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7 BEFORE THE BOARD OF ADMINISTRATION
8 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
9

10
11 In the Matter of the Appeal of the Denial of
12 Pension Benefits to Desi Alvarez

) CalPERS Case No.: 2013-1113
) OAH Case No: 2014080757

13 DESI ALVAREZ and CHINO BASIN
14 WATERMASTER,

) **RESPONDENT DESI ALVAREZ'S POST**
) **HEARING REPLY BRIEF**

15 Appellants.

) Hearing Date: April 11, 12 and 13, 2016
) Location: CalPERS' Regional Office
) 655 N. Central Avenue
) Suite 1400
) Glendale, CA91203
) ALJ: Eric Sawyer

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19 Respondent Desi Alvarez files this Post Hearing Reply Brief.
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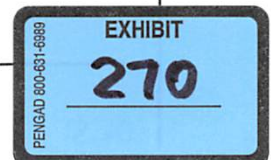


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1 **I. Introduction**

2 Alvarez and Watermaster proved that Alvarez's compensation qualifies as "payrate"
3 under the PERL, including as it was paid pursuant to a publicly available pay schedule. Alvarez
4 and Watermaster also proved that Watermaster had a pay schedule for 2011-2012 that listed the
5 CEO position at the annual payrate of \$228,000 and was publicly available. Watermaster's pay
6 schedule satisfies the *factual* requirements of *Tanner, Adams*, et al. In fact, Watermaster's pay
7 schedule isolates a rate of base pay for CEO, etc. and was "readily available" to the public, etc.

8 Alvarez and Watermaster also proved that Alvarez remained Watermaster's employee
9 under the PERL with required duties for the year, including during paid administrative leave.
10 CalPERS fixates in isolation on ambiguous form language and argues contrary to the evidence
11 that Alvarez was effectively discharged with no further duties once placed on paid administrative
12 leave. Not so. The testimony, evidence and case law indicate that Alvarez was a common law
13 employee, including under the PERL, with ongoing duties and responsibilities during his leave,
14 was under Watermaster's continued control, and was entitled to earn pension benefits, such that
15 his compensation is "PERSible" for the whole year.

16 Alvarez and Watermaster showed that the correct information (received in the hearing)
17 about the pay schedule and continued employee status would require a result in Alvarez's favor.

18 Not only did Alvarez and Watermaster prove their case, they also proved that CalPERS
19 was wrong. Alvarez and Watermaster proved that CalPERS based in its entire determination on
20 incorrect evidence. Through CalPERS' witnesses, Alvarez and Watermaster showed that
21 CalPERS based its determination on the wrong time period and the wrong pay schedule. Alvarez
22 and Watermaster showed that the conclusory statements of CalPERS witness are unsupported,
23 contrary to the evidence, and not based in accepted interpretations of case law.

24 Once Alvarez and Watermaster proved that CalPERS based its decision on incorrect
25 information, any initial presumption or initial deference that CalPERS may once have been
26 entitled to in its administrative decision is rebutted and dispelled. Once the presumption is
27 rebutted, the burden shifted back to CalPERS to defend itself or establish that the preponderance
28 of the evidence supports a decision in its favor. CalPERS cannot maintain the presumption even

1 though it is admittedly or proven wrong.

2 By contrast, while Alvarez and Watermaster may once have had the burden of proof,
3 once they met their burden of proof, they are entitled to a decision in their favor. CalPERS does
4 not even undertake to establish proof. CalPERS cannot state that Alvarez has not met the burden
5 of proof, after he *has* done so and especially after CalPERS has *failed* to meet its own burden.

6 In its conclusory *Post Hearing Brief*, CalPERS does not cite to evidence that would
7 support its determination. CalPERS does not address the facts developed in the administrative
8 process. CalPERS does not neutrally apply law to the facts. Instead, CalPERS broadly seeks
9 refuge in an irrelevant and inapplicable policy that it applies contrary to the facts. But the anti-
10 spiking policy is irrelevant or inapplicable because the facts show that Alvarez did not spike his
11 pension. In short, CalPERS has seized upon spurious "facts" and its own errors to target one of
12 its own retirees with hysterical cries of "pension spiking" and intent to defraud the pension
13 system, when nothing of the sort occurred.

14 After a three-day hearing administrative hearing, with nine separate witnesses and dozens
15 of exhibits, CalPERS has failed to establish its case. Rather than address the clear and consistent
16 testimony brought forward at the hearing, including that elicited by CalPERS itself, its *Brief*
17 chooses to present a hodge-podge of *allegations* and *suppositions* instead. Indeed, CalPERS'
18 *Brief* is little more than general statements of the *Government Code* sections that CalPERS relies
19 on, extensive quotations from three items for which CalPERS sought official notice (but with
20 little attempt to link these to the actual evidence elicited at hearing), and CalPERS' recitation and
21 interpretation of its own long-standing factual presumptions and legal interpretations.

22 One wonders why CalPERS even bothered to hold a hearing before the OAH, since the
23 *Brief* lacks virtually any evidentiary material from the hearing to support CalPERS' arguments.
24 There are a mere seven (7) citations to the hearing testimony,¹ *none* of them from CalPERS' own

25 _____
26 ¹ Two citations (with the exact same citation both times) are used to buttress the
27 inaccurate argument that Alvarez's administrative leave in November 2011 was actually a
28 termination, not a change in duties while on administrative leave; four citations (again twice
using the same citation) are raised to try to dismiss Watermaster's salary matrixes based on their
use in the budgeting process, which isn't even an issue in this dispute; and one citation goes to

1 witnesses and most of them peripheral or irrelevant to the issues in dispute. The exhibit citations,
2 while more numerous, are essentially limited to repeats of CalPERS' *interpretation* of those
3 materials, while studiously ignoring the testimony at hearing putting the materials in context and
4 explaining what actually went on.

5 Alvarez finds himself in the odd position of having to repeat the factual evidence that he
6 and Watermaster have already cited in their own *Post Hearing Opening Briefs*, since CalPERS
7 has for all practical purposes decided that facts are of little relevance, all that counts is CalPERS'
8 quotations of law and *assertions* that it has applied this correctly.

9 **II. Central Questions in Dispute**

10 CalPERS' *First Amended Statement of Issues* identifies the two key questions to be
11 resolved in the administrative proceeding:

12 1. **Was Alvarez paid his Watermaster salary pursuant to a "publicly available"**
13 **salary schedule?**

14 The factual evidence demonstrates convincingly:

15 a) that Watermaster had such a salary schedule for the 2011-2012 fiscal year
16 (the period covering Alvarez's employment), admitted as Watermaster's Exhibit S,

17 b) that salary schedule was publicly available, and in fact all elements of
18 Watermaster's hiring and compensation of Alvarez were fully transparent to anyone who
19 wished to know what he was being paid, but most significant of all,

20 c) CalPERS failed to request the applicable pay schedule and instead
21 admittedly based its denial on an *inapplicable* schedule covering the period after Alvarez
22 had left Watermaster.

23 2. **Did Alvarez continue to be employed by Watermaster as a common law**
24 **employee after November 9, 2011?**

25 Again, the factual evidence demonstrates:

26 a) that Watermaster kept Alvarez on as an employee after November 9 in

27 the essentially irrelevant (and uncontested) fact that one of Watermaster's employees was
28 appointed interim CEO after November 2011.

1 order to help with the transition to a new executive officer that it felt better suited
2 Watermaster's needs and aims,

3 b) that Alvarez continued to be subject to Watermaster's control from
4 November 9, 2011 through the end of his employment on May 3, 2012,

5 c) that Alvarez was *in fact* under such control and periodically
6 communicated with the Watermaster Board to aid in the transition as required,

7 d) that Alvarez received regular payroll checks, accrued vacation time, had
8 his earnings reported and employee/employer contributions made to CalPERS, and

9 e) that the only reason CalPERS deemed Alvarez *not* to be a common law
10 employee was because it chose not to look at the actual factors indicating such status and
11 instead simply seized on (and misconstrued) words in the amendment to his employment
12 agreement designed to implement the transition to a new executive head replacing
13 Alvarez while ignoring the factual situation and Watermaster's (and Alvarez's) clear
14 statements in line with that.

15 **III. Alvarez Satisfies Government Code Section 20636 Re Pay Schedule**

16 Central to CalPERS' entire case is the argument that Alvarez's compensation did not
17 satisfy *Government Code* section 20636 because there was no publicly available pay schedule for
18 2011-2012, the time period during which Alvarez worked at Watermaster. The evidence
19 conclusively demonstrated the precise opposite.

20 **A. Government Code Section 20636 Requires That the Relevant Salary Schedule**
21 **Be "Publicly Available"—It Was**

22 CalPERS has argued that employees be paid pursuant to "publicly available pay
23 schedules" to help insure that the pay rate is properly authorized and available. Watermaster's
24 adoption of Alvarez's salary, its creation of a 2011/2012 Salary Schedule (Exhibit S) listing
25 Alvarez's CEO position and the \$228,000 salary he was paid, and Watermaster's general policies
26 of "openness" make sure that the salary is properly authorized and available.

27 Joe Joswiak, Watermaster's CFO today and throughout the relevant time period, testified
28 extensively about the existence of Watermaster's 2011-2012 Salary Schedule (Exhibit S). He

1 demonstrated explicitly that it listed the position of CEO and contained a salary range including
2 the \$228,000 paid to Alvarez as its third highest step. (Joswiak, 4/13/16, 102:19-103:5.)

3 Joswiak also testified that the salary schedule was not only publicly available and would
4 have been given to anyone who walked in and asked for it (*Id.*, 80:8-14), but that it was actually
5 produced in that fashion when Ms. Tracy of the Monte Vista Water District requested it (*Id.*,
6 79:10-80:7; see also Joswiak, 4/11/16, 110:17-111:10; Exhibit R).

7 Moreover, CalPERS' witness Angel Gutierrez—the analyst who made the determination
8 that Alvarez's salary did not qualify as "final compensation" because there was allegedly no
9 publicly available pay schedule—told Watermaster during the review process that "There's a
10 requirement that salary information be publicly available. How you go about doing that is up to
11 the agency." (Exhibit 259, pg. 1.) Nicole Horning, Gutierrez's manager, agreed that there are
12 "multiple options to make it publicly available." (Horning, 4/13/16, 188:15-24.)

13 Thus, the 2011/2012 Salary Schedule satisfies the *Tanner* requirements that salary be on
14 a publicly available pay schedule; and the *Adams* requirements that it be "readily available ...
15 without unreasonable difficulty".

16 **B. All Watermaster Salary Information is Publicly Available**

17 Testimony throughout the hearing repeatedly and consistently established that all of
18 Watermaster's salary information was available to whomever wanted to know it. Watermaster's
19 Rules and Regulations set forth how information is made available to the public. (Exhibit D.)
20 Watermaster has a Request for Information form on its website that anyone may use. They will
21 get the information they request unless it's involved in litigation. (Kavounas, 4/13/16, 47:8-13.)

22 Further, salary schedules and salary matrices maintained by Watermaster were available
23 to anyone from the public who requested them. (Joswiak, 4/13/16, 78:18-19.) The salary
24 information is available on the website. (Kavounas, 4/13/16, 71:15-16.) Watermaster provided
25 James R. Koren of the Inland Valley Daily Bulletin with a copy of the employment agreement
26 for the then-current CEO. (*Joswiak*, 82:1-10.)

27 In summary, Watermaster made all relevant salary information available to anyone from
28 the public who requested it. CalPERS' never developed or cites any testimony showing

1 otherwise.

2 **C. CalPERS Never Reviewed—And Never Even Had—The Applicable Pay**
3 **Schedule**

4 Perhaps the most important fact that came out in the hearing was that CalPERS made its
5 determination without reviewing or even requesting a copy of the 2011-2012 Salary Schedule
6 (Exhibit S), the one covering the time period Alvarez was Watermaster's CEO.

7 Recall that CalPERS' entire case hinges on the determination that "upon reviewing the
8 compensation that was reported [by Watermaster for Alvarez], CalPERS determined that the
9 reported payments were not pursuant to a publicly available pay schedule and did not qualify as
10 comp earnable." (CalPERS' Opening Statement, 4/11/16, 25:6-10.)

11 Joswiak testified that he never provided the 2011-2012 Salary Schedule (Exhibit S) to
12 CalPERS *because CalPERS never even requested it.* (Joswiak, 4/13/16, 82:13-83:2.) CalPERS
13 itself elicited the same testimony on cross examination:

14 Q. And I'm looking at Exhibit S. Was this exhibit, this Exhibit S, the salary
15 schedule for the year – well, it states "salary schedule" and then underneath that, it
states "2011/2012". Was that provided to CalPERS by you?

16 ...

17 THE WITNESS: No one from CalPERS has ever asked for this.

18 BY MS. KAUR:

19 Q. Did you ever provide it?

20 A. No one has ever asked from CalPERS.

21 Q. So my question is, did you provide this to CalPERS?

22 A. No, no one has ever asked.

23 (Joswiak, 4/13/16, 90:20-91:12.)

24 For some reason, however, this testimony and the fact that CalPERS did not even request
25 a copy from Watermaster of the very document it rests its entire case on is never mentioned in
26 CalPERS' *Brief*. Neither is the fact that two of CalPERS' own employees directly involved in
27 making the determination to deny the use of Alvarez's Watermaster compensation reviewed it as
28 part of the CalPERS determination process: Horning cannot confirm she asked for it and
suggests her staff did (Horning, 4/13/16, 182:4-8), while Gutierrez admits that CalPERS didn't
even have the document at the time of its determination (Gutierrez, 4/12/16, 40:8-41:10).

Instead, CalPERS relied on *the 2012/2013 salary information*, when Alvarez was already

1 gone from Watermaster. Horning's February and March 2013 emails to Watermaster requested
2 the pay schedule for 2012/2013 (Horning, 4/13/16, 183:23-184:20) and she testified that she
3 relied on the documentation in Exhibit 18, the wrong time period (*Id.*, 186:20-22). Gutierrez
4 admitted on direct that the 2012-2013 salary matrix used in the determination would "not apply
5 to Mr. Alvarez at all." (Gutierrez, 4/12/16, 32:9-23.)

6 As Gutierrez concisely summed up, "I think that we didn't have the 2011/2012 pay
7 schedule, so we just used what we had to make our determination." (*Id.*, 91:17-19.)

8 **D. CalPERS' Efforts to Muddy the Waters On This Issue**

9 Rather than acknowledge that CalPERS did not even have the documentation it admits its
10 determination had to be based upon, CalPERS tries to muddy the waters by raising peripheral or
11 irrelevant other issues to buttress an impression that regardless of the testimony, Watermaster
12 still failed to comply with public availability requirements.

13 For example, CalPERS repeatedly uses the terms "salary matrix" and "salary schedule"
14 interchangeably. It then goes on to say that the matrixes are "*merely* 'used to develop and create
15 the final budget for any position that's listed or that's currently filled at Watermaster." (CalPERS'
16 *Brief*, 15:7-8.) The impression is that salary matrixes were used solely for budgeting purposes,
17 with the implication that they were not publicly available or subject to Watermaster's
18 transparency requirements. In fact, the word "merely" is never used or implied in the testimony
19 of witness Joe Joswiak (Joswiak, 4/11/16, 99:3-11); CalPERS has simply made this up.

20 Once it has dismissed the salary matrixes, CalPERS goes on in its *Brief* to incorrectly
21 refer to the 2011/2012 Salary Schedule (Exhibit S) as a "Salary Matrix" (CalPERS' *Brief*, 16:10)
22 when it is clearly labeled "Salary Schedule", and then argues that "[t]he version that was
23 eventually noticed by the Watermaster, after the fact in 2013, was different from the one
24 provided to 'Tracy Tracy' [of Monte Vista Water District].² (See Exh. 16.)" In fact, it was a
25 2011/2012 salary matrix that was approved by the Watermaster Board in 2013 (at the specific
26 request of CalPERS), while the 2011/2012 salary schedule was produced to Ms. Tracy in 2011.

27 _____
28 ² CalPERS never explains why it repeatedly puts Ms. Tracy's name in quotation marks,
but it seems aimed at raising doubts about whether she even exists.

1 As another example, CalPERS raises questions about the process of providing the
2 2011/2012 Salary Schedule (Exhibit S) to Ms. Tracy, arguing that "even the Watermaster staff
3 was unable to provide the document as they had to ask Joe Joswiak, the CFO, to provide the
4 matrix." (CalPERS' *Brief*, pg. 16:20-22.) Joswiak says nothing of the sort, only that his assistant
5 passed the request on to him and could easily have accessed the document herself. (Joswiak,
6 4/13/16, 87:4-88:18.) Moreover, Joswiak himself is part of the very "Watermaster staff" that
7 CalPERS alleges had no access to the document.

8 As a further example, CalPERS' witnesses' questions about whether Exhibit S had an
9 "effective date" or "revision date" are similarly irrelevant and apparently designed to imply the
10 document did not exist during the period it was applicable. Exhibit S clearly lists the period
11 "2011/2012", referencing CalPERS' fiscal year of July 1, 2011 through June 30, 2012.

12 Once again, CalPERS' whole case denying the use of Mr. Alvarez's Watermaster
13 compensation is based on CalPERS' review of the *wrong and inapplicable* 2012-2013 salary
14 information. Arguments like those listed above are not only wrong and/or irrelevant, they seem
15 to be raised simply detract from the foundational issue.

16 **IV. Alvarez Meets the "Common Law Employee" Test; His Post-November 2011**
17 **Service Qualifies and Should Be Included In His Pension Calculations**

18 Alvarez's employment status changed to paid administrative leave in 2011, but he
19 remained an employee of Watermaster. Despite CalPERS' claims that he was "terminated", the
20 testimony at hearing showed clearly and convincingly that he was not.

21 **A. Change in Alvarez's Duties**

22 Watermaster's July 17, 2013 *Amended Appeal* (Exhibit 262, pg. 3) states explicitly that
23 Alvarez was not terminated but remained an employee of Watermaster from November 9, 2011
24 through May 3, 2012 (the "transition period").³ For some reason CalPERS included
25 Watermaster's initial April 19, 2013 *Appeal* in the jurisdictional documents offered as evidence
26 in the hearing, but failed to include the *Amended Appeal* filed after CalPERS issued an *Amended*

27 _____
28 ³ While Watermaster *could* have chosen to terminate Alvarez in November 2011, it
instead chose to place him on paid leave while remaining a Watermaster employee.

1 *Statement of Issues* questioning Alvarez's common law employee status.

2 In any event, the testimony consistently demonstrated that Alvarez continued to carry out
3 duties assigned to him by Watermaster during the transition period:

- 4 • After November 9, 2011, Alvarez remained available at the pleasure of the Board and
5 had conversations with various Board members during that period of time to address
6 some of their questions. Bob Kuhn, a member of the Board (and Board chair during
7 most of the period from November 9, 2011 through May 3, 2012), said he
8 communicated with Alvarez during the transition period about matters of interest to
9 Watermaster. (Kuhn, 4/11/15, 180:11-23, 194:23-25.)
- 10 • Alvarez said he also had conversations with Ken Jeske who had been appointed
11 interim CEO and was responsible for day-to-day Watermaster matters. (Alvarez,
12 4/13/16, 136:16-22.) Day-to-day responsibilities are things like budgeting, personnel
13 and other functions of that nature, preparing for correspondence, and actively
14 representing Watermaster before its Board and the pools. (*Id.*, 143:17-24).
- 15 • CalPERS implies that Alvarez sat on his hands after November 9 with nothing to do.
16 In fact, Alvarez had initiated a large \$20 million effort to buy water for Watermaster
17 that had not yet closed on November 2011 and was one of the few people who was
18 familiar with the "loose ends" of the water deal after November. (*Id.*, 137:18-
19 138:20.) He testified that Board members called him for his expertise between
20 November 9, 2011 and May 3, 2012. (*Id.*, 139:1-13.)
- 21 • Joswiak understood that after November 2011, Alvarez reported to the Board and still
22 acting as a representative of Watermaster. (Joswiak, 4/11/16, 71:4-10.) Alvarez
23 maintained his title as CEO after November 9, 2100 while on administrative leave
24 and was never assigned any other title. (Alvarez, 4/13/16, 156:12-15.) Technically,
25 the Watermaster had both an interim CEO and a CEO. (*Id.*, 159:6-8.)

26 The legal effect of Alvarez's separation agreement was to change his responsibilities at
27 Watermaster. (*Id.*, 143:13-14.) The separation agreement reads: "And the employment agreement
28 is hereby modified, effective as of that date." The word "changed" was being used

1 interchangeably with the word "modified". (*Id.*, 158:17-20.)

2 CalPERS dismisses all this by simply asserting, without any citation to testimony
3 whatsoever, that Alvarez *had no duties*. Again, one wonders why CalPERS bothered with an
4 administrative hearing if it intended to simply rely on its own *apriori* conclusions, despite the
5 credible evidence put on at the hearing.

6 **B. Elements Demonstrating Common Law Employment**

7 All common law employees of CalPERS' contracting agencies such as Watermaster are
8 subject to CalPERS enrollment and accrual of CalPERS' rights and benefits. (*Metropolitan*
9 *Water Dist. of Southern California v. Superior Court* (2004) 32 Cal.4th 491.) The most important
10 element of demonstrating common law employment is the "right to control", whether that control
11 is actually exercised or not. (*Tieberg v. Unemployment Ins. Bd.* (1970) 2 Cal.3d 943.)

12 Not only does the "Separation Agreement" defining Alvarez's new duties from November
13 9, 2011 forward demonstrate that Watermaster had the *right* to control Alvarez's employment
14 activities (Exhibit 12, pgs. 1-2), the testimony cited above concerning Alvarez's communications
15 with the Board and Watermaster's interim CEO clearly demonstrated showed that Watermaster
16 *actually exercised* this control.

17 *Tieberg* also goes on to discuss various secondary factors which tend to demonstrate
18 common law employment. A number of those apply to Alvarez:

- 19 • Watermaster maintained an email address for Alvarez throughout the transition
20 period. (Joswiak, 4/13/16, 77:22-23.) Watermaster recognized that Alvarez was an
21 employee until May 3, 2012 when it then stopped his email. (Joswiak, 4/11/16, 82:11-
22 14.)
- 23 • Watermaster continued to report and deposit employee and employer contributions
24 with CalPERS throughout the transition period. (Joswiak, 4/13/16, 76:21-25.)
- 25 • Alvarez continued to accrue vacation time during the transition period. (Exhibit 12.)
- 26 • He was paid as part of Watermaster's regular bi-weekly payroll. (Joswiak, 4/11/16,
27 71:25; 4/13/16, 76:17-20.)

28 CalPERS, however, never looked at any of these facts, dismissing them as irrelevant

1 because it had already decided (without evidence) that Alvarez had no duties. See, for example,
2 the testimony of Ronald Gow, the CalPERS analyst charged with evaluating compliance with the
3 common law test, who essentially just kept repeating that he did not and could not analyze those
4 factors because he had already decided that Alvarez had no duties he could consider. (See, e.g.,
5 Gow, 4/12/16, 147:23-148:9, 152:10-20, 157:1-12.) Perhaps this explains the fact that CalPERS
6 never cites to a single sentence of Mr. Gow's testimony in its *Brief*.

7 The fact remains that CalPERS had ample opportunity to develop its own testimony
8 about those secondary factors, but did not do so. Then when testimony was elicited by
9 Watermaster and Alvarez establishing these facts, CalPERS simply dismisses any review of
10 those secondary factors as "impractical as Alvarez did not perform any services after November
11 9, 2011." (CalPERS' *Brief*, pg. 23:11-13.)

12 **C. Alvarez is Entitled to Service Credit During Administrative Leave**

13 Even if CalPERS were correct in its assertion that Alvarez had no duties during the
14 transition period (an assertion directly contradicted by the testimony at hearing), he would still be
15 entitled to service credit for that period under *Government Code* section 20898:

16 In computing the service which which a member is entitled to be credited under
17 this part, time during which the member is excused from working because of
18 holidays, sick leave, vacation, or *leave of absence*, with compensation, shall be
19 included.

20 The testimony at hearing established that Alvarez was told of a change in his day-to-day
21 responsibilities at his six-month evaluation when Scott Slater, counsel for Watermaster, told
22 Alvarez that Watermaster had placed him on administrative leave. (Alvarez, 4/13/16, 133:2-23.)

23 CalPERS never put on any evidence to the contrary. Instead, CalPERS attempts to
24 confuse this issue in its *Brief* by quoting from Alvarez's employment contract that he was
25 allowed only 12 days per year of administrative leave (CalPERS' *Brief*, pg. 5:4-6), but this is
26 clearly referring to the time that *Alvarez* could request off from work; it in no way restricts
27 *Watermaster* from placing him on administrative leave for a longer period.

28 **D. Alvarez's Compensation Was Not "Final Settlement Pay"**

CalPERS also denies Alvarez the salary earned during the transition period on the

1 grounds that it constitutes "final settlement pay".

2 *CRC*, Regulation 570, defines final settlement pay in relevant part as follow:

3 "Final settlement pay" means any pay or cash conversions of employee benefits *in*
4 *excess of compensation earnable*, that are granted or awarded to a member in
5 connection with or in anticipation of a separation from employment. (Emphasis
added.)

6 First of all, the pay CalPERS seeks to deny is not "in excess of compensation earnable"
7 but precisely the "compensation earnable" that Alvarez was entitled to and actually earned
8 throughout his Watermaster employment.

9 Second, Alvarez has conclusively demonstrated at hearing that he had no intention of
10 retiring when he took the Watermaster job. (*Alvarez*, 4/13/16, 130:9-10.) He did so only when he
11 realized that Watermaster's determination that he was "not the right fit" for the CEO job would
12 make it virtually impossible to obtain a similar executive level position and he reluctantly
13 decided to retire, rather than continue working another 5-10 years as he had always planned. (*Id.*,
14 146:18-147:21.)

15 **V. Secondary Defects in CalPERS' Argument**

16 While the two central questions above are the only ones raised in CalPERS' *First*
17 *Amended Statement of Issues* and the only matters subject to this administrative proceeding,
18 Alvarez will briefly address several other secondary defects of CalPERS' case and *Post Hearing*
19 *Brief* that either misconstrue the actual evidence elicited at hearing, distort the applicable law
20 that is supposed to be applied to those facts, or both:

21 **A. CalPERS' "Pension Spiking" Allegations Are Unfounded and Simply**
22 **Prejudicial**

23 CalPERS sought official notice of the (i) legislative history of SB 53, (ii) the decision in
24 *Tanner v. CalPERS*, and iii) CalPERS' precedential decision in *Adams v. CalPERS*. While
25 CalPERS essentially confines its lengthy discussion of these materials in its *Brief* to general
26 statements about what the materials purport to prove with virtually no effort to link that with the
27 evidence elicited at hearing, even its analysis of the materials gets things wrong.

28 Take the example of the legislative history of SB 53. As CalPERS says, this legislation

1 was meant to address problems of "pension spiking". But it is worth looking at what the
2 Legislature actually included in the statute in question (*Government Code* section 20636) and
3 what CalPERS asks us to *believe* it includes.

4 CalPERS contends that the Legislature stated that payrate "would have to be publicly
5 noticed by the government body." (CalPERS' *Brief*, pgs. 11:23-12:2, emphasis in original.) In
6 fact, this was language included in an analysis of the legislation authored by CalPERS itself.
7 (CalPERS' RON, Exhibit 1, pgs. 5-6.)

8 The actual legislation that was enacted, however, says nothing of the sort. It simply states
9 in relevant part that " 'Payrate' means the normal monthly rate of pay or base pay of the member
10 paid in cash to similarly situated members of the same group or class of employment for services
11 rendered on a full-time basis during normal working hours, *pursuant to publicly available pay*
12 *schedules.*" (*Government Code*, §20636(b)(1), emphasis added.) As described in detail above, it
13 is uncontroverted that the 2011/2012 Salary Schedule (Exhibit S) was "publicly available".

14 If the Legislature meant to add in additional requirements about being "publicly noticed
15 by the government body" as CalPERS claims, it could easily have added this language. There is
16 no ambiguity in the language as written, and certainly no argument by CalPERS about
17 ambiguity.

18 CalPERS fares no better in its discussion of the *Tanner* and *Adams* decisions.

19 *Tanner* involved the issue of whether a contract that allegedly did not disclose changes in
20 prior compensation and benefits could be deemed a publicly available salary schedule. In this
21 case, the 2011/2012 Salary Schedule (Exhibit S) actually exists and was publicly available.
22 CalPERS, however, never asked for this document during its compensation review, based its
23 determination instead on the 2012/2013 salary information, and thus made its determination on a
24 different document that its own witnesses have declared inapplicable.

25 *Adams* similarly involved an employment contract, and moreover one that was
26 intentionally hidden from public view. This is inapposite to the instant situation. Further, the
27 *Adams* case says that

28 The Legislature intended that a public employee's "payrate" be readily available

1 to an interested person without unreasonable difficulty. This concept does not
2 apply to a situation in which a public employee's payrate is buried in a carefully
3 crafted agreement designed to prevent the easy calculation of that salary, that is
4 set forth in an employment agreement that is privately maintained and that is not
5 based on a published pay schedule or approved in a public manner, and that is not
6 subject to public disclosure except through a formal public records request,
7 subpoena, or other legal process.
8 (CalPERS' RON, Exhibit 3, pg. 20, ¶11.)

9 This bears no resemblance to the instant case where Alvarez's payrate was both publicly
10 available and actually produced to interested members of the public, where Alvarez's
11 employment contract and the salary he was being paid pursuant to that contract was not "buried
12 in a carefully crafted agreement designed to prevent the easy calculation of that salary" or
13 "privately maintained", and where that contract was freely available to anyone who asked for it.

14 **B. Applicability of Regulation 570.5**

15 Alvarez and Watermaster have both raised objections to CalPERS' attempts to apply
16 *CRC*, §570.5 to this dispute as it was enacted months after Alvarez began working for
17 Watermaster. CalPERS' attempt to apply its terms retroactively are barred, especially since it is
18 not simply a "clarification" of existing requirements as CalPERS claims but clearly constitutes
19 new and different requirements than what existed before.

20 Alvarez will not repeat those arguments here, and instead refers the Court to his *Opening*
21 *Post-Hearing Brief*. However, there are two additional points that should be noted:

22 First, CalPERS argues that the language in Section 570.5 simply clarifies previously
23 existing requirements and that Watermaster's 2011/2012 Pay Schedule fails to meet the
24 requirements spelled out in Section 570.5. Interestingly, however, the *Adams* precedential
25 decision—the very decision that CalPERS argues should govern in this case—was incorporated
26 in a *Proposed Decision* dated October 4, 2012 and adopted by the CalPERS Board on December
27 17, 2012, *more than a year after* Regulation 570.5 took effect and yet it says nothing of the sort.

28 Instead, it opines that "[t]he Legislature intended that a public employee's 'payrate' be
readily available to an interested person *without unreasonable difficulty*", which applies squarely
to Alvarez's payrate in this case.

Second, CalPERS' insistence on public adoption by an agency's governing body is

1 contained in sub-section (a)(1) of Regulation 570.5 which requires that payrate shall be limited
2 to the amount listed on a pay schedule that "[h]as been duly approved and adopted by the
3 employer's governing body in accordance with requirements of *applicable public meeting laws*."
4 (*CRC*, §570.5(a)(1), emphasis added.)

5 Alvarez has demonstrated extensively that his salary, along with the materials
6 documenting that salary, were all approved pursuant to the Watermaster Rules and Regulations
7 which had been approved by the San Bernardino Superior Court as the "applicable public
8 meeting laws" for Watermaster. If CalPERS insists that Subsection (a)(1) requires compliance
9 with the Brown Act or Bagley-Keene Act, it could have easily included this in the Regulation
10 since it was the agency that drafted it (and allegedly merely as a "clarification" of existing
11 requirements).

12 **C. CalPERS' Insistence on Deference to Its Determinations**

13 Finally, just a word on CalPERS' insistence on deference to its determinations.

14 CalPERS insists that not only are its interpretations entitled to "great deference [but
15 additionally] CalPERS determinations are entitled to a *presumption* of correctness. [Citations
16 omitted.]" (*CalPERS' Brief*, pg. 3:8-12, emphasis in original.)

17 Even if this might apply in general, it strains credulity to say that its determination that
18 Alvarez's salary was not paid pursuant to a publicly available pay schedule *when the testimony*
19 *explicitly showed, CalPERS itself admits, that it based its supposedly "correct" determination on*
20 *the wrong document to begin with.*

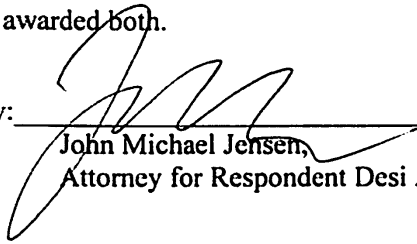
21 **VI. Conclusion**

22 Alvarez is entitled to the correct pension calculated based on his \$228,000 annual salary
23 at Watermaster. He is also entitled to full service credit for the year of employment he served at
24 Watermaster.

25 Alvarez respectfully requests that he be awarded both.

26 Dated: August 8, 2016

27 By: _____

28 
John Michael Jensen,
Attorney for Respondent Desi Alvarez

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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 August 8, 2016, I served the following document (s) by the method indicated below:

RESPONDENT DESI ALVAREZ'S POST HEARING REPLY BRIEF

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 August 8, 2016, at Los Angeles, California



Griselda Montes De Oca