

**ATTACHMENT B**  
**TRACK CHANGES – FINAL DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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

Case No. 2016-1113

DESI ALVAREZ and CHINO BASIN  
WATERMASTER,

OAH No. 2014080757

Respondents.

**PROPOSED FINAL DECISION**

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

Preet Kaur, Senior Staff Counsel, represented petitioner California Public Employees' Retirement System ([PERS/CalPERS](#)).

John Michael Jensen, Esq., represented respondent Desi Alvarez.

Bradley J. Herrema, Esq., and Jessica L. Diaz, Esq., represented respondent Chino Basin Watermaster ([Watermaster](#)).

The record remained open after the hearing in order for the parties to submit closing briefs. The briefs received and events that transpired while the record was held open are described in the ALJ's prior orders marked as exhibits 28, 29 and 31. The record was closed and the matter submitted for decision upon receipt of the last brief on August 8, 2016.

On November 16, 2016, after reviewing the Proposed Decision of the ALJ issued on September 7, 2016, the Board decided not to accept the Proposed Decision and to consider the matter itself at a full Board hearing. The entire record in the matter came before the Board at its duly noticed meeting on December 21, 2016.

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After hearing oral arguments and reviewing the Administrative Record, the Board:

- 1) rejected the finding of the ALJ regarding the employment status of respondent and determined that respondent was not an employee of the Watermaster from November 9, 2011 through May 3, 2012, and that as such he accrued no service

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credit pursuant to Government Code section 20300 subdivision (b) during that time;

2) rejected the finding of the ALJ regarding the “final settlement pay:” and held that the payments made to respondent from November 9, 2011 through May 3, 2012 constituted “final settlement pay” under Government Code section 20636, subdivision (f) and Title 2 of the California Code of Regulations section 570, and therefore are not reportable to CalPERS; and

3) adopted the ALJ’s finding that the final compensation at issue was not provided pursuant to a “publicly available pay schedule.” as required by the PERL Regulation section 570.5.

The Final Decision reflects and carries out the Board’s decision to accept the arguments of the CalPERS staff to (i) adopt the ALJ’s findings as to the burden of proof, jurisdiction, final compensation, equitable estoppel, and laches, and fiduciary duty and (ii) decline to adopt the ALJ’s findings as to the final settlement pay and service credit from November 9, 2011 through May 3, 2012.

## FACTUAL FINDINGS

### *Parties and Jurisdiction*

1. On April 11, 2014, a Statement of Issues was filed on behalf of **PERS**CalPERS by Karen DeFrank, in her official capacity as Chief of the Customer Account Services Division. (Ex. 1.)

2. Respondent Desi Alvarez (respondent) was employed by several public agencies and, at the end of his career, Chino Basin Watermaster as its Chief Executive Officer (CEO). By virtue of his employment, respondent was a local miscellaneous member of **PERS**CalPERS.

3. On May 2, 2012, respondent signed an application for service retirement. (Ex. 9.) Respondent retired from service, effective July 2, 2012, with 31.427 years of service credit. (Ex. 1.) He has been receiving his retirement allowance from that date. (*Ibid.*)

4. Respondent ~~Chino Basin Watermaster~~ (Watermaster) is a local public agency that contracts with **PERS**CalPERS for retirement benefits for its eligible employees. (Ex. 19.) The contract between **PERS**CalPERS and Watermaster incorporates the definitions of words and terms set forth in the Public Employees Retirement Law (PERL). (*Ibid.*) As such, the provisions of the Watermaster’s contract with **PERS**CalPERS are contained in the PERL, which is set forth at Government Code section 20000 et seq.

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5. [PERSCalPERS](#) is a defined benefit plan. Benefits for its members are funded by member and employer contributions and by interest and other earnings on those contributions. The amount of a member's contribution is determined by applying a fixed percentage to the member's compensation. A public agency's contribution is determined by applying a rate to the member compensation as reported by the agency. Using certain actuarial assumptions specified by law, the [PERSCalPERS](#) Board of Administration (Board) sets the employer contribution rate on an annual basis.

6. The amount of a member's service retirement allowance is calculated by applying a percentage figure based upon the member's age on the date of retirement to the member's years of service and the member's "final compensation." In computing a member's retirement allowance, [PERSCalPERS](#) staff may review the salary reported by the employer for the member to ensure that only those items allowed under the PERL will be included in the member's final compensation for purposes of calculating the retirement allowance.

7. After respondent submitted his retirement application, [PERSCalPERS](#) staff reviewed his reported compensation. The Watermaster had reported to [PERSCalPERS](#) an annual salary of \$228,000 for respondent, which calculates to a monthly salary of \$19,000, for the period of May 3, 2011, through May 43, 2012. After reviewing available information, [PERSCalPERS](#) staff believed those reported payments were not pursuant to a publicly available pay schedule and therefore did not qualify as compensation earnable. [PERSCalPERS](#) staff concluded respondent's compensation reported for that period was not eligible to be included in the calculation of his final compensation for purposes of his retirement benefit.

8. By a letter dated February 20, 2013, respondent and Watermaster were notified of [PERSCalPERS](#)'s determination described above, and were advised of their right to appeal that determination. (Ex. 4.)

9. On or about April 19, 2013, both respondent and Watermaster submitted separate written appeals of [PERSCalPERS](#)'s above-described determination. (Exs. 7 & 8.)

10. By a letter dated June 17, 2013, [PERSCalPERS](#) issued an amended determination to respondent and Watermaster. In that letter, the parties were advised [PERSCalPERS](#) had also determined that, in light of a "Confidential Separation Agreement" executed by respondent and Watermaster, respondent had essentially received severance pay for his last six months of service with the Watermaster, which was not reportable compensation. The letter also states that the severance pay is final settlement pay and not reportable to CalPERS. The contents of [PERSCalPERS](#)'s February 20, 2013 letter were reiterated. For all those reasons, [PERSCalPERS](#) advised the parties that respondent's compensation as CEO of Watermaster, from May 3, 2011, through May 43, 2012, would not be accepted as his final compensation for purposes of his retirement benefit. In that regard, [PERSCalPERS](#) instead would accept respondent's compensation of \$15,860 per month in his



final year of employment with the City of Downey as his final compensation. The parties were again advised of their appeal rights. (Ex. 5.)

11. By a letter dated February 12, 2015, respondent and Watermaster were advised of PERSCalPERS's supplemental determination that, under the terms of the Confidential Separation Agreement described above, on and after November 9, 2011, respondent could not be considered an employee under the common law employment test. Moreover, PERSCalPERS deemed respondent's pay the last six months to be severance pay. For those reasons, PERSCalPERS did not deem respondent's compensation from Watermaster to be reportable. (Ex. 6.)

12. On or about February 12, 2015, the First Amended Statement of Issues was filed on behalf of PERSCalPERS by Renee Ostrander, Assistant Division Chief of the Customer Account Services Division. (Ex. 3.)

*Respondent's Background and Interest in Working for Watermaster*

13. Respondent first commenced PERSCalPERS-covered employment as an Assistant Professor in 1977. He then worked for the City of Santa Monica as City Engineer from approximately June 1986 to April 1990; for the East Bay Municipal District; for the City of Redondo Beach as Director of Public Works/City Engineer from January 1992 through April 1996; and the City of Glendale as City Engineer.

14. Respondent later moved on to work for the City of Downey (Downey) as Director of Public Works and then as Deputy City Manager, accruing 13 years of service credit and also purchasing five years of airtime. As Deputy City Manager for Downey, respondent's salary was \$15,860 per month.

15. Although respondent was happy and productive working for Downey, he always had a strong interest in groundwater issues. Respondent could have remained employed at Downey in his position indefinitely, as he was well regarded by his supervisors and colleagues there.

16. In early 2011, respondent learned of the CEO opening at Watermaster. He testified at the hearing that he was 57 years old at the time and planned to work another five to ten years. Respondent testified that he was intrigued with the Watermaster position because it involved groundwater issues, was the head executive position of a public agency and paid more. After mulling it over, he decided to apply for the Watermaster position. ~~While increasing his retirement allowance was one of many reasons to apply for the new position, it was not the primary reason. No evidence presented suggests respondent was interested in working for just one year or so in order to "spike" his pension benefits and then retire.~~ If hired by Watermaster, respondent testified that he intended to continue working in that position indefinitely.

17. Watermaster's CEO recruitment process took place in the spring of 2011. Watermaster received numerous responses. Respondent applied based on the public notice he saw and submitted his qualifications. Many other people also applied. At least three or four rounds of interviews were held at the Watermaster office by its Board. Watermaster was interested in hiring someone to fill that job indefinitely. Until it received respondent's application, no evidence suggests anyone at Watermaster knew respondent or vice versa.

#### *Watermaster's Background*

18. The Watermaster arose from litigation in the Superior Court of the State of California, San Bernardino County (Superior Court), concerning longstanding water right disputes among various property owners in the Chino Basin. The parties to the litigation are the entities that were producing groundwater at the time and those thereafter found to have a continuing right.

19. On January 27, 1978, the Superior Court adopted a Judgment establishing the Chino Basin Municipal Water District to oversee implementation of the Judgment on an ongoing basis. In 1998, the Superior court appointed the Watermaster to the position and established a board of directors (Watermaster Board) to run Watermaster pursuant to the Superior Court's Judgment.

20. The role of the Watermaster is to enforce provisions of the Judgment. That role later expanded to include the implementation of the optimum Basin Management Program. Watermaster is not a water utility, it does not have customers and it does not sell water. The Judgment also empowered Watermaster to make and adopt, after public hearing, appropriate rules and regulations for conduct of Watermaster affairs. The Superior Court approved rules and regulations that were later memorialized and approved as the "Chino Basin Watermaster Rules and Regulations. June 2001" (Rules and Regulations).

21. The Judgment mandated that the Superior Court have continuing supervision over Watermaster. The Superior Court approved Watermaster's Rules and Regulations, including meeting schedules and procedures. By such, Watermaster was required to maintain records for the purposes of allocating the costs of administration and personnel.

22. All actions, decisions or rules of Watermaster are subject to review by the Superior Court on its own motion or on timely motion by any party, the Watermaster (in case of mandated action), and certain Watermaster committees.

23. Rules and Regulations section 2.1 states, "Watermaster Staff shall publish those records [minutes and 'other records'] and other matter that it deems to be of interest to the parties to the Judgment, the general public or the Court on its website." Rules and Regulations section 2.2 specifies, "As a matter of policy, Watermaster shall generally operate in accordance with the provisions of the California Open Meetings Law (Brown Act). However, in the event of conflict, the procedures set forth in these Rules and Regulations shall control." (Ex. D, p. 18.)

24. Anyone may use a "Request for Information Form" found on Watermaster's website to request information. However, there are restrictions placed on the provision of information. Watermaster Board Resolution No. 01-03, adopted February 15, 2001, specifies Watermaster policy in releasing information and documents. First, staff shall attempt to respond within 10 days of a request. Second, staff will consider requests "on a case-by-case basis, subject to guidelines." (Ex. N, p. 2.) The aforementioned request form is to be used, on which the requestor is required to provide a "signed release" and "provide staff with the reason or purpose for their request for information." (*Ibid.*) Third, the guidelines specify the types of information and documents that "should" be produced and that which "generally will not be available." (*Ibid.*) While employee compensation, salary and benefits are not specifically listed in either category, the guidelines do specify that staff will generally not make available "Personnel, or personal information regarding Watermaster members, staff and/or employees." (*Ibid.*)

25. The Watermaster Board meets monthly, pursuant to notice. (Rules and Regulations, § 2.7.) The Rules and Regulations are available to the public and posted on the Watermaster's website. (*Ibid.*) The Rules and Regulations allow the Board to hold confidential sessions, including discussion of personnel matters of Watermaster employees in closed session. (Rules and Regulations, § 2.6.)

26. According to the Rules and Regulations, Watermaster documents, notice, and minutes are required to be made available to each active party and each person who has requested a copy of the minutes and notice. Information is provided to the parties as part of agenda packages and then posted on the Watermaster website.

27. Watermaster's website posts legal documents, filings with or orders of the Superior Court, information related to the budget, and annual audits of Watermaster. It also contains notices of meetings and agendas for all the meetings of the three pools, the advisory committee, and the Board. It contains the minutes after they are approved and the recordings of each meeting, as well as any handouts and presentations that are given out at any meeting.

#### *Watermaster Hires Respondent*

28. On March 31, 2011, the Watermaster Board held a closed session conference to discuss the open Watermaster CEO position. During that closed session, the Board authorized Watermaster's general counsel to extend a binding term sheet to hire respondent as CEO and prepare a binding contract for execution by Watermaster's Board Chair. Watermaster's hiring of respondent was reported in open session by general counsel.

29. On April 28, 2011, the Watermaster Board held a public meeting where it approved the minutes of the Watermaster Board meeting held on March 31, 2011.

30. Respondent and Watermaster executed a written employment agreement, effective May 3, 2011. Pertinent provisions included the following:

A. Section 5.e., with the subheading Administrative Leave, provided:  
“Executive [respondent] shall be allowed twelve days per year of administrative leave (“Administrative Leave”), to be used at the Executive’s discretion. Unused Administrative Leave shall not accrue to the following year.”

B. Section 9.a., with the subheading Termination without Cause, provided:  
“In the event Executive’s employment is terminated without cause prior to the end of the first year of the Employment Term, Watermaster will pay Executive the full salary amount for the first year of the Employment Term plus provide for the health and other benefits that were being provided to Executive for the remaining portion of such first year of the Employment Term, minus the amount of any salary already paid during that first year of the Employment Term. After the first year of the Employment Term, Executive shall not be entitled to any other payment of salary under this Agreement for a termination without cause, except for payments owed through the date of termination.”

*Public Availability of Information Pertaining to Watermaster Employee Compensation*

31. Watermaster staff created a “Salary Matrix” that the Chief Financial Officer (CFO) would use to develop and create the annual budget. Watermaster staff also created a “Salary Schedule,” in which salary for its various staff positions was listed by steps. Both documents were spreadsheets which contained all the budgeted positions, job titles, as well as the hourly, weekly and monthly salary by steps. Those documents, however, were not attached to the budgets presented to the Watermaster Board or discussed in closed session. While the approved budget was announced in open session of Board meetings, it was not established that the salary schedules or salary matrixes were published or made available to those attending the meetings or that either the Board’s agendas or minutes available for public review contained the employee salary information stated on the salary schedules or matrixes.

32. Salary matrixes created for the fiscal years (FY) 2004/2005 through 2010/2011 were presented in evidence. (Ex. 15.) Those salary matrixes all list the position of “General Manager-C.E.O.,” as well as the compensation for the position. The compensation for that position for all of those fiscal years was less than what respondent was paid pursuant to his contract. For example, the last salary matrix in that series, for the FY 2010/2011, lists the salary for “Ken, General Manager-C.E.O.” (referring to the then CEO Kenneth R. Manning) at the rate of \$18,081 per month and \$216,972 per year. (Ex. 15, p. 8.)

33. Respondent was paid \$228,000 per year, pursuant to his contract of May 3, 2011. That amount is listed on the FY 2011-2012 Salary Schedule as “Step G” for the position of “General Manager/CEO.” (Ex. S, p. 1.) The FY 2011-2012 Salary Schedule was used by the CFO in early 2011 to create the budget for the FY 2011-2012 that was later adopted by the Board in late May 2011. That salary schedule was in place when respondent worked as Watermaster’s CEO during the FY 2011-2012. As was the case with the prior



salary schedules and matrices, the FY 2011-2012 Salary Schedule was not discussed in open session of board meetings or otherwise made available to those attending the meetings.

34. Respondent's contract did not isolate the rate of pay or base pay for the position of CEO. It states only the amount Watermaster had agreed to pay to respondent for his services as CEO, which was \$228,000 per year. No evidence indicates respondent's contract was ever publicly announced during a Board meeting or made available to the public, upon request or otherwise.

35. The record presented shows Watermaster only considered providing compensation information to the public after being specifically requested. Employee salary information was not posted on the Watermaster's website at the times in question, and the evidence does not show the information was posted in a public place at the Watermaster's office. The various Watermaster employees who testified in this matter uniformly stated that employee salary information would be, and was, provided when requested. However, there was only evidence showing two requests for such information. Neither requestor was a member of the general public, but instead had some special affiliation that would have likely prompted a greater level of cooperation and attention from Watermaster staff, as explained in more detail below.

36. The first such request occurred in or about October 2010. Watermaster received a telephone inquiry from James Koren, a journalist with *The Sun and Inland Valley Daily Bulletin*, regarding compensation information for Watermaster's then CEO Mr. Manning and its Board members. Watermaster's CFO, Mr. Joswiak, testified this request came after news broke of the City of Bell compensation scandal. On or about October 22, 2010, Watermaster provided Mr. Koren a copy of the employment agreement for Mr. Manning and the amount of compensation received by board members. It was not established that Watermaster's response was within 10 days receipt of the request.

37. The second such request was made by Tracy Tracy, an executive assistant of the Monte Vista Water District, a nearby water district, who requested such information in an e-mail sent to Watermaster on September 8, 2011. She specifically requested Watermaster's "Employee Salary Ranges," among other information. The Watermaster staff member who initially received the request yielded the matter to Mr. Joswiak. Eight days later, Mr. Joswiak provided a copy of the FY 2011-2012 Salary Schedule to Ms. Tracy. That salary schedule showed respondent's compensation as CEO.

38. In May 2013, as a result of the dispute at issue between the parties in this case, the Watermaster Board approved versions of the 2011/2012 and 2012/2013 Salary Matrices in open session. (Ex. 16.) A staff report indicates that gesture was done to "ensure compliance with CalPERS regulations." (Ex. 16, p. 118.) This was well after respondent retired. The 2011/2012 Salary Matrix approved by the Board in open session lists the salary of the "Chief Executive Officer," but does not specify any steps; it also lists respondent's level of compensation as the highest, whereas in the FY 2011/2012 Salary Schedule (ex. S),

there were two steps for that position with higher levels of compensation. (Ex. 16, p. 119.) In this regard, the Salary Matrix approved by the Board in open session in May 2013 is different from the Salary Schedule sent to Ms. Tracy in September 2011, though both contain the compensation level respondent was paid while he was a CEO.

*Respondent is Removed as CEO*

39. Respondent started working as Watermaster CEO on May 3, 2011. He worked in the office on a daily basis, ~~but he did not have set business hours.~~ Respondent's employment agreement states that normal working hours will generally "begin at 8:00 a.m. Monday through Friday." Respondent was paid in biweekly payroll, at \$19,000 a month. Watermaster made ~~PERS~~CalPERS contributions biweekly on respondent's paid salary.

40. As Watermaster CEO, respondent was responsible for its daily operations. Respondent testified that while acting as the CEO from May through early November 2011, he did things like budgeting, overseeing personnel, correspondence and actively representing Watermaster before its Board and committees. Respondent's duties as CEO were specified in section 3 of his employment agreement. (Ex. 11, p. 1.) Respondent performed those duties from May through early November 2011.

41. On November 9, 2011, respondent was given his six-month evaluation with Watermaster's general counsel, Scott Slater. Mr. Alvarez testified that ~~At~~ that evaluation, Mr. Slater advised respondent that Watermaster was placing him on paid administrative leave, effective immediately. Respondent was not told why the move was happening, nor has it ever been disclosed.

42. Watermaster employee Danielle Maurizio ~~assumed many of respondent's functions when respondent was placed on administrative leave~~ acted as the interim CEO from November 9, 2011 to January 17, 2012. ~~In January 2012,~~ Ken Jeske became the interim CEO from January 17, 2012 through September 7, 2012. ~~and took over the functions and duties respondent had previously performed.~~

43. In August 2011, ~~PERS~~CalPERS circulated a letter to its member agencies notifying them of the adoption of a regulation that clarified existing provisions of the PERL concerning what constitutes publicly available pay schedules. (Ex. 266.)

44. Respondent and Watermaster executed the Confidential Separation Agreement, effective on January 23, 2012, which provided, inter alia, as follows:

1. Termination of Active Employment.

Executive's [respondent's] employment in the capacity of Chief Executive Officer of the Watermaster with all the powers and duties associated therewith ceased on November 9, 2011, and the Employment Agreement is hereby modified effective as of that date. Executive acknowledges and agrees

that he has received all compensation accrued and owing pursuant to the Employment Agreement as of the date of the execution of this Agreement, including but not limited to, accrued but unpaid base salary, incentive compensation, and accrued vacation (all as set forth in Section 5 of the Employment Agreement) and expense reimbursement.

## 2. Transition Period.

### A. Term.

As partial consideration for this Separation Agreement, Executive shall be continued to be employed with the Watermaster until May 3, 2012 (the "Transition Period"). At the conclusion of the Transition Period, Executive's employment shall be terminated (the "Separation Date") and such termination shall be designated "without cause."

### B. Duties.

During the Transition Period and thereafter, Executive shall have no actual or implied authority to act on behalf of the Watermaster or enter into any agreements on behalf of the Watermaster, and he shall not hold himself out as having any authority to act on behalf of the Watermaster. Executive acknowledges and understands that he does not have authority to speak on behalf of or bind the Watermaster in any manner during the Transition Period or thereafter. Executive's sole duty during the Transition Period shall be to assist and provide information to the Watermaster as requested with respect to pending projects and the transition of his duties. Executive shall endeavor to respond promptly, fully, accurately and in a professional manner to inquiries and requests made by the Watermaster during the Transition Period. Notwithstanding any limitations to the contrary in the Employment Agreement, Executive forthwith may undertake consulting work on his own account and may pursue any other business, provided that he does not act to the detriment of the Watermaster or in violation of his continuing duties thereto.

### C. Compensation and Benefits.

During the Transition Period, Executive shall continue to receive his base salary, less applicable withholdings, at the rate in effect on November 9, 2011, paid in accordance with the Watermaster's normal payroll system. Executive shall continue to accrue vacation at the rate of twenty (20) days per year, accruing pro rata on a bi-weekly basis. In addition, the Watermaster shall permit Executive to continue to participate as an employee in any insurance plans, deferred compensation plans, and retirement plans in which he was a participant prior to the Transition Period, on the same terms and conditions as



under the Employment Agreement. The compensation and benefits provided hereunder shall be referred to as the "Severance Compensation." Executive agrees that the Severance Compensation, along with any entitlement to benefits under the California Public Employees' Retirement System ("~~CalPERS~~CalPERS") pursuant to the terms thereof on or after the Separation Date, constitute the entire amount of consideration due to him, and Executive is not entitled to any further or other amounts, including severance and other benefits, whether under the Employment Agreement or any other agreement, or any benefit plan, policy or practice of the Releases, as defined below. Executive agrees that he will not seek any further compensation for any other claimed damage, costs, severance, income, or attorneys' fees. Executive acknowledges that the severance Compensation constitutes good and valuable consideration to which he otherwise would not have been entitled.

45. After ~~being placed on administrative leave, as well as signing the Confidential Separation Agreement, - November 9, 2011,~~ respondent was no longer responsible for the daily responsibilities of the Watermaster. He no longer reported for work at the office. No employees reported to him. Per the separation agreement, after November 9, 2011, respondent had no authority to speak, act, or enter into agreements on behalf of the Watermaster. Furthermore, respondent could not bind the Watermaster. He served no function other than to respond to inquiries from the Board.

46. Before ~~being placed on administrative leave~~ his separation, respondent had initiated a \$20 million effort to buy water for Watermaster that had not closed by November 2011. Respondent was one of the few people familiar with the "loose ends" of the water deal after November 2011. Respondent testified he got "some" calls from Board members regarding that transaction. It was not established that respondent received more than a handful of inquiries from the Board while on leave. The only corroboration of respondent's testimony was Watermaster Board member Bob Kuhn, the Board's chair during the majority of this period, who testified that he and respondent communicated during this period regarding matters before Watermaster.

47. Mr. Kuhn also testified respondent was no longer the CEO after -s-powers as CEO ceased in November 2011 and that the only duty he could remember respondent kept was "to answer questions (of the Board) as best he could." In fact, Mr. Kuhn testified that although he believed respondent was still employed by Watermaster, he did not believe respondent still had the title of CEO on and after November 2011; as chair of the Board, Mr. Kuhn did not recognize respondent as the CEO on or after November 2011.

48. Respondent still maintained a Watermaster e-mail address while he was on administrative leave. While respondent had access to his e-mail account, so did Sherri Molino, Watermaster administrative assistant, who monitored e-mails sent to respondent to determine whether any needed action by someone other than respondent.

49. Respondent continued to receive ~~\$19,000-per month his Watermaster salary according to Watermaster's regular pay schedule~~, and Watermaster continued to pay respondent's ~~PERS/CalPERS~~ contributions. This continued until May 3, 2012, ~~when respondent was formally terminated pursuant to the Confidential Separation Agreement.~~ Respondent and ~~Watermaster staff uniformly testified they believed respondent was still an employee during his "transition period" on and after November 2011.~~

#### *Respondent's Decision to Retire*

50. As May 3, 2012 approached, respondent looked for employment elsewhere. A couple of positions came to respondent's attention that he wanted to pursue. At that time, respondent did not intend to retire. After pursuing those two positions but not being invited for an interview with either one, respondent believed that he would have difficulty finding commensurate employment elsewhere because of what happened at Watermaster. He was not interested in a position lower than general manager or one that paid less than what he made at Downey. He decided to retire when his contract with Watermaster expired.

### LEGAL CONCLUSIONS

#### *Burden and Standard of Proof*

1. The person against whom a statement of issues is filed generally bears the burden of proof at the hearing regarding the issues raised. (*Coffin v. Department of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 471, 476.) In the absence of a contrary statutory provision, an applicant for a benefit has the burden of proof as the moving party to establish a right to the claimed entitlement or benefit, and that burden is unaffected by the general rule that pension statutes are to be liberally construed. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.) In this case, respondents bear the burden of proof.

2. In *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 and footnote 5, the court found "the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence." In this case, the parties agree the standard of proof is the preponderance of the evidence.

3. Based on the above, respondent and Watermaster have the burden of establishing by a preponderance of the evidence that respondent is entitled to an amount of final compensation based on the amount of \$19,000 per month he was paid by Watermaster from May 3, 2011, through May 4, 2012.

## *Jurisdiction*

4. A. Respondent argues **PERSCalPERS** has no jurisdiction to decide his pension compensation because Watermaster is a creature of the Superior Court, which he contends has sole jurisdiction to approve or regulate Watermaster decisions and actions. That argument, taken to its logical end, leads to the proposition that the PERL does not apply to this case. Watermaster does not make this argument.

B. The contract between **PERSCalPERS** and Watermaster incorporates the definitions of words and terms set forth in the PERL. (Factual Finding 4; Gov. Code, § 20000 et seq.) Government Code section 20506<sup>1</sup> provides that “[a]ny contract heretofore or hereafter entered into shall subject the contracting agency and its employees to all provisions of this part [the PERL] and all amendments thereto applicable to members, local miscellaneous members, or local safety members except those provisions that are expressly inapplicable to a contracting agency until it elects to be subject to those provisions.”

C. The PERL is a comprehensive statutory scheme and the Legislature has expressly vested **PERSCalPERS** with the sole authority to determine the type and level of benefits-paid under the system. (§§ 21023-20125.) Because of the need for statewide uniformity in its application, the Board has been vested with the sole authority to determine “who are employees and the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this System.” (*Metropolitan Water Dist. Of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 503-505; *City of Los Altos v. Board of Administration* (1978) 80 Cal.App.3d 1049, 1051.) Neither the member nor his employer has authority to enter into agreements that bind **PERSCalPERS**'s determinations as to what constitutes compensation earnable. (*Molina v. Board of Admin., California Public Employees' Retirement System* (2011) 200 Cal.App.4th 53, 61-69.) Thus, in the event of a conflict with a local law, the PERL provisions regarding retirement benefits would prevail. (*City of Los Altos v. Board of Administration, supra*, 80 Cal.App.3d at 1052.)

D. In this case, Watermaster and **PERSCalPERS** entered into a contract whereby Watermaster agreed to participate in the **PERSCalPERS** system and subject itself and participating employees to the provisions of the PERL without reservation or modification. Based on the authorities cited above, it is the PERL that determines a retiree's benefits, not the judgments or orders of the Superior Court in establishing a local public agency governing local water rights. Respondent fails to cite any statute, regulation or law indicating that **PERSCalPERS** lacks authority or jurisdiction to proceed in this case, or that the Superior Court has exclusive jurisdiction over the issues raised by the First Amended Statement of Issues.

## *General Provisions of PERL*

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<sup>1</sup> Further statutory references are to the Government Code.



5. A member's retirement allowance is based on factors of age, length of service and final compensation. "Compensation" is defined under the PERL as "remuneration paid out of funds controlled by an employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work." (§ 20630.) "Final compensation" is the member's highest average compensation earnable paid during a consecutive twelve month period. (§§ 20037, 20042.)

6. Compensation earnable is not simply the amount of remuneration received by a member. It is "exactly defined to include or exclude various employment benefits and items of pay." (*Oden v. Board of Administration* (1994) 23 Ca.App.4th 194, 198; citing former Gov. Code, § 20020 (currently § 20630).) The principal purpose for these rules and the strict enforcement is "[p]reventing local agencies from artificially increasing a preferred employee's retirement benefits by providing the employee with compensation increases which are not available to other similarly situated employees." (*Prentice v. Board of Admin., California Public Employees' Retirement System* (2007) 157 Cal.App.4th 983, 993.)

#### *The Common Law Employment Test*

7. The parties agree that in order for respondent's service with Watermaster to qualify for purposes of establishing his retirement benefit, he must be deemed an employee of Watermaster during the entire 12 month period. However, ~~PERS~~CalPERS argues respondent is not entitled to count his year of service with Watermaster because his employment was terminated in November 2011 and ~~his work he was not an employee~~ during the final six months ~~was not as an employee of his employment contract, but as an independent contractor.~~

8. Under section 20069, subdivision (a), "[s]tate service" means "service rendered as an employee or officer" of a contracting agency. An employee is "[a]ny person in the employ of any contracting agency." (§ 20028, subd. (b).) The California Supreme Court has held that the PERL's provisions concerning employment by a contracting agency incorporate the common law test for employment. (*Metropolitan Water Dist. of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 500.) The parties agree that the common law employment test applies to this case.

9. The common law employment test was articulated by the California Supreme Court in *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949. Under that test, "the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists." (*Ibid.*) If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*Id.* at p. 946-947.)

10. *Tieberg* noted the following other factors may be taken into account, which it characterized as secondary to the primary test articulated above:

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

11. The *Tieberg* court noted one of the most important of those secondary factors is “whether the parties believe they are creating the relationship of employer-employee,” especially as specified in a written agreement. (*Id.* at p. 949.)

12. The burden of establishing an independent contractor relationship is upon the party attacking the determination of employment (*Southwest Research Institute v. Unemployment Ins. Appeals Bd.* (2000) 81 Cal.App.4th 705, 708.)

13. A. In this case, despite the general discussion in Legal Conclusions 1-3 concerning burdens of proof, PERSCalPERS has the burden on the limited issue of establishing that respondent was not an employee an independent contractor of Watermaster his last six months at Watermaster and not an employee after November 9, 2011. PERSCalPERS failed to meet its burden.

B. The facts in this case fail to meet the primary test of employment described in *Tieberg*. By the terms of the Confidential Settlement Agreement, Watermaster maintained the no right to control the manner and means of by which respondent provided services. respondent’s continuing duties at work. Although his duties were drastically limited, that limitation was placed on him by Watermaster. Respondent was not to report to the office and was not to have other employees report to him. He was told to whom he could report. Thus it cannot be concluded that respondent worked on his own time, at his own expense, in his own way, with his own instrumentalities, and at a place of his selection. Those were all decisions made for him by Watermaster, who directed when and how it wanted information from him. Although respondent was allowed under the confidential Settlement Agreement to undertake consulting work with others, he could not do so if it conflicted with his Watermaster duties or caused a detriment to Watermaster. This is another sign of Watermaster’s right to control respondent’s activities and production.

C. There were many facts entered into evidence which support a finding that respondent was not an employee under the common law control factor:

1. Respondent was relieved of all of his day-to-day duties;
2. The Watermaster did not direct respondent in what order or sequence to provide the requested information;
3. Respondent was free to find other work;
4. There was no evidence to demonstrate that the Watermaster had the right to control the manner or means of accomplishing the services performed; and
5. No control by the Watermaster was exercised "in fact."

D. Accordingly, analysis of the most important factor in the common law employment test, i.e. who controlled the manner and means by which respondent performed his work, leads to the conclusion that respondent was not an employee.

E. There were also many facts entered into evidence which support a finding that respondent was not an employee after November 9, 2011, under the secondary factors of the common law employment test:

1. Respondent performed services outside the location of the Watermaster's office;
2. The Watermaster did not furnish office space, equipment, supplies or other materials to respondent after November 9, 2011;
3. Respondent was to be paid the same amount each month no matter how much work was performed;
4. When respondent served as a CEO, the Watermaster could terminate him with or without cause. However, after entering into the separation agreement, there was a specific end date and the Watermaster did not retain the right to terminate at-will;
5. Per the separation agreement, after November 9, 2011, respondent had no authority to speak, act, or enter into agreements on behalf of the Watermaster;
6. Per the separation agreement, respondent could not bind the Watermaster;
7. Per the separation agreement, respondent's compensation was limited to the severance pay;
8. Respondent released the Watermaster from any and all claims that may arise out of the services he performed after November 9, 2011; and
9. Respondent would receive the severance pay even if he failed to perform any services to the Watermaster.

F. Accordingly, review of the secondary factors also leads to the conclusion

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that respondent was not an employee after November 9, 2011. The totality of the evidence supporting CalPERS' determination that respondent was not an employee after November 9, 2011 substantially outweighed any other evidence that might suggest that respondent was an employee.

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C. Application of the secondary factors articulated in *Tieberg* also support a finding that respondent was an employee the entire time he was with Watermaster. As *Tieberg* emphasized, the most important of these secondary factors is whether the parties believe they are creating an employment relationship, especially if specified in a written agreement. In this case, it is clear from their testimony that both respondent and staff from Watermaster believed respondent was still an employee on and after November 2011. That belief was incorporated into the Confidential Settlement Agreement, where it was expressly stated that respondent continued to be an employee of Watermaster during that period. In addition, a number of the less important secondary factors also suggest an employment relationship. For example, it cannot be concluded that respondent was engaged in a distinct occupation by answering inquiries of the Board based on information he obtained while acting as CEO, or that his duty to do so was the kind of work usually done by a specialist without supervision. No particular skill in fulfilling that duty is noted. Respondent was not given an express or specified time to perform the service. He was paid a salary as other employees and not per consultation with the Board. His work was part of the regular business of Watermaster. These are all signs of employment.

D. Finally, it must be noted that respondent continued to receive benefits and trappings not normally associated with independent contracting. For example, he continued to receive his monthly salary, made in biweekly payments. Watermaster continued to make contributions to PERS for him and respondent continued to receive health insurance benefits. He was also still allowed access to an internal e-mail account used by other employees.

14. Based on the above, respondent was an no longer an employee of the Watermaster after November 9, 2011. employee of Watermaster during the entire 12 months he worked there. PERS failed to establish respondent was an independent contractor during any of that period. (Factual Findings 1-50; Legal Conclusions 1-13.)

#### Compensation Earnable

15. PERS CalPERS next contends respondent's salary while working at Watermaster was not made publicly available for purposes of the PERL and thus cannot qualify as compensation earnable that can be the basis of calculating his retirement benefit.

16. Compensation earnable is a combination of a "payrate" and "special compensation." (§ 20636, subd. (a).)

17. A. Pursuant to section 20636, subdivision (b)(1), "payrate" means:

[T]he normal monthly rate of pay or base pay of the member

paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, *pursuant to publicly available pay schedules*. “Payrate,” for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and *pursuant to publicly available pay schedules*, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e). (Emphasis added.)

B. Pursuant to section 20636, subdivision (d), “Notwithstanding any other provision of law, payrate and special compensation schedules, ordinances or similar documents *shall be public records available for public scrutiny*.” (Emphasis added.)

18. The PERL requires a “publicly available pay schedule for services rendered on a full time basis during normal working hours.” (*Molina v. Board of Admin., California Public Employees’ Retirement System, supra*, 200 Cal.App.4th at pp. 66-67.) Generally, disclosing a public employee’s salary in an annual budget does not render that information publicly available, because there is no assurance that what was stated in the budget is the same as what the employee(s) in question actually received based on a published schedule applicable to all similarly situated employees. (*Prentice v. Board of Admin., California Public Employees’ Retirement System, supra*, 157 Cal.App.4th 983, 994.) For the same reason, settlement proceeds received in a negotiated resolution of a wrongful termination case were not paid in accordance with publicly available pay schedules. (*Molina v. Board of Admin., California Public Employees’ Retirement System, supra*, 200 Cal.App.4th at 9. 67.) “The Legislature intended that a public employee’s ‘payrate’ be readily available to an interested person without unreasonable difficulty.” (*Randy G. Adams*, Prec. Dec. No. [unassigned], effective Jan. 16, 2013, Case No. 2011-0788, 9. 20 [*Adams*].) <sup>2</sup>Public employee compensation should be “approved in a public manner, and that is not subject to public disclosure except through formal public records request, subpoena, or other legal process.” (*Ibid.*)

19. The [PERS/CalPERS](#) Board has promulgated regulations to implement the PERL. The regulations relevant to this matter are found at Title 2 of the California Code of Regulations (Regulation).

20. Regulation 570.5 provides as follows:

(a) For purposes of determining the amount of ‘compensation earnable’ pursuant to Government Code Sections 20630, 20636,

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<sup>2</sup> An agency may designate a as precedent a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. (Gov. Code, § 11425.60, subd. (b).) The Board designated *Adams* as a decision that may be relied upon as precedent.

and 20636.1, payrate shall be limited to the amount listed on a pay schedule that meets all of the following requirements:

- (1) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meeting laws;
  - (2) Identifies the position title for every employee position;
  - (3) Shows the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;
  - (4) Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, bi-monthly, or annually;
  - (5) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internal website;
  - (6) Indicates an effective date and date of any revisions;
  - (7) Is retained by the employer and available for public inspection for not less than five years; and
  - (8) Does not reference another document in lieu of disclosing the payrate.
- (b) Whenever an employer fails to meet the requirements of subdivision (a) above, the Board, in its sole discretion, may determine an amount that will be considered to be payrate, taking into consideration all information it deems relevant including, but not limited to, the following:
- (1) Documents approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer;
  - (2) Last payrate listed on a pay schedule that conforms to the requirements of subdivision (a) with the same employer for the position at issue;



(3) Last payrate for the member that is listed on a pay schedule that conforms with the requirements of subdivision (a) with the same employer for a different position;

(4) Last payrate for the member in a position that was held by the member and that is listed on a pay schedule that conforms with the requirements of subdivision (a) of a former CalPERS employer.

21. A. The requirements for a pay schedule set forth in Regulation 570.5 apply to respondent and Watermaster in this case. The regulation became effective on August 10, 2011, which was after respondent's initial employment agreement with Watermaster, but before he was placed on administrative leave; before execution of his Confidential Settlement Agreement in January 2012; and before the date his employment ended with Watermaster in May 2012. In fact, [PERS CalPERS](#) circulated a letter in August 2011 notifying its member agencies of the adoption of Regulation 570.5 and explaining that the regulation clarified existing provisions of the PERL concerning what constitutes publicly available schedules. Since Watermaster had notice of this regulation, it had time to react and adjust accordingly.

B. Even if not, Regulation 570.5 can be applied to this situation because the regulation simply clarified section 20636. (*Adams*, p. 14.) The purpose of the regulation was to ensure consistency between [PERS CalPERS](#) employers as well as enhance disclosure and transparency of public employee compensation. (*Ibid.*) Amendments to statutes that are matters of clarification may be applied retroactively. (*Prentice v. Board of Admin., California Public Employees' Retirement System*, *supra*, 157 Cal.App.4th 983, 990, fn. 4.) The statutory rule of construction applies equally to administrative regulations. (*People ex rel. Deukmejian v. CHE, Inc.* (1983) 150 Cal.App.3d 123, 135.) Such clarifying amendments have no retrospective effect because the true meaning of the law remains the same. (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922.) Respondent and Watermaster cite several sources for support of the contention that the adoption of the regulation after respondent executed his initial employment agreement cannot be applied retroactively. As noted above, this contention is not convincing.

22. A. In this case, it was not established that respondent's pay with the Watermaster was publicly available for purposes of the PERL.

B. Generally, the PERL has been interpreted to require public employee compensation be readily available to an interested person without unreasonable difficulty. In this case, Watermaster made no employee compensation information available to the public, unless a very specific procedure was carried out. That procedure required the requestor of information to sign a specific form, explain the reason for the request and then wait up to 10 days for a response. Based on Watermaster's Rules and Regulations, Watermaster staff would decide whether to respond "on a case-by-case basis." The same Watermaster regulation did not specify that employee compensation was the sort of information that

would be produced to the public; another part of that regulation indicated “personnel information” would not be produced. While not exactly the same, the Watermaster’s procedure here parroted a Public Records Act request in many ways. (See Gov. Code, § 6250 et seq.) But in *Adams*, ~~PERS~~CalPERS’s Board has clearly stated that “publicly available” does not include when public disclosure is only made through formal public records request, subpoena, or other legal process. It cannot be concluded that Watermaster’s employee compensation information was readily available to interested persons without unreasonable difficulty.

C. Under the definition of payrate provided by the PERL, public employee compensation information should be included in public records available for public scrutiny. A summary of the evidence presented in this case shows that the proliferation of employee compensation by Watermaster at the time in question cannot be viewed as being contained in records available for public scrutiny.

1. Watermaster Rules and Regulations section 2.1 indicates the Watermaster could post information of interest to the general public on its website. No information on employee compensation was posted on its website during the time in question.

2. Rules and regulations section 2.2 directs the Watermaster Board to generally operate in accordance with the California Open Meetings Law, which it referred to as the “Brown Act,” indicating application of the Ralph M. Brown Act that applies to local government agencies. The Brown Act is to apply unless doing so conflicted with another provision of the Rules and Regulations. No cited provision of the Rules and Regulations prevented employee compensation from being discussed during Board meetings in open session or otherwise proliferated to the public. The Board was only expressly allowed to discuss in closed session “personnel matters of Watermaster employees involving individual employees.” (Rules and Regulations, § 2.6(1)(ii).) While the Brown Act similarly allows public agencies to discuss individual personnel matters in closed session (Gov. Code, § 54957), the Brown Act provides that discussion of “salary, salary schedules or compensation paid in the form of fringe benefits” may not be held in a special session (Gov. Code, § 54956) and it has no provision allowing for the discussion of such matters in closed session. This means there was no California Open Meeting Law providing for discussion of employee compensation in closed Watermaster Board meetings, nor any Watermaster Rules and Regulations prohibiting or preventing the proliferation of such information.

3. It is not clear that employee compensation information was expressly provided to parties to the Judgment or those attending Board meetings. Only Board members, in closed session, were privy to the compensation information, and even that was generally folded into overall budget information.

4. As discussed above, the only way to obtain compensation information was to specifically request it from Watermaster staff, pursuant to the

aforementioned bureaucratic process, and subject to staff discretion on whether to release it. While the evidence shows two people requested such information and were provided it after a delay of a week or more, it must also be remembered the two requestors were not members of the general public per se; one was a member of the media and the other an employee of a fellow local water district. It is expected their requests received greater attention and cooperation than a request made by a member of the general public. Moreover, those two still had to ask for specific information and had to wait a number of days before being provided it. It cannot be concluded the information was readily available, as discussed above.

5. An analysis of the information actually provided in response to the two requests in question is revealing. The media member received a copy of the then CEO's contract and Board member compensation. He did not receive the pay schedule for Watermaster employees at that time. The second requestor did receive the salary schedules for the FY 2011-2012, which would have included respondent's information. Thus, the evidence shows only one person actually received salary schedules during the relevant time in question. Watermaster argues that is because only one person requested the information; another view of the evidence is that this is because Watermaster so tightly controlled access to the information that it could actually prove the exact people who received it. Under either argument, this sparse proliferation of information cannot be viewed as making employee compensation information available for public scrutiny.

6. The above also indicates that while Watermaster generally had directives to make public information concerning its operations and had the discretion to publicize employee compensation information, Watermaster decided not to do so.

D. Based on the above, it similarly cannot be concluded that the salary schedules concerning respondent's compensation as CEO meet the definition of public availability contained in Regulation 570.5. While all the criteria in Regulation 570.5, subdivision (a), must be met to comply, not all were established in this case.

1. For example, Watermaster pay schedules were not approved and adopted by the Watermaster Board in accordance with applicable public meeting laws, as required by subdivision (a)(1). As discussed above, Watermaster Rules and Regulations allowed adoption of salary schedules in open session and generally required Board meetings to be held in accordance with the Brown Act. No salary schedule was approved or adopted by the Board in open session while respondent was employed. In fact, while the Board approved the annual budget, it is not clear the Board saw, approved or adopted the salary schedule applicable to respondent while he was employed there.

2. The pay schedules or similar information were not posted at the Watermaster office while respondent was employed there, immediately accessible and available for public review during Watermaster's normal business hours or posted on the Watermaster website, as required by subdivision (a)(5).



3. It was not established the schedules in question showed an effective date or date of any revisions, as required by subdivision (a)(6).

4. The salary schedule applicable to respondent's employment was approved and adopted by the Watermaster Board after respondent's employment was terminated and he left Watermaster. However, section 20636 and Regulation 570.5 do not support such retroactive application, in that doing so would defeat the very purpose of those laws. Moreover, Regulation 570.5, subdivision (b), the savings clause, premises relief on conforming documents before the events in question, not after.

E. In addition, the aforementioned savings clause of Regulation 570.5, subdivision (b), is not available to respondent. There were no salary schedules or similar compensation documents approved by the Watermaster in accordance with public meetings law, as required by subdivision (b)(1), before the events in question.

23. A. An even larger problem prevents respondent from meeting the definition of payrate as defined by section 20636. This problem persists even assuming arguendo that Regulation 570.5 has no application to this case and that a retroactive approval and adoption of a salary schedule by the Watermaster Board can be considered. The problem is that no salary schedule or any other document ever created by Watermaster shows the position and payrate for the position respondent occupied in his last six months at Watermaster.

B. The evidence clearly established that, as of early November 2011, respondent was no longer CEO of Watermaster. He no longer had those duties, was no longer seen by the Watermaster Board as CEO, and he had been replaced by two other people who performed his former duties while he was on leave. Respondent's only duty was to answer inquiries of the Board. Whatever position and/or title respondent held his last six months, it was not Watermaster CEO. In light of the fact that other individuals held the CEO position during respondent's last six months at Watermaster, the inquiry becomes whether the position respondent actually held his last six months was established in a salary schedule or any other document made public. The answer is no.

C. Thus, even assuming the facts and legal interpretations most favorable to respondent, it cannot be established that any pay schedule or similar document was ever made public showing the position respondent held his last six months at Watermaster.

24. — Finally, ~~PERS argues the compensation respondent received his final six months at Watermaster was severance compensation or final settlement pay that is excluded from the definition of payrate pursuant to section 20636, subdivision (f). While a decision on this issue is unnecessary given the above conclusions, this issue was raised by PERS in its denial letters and is therefore considered herein. Respondent was employed those final six months and carried a duty, though very limited. If his pay the final six months was severance or final settlement pay, he would have had no duty and his employment would have been terminated immediately. Nor does the evidence establish that his pay during the final six months was of the golden handshake variety expressly excluded by Regulation 570.~~



When respondent signed his first employment agreement with Watermaster, the parties clearly intended for him to be employed there indefinitely. Something happened in the midst of his first year that changed that thinking, but it was not a golden handshake.

Final Settlement Pay

24. Section 20636, subdivision (f), defines “final settlement pay”

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“[F]inal settlement pay” means pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment.

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A. Regulation 570 provides:

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“Final settlement pay” means any pay or cash conversions of employee benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.

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For example, final settlement pay may consist of severance pay or so-called “golden parachutes”. It may be based on accruals over a period of prior service. It is generally, but not always, paid during the period of final compensation. It may be paid in either lump-sum, or periodic payments.

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Final settlement pay may take the form of any item of special compensation not listed in Section 571. It may also take the form of a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS.

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B. The severance pay was calculated and adjusted in contemplation of respondent’s separation from employment. The employment agreement required respondent be paid salary and benefits for a full year term, regardless of whether he was terminated for cause. In accordance with the employment agreement, the Watermaster provided the severance pay to separate respondent from employment.

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C. The severance pay is “final settlement pay” because it was provided in connection with or anticipation of separation of employment. Therefore, the Board finds the severance pay is not reportable to CalPERS and cannot be a basis for receiving service credit.

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*Respondent’s Claims of Estoppel, Breach of Fiduciary Duty and Laches*

25. A. Estoppel. At the end of his closing brief, respondent argues PERSCalPERS is estopped from asserting he is not entitled to base his retirement

compensation on his service with the Watermaster. Neither of the other parties discusses this issue; in any event, the argument is unpersuasive and rejected.

B. The requisite elements for estoppel are the same whether applied against a private party or the government: (1) the party to be estopped was apprised of the facts, (2) the party to be estopped intended by conduct to induce reliance by the other party, or acted so as to cause the other party reasonably to believe reliance was intended, (3) the party asserting estoppel was ignorant of the facts, and (4) the party asserting estoppel suffered injury in reliance on the conduct. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.)

C. In this case, respondent argues [PERSCalPERS](#) “should have known that it promised pension benefits to Watermaster employees even though [PERSCalPERS](#) would later claim it was unauthorized to provide those benefits because of the manner in which Watermaster approves the hiring of personnel.” (Ex. 268, p. 34.) This fanciful argument has no evidentiary support. [PERSCalPERS](#) made no promise to either respondent, direct or implied, that the pay pursuant to either of respondent’s employment contracts was the proper compensation as legally defined for use in the formula to determine his retirement benefit. [PERSCalPERS](#) has no way to predict when a member will file for retirement benefits and its duty to review and determine the appropriate components to use in the formula arises only when retirement occurs. [PERSCalPERS](#) did not mislead respondent in any way, nor is there any evidence present indicating that respondent relied on [PERSCalPERS](#) to any extent.

D. Nor is this claim viable as a matter of law. If section 20636 and/or Regulation 570.5 preclude a portion of pay from being considered, [PERSCalPERS](#) cannot be ordered to pay a pension based on the excluded portion, notwithstanding any failure to timely notify the member of a problem or promises made by the employer. (*City of Pleasanton v. Board of Administration of the California Public Employees’ Retirement System* (2012) (211 Cal.App.4th 522, 543-544.) Nor will these theories justify forcing [PERSCalPERS](#) to violate the mandates of the PERL. (*Chaidez v. Board of Administration of the California Public Employees’ Retirement System* (2014) 223 Cal.App.4th 1425, 1431-1432, as modified (Feb. 27, 2014), review denied (May 14, 2014).) Finally, for estoppel to apply against a government agency that had no legal authority to do what it is requested to do, it must be shown that “the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.” (*City of Long Beach v. Mansell, supra*, 3 Cal.3d 462 at pp. 496-497.) In this case, respondent failed to establish that an injustice would result if his final compensation is not based on compensation that was not made publicly known by an available pay schedule.

26. Fiduciary Duty. While respondent cites the elements for breach of fiduciary duty, he simply states [PERSCalPERS](#) breached its fiduciary duty to him, without any explanation of how or when that happened and no citation to any evidence in the record. The failure to cite to any part of the record supporting this claim means respondent waived his argument. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.)

27. Laches. Respondent argues the doctrine of laches applies to this case, but he does not cite the elements of laches in his closing brief. In a prior appellate case against PERSCalPERS, it was held that the “defense of laches requires unreasonable delay plus either acquiescence in the act about which [petitioner] complains or prejudice to the [respondent] resulting from the delay.” (*City of Oakland v. Public Employees’ Retirement System* (2002) 95 Cal.App.4th 29, 51.) In this case, neither element was demonstrated by respondent. He argues PERSCalPERS has known since the inception of its contract with the Watermaster “that it might later disallow the use of Watermaster salaries approved in confidential session of the Watermaster Board.” (Ex. 268, p. 35.) That argument is beyond fanciful and has no evidentiary support in the record whatsoever. Moreover, respondent completely fails to describe how the alleged delay caused him prejudice. “The failure to provide an explicit prejudice analysis also results in a waiver.” (*City of Oakland v. Public Employees’ Retirement System, supra*, 95 Cal.App.4th at 52.)

28. Based on the above, respondent and Watermaster failed to meet their burden of establishing by a preponderance of the evidence that respondent’s compensation during his one year six months of employment by Watermaster qualifies as compensation earnable that can be used in calculating respondent’s retirement benefit. PERSCalPERS’s determination, in this regard only, was correct. Respondent proved no legally viable defense or claim that would obviate PERSCalPERS’s determination, as he failed to establish the elements of estoppel, laches, breach of fiduciary duty or any other argument made by respondent in his briefs. (Factual Findings 1-50; Legal Conclusions 1-27.)

#### ORDER

The appeals of respondents Desi Alvarez and Chino Basin Watermaster are denied. The determination of complainant is affirmed.

January 17, 2017