would be entitled
8 to payrate of the general manager position. Why wasn't
9 it used at all?

10 THE COURT: I think it is relevant. I just want to
11 make sure we are all on the same page on what you are
12 referring.

13 MR. JENSEN: I'm trying to --

14 THE COURT: Which document?

15 BY MR. JENSEN:

16 Q Let me first ask the witness.

17 Is the -- CalPERS accepted the 2012/2013 pay
18 schedule that listed the general manager position as
19 satisfying 570.5(a)?

20 MS. KAUR: Objection. Vague as to which -- there
21 were several pay schedules. I don't know which year you
22 are referring to.

23 MR. JENSEN: I can point it out, but --

24 THE COURT: Let's identify the exhibit just so the
25 record is clear.

1 MR. JENSEN: I believe it is --

2 MS. KAUR: There is a pay schedule under 16.

3 MR. HERREMA: Page 3 of Exhibit 16.

4 MR. JENSEN: Make it 4 of Exhibit 16.

5 MR. HERREMA: Page 3.

6 THE COURT: Mr. Gutierrez, Exhibit 16.

7 MR. JENSEN: 16. And it's got a 120 on the bottom
8 of it. I believe this -- CalPERS has accepted this
9 document as being correctly enacted, the duly adopted --
10 the correct publicly available pay schedule for the
11 Watermaster under CalPERS rules.

12 MS. KAUR: Objection. Misstates prior testimony.
13 He actually testified to the top title, I believe.

14 BY MR. JENSEN:

15 Q Let me -- Mr. Gutierrez, is this document an
16 acceptable document for CalPERS's purpose on 570.5 and
17 the PERL?

18 MR. HERREMA: I'm sorry. I'm going to object as to
19 relevance to the extent it is beyond the application of
20 this particular line of questioning.

21 THE COURT: Okay.

22 MR. HERREMA: We are here to talk about Mr. Alvarez.
23 We are not here to talk about any other Watermaster
24 employee.

25 MR. JENSEN: I'm trying to restrict it to

1 Mr. Alvarez. I think he is entitled to -- under that
2 570.5(b) -- to the payrate of GM, which would be 218.

3 THE COURT: Yes. My understanding is the question
4 is to be aimed at Mr. Alvarez and whether or not he can
5 take sections or portions of subdivision B assuming
6 section A wasn't related to this employee. So I want
7 to make sure. Is that your concern, that we are not
8 extrapolating to any other employees?

9 MR. HERREMA: Correct.

10 THE COURT: Just with regard to Mr. Alvarez,
11 relevant.

12 MS. KAUR: Can you repeat your question? Sorry.

13 BY MR. JENSEN:

14 Q Mr. Gutierrez, do you see this document?

15 A Yes.

16 Q Is your understanding that the document is in
17 conformity with CalPERS requirements?

18 A For Mr. Alvarez's -- in regard to Mr. Alvarez,
19 this was enacted well after he retired.

20 Q I'm not saying for this publicly available pay
21 schedule. Does it satisfy all of CalPERS rules?

22 MS. KAUR: Objection. Vague and also irrelevant.

23 THE COURT: Overruled. You can answer.

24 THE WITNESS: I think there is some questions in
25 regards to the timing of it being approved since there

1 is -- the effective date would be May 23rd, 2013.

2 BY MR. JENSEN:

3 Q So just for the period after May 2013, would it
4 be in conformity with all of CalPERS rules?

5 A Is it -- the other question I would have is if
6 it is posted at the office of the employer or
7 immediately accessible and available and if it is on the
8 Watermaster's website.

9 Q So in other words, you can't make an opinion of
10 whether this 2012/2013 salary schedule complies with
11 CalPERS rules?

12 A As far as whether it -- it complies with all of
13 the requirements of 20636 and 570.5 just based on this
14 documentation right here on spot.

15 Q Let me just ask: Has CalPERS -- has
16 Watermaster's employees retired in the past?

17 MS. KAUR: Objection. Vague.

18 BY MR. JENSEN:

19 Q Have any Watermaster's employees retired and
20 received CalPERS benefits in the past?

21 MS. KAUR: Objection to the extent it calls for
22 speculation.

23 BY MR. JENSEN:

24 Q Let me just turn your attention to 18, page 7.
25 And that third paragraph from the bottom about halfway

1 through it says, "Other employers have retired from
2 Watermaster, Mr. Ken Manning, and their salary
3 information was adequate and accepted by CalPERS."

4 Does that refresh your recollection?

5 MS. KAUR: Objection. Lacks foundation. It is
6 unclear who made this statement whether it was
7 Mr. Joswiak or whether Nicole Horning did.

8 THE COURT: Okay. You can review that and see
9 if it refreshes your recollection or triggers your
10 recollection. You can tell Mr. Jensen yes or no, and
11 then he can follow up. We don't want you to guess or
12 speculate. It is based on your personal knowledge of
13 your reading this document.

14 He's having you look at this to see if it
15 triggers some memory or recollection if you have any.

16 MS. KAUR: Just want to clarify that sentence --
17 statement was made by Mr. Joswiak.

18 THE COURT: Yes. That would be my assumption since
19 it is his e-mail to Ms. Horning.

20 MS. KAUR: Well, at the top of the e-mail, Joswiak.

21 MR. JENSEN: Your Honor, can I inquire if that
22 refresh his recollection?

23 THE COURT: Yes.

24 BY MR. JENSEN:

25 Q Does this refresh your recollection whether

1 other employees from Watermaster retired from CalPERS?

2 A No.

3 Q Did you make an undertaking to see if
4 Watermaster provided information sufficient to retire
5 other individuals in the past?

6 A I don't recall.

7 Q Would that be the job of the compensation
8 review unit employees to go and search for prior
9 practices of the employer?

10 A In certain circumstances.

11 Q In this circumstance?

12 A I don't recall.

13 Q Did you look for any information provided by
14 the Watermaster?

15 MS. KAUR: Objection. Vague.

16 BY MR. JENSEN:

17 Q With respect to other employees?

18 MS. KAUR: Objection. Asked and answered.

19 THE COURT: Overruled. You can answer.

20 THE WITNESS: I don't recall.

21 BY MR. JENSEN:

22 Q Are you aware of whether CalPERS provided
23 benefits to employees or other entities that are
24 instruments of the court?

25 A I'm not aware.

1 Q Did you search for other Watermaster?

2 MS. KAUR: Objection. Vague.

3 BY MR. JENSEN:

4 Q In your evaluation of this case?

5 A I do not recall.

6 Q Did you consider the Watermaster as a different
7 entity than typical CalPERS contracting entities?

8 A I don't recall.

9 Q At this moment do you understand that
10 Watermaster is a different type of entity than typical
11 CalPERS entities?

12 MS. KAUR: Objection. That calls for legal opinion,
13 legal conclusion.

14 THE COURT: Sustained.

15 BY MR. JENSEN:

16 Q Do you have a nonlegal understanding that
17 Watermaster is a different type of entity than typical
18 CalPERS contracting entities?

19 MS. KAUR: Objection. Vague.

20 THE COURT: Sustained.

21 BY MR. JENSEN:

22 Q So, Mr. Gutierrez, you testified before on
23 direct that after the original determination letter,
24 you were informed that Mr. Alvarez was put on leave,
25 administrative leave; is that correct?

1 A I believe that what I said was that we were
2 notified or that it was stated that he was on
3 administrative leave.

4 Q Okay. And I want to just refer your attention
5 to those documents to make it clearer. And specifically
6 we were talking about --

7 MS. KAUR: Are you looking for the appeal letter?

8 BY MR. JENSEN:

9 Q So actually, tell me your process. At a certain
10 point you were informed by Watermaster's appeal that
11 Mr. Alvarez was placed on administrative leave.

12 What did you after you were informed of that?

13 MS. KAUR: Objection. Vague.

14 THE COURT: Sustained.

15 BY MR. JENSEN:

16 Q Were -- when did you first learn that the
17 Watermaster placed Mr. Alvarez on administrative leave?

18 A I first learned Watermaster had -- stated that
19 they put him on administrative leave when we received
20 the appeal.

21 Q Let me turn your attention to Exhibit 5, which
22 is, I believe is the June 17, 2013 amended letter to
23 Mr. Alvarez. I believe this is in evidence.

24 Did you write this letter?

25 A I drafted it, yes.

1 Q So you are familiar with the language in it?

2 A Yes.

3 Q And in this second sentence down it says, "The
4 agency appeal indicated that Mr. Alvarez was placed on
5 administrative leave from November 9, 2011, through May
6 4, 2012." And the next sentence --

7 MS. KAUR: I'm sorry. Which paragraph and which
8 page are you referring to?

9 MR. JENSEN: It is the second paragraph on the first
10 page. Starts, "In the appeal."

11 THE WITNESS: "The agency's appeal dated April 19,
12 2013. They indicated that you were placed on
13 administrative leave on November 9, 2011, through May 4,
14 2012."

15 BY MR. JENSEN:

16 Q In these cases does CalPERS typically accept
17 the characterization of the employment action taken by
18 an employer?

19 MS. KAUR: Objection to the extent it calls for
20 speculation. And vague.

21 BY MR. JENSEN:

22 Q In your experience in the compensation review
23 unit, does the employer determine what the employment
24 relationship is?

25 MS. KAUR: I have the same objection.

1 THE COURT: Overruled. You can answer.

2 THE WITNESS: To the best of my knowledge, that is
3 sometimes reviewed by -- by CalPERS to determine if the
4 employee and employer relationship is what is stated by
5 the employer.

6 BY MR. JENSEN:

7 Q Okay. So, in other words, you feel CalPERS has
8 the authority to inquire as to the stance or actual
9 relationship?

10 MS. KAUR: Objection.

11 BY MR. JENSEN:

12 Q Would that be a fair restatement of what you
13 just said?

14 MS. KAUR: Objection. Vague.

15 THE COURT: Overruled.

16 THE WITNESS: For CalPERS member -- membership
17 issues, I believe that -- and I'm -- I'm guessing so --

18 BY MR. JENSEN:

19 Q I don't want you to guess.

20 How did you determine that his employment
21 status would be negatively severed when the employer
22 says he is on administrative leave?

23 A During the -- well, I think during the review
24 we determined that -- so in order for the administrative
25 leave to be reportable to CalPERS, there has to be an

1 intent to return for the employee.

2 Q What code section are you relying on for that?

3 A I'm relying on Government Code Section 20636.

4 Q Where does it say an intent to return?

5 A I'm sorry?

6 Q Where does it say in 20636 administrative leave
7 requires an intent to return?

8 A I'm sorry. I'm referring to Government Code
9 Section 20630, which defines compensation.

10 Q So tell us what that means? Where in 20630?

11 THE COURT: Okay. You are looking in your PERL
12 handbook?

13 THE WITNESS: Yes, I just want to get the correct
14 verbiage.

15 THE COURT: Please.

16 THE WITNESS: So 20630 defines compensation as "the
17 remuneration paid out of funds controlled by the
18 employer and payment for member services performed
19 during normal working hours of the time for which the
20 member is excused from work because of any of the
21 following." And number 6 is a leave of absence.

22 And we determined that the leave of absence is
23 -- means that there is an intent for the employee to
24 return to work.

25 ///

1 BY MR. JENSEN:

2 Q What is determined -- where is the statutory
3 language that says that? Or is this your
4 interpretation?

5 A This is my interpretation based on my
6 experience.

7 Q What is your legal authority rather than your
8 opinion?

9 A My legal authority?

10 Q What are you referring to in law that the
11 intent to return --

12 MS. KAUR: Objection to the extent it calls for a
13 legal conclusion or legal opinion.

14 MR. JENSEN: I'm actually asking for your
15 interpretation of -- 20630 does not say "intent to
16 return," so I'm asking his --- where the intent to
17 return requirement comes from.

18 MS. KAUR: Well, answering your question, he's
19 looking at 20636 which is leave of absence.

20 BY MR. JENSEN:

21 Q And my question to him is -- well, leave of
22 absence for intent to return part of that requirement if
23 it is not written in the statute?

24 A It is my understanding that what that is
25 referring to is leave of absence is leave, and then you

1 are going to return back to work at some point.

2 Q Again, I'm asking where did you get the return
3 back to work part? Where is that statutory language
4 that adds to that language?

5 MS. KAUR: Objection. Asked and answered.

6 THE COURT: Overruled. You can answer.

7 THE WITNESS: I think just the part of that
8 Government Code Section.

9 BY MR. JENSEN:

10 Q An unwritten part?

11 A I think the -- I think it is part of the leave
12 of absence, not a separation from employment. So I
13 think that is the distinction and that is made.

14 Q Let me ask you: Are you familiar with service
15 credit provision for administrative leave under the PERL
16 in particular Section 20898?

17 A 20898 is not -- hold on one second.

18 Q Do you want to read that aloud for us again?

19 A "In computing the service with which a member
20 is entitled to be credited under this part time during
21 which the member is excused from work because of
22 holidays, sick leave, vacation, or leave of absence
23 compensation shall be included."

24 Q Did you apply this section to Mr. Alvarez's
25 pension?

1 A That is not -- it is not something that I used
2 to make my determination.

3 Q And why not?

4 A Because in compensation review we usually stick
5 to -- we stick to the compensation laws, which is 20636
6 and the corresponding regulations.

7 Q What happens in this amended appeal -- I will
8 turn your attention to page 3 of this June 17, 2013.
9 Can you take a look at that, please. The top sentence
10 that says, "Service credit to you from November 7, 2011,
11 through May 4, 2012, will be rescinded from the total
12 service and not used to calculate your retirement
13 benefit."

14 Did you write that?

15 A Yes.

16 Q Is that a compensation letter or is that
17 service credit letter?

18 A That is compensation matter because we would
19 ask that they reverse all of the reported compensation
20 from November 9, 2011, through May 4, 2012, thus
21 eliminating the service credit during that time period.

22 Q Just going to address a little of your prior
23 testimony.

24 You said that after you received the
25 confidential settlement letter or agreement you went

1 back to the employment agreement; is that correct?

2 MS. KAUR: Objection. Vague.

3 MR. JENSEN: I'm just trying to characterize his
4 prior testimony.

5 BY MR. JENSEN:

6 Q To look for -- the term that if he was -- if
7 there was termination without cause or something, I'm
8 not sure exactly.

9 Can you tell me what you did when you referred
10 to the initial agreement?

11 MS. KAUR: Objection. Vague. Misstates prior
12 testimony. Compound.

13 THE COURT: Overruled. You can answer.

14 THE WITNESS: I'm not sure I understand what you are
15 asking.

16 BY MR. JENSEN:

17 Q Did you look at the employment agreement at all
18 when determining whether or not he was severed or placed
19 on administrative leave?

20 A Yes.

21 Q And how did do you that, or what did you do?

22 A We looked at Section 9.8 of his employment
23 agreement, which stated severance termination without
24 cause.

25 Q What document are you referring to there?

1 Exhibit 5?

2 A Exhibit 5, page 2.

3 Q And this is the one that reads, "In the event
4 that executive employment terminates without cause prior
5 to the end or first, Watermaster will pay executive a
6 full salary amount the first year of employment term."

7 Is that the phrase you were talking about?

8 A Correct.

9 Q Do you think that phrase means if you have been
10 severed, the lump sum salary would be reduced upon
11 severance?

12 A It does not state that, no.

13 Q What does it state? That he will continue even
14 though he is terminated, that he will continue to work
15 and be paid monthly?

16 MS. KAUR: Objection. Vague to the extent it calls
17 for speculation.

18 THE COURT: Overruled. You can answer.

19 THE WITNESS: It doesn't say monthly. It doesn't
20 say those words.

21 BY MR. JENSEN:

22 Q In your work do you run across cases where
23 individuals are severed from employment?

24 MS. KAUR: Objection. Vague.

25 MR. JENSEN: Just a general question.

1 THE COURT: Overruled. You can answer.

2 THE WITNESS: During the course of our work, do we
3 run across individuals who are separated from
4 employment?

5 BY MR. JENSEN:

6 Q Yes.

7 A Yes.

8 Q What typically occurs when someone is separated
9 from employment?

10 MS. KAUR: Objection. Vague.

11 THE COURT: Sustained.

12 BY MR. JENSEN:

13 Q In your experience have you -- let me rephrase.
14 In your work have you seen individuals who are
15 on contracts where they are severed before the end of
16 term of the contract other than Mr. Alvarez?

17 A I would say yes, we did.

18 Q What happened in those cases?

19 MS. KAUR: Objection. Vague.

20 BY MR. JENSEN:

21 Q Typically, as far as -- was lump sum paid upon
22 severance to those individuals, typically?

23 MS. KAUR: Objection. Vague. Irrelevant. Calls
24 for speculation.

25 THE COURT: Sustained.

1 BY MR. JENSEN:

2 Q Let's turn to the confidential separation
3 agreement in Exhibit 12.

4 How did you come upon this agreement?

5 A How did I come upon this agreement?

6 Q How did CalPERS come in receipt of this
7 agreement?

8 MS. KAUR: Objection to the extent it calls for
9 privileged information.

10 BY MR. JENSEN:

11 Q Do you know how CalPERS came into receipt of
12 this agreement?

13 A I do not.

14 Q When did you first see this agreement?

15 A I don't recall.

16 Q Did you see this agreement prior to writing the
17 Amended Statement of Issues?

18 A I didn't write the Amended Statement of Issues.

19 Q Okay. Let me just turn to the bottom paragraph
20 of this page.

21 THE COURT: Page 1.

22 BY MR. JENSEN:

23 Q Page 1 of the agreement behind the exhibit tab
24 12. There is a sentence here that says, "The executive
25 sole duty during the transition period is consisted of

1 providing information to Watermaster as requested with
2 respect to pending projects and the transition of his
3 duties."

4 Do you see that?

5 A I'm sorry? We are we at? Number --

6 Q It is transition duties and probably the third
7 sentence down. It starts, "The executive sole duty
8 during the transition period."

9 In your experience do people have duties after
10 they have been severed?

11 MS. KAUR: Objection. Vague as to the people having
12 duties.

13 THE COURT: Do you understand what he's asking?

14 THE WITNESS: Generally, it is very fact specific to
15 each case.

16 BY MR. JENSEN:

17 Q Have you ever seen somebody's job duties after
18 they have been terminated?

19 A Similar to being on call, yes, actually.

20 Q Did you -- were they in monthly paid
21 relationship arrangement thereafter?

22 A With their employer, yes.

23 Q Were they determined to be an employee by the
24 employer?

25 A I think the employer considered them to be an

1 employee.

2 Q What did CalPERS consider them as?

3 A CalPERS considered them a member. It is not my
4 area.

5 MS. KAUR: Belated objection to the extent it calls
6 for speculation. And even relevancy.

7 BY MR. JENSEN:

8 Q What determines in your review of the case
9 whether there is an employer/employee relationship
10 between an individual and an entity that pays them?

11 MS. KAUR: Objection to the extent it calls for
12 speculation.

13 THE COURT: Okay. Don't guess or speculate.

14 THE WITNESS: I don't make those determinations.

15 BY MR. JENSEN:

16 Q However, in this case you have testified that
17 that he was severed. Does that word "severed" have a
18 meaning to you?

19 MS. KAUR: Objection. Misstates the testimony. I
20 believe he said "separated." I don't believe he said
21 "severed."

22 THE COURT: We are looking at Exhibit 5?

23 MR. JENSEN: It is Exhibit 5. It is -- it says, "It
24 is clear to the agency you would no longer be CEO and
25 your employment would be effectively severed."

1 MS. KAUR: Which page are you looking at? The first
2 page, second paragraph of Exhibit 5, the first page
3 second paragraph?

4 MR. JENSEN: Yes.

5 MS. KAUR: Second sentence, second paragraph?

6 MR. JENSEN: Yes.

7 BY MR. JENSEN:

8 Q I'm just asking you what is the basis on which
9 you determined that he would be effectively severed if
10 he had ongoing duties and paid monthly?

11 A We determined that based on the information
12 provided at this time of the letter that he was to be --
13 was not to be the CEO November 9, 2011. And thus, he
14 would not be returning to work at any point, and that he
15 would be -- his employment status was effectively
16 separated.

17 Q Now, let me ask you, do you run across cases
18 where people suffered demotion in your compensation
19 review unit?

20 MS. KAUR: Objection. Irrelevant.

21 THE COURT: How is that relevant?

22 MR. JENSEN: I'm just using the analogy if
23 Mr. Alvarez was demoted from CEO to another position
24 that was different than being severed.

25 THE COURT: Is that you are saying analogy, is that

1 your argument in this case?

2 MR. JENSEN: It is not an argument. It is trying to
3 get his understanding of how him not being CEO is
4 equivalent to being severed when he had ongoing duties
5 and responsibilities and being paid.

6 THE COURT: Okay. I will overrule it. Let's not
7 spend a lot of time on this.

8 MR. JENSEN: I'm almost done.

9 BY MR. JENSEN:

10 Q So how do you view this different than if
11 Mr. Alvarez was demoted?

12 A I don't think he was demoted. And with the
13 demotion if you are still an employee and there is no
14 timetable for your release and just -- that's just some
15 of the things I can think of right off the bat.

16 Q Let me ask you another of my analogies.

17 So a police officer is put on paid leave, does
18 that count? Is he still an employee in that context if
19 subsequently at the end of the paid leave he is fired?

20 MS. KAUR: Objection. To the extent it calls for
21 speculation. He already testified whether he was an
22 employee or --

23 MR. JENSEN: Well, he did in this case?

24 MS. KAUR: He testified they made a determination
25 concerning their paid -- pay reported on page 3, so the

1 service -- so the service credit will not be used to
2 calculate retirement benefit. That's what he testified
3 to.

4 MR. JENSEN: On the first page effectively severed.

5 BY MR. JENSEN:

6 Q I guess my question really is, what information
7 do you have that informs your decision effectively
8 severed when Watermaster gave him duties and just a term
9 of future employment doing those duties to the end of
10 the year?

11 MS. KAUR: Objection. Asked and answered.

12 THE COURT: Overruled. You can answer it.

13 THE WITNESS: I think it goes to the fact that he
14 was no longer going to be the CEO as of November 9,
15 2011, and he was not -- there was no intention for him
16 to return.

17 BY MR. JENSEN:

18 Q And just a few more questions. He originally
19 -- you were aware he had a two-year contract; is that
20 correct? He was originally hired with a two-year
21 contract. Would it have made a difference if he was
22 hired with a one-year contract?

23 MS. KAUR: Objection. Vague.

24 THE COURT: Overruled.

25 THE WITNESS: No.

1 MR. JENSEN: I think I'm basically done, your Honor.

2 THE COURT: Okay.

3 MR. JENSEN: Let me just look through this.

4 BY MR. JENSEN:

5 Q Actually, let me just ask you a couple
6 questions.

7 There is no question about -- that Mr. Alvarez
8 wasn't otherwise entitled to the -- the only issue was
9 the publicly available pay schedule and not the payrate
10 in this case?

11 MS. KAUR: Objection. Vague.

12 BY MR. JENSEN:

13 Q Was the payrate ever an issue in this case
14 outside of the publicly available pay schedule?

15 MS. KAUR: Objection. Vague.

16 THE COURT: Overruled. You can answer.

17 THE WITNESS: I think that -- whether or not the
18 payrate was reported pursuant to a publicly available
19 pay schedule that complied with Government Code Section
20 20636 and also California Code of Regulation Section
21 570.5.

22 BY MR. JENSEN:

23 Q That's the only issue in this case?

24 A That's one of the main issues in this case.
25 The other issue in the case was that -- was the final

1 settlement pay.

2 Q Let me just address. Let me turn your
3 attention to 258, Exhibit 258. There has been some
4 testimony prior to this about Chino Water Basin provided
5 information to the public.

6 And did you receive this letter as part of your
7 evaluation of this case?

8 A I do not recall.

9 Q Would it have a made a difference to you that
10 the predecessor had -- upon request of the predecessor
11 that the contract and the board members and the amount
12 of compensation was provided to a newspaper?

13 MS. KAUR: Objection. Vague.

14 THE COURT: Overruled.

15 THE WITNESS: Is there a salary schedule or what --
16 I'm sorry. What was the question again?

17 BY MR. JENSEN:

18 Q Would the Watermaster providing this information
19 to the newspaper upon request change your opinion about
20 whether salaries and -- of the chief executive officer
21 were publicly available pursuant to the applicable laws
22 at the time, which was October 22nd, 2010?

23 MS. KAUR: Objection. Vague as to this information.

24 THE COURT: Vague as to?

25 MS. KAUR: This information.

1 THE COURT: Referring to 258?

2 MR. JENSEN: 258 and the attachments which aren't
3 here.

4 BY MR. JENSEN:

5 Q Would that have change your opinion?

6 THE COURT: Can you answer that?

7 THE WITNESS: I can't. Without the attachments or
8 any information, it is --

9 BY MR. JENSEN:

10 Q So in this period of October 2010, if the agency
11 provided this information and also referred to their
12 website, would that be a factor in whether this
13 compensation of the chief executive officer was publicly
14 available?

15 MS. KAUR: Vague and irrelevant. This refers to
16 2009, 2010. And I don't know if you are asking about
17 Mr. Alvarez or asking generally. If you are asking
18 generally, it is irrelevant.

19 BY MR. JENSEN:

20 Q Is that the case, it is irrelevant what the
21 agency does in past practice?

22 MS. KAUR: Objection. Vague.

23 MR. JENSEN: Let me ask the witness.

24 BY MR. JENSEN:

25 Q Is it not relevant that the agency provides

1 information to the newspapers about the chief executive
2 officer in the six months before they fired Mr. Alvarez?

3 MS. KAUR: I would have the same objection. Vague.

4 THE COURT: Overruled. You can answer.

5 THE WITNESS: That's not irrelevant, no.

6 BY MR. JENSEN:

7 Q Would it make a difference in determination if
8 the CEO compensation and -- and contract was provided
9 six months before to a newspaper even if it was the same
10 individual?

11 MS. KAUR: Objection. Vague as to "same individual."

12 BY MR. JENSEN:

13 Q Even if it was Ken Manning versus Desi Alvarez?

14 A I don't have that information to really make
15 that determination.

16 Q So I guess the question is: If an individual
17 from the public didn't ask during Mr. Alvarez's tenure
18 for his compensation, does that mean that because it
19 wasn't asked for, it is not publicly available?

20 MS. KAUR: Objection. Vague. Irrelevant.

21 THE COURT: Sustained.

22 MR. HERREMA: I'm going to object contrary to prior
23 testimony which in the case -- which is someone did ask
24 for salary information during Mr. Alvarez's tenure.

25 ///

1 BY MR. JENSEN:

2 Q Let me deal with the final settlement pay. You
3 have made a secondary ruling in the compensation after
4 November 9 is final settlement pay.

5 What is the basis of that decision?

6 MS. KAUR: Objection. Vague as to "secondary ruling."

7 THE COURT: Overruled. You can answer.

8 THE WITNESS: That -- that it is in connection with
9 in anticipation of separation of employment.

10 BY MR. JENSEN:

11 Q What is the basis of that? Do you believe that
12 was because the contract had a one year guaranteed
13 salary that -- is that bylaw in anticipation of
14 retirement?

15 A I think it is based on the language in the
16 employment agreement.

17 Q What language are you referring to?

18 A 9-A.

19 Q And how is that language in 9-A --

20 A Number 5, page 2 of 5.

21 THE COURT: Okay. Thank you.

22 BY MR. JENSEN:

23 Q What aspect of that qualifies it as final
24 settlement pay?

25 A That's in the event of this termination without

1 cause. In the event an employee is terminated without
2 cause, Watermaster will pay the executive the full
3 salary for the first year of the employment term.

4 Q And so what language of the final settlement
5 pay regulation that -- that would apply to this
6 termination clause?

7 A It is Government Code Section 20636(f), final
8 settlement pay. It is also further defined in
9 California Code of Regulation Section 570. And that any
10 pay that are granted or awarded to a member in
11 connection with or in anticipation of separation
12 employment.

13 And California Code of Regulation Section 570
14 specifically calls out severance pay as being a form of
15 final settlement pay.

16 Q But isn't in anticipation of retirement, isn't
17 that what final settlement pay is?

18 A It is anticipation of any kind of separation
19 from employment.

20 Q But this is not -- this wasn't written in
21 anticipation of Mr. -- this contract was written in
22 anticipation of Mr. Alvarez's employment not in
23 anticipation of his separation?

24 MS. KAUR: Objection. States fact not into
25 evidence.

1 THE COURT: Is that your understanding, or do you
2 have a different one?

3 THE WITNESS: It was -- I'm not sure. Does it mean
4 agreement or this section?

5 BY MR. JENSEN:

6 Q Well, is -- to get a final settlement pay,
7 would you first have to find severed; is that correct,
8 that it was severance pay?

9 A I think it has to be any -- any connection with
10 -- of in anticipation of separation from employment.

11 Q But if he isn't separated, if he is still
12 employed, there wouldn't be any final settlement pay; is
13 that correct?

14 MS. KAUR: Objection. Vague.

15 THE COURT: Sustained.

16 BY MR. JENSEN:

17 Q If he is still an employee with Watermaster
18 after November 9th and has duties until May 3rd, then is
19 that final settlement pay?

20 A It says that any pay that is granted a member
21 in connection with or in anticipation of separation from
22 employment. That doesn't answer your question?

23 Q Can salary, moneys earned performing duties and
24 being responsible to your employer, having an ongoing
25 obligation, can that be final settlement pay?

1 MS. KAUR: Objection. Vague.

2 THE COURT: Overruled.

3 THE WITNESS: If the employee has not been
4 separated, then it wouldn't be final settlement pay, no.

5 MR. JENSEN: I have no further questions.

6 THE COURT: Okay. Give me one moment. Okay.

7 Mr. Jensen.

8 MR. JENSEN: Let's enter those Exhibits 266 and 267.
9 Those are the regulations.

10 THE COURT: The circular letters. Any objection to
11 those two exhibits?

12 MS. KAUR: No, I don't have any objection.

13 MR. HERREMA: No, your Honor.

14 THE COURT: All right. 266 and 267 are admitted.
15 Are you offering 258 at this time or later?

16 (Respondent's Exhibit 266 and 267 were
17 received in evidence by the Court.)

18 MR. JENSEN: I would like to offer it now. I would
19 wait for Mr. Joswiak to come on.

20 MS. KAUR: I don't have any objection.

21 THE COURT: Okay. Mr. Herrema, any objection to
22 258?

23 MR. HERREMA: No, I don't have any objection. It is
24 the same letter as Watermaster's Exhibit F and --

25 THE COURT: Exact same note?

1 MR. HERREMA: Ours is in color.

2 THE COURT: Better. Why don't we admit, then, 258.

3 MR. JENSEN: Why don't we just admit F since it is
4 the same exhibit, the original from them. But do you
5 want to wait? Why don't you wait?

6 THE COURT: I don't sense any objection. Might as
7 well.

8 MR. HERREMA: It is fine. Go with 259.

9 THE COURT: I will admit -- I will admit 258. If
10 you want to ask clarifying questions, that's fine.

11 (Respondent's Exhibit 258 was received
12 in evidence by the Court.)

13 MR. JENSEN: Thank you.

14 THE COURT: Okay. We are at our afternoon break.
15 Before we do that, do you have redirect, Ms. Kaur?

16 MS. KAUR: I may have one question, but --

17 THE COURT: Did you want to wait until after our
18 break, or do you want to try and conclude and then take
19 our break? If it's not going to take that long, let's
20 do it now, then take our break. But if you want to be
21 more involved, we can take our break now.

22 MS. KAUR: Let's take our break, and I will see if I
23 still have any questions.

24 THE COURT: So we will take our recess, and we will
25 resume at 3:15.

1 (Afternoon recess)

2 THE COURT: We are back from an afternoon break. Is
3 there going to be any redirect?

4 MS. KAUR: No, your Honor.

5 THE COURT: Okay. Mr. Herrema, did you have any
6 questions that you want to ask in response to those
7 asked by Mr. Jensen?

8 MR. HERREMA: No, your Honor.

9 THE COURT: Okay. We will excuse Mr. Gutierrez at
10 this time. I believe counsel are going to discuss
11 whether or not he is needed for tomorrow and/or will be
12 released. So it's best we make that decision later; is
13 that right, Ms. Kaur?

14 MS. KAUR: Yes, your Honor.

15 THE COURT: Thank you, Mr. Gutierrez. You can take
16 your prior seat over near Ms. Kaur.

17 THE WITNESS: Thank you, your Honor.

18 THE COURT: Okay. I believe Mr. Gow is next.

19 MS. KAUR: Yes, your Honor.

20 THE COURT: I know he is anxiously awaiting this
21 moment. Good afternoon. Have a seat across from the
22 court reporter. Okay.

23 You may call your next witness, Ms. Kaur.

24 MS. KAUR: My next witness is Ron Gow.

25 THE COURT: Okay. I will ask the court reporter to

1 swear you in.

2 RONALD GOW,
3 called as a witness, and having been first duly sworn by
4 the Hearing Reporter, was examined and testified as
5 follows:

6 THE WITNESS: I do.

7 THE COURT: Please state and spell your name.

8 THE WITNESS: Ronald Gow; R-O-N-A-L-D, G-O-W.

9 THE COURT: Try to keep your voice up so everyone
10 can hear. And when you are ready, Ms. Kaur.

11

12 DIRECT EXAMINATION

13 BY MS. KAUR:

14 Q Are you prepared to testify, Mr. Gow?

15 A I am.

16 Q Do you currently work for CalPERS?

17 A I do.

18 Q What unit of CalPERS do you work in?

19 A Membership analysis and design unit.

20 Q And what is your job title at the member
21 analysis and design unit?

22 A Retirement program specialist II.

23 Q And how long have you held that position?

24 A About seven or eight years. I'm not sure
25 exactly.

1 Q So you have held the position the retirement
2 program specialist II in the membership analysis and
3 design unit for seven or eight years?

4 A Correct.

5 Q And what are your job duties there?

6 A I review things for membership issues regarding
7 just initial member eligibility, safety issues, things
8 like that.

9 Q And when you say you review, what do you mean?

10 A I review different things that come in
11 compliance with the PERL or the employees' retirement
12 law.

13 Q Do you make determination in those cases?

14 A I can, yes.

15 Q And did you work on the case concerning
16 Mr. Alvarez?

17 A Not initially. I was brought in midstream
18 somewhere.

19 Q There is an exhibit packet -- well, several,
20 but if you could turn to CalPERS exhibit packet and turn
21 to Exhibit 6.

22 A 6?

23 Q Yes. Can you tell us what this document is?

24 A This looks like a letter that went out in
25 February of 2015. And this is -- I contributed some

1 language to this.

2 Q And if you could turn to the last page. Page
3 4, it is not signed by you, is it?

4 A No.

5 Q Can you tell us who signed that?

6 A Emily Perez DeFlores is one of the managers
7 over the employer account management division.

8 Q Is she your manager?

9 A Not directly, no.

10 Q And did you draft this letter?

11 A I don't believe I did. I don't really
12 remember. But it doesn't look like one I would draft.
13 I think I just added a couple paragraphs.

14 Q Were you involved in the part of making this
15 determination?

16 A Yes.

17 MR. JENSEN: Objection. Vague as to determination.

18 THE COURT: Sustained. Can you clarify?

19 BY MS. KAUR:

20 Q Was there a determination made concerning
21 Mr. Alvarez's employment status with Watermaster after
22 November 9, 2011?

23 A Yeah, that was the part I did. I reviewed the
24 employment agreement and the separation agreement. And
25 I determined that the employment agreement had common

1 law control. He was an employer/employee relationship.
2 And then I reviewed the separation agreement, that
3 looked like a separation agreement.

4 Q Is that a discussion on page 2 of this
5 February 12, 2015, on Exhibit 6 paragraphs, the second
6 full paragraph and the third paragraph?

7 A Yes, starting with the May 2011 employment
8 agreement.

9 Q And if you look at page 3 of this letter, the
10 second full paragraph which starts, "Because there is no
11 common law employee/employer relationship." At the very
12 end it says -- of the paragraph it says, "For the period
13 from November 10, 2011, parenthesis a revised date
14 closed parenthesis May 4, 2012, and this time frame is
15 not reportable to CalPERS."

16 Why was it determined that this time frame was
17 reportable to CalPERS?

18 A Because there was no employee/employer
19 relationship.

20 Q Any other reason that you can recall at this
21 time?

22 A Not within my area, no.

23 Q And what was the basis for determining there
24 was no employee/employer relationship?

25 A There was no common law control.

1 Q Why did you reach that determination that there
2 was no common law control?

3 A Because I reviewed the separation agreement and
4 it separated him from employment on that date and
5 removed the duties and authorities.

6 Q If you can turn to Exhibit 12 in the same
7 binder. Is this the confidential separation agreement
8 you reviewed?

9 A It is.

10 Q And why did you determine that his duties were
11 terminated?

12 A Because of paragraph 1, largely, down at the
13 paragraph number 1, termination of active employment.

14 Q What about that paragraph that led you to
15 believe his duties were terminated?

16 A It said executive employment in capacity chief
17 executive officer with the Watermaster with all powers
18 and duties associated therewith ceased on November 9,
19 2011.

20 Q What about the fact that the separation
21 agreement states that Mr. Alvarez is going to continue
22 to be employed until May 4th, 2011?

23 A I didn't find any common law control on that
24 period after November 9th.

25 Q Why?

1 A Because it doesn't list any duties that would
2 show common law control.

3 Q What about the fact that the separation
4 agreement stated he's to be available for information?

5 A Doesn't show me any control.

6 Q Why is that?

7 A Common law control is the right to control the
8 means and manners of executing the duties. And I don't
9 see any actual duties there.

10 Q So the last paragraph under item, which is item
11 2. It is under transition period it is 2(b), which is
12 titled Duties. And the third sentence states "Executive
13 sole duties during their transition period shall be to
14 assist and provide information to Watermaster as
15 requested with respect to pending project and the
16 transition of such duties."

17 A I don't see any control there.

18 Q So you determined that was sufficient to meet
19 the control test?

20 A No. It appears to say that if we ask you a
21 question you are going to answer.

22 Q In your opinion, do you think that would make
23 him a consultant?

24 A A consultant?

25 Q Yes.

1 A Maybe. I don't know. I don't define
2 consultant. That's not really -- to me, it just looks
3 like somebody -- if -- might have a question and you
4 might answer it. I think that would be normal on
5 someone who is separated.

6 Q And if you could turn back to your Exhibit 6
7 and page 2. The very last paragraph which starts out
8 with in addition. So it states, "In addition to these
9 the agreement the common law factors, MADU reviewed the
10 confidential separation agreement and relevant
11 provision of the PERL."

12 And then it cites Government Code Section
13 2069(a). And why -- that was a code section in making
14 the determination?

15 A That would be one, yes. It states that --
16 defines employment or service for retirement purposes as
17 service rendered. And we didn't see any service
18 rendered.

19 Q And page 3, he was -- the determination was
20 there was no service rendered under the 206 -- 200698;
21 is that correct?

22 A Where are you looking?

23 Q Page 3 at the next page.

24 A At the very top, yes. Correct.

25 MS. KAUR: I don't have any further questions, your

1 Honor.

2 THE COURT: Okay. Do you want to do anything with
3 Exhibit 6?

4 MS. KAUR: Yes, I'd like to offer it in evidence.

5 THE COURT: Okay. Do either Respondents have an
6 objection to 6?

7 MR. HERREMA: No objection.

8 MR. JENSEN: No objection, your Honor.

9 THE COURT: All right. 6 is admitted. Who would
10 would like to go first?

11 (Complainant's Exhibit 6 was received in
12 evidence by the Court.)

13

14 CROSS-EXAMINATION

15 BY MR. JENSEN:

16 Q So, Mr. Gow, would you agree that the
17 employment first independent contractor rule established
18 in that an employer's right to -- if the employer has
19 the right to control an individual, he's an employee?

20 MS. KAUR: Objection. Vague.

21 THE COURT: Overruled. You can answer.

22 THE WITNESS: I don't really understand the
23 question. Can you repeat that?

24 BY MR. JENSEN:

25 Q Is the right to control in accomplishing the

1 result of test for employment versus independent
2 contractor?

3 A Yes.

4 Q Is type --

5 A What I would call an employer/employee
6 relationship.

7 Q So if the Watermaster right to control
8 Mr. Alvarez, then Mr. Alvarez would be an employee;
9 correct?

10 A The right to control the means and manner of
11 executing the duties, yes.

12 Q So if according to -- and -- does it matter
13 what duties or specific level of duties that are
14 required to make someone an employee?

15 A I look for the duties sufficient to show me the
16 common law controls. There is a lot of things people
17 can do that don't exercise common law control. So I am
18 looking for a common law control specifically.

19 Q Okay. Just with reference to this case, let me
20 focus on these exhibits in your determination. So this
21 -- looking at Exhibit 6 -- do you mind if I stand?

22 A I don't.

23 Q On what is labeled page 2 in this center of
24 that, I guess, third paragraph down beginning
25 "January 2012 confidential separation agreement." And

1 then it says in the center of that -- well, it states,
2 "Should continue be -- to be employed until May 2012
3 transition period."

4 It also states "You will have no authority and
5 no duties within that transition period."

6 A That's what it says.

7 Q Do you agree with that that there was no duties
8 during that transition period?

9 A None that exercise common law control.

10 Q First, let's get where no duties within the
11 transition, do you think that is an accurate statement?

12 MS. KAUR: Objection. Asked and answered.

13 THE COURT: Overruled.

14 THE WITNESS: I gave my answer. There was no
15 duties that exercised common law control.

16 BY MR. JENSEN:

17 Q So when you referred to duties, there is only
18 duties that you say that are pursuant to common law
19 control?

20 A That's the ones I'm reviewing, yes.

21 Q Now, let's turn to the separation agreement,
22 and.

23 A That's 12?

24 Q It's 12. So in this transition period it says
25 duties here. And the first part says that he won't have

1 the duties to bind the Watermaster, but then it says in
2 here the sole duties shall assist. Now, to assist -- in
3 duties to assist the Watermaster as requested?

4 A I don't know because it doesn't have any
5 description of anything that he is doing. I don't see
6 any common law control law there, no.

7 Q What this says here in the sentence, "sole duty
8 transition period slash to assist and provide
9 information to Watermaster as requested"?

10 A Correct.

11 Q So are you saying that from the -- well, first
12 of all, can somebody hire somebody to say you are going
13 to assist me as requested?

14 MS. KAUR: Objection. Vague.

15 THE COURT: Overruled. You can answer.

16 THE WITNESS: I'm sure they could hire somebody like
17 that.

18 BY MR. JENSEN:

19 Q Would that be an employee/employer
20 relationship?

21 A I wouldn't see any common law control there,
22 no. But I'm sure they could do that.

23 Q In other words, if I -- say, I'm an attorney
24 and I hire a paralegal and say your duties -- your duty
25 is just to assist me as requested. Is that not an

1 employee/employer relationship?

2 MS. KAUR: Objection. Vague. Irrelevant. Calls
3 for speculation.

4 THE COURT: Sustained.

5 BY MR. JENSEN:

6 Q So if the Watermaster goes -- the board of
7 Watermaster says I will assign you CEO duties and you
8 will do the duties that I assign to you, is that
9 employer/employee relationship?

10 MS. KAUR: Objection. Vague. Misstates facts in
11 evidence. There is no evidence that Mr. -- demonstrate
12 he was still CEO after November 9, 2011.

13 MR. JENSEN: I wasn't saying that. I was -- in the
14 beginning if the Watermaster board was to hire a CEO
15 and there the job description is basically you are to
16 assist the board as we assign duties to you, you would
17 do whatever we say. Is that an employer/employee
18 relationship?

19 MS. KAUR: Objection to the extent it calls for
20 speculation.

21 THE COURT: Overruled. You can answer.

22 THE WITNESS: I don't hear any common law control
23 there, no.

24 BY MR. JENSEN:

25 Q So let's look at the job description at this --

1 MR. JENSEN: Mr. Herrema, do you know exactly
2 where that job description is in this case?

3 MS. KAUR: It is not in my binder, so it would be
4 his exhibit.

5 MR. HERREMA: It would be attachment to
6 Watermaster's Exhibit G. It is part of Watermaster
7 Exhibit G.

8 THE COURT: Look at the letters.

9 THE WITNESS: G?

10 THE COURT: Yes.

11 BY MR. JENSEN:

12 Q So this is one of the job descriptions. And it
13 says supervision received in and exercised. Can the CEO
14 receive directions from and response from the
15 Watermaster board at all pertaining to administration
16 under the provision, is that -- is that a
17 employer/employee relationship?

18 A That one sentence, no, I wouldn't see that.

19 Q And why not?

20 A There is no duties involved. It says he is
21 going to do something, but it doesn't say what he's
22 going to do.

23 Q In other words, a formal job description -- in
24 other words, employer/employee relationship?

25 A Something that shows job duties and control of

1 the means and manner of those duties.

2 Q So say that once again. You are quoting
3 Tieberg?

4 A That tells me what I do.

5 Q Does this -- I'm trying to read this. In this
6 particular -- "The principal test of an employment
7 relationship is whether the person to whom service is
8 rendered has the right to control the manner and means
9 of accomplishing the result desired," is that
10 consistent?

11 A That's consistent with what I do, yes.

12 Q So where does it say requirement that there is
13 formal duties established at the time of the employer/
14 employee relationship?

15 MS. KAUR: Objection. Assumes facts not in
16 evidence. And misstates the testimony. There is no
17 testimony of formal duties. And vague as to the term
18 formal duties.

19 THE COURT: Sustained.

20 BY MR. JENSEN:

21 Q So let me ask you a question. Do you have to
22 establish the duties at the time that you establish the
23 employer/employee relationship?

24 A That's outside of my job. I don't know how to
25 answer that.

1 Q Am I correct that you are saying that in order
2 to have employer/employee relationship there has to be
3 specific duties that are established?

4 A I would think so. That's what I review.

5 Q But can the relationship just be this, that I
6 am hiring you to assist me in what I need you to do?

7 MS. KAUR: Objection. Asked and answered.

8 THE COURT: Overruled. You can answer.

9 THE WITNESS: Like I said, I suppose you could hire
10 somebody that way. But if it came to me for review, I
11 wouldn't have anything to review. I wouldn't be able to
12 make a common law determination on that.

13 BY MR. JENSEN:

14 Q So now we are in a different situation. Now we
15 have the question of looking at documentation that allow
16 to establish that employer/employee relationship, is
17 that what you are talking about now?

18 MS. KAUR: Objection. Vague. Compound.

19 THE COURT: Overruled. You can answer.

20 THE WITNESS: Vague and -- I didn't understand the
21 question.

22 BY MR. JENSEN:

23 Q So when you said -- our discussion that I could
24 establish employer/employee relationship by just saying
25 that you are -- whatever I say to do and this is what

1 I'm going to tell you to do. That would be establishing
2 an employer/employee relationship?

3 A I said I presume you could do that.

4 Q Then in turn you wouldn't have anything to
5 review in my job unless that was written down as far as
6 duties; is that correct?

7 A I don't believe I said that, no.

8 Q You said you wouldn't have anything to review
9 to make a determination about an employer?

10 A Correct.

11 Q Can you explain what -- what you meant by
12 saying that?

13 A I meant that if you are just saying that you
14 are going to assist me, that doesn't tell me anything
15 about the control and doesn't tell me the means and
16 manner, the common law factors that I'm looking for.

17 Q But the essence of what I'm trying to say to
18 you, you said that the employer/employee relationship
19 would exist outside of documentation; is that correct?

20 A I did not say that.

21 MS. KAUR: Objection. Misstates prior testimony.

22 THE COURT: Overruled.

23 BY MR. JENSEN:

24 Q So just to develop this a little more without
25 belaboring it.

1 The employer/employee relationship can exist
2 without their duties documented on pages or paper; is
3 that correct?

4 A Not in my job, no.

5 Q But in the real world is what matters as far as
6 employee/employer relationship; is that correct?

7 MS. KAUR: Objection. Vague as to the real world.
8 Irrelevant.

9 THE COURT: Sustained.

10 BY MR. JENSEN:

11 Q Under the law there could be employee/employer
12 relationship without documentation that would satisfy
13 you?

14 MS. KAUR: Objection. Vague. Irrelevant. Under
15 the law.

16 THE COURT: Overruled. You can answer, if you know.

17 THE WITNESS: I don't know the law there.

18 BY MR. JENSEN:

19 Q So in order to establish an employer/employee
20 relationship for your purposes, there has to be some
21 documentation or duties; is that correct?

22 A Generally, I get a job duty statement, yes.

23 Q And -- and can a job duty statement be
24 something like assist another individual?

25 A It could be.

1 Q Would that satisfy you?

2 A No, it would not.

3 MS. KAUR: I have a belated objection. Satisfy
4 what? If you could wait.

5 THE WITNESS: Sorry.

6 BY MR. JENSEN:

7 Q So you are looking in to the substance of a --
8 what the duties are whether it establishes an
9 employer/employee relationship; is that correct?

10 MS. KAUR: Objection. Vague as to substance.

11 THE COURT: Sustained.

12 BY MR. JENSEN:

13 Q Are you making a judgement on what the
14 individual has to do in that position in order to
15 evaluate whether there is an employee/employer
16 relationship?

17 A No, I'm not.

18 Q So what are the minimal duties that an
19 individual would have to document in order to satisfy
20 your employment relationship, employee/employer
21 relationship?

22 MS. KAUR: Objection. Vague.

23 THE COURT: Sustained.

24 BY MR. JENSEN:

25 Q So let's look at the document, which is 12, and

1 it says, "Executive sole duty during transition, assist
2 and provide information to Watermaster as requested with
3 respect to pending project and transition of his
4 duties."

5 A It says that, yeah.

6 Q And so does assist and provide information as
7 requested regarding pending project in transition, are
8 those specific enough duties to establish duty to that
9 perform?

10 A No, I don't see any common law control there.
11 No.

12 Q No, no. I'm just asking about duties.

13 A You are outside of my job now. I review duties
14 for common law control. I stated that I don't see any.

15 Q But I'm just asking about the duties part. Can
16 someone have a job which is assist and provide
17 information as requested about pending projects and
18 transition of other duties?

19 MS. KAUR: Objection. Vague. Irrelevant.

20 THE COURT: One moment. Overruled. Do you
21 understand what he's asking?

22 THE WITNESS: Not really. It sounds like the same
23 question to me.

24 BY MR. JENSEN:

25 Q I'm asking to -- looking at this and just say

1 whether duties, is that, in your opinion, could be the
2 substance of what the employee does?

3 A I don't see any there, no. Like I said, it
4 looks to me like someone is asking, can I ask you a
5 question and you may answer it.

6 Q But are you looking at this language in that it
7 "shall be" means required to; is that right?

8 MS. KAUR: Objection to the extent it calls for
9 speculation.

10 THE COURT: Overruled. You can answer.

11 THE WITNESS: In the context of the whole sentence,
12 no, I wouldn't read that that way.

13 BY MR. JENSEN:

14 Q "Shall be" doesn't mean required?

15 A If it stated something that I could pin the
16 "shall be" to, it might. But when it is just you are
17 going to ask a question and I might answer, no, I don't
18 see that.

19 Q Where do you get might out of that?

20 A Because I don't see anything that says he's
21 going to do anything.

22 Q So is the element of control is not limited by
23 in your mind by the requirement to answer information as
24 requested?

25 A No, I don't see that as common law control.

1 No.

2 Q So let me ask you a question. Isn't it the
3 right to control?

4 MS. KAUR: Objection. Vague. Incomplete --

5 BY MR. JENSEN:

6 Q Isn't the test not actual control but the right
7 to control?

8 A That's the right -- the right to control means
9 and manner.

10 Q So under Tieberg, it is really not to exercise
11 control or actual control right to control the right,
12 compel to do something; is that correct?

13 A The means and manner of doing something.

14 Q Like the timeliness or does timeliness falls
15 into means and manner?

16 MS. KAUR: Objection as to the term timeliness.

17 THE COURT: Overruled.

18 THE WITNESS: I'm not hearing any control there, no.

19 BY MR. JENSEN:

20 Q So if I or the Watermaster tells Alvarez that
21 he has to answer this question as requested, would that
22 be right to control?

23 A I don't hear any means and manner, no.

24 Q Is that requested, is that the means and
25 manner?

1 A I don't hear that, no.

2 Q If the Watermaster is saying you have to do
3 something as requested, that's not right to control?

4 MS. KAUR: Objection. Asked and answered.

5 THE COURT: Overruled.

6 THE WITNESS: I don't hear any control, no.

7 BY MR. JENSEN:

8 Q Let's go to the next full -- accurate
9 professional manner to inquire and request by made
10 Watermaster during this transition period.

11 Does he have an obligation to respond?

12 A I don't read that, no.

13 Q You mean -- in other words, he has -- in your
14 mind there is nothing that he has to do under this?

15 MS. KAUR: Objection. Vague.

16 THE COURT: Sustained. Why don't you clarify.

17 BY MR. JENSEN:

18 Q Under this language you read it as though
19 Mr. Alvarez is free of any obligation to respond to
20 Watermaster; is that correct?

21 A It looks like he can if he wants.

22 Q Free of any obligation?

23 A I don't really see any obligation, no.

24 Q Let me just ask you: Were you aware that
25 Mr. Alvarez was receiving payroll checks during this

1 period?

2 A No.

3 Q Would that have changed your determination?

4 A No.

5 Q That's for this period from November to May
6 that -- that Watermaster was paying him a salary, would
7 that have changed your determination?

8 A No.

9 Q And why not?

10 A That would be for compensation to decide. That
11 is outside the scope of my job.

12 Q And you mentioned earlier in our conversation
13 that it would be normal for someone to be separated to
14 answer questions?

15 A Correct.

16 Q On what basis did you find that to be normal?

17 MS. KAUR: Objection. Vague.

18 BY MR. JENSEN:

19 Q What is the basis for your assertion or your
20 assertion that it would be normal for someone who is
21 separated to answer questions to former employer?

22 A Can I answer?

23 Q Yes.

24 A Because it is just something I have seen quite
25 a bit over the years. When someone leaves, there may

1 be questions. They want to ask questions.

2 Q And then you are saying that if someone leaves
3 -- how -- look at the confidential separation agreement.

4 Do you understand that -- did you interpret it
5 that the Watermaster terminated Mr. Alvarez?

6 A I read it as a confidential separation
7 agreement is how I read it.

8 Q When was he separated?

9 A It says November 9, 2011.

10 Q Okay. And were you aware that Watermaster
11 asserts that he was put on administrative leave?

12 A I was not aware of that.

13 Q Would that change your opinion?

14 A No.

15 Q Why not?

16 A Because administrative leave doesn't show me
17 any common law control either.

18 Q When an employee is put on administrative
19 leave, does the same -- does he at that point not become
20 -- he's no longer an employee who is on administrative
21 leave?

22 MS. KAUR: Objection. Vague.

23 BY MR. JENSEN:

24 Q Do you agree -- did you review the employment
25 agreement in this Matter?

1 A I did.

2 Q Was Mr. Alvarez at one time a common law
3 employee of Watermaster?

4 A That was my determination, yes.

5 Q Were you aware that Watermaster put him on
6 administrative leave from November 4th through May 3rd?

7 A I was not aware of that, no.

8 Q And would that change your determination as far
9 as whether he was an employee during that period?

10 MS. KAUR: Objection. Asked and answered.

11 THE COURT: Didn't we cover that before?

12 MR. JENSEN: Probably did.

13 BY MR. JENSEN:

14 Q If he was an employee and his duties were
15 changed or reduced, how is it that -- and if he wasn't
16 separated, how is it that -- would he still remain an
17 employee in that context? Let me rephrase.

18 If he was an employee and put on administrative
19 leave with different duties, reduced duties, would he
20 still be an employee?

21 A I would have to review the duty statement for
22 the employee.

23 Q It is a statement?

24 MS. KAUR: Objection. Vague as to time and put on
25 administrative leave and what duties are, saying assign

1 duties during administrative leave.

2 BY MR. JENSEN:

3 Q That's right.

4 In this period he was put on administrative
5 leave on November 9, and his duties are reduced?

6 A I don't see anything that says that.

7 Q If there were documentation that says he was
8 placed on administrative leave?

9 A I would review that.

10 Q Do you want to review the Watermaster -- did
11 you review the Watermaster appeal in this Matter?

12 A I went over it, yes.

13 Q Did you see that Watermaster indicated he was
14 placed on administrative leave and remained an employee
15 until May 3?

16 A I seem to remember seeing something about that.

17 Q Did you take that into consideration in your
18 opinion in this Matter?

19 A No, I didn't.

20 Q And why not?

21 A I didn't see anything that showed any
22 administrative leave.

23 Q What would show administrative leave?

24 A A duty statement and then leave and then
25 returning to that job.

1 Q Where do you find returning to that job part?

2 MS. KAUR: Objection. Vague.

3 BY MR. JENSEN:

4 Q Where is the requirement to return to that job
5 in administrative leave?

6 A Well, it's implied that you have a job and that
7 you are on leave.

8 Q Where he had a job and you were on leave; is
9 that right?

10 MS. KAUR: Objection. Vague.

11 BY MR. JENSEN:

12 Q Can people retire when they are on
13 administrative leave?

14 A I have no idea how to answer that one.

15 Q In the context of employee/employer
16 relationship, did you give -- do you ever refer to the
17 employer's determination to exercise control and believe
18 this person to be an employee?

19 A I can. I don't always.

20 Q Did you in this case?

21 A I -- could you define in this case?

22 Q In this case there was testimony from the
23 Watermaster that they believed that -- treated,
24 considered Mr. Alvarez to be an employee through May
25 3rd.

1 Would that make a difference in your
2 determination?

3 A No, it would not.

4 Q And why not?

5 A Because I have the separation agreement that
6 says that is not what happened.

7 Q Where does it say that he's no longer an
8 employee in this?

9 A In paragraph labeled number 1, termination of
10 active employment and then the title of the agreement
11 that says it is a separation agreement.

12 Q And -- and in your view of things, separation
13 has to be in a certain way in the past. You can't
14 separate in the future; is that correct?

15 MS. KAUR: Objection. Vague.

16 THE COURT: Sustained.

17 BY MR. JENSEN:

18 Q If you have an agreement, can you have a term
19 where you reduce an individual's duties and then in the
20 future agree to separate them?

21 MS. KAUR: I'm sorry? Can you repeat your question?

22 BY MR. JENSEN:

23 Q Do you understand?

24 A No.

25 Q If you have an agreement between

1 employee/employer that reduce the individual employment
2 duties and then in the future you decide not to continue
3 the employment agreement, the employment relationship;
4 isn't all contractual?

5 A It is. So I don't see a contract that says
6 that.

7 Q So how can somebody separate and still have
8 duties after they separate?

9 MS. KAUR: Objection. Vague. Irrelevant.

10 THE COURT: Sustained.

11 BY MR. JENSEN:

12 Q In this agreement, you said separation
13 agreement what was that date of separation you said?

14 A November 9, 2011.

15 Q And then you refer to the section duty in this
16 transition period; is that correct?

17 A I beg your pardon?

18 Q You referred to the section about duties,
19 transition after November 2nd -- November 9th, 2011; is
20 that correct?

21 A I referred to it?

22 Q Yes.

23 A Yes.

24 Q You referred to it right in your discussion in
25 this transition period, B, and then it says duties?

1 A Correct.

2 Q How can an individual have job duties after
3 they separate?

4 A Well --

5 MS. KAUR: Objection. Vague.

6 THE COURT: Sustained.

7 BY MR. JENSEN:

8 Q What is -- when you reviewed this document, it
9 says transition period, was transition period after
10 November 9th, 2011?

11 MS. KAUR: Objection to the extent it calls for
12 speculation.

13 THE COURT: Overruled. You can answer.

14 THE WITNESS: It appears to be. It doesn't give a
15 start, so I don't know how to answer that. It says it
16 ends of May 3rd, 2012, but it doesn't say anything else.

17 BY MR. JENSEN:

18 Q So my question to you: How can there be duties
19 specifically referring to after separation?

20 MS. KAUR: Objection. Well, it was sustained based
21 on my objection.

22 THE COURT: I'm sorry?

23 MS. KAUR: I believe -- well, same objection. And
24 vague.

25 THE COURT: Do you understand what he's asking?

1 THE WITNESS: Yes. I would agree that I have
2 answered it multiple times.

3 THE COURT: Okay. Try again just to make sure we
4 are all on the same --

5 THE WITNESS: I don't see any duties that rise to
6 common law control.

7 BY MR. JENSEN:

8 Q Now we are back to that again.

9 So do you believe he was an independent
10 contractor?

11 A I believe he was separated.

12 Q What was his status after he was separated?

13 A Separate.

14 Q Is that an employment status?

15 A Not to me, no.

16 Q Are you making that up?

17 A That's my opinion.

18 MS. KAUR: Objection. Argumentative.

19 THE COURT: Sustained.

20 BY MR. JENSEN:

21 Q So he wasn't an employee; correct?

22 A He was not a common law employee.

23 MS. KAUR: I've a belated objection as to time
24 frame. I believe he was an employee, and then start up
25 to November.

1 MR. JENSEN: I'm referring to after November 9th.

2 BY MR. JENSEN:

3 Q Actually, let me --

4 What is the effective date of this agreement
5 when it was signed?

6 A That I don't know.

7 MS. KAUR: Are you referring to the separation or
8 the --

9 MR. JENSEN: The separation agreement.

10 BY MR. JENSEN:

11 Q If you look at the last page, it is January
12 23rd, 2012. And so what do you believe the effective
13 date of separation was?

14 A November 9th, 2011.

15 Q So retroactive separation?

16 A It says the date it shows his active employment
17 was terminated.

18 Q And so when you read into these terms that --
19 that he was relieved from active employment as CEO, does
20 that mean he was -- that there was no employment
21 relationship in which he was an employee of Watermaster?

22 MS. KAUR: Objection to the extent it calls for
23 speculation. And vague.

24 THE COURT: You can answer. But don't guess or
25 speculate.

1 THE WITNESS: Well, yeah. There was nothing before
2 me that indicated that.

3 BY MR. JENSEN:

4 Q So you are saying that his active --
5 termination activity as CEO that ending of the job means
6 that he is no longer an employee in any context; is that
7 correct?

8 A That's the way I read it.

9 Q Could it be that, that he was relieved of those
10 duties of CEO but he was given different duties during
11 the transition and those duties are to provide
12 information and to assist?

13 MS. KAUR: Objection to the extent it has been asked
14 and answered.

15 BY MR. JENSEN:

16 Q Is someone allowed to do duties and maintain
17 employee/employer relationship?

18 MS. KAUR: Objection. Vague.

19 THE COURT: Overruled.

20 THE WITNESS: Someone could do that

21 BY MR. JENSEN:

22 Q And so it isn't just that active termination or
23 active employment is the end of the employee/employer
24 relationship it could terminate the CEO and have
25 different duties in transition; is that correct?

1 MS. KAUR: Objection. Vague.

2 THE COURT: Sustained.

3 BY MR. JENSEN:

4 Q In your reading of this, you mention
5 termination activity as CEO was separation and end of
6 his employment relationship with Watermaster; is that
7 correct?

8 A Could you restate that?

9 Q You said that the termination of active
10 employment as CEO was the end of the -- his common law
11 duties for purposes of establishing as an employee of
12 Watermaster; is that correct?

13 A Correct.

14 Q And do you see in the agreement where it also
15 establishes other duties in response to different duties
16 and responsibility in that transition period?

17 MS. KAUR: Objection. Asked and answered.

18 THE COURT: Overruled.

19 THE WITNESS: Not really, no.

20 BY MR. JENSEN:

21 Q So your expertise in CalPERS is related only to
22 employee/employer relationship, that's the only thing
23 that --

24 A That's not all I do, no.

25 Q What else do you?

1 A Other membership questions.

2 Q Just give me.

3 A Safety issues.

4 THE COURT: What do you mean safety issues?

5 THE WITNESS: Public safety. CalPERS has different
6 levels of retirement benefits. So your membership can
7 be into one of those different levels. I determine
8 where that would go.

9 THE COURT: Fire employees?

10 THE WITNESS: Fire employees, public safety,
11 correct.

12 MR. JENSEN: I kind of want to ask you -- want to
13 ask him some questions. Can I just -- fighting time.
14 So I defer to Mr. Herrema and --

15 THE COURT: Yield your time.

16 MR. JENSEN: Yield my time.

17 THE COURT: Okay. Mr. Herrema.

18 BY MR. HERREMA:

19 Q Good afternoon, Mr. Gow.

20 You mentioned that you were brought into this
21 case midstream, is that the characterization? Do you
22 recall that?

23 A Right.

24 Q Do you remember who brought you into this case?

25 A I believe it was one of the attorneys in legal.

1 Q Do you specifically know who it was?

2 MS. KAUR: Objection to the extent it reflects
3 attorney/client privilege.

4 MR. HERREMA: I don't want information on
5 attorney/client privilege.

6 THE COURT: Overruled.

7 THE WITNESS: I believe it was Wes Kennedy.

8 BY MR. HERREMA:

9 Q Do you know why he brought you into the case to
10 the extent you can without disclosing any privilege
11 communication?

12 A He brought it to me for common law
13 determination.

14 Q Do you recall what he asked you to do?

15 MS. KAUR: Objection. Calls for attorney privilege,
16 privilege information.

17 THE COURT: Sustained.

18 BY MR. HERREMA:

19 Q Did you speak to anyone else at CalPERS about
20 your analysis of this issue besides Mr. Kennedy?

21 A Yes, I did.

22 Q Who did you speak with?

23 A My manager.

24 Q Who was your manager at the time?

25 A I believe it was Christina Rowllins.

1 Q Did you take any notes during your preparation
2 or analysis of this issue?

3 MS. KAUR: Objection. Vague as to time.

4 THE COURT: Overruled. You can answer.

5 THE WITNESS: I may have. I don't recall. I don't
6 have any now.

7 BY MR. HERREMA:

8 Q Did you have any notes at some point?

9 A I don't recall.

10 Q Did you write up a summary of your opinion on
11 this -- on this issue beyond what is February 12, 2015,
12 letter?

13 A I believe that my summary is what's in the
14 letter if I recall.

15 Q And if you could remind me, which paragraph did
16 you since attribute to the February 12, 2015, letter
17 that is marked as Exhibit 6?

18 A It looks like I wrote starting about the second
19 paragraph of page 2, the second or third, the one
20 beginning "May 2011 employment agreement."

21 Q And how far?

22 A Probably up to where it says, "You have the right
23 to appeal."

24 Q Do you know who wrote the balance of the
25 letter?

1 A Emily DeFlores.

2 Q Turning your attention to the third full
3 paragraph on page 2, paragraph that starts "January 2012,
4 confidential separation agreement." About halfway down
5 there is a sentence that says, "While it states that you
6 shall continue to be employed until May 2012 in the
7 transition period, it also clearly states that you have
8 no authority and no duties within that transition
9 period."

10 How do you square that statement with paragraph
11 2(b) of the confidential separation agreement, which is
12 Exhibit 12 where it lists duties?

13 A Same question. There is no common law
14 control.

15 Q Do you think that the letter -- confidential
16 separation agreement clearly states that Mr. Alvarez
17 has no duties within the transition period?

18 MS. KAUR: Objection. Vague.

19 THE COURT: Overruled.

20 THE WITNESS: My agreement -- it says there is
21 duties in the agreement.

22 BY MR. HERREMA:

23 Q Do you think the confidential separation
24 agreement clearly states that Mr. Alvarez has no duties
25 during the transition period?

1 A I said it clearly he has duties.

2 Q This letter is not accurate?

3 A It is accurate for my determination. I found
4 no common law control. There is no duties that exercise
5 common law control.

6 Q I have had a lot of trouble understanding your
7 discussion with Mr. Jensen.

8 Can there be duties without common law control?

9 A Not for my purposes.

10 Q What were your purposes?

11 A To determine membership in CalPERS.

12 Q So the only things that are relevant to
13 determination are those employer has common law control?

14 A Correct.

15 Q The next sentence says, "The agreement further
16 states that you are free to pursue other work provided
17 it is not detrimental to the agency."

18 Do you see that sentence?

19 A Yes.

20 Q How is that relevant to your determination?

21 A It was not relevant at all.

22 Q It wasn't relevant?

23 A No.

24 Q Why is it in this paragraph?

25 A In the confidential separation agreement?

1 Q The sentence -- the sentence on the page --
2 third full paragraph on page 2 of the February 12, 2015,
3 letter, which is Exhibit 6, states "The agreement further
4 states you are free to pursue other work provided it is
5 not detrimental to the agency."

6 The agreement that is referred to there is the
7 confidential separation agreement?

8 A Because that is standard language for
9 separations.

10 Q Did you review Mr. Alvarez's employment
11 agreement?

12 A I did.

13 Q Can I turn your attention to page 2 of what's
14 been marked as CalPERS Exhibit --

15 MS. KAUR: It is 11.

16 MR. HERREMA: 11.

17 THE WITNESS: In CalPERS?

18 MS. KAUR: Yes.

19 THE WITNESS: Okay.

20 BY MR. HERREMA:

21 Q About halfway of the page there is paragraph
22 marked C.

23 A What page is this?

24 Q Page 2 of the employment agreement, which is
25 Exhibit 11. Halfway through the paragraph and paragraph

1 B of 2. " Executive shall not consult in work or any
2 trade or business for his own account for and on behalf
3 of any person, firm, or company that competes,
4 conflicts, or interferes hereunder in any material way."

5 What -- how is that different than what was in
6 the confidential separation agreement?

7 MS. KAUR: Objection to the extent it calls for
8 speculation.

9 THE COURT: Overruled.

10 THE WITNESS: It appears to be just the opposite
11 thing. The employment agreement says he shall not and
12 the separation agreement says he's free to.

13 BY MR. HERREMA:

14 Q Turning your attention to page 1 of the
15 Exhibit 12, the very last sentence going at the bottom
16 of the page. It starts out, "Executive forthwith may
17 undertake consulting work trade or business provided he
18 does not act to the detriment of Watermaster or in
19 violation of continuing duties thereto."

20 How is that materially different than what was
21 in the employment agreement?

22 A It doesn't sound materially different.

23 Q Why did you include that determination
24 statement about Mr. Alvarez's ability to undertake
25 consulting work during the transition period?

1 MS. KAUR: Objection to the extent it has been asked
2 and answered. Vague.

3 THE COURT: Overruled.

4 THE WITNESS: Because I retained the language like
5 that in the separation agreement.

6 BY MR. HERREMA:

7 Q But in this you just said the language in the
8 agreement is materiality the same as the language in the
9 employment agreement?

10 A Okay.

11 Q So would it be important in evaluating the
12 relationship under the transition period?

13 A Because I was discussing the separation
14 agreement, not the employment agreement.

15 Q But nothing changed between the two; correct?

16 MS. KAUR: Objection. Vague.

17 BY MR. HERREMA:

18 Q Nothing changed in Mr. Alvarez's ability to
19 undertake consulting work; is that correct?

20 A I disagree.

21 Q Why do you disagree?

22 A Because -- I can't have both of these going at
23 the same time here. Where was the one in the separation
24 agreement?

25 THE COURT: Bottom of page 1 and top of page 2 of

1 Exhibit 12.

2 THE WITNESS: Yeah. He may undertake consulting
3 work and may pursue any trade or business is not the
4 same to me. The employment agreement says "shall not
5 engage in consulting work or trade or business on his
6 own account." I see that as entirely the opposite.

7 BY MR. HERREMA:

8 Q It says "shall not engage in consulting work on
9 his own account that competes, conflicts, or interferes
10 with the performance of his duties." It is not
11 prohibition?

12 MS. KAUR: Objection. No question pending. There
13 is no question.

14 BY MR. HERREMA:

15 Q It is not absolute prohibition, is it?

16 A I don't understand.

17 Q The employment agreement states "that the
18 executive shall not engage in consulting trade or
19 business for his own behalf, before or on behalf of any
20 other person, firm, or company that competes, conflicts,
21 or interferes with the performance or duties hereunder
22 in any material way." Is that what it says?

23 A And you are looking at which part?

24 Q Paragraph 3(c), page 2 of the May 3, 2011,
25 employment agreement marked as CalPERS Exhibit 11.

1 A There is no restriction in the separation
2 agreement like that.

3 Q My question was whether the language of the
4 employment agreement is an absolute prohibition to do
5 consulting work or other work.

6 MS. KAUR: Objection to the extent it calls for a
7 legal opinion or conclusion; to the extent it calls for
8 speculation.

9 THE COURT: Overruled. You can answer.

10 THE WITNESS: I wouldn't say there is an absolute
11 prohibition. But it has severe limitations.

12 BY MR. HERREMA:

13 Q How in your mind does the limitation language
14 in the confidential separation agreement executive may
15 undertake consulting work provided he does not act in
16 the detriment of the Watermaster?

17 A It is slightly less restricted.

18 Q What was the materiality of the difference in
19 that that caused you to place that sentence in the
20 February 12, 2015 letter, states "the agreement further
21 states you are free to pursue other work provided it is
22 not detrimental to the agency"?

23 MS. KAUR: Objection. Asked and answered. I
24 believe it has been answered two times.

25 THE COURT: Overruled. You can answer.

1 THE WITNESS: I'm getting lost in the language at
2 this point. I don't really even -- could you repeat the
3 question?

4 BY MR. HERREMA:

5 Q Here that language about the freedom of Mr.
6 Alvarez to pursue other work provided it is not a
7 detriment to the agency.

8 Do you think that is material to the agency
9 employer, the Watermaster during the transition period?

10 A I think it is a lot broader than the one in the
11 employment agreement and what it allows him to do.

12 Q So the difference between competing and
13 interfering is different than detriment in your mind?

14 A Correct.

15 Q And that was one of the basis of your opinion?

16 A One of, yes.

17 Q I just have one last question for you. It is
18 hypothetical.

19 If CalPERS were to hire your successor and keep
20 you on with the sole duty to transition whatever work
21 you have been doing to your successor during that
22 transition period, do you think you would be considered
23 a CalPERS employee?

24 A Probably not.

25 THE COURT: Okay. Anything further, Mr. Jensen?

1 MR. JENSEN: I just have a brief question.

2 BY MR. JENSEN:

3 Q When we were talking about -- you agree with
4 the Tieberg test, right to control?

5 MS. KAUR: I'm sorry?

6 BY MR. JENSEN:

7 Q The Tieberg test of employment whether the
8 employer has the right to control the means and manner
9 in which an individual does the task that they perform
10 within the job?

11 MS. KAUR: Objection to the extent it calls for a
12 legal opinion and legal conclusion.

13 THE COURT: Overruled.

14 THE WITNESS: Tieberg, I think, is a precedential
15 decision.

16 BY MR. JENSEN:

17 Q Tieberg is a case law in California. It is
18 quoted in your determination letter, I believe. It is
19 Metropolitan Water.

20 A Metropolitan, I'm familiar with.

21 MS. KAUR: Page 2 of Exhibit 6.

22 BY MR. JENSEN:

23 Q Yeah, it is on the bottom of page 2.

24 Were you under the impression that in this case
25 law the emphasis was on the duties performed by an

1 individual who was being tested to be employed or
2 whether the emphasis was on the right to control by the
3 employer?

4 MS. KAUR: Objection. Vague and to the extent it
5 calls for a legal opinion.

6 THE COURT: Do you understand what he's asking?

7 THE WITNESS: I don't know anything about case law.

8 BY MR. JENSEN:

9 Q So just in your testing, do you put more
10 emphasis or evaluation -- do you put more emphasis on
11 looking at whether the putative employer has a right to
12 control what the means and manner of what an individual
13 does, or do you put more emphasis on what the duties to
14 be performed by the individual for purposes to be
15 employed?

16 MS. KAUR: Objection. Vague, specifically to the
17 term "putative."

18 THE COURT: Do you understand what he means by that
19 term?

20 THE WITNESS: Yeah, I understand the term. It
21 seems like we have been here before.

22 BY MR. JENSEN:

23 Q I'm just asking to weigh which is more
24 important.

25 MR. JENSEN: For the record counsel is standing

1 with two hands up in the air like a scale.

2 BY MR. JENSEN:

3 Q Which has more emphasis the right to control
4 or the duties?

5 A The right to control.

6 Q And in this agreement, this confidential
7 separation agreement, just in one sentence that you were
8 discussing --

9 A We are back to 12?

10 Q This is 12. Where it says, "Notwithstanding
11 any contrary employment agreement, the executive
12 henceforth may take consulting work, pursue trade that
13 does not act to the detriment."

14 Do you see any aspect of control in that?

15 A Not really, no.

16 Q Do you see aspect of control in forbidding any
17 -- from you doing some acts?

18 MS. KAUR: Objection. Vague.

19 THE COURT: Overruled.

20 THE WITNESS: I don't see any means and manner.

21 BY MR. JENSEN:

22 Q My question is, do you see any ability to
23 control?

24 A My answer is I don't see any means or manner.

25 Q And when you restrict what an individual can

1 sell his services for in the world by limiting his
2 consulting work, do you see a restriction or right to
3 control the means and manner of the way that employee
4 sells his services in the world?

5 MS. KAUR: Objection. Vague. Compound.

6 THE COURT: Sustained.

7 BY MR. JENSEN:

8 Q When in this limitation on what Mr. Alvarez can
9 do is restricted in the manner of him working for others
10 during the transition period?

11 A I don't understand that question.

12 Q So Mr. Alvarez has certain skills and executive
13 skills. If you restrict how he is able to use means and
14 manner for him to employ his executive skills in this
15 agreement, does that -- does that evidence a right to
16 control?

17 A I don't think so.

18 MR. JENSEN: I have no further questions.

19 THE COURT: All right. Any redirect, Ms. Kaur?

20 MS. KAUR: No, your Honor.

21 THE COURT: All right. Mr. Herrema, any follow up
22 to any of Mr. Jensen's last questions?

23 MR. HERREMA: No, your Honor.

24 THE COURT: Okay. Shall we release Mr. Gow?

25 MR. HERREMA: Yes.

1 MS. KAUR: Thank you.

2 THE COURT: Thank you, Mr. Gow. Thanks again for
3 your patience. We are going to release you. You don't
4 have to come back.

5 THE WITNESS: I'm released?

6 THE COURT: Yes, indeed. Let's go off the record
7 for a moment.

8 (Discussion off the record)

9 (Hearing adjourned at 4:40 p.m.)

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