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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 REPLY BRIEF**

Hearing Date: April 11, 12 and 13, 2016

Time: 9:00 a.m.

Location: CalPERS' Glendale Offices

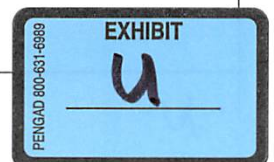
Judge: Hon. Eric Sawyer

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

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

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1
2 **I. INTRODUCTION**

3 Four years have elapsed since Mr. Desi Alvarez filed his application for service
4 retirement. The California Public Employees' Retirement System ("CalPERS") has propounded
5 multiple rounds of discovery on Mr. Alvarez and the Chino Basin Watermaster ("Watermaster"),
6 and a three-day evidentiary hearing has been held. CalPERS had every opportunity to introduce
7 or elicit relevant evidence regarding the matter at hand – through the introduction of exhibits,
8 through direct testimony, through cross-examination, or otherwise. Now, absent any evidence,
9 CalPERS alleges that Mr. Alvarez and Watermaster intended to engage in pension "spiking." As
10 the evidence does not support its positions, CalPERS also now introduces an entirely new
11 interpretation of the relevant statutory provisions – positing statutory ambiguity so that it may
12 read a new requirement into the statute – in order to rehabilitate CalPERS staff's prior
13 determination, which was shown to be based on documentation they admitted was irrelevant.

14 Despite CalPERS' eleventh-hour change of course, the evidence demonstrates that the two
15 questions in this matter are simply answered. The facts are clear that Mr. Alvarez's Watermaster
16 salary was included on a publicly available pay schedule. Neither CalPERS' introduction of
17 legislative history nor its invocation of inapplicable authority regarding agency deference
18 warrants a contrary conclusion, and a preponderance of uncontroverted evidence shows that Mr.
19 Alvarez's Watermaster salary met the statutory requirement of public availability. The evidence
20 further shows that Watermaster had the right to control the manner and means of Mr. Alvarez's
21 work until his termination on May 3, 2012,¹ meeting the common law employee test such that
22 Mr. Alvarez is entitled to service time credit for his entire one-year tenure at Watermaster.
23 CalPERS' new allegation of pension spiking attempts to obscure the real issues in this appeal, but
24 the record is clear and the Administrative Law Judge (ALJ) should find in Watermaster's favor on
25 both issues.

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¹ The period from November 10, 2011 to May 3, 2012 shall hereinafter be referred to as the
"Transition Period."

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II. ARGUMENT

A. Mr. Alvarez's Watermaster Salary Is "Compensation Earnable" Under Government Code Section 20636.

1. The ALJ need not refer to the legislative history of Government Code section 20636.

More than three years have passed since CalPERS issued its first determination letter and Watermaster filed its original appeal in this matter. (Exhs. 4, 7.) CalPERS conducted discovery and issued three additional determination letters (Exhs. 5-6). A three-day evidentiary hearing was held ("Hearing"), with ample opportunity for CalPERS to present evidence supporting its theory of the case. Yet, in its closing brief and Request for Official Notice, and, raising the argument for the first time in this matter, CalPERS asks the ALJ to read into the Government Code a new requirement appearing nowhere in the statute's plain language – that a pay schedule can only be found to be **publicly available** if publicly noticed by an agency's "governing body."

As a threshold matter of law, the use of legislative history is appropriate in interpreting a statute only if it aids in resolving ambiguity. In determining legislative intent, a court looks first to the words of the statute, giving the language its usual, ordinary meaning, and in the absence of ambiguity "presume[s] the Legislature meant what it said, and the plain meaning of the statute governs." (*Hunt v. Sup. Ct.* (1999) 21 Cal.4th 984, 1000.) "Only when the language of a statute is susceptible to more than one reasonable construction is it appropriate to turn to extrinsic aids, including the legislative history of the measure, to ascertain its meaning." (*Diamond Multimedia Systems, Inc. v. Sup. Ct.* (1999) 19 Cal.4th 1036, 1055.)

Nowhere does CalPERS explain how section 20636's "publicly available" language is ambiguous. In fact, the precedential decision referenced in CalPERS' own Request for Official Notice illuminates a common-sense interpretation: that a document be "readily available to an interested person without unreasonable difficulty." (*Randy G. Adams v. City of Bell*, Decision 15-01, OAH No. 2012030095.) Availability for review by the public, as contrasted with public approval by an agency's governing body, are two different and independent requirements, and the latter cannot be read into the former absent any statutory language to that effect. An example of the distinctive requirement for public agency approval is the statute regarding the conversion of

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1 employer CalPERS contributions to salary, which was enacted through the same legislation as
2 what is now Government Code section 20636. This statutory provision contains the express
3 requirement that an agency “with timely public notice, place the consideration of [such a
4 conversion] on the agendas of two consecutive public meetings of the governing body.” (Gov.
5 Code § 20692 [formerly Gov. Code § 20615.5]; CalPERS’ Request for Official Notice (RON),
6 pp. 13, 18.) Other provisions in the Public Employees’ Retirement Law (PERL) similarly include
7 explicit references to notice or approval by a contracting agency’s governing body. (See, e.g.,
8 Gov. Code §§ 20471 [contract approval], 20903 [enhancements to service credit], 21090
9 [establishment of a two-tiered retirement system].) This shows that if the Legislature intended to
10 require notice and adoption by the governing body, it was expressly written into the statute, rather
11 than leaving it to the intuition of the executive branch. In the present case, the statute is clear, and
12 the requested reference to legislative history here merely attempts to create ambiguity where none
13 exists.²

14 Even if it *were* appropriate to consider the legislative **history** of Government Code section
15 20636 as a general matter, not “every scrap of paper that is generated in the legislative process” is
16 admissible, much less entitled to equal weight in discerning legislative **intent**. (*Kaufman & Broad*
17 *Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 29.) The specific
18 materials for which CalPERS requested official notice are unpersuasive and irrelevant in this
19 context, and the ALJ should not rely upon them in making its determination in this matter.

20 Contrary to CalPERS’ claim that the phrase “publicly noticed by the governing body”
21 appears “repeatedly” in the legislative history, in fact, the quoted language appears in only two
22 documents submitted in CalPERS’ Request for Official Notice, both of which appear to be
23 authored by CalPERS itself: 1) a bill summary provided by CalPERS to the Senate Public
24 Employment & Retirement Committee (“Senate PERS Committee”) and 2) the enrolled bill
25

26 _____
27 ² *Joseph Tanner v. California Public Employees’ Retirement System*, No. C078458, 2016 WL
28 3611051 (Cal. Ct. App. June 28, 2016), does not change this analysis. As explained in
Watermaster’s Response to CalPERS’ Request to Amend the ALJ’s July 20, 2016 Order, *Tanner*
did not analyze the meaning of the phrase “publicly available.”

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1 reports.³ The first source of the language CalPERS cites was a document entitled, “Section-by-
2 Section Analysis of the 3/16/93 Version of SB 53 **Provided to the Committee By PERS.**” (See
3 CalPERS’ RON, attach. A, pp. 7, 9 [emphasis added].)⁴ As is clear from the Senate PERS
4 Committee analysis, it was a summary provided to the Senate PERS Committee by the bill’s
5 sponsor, CalPERS, and was not authored by the committee consultant. (CalPERS’ RON, attach.
6 A, pp. 7, 9.) No evidence indicates that this summary accurately reflected the Senate PERS
7 Committee’s understanding of the bill as introduced, much less the version finally adopted.

8 The other references to salaries being “publicly noticed by the governing body” appear in
9 the enrolled bill reports, (CalPERS’ RON, attach. A, pp. 19, 30), authored *after* passage of SB 53
10 by the State Assembly and Senate. (See *Kaufman & Broad Communities, Inc. v. Performance*
11 *Plastering, Inc.* (2005) 133 Cal. App. 4th 26, 41-42 [describing enrolled bill reports].) California
12 courts have specifically expressed caution about the use of such reports in interpreting legislative
13 intent, noting that they are not given “great weight” at least in part because “it is not reasonable to
14 infer that enrolled bill reports prepared by the **executive branch** for the Governor were ever read
15 by the **Legislature.**” (*McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1161 n.3 [emphasis
16 added].) Courts have further explained that “to permit consideration of enrolled bill reports as
17 cognizable legislative history gives the executive branch an unwarranted opportunity to determine
18 the meaning of statutes. That is the proper and exclusive duty of the judicial branch of
19 government.” (*Joyce v. Ford Motor Co.* (2011) 198 Cal.App.4th 1478, 1492-93 [internal
20 quotation marks omitted].) CalPERS’ attempt to use the enrolled bill reports as evidence of
21 legislative intent is particularly problematic, since at least one of the reports appears to have been
22 authored by CalPERS itself. (CalPERS’ RON, attach. A, p. 17 [listing CalPERS under
23 “Department” and bearing the signature of a “Department Director”].) CalPERS’ own, post-

24
25 ³ Although the phrase appears three times in the documents that CalPERS introduced, two of the
26 references are in nearly identical versions of the same document, enrolled bill reports for Senate
27 Bill 53 (“SB 53”). Hereinafter, we refer to these two documents collectively as the “enrolled bill
28 reports.”

⁴ For clarity, page references to the legislative history submitted by CalPERS correspond to the
pagination of the PDF version of Attachment 1 to CalPERS’ RON.

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1 enrollment statements cannot be the final arbiter of legislative intent.

2 Other than the sentence apparently authored by CalPERS and later duplicated in enrolled
3 bill reports, CalPERS points to nothing in the legislative history of Government Code section
4 20636 requiring that a payrate be publicly noticed and approved by the governing body in order
5 to qualify as “compensation earnable.”

6 **2. The evidence of a publicly available pay schedule for the relevant time**
7 **period is uncontroverted.**

8 Government Code section 20636 provides the operative definition of “compensation
9 earnable” for this case and requires that a payrate be “pursuant to [a] publicly available pay
10 schedule[.]” The evidence in this case is uncontroverted that Watermaster maintained a salary
11 schedule for its Fiscal Year (FY) 2011-12, (Exh. S; Tr. Vol. II, pp. 57:8-58:7) which two
12 CalPERS witnesses testified was the relevant time period for this case. (Tr. Vol. II, p. 32:9-32:23,
13 42:9-42:16, 84:11-84:20, 92:18-92:22 [Angel Gutierrez], Tr. Vol. III, p. 183:12-183:22 [Nicole
14 Horning].) The FY 2011-12 Salary Schedule shows an annual salary for the Chief Executive
15 Officer (CEO) position of \$228,000, which is the amount Watermaster reported to CalPERS as
16 Mr. Alvarez’s salary. (Exh. S; Exh. 1, p. 3.) CalPERS does not contest these facts, but rather
17 questions whether the FY 2011-12 Salary Schedule was “publicly available.” However,
18 Watermaster has established public availability through the uncontroverted evidence recounted
19 below.

20 First, Watermaster presented evidence regarding generally applicable policies that ensure
21 the public availability of Watermaster’s salary schedules. At the greatest level of specificity,
22 Watermaster Resolution No. 01-03, “Adopting Procedures, Guidelines and Fee Schedule for
23 Release of Information and Documents” (“Resolution 01-03”) required Watermaster staff to
24 respond to written requests for documents within 10 working days. (Exh. N, p. 2.) Pursuant to
25 Resolution 01-03, a simple “Request for Information Form” is posted on Watermaster’s website
26 for use by any member of the public. (Exh. N, p. 2; Exh. O; Tr. Vol. III, p. 52:4-52:14.)
27 Watermaster’s General Manager, Peter Kavounas, and Chief Financial Officer (CFO), Joseph
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1 Joswiak, testified about these procedures and their implementation by Watermaster.⁵ (Tr. Vol. III,
2 pp. 52:15-53:2, 73:23-74:1, 78:24-79:5.) There is no evidence in the record demonstrating that
3 these procedures were not followed as a matter of pattern and practice.

4 In fact, the record establishes not only that public availability was assured through
5 Watermaster's **generally** applicable policies, but that Watermaster adhered to those policies in
6 regard to the FY 2011-12 Salary Schedule **in particular**. On September 15, 2011, the FY 2011-
7 12 Salary Schedule was provided to Tracy Tracy⁶ of the Monte Vista Water District in response
8 to an inquiry regarding "Employee Salary Ranges." (Exhs. R and S; Tr. Vol. I, pp. 110:21-112:1.)
9 The record contains no contrary evidence.

10 CalPERS' description of events appears to be aimed at creating a narrative – contrary to
11 the evidence – that, though the applicable pay schedule was made available upon request, it was
12 nonetheless not "publicly available."⁷ For example, CalPERS claims that "Watermaster staff"
13 was unable to respond to Ms. Tracy's request even though Mr. Joswiak, Watermaster's CFO,
14 provided the FY 2011-12 Salary Schedule within the 10-day timeframe specified in Resolution
15 01-03. (Exhs. N, R; Tr. Vol. III, pp. 79:16-81:14.) There is simply no evidence in the record
16 supporting this characterization. CalPERS presented no evidence to this effect and did not even
17 attempt to elicit evidence in this regard from Watermaster's witnesses. (See Tr. Vol. III, pp.

18
19 ⁵ Additional assurances that Watermaster's documents are publicly available are provided through
20 the general policy reflected in the 1998 order of the San Bernardino Superior Court ("Court")
21 (Exh. B, pp. 10-11) and Section 2.1 of Watermaster's Rules and Regulations, which provided that
copies of Watermaster records be made available pursuant to Watermaster policy. (Exh. D, p. 18.)

22 ⁶ It is unclear why CalPERS refers to Ms. Tracy as " 'Tracy Tracy' " throughout its brief.
23 (CalPERS Brief, p. 16 [quotation marks in original].) CalPERS did not challenge the
24 authenticity of the e-mails demonstrating Watermaster's provision of documents to Ms. Tracy,
25 (see Exhs. R and S), and did not elicit any testimony from Watermaster's witnesses – or others –
that Ms. Tracy was not a legitimate employee of Monte Vista Water District that sought, and was
provided, information regarding Mr. Alvarez's salary during his employment by Watermaster.
(See Tr. Vol. II, pp. 49:21-50:19, Vol. III, pp. 86:25-87:20.)

26 ⁷ For purposes of clarification, the heading on page 15 of CalPERS' closing brief that reads,
27 "Salary Matrix 2011/12" is followed by a discussion of the salary matrix for **FY 2010/11**. The
28 heading that reads, "Salary Matrix 2012/2012" presumably refers to the Salary Matrix for **FY**
2011/12. Finally, CalPERS states erroneously that the Watermaster Board of Directors
("Watermaster Board") approved salary matrices for FY 2010/11 and FY 2011/12. The
Watermaster Board approved salary matrices for FY 2011/12 and FY 2012/13. (Exh. 16.)

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1 86:22-90:19.) A Watermaster staff member forwarded the request to Mr. Joswiak, who timely
2 fulfilled it – this demonstrates public availability, not its opposite. The best characterization of
3 CalPERS’ argument is that it seeks, after the fact, to shore up what has been shown to be an
4 incorrect and unsupported staff determination.⁸

5 In sum, CalPERS’ recitation of the factual background seems designed to cast
6 unnecessary confusion over the evidence presented at the Hearing. It cannot change, however,
7 the uncontroverted evidence that Mr. Alvarez’s salary was listed on Watermaster’s salary
8 schedule for FY 2011-12 – “the most appropriate time frame” to examine⁹ – and that this
9 document was publicly available. (Tr. Vol. III, p. 183:12-183:22.)

10 **3. CalPERS misstates the relevant standard of review.**

11 **a. CalPERS’ staff determination interpreting Government Code**
12 **section 20636 is not entitled to deference.**

13 Consistent with general administrative law principles, a trial or appellate court indeed
14 affords deference to CalPERS’ interpretation of the PERL. (*City of Sacramento v. Public*
15 *Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478.) Each of the cases CalPERS
16 cites, however, involves a court’s interpretation of a final decision of the CalPERS Board of

17 ⁸ CalPERS also obfuscates the relevant issues by suggesting, without evidentiary support, that
18 there were multiple versions of the FY 2011-12 “Salary Matrix.” (CalPERS’ Brief, p. 15.) This is
19 inaccurate. The record contains both a “Salary Matrix” and a “Salary **Schedule**” for FY 2011-12.
20 (Exh. S, Exh. 116, p. 3.) Watermaster’s salary matrices were maintained at least as early as FY
21 2004-05 and used, in part, as tools in budget planning. (Tr. Vol. I, pp. 98:21- 99:11; Exh. 15.)
22 Accordingly, the FY 2011-12 Salary Matrix sent to Ms. Tracy in September 2011 contained
23 “steps” for certain employee positions that did not appear on the FY 2011-12 Salary Schedule,
24 approved eight months later by the Board in response to a CalPERS recommendation, because
25 those salary steps had not actually been utilized during that fiscal year. (Tr. Vol. I, pp. 93:18-94:8;
26 Exh. 14, p. 2; Tr. Vol. III, pp. 101:20-103:5; Exh. S, Exh. 116, p. 3.) Regardless of the differences
27 in the two documents, Mr. Alvarez’s \$228,000 annual salary as CEO is accurately reflected on
28 the faces of both the FY 2011-12 Salary Matrix and Salary Schedule. (Exh. S, Exh. 16, p. 3.)
CalPERS questioned Watermaster’s CFO about this topic at the Hearing, (Exh. Vol. III, pp.
93:25-97:25) and the implication that the existence of these two documents was somehow
improper is without any factual basis.

⁹ CalPERS confuses this issue by temporarily shifting its focus to the FY 2010-11 salary matrix.
As indicated by testimony from CalPERS’ own witnesses, however, that is not the relevant
document for this case. (Tr. Vol. II, p. 32:9-32:23, 42:9-42:16, 84:11-84:20, 92:18-92:22 [Angel
Gutierrez], Tr. Vol. III, p. 183:12-183:22 [Nicole Horning].) Even if it were, CalPERS’
characterization of the FY 2010-11 salary matrix as “list[ing] the salary of an individual” rather
than the CEO is simply inaccurate. The position title “General Manager – C.E.O.” was listed on
that document. (Exh. 15.)

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1 Administration (“Board”) – not an ALJ’s recommendation as to what the Board’s decision should
2 be. (See *City of Pleasanton v. Board of Administration of the California Public Employees’*
3 *Retirement System* (2012) 211 Cal.App.4th 522, 539 [affording deference to “[t]he board’s
4 decision”]; *Molina v. Board of Administration* (2012) 200 Cal. App.4th 53, 58, 61 [same];
5 *Prentice v. Board of Administration*, (2007) 157 Cal. App.4th 983, 988-89 [same]; *City of*
6 *Sacramento, supra*, 229 Cal.App.3d at 1478 [“The **Board’s** interpretation of the PERL is to be
7 accorded great weight unless clearly erroneous.” (emphasis added)].)

8 In contrast to the procedural posture in cases where the Board had reached a final
9 decision, the ALJ’s role in this appeal is to *recommend* to the Board what that decision should be.
10 Accordingly, the doctrines governing deference to an agency determination that is under review
11 would not apply. (See *California Water Impact Network v. Newhall County Water Dist.* (2008)
12 161 Cal.App.4th 1464, 1485 [“Until a public agency makes a ‘final’ decision, the matter is not
13 ripe for judicial review.”].) The agency has not yet completed its determinative process;
14 accordingly, deference to its statutory interpretation is inappropriate at this stage.

15 Even if some level of deference were normally afforded to determinations by CalPERS
16 staff, this would not justify deference to an opinion on a pure question of law, posed by agency
17 counsel for the first time in a closing brief, after all evidence was entered at the Hearing. The
18 claim that Government Code section 20636 requires a pay schedule to be “publicly noticed by the
19 governing body” does not implicate any expertise that CalPERS staff may have in applying the
20 PERL to a specific set of facts. That language was extracted from the statute’s legislative history,
21 and was not referenced by CalPERS’ staff in its February 20, 2013 determination
22 (“Compensation Determination Letter”) or in testimony at the Hearing. Accordingly, it should
23 not be treated as a staff determination for purposes of the ALJ’s review.

24 Deference to CalPERS staff would also be inappropriate given that the agency’s own
25 witnesses admitted that their determination was not based on the relevant documents. At the
26 Hearing, CalPERS’ agency representative, Angel Gutierrez, testified that the Compensation
27 Determination Letter was not based on the FY 2011-12 Salary Schedule, even though it was part
28 of his duties to ask for that document. (Tr. Vol. II, pp. 32:9-32:23, 36:24-37:15, 39:17-40:20;

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1 92:18-92:22.) Similarly, Mr. Gutierrez’s supervisor, Nicole Horning, testified that she looked
2 only at the salary schedule for the year following Mr. Alvarez’s tenure at Watermaster: FY 2012-
3 13. (Tr. Vol. III, pp. 183:12-184:1.) Ms. Horning admitted that FY 2012-13 would not have been
4 the correct timeframe to examine in evaluating Mr. Alvarez’s case. (Tr. Vol. III, pp. 183:12-
5 184:1.) The uncontroverted evidence therefore shows that that CalPERS’ application of the
6 PERL was based on an erroneous understanding of the facts. No deference is warranted in such a
7 situation.

8 Finally, deference is not warranted here because CalPERS has continually changed its
9 position throughout Mr. Alvarez’s case. The Compensation Determination Letter cited
10 Government Code section 20636(b)(1) but did not discuss the meaning of a “publicly available
11 pay schedule[,]” focusing instead on the distinct requirements of California Code of Regulations
12 (CCR), title 2, section 570.5 (“Rule 570.5”). (Exh. 4, pp. 1-2.) CalPERS staff later seemed to
13 abandon these requirements, indicating that it “is up to the agency” how public availability is
14 achieved. (Exh. 259, p. 1.) At the Hearing, Mr. Gutierrez testified that the FY 2011-12 Salary
15 Schedule failed to satisfy the relevant requirements in part because it was not posted on
16 Watermaster’s website or at its office, and that it was not adopted by the Watermaster Board. (Tr.
17 Vol. II, pp. 46:7-46:15, 49:15-50:4.) Now, for the first time in its closing briefing, CalPERS relies
18 on language in the legislative history for SB 53 and argues that Government Code section 20636
19 requires a salary to be “publicly noticed by the governing body.” A “vacillating position” such as
20 this is not entitled to deference. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19
21 Cal.4th 1, 12.)

22 **b. CalPERS’ staff determination regarding “compensation**
23 **earnable” is not entitled to a presumption of correctness.**

24 Similarly, CalPERS is not entitled to its claimed “presumption of correctness” in this
25 appeal. The legal authorities CalPERS cites as to the presumption of correctness – also known as
26 the presumption of “regularity” – apply only to **judicial review** of a final agency determination –
27 not to an ALJ’s recommended decision for adoption by the agency itself. Evidence Code section
28 664 “applies to the decision of an **administrative board.**” (*Bd. of Administration v. Sup. Ct.*

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1 (1975) 50 Cal.App.3d 314, 320 [emphasis added].)¹⁰ Other cases cited by CalPERS do not
2 address the presumption of regularity at all, and stand instead for the rule that an agency's
3 findings of fact are reviewed under the substantial evidence rule. (*Rau v. Sacramento County*
4 *Retirement Bd.* (1966) 247 Cal.App.2d 234, 236; *Harmon v. Bd. of Retirement* (1976) 62
5 Cal.App.3d 689, 692.) Regular performance of official duty is irrelevant where the agency has not
6 yet made findings of fact; indeed such findings would be the outcome of the ALJ's proposed
7 decision and the Board's subsequent adoption or revision. It would be particularly problematic to
8 apply a presumption of regularity where two agency witnesses have admitted that the agency's
9 determination was not based on the information that should have informed its decision.

10 Finally, CalPERS incorrectly articulates the applicable burden of proof. Watermaster
11 agrees that it bears the burden of proof on factual issues, since it was forced by CalPERS'
12 erroneous determination to affirmatively assert issues in this appeal. (See *McCoy v. Bd. of*
13 *Retirement* (1986) 183 Cal.App.3d 1044, 1052.) Watermaster met this burden by presenting
14 uncontroverted evidence that (i) Mr. Alvarez's salary was listed on a publicly available pay
15 schedule and (ii) CalPERS' original determination was based on the document for the wrong
16 fiscal year. (Tr. Vol. II, pp. 32:9-32:23, 36:24-37:15, 39:17-40:20; 92:18-92:22; Tr. Vol. III, pp.
17 183:12-184:1.) Now, after the close of the Hearing, CalPERS has attempted to raise new
18 allegations of pension spiking that are unsupported by evidence. CalPERS could have issued a
19 revised Statement of Issues prior to the Hearing, but did not. (See Exh. 3.) Watermaster does not
20 now bear the burden of disproving new and unsubstantiated allegations.

21 **4. Rule 570.5 does not invalidate Mr. Alvarez's salary while at**
22 **Watermaster.**

23 **a. Rule 570.5 is inapplicable to this case.**

24 As a matter of law, amendments to CalPERS regulations cannot be applied retroactively

25 _____
26 ¹⁰ The other cases cited by CalPERS on the presumption of correctness similarly involve the
27 presumption of regularity afforded to administrative board decisions. (*McCoy v. Board of*
28 *Retirement* (1986) 183 Cal.App.3d 1044, 1047 [evaluating a Los Angeles County retirement
board determination]; *Bowman v. Bd. of Pension Commissioners* (1984) 155 Cal.App.3d 937, 943
[noting that "the judiciary will not interfere with the exercise of a board's authority" absent
certain conditions].)

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1 to change whether a public employee salary constitutes “compensation earnable.” “The general
2 rule that statutes will not be given retroactive operation has been followed from the earliest days
3 of California’s statehood to the present.” (*McKeon v. Hastings College* (1986) 185 Cal.App.3d
4 877, 887.) This same rule has been extended to administrative regulations. (*Ibid.*) The relevant
5 chronology of Rule 570.5 shows that it was not intended to be applied retroactively to invalidate
6 existing payrates and should not have been applied to determine Mr. Alvarez’s “compensation
7 earnable” in this case.¹¹

8 **b. Even if Rule 570.5 were applicable, Watermaster substantially**
9 **complied.**

10 California courts have recognized the equitable doctrine of “substantial compliance” in the
11 context of public employee retirement benefits. (*Sawyer v. Sonoma County* (9th Cir. 1983) 719
12 F.2d 1001, 1008 [applying a California statutory requirement regarding a written election of
13 retirement benefits].) If Rule 570.5(a) were applicable, Watermaster substantially complied with
14 its eight requirements.

15 First, Watermaster complied with the requirement that a salary schedule be “duly
16 approved and adopted by the employer’s governing body in accordance with requirements of
17 applicable public meetings laws.” (Rule 570.5(a)(1).) The applicable public meeting laws for
18 Watermaster are the Court’s 1978 Judgment as modified by the 2012 Restated Judgment, the
19 Court’s 1998 order, the Court-approved Rules and Regulations, and Resolution 01-03. (Exhs. A,
20 B, D, E, N.) These public meeting laws do not require that salary schedules be adopted by the
21 Watermaster Board. Nonetheless, the Watermaster Board began approving salary schedules in
22 response to concerns expressed by Ms. Horning, approving a salary schedule for FY 2011/12 and
23 FY 2012/13 in May 2013. (Tr. Vol. I, pp. 93:18-94:8; Exh. 14, p. 2; Exh. 16, Exh. 18, p. 5.)

24 Next, the pay schedule for FY 2011-12 **strictly** complied with Rule 570.5(a)(2), (a)(3),

25 ¹¹ The relevant chronology is as follows: Mr. Alvarez was hired by Watermaster on May 3, 2011,
26 and Rule 570.5 did not become effective until August 10, 2011. (Exhs. 11 [hire effective May 3,
27 2011] and 266.) Tellingly, CalPERS distributed a circular on August 19, 2011, the purpose of
28 which was to “inform [the employer] of **newly** enacted regulation[s].” (Exh. 266 [emphasis
added].) Over a year later – and after Mr. Alvarez had left Watermaster – CalPERS issued yet
another circular on the Rule 570.5 requirements, showing that CalPERS was still working with
agencies to bring them into compliance with the new regulations. (Exh. 267.)

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1 (a)(4), and (a)(8) because it showed the title for each employee position, the payrate associated
2 with each position, and the time base for the salary without referencing “another document in lieu
3 of disclosing the payrate.” (See Exh. 16.) As discussed above, Watermaster presented
4 uncontroverted evidence that these salary schedules were “available for public inspection”
5 through its Request for Information form, and as demonstrated by Watermaster’s response to the
6 September 2011 request from Monte Vista Water District. (See Rule 570.5(a)(7).) These
7 assurances of transparency complied with the requirement under Rule 570.5(a)(5) that salary
8 information be “posted at the office of the employer or immediately accessible and available for
9 public review from the employer during normal business hours or posted on the employer’s
10 internet website.” Although the date of revision is not expressly included on the face of the
11 document, the salary schedule is labeled “2011/2012.” (See Exh. S; Rule 570.5(a)(6).) Lastly, the
12 salary matrices for FY 2004-05 through FY 2010-11, coupled with testimony from Watermaster’s
13 CFO illustrate that salary schedules were retained by the employer in accordance with Rule
14 570.5(a)(7).

15 As outlined above, Watermaster substantially complied with Rule 570.5(a), despite the
16 regulation becoming effective only after Mr. Alvarez was hired. Even if Watermaster had not
17 complied with Rule 570.5(a), it would be well within CalPERS’ discretion to use the salary listed
18 on both the FY 2011-12 Salary Matrix and FY 2011-12 Salary Schedule in calculating Mr.
19 Alvarez’s under Rule 570.5(b). It would therefore be inequitable to disqualify Mr. Alvarez’s
20 payrate at Watermaster from “compensation earnable” solely on the basis of minor variations
21 from the new process that Rule 570.5 prescribes.

22 **B. The Transition Period Should Count Toward Mr. Alvarez’s Service Credit.**

23 **1. There is no evidence that Watermaster facilitated pension spiking.**

24 Despite its failure to introduce any evidence on the topic during the Hearing, CalPERS
25 now raises the highly prejudicial and unfounded speculation that Watermaster and Mr. Alvarez
26 crafted the Confidential Separation Agreement (CSA) to create the illusion of an employer-
27 employee relationship and allow Mr. Alvarez to spike his pension. It is irresponsible to raise
28 these allegations at this juncture, when Watermaster has been deprived of an opportunity to

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1 respond through the presentation of relevant evidence. Most importantly, there is simply **no**
2 **evidence** to suggest that Watermaster engaged in any type of collusion or improper dealing with
3 Mr. Alvarez.

4 To the contrary, evidence in the record shows that Mr. Alvarez was an arm's length hire
5 for Watermaster. (Tr. Vol. III, pp. 74:2-74:16, 116:18-116:25, 132:6-132:16; see also Exhs. G,
6 205, and 206.) Mr. Alvarez's initial employment contract was for two years and Mr. Alvarez
7 testified that he intended to continue his career at Watermaster. (Tr. Vol. III, pp. 11:24-12:15.)
8 Mr. Alvarez received no lump sum payout and no special treatment in connection with the
9 modification of his job duties or his ultimate separation from Watermaster. It is troubling to see
10 an unfounded claim of pension spiking being raised at this point in the appeal.

11 **2. CalPERS applies the wrong legal framework to assess whether Mr.**
12 **Alvarez met the common law employment test.**¹²

13 Under the common law test for employment articulated in *Tieberg v. Unemployment*
14 *Insurance Appeals Board*, "the most important factor is the right to control the manner and means
15 of accomplishing the result desired. If the employer has the authority to exercise complete
16 control, whether or not that right is exercised with respect to all details, an employer-employee
17 relationship exists" ((1970) 2 Cal.3d 943, 949.) CalPERS focuses exclusively on Mr.
18 Alvarez's duties under the CSA, even though the *Tieberg* analysis is focused not on an
19 individual's specific job duties but instead on the **right to control** the manner and means of work.
20 CalPERS' argument incorrectly focuses on whether Watermaster **actually exercised control** over
21 Mr. Alvarez, and the nature of Mr. Alvarez's job duties rather than Watermaster's right to control.

22 Puzzlingly, CalPERS' brief does not even cite the testimony of Mr. Ron Gow, who was
23 brought into Mr. Alvarez's case to advise on the common law employment test, and who was
24 CalPERS' primary witness on this issue. (Tr. Vol. II, p. 143:8-143:22, 145:20-146:3, 146:23-25,

25 ¹² CalPERS also raises a statutory argument that because Government Code section 20630
26 restricts "compensation" to remuneration paid for "services performed during normal working
27 hours," payments from Watermaster during the Transition Period could not have been
28 "compensation." CalPERS did not raise this issue at the Hearing and presented no evidence that
services performed by Mr. Alvarez during the Transition Period were performed outside of
"normal working hours."

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1 147:20-148:9.) However, CalPERS' closing argument mirrors the central problem with Mr.
2 Gow's testimony at the Hearing: the exclusive focus on the nature of the duties articulated in the
3 CSA, rather than the nature of Watermaster's **right to control** the execution of those duties. (Tr.
4 Vol. II, p. 145:20-146:3, 146:23-25, 147:20-148:9, 151:12-18, 152:7-9, 154:13-23 [repeated
5 statements by Mr. Gow that the duties themselves did not evince common law control].)
6 According to Mr. Alvarez, he was subject to an obligation under the CSA to assist and be
7 available to Watermaster until May 3, 2012, (Tr. Vol. III, p. 144:14-25) and Watermaster Board
8 member Bob Kuhn testified that he indeed communicated with Mr. Alvarez on Watermaster
9 issues during the Transition Period. (Tr. Vol. I, p. 180:11-180:23, 194:23-25.) The evidence
10 therefore shows that Watermaster had the authority to control the means and manner of Mr.
11 Alvarez's work during the Transition Period.

12 **3. An examination of the "other" *Tieberg* factors is possible and shows**
13 **that Mr. Alvarez was a common law employee.**

14 In addition to the right to control the manner and means of accomplishing the desired
15 outcome, *Tieberg* articulates a number of other factors that bear on whether an individual is an
16 employee under the common law test. (*Tieberg, supra*, 2 Cal.3d at 949.) Yet CalPERS dismisses
17 an analysis of these factors as "impracticable" based on the allegation that Mr. Alvarez performed
18 no services after November 9, 2011. As an initial factual matter, this claim is contrary to the
19 evidence in the record. For instance, one of Mr. Alvarez's duties under the CSA was to respond
20 promptly, accurately and in a professional manner to inquiries and requests made by
21 Watermaster, and Watermaster Board member Bob Kuhn testified that he communicated with
22 Mr. Alvarez regarding Watermaster business during the Transition Period. (Exh. 12, pp. 1-2; Tr.
23 Vol. I, p. 180:11-180:23, 194:23-25.) CalPERS' assertion that Mr. Alvarez performed "no
24 services" during the Transition Period is simply lacking in factual basis.

25 Nor is it clear why CalPERS finds it "impracticable" to consider the other indicia of Mr.
26 Alvarez's employment status (CalPERS' Brief, at p. 23), given that some of these factors do not
27 even relate to how Mr. Alvarez performed his duties. The following facts do further establish
28 additional evidence that Mr. Alvarez was a common law employee under *Tieberg*: namely, the

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1 parties' description of Mr. Alvarez's employment as continuing until May 3, 2012, Mr. Alvarez's
2 payment according to the usual payroll schedule during the Transition Period, the continued
3 payment of Mr. Alvarez's CalPERS contributions, and Mr. Alvarez's continued accrual of
4 vacation time. (Tr. Vol. III, 76:17-76:25; Exh. 12, pp. 1-2; see *Tieberg, supra*, 2 Cal.3d at 949
5 [noting as factors "whether or not the parties believe they are creating the relationship of
6 employer-employee" and "the method of payment, whether by the time or by the job"].)

7 **III. CONCLUSION**

8 The ample testimony and documentary evidence presented at the Hearing clarified the
9 course of events and revealed that CalPERS reached erroneous determinations as to Mr.
10 Alvarez's pension benefits. CalPERS now attempts to cloud the core issues by introducing new
11 materials and raising prejudicial allegations, but this does not disturb the clarity of the
12 administrative record.

13 Watermaster has presented uncontroverted evidence as to both issues on appeal. First,
14 Watermaster has established by a preponderance of the evidence that Mr. Alvarez's earnings
15 while employed by Watermaster were pursuant to a publicly available pay schedule, as required
16 by Government Code section 20636. Second, Watermaster has established by a preponderance of
17 the evidence that Mr. Alvarez remained a common law employee of Watermaster during the
18 period from November 10, 2011 through May 3, 2012. Therefore, Watermaster respectfully
19 requests an order granting its appeal to include Mr. Alvarez's salary at Watermaster from May 3,
20 2011 to May 3, 2012 as compensation earnable.

21 Dated: August 8, 2016

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22
23
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PROOF OF SERVICE

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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.

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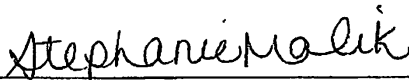
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 8, 2016, at Santa Barbara, California.



Stephanie Malik

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

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