

1 MATTHEW G. JACOBS, GENERAL COUNSEL
PREET KAUR, SENIOR STAFF ATTORNEY, SBN 262089
2 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811
3 P. O. Box 942707, Sacramento, CA 94229-2707
Telephone: (916) 795-3675
Facsimile: (916) 795-3659

4 Attorneys for California Public
5 Employees' Retirement System

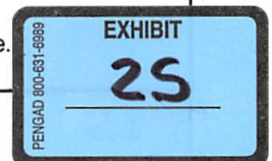
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7 BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

8	In the Matter of the Application for Final)	CASE NO. 2013-1113
9	Compensation)	
10	DESI ALVAREZ,)	OAH NO. 2014080757
11	Respondent,)	CalPERS BRIEF
12	and)	Hearing Date: April 11, 2016 at
13	CHINO BASIN WATERMASTER,)	9:00 am
14	Respondent.)	Hearing Location: Glendale
15)	Prehearing Conf.: None Scheduled
16)	Settlement Conf.: None Scheduled

17 **I. INTRODUCTION**

18 At first glance, CalPERS determination in this case, that Desi Alvarez's (Alvarez)
19 compensation does not qualify as payrate, because it was not paid pursuant to a
20 publicly available pay schedule, may appear to be based on a technicality or a broad
21 interpretation of the law. This matter; however, highlights the importance of the
22 passage of SB 53, the anti-spiking law, which enacted Government Code section
23 20636(b)(1),¹ of the Public Employees' Retirement Law ("PERL"). Upon further
24 analysis, it becomes clear that CalPERS determination is simply an attempt to apply

25 ¹ Except as indicated all statutory references will be to the California Government Code.



1 section 20636(b)(1), as it was intended by the Legislature and interpreted by relevant
2 case law, to ensure employers do not sidestep the requirements of public notice and
3 spike employee compensation.

4 As discussed below, the compensation paid to Alvarez, from May 3, 2011 to
5 May 4, 2012, by the Chino Basin Watermaster (Watermaster), was not paid pursuant
6 to a publicly available pay schedule and therefore does not qualify as payrate.
7 Furthermore, the "Severance Compensation" paid from November 9, 2011 to May 4,
8 2012, is not reportable as Alvarez was not a common law employee after the effective
9 date of the "Confidential Separation Agreement."

10 **II. RESPONDENT HAS THE BURDEN OF PROOF**

11 It is well-settled and without question, that petitioner in this matter bears the
12 burden of proof to establish that CalPERS' determination to exclude pay that fails to
13 meet the statutory definition of "compensation earnable" or "payrate" under the
14 Government Code or regulations was erroneous. (See, *McCoy v. Board of Retirement*
15 (1986) 183 Cal.App.3d 1044, 1047; *Harmon v. Board of Retirement* (1976) 62
16 Cal.App.3d 689, 691; *Rau v. Sacramento County Retirement Board* (1966) 247
17 Cal.App.2d 234, 238; and *Bowman v. Board of Commissioners* (1984) 155 Cal.App.3d
18 937, 947).

19 As the sole agency charged with the enforcement of the PERL, and specifically
20 membership and benefits, CalPERS determinations are entitled to great deference.
21 (*City of Pleasanton v. Board of Administration of the California Public Employees'*
22 *Retirement System* (2012) 211 Cal.App.4th 522, 539 [where our review requires that
23 we interpret the PERL or a PERS regulation, the court accords great weight to PERS
24 interpretation.]; See also *Molina v. Board of Administration* (2012) 200 Cal.App.4th
25 53, 61; [construing § 20636]; *Prentice v. Board of Administration*, (2007)157 Cal. App.

1 4th 983, 989, [construing § 20636]; *City of Sacramento v. Public Employees*
2 *Retirement System* (1991) 229 Cal.App.3d 1470, 1478.) CalPERS has the expertise
3 and technical knowledge as well as an intimate knowledge of the problems dealt with
4 in the statute and the various administrative consequences arising from particular
5 interpretations. (*City of Pleasanton v. Board of Administration of the California Public*
6 *Employees' Retirement System*, supra; 211 Cal.App.4th at p. 539, citing *Yamaha Corp.*
7 *of America v. State Bd. of Equalization* (1999) 73 Cal.App.4th 338, 353.)

8 In addition to the great deference, CalPERS determinations are entitled to a
9 presumption of correctness. (Evid. Code § 664; *McCoy v. Board of Retirement*, supra,
10 183 Cal.App.3d at p. 1047; *Harmon v. Board of Retirement*, supra, 62 Cal.App.3d at p.
11 691; *Rau v. Sacramento County Retirement Board*, supra, 247 Cal.App.2d at p. 238;
12 *Bowman v. Board of Commissioners*, supra, 155 Cal.App.3d at p. 947.)

13 Ambiguity or uncertainty in the meaning of pension legislation may not be
14 resolved in favor of a member if it would be inconsistent with the clear language and
15 purpose of the statute. Thus, "courts must not blindly follow such rule of construction
16 where it would eradicate the clear language and purpose of the statute and allow
17 eligibility for those for whom it was obviously not intended." (*Barrett v. Stanislaus*
18 *County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1608-1609;
19 *Hudson v. Board of Admin. of Public Employees' Retirement System* (1997) 59
20 Cal.App.4th 1310, 1324-25.)

21 In this matter, Alvarez has appealed CalPERS determination of his retirement
22 allowance. (Title 2, Cal. Code Regs. 555.1, 55.2; 555.4.) It is his burden to establish
23 his entitlement to a retirement allowance greater than that determined by CalPERS,
24 and of course as to all affirmative defenses and new matter.

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1 **III. FACTUAL BACKGROUND**

2 Watermaster contracts with CalPERS to provide its employees public pension
3 benefits as are available under the PERL. (Exh. 19.) All enrolled employees of
4 participating contracting public agencies are members of the system. (Gov. Code §§
5 20281, 20383.)

6 On March 31, 2011, a confidential Watermaster Board Closed Session
7 Conference call was held, whereby Watermaster counsel was authorized to "extend a
8 binding term sheet for the retention of Alvarez, the new CEO of Watermaster, and to
9 prepare a confirming legal contract for execution by the Watermaster Board Chair."
10 (Exh. 10.)

11 Respondent Alvarez entered an employment agreement with the Watermaster,
12 effective May 3, 2011, as a Chief Executive Officer (CEO), which states in pertinent
13 part:

14 1. **Employment:** The Watermaster hereby employs the Executive and the
15 Executive hereby accepts employment with the Watermaster as CEO.
16 During the Employment Term (as hereinafter defined), Executive will
17 have the title status, and duties of CEO and will report directly to the
18 Watermaster Board of Directors ("Board").

19 3. **Scope of Duties: During the Employment Term:**

20 a. The Executive will perform duties assigned by the Board and will be
21 responsible for the administration and oversight of Watermaster
22 functions, including implementation of the Judgment and OBMP.
23 Subject to the control and direction of the Board, the CEO provides
24 Day-to-day leadership for Watermaster and is directly responsible to
25 the Board on all matters pertaining to the administration and
operations of the Chino Groundwater Basin ("Basin") under the
provisions of the Judgment and the Optimum Basin Management
Program. The CEO is responsible for overseeing the operating
budget and the other employees of Watermaster. The CEO must
keep the Board, through the Advisory Committee process, apprised
of all applicable federal, state, regional and local policies regulating
Watermaster activities.

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4. **Hours of Work:** Executive's hours of work will vary depending on the duties to be performed and depending on what is necessary to completely perform the job of CEO. As general guidance, normal work hours will begin at 8:00 a.m. Monday through Friday.

5e. **Administrative Leave:** Executive shall be allowed twelve days per year of administrative leave ("Administrative Leave"), to be used as the Executive's discretion. Unused Administrative Leave shall not accrue to the following year.

9. **Severance:**

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

Between May 3, 2011 and May 4, 2012, Watermaster reported to CalPERS Alvarez and his pay as one of its employees. (Cal.Code Regs., tit. 2, § 565.1.) On January 23, 2012, Alvarez executed a "Confidential Separation Agreement" the terms of which stated:

1. **Termination of Active Employment.** Executive's employment in the capacity of Chief Executive Officer of the Watermaster with all of the powers and duties associated therewith ceased on November 9, 2011, and the Employment Agreement is hereby modified effective as of that date. [¶]...[¶]

2. **Transition Period.**

A. **Term**

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

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B. Duties.

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

C. Compensation and Benefits.

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

[¶]...[¶]

///

1 13. Entire Agreement: Modifications.

2 This Separation Agreement constitutes the sole agreement between the
3 parties with respect to the subject matter hereof, and supersedes all prior
4 discussions, negotiations, understandings or agreements, whether oral or
5 written, among the parties relating to the subject matter of this Separation
6 Agreement, expressly including the Employment Agreement. **Neither the
7 Watermaster nor Executive shall have any further obligations under
8 the Employment Agreement, and the parties' per respective
9 obligations thereunder are hereby extinguished.** This Separation
10 Agreement may not be amended, modified or changed (in whole or in
11 part), except by a formal, definitive written agreement expressly
12 refereeing to this Separation Agreement, which agreement is executed
13 by both of the parties hereto.

14 After November 9, 2011, Alvarez had no duties, aside from answering any
15 questions posed by the Board regarding pending projects and the transition of his
16 duties. (Exh. 12, Tr. Vol I. p. 182:7-12.) After November 9, 2011, the Watermaster
17 appointed Danielle Maurizio as the interim CEO. (Exh.8; Tr. Vol I. p. 183:10-25.)

18 Despite separating Alvarez from employment, Watermaster continued to report
19 his earnings to CalPERS. Watermaster reported an annual salary of \$228,000,
20 which calculates to a monthly salary of \$19,000, from May 3, 2011 through May 4
21 2012.

22 On May 2, 2012, Alvarez submitted to CalPERS an application for service
23 retirement. (Exh. 9.) In his application, Alvarez requested that CalPERS use the
24 amount received from Watermaster as his final compensation. (*Id.*, at p. 1.)

25 On February 20, 2013, CalPERS informed respondents that the compensation
reported by the Watermaster is not pursuant to a publicly available pay schedule for
Alvarez's position of a CEO. (Exh. 4.) The letter explained that the reported
compensation does not meet the definition of "payrate" under section 20636(b)(1),
which requires the rate of pay must be provided pursuant to a publicly available pay
schedule. (Exh. 4.) The letter also stated the payrate for Alvarez also fails to comply
with the criteria set out in Title 2, California Code of Regulations section 570.5.²

CalPERS notified respondents that it will use the monthly rate and special

² All regulatory references are to Title 2.

1 compensation reported by the City of Downey, Alvarez's previous employer, to
2 calculate Alvarez's retirement benefits. (*Id.*)

3 On April 19, 2013, Alvarez and Watermaster appealed CalPERS February 20,
4 2013 determination. (Exh. 7 & 8.) In its appeal, the Watermaster provided more
5 information concerning the circumstances surrounding Alvarez's employment and
6 separation with the Watermaster. (Exh. 8.)

7 On May 23, 2013, the Watermaster Board retroactively adopted a Salary
8 Matrix for FY 2011/2012 and a Salary Matrix for FY 2012/13 during open session.
9 (Exh. 14.) Prior to 2013, the Salary Matrix "from FY 2011/2012 and FY 2012/2013
10 [had] never been approved in open session by the Watermaster Board." (Exh. 16, p.
11 2; Tr. Vol. I, p. 96:1-12.)

12 The Salary Matrix was "used to develop and create the final budget for any
13 position that's listed or that's currently filled at Watermaster." (Tr. Vol. I, p. 99:3-11.)
14 The budget, which is approved in open session, does not have the Salary Matrix
15 attached to it. (Tr. Vol. I, p. 99:16-20.)

16 On June 17, 2013, in response to respondents' appeals, CalPERS issued an
17 Amended determination informing respondents the "Severance Compensation"
18 provided to Alvarez from November 9, 2011 to May 4, 2012 constitutes "final
19 settlement pay" under section 20636(f) and will not be used to calculate his
20 retirement benefits.

21 Dissatisfied with CalPERS action, respondents appealed CalPERS
22 determination. On September 4, 2014, CalPERS served a Statement of Issues (SOI)
23 and referred the matter to the Office of Administrative Hearings to conduct an
24 evidentiary hearing and prepare a proposed decision.

25 On February 12, 2015, CalPERS issued a supplemental determination letter
informing Alvarez that pursuant to sections 20069(a) and 20028(b) and the common
law employment test, he was not considered an employee of the Watermaster after
the effective date of the "Confidential Separation Agreement," from November 10,

1 2011 through May 4, 2012. (Exh. 6.) As a result, Alvarez's time after November 9,
2 2011 is not reportable to CalPERS. (Exh. 6.)

3 On February 12, 2015, CalPERS filed an amended SOI, incorporating its
4 determination that Alvarez was not in the employ of Watermaster after November 9,
5 2011. (Exh. 3.)

6 **IV. COMPENSATION**

7 **A. Generally**

8 The PERL is a comprehensive statutory scheme and the Legislature has expressly
9 vested CalPERS with the sole authority to determine the type and level of benefits paid
10 under the system. (Gov. Code §§ 21023 -20125.) All employees of the state and
11 public agencies are members of the System. Because of the need for statewide
12 uniformity in its application, the Board has been vested with the sole authority to
13 determine "... who are employees and the sole judge of the conditions under which
14 persons may be admitted to and continue to receive benefits under this System"
15 following a hearing if necessary. (*Metropolitan Water District of California v. Cargill*
16 (2004) 32 Cal.4th 491, 503-505; *City of Los Altos v. Board of Administration* (1978) 80
17 Cal.App.3d 1049, 1051.) Neither the member nor his/or her employer have authority to
18 enter into agreements that bind CalPERS determinations as to what constitutes
19 compensation earnable. (*Molina v. Board of Administration* (2011) *supra*, 200
20 Cal.App.4th at 61-69, parties do not have the right to characterize settlement terms as
21 PERSable.) Only the Legislature, through statute and CalPERS, through regulations
22 determine, what is compensation earnable or what must be excluded. (*Id.*)

23 A members' retirement allowance is based on factors of age, length of service
24 and final compensation. "Compensation" is defined under the PERL as "remuneration
25

1 paid out of funds controlled by an employer in payment *for the member's services*
2 *performed* during normal working hours or for time during which the member is
3 excused from work." (Gov. Code §20630.) "Final compensation" is the highest
4 average member's compensation earnable paid during a consecutive twelve month
5 period. (Gov. Code §§ 20037, 20042.)

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

14 "Compensation earnable" is a combination of a "payrate" and "special
15 compensation." (Gov. Code §20636, subd. (a); Title. 2, Cal.Code Regs., § 570.)³
16 Under section 20636, subdivision (b)(1): " 'Payrate' means the normal monthly rate of
17 pay or base pay of the member paid in cash to similarly situated members of the same
18 group or class of employment for services rendered on a full-time basis during normal
19 working hours, pursuant to publicly available pay schedules. 'Payrate,' for a member
20 who is not in a group or class, means the monthly rate of pay or base pay of the
21 member, paid in cash and pursuant to **publicly available pay schedules**, for services
22 rendered on a full-time basis during normal working hours, subject to the limitations of
23 paragraph (2) of subdivision (e)." (Emphasis added.) The statutory definitions

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25 ³ All regulatory references are to Title 2.

1 delineating the scope of PERS compensation cannot be qualified by public agencies.
2 (*Oden, supra* at p. 201.)

3 **B. Statutory Background**

4 CalPERS has the responsibility to ensure that only those benefits, which have
5 been legally and actually accrued and earned by a member, be payable.⁴
6 Compensation reported to CalPERS for use as final compensation in excess of
7 compensation earnable, particularly over a short duration of time prior to retirement,
8 distorts the funding process established by the legislative scheme and is therefore
9 specifically excluded. It neither reflects a normal pay for the position and/or
10 constitutes "final settlement pay."

11 Due to widespread pension spiking of final compensation⁵ the Legislature
12 passed section 20023 (currently Gov. Code §20636).

13 "Considerable attention has recently been focused on PERS due to
14 newspaper articles about public employers' "pension spiking" and
15 pension fraud or abuse. One local agency has even had several of
16 its employees face felony charges regarding pension fraud. It
17 appears that the most common method of enabling employees to
18 retire with benefits greater than should be otherwise earned is by
19 manipulating compensation reported to PERS during an
20 employee's last year or so prior to employment."

21 Compensation is a critical variable used for determining a
22 member's death, disability or service retirement benefits since
23 these benefits are based on a percent of "final compensation."⁶

24 To remedy this situation, the Legislature enacted section 20636 (formerly
25 §20023) which provides that "compensation earnable" be reviewed in terms of "items
of the normal payrate, rate of pay, or base pay utilized for the periodic reporting of
payroll information to the system." Specifically, as to "payrate" the legislature stated:

24 ⁴ CRON (1) ((A), Enrolled Bill Report, SB 53, PERS, 4/6/93, p. 4.

25 ⁵ CRON (1), Senate Final History, employment & Retirement Committee, SB53, 3/29/93. P.1.

⁶ CRON - (1)(D) - Bill Analysis, SB 53=, 4/6/93, p.1.

1 "Payrate would have to be **stable and predictable** among all members of
2 a group or class of employment and would have to be **publicly noticed**
3 **by the government body.**"⁷

4 Requiring the pay rate to reflect a "normal base pay or rate of pay" endemic to
5 the position that is consistent with other members of a similar group or class, the
6 Legislature was able to address part of the remedy. However, it did not stop, there and
7 added a further required element that the payrate be set forth in a pay schedule that
8 will be "**publicly noticed by the governmental entity.**"

8 **V. ARGUMENT**

9
10 **A. Compensation Provided To Alvarez Does Not Meet The Definition Of**
11 **Payrate Under Section 20636(b)(1).**

12 Compensation provided to Alvarez is not compensation earnable. To be
13 compensation earnable, a member's base pay or rate of pay must be paid "pursuant to
14 a publicly available pay schedule."⁸ The Employment Agreement and the various
15 salary matrices, presented by the Watermaster, fail to qualify as publicly available pay
16 schedule under section 20636(b)(1) and relevant case law.

17 **1. Alvarez's Employment Agreement Is Not Publicly Available Pay Schedule.**

18 It is well settled law that individual agreements between the member and the employer
19 do not qualify as a "publicly available pay schedule." (*Prentice, supra*, 157 Cal.App.4th
20 at pp.994-995, ; *Molina, supra*, 200 Cal.App.4th at pp. 66-67, settlement agreement
21 not a publicly available salary schedule; CalPERS Request For Official Notice, attach.
22 3, *In re the Matter of Randy Adams*, OAH 2012030095 (*Adams*); CalPERS Request
23 For Official Notice, attach. 2, *Tanner v. California Public Employees' Retirement*
24 *System*, Case No. C078458, p. 15-16 (*Tanner*)).

24 ⁷ CRON (1)(C), Senate Floor Analysis, SB 53, 5/1/93, attach. p 6.

25 ⁸ § 20636, subd. (b)(1); Tit. 2, Cal.Code Regs. § 570.5, expressly to "clarify" existing law.

1 The *Tanner* court very recently interpreted section 20636(b)(1) and analyzed
2 what is considered a "pay schedule." (*Tanner*, p. 14.) The court held that a "pay
3 schedule is a written or printed list, catalog or inventory of the rate of pay base pay of
4 one or more employees who are members of CalPERS." (*Id.* at p. 14-15.) The court
5 held that an employment agreement does not meet the definition of a "pay schedule"
6 because such documents do not "qualify as a list, catalog, or inventory of the rate of
7 pay or base pay of one or more employees." (*Id.* at p.15.) To be considered a "pay
8 schedule," the document must isolate the rate of pay or base pay of its employees.
9 (*Id.*) Such a document "more readily informs the public of the payrate that will or may
10 be used in determining the amount of an employees retirement benefit" and prevents
11 spiking. (*Id.* at 15-16.)

12 Previously, upon considering the plain language of the statute and the
13 legislative history, the *Adams* court had reached the same conclusion and held that as
14 a matter of law, an individual employment agreement, even if available to the public
15 cannot qualify as a publicly available pay schedule, finding:

16 "SB53 was designed "to curb "spiking," the intentional inflation of a public
17 employee's final compensation, and to prevent unfunded pension fund
18 liabilities. SB53 defined "compensation earnable" in terms of normal
19 payrate, rate of pay, or base pay so payrates would be "stable and
20 predictable among all members of a group or class" and "publically
21 noticed by the governing body." The legislation was intended to restrict
22 an employer's ability to spike pension benefits for preferred employees
23 and to result in equal treatment of public employees. (Senate File History
24 Re: SB 53).

21 Using a broad interpretation of "pay schedule" based upon the inclusion
22 of a salary disclosed only in a budget has the vice of permitting an
23 agency to provide additional compensation to a particular individual
24 without making the compensation available to other similarly situated
25 employees. And, a written employment agreement with an individual
employee should not be used to establish that employee's "compensation
earnable" because the employment agreement is not a labor policy or
agreement within the meaning of an existing regulation and would not
limit on the compensation a local agency could provide to an individual

1 employee by way of individual agreements for retirement purposes.
(*Prentice, supra*, 157 Cal.App.4th at pp.994-995.)

2 Here, Alvarez's employment agreement does not qualify as a "publicly available
3 pay schedule." It clearly cannot qualify as a "pay schedule" pursuant to *Tanner* and
4 *Adams*. It does not isolate the rate of pay or base pay for the position of CEO. It states
5 only an amount that Watermaster had agreed to pay to Alvarez for services as CEO.
6 Furthermore, Alvarez's employment agreement was not "publicly available." There is
7 no evidence that it was ever publicly noticed by the Watermaster. Furthermore, there
8 is no evidence that it was ever made available to the public.

9 Under the facts of this case, Alvarez's employment agreement does not meet
10 the definition of payrate under section 20636(b)(1) and relevant case law.

11 2. The Salary Matrices Were Not Publicly Available Pay Schedules.

12 a. *All Salary Matrices were not "publicly available" under section 20636(b)(1).*

13 In addition to being a "pay schedule," the document listing the salary of the
14 employee must also be "publicly available" for it to qualify as payrate. "Publicly
15 available" means the pay schedule be "publically noticed by the governing body."
16 (CRON attach. (1)(C), Senate Floor Analysis, SB 53, 5/1/93, p 6.) While *Tanner*
17 discusses what a "pay schedule" is, *Adams* thoroughly discusses the meaning of
18 "publicly available" under section 20636(b)(1). In *Adams*, the Court looked at the intent
19 of the legislature and held:

20 "[t]he word 'available' means 'suitable or ready for use' and 'readily obtainable'.
21 [Citations omitted] The Word 'publicly' modifies 'available.' 'Publicly' means "in a
22 public or open manner or place' and 'in the name of the community' and 'by public
action or consent.' [Citations omitted]. (*Adams* at p. 20.)

23 The *Adams* court refused to recognize the employment agreement, presented by
24 respondents, as a "publicly available" document, noting that it was not approved by the
25 City of Bell. The reasoning in *Adams* is in line with the Legislative intent, which

1 repeatedly states the pay schedule must be “publicly noticed by a governing entity.” As
2 previously discussed, the requirement, that a pay schedule must be “publicly noticed
3 by a governing entity” was put in place to prevent pension spiking. Merely making the
4 “pay schedule” available to the public, without having it publicly noticed or approved by
5 the governing entity, does not meet the Legislative intent and the purpose of section
6 20636(b)(1).

7 The salary matrices were merely “used to develop and create the final budget for
8 any position that’s listed or that’s currently filled at Watermaster.” (Tr. Vol. I, p. 99:3-
9 11.) The Watermaster Board approved versions of the 2010/2011 and 2011/2012
10 salary matrices in 2013; however, that was after the fact and is not sufficient to qualify
11 as “publicly available pay schedule” for compensation paid to Alvarez in 2011. . (See
12 Exhs. 14 & 16.) Thus, the salary matrices presented by the Watermaster do not qualify
13 as “publicly available pay schedules” as they were not publicly noticed or publicly
14 approved by the Watermaster in 2011 or 2012.

15 *b. Salary Matrix 2011/2012*

16 The 2010/2011 Salary Matrix in CalPERS Exhibit 15 lists the salary for Ken,
17 General Manager –CEO at the rate of \$18,081 per month and 216,972 per year. This
18 fails to qualify as a pay schedule for Alvarez as Alvarez’s salary is in excess of what is
19 listed in this Salary Matrix. Furthermore, that particular Salary Matrix only lists the
20 salary of an individual, Ken, rather than listing the salary of the CEO.

21 *c. Salary Matrix 2012/2012*

22 It is unclear exactly how many versions there are of the 2011/2012 “Salary Matrix,”
23 however, CalPERS has been presented with at least two different versions. (See
24 Exhs. 15 & Watermaster Exh. S.) The first version of the 2011/2012 Salary Matrix,
25 included in the Watermaster’s Staff Report, lists the salary of the “Chief Executive

1 Officer" (Exh. 16.) The second version of the 2011/2012 Salary Matrix, presented in
2 Watermaster Exhibit S, lists the salary of the General Manager/CEO. The "Step"
3 salary in both matrices is different for all positions, including that of a CEO.

4 Watermaster may contend the salary matrix presented in Watermaster's Exhibit S
5 met the "publicly available" requirement because the matrix was disclosed in response
6 to an inquiry by a "Tracy Tracy," a member of the public. (Watermaster Exh. R.) In
7 other words, if a document is sent to a member of the public pursuant to a request, it is
8 a publicly available pay schedule. Such an absurd interpretation conflicts with the
9 express intent of the legislature.

10 The 2011/2012 Salary Matrix in Watermaster's Exhibit S is far from meeting the
11 requirements of section 20636(b)(1). First, it was never publicly noticed by the
12 Watermaster. The version that was eventually noticed by the Watermaster, after the
13 fact in 2013, was different from the one provided to "Tracy Tracy." (See Exh. 16.) This
14 further demonstrates that the Watermaster did not have a salary schedule that was
15 publicly noticed by governing entity, finalizing and setting the salary of its employees.
16 Rather, the Watermaster had various versions of a salary matrix, which were merely
17 used to put the annual budget together. Second, there is no evidence that the
18 2011/2012 Salary Matrix in Watermaster's Exhibit S was readily available to the public.
19 "Tracy Tracy" requested the document on September 8, 2011, and was not provided
20 a copy until September 15, 2011. Furthermore, even the Watermaster staff was
21 unable to provide the document as they had to ask Joe Joswiak, the CFO, to provide
22 the matrix. (Watermaster Exh. R.)

23 *a. All Matrices fail to meet the requirements of section 570.5*

24 All matrices presented by the Watermaster also fail to meet the applicable
25 requirements set out in section 570.5. The matrices were not "duly approved or

1 adopted” by the Watermaster; were not posted at the Watermaster’s office and were not
2 immediately accessible and available to the public for review; and do not indicate an
3 effective date or date of revisions. (See §570.5(a)(1)(5)(6).) Therefore, the matrices
4 further fail to qualify as payrate.

5 **B. “Severance Compensation” Provided To Alvarez, After November 9, 2011,
6 Did Not Meet The Definition Of “Compensation” And Must Be Excluded As
7 Final Settlement Pay.**

7 Although the entire compensation reported by the Watermaster on behalf of
8 Alvarez does not qualify as “payrate,” the “Severance Compensation,” paid pursuant to
9 the “Confidential Separation Agreement” is further excludable as it fails to meet the
10 definition of section 20630 and is final settlement pay. The plain and unambiguous
11 language of the “Confidential Separation Agreement” demonstrates that the payments
12 and benefits set are not normal payrate, but are “Severance Compensation.” (Exh. 12,
13 p. 2.) The “Severance Compensation” was provided to Alvarez to settle all disputes
14 between him and the Watermaster, as the “Severance Compensation” constituted “the
15 entire amount of consideration due to [Alvarez], and [Alvarez] is not entitled to any
16 further or other amounts, including severance and other benefits, whether under the
17 Employment Agreement or any other agreement, or any benefit plan, policy or practice.
18 . . .” (Exh. 12, p. 2.) Alvarez also agreed to fully release and discharge the
19 Watermaster from any and all claims, wages, demands, rights, liens, agreements,
20 liabilities whether known or unknown to him. (*Id.*) Therefore, it is clear that the
21 “Severance Compensation” under the “Confidential Separation Agreement” is intended
22 as a final settlement.

21 The fact that the “Confidential Separation Agreement” states Alvarez “shall be
22 continued to be employed with the Watermaster until May 3, 2012 (the ‘Transition
23 Period’)” does mean the “Severance Compensation” constitutes wages and must be
24 included in his retirement compensation. The Confidential Separation Agreement
25

1 states that, Alvarez's "employment in the capacity of Chief Executive Officer of the
2 Watermaster with all of the powers and duties associated therewith ceased on
3 November 9, 2011." (Exh. 12.) After November 9, 2011, Alvarez had "no actual or
4 implied authority to act on behalf of the Watermaster or enter into any agreements on
5 behalf of the Watermaster." Furthermore, Alvarez could not "hold himself out as having
6 any authority to act on behalf of the Watermaster," and could not speak on behalf of or
7 bind the Watermaster. His "sole duty" was to provide information on an as needed
8 basis. (Exh. 12.) Under its own terms, the compensation provided to Alvarez after
9 November 9 2011 was "Severance Compensation." After November 9, 2011, Alvarez
10 had no duties, aside from answering questions posed by the Board regarding pending
11 projects and the transition of his duties. (Exh. 12, Tr. Vol I. p. 182:7-12.)

12 Therefore, although the "Confidential Separation Agreement" indicates that
13 Watermaster will continue to pay Alvarez \$19,000 per month, in accordance with
14 Watermaster regular payroll practices, such "Severance Compensation" cannot be
15 included in his retirement calculation unless it qualifies as "compensation" or "special
16 compensation", under the PERL which it clearly does not.

- 17
18 1. The "Severance Compensation" was not paid for "services performed during normal business hours" as required by section 20630.

19 Government Code Section 20630 provides in part:

20 "(a) As used in this part, "compensation" means the
21 remuneration paid out of funds controlled by the employer
22 in payment for the member's **services performed during normal working hours** or for time during which the
23 member is excused from work because of any of the
24 following:

- 25 (1) Holidays.
(2) Sick leave.
(3) Industrial disability leave, during which, benefits are

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payable pursuant to Sections 4800 and 4850 of the Labor Code, Article 4 (commencing with Section 19869) of Chapter 2.5 of Part 2.6 . . .

(4) Vacation.

(5) Compensatory time off.

(6) Leave of absence.

(b) When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall be reported in accordance with Section 20636 and shall not exceed compensation earnable, as defined in Section 20636.

After November 9, 2011, Alvarez was relieved of all duties as a CEO and was replaced by Danielle Maurizio. Although he may have responded to questions posed by the Watermaster Board, there is no evidence that Alvarez performed any services during normal working hours after November 9, 2011. The "Severance Compensation" paid to Alvarez was exchange of his separation from employment, not for not for services performed during normal working hours. Although the Watermaster is free to provide such "Severance Compensation," the "Severance Compensation" does not qualify as "compensation" under section 20630 as it was paid to separate Alvarez from his position of a CEO. Alvarez and Watermaster may argue that the "Severance Compensation" was paid to Alvarez for the "information" he continued to provide to the Watermaster after November 9, 2011; however, such an argument would require the Court to ignore the plain language and titles of the "Confidential Separation Agreement," that provides "Severance Compensation."

2. "Severance Compensation" Provided to Alvarez, After November 9, 2011, Must be Excluded as "Final Settlement Pay"

"Final settlement pay" is excluded from payroll reporting to CalPERS, either as payrate or special compensation. (Gov. Code §20636(f).) It is defined as any

1 employee's pay in excess of compensation earnable that is granted or awarded to a
2 member in connection with, or in anticipation, of a separation from employment.
3 Examples include such items as golden parachutes and may take the form of periodic
4 payments or any other method of payroll reported to CalPERS. (§ 570.) Final
5 settlement pay is singled out for legislative and regulatory treatment because it is the
6 quintessential example of pension spiking. It has the effect of generating a large
7 unfunded liability, by increasing compensation in the last years of employment.

8 It is clear, by the unambiguous language of the "Confidential Separation
9 Agreement," that the Watermaster was paying the salary under the "Confidential
10 Separation Agreement" in anticipation of Alvarez's separation from employment as of
11 November 9, 2011. Therefore, the payment was made to secure the peaceful
12 separation from all employment relationships of any kind. Thus, section 20636,
13 subdivision (f), provides another basis for excluding the payments made to Alvarez.

14 **C. Alvarez Was No Longer A Common Law Employee Of The Watermaster
15 After November 9, 2011, Therefore The Severance Compensation Paid
After That Date Is Not Reportable To CalPERS.**

16 Based on the evidence before the Court, Alvarez fails to satisfy his burden of
17 proving that he remained a common law employee of the Watermaster after November
18 9, 2011, the effective date of the "Confidential Separation Agreement." The
19 "Confidential Separation Agreement" attempted to preserve formalities, by assigning a
20 "duty" to create an appearance of an employment relationship, however the
21 appearance is illusory.

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1 **1. The Common Law Employment Test**

2 It is a well set precedent that only common law employees are entitled to
3 earn CalPERS retirement benefits. (*Metropolitan Water Dist., supra*, 32 Cal. 4th 491; *In*
4 *the Matter of Application to Contract with CalPERS by Galt Service Authority and City*
5 *of Galt*, Board of Administration's Precedential Decision 08-01.)

6 Pursuant to the common law employment test, "the most important factor is
7 the right to control the manner and means of accomplishing the result desired."
8 (*Tieberg v. UIAB* (1970) 2 Cal.3d 943, 949.) The control over the manner and means
9 must be "substantial" and "extensive." (*Singh v. 7-Eleven, Inc.*, 2007 U.S. Dist. Lexis
10 16677, at *2, franchisor was not the employer as it did not exercise "substantial control
11 over the daily activities" of the business.)

12 Though the recital of employment status in a written agreement is a "significant
13 factor" when determining whether an employment relationship exists, "the terminology
14 used in an agreement is not conclusive." *Tieberg, supra*, 2 Cal.3d at 952. Instead, the
15 courts look beyond the characterization assigned and inquire into the actual nature of
16 the relationship. (*Professional & Executive Leasing, Inc. v. Commissioner* (9th Cir,
17 1988) 862 F.2d 751, 754.)

18 Aside from the control test, courts also consider secondary factors such as:

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

1 *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341,
2 350-351.) The secondary factors are intertwined "and their weight depends often on
3 particular combinations." (*Id.* at 351.) These factors are not to be "applied
4 mechanically as separate tests." (*Id.*)

5 **2. Alvarez Fails to Satisfy the Common Law Employment Test**

6 Alvarez's employment was terminated effective November 9, 2011 pursuant to
7 the "Confidential Separation Agreement." (See Exh. 12, p. 1, para. 1. "Termination of
8 Active Employment.) "[A]ll of the powers and duties" that Alvarez had, associated with
9 the position of a CEO, ceased on November 9, 2011. (*Id.*) Alvarez no longer had
10 authority to speak on behalf of the Watermaster or bind it in any manner. Although
11 Alvarez may disagree, he was clearly no longer the CEO of Watermaster effective
12 November 9, 2011. According to the "Confidential Separation Agreement," Alvarez's
13 "sole duty" after November 9, 2011, was to "provide information to the Watermaster as
14 requested with respect to pending projects and the transition of his duties." (*Id.*)

15 Setting aside Watermaster's attempt to create an appearance of an employment
16 relationship, by assigning Alvarez a duty to answer questions on an as needed basis, it
17 becomes clear that Alvarez was no longer an employee after the execution of the
18 November 9, 2011. The purpose of the "Confidential Separation Agreement" was to
19 sever the employment relationship between Alvarez and the Watermaster and provide
20 a severance package to Alvarez, as promised in the Employment Agreement. (See
21 Exh. 11, p. 4, para. 9.) Although Alvarez was terminated from employment, the
22 appearance of an employment relationship allowed the Watermaster to provide the
23 severance package, initially promised under the Employment Agreement, and allowed
24 Alvarez to spike his pension.

25

1 Furthermore, the Watermaster did not control the manner or means by which
2 Alvarez performed his work, if any, after November 9, 2011. The Watermaster Board
3 retained no control over Alvarez after November 9, 2011. By the terms of the
4 "Confidential Separation Agreement," Alvarez was relieved of all powers and duties
5 after November 9, 2011. He was not assigned any projects and there is no evidence
6 that Alvarez performed any work after November 9, 2011. Though Alvarez claims to be
7 an employee of the Watermaster, the record is devoid of any documents or testimony
8 relating to Watermaster's actual control over the manner and means by which Alvarez
9 performed any services after November 9, 2011. Witness testimony merely revealed
10 the Watermaster posed questions to Alvarez regarding pending projects and Alvarez
11 provided answers. This does not support a finding of an employment relationship. An
12 examination of the secondary factors is impracticable as Alvarez did not perform any
13 services after November 9, 2011.

14 Alvarez independently may have answered a few inquiries after November 9,
15 2011; however, such services do not meet the requirements of the control test. The
16 common law employment relationship between Alvarez and Watermaster ceased after
17 November 9, 2011, therefore, the "Severance Compensation" provided to him after
18 November 9, 2011 cannot be reported to CalPERS under sections 20069(a) and
19 20028(b).

20 **IV. CONCLUSION**

21 That fact that the Watermaster sent a version of the 2011/2012 Salary Matrix to
22 a member of the public does not mean the compensation provided to Alvarez was
23 publicly noticed. The compensation paid does not meet the definition of payrate, as the
24 intent of the legislature and the requirements of section 20636(b)(1) have not been
25 met. Furthermore, the "Severance Compensation" paid after November 9, 2011 is not

1 reportable to CalPERS as the character and purpose of the "Confidential Separation
2 Agreement" was to sever the employment relationship between Alvarez and the
3 Watermaster and provide a severance package to Alvarez.

4
5 Respectfully submitted,

6 Dated:

7 7/11/16



8 PREET KAUR, SENIOR STAFF ATTORNEY
9 Attorney for California Public Employees'
10 Retirement System

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PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On **July 11, 2016**, I served the foregoing document described as:

CalPERS BRIEF and CalPERS REQUEST FOR OFFICIAL NOTICE - In the Matter of the Calculation of the Final Compensation of DESI ALVAREZ, Respondent, and CHINO BASIN WATERMASTER, Respondent. ; Case No. 2013-1113; OAH No. 2014080757.

on interested parties in this action by placing ___ the original XX a true copy thereof enclosed in sealed envelopes addressed and/or e-filed as follows:

John M. Jensen
Law Offices of John Michael Jensen
11500 W. Olympic Blvd., Suite 550
Los Angeles, CA 90064
Via Email - johnjensen@johnmjensen.com

Office of Administrative Hearings
320 West Fourth Street, Suite 630
Los Angeles, CA 90013
Via e-file - laxfilings@dgs.ca.gov

Bradley J. Herrema
Brownstein Hyatt Farber Schreck, LLP
1020 State Street
Santa Barbara, CA 93101
Via Email - bherrema@bhfs.com

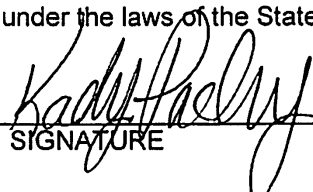
[X] **BY CERTIFIED MAIL --** As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Sacramento, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing an affidavit.

[X] **BY ELECTRONIC TRANSMISSION:** I caused such document(s) to be sent to the addressee(es) at the electronic notification address(es) above. I did not receive within a reasonable time of transmission, any electronic message, or other indication that the transmission was unsuccessful.

Executed on **July 11, 2016**, at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Kady Pasley
NAME


SIGNATURE