

BROWNSTEIN
2049
TT FARBER SCHRECK, LLP
3 Park East, Suite 3550
Los Angeles, CA 90067

1 SCOTT S. SLATER (State Bar No. 117317)
BRADLEY J. HERREMA (State Bar No. 228976)
2 JESSICA L. DIAZ (State Bar No. 302999)
BROWNSTEIN HYATT FARBER SCHRECK, LLP
3 1020 State Street
Santa Barbara, CA 93101
4 Telephone: 805.963.7000
Facsimile: 805.965.4333

5 Attorneys for Respondent
6 CHINO BASIN WATERMASTER

7
8 BOARD OF ADMINISTRATION

9 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

10
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 CLOSING BRIEF**

Hearing Date: April 11, 12 and 13, 2016

Time: 9:00 a.m.

Location: CalPERS' Glendale Offices

Judge: Hon. Eric Sawyer

17
18
19 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

20 **PLEASE TAKE NOTICE** that Respondent Chino Basin Watermaster, by and through
21 counsel Brownstein Hyatt Farber Schreck, LLP, submits this Closing Brief with regard to the
22 hearing held on April 11, 12, and 13, 2016.

23 ///

24 ///



BROWNSTEIN
2044
VT FARBER SCHRECK, LLP
Park East, Suite 3550
Los Angeles, CA 90067

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
26
27
28

TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. PRELIMINARY STATEMENT.....	1
II. STATEMENT OF FACTS	2
A. Background on Watermaster.....	2
B. Mr. Alvarez’s Hiring and Tenure at Watermaster	4
C. CalPERS’ Determinations as to Mr. Alvarez’s Compensation Earnable and Service Time	6
D. CalPERS’ Investigation and Communications with Watermaster.....	7
E. The FY 2011-2012 Salary Matrix and Salary Schedule	9
F. Availability of Watermaster Information.....	10
III. BURDEN OF PROOF	11
IV. LEGAL ARGUMENTS.....	12
A. Alvarez’s Payrate at Watermaster was Pursuant to a Publicly Available Pay Schedule as Required by Government Code Section 20636.....	12
1. Inclusion on a publicly available pay schedule is the relevant statutory requirement	12
2. CalPERS’ determination was erroneously based upon an inapplicable pay schedule	13
3. The FY 2011-12 Salary Schedule was publicly available	15
B. Mr. Alvarez’s Status as a Watermaster “Employee” from November 10, 2011 through May 3, 2012 Entitles Him To Service Credit	16
1. Common law and statutory definition of “employee”	16
2. Watermaster had the right to and did exercise control over the manner and means of Mr. Alvarez’s work during the Transition Period	17
3. Other factors similarly show that Mr. Alvarez was a common law employee of Watermaster during the Transition Period	19
V. CONCLUSION.....	20

BROWNSTEIN
2014
TT FARBER SCHRECK, LLP
3550 Park East, Suite 3550
Los Angeles, CA 90067

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
26
27
28

TABLE OF AUTHORITIES

Page(s)

Cases

McCoy v. Bd. of Retirement
(1986) 183 Cal.App.3d 1044.....11, 12

McKeon v. Hastings College
(1986) 185 Cal.App.3d 877.....8

Metropolitan Water Dist. of So. Cal. v. Sup. Ct.
(2004) 32 Cal.4th 49117

Tiberg v. Unemployment Ins. App. Bd.
(1970) 2 Cal.3d 94317, 18, 19

Statutes

Cal. Gov. Code § 20028(b).....16

Cal. Gov. Code § 20069(a)7, 16

Cal. Gov. Code § 20630(b)2, 12

Cal. Gov. Code § 20636..... *passim*

Regulations

Cal. Code of Regs., tit. 2, § 570.56

BROWNSTEIN
2014
VT FARBER SCHRECK, LLP
8 Park East, Suite 3550
Los Angeles, CA 90067

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
26
27
28

INTRODUCTION

This appeal arises from CalPERS' denial of retirement benefits for Mr. Desi Alvarez attributable to his time of service with Chino Basin Watermaster ("Watermaster"). The two questions presented for resolution through this appeal hearing are simple ones: (1) for the purposes of computing Desi Alvarez's pension benefit, should the California Public Employees' Retirement System ("CalPERS") utilize Mr. Alvarez's salary from the Chino Basin Watermaster ("Watermaster"), as it was reported to CalPERS, and (2) was Mr. Alvarez a Watermaster "employee," pursuant to the common law test, throughout the relevant time period? A preponderance of largely uncontroverted facts admitted into evidence compels the conclusion that the payrate reported for Mr. Alvarez was pursuant to a publicly available salary schedule and that Mr. Alvarez is eligible for service credit for the entirety of his employment with Watermaster.

I. PRELIMINARY STATEMENT

After periods of service with a number of other entities contracting with CalPERS, Mr. Alvarez was employed by Watermaster from May 3, 2011 to May 3, 2012 and, on or about May 2, 2012, filed a service retirement application with CalPERS. (Exh. 9.) In evaluating Mr. Alvarez's application, CalPERS determined that his salary at Watermaster should not be considered "compensation earnable" for purposes of calculating his retirement benefit. (Exh. 4.) CalPERS subsequently determined that approximately six months of Mr. Alvarez's tenure at Watermaster should be excluded from Mr. Alvarez's service time. (Exh. 6.) Watermaster and Mr. Alvarez appealed these determinations. (Exhs. 7 and 8.) All parties, represented by counsel, appeared before the Honorable Administrative Law Judge Eric Sawyer for a three-day hearing April 11 through April 13, 2016 ("Hearing"). The parties agreed to the submittal of written closing arguments.

This appeal presents two issues:

1. Should Watermaster's payment to Mr. Alvarez be included in the calculation of Mr. Alvarez's final compensation?
2. Should the period from November 10, 2011 through May 3, 2012 be included for the purpose of calculating Mr. Alvarez's service credit? (Exh. 3, p. 13.)

BROWNSTEIN
204
YTT FABER SCHRECK, LLP
Park East, Suite 3550
Los Angeles, CA 90067

1 The first issue hinges on a single inquiry: was Mr. Alvarez's Watermaster payrate listed
2 on a publicly available pay schedule, consistent with California Government Code section 20636?
3 The evidence in the record is unambiguous: Watermaster had a salary schedule for FY 2011-
4 2012 that listed Mr. Alvarez's payrate as Chief Executive Officer ("CEO"). That salary schedule,
5 like Watermaster records generally, was publicly available, and the evidence demonstrates that
6 the applicable schedule was made available upon request. The evidence therefore establishes that
7 Mr. Alvarez's salary while employed by Watermaster met the statutory requirement of
8 "compensation earnable" and his Watermaster salary should therefore be used to calculate Mr.
9 Alvarez's final compensation. (See Gov. Code §§ 20630(b), 20636(a).)

10 The second issue is whether Mr. Alvarez met the definition of a Watermaster "employee"
11 during the period from November 10, 2011 through the termination of his employment on May 3,
12 2012 (referred to as the "Transition Period"). Mr. Alvarez's employment during the Transition
13 Period was pursuant to a Confidential Separation Agreement that not only specifically described
14 the parties' intent that Mr. Alvarez be employed by Watermaster through May 3, 2012, but also
15 outlined Mr. Alvarez's specific employment duties during that time. Additional indicia of Mr.
16 Alvarez's continued status as a Watermaster "employee" were also present, such as Watermaster
17 continuing to pay Mr. Alvarez through the regular payroll process, Mr. Alvarez's continued
18 accrual of vacation time, and Watermaster's continued CalPERS contributions for Mr. Alvarez.
19 Watermaster has therefore shown that Mr. Alvarez met the common law test for an "employee"
20 during the Transition Period, therefore entitling him to service credit for this time.

21 **II. STATEMENT OF FACTS**

22 **A. Background on Watermaster**

23 Watermaster is an extension of the San Bernardino Superior Court ("Court"). (Transcript
24 of the April 11-13, 2016 Hearing (hereinafter, "Tr.") Vol. III, p. 35:12-13, 68:5-68:24; Exh. P, p.
25 4:9-4:16.) Watermaster assists the Court in the administration and implementation of the 1978
26 judgment adjudicating substantially all water rights in the Chino groundwater basin, under the
27 Court's retained continuing jurisdiction ("Judgment"). (Tr. Vol. III, p. 35:17-35:20; Exh. A, pp.
28 18-19.) The Judgment initially assigned the responsibilities of the Watermaster to the Chino

BROWNSTEIN
20149
TT FABER SCHRECK, LLP
Park East, Suite 3550
Los Angeles, CA 90067

1 Basin Municipal Water District but, in 1998, transferred this responsibility to a nine-member
2 board. (Exh. A, pp. 18-19; Exh. B, p. 4; Tr. Vol. III, p. 44:2-44:8.) Significantly, the Court's 1998
3 order creating the Board required that, in the transition of Watermaster responsibilities from
4 Chino Basin Municipal Water District to the Watermaster Board, Chino Basin Municipal Water
5 District staff transitioning to employment by the new Watermaster maintain "all of their
6 employment credits and benefit programs." (Exh. B, pp. 6-7.)

7 The parties to the Judgment are entities who were found to hold water rights at the time
8 the Judgment was entered, as well as the successors-in-interest to those entities. (Tr. Vol. III, p.
9 41:7-47:14.) Watermaster is not a utility, does not sell water, and does not have customers. (Tr.
10 Vol. III, p. 42:4-42:9.) Instead, Watermaster's direct responsibility is to the Court in the
11 administration of the Judgment, and its constituency consists of the parties to the Judgment,
12 which include both private landowners, and municipal water purveyors such as cities, water
13 districts, and privately held water companies. (See Tr. Vol. III, p. 42:16-43:7.) Watermaster is
14 governed by a nine-member board ("Watermaster Board"), consisting of representatives from
15 three "Pools" of groundwater right-holders: public and private agricultural overlying landowners,
16 non-agricultural overlying landowners, and municipal water suppliers/other appropriators. (Tr.
17 Vol. III, pp. 42:14-43:7, 43:19-44:1; Exh. B, p. 3.) Each Pool is represented on the Advisory
18 Committee that is charged with making recommendations to the Watermaster Board. (Tr. Vol.
19 III, pp. 43:8-43:18.)

20 Watermaster is directly accountable to the Court. Accordingly, it is governed by the
21 Judgment, as amended in the 2012 Restated Judgment, and is subject to the Court's continuing
22 jurisdiction. (See Tr. Vol. III, pp. 39:8-41:3, 45:4-45:10; Exh. A, pp. 16-18; Exh. Q, pp. 14-15.)
23 Of particular relevance to the resolution of this matter are the Court-approved Rules and
24 Regulations that govern Watermaster's actions. (See Exhs. D & E.) These Rules & Regulations,
25 initially approved by the Court in its July 19, 2001 order, set forth the applicable procedures for
26 responding to requests for information and otherwise ensuring transparent decision-making. (Tr.
27 Vol. III, pp. 50:23-51:25; Exh. D, pp. 18-19.)

28

BROWNSTEIN
2014
FT FARBER SCHRECK, LLP
8 Park East, Suite 3550
Los Angeles, CA 90067

1 **B. Mr. Alvarez's Hiring and Tenure at Watermaster**

2 The Watermaster Board conducted an open recruitment process in early 2011 to fill its
3 vacant CEO position, and, only after considering and interviewing multiple candidates, was Mr.
4 Alvarez hired. (Tr. Vol. III, pp. 74:2-74:16, 116:18-116:25, 132:6-132:16; see also Exhs. G [job
5 announcement], 205 [Mr. Alvarez's submission of qualifications], and 206 [Mr. Alvarez's
6 application].) On March 31, 2011, the Watermaster Board held a closed session meeting in
7 accordance with Article 2.6 of Watermaster's Rules and Regulations, which provides that
8 personnel matters may be discussed in a confidential meeting. (Tr. Vol III, pp. 49:20-50:6; Exh.
9 D, p. 19; Exh. J.) The agenda for that meeting included an item related to the then-vacant CEO
10 Position. (Exh. I.) Following the meeting, Watermaster's general counsel reported out the
11 following Watermaster Board action: "Authorized counsel to extend a binding term sheet for the
12 retention of Desi Alvarez, the new CEO of Watermaster, and to prepare a confirming legal
13 contract for execution by the Watermaster Board Chair." (Exh. J, p. 2; Tr. Vol. III, p. 75:1-75:12.)
14 During open session at the next Watermaster Board meeting on April 28, 2011, Board member
15 Bob Kuhn thanked the CEO Ad Hoc Committee for their assistance in the hiring of the new CEO.
16 (Exh. K, p. 6.) Pursuant to the Watermaster Board's action, the Watermaster Board chair executed
17 an Employment Agreement with Mr. Alvarez hiring him as CEO, effective May 3, 2011. (Tr.
18 Vol. III, p. 75:13-75:15; Exh. 11.) The Employment Agreement provided that Mr. Alvarez would
19 have an annual salary of \$228,000.¹ (Exh. 11, p. 2.)

20 CalPERS has offered no evidence that Mr. Alvarez's hiring was in anticipation of
21 retirement. (Tr. Vol. III, pp. 11:24-12:15.) Nor is there any direct or circumstantial evidence that
22 there was intent by Watermaster or Mr. Alvarez to engage in pension "spiking": Mr. Alvarez
23 simply took a new position as a high-level executive, and he intended to continue his career at
24 Watermaster. (Tr. Vol. III, pp. 11:24-12:15.)

25 On or around November 9, 2011, Mr. Alvarez was informed by Watermaster's general
26 counsel that his responsibilities under his employment agreement would be changed to assist in

27 _____
28 ¹ This annual salary of \$228,000 was equivalent to the payrate that Watermaster reported to
CalPERS, which was \$19,000/month. (See Exh. 1, p. 3 [CalPERS' Statement of Issues].)

BROWNSTEIN
2014
FT FARBER SCHRECK, LLP
3 Park East, Suite 3550
Los Angeles, CA 90067

1 the transition of the CEO responsibilities upon Mr. Alvarez's separation from Watermaster. (Tr.
2 Vol. III, pp. 132:23-133:7, 157:6-157:15.) On January 23, 2012, Watermaster and Mr. Alvarez
3 executed a Confidential Separation Agreement ("CSA") modifying Mr. Alvarez's Employment
4 Agreement, effective November 9, 2011. (Exh. 12, p. 1.) The CSA provided that Mr. Alvarez
5 would continue to be employed with Watermaster until May 3, 2012 (identified as the
6 "Separation Date") and characterized the time remaining as the "Transition Period." (Exh. 12, p.
7 1.)

8 The CSA established Mr. Alvarez's duties to Watermaster during the Transition Period:
9 namely, "to assist and provide information to the Watermaster as requested with respect to
10 pending projects and the transition of his duties." (Exh. 12, p. 1.) The CSA further required Mr.
11 Alvarez to respond promptly, accurately and in a professional manner to inquiries and requests
12 made by Watermaster during the Transition Period. (Exh. 12, pp. 1-2.)

13 During the Transition Period, as during the prior portion of his Watermaster employment,
14 Mr. Alvarez was subject to the same administrative processes as other Watermaster employees.
15 He continued to receive his Watermaster salary according to Watermaster's regular payroll
16 schedule, and Watermaster continued to pay Mr. Alvarez's CalPERS contributions. (Tr. Vol. III,
17 76:17-76:25.) In January 2012, Watermaster's Chief Financial Officer (CFO), Joseph Joswiak,
18 received a request from Mr. Alvarez to modify a payroll deduction, and Mr. Joswiak processed
19 that change. (Tr. Vol. III, p. 77:9-20; Exh. 18, p. 1.)

20 The uncontroverted evidence shows that Mr. Alvarez continued to be available to
21 Watermaster as required. Mr. Alvarez maintained his Watermaster email during this time. (Tr.
22 Vol. III, p. 77:21-77:24, 78:2-78:11, 135:24-136:1.) Watermaster Board member Bob Kuhn –
23 who was the Board's chair during the majority of the Transition Period – also testified that he and
24 Mr. Alvarez communicated during this period regarding matters before Watermaster and in
25 response to questions from the Watermaster Board, its committees, and the interim CEO. (Tr.
26 Vol. I, p. 176:12-176:17, 180:11-180:23, 194:23-25.) No evidence has been presented by
27 CalPERS that Mr. Alvarez was not available to Watermaster or that he failed to perform any
28 specific duty or request by his employer.

BROWNSTEIN
2014
ATTORNEYS AT LAW
FT. FARBER SCHIRECK, LLP
3550 Park East, Suite 3550
Los Angeles, CA 90067

1 C. CalPERS' Determinations as to Mr. Alvarez's Compensation Earnable and
2 Service Time

3 Anticipating the end of his employment with Watermaster on May 3, 2012, Mr. Alvarez
4 sought another executive-level position in water management. (Tr. Vol. III, p. 145:6-145:22; Exh.
5 265.) After these efforts were unsuccessful, Mr. Alvarez decided to retire and, in May 2012, he
6 applied for retirement benefits with CalPERS. (Tr. Vol. III, p. 147:1-147:21; Exh. 9.)

7 CalPERS issued a determination letter dated February 20, 2013 concluding that Mr.
8 Alvarez's compensation from Watermaster did not qualify as compensation earnable (hereinafter,
9 the "Compensation Determination Letter"). (Exh. 4.) That letter cited Government Code section
10 20636(b)(1) as the basis for its decision and further stated that a "[p]ayrate must also meet
11 specific provisions in the California Code of Regulations (CCR) § 570.5." (Exh. 4, pp. 1-2.)
12 CalPERS explained that it had examined the Employment Agreement and a salary schedule for
13 FY 2012-13 in reaching its decision, noting that Watermaster's FY 2012-13 salary schedule did
14 not list the position of CEO or Mr. Alvarez's \$228,000 annual salary. (Exh. 4, p. 3.) Watermaster
15 filed a notice of appeal contesting this determination on April 19, 2013. (Exh. 7.)

16 CalPERS subsequently issued three amended determination letters, which raised a second
17 issue not previously included in the February 2013 determination letter: service credit for Mr.
18 Alvarez's time while employed by Watermaster. In its letter dated June 17, 2013, CalPERS
19 characterized Mr. Alvarez's salary from November 9, 2011 through May 4, 2012 as "final
20 settlement pay" under Government Code section 20636(f) and stated that it would not count this
21 time towards Mr. Alvarez's service credit.² (Exh. 5, pp. 2-3; Tr. Vol. II, p. 26:5-26:23.)

22 Subsequently, CalPERS issued a supplemental determination dated February 4, 2015, as amended
23 by a corrected letter dated February 12, 2015 (hereinafter, collectively referred to as the "Service
24 Time Determination"). (Exh. 6.) In its Service Time Determination, CalPERS further explained

25 _____
26 ² The CalPERS' determination letter dated June 17, 2013 refers to the period "from November 9,
27 2011 through May 4, 2012" as the relevant time period. (Exh. 5, p. 3.) However, it subsequently
28 revised that time period to November 10, 2011 through May 4, 2012. (Exh. 6, p. 3.) By way of
further clarification, Mr. Alvarez's last day with Watermaster was May 3, 2012 and Watermaster
does not contend that Mr. Alvarez is entitled to service credit for the day of May 4, 2012 itself.
(See Exh. 12, p. 1.)

BROWNSTEIN
2014
VT FARBER SCHIRECK, LLP
Park East, Suite 3550
Los Angeles, CA 90067

1 its basis for excluding the Transition Period from Mr. Alvarez's service time under Government
2 Code section 20069(a), citing the common law test for whether an individual is considered an
3 "employee." (Exh. 6.)

4 **D. CalPERS' Investigation and Communications with Watermaster**

5 During the Hearing, CalPERS' agency representative, Angel Gutierrez, testified that he
6 performed a "routine review" of whether the payrate reported by Watermaster for Mr. Alvarez
7 was in accordance with applicable law, and that he had contacted Watermaster's CFO, Mr.
8 Joswiak, when he received Mr. Alvarez's case. (Tr. Vol. II, p. 7:1-7:21, 8:6-8:11.) Mr. Gutierrez
9 is a Retirement Program Specialist II with the Compensation and Employer Review Unit and
10 testified that he prepared both the Compensation Determination and Service Time Determination.
11 (Tr. Vol. II, p. 6:14-23, 8:18-9:10, 28:20-29:1; see Exhs. 4 and 5.)

12 Communications between Mr. Gutierrez and Mr. Joswiak regarding Mr. Alvarez's
13 reported payrate began as early as November 2012. (Exh. 259; Tr. Vol. II, pp. 55:10-56:1.) On
14 November 15, 2012, Mr. Joswiak emailed Mr. Gutierrez a copy of Watermaster's FY 2012-13
15 salary schedule along with additional information, at Mr. Gutierrez's request. (Exh. 259; Tr. Vol.
16 III, p. 82:13-83:2.) Mr. Gutierrez responded the following day inquiring whether "Mr. Alvarez's
17 salary information was ever made public due to a Public Requests Act [sic] or through any
18 publication or just happened to be published at any point?" (Exh. 259, p. 3.) Mr. Joswiak
19 explained that he had received and responded to a request for salary information from a local
20 newspaper. (Exh. 259, p. 3; see also Exh. F.) Mr. Gutierrez asked if this information was ever
21 published and Mr. Joswiak explained that it had not been, further inquiring as to whether there
22 was a requirement for the publication of salary information. (Exh. 259, p. 2.) Mr. Gutierrez
23 responded by explaining that "[t]here is a requirement that the salary information be **publicly**
24 **available, how you go about doing that is up to the agency**, however the most transparent
25 would be to have it accessible through the agency's website. There are also other requirements
26 contained in California Code of Regulations Section 570.5[.]"³ (Exh. 259, p. 1 [emphasis added].)
27

28 ³ In evaluating the public availability of Watermaster's salary schedule, it would not have been

BROWNSTEIN
2014
VT FARBER SCHRECK, LLP
Park East, Suite 3550
Los Angeles, CA 90067

1 There is no evidence in the record demonstrating further communications or information
2 exchanged between Watermaster or CalPERS prior to CalPERS' Compensation Determination
3 Letter dated February 20, 2013, which Mr. Gutierrez prepared. (See Exh. 259 [emails dated
4 November 15-16, 2015]; Tr. Vol. II, pp. 8:18-9:10.) In this letter, CalPERS stated that Mr.
5 Alvarez's payrate did not meet the requirement of inclusion on a publicly available salary
6 schedule, but referenced only the salary schedule for the fiscal year *following* Mr. Alvarez's
7 tenure at Watermaster: FY 2012-13. (Exh. 4, pp. 1, 3.) According to Mr. Gutierrez's hearing
8 testimony, this salary schedule "would not apply to Mr. Alvarez at all" and it would have been
9 part of Mr. Gutierrez's duties to specifically ask for the FY 2011-12 salary schedule. (Tr. Vol. II,
10 p. 32:9-32:23, 92:18-92:22.) In fact, the Compensation Determination Letter was not based on
11 salary information pertinent to the time that Mr. Alvarez was employed by Watermaster and Mr.
12 Gutierrez examined that time period only in preparation for the administrative hearing. (Tr. Vol.
13 II, pp. 36:24-37:15, 39:17-40:20.)

14 After CalPERS issued its Compensation Determination Letter, Mr. Joswiak exchanged
15 emails with Nicole Horning, who at that time was Mr. Gutierrez's supervisor in the
16 Compensation and Employer Review unit. (Exh. 18, pp. 3-12; Tr. Vol. I 86:16-86:24, Vol. III, p.
17 170:10-170:22.) In an email sent two days after CalPERS' issuance of the Compensation
18 Determination Letter, Ms. Horning asked for the information that Mr. Joswiak had previously
19 emailed to Mr. Gutierrez. (Exh. 18, p. 12.) Because Watermaster no longer had a CEO position
20 when Mr. Gutierrez requested a copy of Watermaster's current salary schedule, the document Mr.
21 Joswiak had sent to Mr. Gutierrez included only a "General Manager" position. (Tr. Vol. I, p.
22 89:14-90:15; Exh. 259, p. 4.) Accordingly, Mr. Joswiak explained this issue to Ms. Horning and
23 sent her a revised FY 2012-13 salary schedule that included the CEO position. (Exh. 18, p. 11; Tr.

24
25 appropriate to rely on California Code of Regulations, title 2, section 570.5 ("Section 570.5")
26 because that regulation did not become effective until August 10, 2011 – after Mr. Alvarez was
27 hired. (Exhs. 11 [hire effective May 3, 2011] and 266.) Accordingly, this provision cannot be
28 applied retroactively to change whether a salary constitutes "compensation earnable." (*McKeon v.
Hastings College* (1986) 185 Cal.App.3d 877, 887 ["The general rule that statutes will not be
given retroactive operation has been followed from the earliest days of California's statehood to
the present. It being the rule that administrative regulations are subject to the same treatment as
statutes a comparable disinclination to apply regulations retroactively has also evolved."])

BROWNSTEIN
2014
VT FARBER SCHRECK, LLP
3 Park East, Suite 3550
Los Angeles, CA 90067

1 Vol. I 89:14-91:1, 92:7-93:12, 121:4-121:17.) Mr. Joswiak also appended a screenshot of
2 Watermaster's website showing its "Request for Information" form. (Exh. 18, p. 11; Tr. Vol. I
3 91:13-91:25.)

4 Several weeks later, Ms. Horning emailed Mr. Joswiak, asking if Watermaster had any of
5 the documents provided to the media and if the FY 2012-13 salary schedule had been approved
6 by Watermaster's governing body. (Exh. 18, p. 8; Tr. Vol. III, pp. 174:20-175:10.) Mr. Joswiak
7 explained that Watermaster's salary schedules were an integral part of the budget process and
8 provided further background on Watermaster's information request procedures and the adoption
9 of Watermaster's budget. (Exh. 18, pp. 6-7.)

10 Subsequent emails followed between Ms. Horning and Mr. Joswiak, but at no point during
11 this exchange did Ms. Horning request a salary schedule relating to FY 2011-12. (Exh. 18; see
12 also Tr. Vol. III, p. 182:4-182:8, 186:16-186:22.) In her testimony at the Hearing, Ms. Horning
13 admitted that she instead looked at the FY 2012-13 documentation in completing her assessment,
14 and that FY 2011-12 would have been "the most appropriate time frame to ask for." (Tr. Vol. III,
15 pp. 183:12-184:1.)

16 **E. The FY 2011-2012 Salary Matrix and Salary Schedule**

17 As a matter of practice, Watermaster would maintain salary matrices that the CFO would
18 use to develop and create Watermaster's budget. (Tr. Vol. I, pp. 98:21- 99:11; Exh. 15 [salary
19 matrices for FY 2004-05 through 2010-11].) Accordingly, Mr. Alvarez's annual Watermaster
20 payrate of \$228,000 is listed on the FY 2011-12 "Salary Matrix" under "Chief Executive
21 Officer." (Exh. 16, p. 3.)

22 Mr. Alvarez's payrate also appeared on a substantially identical document entitled the FY
23 2011-2012 "Salary Schedule." (Exh. S.) A salary of \$228,000 was listed as "Step G" under
24 "General Manager/CEO." (Exh. S; Tr. Vol. II, pp. 57:8-58:7.) Watermaster has presented
25 uncontroverted evidence that this document was made available to Tracy Tracy of the Monte
26 Vista Water District on September 15, 2011 after Ms. Tracy emailed Watermaster staff requesting
27 Watermaster's "Employee Salary Ranges." (Exhs. R and S; Tr. Vol. I, pp. 110:21-112:1.)
28

BROWNSTEIN
204
T FARBER SCHRECK, LLP
Park East, Suite 3550
Los Angeles, CA 90067

1 **F. Availability of Watermaster Information**

2 The availability of Watermaster information is assured through multiple sources of
3 governing authority: the Judgment (Exhs. A & Q), the 1998 order appointing the nine-member
4 Watermaster Board (Exh. B), Watermaster's 2001 Court-approved Rules and Regulations (Exhs.
5 D and E), and Watermaster Resolution No. 01-03, "Adopting Procedures, Guidelines and Fee
6 Schedule for Release of Information and Documents" ("Resolution No. 01-03"). (Exh. N.)

7 Section 2.1 of Watermaster's Court-approved Rules and Regulations, entitled "Records,"
8 reads as follows:

9 The minutes of Watermaster meetings shall be open to inspection
10 and maintained at the principal office. Copies of minutes may be
11 obtained upon payment of the duplication costs thereof. Copies of
12 other records may be obtained on the payment of the duplication
13 costs thereof and pursuant to Watermaster policy. Watermaster
14 shall maintain a website. Watermaster Staff shall publish those
15 records and other matters that it deems to be of interest to the
16 parties to the Judgment, the general public or the Court on its
17 website. (Exh. D, p. 18; see also Tr. Vol. III, p. 51:7-51:25.)

18 Watermaster Resolution No. 01-03 provides yet further detail as to how Watermaster
19 makes information available to those who request it. (Exh. N; see also Tr. Vol. III, p. 51:12-
20 51:19.) In particular, it provides that "Watermaster staff will attempt to respond to written
21 requests for copies of documents within 10 working days following receipt of the request." (Exh.
22 N, p. 2.) It further provided for the use of a "Request for Information Form," which is posted on
23 Watermaster's website and may be used by any member of the public. (Exh. N, p. 2; Exh. O; Tr.
24 Vol. III, p. 52:4-52:14.)

25 Evidence in the record illustrates Watermaster's implementation of these policies in
26 regard to the payrate information at issue in at least two instances. In 2010, Watermaster received
27 an inquiry from James Koren, a journalist at *The Sun and Inland Valley Daily Bulletin*, regarding
28 salary information for Watermaster's CEO. (Exh. F; Tr. Vol. III, pp. 81:15-82:12.) Watermaster
promptly provided this information after receiving a specific verbal request from Mr. Koren. (Tr.
Vol. III, pp. 99:2-101:5 [Mr. Joswiak recalled verbal request being made "middle to end of
October"]; Exh. F [dated October 22, 2010].) Specifically, Watermaster sent Mr. Koren salary
information and the employment agreement for then Watermaster CEO Kenneth Manning. (Tr.

BROWNSTEIN
204
TIT FARBEN SCHRECK, LLP
100 Park East, Suite 3550
Los Angeles, CA 90007

1 Vol. III, pp. 81:15-82:12.)

2 As noted above, Watermaster also provided a copy of the FY 2011-12 Salary Schedule in
3 response to a request from Monte Vista Water District in September 2011. (Exh. R and S; Tr.
4 Vol. III, pp. 79:13-80:7.) As Mr. Joswiak confirmed, the timing of Watermaster's response to this
5 request was consistent with the procedure for such requests outlined in Resolution 01-03. (Tr.
6 Vol. III, pp. 80:20-81:14.) Mr. Joswiak further testified that Watermaster's salary schedules were
7 available to the public as a general matter and that the FY 2011-12 Salary Schedule in particular
8 would have been made available to any member of the public upon request. (Tr. Vol. III, pp.
9 78:12-79:12.)

10 Watermaster's current General Manager, Peter Kavounas, also provided testimony about
11 the availability of Watermaster information. (See Tr. Vol. I, p. 131:20-131:25.) In particular, he
12 testified that Watermaster maintains its Request for Information Form and Resolution 01-03 on its
13 website and that unless the requested information is protected by a litigation privilege, it is
14 provided to "anyone" upon request. (Tr. Vol. III, p. 47:4-47:13.)

15 Moreover, Mr. Kavounas's testimony illustrated that information on Watermaster's
16 activities and expenditures is included in the agenda packets for Watermaster's monthly Board
17 meetings, which are posted on Watermaster's website. (Tr. Vol. III, p. 50:7-50:22.) Mr. Kavounas
18 testified that Watermaster follows the procedures outlined in Resolution No. 01-03 by responding
19 to requests for information within 10 working days. (Tr. Vol. III, pp. 52:15-53:2; see Exh. N, p.
20 2.) To his knowledge, no party – including the State of California, which is a party to the
21 Judgment – has ever raised any concern with respect to the availability of Watermaster
22 documents. (Tr. Vol. III, pp. 54:20-55:5; see Exh. A, p. 8.)

23 **III. BURDEN OF PROOF**

24 As a result of CalPERS' erroneous determinations, Watermaster was required to
25 affirmatively assert issues in this administrative appeal. Accordingly, Watermaster bears the
26 burden of proof on appeal. (*McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1052
27 (["As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has
28 the burden of proof, including both the initial burden of going forward and the burden of

BROWNSTEIN
204
TT FARBER SCHRECK, LLP
35 Park East, Suite 3550
Los Angeles, CA 90067

1 persuasion by a preponderance of the evidence.”].) The standard of proof in this matter is a
2 preponderance of the evidence. (*McCoy, supra*, 183 Cal.App.3d at 1052.)

3 **IV. LEGAL ARGUMENTS**

4 **A. Alvarez’s Payrate at Watermaster was Pursuant to a Publicly Available Pay**
5 **Schedule as Required by Government Code Section 20636.**

6 The first issue to be resolved in this appeal is whether Mr. Alvarez’s payrate as reported to
7 CalPERS was pursuant to a publicly available pay schedule. In making its determination, by its
8 own admission, CalPERS staff never examined the document that should have been dispositive to
9 its inquiry: the salary schedule actually in place during Mr. Alvarez’s tenure, for FY 2011-12.
10 Instead CalPERS erroneously focused on the wrong time period and formed a conclusion about
11 the relevant salary schedule only in preparation for the Hearing. The uncontroverted evidence
12 shows that Mr. Alvarez’s salary was consistent with Watermaster’s publicly available pay
13 schedule and that Watermaster thereby met the relevant statutory requirement under Government
14 Code section 20636. Mr. Alvarez’s salary from Watermaster should therefore be considered
15 “compensation earnable.”

16 **1. Inclusion on a publicly available pay schedule is the relevant statutory**
17 **requirement.**

18 The statutory definitions of “compensation earnable” and “payrate” govern whether Mr.
19 Alvarez’s salary at Watermaster may be considered for the purpose of his benefit calculation.

20 Government Code section 20630(b) states, “Compensation shall be reported in accordance
21 with Section 20636 and shall not exceed compensation earnable, as defined in Section 20636.” In
22 turn, Government Code section 20636 provides in part:

23 (a) “Compensation earnable” by a member means the payrate and
24 special compensation of the member, as defined by subdivisions
(b), (c), and (g), and as limited by Section 21752.5.

25 (b)(1) “Payrate” means the normal monthly rate of pay or base pay
26 of the member paid in cash to similarly situated members of the
27 same group or class of employment for services rendered on a full-
28 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

BROWNSTEIN
204
TTT FARBER SCHRECK, LLP
3550
Park East, Suite 3550
Los Angeles, CA 90067

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
26
27
28

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).

2. CalPERS' determination was erroneously based upon an inapplicable pay schedule.

Only one inquiry is necessary to resolve this issue: whether Mr. Alvarez's \$228,000 annual salary was "pursuant to [a] publicly available pay schedule[]," as required by Government Code section 20636. Watermaster met its burden of proof through a preponderance of uncontroverted evidence that Mr. Alvarez's salary was pursuant to Watermaster's FY 2011-12 Salary Schedule and that the FY 2011-12 Salary Schedule was publicly available.

Neither CalPERS' Compensation Determination Letter nor testimony by Mr. Gutierrez or Ms. Horning revealed how the FY 2011-12 Salary Schedule shown in Exhibit S fell short of what the statute requires. During the hearing, Mr. Gutierrez alluded to three alleged shortcomings with the FY 2011-12 Salary Schedule: 1) that it may not be an authentic document, 2) that it was not posted on Watermaster's website or at its office, and 3) that it was not adopted by the Watermaster Board. (Tr. Vol. II, pp. 46:7-46:15, 49:15-50:4.) However, there is no testimony that these alleged defects formed the basis for the Compensation Determination Letter, as they were presented for the first time at the Hearing. (See Exhs. 4-6.) Nevertheless, even if CalPERS' determination had turned on these considerations, they are inconsistent with the evidence and applicable law.

As to the first concern, the authenticity of the FY 2011-12 Salary Schedule was directly established by the testimony of Mr. Joswiak, which CalPERS did not refute.⁴ (Tr. Vol. III, pp. 79:13-80:7.) Each of the following facts were established by direct testimony, un rebutted by CalPERS, and cumulatively establish the authenticity of Exhibit S as a publicly available document meeting the requirement of Government Code section 20636 : 1) that Watermaster maintained a salary schedule in place during Mr. Alvarez's tenure as CEO (Tr. Vol. I, pp. 98:21-

⁴ Nor did CalPERS object to the admission of the FY 2011-12 Salary Schedule. (Tr. Vol. II, pp. 46:16-48:3 [introducing Exh. S as attachment to Exh. R email], Vol. III, pp. 83:18-84:3 [no objection from CalPERS].)

BROWNSTEIN
2014
TTT FARBER SCHRECK, LLP
3550 Park East, Suite 3550
Los Angeles, CA 90067

1 99:11; Exh. 16, p. 3; Exh. S); 2) that one of the CEO salary steps on that salary schedule was
2 equal to the salary Watermaster reported to CalPERS and upon which Watermaster made
3 CalPERS payments (Exh. 16, p. 3; Exh. S); 3) that Mr. Joswiak indeed provided the FY 2011-12
4 Salary Schedule in response to a request from Monte Vista Water District in September 2011
5 (Exhs. R and S; Tr. Vol. I, pp. 110:21-112:1); and 4) that Watermaster complied with its
6 applicable protocol, Resolution No. 01-03, in responding to this request. (See Tr. Vol. III, pp.
7 79:16-81:14; Exhs. N, R, and S.)

8 As for the second and third concerns that formed Mr. Gutierrez's opinion, there is no legal
9 authority that Government Code section 20636 – which mentions only “publicly available pay
10 schedules” – specifically requires the posting of a salary schedule on an agency website or at its
11 place of business, or adoption by the agency's governing body. (Tr. Vol. II, p. 106:11-106:15.)
12 Ms. Horning admitted in her email to Mr. Joswiak that the details of how an agency complies
13 with Government Code section 20636 are “**up to the agency**,” which is inconsistent with the
14 opinion now expressed by Mr. Gutierrez. (Exh. 259, p. 1 [emphasis added].)

15 Mr. Gutierrez appears to opine in his testimony that Government Code section 20636's
16 requirement of public availability can only be satisfied if a member of the public can access a
17 salary schedule without requesting it. (Tr. Vol. II, pp. 58:17-58:25.) This lacks evidentiary
18 support of custom and practice by other entities, and most importantly, it is contrary to the plain
19 language of the statute. As noted in *Randy G. Adams v. City of Bell*, Government Code section
20 20636 embodies the Legislature's intent “that a public employee's ‘payrate’ be readily available
21 to an **interested person without unreasonable difficulty**.” (Decision 15-01, OAH No.
22 2012030095 [emphasis added].) “Publicly available” cannot reasonably be interpreted as
23 synonymous with “publication.” Government Code section 20636 does not require unsolicited
24 publication of a salary schedule. Expediently providing information upon request – as
25 Watermaster's policies so ensure – satisfies the statutory requirement of public availability.

26 In its best light, CalPERS' testimony reflects a haphazard review of Mr. Alvarez's pension
27 request. The agency reached its determination on Mr. Alvarez's application without considering
28 the critical document for its decision: the actual pay schedule for FY 2011-2012, rather than

BROWNSTEIN
204
TT FABER SCHRECK, LLP
Park East, Suite 3550
Los Angeles, CA 90067

1 another inapplicable period. In particular, Mr. Gutierrez conceded in his testimony that
2 requesting the FY 2011-12 salary schedule “would be part of the process,” that it was among his
3 duties to specifically ask for the FY 2011-12 salary schedule, and that in contrast, the FY 2012-13
4 salary schedule “would not apply to Mr. Alvarez at all.” (Tr. Vol. II, p. 32:9-32:23, 42:9-42:16,
5 84:11-84:20, 92:18-92:22.) Similarly, Ms. Horning, who conducted a subsequent review of Mr.
6 Alvarez’s case, testified that FY 2011-12 “would have been the most appropriate time frame”
7 from which to request the salary schedule. (Tr. Vol. III, p. 183:12-183:22.) Yet, according to Mr.
8 Gutierrez’s testimony, CalPERS’ Compensation Determination Letter was based on the salary
9 schedule for the following year, and Mr. Gutierrez formed a conclusion about the public
10 availability of the FY 2011-12 salary schedule only in preparation for the Hearing. (Tr. Vol. II,
11 pp. 8:18-9:10, 36:24-37:15, 39:17-40:20.) Nor did Mr. Gutierrez request Watermaster’s Rules and
12 Regulations. (Tr. Vol. II, pp. 94:22-95:6.) The record suggests that CalPERS’ Compensation
13 Determination Letter was simply not informed by the salient facts.

14 Neither CalPERS’ testimony nor the email communications in the record offer any
15 evidence that any CalPERS staff person ever asked for the relevant salary schedule. (See Tr. Vol.
16 II, pp. 91:20-92:1; Exhs. 18 and 259; see also Vol. III, pp. 82:13- 83:2 [Mr. Joswiak’s testimony
17 that CalPERS never asked for the FY 2011-12 salary schedule].) The evidence shows that
18 Watermaster responded to CalPERS’ investigation with complete transparency and was
19 responsive to all requests for information, (see Exhs. 18, 259) and that Mr. Alvarez’s payrate at
20 Watermaster was reported in accordance with the Public Employees’ Retirement Law (PERL).

21 **3. The FY 2011-12 Salary Schedule was publicly available.**

22 There is no ambiguity as to the FY 2011-12 Salary Schedule and whether it was publicly
23 available. Mr. Alvarez’s annual salary of \$228,000 was listed on the FY 2011-12 Salary
24 Schedule, and the record contains ample evidence that this was publicly available.

25 First, Watermaster’s governing policies provided for the public availability of this
26 information. The Court’s 1998 order reflected a general policy of public transparency. (Exh. D,
27 p. 18.) Watermaster’s Rules and Regulations further required that records be available to the
28 public. And finally, Watermaster Resolution 01-03 specifically require that Watermaster respond

BROWNSTEIN
2014
TT FABER SCHRECK, LLP
37 Park East, Suite 3550
Los Angeles, CA 90067

1 to requests for information within 10 working days. (Exh. N, p. 2.) The Request for Information
2 Form has been posted on Watermaster's website since at least April 2010, (Tr. Vol. III, pp. 73:23-
3 74:1, 78:24-79:5) and provided a straight-forward, efficient avenue for members of the public to
4 seek information. For many members of the public this likely provides a more expedient means
5 of accessing information than searching for it on an agency's website or physically travelling to
6 an agency's place of business.

7 Coupled with these policy assurances of transparency is documentary evidence showing
8 that Watermaster effectively implemented these policies in practice. For example, Watermaster's
9 timely response to requests from both *The Sun and Inland Valley Daily Bulletin* and Monte Vista
10 Water District show that as a matter of pattern and practice, Watermaster readily disclosed the
11 salaries of its personnel. In particular, the email exchange with Monte Vista Water District and
12 Mr. Joswiak's unimpeached testimony show that not only was salary information available as a
13 general matter, but that Watermaster made available the specific document that CalPERS
14 described as relevant to this inquiry: the salary schedule for FY 2011-12. (See Exhs. R and S; Tr.
15 Vol. III, pp. 79:16-80:7.) Testimony from Watermaster's General Manager and CFO further
16 confirmed the consistent implementation of these policies. In contrast, CalPERS presented no
17 evidence disputing either Watermaster's commitment to its information-availability policies as a
18 general matter. Nor could it identify a single instance in which Watermaster failed to timely
19 respond to requests for salary information.

20 Substantial uncontroverted evidence establishes that Mr. Alvarez's payrate was pursuant
21 to a publicly available pay schedule.

22 **B. Mr. Alvarez's Status as a Watermaster "Employee" from November 10, 2011**
23 **through May 3, 2012 Entitles Him To Service Credit.**

24 **1. Common law and statutory definition of "employee"**

25 Under Government Code section 20069(a), "[s]tate service" means "service rendered as
26 an **employee** or officer" of a contracting agency." (Emphasis added.) An "employee" is "[a]ny
27 person in the employ of any contracting agency." (Gov. Code, § 20028(b); see also Exh. 19
28 [amended contract between CalPERS and Watermaster].) The California Supreme Court has held

BROWNSTEIN
204
ATTY FARBER SCHRECK, LLP
3700 Park East, Suite 3550
Los Angeles, CA 90067

1 that the PERL's provisions concerning employment by a contracting agency incorporate the
2 common law test for employment. (*Metropolitan Water Dist. of So. Cal. v. Sup. Ct.* (2004) 32
3 Cal.4th 491, 500.)

4 The common law test for determining whether an individual is an employee was
5 articulated in *Tiberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949. Under the
6 common law test, "the most important factor is the right to control the manner and means of
7 accomplishing the result desired. If the employer has the authority to exercise complete control,
8 whether or not that right is exercised with respect to all details, an employer-employee
9 relationship exists" Thus, an employer need not even exercise its right to control in order
10 for an employer-employee relationship to exist. *Tiberg* also noted the following other factors
11 which may be taken into account:

12 (a) whether or not the one performing services is engaged in a
13 distinct occupation or business; (b) the kind of occupation, with
14 reference to whether, in the locality, the work is usually done under
15 the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the
16 principal or the workman supplies the instrumentalities, tools, and
17 the place of work for the person doing the work; (e) the length of
18 time for which the services are to be performed; (f) the method of
19 payment, whether by the time or by the job; (g) whether or not the
20 work is a part of the regular business of the principal; and (h)
21 whether or not the parties believe they are creating the relationship
22 of employer-employee. (*Id.* at 949.)

23 **2. Watermaster had the right to and did exercise control over the manner
24 and means of Mr. Alvarez's work during the Transition Period.**

25 Both the express terms of the CSA and testimony presented at the Hearing demonstrate
26 that, during the Transition Period, Mr. Alvarez's duties to Watermaster continued during the
27 Transition Period and that Watermaster had the right to control the manner and means by which
28 Mr. Alvarez was to accomplish those continued duties.

The CSA modified the duties associated with Mr. Alvarez's employment with
Watermaster. (Exh. 12, p. 1.) Specifically the CSA imposed the following duties: to assist and
provide information to the Watermaster as requested with respect to pending projects and the
transition of his duties to another; and to respond promptly, accurately and in a professional

BROWNSTEIN
20
MITT FARBES SCHRECK, LLP
3000 Wilshire Blvd., Suite 3550
Los Angeles, CA 90067

1 manner to inquiries and requests made by Watermaster during the Transition Period. (Exh. 12, pp.
2 1-2.)

3 CalPERS presented no evidence countering this characterization. Instead, CalPERS
4 offered testimony from Ron Gow, a CalPERS Retirement Program Specialist II. (Tr. Vol. II, p.
5 143:8-143:22.) Mr. Gow testified that he was added to Mr. Alvarez's case "midstream" at the
6 request of a CalPERS' attorney and had not contributed to CalPERS' original decision – its
7 Compensation Determination Letter. (Tr. Vol. II, pp. 144:15-145:16, 177:20-178:13.) Mr. Gow
8 characterized his review as narrowly focused on the concept of "common law control" for the
9 purpose of Mr. Alvarez's service time credit. (Tr. Vol. II, pp. 145:20-146:3, 146:23-25, 147:20-
10 148:9.) When pressed on how he determined that Watermaster lacked the requisite control over
11 how Mr. Alvarez performed his duties, Mr. Gow repeatedly stated that the list of duties in the
12 CSA did not *itself* evince "common law control." (Tr. Vol. II, p. 145:20-146:3, 146:23-25,
13 147:20-148:9, 151:12-18, 152:7-9, 154:13-23.)

14 However, this framework conflates what are two distinct concepts: whether an employee
15 has particular job duties, and whether the employee's employer has the requisite control over
16 manner and means of accomplishing the desired result, the latter concept being relevant to the
17 question of whether an employer-employee relationship exists. (*Tiberg v. Unemployment Ins.*
18 *App. Bd.* (1970) 2 Cal.3d 943, 949.) Significantly, Mr. Gow stated that the lack of specific duties
19 to review would prevent him from forming a conclusion under the following circumstances:
20 where an employer hires an employee to assist with whatever the employer needs. (Tr. Vol. II, p.
21 157:1-12.) Yet even under such an arrangement, an employer could possess significant control
22 over the manner and means with which job duties are performed, thus constituting an
23 employer/employee relationship under *Tiberg*. Beyond his interpretation of the Employment
24 Agreement and CSA, Mr. Gow was unable to point to any evidence in the record that
25 Watermaster lacked the requisite control over the manner and means of how Mr. Alvarez carried
26 out his responsibilities during the Transition Period. (Tr. Vol. II, pp. 146:23-148:17, 160:25-
27 161:11, 180:2-180:14.) In contrast, Mr. Alvarez testified that, pursuant to the CSA, he felt
28 himself subject to a legal obligation to assist and be available to Watermaster until May 3, 2012.

BROWNSTEIN
20-
ATTY FARMER SCHRECK, LLP
100 Park East, Suite 3550
Los Angeles, CA 90067

1 (Tr. Vol. III, p. 144:14-25.) Evidence of his availability and responsiveness was demonstrated
2 through Board member Bob Kuhn's testimony that he communicated with Mr. Alvarez on
3 matters of interest to Watermaster during the Transition Period. (Tr. Vol. I, p. 180:11-180:23,
4 194:23-25.) The evidence therefore shows that what Mr. Gow characterized as common law
5 control existed and was exercised by Watermaster throughout the Transition Period.

6 **3. Other factors similarly show that Mr. Alvarez was a common law**
7 **employee of Watermaster during the Transition Period.**

8 Both the terms of the CSA and direct testimony by Mr. Joswiak and Mr. Alvarez similarly
9 illustrate that Mr. Alvarez continued to meet the common law test for an "employee" during the
10 Transition Period.

11 As an initial matter, the terms of the CSA demonstrated the parties' mutual understanding
12 that they remained in an employer-employee relationship until the end of the Transition Period.
13 (See *Tiberg, supra*, 2 Cal.3d at 949 [noting as one factor of the employment test, "whether or not
14 the parties believe they are creating the relationship of employer-employee".]) The CSA provided
15 that Mr. Alvarez "would continue to be **employed** with the Watermaster until May 3, 2012."
16 (Exh. 12, p. 1 [emphasis added].) It further stated that "[a]t the **conclusion** of the Transition
17 Period, Executive's **employment** shall be terminated." (Exh. 12, p. 1 [emphasis added].) This
18 date was labeled "Separation Date." (Exh. 12, p. 1.) Mr. Alvarez's communications with Board
19 member Kuhn during the Transition Period and his availability for Watermaster inquiries,
20 moreover, were part of the regular business of Watermaster. (See *Tiberg, supra*, 2 Cal.3d at 949
21 [noting as one factor of the employment test, "whether or not the work is a part of the regular
22 business of the principal".])

23 Additionally, Mr. Alvarez's manner of payment during the Transition Period remained
24 unchanged after November 10, 2011. (See *Tiberg, supra*, 2 Cal.3d at 949 [noting as one factor of
25 the employment test, "the method of payment, whether by the time or by the job".]) Mr. Alvarez
26 continued to be paid according to the regular payroll schedule and Watermaster continued to pay
27 Mr. Alvarez's CalPERS contributions. (Tr. Vol. III, 76:17-76:25; Exh. 12, p. 2.) Mr. Alvarez also
28 continued to accrue vacation at the same rate as before the Transition Period. (Exh. 12, p. 2; see

BROWNSTEIN
HYATT FARBER
SCHRECK, LLP
2014
3550 Park East, Suite 3550
Los Angeles, CA 90067

1 Exh. 11, p. 3.) As Mr. Joswiak testified, Mr. Alvarez had a Watermaster email address during the
2 Transition Period. (Tr. Vol. III, p. 77:21-77:24, 78:2-78:11, 135:24-136:1.) These indicia further
3 confirm Mr. Alvarez's status as an "employee" from November 10, 2011 through May 3, 2012.

4 **V. CONCLUSION**

5 Watermaster has established by a preponderance of the evidence that Mr. Alvarez's
6 earnings while employed by Watermaster were pursuant to a publicly available pay schedule, as
7 required by Government Code section 20636. Watermaster has demonstrated that it had a salary
8 schedule, that there were published procedures in place to make that salary schedule available,
9 and that Watermaster timely made that salary schedule – and other information regarding the
10 salaries and contracts of its employees – available when asked for information. None of the
11 concerns raised by CalPERS regarding Watermaster's salary schedule have any basis under the
12 governing law.

13 Watermaster has also established by a preponderance of the evidence that Mr. Alvarez
14 remained a common law employee of Watermaster during the period from November 10, 2011
15 through May 3, 2012, because Watermaster had the authority to control the manner and means by
16 which Mr. Alvarez was to perform his duties during the Transition Period and exercised that
17 control during the Transition Period, and because Mr. Alvarez was otherwise treated consistently
18 with Watermaster's employment practices. Therefore, this period should be included in
19 calculating Mr. Alvarez's service credit.

20 For all these reasons, Watermaster therefore respectfully requests an order that CalPERS'
21 determinations regarding Mr. Alvarez's service retirement allowance be reversed.

22 Dated: July 11, 2016

BROWNSTEIN HYATT FARBER
SCHRECK, LLP



24 By: _____

25 SCOTT S. SLATER
26 BRADLEY J. HERREMA
27 JESSICA L. DIAZ
28 Attorneys for Respondent
CHINO BASIN WATERMASTER

BROWNSTEIN I
1020 State Street
Santa Barbara, CA 93101-2711
FARBER SCHRECK, LLP

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
26
27
28

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 11, 2016, I served a copy of the within document(s):

RESPONDENT CHINO BASIN WATERMASTER'S CLOSING BRIEF

- 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 11, 2016, at Santa Barbara, California.


Stephanie Malik

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
26
27
28

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

Preet Kaur
Senior Staff Attorney
CalPERS Legal Office
400 Q Street, Room 3340
Sacramento, CA 95814
Preet.Kaur@calpers.ca.gov

Attorneys for California Public Employees' Retirement System

John Michael Jensen
Law Offices Of John Michael Jensen
11500 West Olympic Boulevard, Suite 550
Los Angeles CA 90064
johnjensen@johnmjensen.com

Attorneys for Desi Alvarez

BROWNSTEIN I
T. FARBER SCHRECK, LLP
1020 State Street
Santa Barbara, CA 93101-2711