

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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

DESI ALVAREZ and  
CHINO BASIN WATERMASTER,

Respondents.

Case No. 2013-1113

OAH No. 2014080757

**AMENDED ORDER RE:  
PETITIONER'S REQUEST FOR  
OFFICIAL NOTICE**

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

The record remained open after the hearing in order for the parties to submit closing briefs, which were timely received and marked. Petitioner filed concurrently with its opening brief a Request for Official Notice, which included, among three items, the recent appellate decision of *Joseph Tanner v. California Public Employees' Retirement System* (*Tanner* decision) [attach. 2]. Respondent Alvarez promptly filed Objections to the Request. Petitioner promptly filed a Response to the Objections.

The ALJ issued an order dated July 20, 2016, ruling on petitioner's request. In the order, the ALJ declined to take official notice of the *Tanner* decision, because it appeared that the case had not been published.

Petitioner promptly requested the ALJ amend his order regarding the *Tanner* decision, arguing that the appellate court has certified it for publication. Respondents were given leave to respond to petitioner's request, which they did. While they argue official notice should not be taken because the *Tanner* decision is not relevant to the facts and circumstances of the case at bar, neither respondent argues the *Tanner* decision is an unpublished decision that may not be cited.

Pursuant to Government Code section 11515, the ALJ may take official notice of any fact that may be judicially noticed by courts of this state. Pursuant to Evidence Code section 451, judicial notice must be taken of decisional law of this state.

Petitioner has submitted evidence and legal authority indicating the *Tanner* decision has been certified for publication and can be cited. Respondents have not demonstrated the contrary.



The relevancy arguments need not be decided at this moment. The ALJ will review the *Tanner* decision, determine at that time if it is published authority that may be relied upon, and rely on it to the extent it is relevant and on point. Use of *Tanner* decision will be the same as the other authority cited by the parties in their briefs. The extent to which the *Tanner* decision is relied upon or not will be explained in the Proposed Decision, if it is a critical issue.

Based on the above, official notice is taken of *Joseph Tanner v. California Public Employees' Retirement System*, contained in petitioner's initial Request for Official Notice as attachment 2.

This order, petitioner's request for an amended order and respondents' responses, will be collectively marked for identification as exhibit 29.

IT IS SO ORDERED.

DATED: July 29, 2016

DocuSigned by:  
*Eric C. Sawyer*  
E08381E7779D4F0

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ERIC SAWYER  
Administrative Law Judge  
Office of Administrative Hearings

**DECLARATION OF SERVICE**

**Case Name: Alvarez, Desi**

**OAH No.: 2014080757**

I, Lori Pilibosian, declare as follows: I am over 18 years of age and am not a party to this action. I am employed by the Office of Administrative Hearings. My business address is 320 West Fourth Street, Suite 630, Los Angeles, CA 90013. On August 01, 2016, I served a copy of the following document(s) in the action entitled above:

**AMENDED ORDER RE: PETITIONER'S REQUEST FOR OFFICIAL NOTICE**

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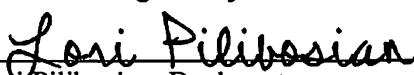
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration was executed at Los Angeles, California on August 01, 2016.

DocuSigned by:  
  
Lori Pilibosian, Declarant  
3EFC4C6EB4F7402...

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12	In the Matter of the Application for Final Compensation	)	CASE NO. 2013-1113
13	DESI ALVAREZ,	)	OAH NO. 2014080757
14	Respondent,	)	CALPERS' REQUEST TO
15	and	)	THE COURT TO AMEND
16	CHINO BASIN WATERMASTER,	)	JULY 20, 2016 ORDER
17	Respondent.	)	Hearing Date: April 11, 2016;
		)	9:00 am
		)	Hearing Location: Glendale, CA
		)	Prehearing Conf.: None Scheduled
		)	Settlement Conf.: None Scheduled

17 CalPERS is in receipt of the court's July 20, 2016 Order, and requests the court  
18 to amend its order by taking official notice of the appellate case of *Joseph Tanner v.*  
19 *California public Employees' Retirement System (Tanner)* as the case has been  
20 certified for publication and is a citable opinion. California Rules of Court, rule  
21 8.1115(d) provides that "[a] published California opinion may be cited or relied on as  
22 soon as it is certified for publication or ordered published." A copy of the *Tanner* case  
23 that was attached to CalPERS Request for Official Notice states the opinion is certified  
24 for publication. The exact same copy can also be found on the "Published/Citable  
25 Opinions" web-page of the "California Courts" official website. (See Attachment 1 or



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3rd Appellate District

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Jul 11, 2016	C075191 <a href="#">[PDF]</a>   <a href="#">[DOC]</a>	P. v. Ranlet 7/11/16 CA3 <a href="#">Case Details</a>
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Jun 28, 2016	C078458 <a href="#">[PDF]</a>   <a href="#">[DOC]</a>	Tanner v. CalPERS 6/28/16 CA3 <a href="#">Case Details</a>
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May 25, 2016	C071195 <a href="#">[PDF]</a>   <a href="#">[DOC]</a>	P. v. Vasquez 5/25/16 CA3 <a href="#">Case Details</a>
May 25, 2016	C072053A <a href="#">[PDF]</a>   <a href="#">[DOC]</a>	P. v. Cornejo 5/25/16 CA3 <a href="#">Case Details</a>
May 24, 2016	C073865 <a href="#">[PDF]</a>   <a href="#">[DOC]</a>	Dept. of Corrections & Rehab. v. State Personnel Bd 5/24/16 CA3 <a href="#">Case Details</a>
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May 19, 2016	C078233 <a href="#">[PDF]</a>   <a href="#">[DOC]</a>	P. v. Silva 5/19/16 CA3 <a href="#">Case Details</a>
May 12, 2016	C077098M <a href="#">[PDF]</a>   <a href="#">[DOC]</a>	P. v. Nicholes 5/11/16 CA3 <a href="#">Case Details</a>
May 10, 2016	C072500M <a href="#">[PDF]</a>   <a href="#">[DOC]</a>	Certain Underwriters at Lloyds, London v. Arch Specialty Ins. Co. 5/10/16 CA3 <a href="#">Case Details</a>
May 06, 2016	C080099 <a href="#">[PDF]</a>   <a href="#">[DOC]</a>	P. v. Johnston 5/6/16 CA3 <a href="#">Case Details</a>
May 04, 2016	C076324 <a href="#">[PDF]</a>   <a href="#">[DOC]</a>	P. v. Fruits 5/4/16 CA3 <a href="#">Case Details</a>
Apr 27, 2016	C074211	A.G. v. C.S. 4/27/16 CA3 <a href="#">Case Details</a>



# **ATTACHMENT 2**



1 of 3 DOCUMENTS

JOSEPH TANNER, Plaintiff and Appellant, v. PUBLIC EMPLOYEES' RETIREMENT SYSTEM et al., Defendants and Respondents.

C078458

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

2016 Cal. App. LEXIS 520

June 28, 2016, Opinion Filed

**PRIOR HISTORY:** [\*1] APPEAL from a judgment of the Superior Court of Sacramento County, No. 34201380001492CUWMGDS, Shelleyanne W. L. Chang, Judge.

**DISPOSITION:** Affirmed.

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

The trial court denied a petition for a writ of administrative mandate challenging a decision of the California Public Employees' Retirement System (CalPERS) that determined the expected retirement benefit of a city manager. (Superior Court of Sacramento County, No. 34201380001492CUWMGDS, Shelleyanne W. L. Chang, Judge.)

The Court of Appeal affirmed, holding that a pay schedule (*Gov. Code, § 20636, subd. (b)(1)*) is a written or printed list, catalog, or inventory of the rate of pay or base pay of one or more employees who are members of CalPERS. Although an employment agreement and a cost analysis setting forth the city manager's salary were publicly available, neither of these documents qualified as a pay schedule from which final compensation could be determined (*Gov. Code, §§ 20630, subds. (a), (b), 20636, subds. (a), (b)(1)*) because they were not limited to pay information and would not have enabled a member of the public to locate the base salary of the city manager position without difficulty. Thus, the city manager was not entitled to have retirement benefits calculated based on the salary set forth in the agreement. (Opinion by Robie, J., with Nicholson, Acting P. J., and Renner, J., concurring.)

**HEADNOTES**

**CALIFORNIA OFFICIAL REPORTS HEADNOTES**

**(1) Pensions and Retirement Systems § 6--Amount and Computation of Benefits--Public Employees' Retirement Law--Formula.--**Under the Public Employees' Retirement Law (*Gov. Code, § 20000 et seq.*), the formula for determining a member's retirement benefit takes into account (1) years of service; (2) a percentage figure based on age on the date of retirement; and (3) final compensation.

**(2) Pensions and Retirement Systems § 6--Amount and Computation of Benefits--Public Employees' Retirement Law--Final Compensation--Publicly Available Pay Schedule.--**Based on *Gov. Code, §§ 20630, subds. (a), (b), 20636, subds. (a), (b)(1)*, whether an employee is a member of a group or class of employees, the employee's normal monthly rate of pay or base pay must be paid in cash pursuant to a publicly available pay schedule in order to qualify as payrate and thus as compensation earnable that can be reported to the California Public Employees' Retirement System for use in the calculation of the employee's retirement benefit.

**(3) Pensions and Retirement Systems § 6--Amount and Computation of Benefits--Public Employees' Retirement Law--Final Compensation--Publicly Available Pay Schedule.--**Because, in view of the entire statutory scheme, the limitations on salary under the Public Employees' Retirement Law (*Gov. Code, § 20000 et seq.*) are designed to require that retirement benefits be based on the salary paid to similarly situated employees, the California Public Employees' Retirement System

properly looks at the published salary range rather than an exceptional arrangement made with an employee that is reflected in the city's budget documents.

**(4) Statutes § 30--Construction--Language--Plain Meaning Rule--Unambiguous Language.--**When interpreting a statute, a court begins with the plain language of the statute, giving the words their ordinary and common meaning. If the language is unambiguous, the plain meaning controls, and no further analysis is warranted. If the language allows more than one reasonable construction, the court considers such aids as the legislative history of the statute and maxims of statutory construction. In cases of uncertain meaning, courts may also consider the consequences of a particular interpretation, including its impact on public policy.

**(5) Pensions and Retirement Systems § 6--Amount and Computation of Benefits--Public Employees' Retirement Law--Final Compensation--Publicly Available Pay Schedule.--**A pay schedule (*Gov. Code, § 20636, subd. (b)(1)*) is a written or printed list, catalog, or inventory of the rate of pay or base pay of one or more employees who are members of the California Public Employees' Retirement System.

**(6) Pensions and Retirement Systems § 6--Amount and Computation of Benefits--Public Employees' Retirement Law--Final Compensation--Publicly Available Pay Schedule.--**Neither an employment agreement nor a cost analysis setting forth a city manager's salary qualified as a pay schedule (*Gov. Code, § 20636, subd. (b)(1)*). Accordingly, the trial court properly denied a writ petition on the ground that the city manager had no right to have his retirement benefit calculated based on the base salary in the agreement.

**COUNSEL:** Law Offices of John Michael Jensen and John Michael Jensen for Plaintiff and Appellant.

Reed Smith, Harvey L. Leiderman and Jeffrey R. Rieger for Defendants and Respondents.

**JUDGES:** Opinion by Robie, J., with Nicholson, Acting P. J., and Renner, J., concurring.

**OPINION BY:** Robie, J.

#### **OPINION**

**ROBIE, J.--**In this "pension spiking" case, plaintiff Joseph Tanner sought to overturn a decision of defendant Public Employees' Retirement System (CalPERS) significantly reducing his expected retirement benefit.

Specifically, Tanner argues his retirement benefit should be set based on a base salary of \$305,844, which was provided for in his final written contract with the City of Vallejo. The board of administration of CalPERS (also a defendant in this action) decided Tanner was not entitled to have his retirement benefit based on that figure. On Tanner's petition for a writ of administrative mandate, the trial court agreed with the board, holding (among other things) that the \$305,844 figure could not be used as Tanner's final compensation for purposes of setting his retirement benefit [\*2] because it did not qualify as his pay rate due to the fact that the figure did not appear on a publicly available pay schedule.

On Tanner's appeal, we agree with the trial court that neither Tanner's final contract with the city nor a chart prepared by city staff to show how Tanner's final base salary was determined qualified as a publicly available pay schedule for purposes of determining the amount of Tanner's final compensation and, in turn, the amount of his retirement benefit. Accordingly, we affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

By virtue of his employment with a number of California cities over the years, up to and including his employment as city manager of the City of Pacifica, Tanner was a miscellaneous member of CalPERS.

In November 2006, while still employed by Pacifica, Tanner entered into a written agreement with the City of Vallejo to serve as that city's manager for a term of three years, from January 8, 2007, through January 7, 2010. Under the terms of that agreement, Tanner was to serve initially as a limited term employee not enrolled in CalPERS but was to become a permanent employee and be reinstated in CalPERS on or before March 8, 2007.<sup>1</sup> The agreement provided that [\*3] Tanner's base annual salary was to be \$216,000, but he was also to receive certain other types of compensation, including (as relevant here) the following:

1 The reason for this initial period of limited term employment is not entirely clear from the record, but it is also irrelevant for our purposes.

(1) A monthly automobile allowance of \$600 that was to "be converted to base salary after March 8, 2007";

(2) A monthly contribution to a deferred compensation plan equal to 15 percent of his base salary, which the city was to "convert ... to base salary upon reinstatement to [Cal]PERS";

(3) Thirty days of management leave per year, which was to "be paid as salary";

2016 Cal. App. LEXIS 520, \*

(4) Two hundred forty hours of annual leave per year, with the right to sell back to the city up to 120 hours of accrued leave each year; and

(5) The city's payment of Tanner's share of the required contribution to CalPERS, which, at the city's option, could be "converted to base salary."<sup>2</sup>

2 This sort of payment is referred to as employer-paid member contributions. Tanner's required contribution to CalPERS was 8 percent of his salary, with the city contributing another 1 percent. Thus, under this provision, the city was to pay Tanner's 8 percent contribution for him [\*4] or pay him an equal amount as additional salary.

Tanner ended his employment with the City of Pacifica effective January 8, 2007, and began working for the City of Vallejo that same day.

Vallejo city staff forwarded the November 2006 contract to CalPERS, and CalPERS responded in a letter dated January 26, 2007. CalPERS acknowledged that Tanner's base salary qualified as reportable compensation for purposes of retirement. With respect to the first three items of compensation identified above, however, CalPERS explained that the Government Code provision defining reportable compensation did "not allow for converting additional compensation into base pay or adding non reportable compensation to base pay for retirement purposes. Thus, payments such as management leave credits; automobile allowance; and deferred compensation should not be converted to salary and reported to CalPERS for retirement purposes." With regard to the employer-paid member contributions, CalPERS explained that this amount could be reported to CalPERS provided that the city adopted "the appropriate resolution for a group or class of employees" and that the agreement "should be amended to reflect this provision." With [\*5] regard to the provision for selling back annual leave, CalPERS pointed out that "[t]he City already provides management incentive pay to other management staff, 120 hours per year at their hourly rate of pay," but the California Code of Regulations "states that employees can not [*sic*] be granted the option of either taking time off or receiving pay. Therefore, in order for the City Manager's 'sell back of 120 hours of accrued leave' to qualify as management incentive pay, the option of time off or receiving cash payment must be taken out of the Managers [*sic*] contract and replaced by a management incentive pay clause similar to that found in the City's Memorandum of Understanding (MOU) for other management staff."

Following receipt of the letter from CalPERS, city staff undertook to create a new class or group of em-

ployees, to be known as the "Council Appointed Executive Staff," which would consist of the city manager and the city attorney. City staff also drafted a new employment agreement for Tanner that was to be entered into as of March 8, 2007, the date Tanner's employment was to become permanent under the original agreement. Under the new agreement, Tanner's base salary was to be \$305,844. [\*6] The contract also provided that the city would pay Tanner's portion of the contribution to CalPERS. There were no provisions, however, for an automobile allowance, deferred compensation, management leave, or annual leave sell-back. The March 2007 agreement specifically provided that it superseded the November 2006 agreement and contained a clause declaring that the March 2007 agreement represented the entire agreement of the parties.

At a meeting on March 27, 2007, the city council authorized the mayor to amend Tanner's employment agreement "to comply with CalPERS regulations" and authorized the city to pay the member contributions of the two employees in the "Council Appointed Executive Staff."

As of May 8, 2007, the mayor still had not signed the March 2007 agreement. On that date, the city's human resources operations manager, Debora R. Boutte, sent a memo to the mayor requesting that he authorize the agreement. In part, the memo explained that city staff had amended the employment agreement "to comply with [CalPERS] regulations without changing the total cost of the original employment agreement ... . The necessary amendments involved moving the additional costs of the car allowance, [\*7] deferred compensation, management leave and 1% of the Employment Paid Retirement Contribution be added [*sic*] to the base [salary] versus being reported separately as additional pay.<sup>3</sup> This change resulted in the base salary going from \$216,000 to \$305,844." The memo was accompanied by a document entitled "City Manager [¶] Salary Computation [¶] March 8, 2007," which Boutte referred to as a cost analysis, that showed how Tanner's new base salary was determined by adding to the original base salary the values of the automobile allowance, the deferred compensation, the management leave, the employer's share of the CalPERS contribution, and the annual leave sell-back.<sup>4</sup> While the cost analysis showed the new base salary, it did so among numerous other figures.

3 In communications following the January 2007 letter, CalPERS had explained to city staff that the employer's 1 percent share of the contribution to CalPERS was not reportable compensation for purposes of retirement and could not be converted into base salary.

4 We will refer to this document as the cost analysis.

Sometime after Boutte sent these materials to the mayor, the mayor signed the March 2007 agreement. Ultimately, CalPERS reinstated [\*8] Tanner effective March 8, 2007, thus allowing him to begin accruing service credit again.

Two years later, Tanner resigned his employment with the city effective June 1, 2009. He submitted an application for service retirement with CalPERS effective the next day and reported his highest compensation period as June 1, 2007, to May 31, 2008.

In December 2009, CalPERS notified Tanner that it would compute his retirement benefit based on his original base salary of \$216,000 in the November 2006 agreement rather than the increased base salary in the March 2007 agreement. Tanner appealed that decision in February 2010.<sup>3</sup> The matter was heard by an administrative law judge over 10 days between November 2011 and May 2012.

5 Tanner's appeal does not appear in the administrative record, as far as we can determine, but there are references to it in Tanner's prehearing conference statement and CalPERS's statement of issues in the administrative proceeding.

In November 2012, the administrative law judge issued a proposed decision denying Tanner's appeal, and in February 2013, the board adopted that proposed decision as its own (with three minor changes). In the decision, the board concluded that Tanner's [\*9] "compensation earnable for purposes of calculating his retirement benefits cannot include amounts previously paid to [him] as an automobile allowance, employer-paid deferred compensation, 30-day leave allowance, one percent employer portion of PERS contributions, or 120-hour annual leave cash out option."

The board denied Tanner's petition for reconsideration in April 2013, and in May 2013 Tanner filed a petition for a writ of administrative mandamus in the superior court. In January 2015, the trial court entered its judgment denying Tanner's writ petition. In its ruling, the trial court noted that, to show that CalPERS had abused its discretion in determining that Tanner was not entitled to have his retirement benefit based on the increased base salary in the March 2007 agreement, Tanner had to "establish that the \$305,844 was his 'pay rate.'" The court concluded that Tanner could not "legitimately claim that his salary of \$305,844 [wa]s 'pay rate,' because [Tanner] has not shown that this salary was on a publicly available 'pay schedule.'"<sup>6</sup>

6 The trial court also concluded that the additional items of compensation from Tanner's November 2006 contract that were folded into the new base salary [\*10] in his March 2007 contract did not qualify as "special compensation" that could be added to the pay rate in the earlier contract for purposes of calculating Tanner's retirement benefit, but Tanner never actually made such an argument. Instead, his contention was that the base salary in his March 2007 agreement was the pay rate on which he was entitled to have his retirement benefit calculated.

Tanner timely appealed.

## DISCUSSION

### I

#### *Contract Arguments*

Tanner spends much of his opening brief arguing that the trial court erred by failing to properly apply contract principles, such as reformation for mistake and the parole evidence rule. In essence, Tanner's argument appears to be that, under contract principles, he and the city made a mutual mistake in entering into the November 2006 agreement because they thought all of his compensation in that agreement could be used to calculate the amount of his retirement benefit, and when CalPERS informed them otherwise, they reformed the agreement to achieve their original intent by folding various miscellaneous items of compensation in the November 2006 agreement into his new, greater base salary in the March 2007 agreement. In Tanner's view, because the [\*11] March 2007 agreement was an integrated contract that superseded and replaced the November 2006 agreement, CalPERS and the trial court could not lawfully construe the later agreement by referring to the earlier, superseded agreement.

As we will explain, however, we conclude Tanner's appeal is without merit regardless of these contract arguments, or any of the other arguments Tanner makes. This is so because we agree with the trial court that the greater base salary in the March 2007 agreement did not qualify as Tanner's pay rate for purposes of calculating the amount of his retirement benefit because that salary was not paid pursuant to a publicly available *pay schedule*. For this reason, Tanner has no right to have his retirement benefit calculated based on that greater base salary.

### II

#### *The Public Employees' Retirement Law*

2016 Cal. App. LEXIS 520, \*

(1) Under the Public Employees' Retirement Law (*Gov. Code, § 20000 et seq.*), "[t]he formula for determining a member's retirement benefit takes into account (1) years of service; (2) a percentage figure based on age on the date of retirement; and (3) 'final compensation' ..." (*City of Sacramento v. Public Employees Retirement System (1991) 229 Cal.App.3d 1470, 1478, fn. 5 [280 Cal. Rptr. 847]*). As used in the Public Employees' Retirement Law, "'compensation' means the remuneration paid out of funds controlled by the [\*12] employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work" for certain reasons not relevant here. (*Gov. Code, § 20630, subd. (a).*) Compensation reported by the employer to CalPERS "shall not exceed compensation earnable, as defined in Section 20636." (*Gov. Code, § 20630, subd. (b).*)

"'Compensation earnable' by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5." (*Gov. Code, § 20636, subd. (a).*) "'Payrate' means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules. 'Payrate,' for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e)." (*Gov. Code, § 20636, subd. (b)(1)*, italics added.)

(2) Based on the foregoing statutes, whether an employee is a member of a group or class of employees, the employee's normal monthly rate [\*13] of pay or base pay must be paid in cash pursuant to a publicly available pay schedule in order to qualify as pay rate and thus as "compensation earnable" that can be reported to CalPERS for use in the calculation of the employee's retirement benefit.

The question of what does or does not constitute a publicly available pay schedule has been addressed in only two published decisions.

In *Prentice v. Board of Administration (2007) 157 Cal.App.4th 983 [69 Cal. Rptr. 3d 167]* (*Prentice*), "a local municipality decided to provide the manager of its water and power department with a 10.49 percent salary increase during what turned out to be the last two years of his career. Although the municipality had a salary range for the manager's position which would have applied to anyone else who filled the position, the municipality did not alter the salary range to reflect the increase

and it was not otherwise available to other employees in the same class as the manager. In light of these circumstances, [Cal]PERS did not include the salary increase in calculating the manager's retirement allowance. The manager then challenged [Cal]PERS's decision by way of a petition for a writ of mandate, which the trial court denied." (*Id. at p. 986.*)

(3) On Prentice's appeal, the appellate court concluded the salary increase was not [\*14] part of Prentice's pay rate because "the increase Prentice received was never part of a published pay schedule within the meaning of [*Government Code*] section 20636, subdivision (b)(1)" in that "the city consistently excluded the increase from the salary range available for Prentice's position." (*Prentice, supra, 157 Cal.App.4th at p. 994.*) The appellate court went on to reject the argument that disclosure of Prentice's full salary in the city's annual budget was sufficient to satisfy the statute, observing as follows: "Admittedly, as Prentice points out, his full salary would have been available to anyone examining the city's annual budget. However, as a practical matter, inclusion of a provisional or temporary salary in a budget document would not have afforded any other person holding the position the right to receive the same increase, where, as here, the city itself consistently recognized that the salary range did not include the raise. Because, as we view the entire statutory scheme, the limitations on salary are designed to require that retirement benefits be based on the salary paid to similarly situated employees, [Cal]PERS acted properly in looking at the published salary range rather than the exceptional arrangement the city made with Prentice and reflected in the city's [\*15] budget documents. The defect in Prentice's broad interpretation of 'pay schedule' is that it would permit an agency to provide additional compensation to a particular individual without making the compensation available to other similarly situated employees." (*Ibid.*)

In *Molina v. Board of Administration, etc. (2011) 200 Cal.App.4th 53 [132 Cal. Rptr. 3d 435]* (*Molina*), a former public employee "sought to compel the inclusion in the calculation of his retirement pension all, or at least some portion of, the settlement proceeds received in the negotiated resolution of his wrongful termination action against the City of Oxnard." (*Id. at p. 56.*) The trial court denied his writ petition, and the appellate court affirmed. (*Ibid.*) In doing so, the appellate court explained as follows: "Molina fails to recognize the important difference between the amount he was paid by Oxnard (i.e., the settlement proceeds), which may be subject to income taxes, and the much narrower category of 'compensation earnable' that can be taken into account for pension purposes, as established under [the Public Employees' Retirement Law]. Because, under [the Public Employees'

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Retirement Law], even if a portion of the settlement amount had been labeled back pay and was includible in taxable income, it could not be included [\*16] in Molina's 'payrate' because there was no evidence that the amount was either (1) paid to similarly situated employees or (2) paid in accordance with a 'publicly available pay schedule[] ... for services rendered on a full-time basis during normal working hours.'" (*Id.* at p. 67.)

In the trial court here, CalPERS argued there was "no basis to distinguish the present case from *Prentice* and *Molina*. The only documents that list Tanner's salary as \$305,844 are his amended contract and the May 8, 2007, documents relating to that amended contract. Just like the budget documents in *Prentice* and the settlement agreement in *Molina*, Tanner's amended contract and the May 8, 2007 documents do not qualify as a 'pay schedule.' These documents relate only to Tanner personally, without listing any other position or person. There is no evidence that the City Council ever voted to adopt any of these documents for any purpose, much less adopt them as 'pay schedules.'"

The trial court agreed with CalPERS on this point, finding that Tanner's claimed base salary of \$305,844 did not appear on any publicly available pay schedule. In response to Tanner's argument that the cost analysis was his pay schedule, the trial [\*17] court noted that the city "made an exceptional arrangement with [Tanner] to provide him significant compensation" that was "well above the salary paid to the last Vallejo City Manager." The court also observed that the cost analysis "differs from the 'pay schedules' for other groups or classifications of City employees," in particular, the document showing "the salary information for Department Heads and Executive Assistants." The court pointed out that the cost analysis Tanner claimed was his pay schedule was "specific to him only, in that it is dated 'March 8, 2007' and pertains only to the City Manager." Finally, the court concluded that Tanner's "broad interpretation of 'pay schedule' would permit an agency to provide additional compensation to a particular high-ranking official, any time it made a document with his specific pay information 'publicly available,'" and the court did "not believe that the Legislature intended such a broad construction of 'pay schedule.'"

On appeal, Tanner contends the city "satisfied the publicly available pay schedule 'requirement' as it existed in 2007" because "Boutte testified that the [cost analysis] was a pay schedule and that it was provided [\*18] to the public" and because the city's human resources director, Dennis Morris, "also testified that the City Manager's contract was [Tanner's] pay schedule." This argument is not persuasive for several reasons.

First, the question of whether the \$305,844 base salary in Tanner's March 2007 agreement was paid pursuant to a publicly available pay schedule within the meaning of *Government Code section 20636, subdivision (b)(1)* is a question of law because it involves "[t]he proper interpretation of a statute, and its application to undisputed facts." (*State Water Resources Control Bd. Cases (2006) 136 Cal.App.4th 674, 722 [39 Cal. Rptr. 3d 189].*) Here, the facts are undisputed that Tanner's \$305,844 base salary appeared in the March 2007 agreement and in the related cost analysis and both of those documents were publicly available. Thus, the question of whether either or both of those documents qualified as a pay schedule, as the Legislature intended that term in *Government Code section 20636, subdivision (b)(1)*, is a question of law that we review de novo. The fact that Boutte may have characterized the cost analysis as a pay schedule and Morris may have characterized the March 2007 agreement as a pay schedule has very little bearing on our analysis of that legal question.

Second, even if we were to give weight to the testimony of Boutte and Morris on the question of whether the [\*19] cost analysis or the March 2007 agreement qualifies as a pay schedule, it turns out their testimony is far less supportive of Tanner's argument on this point than he lets on. On the first day of the administrative hearing, Boutte testified that the city manager and city attorney positions are different from other positions within city employment because those two positions are filled only by the city council, which does not hire any other employees, and those two positions are the only ones that have "actual agreements," i.e., written contracts. When asked how the contracts for those two positions "differ from the way the other employees [are] hired, particularly with respect to published pay scales," Boutte responded, "We do not publish those salaries because they change, based upon what's negotiated between the two parties, the City and that individual. And it changes. And once the document is finalized through a resolution, that becomes publicly [available] but *there is no set salary schedule for City Manager or City Attorney.*" (Italics added.)

Later, when asked "what document contains the compensation for the City Manager," Boutte responded, "The contract, the agreement, the individual [\*20] agreement. And possibly, the resolution may outline the total." And after that, when asked if she felt "any need to post the[] pay [of the city manager and city attorney] on a publicly available pay schedule," Boutte responded, "No, I did not."

It was only the following day, while being questioned about the items of compensation in the November 2006 agreement that were not included in the March 2007 agreement, that Boutte spontaneously referenced

the cost analysis and described it as "the pay schedule in terms of how we determined the base salary for Mr. Tanner's contract."

In arguing that Boutte testified the cost analysis was a pay schedule, Tanner refers only to her testimony on the second day and ignores completely her testimony on the first day. Viewed as a whole, however, Boutte's testimony does not support Tanner's argument that Boutte believed the cost analysis qualified or served as a pay schedule.

As for Morris, he testified that a spreadsheet showing the salary ranges for department heads and executive assistants with the city was an appropriate pay schedule because "[a] pay schedule normally has the various steps of the salary range, from the top to the very—you know, from [\*21] start to the very top of the range. Then it's broken down in an hourly, monthly, biweekly basis, that type of thing. It's pretty standard." When asked if employees hired by contract at the city are on pay schedules, Morris responded, "Normally, no," because "normally their compensation is only specified in the agreement, in the contract itself." Morris then testified that the city attorney and the city manager were the only two city positions he could think of that were hired by contract. This is the testimony to which Tanner refers when he argues that "Morris ... testified that the City Manager's contract was his pay schedule." Of course, as can be seen from the testimony itself, which we have set forth in full, Morris testified to no such thing. Instead, his testimony is more consistent with Boutte's initial testimony, which was that there were no pay schedules for the city's two contract employees: the city manager and the city attorney.

In any event, as we have noted, the question of whether the \$305,844 base salary in Tanner's March 2007 agreement was paid pursuant to a publicly available pay schedule within the meaning of *Government Code section 20636, subdivision (b)(1)* is a question of law, and thus we would not defer to [\*22] either Boutte or Morris on this question even if their testimony had been more favorable to Tanner than it actually was. On questions of law, we exercise de novo review (*State Water Resources Control Bd. Cases, supra, 136 Cal.App.4th at p. 722*), which means we do not defer even to the trial court. Instead, we apply well-known rules of statutory interpretation to determine for ourselves the intended meaning of the statute and the impact of that meaning on the present case.

(4) When interpreting a statute, "we begin with the plain language of the statute, giving the words their ordinary and common meaning. [Citation.] 'If the language is unambiguous, the plain meaning controls,' and no further analysis is warranted. [Citations.] If the language

allows more than one reasonable construction, we consider 'such aids as the legislative history of the [statute] and maxims of statutory construction. In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy.'" (*State ex rel. Bartlett v. Miller (2016) 243 Cal.App.4th 1398, 1408 [197 Cal. Rptr. 3d 673]*.)

(5) Applying these rules here, we conclude that neither of the documents on which Tanner relies qualified as a pay schedule for purposes of determining his final compensation and thus the amount of his retirement benefit. In reaching [\*23] that conclusion, we begin with the ordinary and common meaning of the word "schedule," which is, in this context, "a written or printed list, catalog, or inventory." (Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 1110, col. 1.) From this definition, and the surrounding context of the statute, we can discern that a *pay* schedule is a written or printed list, catalog, or inventory of the rate of pay or base pay of one or more employees who are members of CalPERS.

Does the March 2007 agreement or the cost analysis meet this definition? No, because neither document qualifies as a list, catalog, or inventory of the rate of pay or base pay of one or more employees. It is true both documents show the base pay the city ultimately agreed to pay Tanner as city manager starting in March 2007, but neither document is limited to that pay information. For its part, the March 2007 employment agreement runs 14 pages and shows *all* of the terms and conditions of Tanner's employment as city manager, with the base salary for the position appearing on page 7 of the agreement. As for the cost analysis, that document differs from the employment agreement in that it is only a single page and does [\*24] not set forth all of the other terms and conditions of Tanner's employment; nonetheless, the cost analysis contains a slew of figures above and beyond Tanner's base salary under the March 2007 agreement, and a member of the public would be hard-pressed to locate the new base salary of the city manager position among all of the other figures on the page and identify it as such.

### III

#### "Antispiking" Legislation—Public Disclosure

Why is this important? Because we discern from the Legislature's use of the term pay schedule an intent to require the employer to use a document (or documents) that isolates the rate of pay or base pay of its employees who are CalPERS members from other employment information and other figures—with the exception, of course, of the rate of pay or base pay for other such employees. The purpose behind such isolation is apparent, especially in light of the accompanying requirement that



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such pay schedules are to be made available to the public. A document that catalogs or lists the rate of pay or base pay of one or more employees who are CalPERS members, separate and apart from other information, more readily informs the public of the pay rate that will or may be used [\*25] in determining the amount of an employee's retirement benefit.

That this was the Legislature's purpose--to facilitate the public disclosure of pay information for public employees who are members of CalPERS--appears not only from the terms the Legislature used in *Government Code section 20636, subdivision (b)(1)*, but also from the circumstances surrounding the origin of that provision. The term pay schedule first appeared in the Public Employees' Retirement Law in 1993, when the predecessor statute to *Government Code section 20636--Government Code former section 20023*--was enacted in place of a previous statute bearing the same section number (Stats. 1993, ch. 1297, § 6, p. 7691) as part of a bill sponsored by CalPERS to address the then "recently uncovered, but apparently widely used, practice of 'spiking' (intentional inflation) the final 'compensation' (upon which retirement benefits are based) of employees of [Cal]PERS local contracting agencies." (Sen. Public Employment & Retirement Com., Analysis of Sen. Bill No. 53 (1993-1994 Reg. Sess.) as amended Mar. 16, 1993, p. 1.) The stated purpose of this part of the new *section 20023* was to ensure that pay rates would "be stable and predictable among all members of a group or class of employment" and that they would "be publicly noticed b[y]

the governing body." (Sen. Public Employment & Retirement Com., Analysis of Sen. Bill No. 53, *supra*, as amended Mar. 16, 1993, at p. 5.)

This purpose [\*26] would not be served by deeming either the March 2007 agreement or the cost analysis to be a pay schedule. If we were to do so, we would be sanctioning a practice--including an employee's rate of pay or base pay among any number of other figures or terms and conditions of employment--that would frustrate, rather than further, the apparent legislative purpose and intent behind the law. Such a result would also deviate substantially from the ordinary and common meaning of the term pay schedule as a list, catalog, or inventory of the rate of pay or base pay of one or more employees.

(6) Based on the foregoing analysis, we conclude that neither of the documents Tanner claims was a pay schedule qualified as such a document under the intended meaning of *Government Code section 20636, subdivision (b)(1)*. Accordingly, the trial court properly denied Tanner's writ petition on the ground that Tanner has no right to have his retirement benefit calculated based on the base salary in the March 2007 agreement.

#### DISPOSITION

The judgment is affirmed. CalPERS shall recover its costs on appeal. (*Cal. Rules of Court, rule 8.278(a)(1)*.)

Nicholson, Acting P. J., and Renner, J., concurred.

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 21, 2016, I served the foregoing document described as:

**CALPERS' REQUEST TO THE COURT TO AMEND JULY 20, 2016 ORDER** - 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:

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[ XX ] BY 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.

[ XX ] 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 21, 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.

\_\_\_\_\_  
Marlene Martinez  
NAME

\_\_\_\_\_  
*Marlene Martinez*  
SIGNATURE

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9 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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11 In the Matter of the Calculation of Final  
Compensation of:

12 DESI ALVAREZ,  
13 Respondent,

14 v.

15 CHINO BASIN WATERMASTER,  
16 Respondent.

CalPERS Case No. 2013-1113

OAH Case No: 2014080757

**RESPONDENT CHINO BASIN  
WATERMASTER'S RESPONSE TO  
CALPERS' REQUEST TO AMEND THE  
JULY 20, 2016 ORDER ON PETITIONER'S  
REQUEST FOR OFFICIAL NOTICE**

Hearing Date: April 11, 12, and 13, 2016  
Time: 9:00 a.m.  
Location: CalPERS' Glendale Offices  
Judge: Hon. Eric Sawyer

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18  
19 Respondent Chino Basin Watermaster ("Watermaster") objects to CalPERS' July 21,  
20 2016 Request to the Court to Amend July 20, 2016 Order on the grounds that the appellate  
21 opinion in *Joseph Tanner v. California Public Employees' Retirement System* ("Tanner") is  
22 irrelevant and therefore not properly the subject of official notice.

23 As the California Supreme Court has explained, a court "**must** take judicial notice of some  
24 matters ([Evidence Code] § 451) and **may** take judicial notice of others ([Evidence Code] § 452).  
25 There is, however, a precondition to the taking of judicial notice in either its mandatory or  
26 permissive form — any matter to be judicially noticed must be **relevant to a material issue.**"  
27 (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422 n. 2 [final emphasis  
28 1

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1 added].)

2 While judicial notice is otherwise mandatory for the decisional law of this state (see Evid.  
3 Code § 451(a)), the Court of Appeal’s opinion in *Tanner* does not meet the necessary  
4 “precondition” of relevance to a material issue and accordingly, judicial notice would be  
5 improper. (See *Shamrock Foods Co., supra*, 24 Cal.4th at 422 n.2.) The *Tanner* decision  
6 addressed the narrow issue of whether two documents – an employment agreement and an  
7 associated “City Manager Salary Computation”– should be considered “pay schedules” for the  
8 purposes of Government Code section 20636. (No. C078458, 2016 WL 3611051 (Cal. Ct. App.  
9 June 28, 2016).) It did not analyze the meaning of the phrase “publicly available” for the purpose  
10 of Government Code section 20636, as, in that case, “the facts [were] undisputed” as to whether  
11 these two documents were “publicly available.” (*Id.* at \*6.)

12 In this appeal, Watermaster is not relying on an employment agreement as constituting a  
13 “pay schedule[.]” The only material issue with respect to the requirements of Government Code  
14 section 20636 in this matter is whether the pay schedule for the relevant fiscal year was “**publicly**  
15 **available.**” Because the *Tanner* decision did not address this issue, it is not relevant to any  
16 material issue and does not meet the necessary “precondition” to judicial notice. (See *Shamrock*  
17 *Foods Co., supra*, 24 Cal.4th at 422 n.2.)

18 For the reasons above, Watermaster respectfully requests that the ALJ deny CalPERS’  
19 renewed request for official notice of the *Tanner* decision and leave its July 20, 2016 Order in  
20 place.

21 Dated: July 27, 2016

BROWNSTEIN HYATT FARBER  
SCHRECK, LLP



By: \_\_\_\_\_

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**PROOF OF SERVICE**

I, Stephanie Malik, declare:

I am a citizen of the United States and employed in Santa Barbara, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Brownstein Hyatt Farber Schreck, LLP, 1020 State Street, Santa Barbara, California 93101-2711.

On July 27, 2016, I served a copy of the within document(s):

**RESPONDENT CHINO BASIN WATERMASTER'S RESPONSE TO CALPERS' REQUEST TO AMEND THE JULY 20, 2016 ORDER ON PETITIONER'S REQUEST FOR OFFICIAL NOTICE**

- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Santa Barbara, California addressed as set forth below.
- by electronic transmission: I caused such document to be sent to the addresses at the electronic notification addresses on the attached service list. I did not receive within a reasonable time of transmission, any electronic message or other indication that the transmission was unsuccessful.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

**SEE ATTACHED SERVICE LIST**

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, 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 date of deposit for mailing in affidavit.

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

Executed on July 27, 2016, at Santa Barbara, California.

  
Stephanie Malik

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*In the matter of the Application for Final Compensation*  
**Case No. 2013-1113**  
**OAH Case No.: 2014080757**

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7 BEFORE THE BOARD OF ADMINISTRATION  
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9

10  
11 In the Matter of the Appeal of the Denial of ) CalPERS Case No.: 2013-1113  
12 Pension Benefits to ) OAH Case No: 2014080757  
13 )  
14 DESI ALVAREZ and CHINO BASIN ) **RESPONDENT DESI ALVAREZ'S**  
15 WATERMASTER, ) **OPPOSITION TO CALPERS' REQUEST**  
16 ) **TO AMEND COURT'S JULY 20, 2016**  
17 ) **ORDER**  
18 )  
19 ) Hearing Date: April 11, 12 and 13, 2016  
20 ) Location: CalPERS' Regional Office  
21 )) 655 N. Central Ave., #1400  
22 ) Glendale, CA 91203  
23 ) ALJ: Eric Sawyer

24 Respondent Desi Alvarez opposes CalPERS' request that the Court amend its July 20,  
25 2016 *Order*, and reverse its earlier ruling. Respondent Desi Alvarez opposes Official Notice of  
26 the appellate court decision in *Joseph Tanner v. CalPERS*.

27 The case is not relevant. Since it is not relevant, it is not a proper subject of judicial  
28 notice. CalPERS focuses on procedural issues governing when slip opinions may be cited, but  
fails to address the underlying foundation, substance or relevance. CalPERS fails to even argue  
facts or law why the *Tanner* decision is relevant. And CalPERS ignores the relevant issues.

The exhibits and testimony show that Watermaster had a publicly available salary

1 schedule covering the 2011-2012 fiscal year during which Mr. Alvarez was employed as  
2 Watermaster's CEO. The exhibits and testimony show that CalPERS did not even ask  
3 Watermaster or Alvarez for the publicly available salary schedule covering the 2011-2012 fiscal  
4 year.

5 CalPERS requested the wrong document for the wrong year. CalPERS' determination  
6 that Mr. Alvarez was not paid his Watermaster CEO salary pursuant to a publicly available pay  
7 schedule was premised on the fact that the 2012-2013 salary schedule for Watermaster did not  
8 list "CEO" but instead listed "General Manager". CalPERS was looking at the wrong salary  
9 schedule for the wrong year.

10 In the hearing, Watermaster presented exhibits and testimony about the correct salary  
11 schedule for the correct year. Watermaster employees testified that the correct salary schedule  
12 for the correct year was publicly available.

13 In addition, the testimony established that the reason the title "CEO" was not listed on the  
14 2012-2013 salary schedule is because Watermaster changed the name of the same executive  
15 level position from "CEO" to "General Manager" after Mr. Alvarez's CEO tenure.

16 If CalPERS had requested the correct salary schedule (for fiscal year 2011-2012 during  
17 Mr. Alvarez's employment), then Watermaster would have provided the correct salary schedule.  
18 Then CalPERS would have seen that the correct salary schedule for the correct year did indeed  
19 contain the position of "CEO" and the salary earned by Mr. Alvarez.

20 Tanner does not address these questions. Tanner is not relevant to CalPERS *using the*  
21 *wrong year's salary schedule* when it should have asked for the 2011-2012 salary schedule  
22 instead.<sup>1</sup> The *Tanner* decision has no relevance to the only disputed issues in this case and should  
23 not be considered by the Court in reaching its *Proposed Decision*.

24 Dated: July 27, 2016

By: \_\_\_\_\_

John Michael Jensen,  
Attorney for Respondent Desi Alvarez

25 \_\_\_\_\_  
26 <sup>1</sup> Angel Gutierrez, one of CalPERS' witnesses, acknowledged that the 2012-2013 salary  
27 schedule "would not apply to Mr. Alvarez at all" and that it would have been part of his  
28 [Gutierrez's] duties to ask for the 2011-2012 salary schedule as part of CalPERS' review process.  
(Gutierrez, 4/12/16, 32:9-23, 92:18-22.)



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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Law Offices of John Michael Jensen, 11500 West Olympic Blvd, Suite 550, Los Angeles, CA 90064-1524.

On July 27, 2016, I served the following document (s) by the method indicated below:

**Respondent Desi Alvarez's Opposition to CalPERS' Request to Amend Court's July 20, 2016 Order**

By placing the document (s) listed above in a sealed envelope (s) and consigning it First Class Mail through the U.S. Postal Service to the address (es) set forth below:

Preet Kaur, Staff Attorney  
CalPERS Legal Office  
California Public Employee Retirement System  
P.O. Box 942707  
Sacramento, CA 94229-2707

Bradley J. Herrema  
Brownstein Hyatt Farber Schreck, LLP  
2049 Century Park East, Suite 3550  
Los Angeles, CA 90067

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on July 27, 2016, at Los Angeles, California



Griselda Montes De Oca