

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

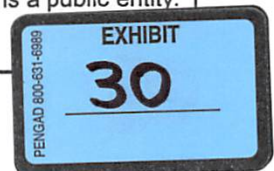
6
7 BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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

16
17 I. INTRODUCTION

18 In his Closing Brief, respondent Desi Alvarez (Alvarez) claims that the Chino
19 Basin Watermaster (Watermaster) is not subject to OAH jurisdiction, is not a public
20 entity, is not subject to the open meeting laws, such as the Bagely-Keene Act or the
21 Brown Act, it is not required to give notice to the public and is not subject to section
22 570.5.¹ (Alvarez's Closing Brief pp. p. 15:5, 15:28, 16:9-12, 17:5-7.) Essentially,
23 Alvarez argues that the Watermaster is somehow above the PERL because it has its

24 ¹ It is interesting to note that while Alvarez makes such claims concerning the Watermaster's status, the
25 Watermaster has remained silent on these issues, including whether the Watermaster is a public entity.



1 own Rules and Regulations. (Alvarez's Closing Brief, pp. 5:20-28, stating "CalPERS
2 cannot challenge the compensation of Watermaster employees. . .")

3 Alvarez further argues that if the PERL happen to apply, then CalPERS should
4 put on its blinders and accept the actions of the Watermaster as told because
5 CalPERS is "ministerially required to simply take the decisions of contracting agencies.
6 . ." (Alvarez's Closing Brief, pp. 5:20-28.) Alvarez fails to acknowledge that it is the
7 Legislature, not the employer, that defines what constitutes compensation and
8 CalPERS is charged with determining who is an employee of the system. (See
9 *Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578;
10 *Metropolitan Water District of California v. Cargill* (2004) 32 Cal.4th 491, 503-505.)

11 Contrary to Alvarez's wishes, CalPERS is not merely a bank teller, dispensing
12 money from the pension fund at the pleasure of the Watermaster. Rather, CalPERS
13 has a fiduciary duty to its members and an obligation to prevent pension spiking.
14 CalPERS analysts thoroughly analyze the reported compensation and actions of
15 respondents in an attempt to fulfill CalPERS' fiduciary duty and prevent pension
16 spiking. The Court should put aside Alvarez's colorful arguments and equally apply
17 the PERL to the Watermaster, as it would be applied to all other contracting agencies.
18 If the PERL is applied in accordance with the intent of the Legislature, the Court will
19 find Alvarez's payrate does not qualify as compensation under Government Code
20 sections 20636 and 20630,² and Title 2, California Code of Regulations 570.5³ and
21 that he was no longer an employee of the Watermaster after November 9, 2011.

22 ///

23 ///

24 _____

25 ² Except as indicated all statutory references will be to the California Government Code.

³ All regulatory references are to Title 2.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

II. ARGUMENT

A. Respondents' intent is irrelevant in determining pension spiking.

Respondents point out that Alvarez did not intend to retire when he began working for the Watermaster and did not intend to spike his final compensation. (Watermaster's Closing Brief, p. 4:20-24; Alvarez's Closing Brief, pp. 3:9-17, 13:17-26, 34:2-5.) Alvarez's intent, however, is irrelevant. ". . . [T]he issues of questionable intent and good faith are not involved in the statutory regulatory determination of what constitutes 'final compensation.'" (CalPERS Presidential Decision, *In the Matter of Appeal for Calculation of Benefits Pursuant to the Employer's Report of Final Compensation, Roy T. Ramirez and City of Indio*, OAH L-2000050022 (Ramirez).)

Rather, it is the intent of the Legislature that is relevant. Whether respondents engaged in pension spiking is dependent on whether the payrate was compliant with the statutes enacted by the Legislature that prevent pension spiking, particularly Government Code sections 20630 and 20636, which it was not.

B. Alvarez's payrate was not pursuant to a "publicly available pay schedule."

1. CalPERS' determination was not in error and remained unchanged after review of the 2011/2012 salary matrix because the 2011/2012 salary matrix is not a "publicly available pay schedule."

Respondents argue CalPERS determination was in error as CalPERS did not review the 2011/2012 salary matrix when determining whether Alvarez's payrate was based on a publicly available pay schedule. (Alvarez's Closing Brief p. 14:14-28; Watermaster's Closing Brief p. 13-15.) Respondents point to CalPERS analysts Angel Gutierrez and Nicole Horning's testimony and state that the analysts did not review the 2011/2012 salary matrix when CalPERS' determination was issued. (Alvarez Closing Brief p. 14:14-28; Watermaster's Closing Brief, pp. 14:26-28, 15:1-20.)

1 Respondents, however, neglect to mention analyst Gutierrez's testimony that he
2 did review the 2011/2012 matrix prior to the hearing and even after reviewing the
3 2011/2012 matrix, his determination remained unchanged. (Tr. II pp. 16:22-25, 17:1-
4 12, 40:8-16.) Analyst Gutierrez testified that the 2011/2012 matrix cannot be used to
5 determine Alvarez's payrate because the 2011/2012 matrix does not qualify as a
6 "publicly available pay schedule" pursuant to section 20636 (b)(1). (Tr. II p. 14:7-20.)
7 Analyst Gutierrez testified that the pay schedule must be adopted or approved through
8 public consent. (Tr. II p. 45:1-20.) Analyst Gutierrez's testimony is consistent with the
9 legislative intent which states the pay schedule must be "publicly noticed by a
10 government entity." (See CRON (1)(C), Senate Floor Analysis, SB 53, 5/1/93, attach.
11 p 6.)

12 Analyst Gutierrez's testimony is also consistent with relevant case law.
13 Presidential Decision *In re the Matter of Randy Adams*, OAH 2012030095 (*Adams*),
14 explains publicly means "by public action or consent." (*Adams*, p. 20.) The *Tanner*
15 decision provides that the purpose of 20636 was to ensure payrates "would 'be publicly
16 noticed b[y] the governing body." (CalPERS Request For Official Notice, attach. 2,
17 *Tanner v. California Public Employees' Retirement System*, Case No. C078458, p. 16
18 (*Tanner*), citing Legislative history.)

19 Watermaster claims ". . . there is no legal authority that Government Code
20 section 20636 – which mentions only 'publicly available pay schedules' – specifically
21 requires . . . adoption by the agency's governing body." (Watermaster's Closing Brief,
22 p. 14: 8-11.) This argument, however, directly contradicts the legislative history,
23 *Adams* and *Tanner*. Analyzing it as if it is a technical requirement, Respondents fail to
24 recognize the true intent behind section 20636. It is important to note that "[d]isputed
25 payments are evaluated in light of relevant code provisions and the Legislative

1 scheme. Where a particular statute is ambiguous, the intent of the act prevails over the
2 letter, and the letter will, if possible be so read as to conform to the spirit of the act."
3 (*Ramirez* p. 10, citing *Hudson v. Board of Admin. of Public Employees' Retirement*
4 *System* (1997) 59 Cal.App.4th 1310; *Pomona Police Officers' Assn. v. City of Pomona*
5 58 Cal.App.4th 578; *Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, *City*
6 *of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470,
7 *Snow v. Board of Administration* (1987) 87 Cal. App. 3d 484.)

8 Merely making a "pay schedule" available to the public after it has been
9 implemented behind closed doors does not help prevent pension spiking. The purpose
10 of section 20636 was to eradicate pension spiking by ensuring "pay schedules," which
11 specify the payrate of public employees, are implemented in a public or open manner,
12 allowing the public to voice its concerns. (See *Adams* at p. 20.) Here, none of the
13 salary matrices were "publicly available" as they were not adopted or approved through
14 public action or consent. Furthermore, approving them through open session, after the
15 fact, does not fix the lack of public involvement. (See Tr. II pp. 16:22-25, 17:1-12.)

16 Conveniently neglecting the "public" part of section 20636(b)(1), Watermaster
17 and Alvarez focus on "available," claiming the salary matrices were available to those
18 who requested them as they were produced to a journalist in 2010 and a water district
19 in 2011. (Watermaster's Closing Brief, pp. 13 & 14.) Watermaster claims "'[p]ublicly
20 available' cannot reasonably be interpreted as synonymous with 'publication'."
21 (Watermaster's Closing Brief 14:22-23.) In stating so, the Watermaster ignores
22 *Adams*, which specifically states "[t]he term 'publicly available' has been determined to
23 be consistent with 'a published monthly payrate.'" (*Adams* p. 21, citing *Molina v. Board*
24 *of Administration* (2012) 200 Cal.App.4th 53.) *Adams* has interpreted available to
25 mean 'suitable or ready for use' and 'readily obtainable'. (*Adams* at p. 20, Tr. II, pp.

1 62:2-25, 63:1-2.) There is no evidence that the salary matrices were published on the
2 internet or readily available to the public at large. (Tr. II, p. 50:5-25, 51:1-8.) A
3 member of the public would have to make a request for the salary matrix and the
4 Watermaster had up to 10 working days to comply with the request. (Tr. III, p. 52:7-
5 23.) Thus, the salary matrices were not readily available to the public as required by
6 section 20636 and relevant case law.

7 2. CalPERS' correctly relied on section 570.5 in determining that Alvarez's
8 compensation fails to qualify as payrate under section 20636(b)(1).

9 Alvarez contends CalPERS unconstitutionally violated his due process rights by
10 subjecting him to the requirements of section 570.5 because section 570.5 took effect
11 after his employment with the Watermaster. (Alvarez's Closing Brief, p. 21:16-28.)
12 Alvarez further claims CalPERS has no authority to apply section 570.5. (*Id.*) Section
13 570.5 is a *clarifying regulation*, which clarifies section 20636. (See *Adams*, p. 14.) As
14 noted in *Adams*, "[t]he notice of Proposed Regulatory Action related to section 570.5
15 stated that the regulation 'will ensure consistency between CalPERS employers as well
16 as enhance disclosure and transparency of public employee compensation. . . This
17 proposed regulatory action clarifies and makes specific requirements for publicly
18 available pay schedule and labor policy or agreement. . .'" (*Adams*, p. 14.)

19 Contrary to Alvarez's contentions, CalPERS has full legal authority to apply
20 570.5 in determine whether Alvarez's compensation complies with section 20636.
21 Clarifying amendments have "no retrospective effect because the true meaning of the
22 statute remains the same." (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th
23 232, 243; *Helga Carter v. California Department of Veterans Affairs* (2006) 38 Cal.4th
24 914, 922.) Case law provides that "[i]f the amendment merely clarified existing law, no
25 question of retroactivity is presented." (*McClung v. Employment Development Dept.*

1 (2004) 34 Cal.4th 467, 471-472) Furthermore, the Court may use legislative history to
2 assist in determining whether the amendment changed or merely clarified existing law.
3 *In re Marriage of Walker* (2006) 138 Cal.App.4th 1408, 1426. A review of the
4 regulatory history of section 570.5, by *Adams*, demonstrates section 570.5 merely
5 clarified section 20636. Therefore, CalPERS may apply section 570.5 in determining
6 whether Alvarez's payrate complied with section 20636.

7
8 3. Even if CalPERS had not relied on 570.5, CalPERS would have reached the
9 same conclusion because Alvarez's payrate does not satisfy section
10 20636(b)(1).

11 Even assuming that 570.5 does not apply, CalPERS determination would
12 remain the same because, as discussed previously, the salary matrices are not
13 publicly available pay schedules under section 20636(b)(1). (Tr. II pp. 9:24-25, 10:1-2,
14 11:17-21, 18:23-25, 19:1-4, 30:12-25, .) The matrices were not publicly noticed by the
15 Watermaster in 2011 and they were not available to the general public. Since the
16 salary matrices fail to meet the requirements of section 20636(b)(1) whether section
17 570.5 applies has no bearing on the ultimate result.

18 4. Watermaster Rules and Regulations cannot override the requirements of
19 section 20636.

20 Alvarez argues that the Watermaster is not subject to open meeting laws and
21 the Watermaster's Rules and Regulations allow discussion of employee personnel
22 matters in closed session. (Alvarez's Closing Brief p. 17.) Alvarez further concludes
23 that "CalPERS' rules and regulations and the PERL" were satisfied because the
24 Watermaster's Rules and Regulations were followed and an Employment Agreement
25 was executed. (Alvarez's Closing Brief p. 17.)

First, the Watermaseter's Rules and Regulations cannot override section 20636,
which requires the payrate must be pursuant to a "publicly available pay schedule."

1 Alvarez fails to cite any legal authority supporting his argument that the Watermaster
2 only has to adhere to its own Rules and Regulations and can set an employee's salary
3 in closed session rather than pursuant to a "publicly available pay schedule."

4 Second, contrary to Alvarez's contentions, the Employment Agreement simply
5 does not qualify as a "publicly available pay schedule," regardless of whether it is
6 approved in compliance with the Watermaster's Rules and Regulations. (See
7 CalPERS Request For Official Notice, attach. 2, *Tanner v. California Public*
8 *Employees' Retirement System*, Case No. C078458, p. 15 (*Tanner*).

9 Lastly, even the Watermaster's Rules and Regulation do not allow the setting of
10 employee salary in special or closed session. Watermaster Rules and Regulations
11 Article II, section 202 states that the "Watermaster shall generally operate in
12 accordance with the provisions of California Open Meeting Law (Brown Act)" unless
13 there is a conflict between the two. Watermaster Rules and Regulations, Article II,
14 section 2.6(1)(ii) states the Watermaster Board may discuss personnel matters of
15 Watermaster employees in closed session. This requirement in line with the public
16 meeting laws, which provide that a local agency may hold closed sessions to "consider
17 the appointment, employment, evaluation of performance, discipline, or dismissal of a
18 public employee. . ." (Gov. Code §54957.)

19 Though Alvarez appears to argue otherwise, the Watermaster's own Rules and
20 Regulations only allow discussion of personnel matters in closed session, not setting of
21 salary for executives. Since the Watermaster's Rules and Regulations are silent
22 regarding the setting of salary, Watermaster Rules and Regulations, Article II, section
23 202 defer us to the open meeting laws or the Brown Act. The Brown Act provides that
24 the "salary, salary schedules or compensation paid in form of fringe benefits" to a local
25 agency executive may not be set in a special meeting." Thus, Alvarez's salary, as

1 provided in the Employment Agreement, was not set in accordance with the
2 Watermaster's Rules and Regulations because it was approved in special session.

3 C. Alvarez was not on administrative leave, but rather ceased being an employee
4 of the Watermaster after November 9, 2011.

- 5 1. There is no evidence demonstrating Alvarez was placed on
6 administrative leave after November 9, 2011.

7 Although Alvarez claims he was placed on administrative leave, there is nothing
8 in the Confidential Separation Agreement stating or even indicating that he is being
9 placed on administrative leave. (Alvarez's Closing Brief, p. 25:5-6; Exh. 12, p. 1.)
10 Rather, the Confidential Separation Agreement states that Alvarez's "employment in
11 the capacity of the Chief Executive Officer of the Watermaster with all of the powers
12 and duties associated therewith cased on November 9, 2011. . ." (*Id.*) The
13 compensation paid to Alvarez was "severance compensation," which was not, in any
14 manner, contingent upon Alvarez performing any services for the Watermaster.

15 The "severance compensation" was provided pursuant to the Employment
16 Agreement, which requires payment of "severance compensation" in the event Alvarez
17 was terminated without cause. (See Exh. 11, p.4 para. 9a. "[i]n the event Executive's
18 employment is terminated without cause prior to the end of the first year of the
19 Employment Term, Watermaster will pay Executive the full salary amount for the first
20 year of the employment term plus provide the health and other benefits that were being
21 provided to the Executive. . .") It is also important to note that the Employment
22 Agreement only allows up to twelve days of administrative leave, while the Confidential
23 Separation Agreement says nothing about placing Alvarez on administrative leave.
24 Thus, aside from Alvarez's self-serving testimony, there is no evidence that he was
25

1 placed on administrative leave. Rather, the evidence clearly demonstrates he was
2 separated without cause and provided "severance compensation" until May 2, 2012.

3 2. Watermaster did not have the right to control Alvarez's actions after
4 November 9, 2011.

5 The Watermaster retained "no control over the means and means of
6 accomplishing the result desired." (*See Tieberg v. UIAB* (1970) 2 Cal.3d 943, 949.) All
7 powers and duties associated with Alvarez's CEO position ceased After November 9,
8 2011. (Exh.12, p. 1.) Alvarez only had one duty, which was to provide information "as
9 requested with respect to pending projects and transition of his duties." (Id.) The
10 Confidential Separation Agreement does not indicate that Watermaster had any right
11 to control the manner or means of how that information was provided.

12 Other than to say Alvarez "shall endeavor" to provide prompt and accurate
13 information, the Watermaster retained no control over Alvarez. While the Employment
14 Agreement, applicable prior to November 9, 2011, states Alvarez "will perform his
15 duties diligently and competently and shall act in conformity with the Watermaster's
16 written and oral policies and within the limits, budgets and business plans set by the
17 Board of Directors. . . strictly adhere to and obey all of the rules and regulations in
18 effect," the Confidential Separation Agreement imposes no such restrictions on Alvarez
19 after November 9, 2011. (Exh. 11, p. 12.) The Watermaster clearly relinquished all
20 control over Alvarez after November 9, 2011.

21 3. The "severance compensation" is not reportable compensation under
22 section 20630.

23 All compensation reported to CalPERS must meet the definition of
24 compensation under section 20630. The "severance compensation," reported after
25 November 9, 2011 does not qualify as compensation under section 20630. Section
20630 defines compensation as "remuneration paid out of funds controlled by the

1 employer in payment for the member's services performed during normal working
2 hours or for time during which the member is excused from work. . ." Section
3 20630(a)(6) lists "leave of absence" as one of the categories under which a member
4 may be excused from work.

5 Here, Alvarez was not on a leave of absence after November 9, 2011, but was
6 rather separated from his position as a CEO and provided "severance compensation"
7 as a result of the termination without cause. (See Exhs. 11, p.4 & 12.) The "severance
8 compensation" was not remuneration paid for the services performed during normal
9 working hours but was paid to sever his employment. Because the Employment
10 Agreement required payment of the full salary amount for the first year of employment
11 Alvarez was provided "severance compensation" until May 3, 2012. (*Id.*) Therefore,
12 pursuant to section 20630, the "severance compensation" simply cannot be reported
13 as compensation to CalPERS.

14 III. CONCLUSION

15 The compensation paid to Alvarez does not meet the definition of payrate
16 because it was not paid pursuant to a "publicly available pay schedule" as required by
17 section 20636(b)(1). Furthermore, the "Severance Compensation" paid after
18 November 9, 2011 is not reportable to CalPERS under section 20630 and Alvarez was
19 no longer an employee of the Watermaster after November 9, 2011.

21 Respectfully submitted,

22 Dated:

8/8/16


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

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 August 8, 2016, I served the foregoing document described as:

CALPERS' REPLY BRIEF - 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

Office of Administrative Hearings
320 West Fourth Street, Suite 630
Los Angeles, CA 90013

*Via e-file at: laxfilings@dgs.ca.gov

*VIA e-mail at:
johnjensen@johnjensen.com

Bradley J. Herrema
Brownstein Hyatt Farber Schreck, LLP
1020 State Street
Santa Barbara, CA 93101

Desi Alvarez
[REDACTED]
[REDACTED]

*VIA e-mail at: BHerrema@bhfs.com

Joe Joswiak
Chino Basin Watermaster
9641 San Bernardino Road
Rancho Cucamonga, CA 91730

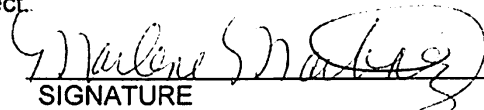
[XX] **BY MAIL** -- As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Sacramento, California, in the ordinary 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 August 8, 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


SIGNATURE