Memorandum

DATE: November 19, 2021

TO: Members of the Board of Retirement

FROM: Suzanne Jenike, Assistant CEO, External Operations

SUBJECT: **DA-2 APPLICATION OF JAMES B. MORELL FOR A RECALCULATED RETIREMENT ALLOWANCE – ON REMAND FROM THE LOS ANGELES COUNTY SUPERIOR COURT AFTER JUDGMENT ON PEREMPTORY WRIT OF MANDATE**

Recommendation

Staff recommends that the Board: (1) set aside its prior administrative decision of October 18, 2018 in this matter, and (2) reconsider the Application of James B. Morell for a Recalculated Retirement Allowance in light of the Superior Court's Judgment and Writ, wherein the Board is directed by the Court to decide the Applicant's contentions that OCERS improperly excluded Optional Benefit Plan payments from the calculation of his final compensation separate and apart from the 2002 Settlement Agreement in *In re Retirement Cases*, Judicial Council Coordination Proceeding No. 4049 in San Francisco County Superior Court.

Background

This matter began as an appeal to the OCERS Director of Member Services and CEO by OCERS member, James B. Morell (Morell), of OCERS' staff's determination to exclude Optional Benefit Plan (OBP) payments from Morell's compensation earnable. Both the Director of Member Services and the CEO upheld OCERS' staff's determination, and Morell then sought review of the determination by the OCERS Board.

On August 17, 2015, the Board denied Morell's request to include OBP benefits in compensation earnable for purpose of calculating his final average salary and retirement allowance. Morell timely requested an administrative hearing to challenge the Board's decision; and an administrative hearing was held on May 5, 2017, before Hearing Officer Snider.

On November 29, 2017, Hearing Officer Snider issued his Findings of Fact, Conclusions of Law, and Recommended Decision. He recommended that "the computation of [Morell's] retirement allowance be maintained as accurate in light of the 2002 agreement that settled the litigation between OCERS and its membership class and associations" in the *In re Retirement Cases* following the *Venutra* decision ("2002 Settlement Agreement"). He further recommended that "the Board reexamine the portion of the settlement that excludes from pensionability flexible benefits received by employees as taxable cash, and that the Board consider pursuing an amendment of the Superior Court judgment on

the basis that it precludes taxable cash received under the Optional Benefit Plan from counting in the determination of final compensation."

The Hearing Officer's recommendations were presented to the Board at its August 20, 2018 meeting. On August 20, 2018, the Board voted to set aside the Hearing Officer's recommendations and thereafter denied Morell's appeal on the grounds "(a) that OCERS and [Morell were] bound by the Settlement Agreement and Judgment, and (b) that OCERS did calculate [Morell's] retirement allowance in accordance with the Settlement Agreement and Judgment." Based on its determination in reliance upon the 2002 Settlement Agreement, the Board issued its Findings of Fact, Conclusions of Law and Decision on October 18, 2018.

On January 15, 2019, Morell filed a Petition pursuant to Code of Civil Procedure section 1094.5 in the Orange County Superior Court to challenge the Board's administrative decision to apply the 2002 Settlement Agreement to exclude the OBP benefits from the base compensation upon which Morell's retirement benefits were calculated.[1] On August 21, 2020, the Court denied the writ petition on the grounds that the terms of the 2002 Settlement Agreement that excluded OBP payments from pensionable treatment applied to Morell; and held that OCERS had properly calculated Morell's retirement benefits under the agreement.

Morell timely moved for reconsideration of the court's ruling on the writ petition, based in part on new case authority, *Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association* (2020) 9 Cal.5th 1032, which held in part that a county retirement board's settlement agreement must comport with the terms of the CERL. On reconsideration, the Court granted, in part, the writ petition due to the fact that the Board had only determined that Morell's OBP benefits were not pensionable under the 2002 Settlement Agreement, but had not evaluated whether the OBP benefits were pensionable under the CERL. Accordingly, the Court issued a writ directing the Board to set aside its decision dated October 18, 2018, and to reconsider the case on remand.

The Court's Judgment and Writ instructed the Board that on remand "the Board shall <u>not</u> limit the issues for consideration to (1) whether OCERS and [Morell] were bound by the 2002 Settlement Agreement and the judgment entered thereon, and (2) whether [Morell's] retirement allowance had been calculated in accordance with the Settlement Agreement and judgment. Board shall decide [Morell's] contentions that OCERS improperly excluded OBP benefits from the calculation of his final compensation separate and apart from the Settlement Agreement."

Thus, in the present administrative proceeding on remand, the issue before the Board is whether the exclusion of OBP payments from "compensation earnable" under OCERS Board Resolution 98-001 was

[1] Because Morell formerly worked at the Orange County Superior Court (a participating employer in OCERS), the Orange County Superior Court reassigned the case to Los Angeles Superior Court pursuant to Government Code section 69740(b).

valid under the CERL at the time Morell retired in 2014, notwithstanding the 2002 Settlement Agreement.

Notice to Morell

On September 17, 2021, OCERS served a notice on Morell informing him that the OCERS Board would hear this matter at its December 13, 2021 meeting, and that the issue to be addressed is: "whether OCERS' Resolution 98-001's exclusion of Optional Benefit Plan ("OBP") pay items was valid under the County Employees' Retirement Law of 1937, codified at Government Code §§ 31450 et seq. ("CERL") at the time Petitioner James B. Morell retired in 2014, notwithstanding the 2002 Settlement Agreement applicable to OCERS?"

The notice also established a schedule for the parties to submit briefs and evidence for the Board's consideration prior to the December 13 Board meeting. The notice also specified that both parties shall have 20 minutes to present their respective positions to the Board, followed by questions from the Board.

Positions of the Parties

The positions of the parties in this matter are set forth in their respective briefs, which have been submitted to the Board.

Materials Provided to the Board for Consideration:

- Morell's Opening Brief and Evidence; Declaration of Morell and Evidence
- OCERS' Amended Opening Brief, Declaration of Dawn Matsuo and Evidence
- Morell's Response Brief
- OCERS' Response Brief; Supplemental Declaration of Dawn Matsuo and Evidence
- Electronic copy of the Bates' stamped Administrative Record in this matter

Submitted by:

SJ-Approved

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BEFORE THE BOARD OF RETIREMENT OF THE

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

In the Matter of the Service Retirement Benefits of **JAMES B. MORELL** Applicant.	**AMENDED ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM'S OPENING BRIEF ON REMAND; Amended Declaration of Dawn M. Matsuo and Exhibits**

I. BACKGROUND AND PROCEDURAL HISTORY

James B. Morell ("Morell") was employed by the Orange County Superior Court as a research attorney for approximately 21 years, from August 1992 to February 2014. Morell became a member of Orange County Employees Retirement System ("OCERS") on October 14, 1994, and retired on February 21, 2014. (*See* Dawn M. Matsuo Amended Declaration ("Matsuo Am. Decl.") Ex. G at ¶ 2, AR 0023, 0034.) When calculating Morell's final average salary, OCERS excluded from his compensation Optional Benefit Plan ("OBP") payments he received from his employer pursuant to the Orange County Superior Court's IRS Section 125 Plan. (Matsuo Am. Decl, Ex. C (Morell's Petition for Administrative Mandate) at ¶1.)

"Section 125 Plan" refers to "Cafeteria Plans" permitted under 26 U.S.C. § 125, the Internal Revenue Code. Under Section 125 of the Internal Revenue Code, a "Cafeteria Plan" allows for pretax treatment of benefits provided under such plan, even if an employee opts to receive cash in lieu of the specified benefits. Under the Orange County Superior Court's IRS Section 125 Plan, the OBP is a program "where

OBP credits can be allocated by pay for certain benefits." (Matsuo Am. Decl., Ex. G at ¶ 7, AR 0792.) Morell alleges that the Orange County Superior Court's IRS Section 125 Plan provided for $3,500.00 in annual OBP payments, which he contends should be pensionable. (Matsuo Am. Decl., Ex. C (Morell's Petition for Administrative Mandate) at ¶¶1-5.)

Morell contends that the OBP payments he received in varying amounts in his final compensation period should be included as "compensation earnable" for purposes of calculating his final average salary and ultimate retirement allowance. Specifically, Morell claims that he "received non-taxable health/dental care reimbursement payments in the total amounts of $2,500.00 in 2011, $700.00 in 2012, $2,500.00 in 2013, and $1,100.00 in early 2014. The remainder of the $3500 benefit was paid as taxable cash ($1,000.00 in 2011, $2,800.00 in 2012, $1,000.00 in 2013, and $2,400.00 in 2014.)" (*Id.* at ¶5.) Upon Morell's retirement in February 2014, OCERS' staff excluded the OBP benefit received by Morell when calculating his retirement allowance.

Morell appealed OCERS' staff decision to exclude the OBP benefits from compensation earnable to the OCERS Director of Member Services and CEO. (Matsuo Am. Decl., Ex. G at ¶ 2, AR 0034-0035, 0043-0047.) When both agreed that the OBP benefits should not be included in Morell's compensation earnable, Morell appealed to the OCERS Board of Retirement ("Board"). On August 17, 2015, the Board denied Morell's request to include OBP benefits in compensation earnable for purpose of calculating his final average salary and retirement allowance. (Matsuo Am. Decl., Ex. G at ¶ 4, AR 0101, See Transcript of August 17, 2015 Board Meeting, ¶ 25, AR 0104-0138.) Morell timely requested an administrative hearing to challenge the Board's decision. The hearing was held on May 5, 2017, before Hearing Officer Snider. (AR 0151, 0864-0991.)[1]

On November 29, 2017, Hearing Officer Snider issued his Findings of Fact, Conclusions of Law, and Recommended Decision. He recommended that "the computation of [Morell's] retirement allowance be maintained as accurate in light of the 2002 agreement that settled the litigation between OCERS and its membership class and associations" following the *Venutra* decision ("2002 Settlement Agreement") and that "the Board reexamine the portion of the settlement that excludes from pensionability flexible

[1] Documents designated with only "AR" are not attached to Matsuo Declaration, but are a part of the Administrative Record.

benefits received by employees as taxable cash, and that the Board consider pursuing an amendment of the Superior Court judgment on the basis that it precludes taxable cash received under the Optional Benefit Plan from counting in the determination of final compensation." (Matsuo Am. Decl., Ex. G at ¶10, AR 1054, 1072.)

The Hearing Officer's recommendations were presented to the Board at its duly noticed public meeting on August 20, 2018. In advance of its August 20, 2018, meeting the Board received and reviewed a transcript and summary of all of the testimony given at the administrative hearing, plus all other evidence received by the Hearing Officer in connection with the matter, pursuant to the County Employees Retirement Law of 1937 ("CERL"), Government Code section 31534. Subdivision (b) of Government Code section 31534 provides that, upon receipt of the transcript and summary of all evidence, "the board shall take such action as in its opinion is indicated by such evidence."

On August 20, 2018, the Board voted to set aside the Hearing Officer's recommendation and to proceed pursuant to Government Code section 31534 subdivision (b). The Board thereafter denied Morell's appeal on the grounds "(a) that OCERS and [Morell were] bound by the Settlement Agreement and Judgment, and (b) that OCERS did calculate [Morell's] retirement allowance in accordance with the Settlement Agreement and Judgment." (Matsuo Am. Decl., Ex. G at ¶17, AR 2058, 2065-2067.) The 2002 Settlement Agreement incorporated the Board's Resolution 98-001, which was adopted by the Board in response to the *Ventura* decision. Resolution 98-001 delineates what items of compensation are included and what items of compensation are excluded from "compensation earnable", and specifically excluded flexible cafeteria benefits such as OBP benefits. (Matsuo Am. Decl., Ex. G at ¶2.F, AR 0057-0061.) Based on its determination in reliance upon the 2002 Settlement Agreement, the Board issued its Findings of Fact, Conclusions of Law and Decision on October 18, 2018. (Matsuo Am. Decl., Ex. G at ¶23, AR 2208-2215.)

On January 15, 2019, Morell filed a Petition pursuant to Code of Civil Procedure section 1094.5 in the Orange County Superior Court to challenge the Board's administrative decision to apply a 2002 Settlement Agreement to exclude the OBP benefits provided through the Orange County Superior Court's IRS Section 125 Plan from the base compensation upon which Morell's retirement benefits were calculated. (Matsuo Am. Decl., Ex. C.) Initially, on August 21, 2020, the Court denied the writ petition

on the grounds that the terms of the 2002 Settlement Agreement that excluded OBP payments from pensionable treatment applied to Morell, and OCERS had properly calculated Morell's retirement benefits under the agreement. (Matsuo Am. Decl., Ex. D (8/21/20 Minute Order).) Morell timely moved for reconsideration of the court's ruling on the writ petition, based in part on new case authority, *Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association* (2020) 9 Cal.5th 1032, which held in part that a county retirement board's settlement agreement must comport with the terms of the CERL. On reconsideration the Court granted, in part, the writ petition due to the fact that the Board had only determined that Morell's OBP benefits were not pensionable under the 2002 Settlement Agreement, but had not evaluated whether the OBP benefits were pensionable under the CERL. (Matsuo Am. Decl., Ex. F (Judgment).) Accordingly, the Court issued a writ directing the Board to set aside its decision dated October 18, 2018, and to reconsider the case on remand. (Matsuo Decl., Ex. E (Writ).)

The Court instructed that on remand "the Board shall not limit the issues for consideration to (1) whether OCERS and [Morell] were bound by the 2002 Settlement Agreement and the judgment entered thereon, and (2) whether [Morell's] retirement allowance had been calculated in accordance with the Settlement Agreement and judgment. Board shall decide [Morell's] contentions that OCERS improperly excluded OBP benefits from the calculation of his final compensation separate and apart from the Settlement Agreement." (Matsuo Am. Decl., Ex. F (Judgment, page 11 of the Court's May 20, 2021 ruling.).)

Thus, in the present administrative proceeding on remand, the issue before the Board is whether the exclusion of OBP payments from "compensation earnable" under OCERS Board Resolution 98-001 was valid under the CERL at the time Morell retired in 2014, notwithstanding the 2002 Settlement Agreement.

II. PAYMENTS FOR OPTIONAL BENEFIT PLANS WERE PROPERLY EXCLUDED FROM COMPENSATION EARNABLE BASED UPON THE ORANGE COUNTY BOARD OF SUPERVISORS' RESOLUTION ADOPTING GOVERNMENT CODE SECTION 31460.1

OCERS Board Resolution 98-001 and OCERS' decision to exclude Morell's OBP benefits from compensation and compensation earnable incorporated existing law, i.e., Government Code section 31460.1 (an optional carve-out) ("Section 31460.1) and the Orange County Board of Supervisors

("BOS") Resolution 90-1551. Both Section 31460.1 and BOS Resolution 90-1551 were applicable in Orange County in 2014 when Morell retired and both remain valid and enforceable in Orange County to this day. Moreover, as more fully explained below, even absent the BOS Resolution 90-1551 and Section 31460.1, the OCERS Board had (and has) the authority – independent of BOS Resolution 90-1551 and Section 31460.1 – to determine that flexible benefits such as Morell's OBP payments did not qualify as "compensation earnable" under OCERS Resolution 98-001 at the time Morell retired in 2014.

A. OBP Payments Excluded by Section 31460.1 and BOS Resolution 90-1551

"CERL contains a collection of alternative pension provisions tailored to individual counties and subsets of workers within those counties. (See, e.g., §§ 31486, 31487, 31496, 31499, 31511, 31676.01-31676.19.)" (*Alameda* 9 Cal.5th at 1055.) Some provisions of the CERL are mandatory and some are optional and become effective only by action taken by each county Board of Supervisors. Some of these optional provisions are "carve-outs" from the general definitions of "compensation" and "compensation earnable" found in Government Code sections 31460 and 31461(a).

There are several such optional "carve-outs" available to CERL counties – *see*, for example, similar exclusions from "compensation" and "compensation earnable" adoptable only by the Los Angeles County ("county of the first class") Board of Supervisors in sections 31461.1, 31461.4 and 31461.45; the carve-outs found in CERL sections 31461.5 and 31461.6 for certain cash payments that otherwise might be considered "compensation" and "compensation earnable"; the one-year "final compensation period" found in subdivision (a)(2) of section 31462.1 ("This section shall not be operative in any county until such time as the board of supervisors shall, by resolution adopted by a majority vote, make the provisions of this section applicable in such county.") instead of the three-year average period found in section 31462; and the multiple optional benefit formulas found in CERL sections 31676 et seq. (*See, e.g.,* section 31676.01 ("This section shall be operative in a county at such time or times as may be mutually agreed to in memoranda of understanding executed by the employer and employee representatives if the board of supervisors adopts, by majority vote, a resolution declaring that the section shall be operative in the county.")[2]

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[2] *Alameda* recognizes that some provisions of the CERL provide alternate, more restrictive, conditions for defining "compensation" and "compensation earnable" that some counties may adopt. *See Alameda County Deputy Sheriff's*

The Legislature has structured the CERL to provide each county adopting its general scheme both a core defined benefit plan with uniform characteristics, plus a menu of optional provisions for selection by local authorities. There is no case in California that finds a county's adoption of a CERL "carve-out" option approved by the Legislature violates the terms of the remaining general law.

Section 31460.1 was one of many optional CERL provisions that counties could adopt or not adopt, to tailor their benefit structures to their own unique local conditions. On June 15, 1990, the Legislature enacted Section 31460.1, which read:

> 'Compensation' shall not include employer payments, including cash payments, made to, or on behalf of, their employees who have elected to participate in a flexible benefits program, where those payments reflect amounts that exceeds their employees' salaries. (Matsuo Am. Decl., Ex. A (Former Gov. Code §31460.1; See *Howard Jarvis Taxpayers' Assn. v. Board of Supervisors* (1996) 41 Cal.App.4th 1363, 1367.)

Section 31460.1 was an elective statute, meaning that it was not operative in any county until adopted by that county's Board of Supervisors. (Matsuo Am. Decl., Ex. A (Former Gov. Code § 31460.1, subd. (b).)

On December 18, 1990, via Resolution 90-1551, the BOS adopted Government Code section 31460.1, and it became effective January 1, 1991. (Matsuo Am. Decl., Ex. G at ¶6, AR 2056-2057.) Thus as of January 1, 1991, in Orange County, "compensation" (as otherwise defined by Government Code section 31460) **DID NOT INCLUDE** employer payments, including cash payments, paid to or on behalf of employees who elected to participate in a flexible benefits program. Accordingly, at the time Morell began working for the Orange County Superior Court in 1992, the BOS had excluded flexible benefit payments (such as OBP payments) from the definition of "compensation" under Government Code section 31640.

The Legislature, however, on May 11, 1992, repealed Section 31460.1 by Senate Bill No. 193 (1991–1992 Reg. Sess.) ("Senate Bill No. 193."), but provided a savings clause in the repeal bill to allow

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Association v. Alameda County Employees' Retirement Association (2020) 9 Cal.5th 1032, at fn.7: "CERL contains a few alternative definitions of compensation earnable applicable in specific circumstances. (See, e.g., §§ 31461.1, 31461.4, 31461.45 [all applicable only to Los Angeles County…" Of course, that does not make those alternate provisions inconsistent with CERL, but rather part and parcel of the overall statutory scheme.

the continued validity of any prior action taken by a county to exclude flexible benefits from the definition of "compensation" under the CERL. (Matsuo Am. Decl., Ex. B; Senate Bill No. 193.) Specifically, Senate Bill No. 193 provided in part that, "**Nothing in this act is intended to, or shall be construed to, affect the validity of any action taken by a county pursuant to Section 31460.1 of the Government Code, prior to the effective date of this act.**" (Matsuo Am. Decl., Ex. B, ¶3, Gov. Code, § 31460.1, notes.) Thus, any action taken by any county pursuant to Section 31460.1 prior to May 11, 1992, remained valid, and continues to be valid today.

Because the BOS adopted Section 31460.1 via Resolution 90-1551 prior to May 11, 1992, Section 31460.1 is still valid in Orange County. BOS Resolution 90-1551 made Section 31460.1 operative in the County of Orange, thereby excluding from "compensation" payments made by an employer to an employee or on behalf of an employee, for that employee's participation is a flexible benefit plan. This includes OBP benefits provided pursuant to the Orange County Superior Court's IRS 125 Plan.

As a result, under BOS Resolution 90-1551, OBP payments are excluded from the CERL definition of "compensation" in OCERS retirement benefit calculations. Retirement benefit calculations involve "a logical progression … under which a pension is calculated. Application of section 31460 is the first step, since an item must meet its broad definition of 'compensation' if it is also to fall within the narrower category of 'compensation earnable' defined in section 31461 and thus form the basis for the calculation of 'final compensation' on which the pension is based pursuant to section 31462 or 31462.1." (*Ventura County Deputy Sheriffs' Assn. v. Board of Retirement County* (1997) 16 Cal.4th 483, 493-494.) Thus, OBP payments fail to meet the threshold requirement of qualifying as "compensation" by reason of BOS Resolution 90-1551. Indeed, the Court of Appeal confirmed this conclusion in *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 479-481, which was decided in 2003 after the 1997 *Ventura* decision. In *In re Retirement Cases*, the Court examined whether flexible benefit plans were included within the definition of "compensation". Petitioners in that case "assert[ed] that an employer's [] **cash payments into members' flexible benefit plans that were used to pay insurance premiums for the member (and/or cash payments to purchase benefits for the members)** … should be included in the calculations of their pension benefits." (*In re Retirement Cases* at 477.)

The Court in *In re Retirement Cases* considered the legislative history surrounding Section 31460.1 and the reason provided by the Legislature for repealing it. The Court looked at the language of Senate Bill No. 193, which provided in part:

> "Sec. 3. The Legislature hereby finds and declares that: [¶] ... [¶] (3) Section 31460.1 has been erroneously construed as implicitly requiring counties maintaining retirement systems under the 1937 act to include in 'compensation' those flexible benefits payments until the board of supervisors elect pursuant to that section to exclude those flexible benefits payments from 'compensation.' [¶] (4) That interpretation was not intended by the Legislature when it enacted that section." (*In re Ret. Cases* at 479.)

Based on that legislative history, the Court rejected the plan member's argument that "Senate Bill No. 193 did not change the definitions in sections 31460 and 31461 and further noted that the Legislature expressed its intent that it never considered inclusion of flexible benefits to be mandatory under CERL." (*Id.*) Because Senate Bill No. 193 clarified the Legislature's intention regarding former Section 31460.1 and did so within just two years after enacting this statute, it "must be accepted as the legislative declaration of the meaning of section 31460.1 and its interpretation of the requirements under CERL." (*In re Ret.Cases. at* 481.)

The Court of Appeal then concluded: "the Legislature [] expressed its intent not to include **employer payments into flexible benefit plans** and payments of insurance carrier premiums as "compensation" under CERL, which is consistent with the language of CERL, in harmony with the statutory framework of CERL as a whole, **and consistent with the interpretation of CERL as set forth in *Ventura.*** Accordingly, we conclude the trial court properly found that CERL did not require these payments to be included in the calculation of retirement benefits." (*Id.*)

Therefore, *In re Retirement Cases* confirms that the Legislature intended to leave intact any county act (such as BOS Resolution 90-1551) that excluded flexible benefit payments (such as OBP payments) from the CERL definition of "compensation" and thus from a member's retirement benefit calculations.

In sum, legislative history and case law demonstrate that the Legislature amended the CERL to provide counties with the option of explicitly excluding the flexible benefit plans from the meaning of "compensation", and thus precluding the retirement boards from being able to include this type of

benefit in retirement calculations. The BOS exercised its right to bar the OCERS Board from including the flexible benefits payments in "compensation" when the BOS adopted Section 31460.1. The OCERS Board continues to be bound by the actions of the BOS. Accordingly, the OCERS Board correctly calculated Morell's retirement benefit by excluding the OBP payments he received, either directly or indirectly, under his employer's flexible benefit plans, from "compensation" and thus from "compensation earnable", and ultimately from his final average compensation.

B. OBP Benefits Are Excluded under OCERS Resolution 98-001

In 1998, in response to the *Ventura* decision the OCERS Board adopted Resolution 98-001 based on the BOS Resolution 90-1551, and delineated what was included and what was excluded from "compensation earnable," – the second step in pension calculations. (Matsuo Am. Decl., Ex. G at ¶2.F, AR 57 and ¶2.H, AR 87-89); *Ventura at pp.* 493-494.) On February 6, 1998, the OCERS Board adopted Resolution 98-001, which states in relevant part:

> Elements to be Excluded From "Compensation Earnable".
> Remuneration or other value to the employee neither earned or payable in cash to the employee during the final compensation period for working the ordinary time required of other employees in the same grade/class shall be excluded from "compensation earnable", including but not limited to the following items, and others substantially similar to them:
>
> . . .
>
> Flexible Benefits ("Cafeteria Plan") provided in-kind
> Flexible Benefits ("Cafeteria Plan") paid in cash to the extent paid to members retiring on and after January 1, 1991" (Matsuo Am. Decl., Ex. G at ¶2.F, AR 57, 59.)

The OCERS Board has the authority to determine what is "compensation earnable" under the terms of the CERL. When the BOS adopted section 31460.1 the OCERS Board had no discretion, it was compelled to exclude flexible benefits from compensation. The Board was required to abide by the BOS resolution. The Board then exercised its quasi-legislative power to make that determination under Resolution 98-001. (Gov. Code, § 31461 ("'Compensation earnable' by a member means the average compensation as determined by the board....").)

If prior to the enactment of Section 31460.1 it was not mandatory that retirement systems include payments made pursuant to an employer's flexible benefit plans in the definition of "compensation," then

the decision as to whether to include or exclude it from "compensation earnable" rested with the county board of retirement.

This legal principle was recognized by the Court of Appeal in the case of *Howard Jarvis Taxpayers Assn. v. Board of Supervisors* (1996) 41 Cal.App.4th 1363. ("*Howard Jarvis*"). In January 1991, the Los Angeles County Employees Retirement Association (LACERA) started including the Los Angeles County's flexible benefit plan contributions in "compensation earnable" within the meaning of CERL, which resulted in increased future retirement benefit payments for eligible participating Los Angeles County employees. A taxpayer group filed a civil action against the Los Angeles Board of Supervisors contending that it "unlawfully included certain flexible benefits in computation of 'compensation earnable' for the purposes of calculating retirement benefits to county employees."

The flexible benefit plans at issue in the *Howard Jarvis* case are similar to the flexible benefit plan at issue in Morell's case. "The benefit plans provided for additional remuneration that could either be received in cash or be used to pay for certain benefits such as health, dental, life, or disability insurance. The benefit plans were designed to meet the requirements of section 125 of the Internal Revenue Code, which allows the benefits to be treated on a pre-tax basis, even though employees had the option of receiving cash in lieu of benefits." (*Howard Jarvis Taxpayers,* 41 Cal.App.4th at p. 1367.)

The Court of Appeal in *Howard Jarvis* focused on the issue of which entity, the County of Los Angeles, the Board of Retirement or LACERA, had the authority to make the decision to include the flexible benefit plan contributions into compensation earnable. The Court noted that "[b]y statute, the management of a county employee retirement system is vested with the board of retirement. (Gov. Code, § 31520.) A county Board of Retirement does not act as an agent for the county, but as an independent entity established pursuant to CERL." (*Howard Jarvis Taxpayers,* at p. 1373.) "Thus, the Board of Retirement is vested with the authority to determine which elements of compensation constitute "compensation earnable" for purposes of inclusion or exclusion from calculation of 'final compensation.'" (*Id.*) "Thus, the Board of Retirement has the statutory authority to determine which items of remuneration are included in the calculation of retirement benefits, consistent with section 31460." (*Id.* at p. 1374.) The Court noted "that recent additions and amendments to CERL authorize the County's legislative body, the Board of Supervisors, to take action to exclude flexible benefit payments

at its option. Implicit in these provisions is recognition that such benefits could properly be included in the calculation of retirement-eligible compensation by the Board of Retirement." (Id. at p. 1376.) Note, **the inclusion of these benefits "could properly be included" but it was not mandatory that they be included within the definition of "compensation."**

If the inclusion of flexible benefit plans within the meaning of "compensation" was not mandatory prior to the enactment of Section 31460.1, but allowable; and the OCERS Board had the authority to include or exclude it, then Morell has no legal justification to reverse the decision OCERS' staff made to exclude the OPB payments, even absent Section 31460.1 and BOS Resolution 90-1551.

The Superior Court recognized this point of law when issuing its Tentative Decision Re: Orange County Resolution 90-1551 (Matsuo Am. Decl., Ex. G at ¶2E, AR 0054-0056), stating:

> When former section 31460.1 was enacted, the obligation to include cash payments received in lieu of flexible benefits in compensation was at best uncertain. . . . When plan members accepted employment prior to the enactment of former section 31460.1 and the adoption of Resolution 90-1551, the parties could not reasonably have anticipated that the cash payments in question would be included in pension calculations. Certainly the OCERS Board had no such expectation since, even prior to the adoption of resolution 90-1551, these benefits were not being included in pension calculations, . . . (Matsuo Am. Decl., Ex. G at ¶2.H, AR 55.)

Given that nothing in the CERL required that flexible benefit payments be treated as mandatorily pensionable pay items, the OCERS Board had the authority to exclude them under the CERL, even before the Legislature's enactment of Section 31460.1, which the BOS adopted for Orange County. Therefore, the OCERS Board Resolution 98-001 itself comports with the terms of the CERL, regardless of the BOS action or the repeal of Section 31460.1 as a matter of law. Morell's OBP payments fall within the ambit of the exclusions provided in the OCERS Board Resolution 98-001, and the OCERS staff properly excluded them from his retirement calculations.

III. MORELL SATISFIED THE REQUIREMENTS OF SECTION 31460.1 AT THE TIME OF HIS RETIREMENT

Section 31460.1 requires (1) employer payments made to or on behalf of their employees, (2) employees that have "elected to participate in the flexible benefits program and (3) payments that exceed the employee's salary." Morell argues that Section 31460.1 did not apply to him because he did not "elect to participate" and because the payments for the flexible benefit plan were not "amounts that

exceeded his salary." (Matsuo Am. Decl., Ex. G at ¶2.E, AR 53 and ¶9, AR 0955-0957.) Morell is wrong for two reasons.

First, the record shows that Morell **did** elect to participate in the OBP flexible benefit plan each year when he made his election on the allocation of his OBP Dollars. The OBP plan is set forth in the County of Orange Section 125 Plan ("Plan Document"). The Plan Document defines "Enrollment Documentation" as "the documentation, whether by paper form or electronic submission, established and provided by Employer for use by the Participant to elect the type of benefits and the amount of Salary Redirection contributions and the amount of OBP Dollar credit allocations he or she desires, or to change or discontinue contributions or allocations altogether." (Matsuo Am. Decl., Ex. G at ¶7, AR 0752-0755, 0758-0761, 0766, 0791-0792.) The "Application to Participate" required the employee to complete and submit the "Enrollment Documentation" and the elections made pursuant to the Enrollment Documentation were irrevocable until the end of the applicable period. (Matsuo Am. Decl., Ex. G at ¶7, AR 0756.) Thus, by submitting his elections each year, Morell was electing to participate in the OBP flexible benefit plan. (*See* Matsuo Am. Decl., Ex. C (Writ Petition) at ¶¶ 1& 4. (identifying years of participation).)

Second, the Salary Redirection is separate and apart from the OBP Dollars, and the Plan Document distinguishes between the two. Salary Redirection "means the portion of Benefits attributable to contributions made by the Employer on behalf of [employees] pursuant to Section 3.1 of the Plan." (Matsuo Am. Decl., Ex. G at ¶7, AR 0754.) Section 3.1 provides that employees that are eligible for the OBP Dollars will have the OBP credits allocated and their compensation reduced in an amount equal to the amount of contributions elected pursuant to Section 4. (Matsuo Am. Decl., Ex. G at ¶7, AR 0759.) Section 4 sets out the benefits the OBP Dollars and the Salary Redirection can each be allocated to. OBP benefits cannot be allocated to premium only plan benefits or Dependent Care Reimbursement Accounts Benefits (Matsuo Am. Decl., Ex. G at ¶7, AR 0761) while Salary Redirection can be used for both. OBP Dollars can be allocated to a Health Care Reimbursement Account and Accidental Death and Dismemberment Premiums Payroll Credit Benefit, but Salary Redirection cannot apply to either. (Matsuo Am. Decl., Ex. G at ¶7, AR 0761.)

The Plan Document further distinguishes between OBP Dollars and Salary Redirection by permitting changes to be made to Salary Redirection elections, yet those changes do not apply to OBP Dollar allocations. (Matsuo Am. Decl., Ex. G at ¶7, AR 0762.) A distinction is seen once again between the OBP Dollars and the Salary Redirection when the Plan Document defined OBP Dollars. "OBP Dollars means the amounts, **other than Salary Redirection amounts**, credited to an OBP Eligible Employee and attributable to contributions made by the Employer on behalf of a Participant to be allocated in accordance with the Participant's Benefit elections under Section 3. The amounts of OBP Dollars are described in Section 4.2." (Matsuo Am. Decl., Ex. G at ¶7, AR 0754.)

Employees must enter into a Salary Redirection Agreement, which is defined as "an agreement set forth in the Enrollment Documentation between the Participant and the Employer under Section 3.1 of the Plan where the Participant agrees to reduce his or her Compensation and to have such amounts contributed by the Employer to the Plan on the Participant's behalf. The Salary Redirection Agreement shall apply only to Compensation that has not been actually or constructively received by the Participant as of the date of the Salary Redirection Agreement (after taking this Plan and Code Section 125 into account) and, subsequently does not become currently available to the Participant." (Matsuo Am. Decl., Ex. G at ¶7, AR 0793-0794.)

The Plan provides that the employer will credit OBP eligible employees with a specific amount of OBP Dollars each year, and that the OBP dollars "are determined by the Employer in its discretion." (Matsuo Am. Decl., Ex. G at ¶7, AR 0801.) Any portion of the OBP Dollars not used in the plan period "shall remain court or County Funds." (Matsuo Am. Decl., Ex. G at ¶2.F, AR 0053.). The Plan Documents clearly establish that the OBP Dollars are not the same as the Salary Redirection and that the OBP Dollars exceed the employee's salary. Morell's employer made payments to him or on his behalf; he elected to participate in the flexible benefits program; and the OBP Dollars exceeded Morell's salary. Therefore, Section 31460.1 applies to Morell. OCERS properly excluded the OBP payments from his compensation earnable.

IV. CONCLUSION

The Board should find that OCERS staff correctly excluded from Morell's compensation earnable the OBP payments made by his employer to him or on his behalf when calculating his final average

salary based upon the BOS Resolution 91-1551, Government Code section 31460.1 and OCERS Board Resolution 98-001.

DATED: November 18, 2021

By _____
DAWN M. MATSUO
Attorney at Law

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
2223 Wellington Avenue
Santa Ana, California 92701
Telephone: 714/558-6220

Dawn M. Matsuo
Attorney for Orange County Employees
Retirement System

BEFORE THE BOARD OF RETIREMENT OF THE

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

In the Matter of the Application for Disability Retirement **JAMES B. MORELL** Applicant.	**AMENDED DECLARATION OF DAWN M. MATSUO AND ATTACHED EXHIBITS** Date: 12-13-2021 Time: 10:00 a.m. Location: Board pf Retirement 2223 Wellington Ave., Santa Ana, CA 92701

I, Dawn M. Matsuo, declare as follows:

1. I am an attorney and serve as counsel for the Orange County Employees Retirement System ("OCERS"). I make this declaration in support of OCERS' Opening Brief on Remand prepared for the OCERS' Board of Retirement ("Board") December 13, 2021 regularly scheduled meeting with regard to the James B. Morell matter on remand pursuant to the Peremptory Writ of Mandate issued to the OCERS Board in Orange County Superior Court Case No. 30-2019-01043847 ("Writ Proceeding"). The facts set forth herein are based on my own personal knowledge, and if called to testify as a witness in this action, I could and would testify competently thereto.

2. Attached hereto as Exhibit A is a true and correct copy of former Government Code section 31460.1, publicly accessible on the Westlaw database and provided here for the Board's convenience as the current copy of the statute in the administrative record is illegible. This document was filed as a part of the record to the Writ Proceeding as an exhibit to the Declaration of Maytak Chin in

support of the OCERS Board's Opposition to the Petition for Administrative Writ of Mandate, filed on July 21, 2020.

3. Attached hereto as Exhibit B is a true and correct copy of the Legislative Counsel's Digest of the 1992 Senate Bill No. 193 publicly accessible on the Westlaw database and provided here for the Board's convenience. Senate Bill No. 193 repealed Government Code section 31460.1. This document was filed as a part of the record to the Writ Proceeding as an exhibit to the Declaration of Maytak Chin in support of the OCERS Board's Opposition to the Petition for Administrative Writ of Mandate, filed on July 21, 2020.

4. Attached hereto as Exhibit C is a true and correct copy of Morell's Petition for Administrative Writ of Mandate filed on January 15, 2019 in the Writ Proceeding, which is provided here for the Board's convenience.

5. Attached hereto as Exhibit D is a true and correct copy of the August 21, 2020 Minute Order (Hearing on Petition for Writ of Mandate, Ruling on Submitted Matter.)

6. Attached hereto as Exhibit E is a true and correct copy of Preemptory Writ of Mandate filed on July 16, 2021 in the Writ Proceeding, which is provided here for the Board's convenience.

7. Attached hereto as Exhibit F is a true and correct copy of the Judgment, including Minute Order dated May 20, 2021, filed on July 16, 2021 in the Writ Proceeding and provided here for the Board's convenience.

8. Attached hereto as Exhibit G are true and correct copies of relevant pages of the Administrative Record filed in the Writ Proceeding. The Administrative Record in this matter is slightly more than 2,222 pages and has been redacted to protect the disclosure of personally identifiable information, such as birthdates, addresses, etc. The entire Administrative Record ("AR") will be available to the Board members. However, for the Board's convenience, the documents attached are true and correct copies of the relevant pages of the Administrative Record in the Writ Proceeding.

1. Morell's Online Application for Service Retirement – AR 0001-0002.

2. Memorandum to the Board dated August 17, 2015 with attachments.

Memorandum – AR 0023-0025

Attachments:

A. Member Letter to Suzanne Jenike dated June 23, 2014 – AR 0034-0035;

B. Suzanne Jenike letter to member dated September 9, 2014 – AR 0048;

C. Member Letter to Steve Delaney received by OCERS on December 1, 2014 – AR 0043-0047;

D. Steve Delaney letter to member dated March 20, 2015 – AR 0049-0051;

E. Member letter requesting appeal to the Board dated June 15, 2015 –AR 0052-0056;

F. OCERS Resolution 98-001 – AR 0057-0061;

G. Judgment (Ventura settlement) including Settlement Agreement – AR 0062-0086;

H. Tentative Decision re: Optional Benefit Payments – AR 0087-0089.

3. Personnel Policies and Regulations adopted by Orange County Superior Court December 18, 2013. – AR 0036-0038.

4. OCERS Board minutes of regular meeting dated August 17, 2015 – AR 0090, 0101.

5. Letter from Suzanne Jenike to member dated November 4, 2015 – AR 0151.

6. Board of Supervisors Resolution No. 90-1551 – AR 2056-2057.

7. Third Amended and Restated, County of Orange Section 125 Plan, Plan Document dated June 1, 2011 – AR 0744, 0749-0750, 0752-0756, 0758-0762, 0766 and 0781, 0791-0795, 0798, 0800-0801.

8. Personnel Policies and Regulations, Orange County Superior Court dated September 28, 2007 – AR 0822, 0836, 0867-0869.

9. Reporter's Transcript of Administrative Hearing held on May 5, 2017, Morell Testimony – AR 0955-0957, 0958, 0971.

10. Proposed Findings of Fact, Conclusions of Law, and Recommended Decision by Hearing Officer, Robert M. Snider dated November 29, 2017 – AR 1054, 1072.

12. Government Code section 31460, Compensation – AR 1261.
13. Government Code section 31461, Compensation Earnable – AR 1263.
14. Government Code section 31462, Final Compensation – AR 1265.
15. Morell's County of Orange Payroll Certificates – AR 1796-1799.
16. Memorandum to Board of Retirement dated August 20, 2018 – AR 1114-1120.
17. Board of Retirement Minutes dated August 20, 2018 – AR 2058, 2065-2067.
18. Reporter's Transcript of portions of videotaped proceedings of the OCERS Board's Regularly Scheduled Board Meeting on Monday, August 20, 2018 – AR 2069-2129.
19. Applicant's Objections to OCERS Staff's Proposed Findings of Fact, Conclusions of Law and Decision dated September 17, 2018- AR 2169-2173.
20. Memorandum to the Board of Retirement dated October 15, 2018 – AR 2130-2131.
21. Board of Retirement Minutes dated October 15, 2018 – AR 2141, 2152-2153.
22. Reporter's Transcript of portions of videotaped proceedings of the OCERS Board's Regularly Scheduled Board Meeting on October 15, 2018 – AR 2174-2206.
23. Findings of Fact, Conclusions of Law and Decision of the Board of Retirement dated October 18, 2018- AR 2208-2215.
24. Letter to Member from Suzanne Jenike dated October 18, 2018 – AR 2159-2160.
25. Reporter's Transcript of portions of videotaped proceedings of the OCERS Board's Regularly Scheduled Board Meeting on August 17, 2015 – AR 0104-0138.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 18th day of November 2021 in Santa Ana, CA.

By _____
DAWN M. MATSUO
Attorney at Law

Exhibit A

California Statutes Annotated - 1991

West's Ann.Cal.Gov.Code § 31460.1
WEST'S ANNOTATED CALIFORNIA CODES
GOVERNMENT CODE
TITLE 3. GOVERNMENT OF COUNTIES
DIVISION 4. EMPLOYEES
PART 3. RETIREMENT SYSTEMS
CHAPTER 3. COUNTY EMPLOYEES RETIREMENT LAW OF 1937
ARTICLE 1. GENERAL

§ 31460.1. Exclusions from compensation; operative effect of section

"Compensation" shall not include employer payments, including cash payments, made to, or on behalf of, their employees who have elected to participate in a flexible benefits program, where those payments reflect amounts that exceeds their employees' salaries.

This section shall not be operative in any county until the time the board of supervisors shall, by resolution adopted by a majority vote, makes this section applicable in that county.

1991 Pocket Part Credit(s)

(Added by Stats.1990, c. 142 (A.B.3146), § 1.)

End of Document

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Exhibit B

1992 Cal. Legis. Serv. Ch. 45 (S.B. 193) (WEST)

CALIFORNIA 1992 LEGISLATIVE SERVICE

1992 Portion of 1991-92 Regular Session

Additions are indicated by <<+ Text +>>; deletions by

<<- Text ->>. Changes in tables are made but not highlighted.

CHAPTER 45

S.B. No. 193

PUBLIC EMPLOYEES—RETIREMENT—EXCLUSIONS FROM COMPENSATION

AN ACT to repeal Section 31460.1 of the Government Code, relating to public employees, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor May 8, 1992.]

[Filed with Secretary of State May 11, 1992.]

LEGISLATIVE COUNSEL'S DIGEST

SB 193, C. Green. County employees: retirement: compensation.

A provision of the County Employees Retirement Law of 1937, which is optional to counties, excludes from the term "compensation," employer payments made to, or on behalf of, their employees who have elected to participate in a flexible benefits program, where those payments reflect amounts which exceed their employees' salaries.

This bill would repeal that section and make related legislative findings and declarations.

This bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

<< Repealed: CA GOVT § 31460.1 >>

SECTION 1. Section 31460.1 of the Government Code is repealed.

<< Note: CA GOVT § 31460.1 >>

SEC. 2. Nothing in this act is intended to, or shall be construed to, affect the validity of any action taken by a county pursuant to Section 31460.1 of the Government Code, prior to the effective date of this act.

<< Note: CA GOVT § 31460.1 >>

SEC. 3. The Legislature hereby finds and declares that:

(1) The County Employees Retirement Law has, since its original enactment in 1937 by Chapter 677 of the Statutes of 1937, conferred upon the county retirement boards the duty and power to determine which of the items of compensation paid to county employees who are members of the county retirement associations or systems would constitute "compensation earnable,"

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which, in turn, generally determines the amounts of the retirement allowances of retiring members (see Guelfi v. Marin County Employees' Retirement Assn., 145 Cal.App.3d 297 at pages 303, 305, and 307 fn.).

(2) It was in this setting that Chapter 142 of the Statutes of 1990 (Assembly Bill 3146 of the 1989–90 Regular Session) was enacted. That chapter added to the County Employees Retirement Law of 1937, Section 31460.1 of the Government Code. That section would apply to a county only if and when the board of supervisors elects to make the section applicable to the county. Section 31460.1 excludes from the term "compensation" employer payments made to, or on behalf of, their employees who have elected to participate in a flexible benefits program, where those payments reflect amounts which exceed their employees' salaries.

(3) Section 31460.1 has been erroneously construed as implicitly requiring counties maintaining retirement systems under the 1937 act to include in "compensation" those flexible benefits payments until the board of supervisors elect pursuant to that section to exclude those flexible benefits payments from "compensation."

(4) That interpretation was not intended by the Legislature when it enacted that section. Had that been the intent of the Legislature when it enacted Assembly Bill 3146, it would have been a substantial departure from the long-standing practice of the Legislature of not intruding into the county decisionmaking process regarding compensation determinations with respect to those county retirement systems (see Sections 31460 and following, Government Code).

(5) Moreover, had that been the intent of the Legislature when it enacted that section, any resulting increased costs to affected counties would have constituted state-reimbursable, state-mandated local program costs and Assembly Bill 3146 would have included in its text the determination of the Legislature of how the state should respond to the resulting state-mandated local program costs. Assembly Bill 3146, however, did not, in its text, contain any such legislative determination.

(6) It was the intent of Assembly Bill 3146 merely to accord to each county board of supervisors, at its option, the power either to preclude its county retirement board from including those flexible benefits payments in "compensation," if the county retirement board had not previously taken such action, or to supersede any previous decision of their county retirement board to include those flexible benefits payments in "compensation."

(7) In order that the source of misconstruction of legislative intent regarding the enactment of Section 31460.1 of the Government Code may be eliminated at the earliest possible time, and that any county actions taken on the basis of that misconstruction may be reversed or terminated at the earliest possible time, the Legislature finds that it is necessary to repeal Section 31460.1 of the Government Code.

(8) Any reversal or termination, on or after the effective date of this act, of county actions taken on the basis of misconstruction of the intent and meaning of Section 31460.1 of the Government Code would merely restrict county employees to those gains reasonably to be expected from their county retirement contracts and withhold unforeseen and windfall advantages which bear no relation to the fundamental theory and objective of the county retirement systems maintained pursuant to the County Employees Retirement Law of 1937 and would, therefore, not constitute an unconstitutional impairment of the county retirement contract (see Allen v. Board of Administration, 34 Cal.3d 114, at pages 119-120, 122, and 124).

<< Note: CA GOVT § 31460.1 >>

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order that the source of misconstruction of legislative intent regarding the enactment of Section 31460.1 of the Government Code may be eliminated at the earliest possible time through the repeal of that section, it is necessary that this act take effect immediately.

CA LEGIS 45 (1992)

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End of Document

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Exhibit C

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
James B. Morell
222 Avenue G
Redondo Beach, CA 90277

TELEPHONE NO.: 424-304-2865 FAX NO.:

ATTORNEY FOR (Name):

FOR COURT USE ONLY

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

JAN 15 2019

DAVID H YAMASAKI Clerk of the Court

BY A. CARBAJAL DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF
STREET ADDRESS: 700 Cuvic Center Drive West
MAILING ADDRESS:
CITY AND ZIP CODE: Santa Ana, CA 92701
BRANCH NAME: Central

CASE NAME:
Morell v. Board of Retirement

CIVIL CASE COVER SHEET

☑ **Unlimited** (Amount demanded exceeds $25,000) ☐ **Limited** (Amount demanded is $25,000 or less)

Complex Case Designation

☐ **Counter** ☐ **Joinder**

Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

CASE NUMBER: 30-2019

JUDGE: JUDGE LAYNE MELZER

DEPT: 01043847

Items 1–6 below must be completed (see instructions on page 2).

1. Check **one** box below for the case type that best describes this case:

Auto Tort
- ☐ Auto (22)
- ☐ Uninsured motorist (46)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort
- ☐ Asbestos (04)
- ☐ Product liability (24)
- ☐ Medical malpractice (45)
- ☐ Other PI/PD/WD (23)

Non-PI/PD/WD (Other) Tort
- ☐ Business tort/unfair business practice (07)
- ☐ Civil rights (08)
- ☐ Defamation (13)
- ☐ Fraud (16)
- ☐ Intellectual property (19)
- ☐ Professional negligence (25)
- ☐ Other non-PI/PD/WD tort (35)

Employment
- ☐ Wrongful termination (36)
- ☐ Other employment (15)

Contract
- ☐ Breach of contract/warranty (06)
- ☐ Rule 3.740 collections (09)
- ☐ Other collections (09)
- ☐ Insurance coverage (18)
- ☐ Other contract (37)

Real Property
- ☐ Eminent domain/Inverse condemnation (14)
- ☐ Wrongful eviction (33)
- ☐ Other real property (26)

Unlawful Detainer
- ☐ Commercial (31)
- ☐ Residential (32)
- ☐ Drugs (38)

Judicial Review
- ☐ Asset forfeiture (05)
- ☐ Petition re: arbitration award (11)
- ☑ Writ of mandate (02)
- ☐ Other judicial review (39)

Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400–3.403)
- ☐ Antitrust/Trade regulation (03)
- ☐ Construction defect (10)
- ☐ Mass tort (40)
- ☐ Securities litigation (28)
- ☐ Environmental/Toxic tort (30)
- ☐ Insurance coverage claims arising from the above listed provisionally complex case types (41)

Enforcement of Judgment
- ☐ Enforcement of judgment (20)

Miscellaneous Civil Complaint
- ☐ RICO (27)
- ☐ Other complaint *(not specified above)* (42)

Miscellaneous Civil Petition
- ☐ Partnership and corporate governance (21)
- ☐ Other petition *(not specified above)* (43)

2. This case ☐ is ☑ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
   a. ☐ Large number of separately represented parties
   b. ☐ Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
   c. ☐ Substantial amount of documentary evidence
   d. ☐ Large number of witnesses
   e. ☐ Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
   f. ☐ Substantial postjudgment judicial supervision
3. Remedies sought *(check all that apply):* a. ☐ monetary b. ☑ nonmonetary; declaratory or injunctive relief c. ☐ punitive
4. Number of causes of action *(specify):* mandamus
5. This case ☐ is ☑ is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. *(You may use form CM-015.)*

Date: January 15, 2019
James B. Morell
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE
- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on **all** other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Form Adopted for Mandatory Use
Judicial Council of California
CM-010 [Rev. July 1, 2007]

CIVIL CASE COVER SHEET

Cal. Rules of Court, rules 2.30, 3.220, 3.400–3.403, 3.740;
Cal. Standards of Judicial Administration, std. 3.10
www.courtinfo.ca.gov

CM-010

INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

To Plaintiffs and Others Filing First Papers. If you are filing a first paper (for example, a complaint) in a civil case, you **must** complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 6 on the sheet. In item 1, you must check **one** box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the **primary** cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

To Parties in Rule 3.740 Collections Cases. A "collections case" under rule 3.740 is defined as an action for recovery of money owed in a sum stated to be certain that is not more than $25,000, exclusive of interest and attorney's fees, arising from a transaction in which property, services, or money was acquired on credit. A collections case does not include an action seeking the following: (1) tort damages, (2) punitive damages, (3) recovery of real property, (4) recovery of personal property, or (5) a prejudgment writ of attachment. The identification of a case as a rule 3.740 collections case on this form means that it will be exempt from the general time-for-service requirements and case management rules, unless a defendant files a responsive pleading. A rule 3.740 collections case will be subject to the requirements for service and obtaining a judgment in rule 3.740.

To Parties in Complex Cases. In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

CASE TYPES AND EXAMPLES

Auto Tort
- Auto (22)–Personal Injury/Property Damage/Wrongful Death
- Uninsured Motorist (46) (*if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto)*

Other PI/PD/WD (Personal Injury/ Property Damage/Wrongful Death) Tort
- Asbestos (04)
  - Asbestos Property Damage
  - Asbestos Personal Injury/ Wrongful Death
- Product Liability *(not asbestos or toxic/environmental)* (24)
- Medical Malpractice (45)
  - Medical Malpractice–Physicians & Surgeons
  - Other Professional Health Care Malpractice
- Other PI/PD/WD (23)
  - Premises Liability (e.g., slip and fall)
  - Intentional Bodily Injury/PD/WD (e.g., assault, vandalism)
  - Intentional Infliction of Emotional Distress
  - Negligent Infliction of Emotional Distress
  - Other PI/PD/WD

Non-PI/PD/WD (Other) Tort
- Business Tort/Unfair Business Practice (07)
- Civil Rights (e.g., discrimination, false arrest) *(not civil harassment)* (08)
- Defamation (e.g., slander, libel) (13)
- Fraud (16)
- Intellectual Property (19)
- Professional Negligence (25)
  - Legal Malpractice
  - Other Professional Malpractice *(not medical or legal)*
- Other Non-PI/PD/WD Tort (35)

Employment
- Wrongful Termination (36)
- Other Employment (15)

Contract
- Breach of Contract/Warranty (06)
  - Breach of Rental/Lease Contract *(not unlawful detainer or wrongful eviction)*
  - Contract/Warranty Breach–Seller Plaintiff *(not fraud or negligence)*
  - Negligent Breach of Contract/ Warranty
  - Other Breach of Contract/Warranty
- Collections (e.g., money owed, open book accounts) (09)
  - Collection Case–Seller Plaintiff
  - Other Promissory Note/Collections Case
- Insurance Coverage *(not provisionally complex)* (18)
  - Auto Subrogation
  - Other Coverage
- Other Contract (37)
  - Contractual Fraud
  - Other Contract Dispute

Real Property
- Eminent Domain/Inverse Condemnation (14)
- Wrongful Eviction (33)
- Other Real Property (e.g., quiet title) (26)
  - Writ of Possession of Real Property
  - Mortgage Foreclosure
  - Quiet Title
  - Other Real Property *(not eminent domain, landlord/tenant, or foreclosure)*

Unlawful Detainer
- Commercial (31)
- Residential (32)
- Drugs (38) *(if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential)*

Judicial Review
- Asset Forfeiture (05)
- Petition Re: Arbitration Award (11)
- Writ of Mandate (02)
  - Writ–Administrative Mandamus
  - Writ–Mandamus on Limited Court Case Matter
  - Writ–Other Limited Court Case Review
- Other Judicial Review (39)
  - Review of Health Officer Order
  - Notice of Appeal–Labor Commissioner Appeals

Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403)
- Antitrust/Trade Regulation (03)
- Construction Defect (10)
- Claims Involving Mass Tort (40)
- Securities Litigation (28)
- Environmental/Toxic Tort (30)
- Insurance Coverage Claims *(arising from provisionally complex case type listed above)* (41)

Enforcement of Judgment
- Enforcement of Judgment (20)
  - Abstract of Judgment (Out of County)
  - Confession of Judgment *(non-domestic relations)*
  - Sister State Judgment
  - Administrative Agency Award *(not unpaid taxes)*
  - Petition/Certification of Entry of Judgment on Unpaid Taxes
  - Other Enforcement of Judgment Case

Miscellaneous Civil Complaint
- RICO (27)
- Other Complaint *(not specified above)* (42)
  - Declaratory Relief Only
  - Injunctive Relief Only *(non-harassment)*
  - Mechanics Lien
  - Other Commercial Complaint Case *(non-tort/non-complex)*
  - Other Civil Complaint *(non-tort/non-complex)*

Miscellaneous Civil Petition
- Partnership and Corporate Governance (21)
- Other Petition *(not specified above)* (43)
  - Civil Harassment
  - Workplace Violence
  - Elder/Dependent Adult Abuse
  - Election Contest
  - Petition for Name Change
  - Petition for Relief From Late Claim
  - Other Civil Petition

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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
JAN 15 2019
DAVID H YAMASAKI Clerk of the Court
BY A. CARBAJAL DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

30-2019
01043847

JUDGE LAYNE MELZER

JAMES B. MORELL,

Petitioner,

v.

BOARD OF RETIREMENT, ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM,

Respondent.

PETITION FOR WRIT OF MANDATE

PURSUANT TO CODE OF CIVIL PROCEDURE SECTIONS 1094.5 AND 1094.6

Petitioner alleges:

1. Petitioner, James B. Morell, was employed as a research attorney at the Orange County Superior Court from August 1992 to February 2014. While employed at the Court, as a component of his standard attorney compensation package, petitioner participated in an Optional Benefit Plan (hereinafter "OBP") administered by Orange County pursuant to section 125 of the Internal Revenue Code.

2. During the pertinent time period, 2011-2014, the OBP provided an annual benefit in the amount of $3,500.00. At open enrollment each November, Court attorneys were able to make an irrevocable allocation of these funds among a limited number of uses, which included a taxable lump sum cash payment included in the first payroll distribution of the new year; reimbursement on a pre-tax basis for certain health/dental care expenses not covered by insurance, such as deductibles and copayments; a pre-tax payroll credit for supplemental accidental death and dismemberment coverage; and allocation of the funds to the attorney's section 457 deferred compensation plan.

3. The OBP plan was administered pursuant to the County of Orange Section 125 Plan and the Orange County Superior Court Personnel Policies and Regulations. Upon submission of proper expense receipts, any portions of the annual benefit allocated to a permitted category of use were paid directly to petitioner and other Court research attorneys on a pre-tax basis by Orange County as cash reimbursement for the expense incurred. If no allocation was made during open enrollment, $3,500.00 cash was automatically paid to the attorney in the first payroll distribution of the new year, as was any portion of the $3500.00 not allocated to a permitted category of use.

4. Based upon the allocations he made during the pertinent time period, petitioner received non-taxable health/dental care reimbursement payments in the total amounts of

$2,500.00 in 2011, $700.00 in 2012, $2,500.00 in 2013, and $1,100.00 in early 2014. The remainder of the $3500.00 benefit was paid as taxable cash ($1,000.00 in 2011, $2,800.00 in 2012, $1,000.00 in 2013, and $2,400.00 in 2014).

5. Upon petitioner's retirement in February 2014, respondent excluded the $3500.00 annual OBP payments from "compensation" and "compensation earnable" in determining petitioner's retirement allowance.

6. In accordance with respondent's established procedure, petitioner timely appealed the OBP exclusion by letter of June 23, 2014, wherein he pointed out that state law, as construed by the California Supreme Court in Ventura County Deputy Sheriffs' Assn. v. Board of Retirement (1997) 16 Cal.4th 483, required such payments to be included in "compensation" and "compensation earnable" for purposes of determining retirement allowances.

7. In a September 9, 2014, letter, respondent denied petitioner's appeal, citing its Resolution 98-001, adopted in February 1998 in response to the Ventura decision, wherein "Flexible Benefits ('Cafeteria Plan') paid in cash" are specifically excluded from the calculation of retirement allowances for persons retiring after 1990.

8. Through conversations with respondent's staff, petitioner subsequently learned that the 1991 cut-off date embodied in Resolution 98-001 was based upon former Government Code section 31460.1, which had been enacted in 1990 and repealed without reenactment on May 11, 1992. In December 1990, the Orange County Board of Supervisors had adopted Resolution 90-1551, making Government Code section 31460.1 operative in the County, effective January 1, 1991.

9. In determining in early 1998 that "Flexible Benefits" paid in cash should be

excluded (via Resolution 98-001) from the calculation of "compensation" and "compensation earnable" for members retiring after 1990, both respondent's Ad Hoc Committee and respondent's Board of Retirement had accepted and relied upon legal counsel's stated conclusion that Government Code section 31460.1 remained applicable to flexible benefit plans in Orange County following its repeal.

10. In his timely further appeal of respondent's decision, petitioner pointed out that decisional law has held that the definitions of "compensation" and "compensation earnable" under the County Employees Retirement Law of 1937 (hereinafter "CERL") are not subject to contractual modification; that former Government Code section 31460.1 was by its terms applicable only to employees who "elected to participate in" flexible benefit plans, whereas the OBP payments were part of the standard compensation package for research attorneys at the Orange County Superior Court; that petitioner had not been represented by any bargaining unit which might have agreed to the 1991 cut-off date; that cited case law made clear that former section 31460.1 had become ineffective upon its repeal in 1992 via S.B. 193; and that the "savings clause" contained in S.B. 193 ("Nothing in this act is intended to, or shall be construed to, affect the validity of any action taken by a county pursuant to Section 31460.1 of the Government Code, prior to the effective date of this act") was best understood to permit the continued exclusion of OBP payments only for persons who retired between January 1, 991, and May 11, 1992.

11. By letter of March 20, 2015, respondent again denied petitioner's appeal, citing for the first time a 2002 settlement agreement in post-Ventura class action litigation (consolidated Orange County Superior Court cases 791315 and 791499), which incorporated "as final and binding," for "all past, present and future members of the Orange County Retirement System," the inclusions and exclusions set forth in respondent's Resolution 98-001. Petitioner has no recollection of receiving notice of the class action settlement, but is unable to establish that he did not.

12. In addition, respondent's March 20 letter cited a pre-settlement "Tentative Decision" in the class action litigation wherein the trial court had ruled that post-1990 retirees who were employed prior to 1991 did not have a vested constitutional right to have their OBP benefits included in the calculation of their retirement allowance. Respondent did not address the prior decision of July 20, 2000, in that litigation, wherein the trial court had ruled that, except as otherwise required by former Government Code section 31460.1, cash payments made directly to employees in lieu of "in kind" flexible benefits must be included in "compensation" under the CERL.

13. Petitioner thereafter pursued his appeal via a timely written submission to respondent Board, wherein he reiterated his prior contentions and further pointed out that the 2001 "Tentative Decision" in the class action litigation involved a single constitutional question and was not relevant to the statutory issues presented by petitioner's appeal; that the issues raised by petitioner regarding the inapplicability and current invalidity of former Government Code section 31460.1 had never been raised in the class action litigation; that respondent in successful opposition to a 1998 demurrer to its complaint for declaratory relief in the class action litigation had expressly and emphatically disclaimed any effort to obtain an advisory decision or to litigate any issues relating to Resolution 98-001 which were not specifically raised by the parties, and was now estopped from claiming otherwise; and that the settlement agreement was unlawful and unenforceable insofar as it purported to bind retirees to a bargained-for definition of "compensation earnable" in derogation of the substantive requirements of statutory law.

14. In an unwritten decision issued at a 2016 "disability agenda" hearing, respondent Board denied petitioner's appeal. In accordance with respondent's administrative procedures, petitioner thereafter submitted a timely request for a de novo administrative hearing of his appeal before a hearing officer approved by respondent.

15. Prior to the administrative hearing, the parties submitted timely prehearing statements to the hearing officer, and petitioner submitted an extensive administrative record consisting largely of documents filed during the 1998-2002 class action litigation. In addition, petitioner timely submitted a supplemental prehearing statement containing proposed findings of fact and conclusions of law with numerous citations to undisputed existing and anticipated evidence.

16. At the administrative hearing of May 5, 2017, the hearing officer admitted the administrative record into evidence and heard sworn testimony from petitioner and from an employee of respondent, Adina Bercaru. In her testimony, Ms. Bercaru explained the calculation of petitioner's retirement allowance under Resolution 98-001 but acknowledged that the determination whether to include or exclude four hours of comp time received annually by Superior Court research attorneys was based upon considerations of administrative convenience rather than upon the requirements of state law.

17. At the outset of the May 5 hearing, petitioner sought to testify that plaintiff's lead counsel in the class action litigation had in 2015 acknowledged, inter alia, that he was unaware of any issue regarding the applicability or continued effectiveness of former Government Code section 31460.1, that he had never reviewed and was unaware of the actual OBP provisions applicable to petitioner and other Orange County employees, and that the sole consideration obtained by class members in exchange for acceptance of the exclusions set forth in Resolution 98-001 consisted of an acknowledgment that the Ventura decision was to be applied retroactively to pre-Ventura retirees. The testimony was proffered pursuant to Rule 15(d) of respondent's Administrative Hearing Procedures (attached hereto as Exhibit A), which provides, "Hearsay evidence may be used for the express purpose of supplementing or explaining other evidence but shall not be sufficient by itself to support a finding unless it would be admissible over objection in civil actions."

18. Petitioner explained in detail that the statements made by plaintiff's lead counsel were admissible under the rule for the purpose of supplementing petitioner's other evidence, as identified in his supplemental prehearing statement, regarding (1) the class action parties' misapprehension of the legal effectiveness of former Government Code section 31460.1, and (2) the intended scope of the 2002 settlement agreement. While acknowledging that the proffered testimony was supplemental hearsay within Rule 15(d), the hearing officer nonetheless excluded the testimony on general relevance grounds. (Pertinent portions of the reporter's transcript of the May 5 hearing are attached hereto as Exhibit B.) This evidentiary ruling was erroneous, and the error may ultimately have been prejudicial.

19. In his final decision, issued January 31, 2018, the hearing officer determined that both respondent's exclusion of the OBP payments received by petitioner and the 2002 settlement agreement's incorporation of Resolution 98-001's OBP exclusion were unlawful, and he recommended that respondent voluntarily seek modification of the settlement agreement to conform to the requirements of the County Employees Retirement Act.

20. At its regular meeting of August 20, 2018, after receiving recommendations from staff and petitioner's response thereto, respondent Board pursuant to Government Code section 31534(b) elected to set aside the hearing officer's Proposed Findings of Fact, Conclusions of Law and Decision and to "limit its consideration" solely to the issues of (1) whether respondent and petitioner were bound by the 2002 settlement agreement and the judgment entered thereon, and (2) whether petitioner's retirement allowance had been calculated in accordance with the settlement agreement and judgment. Respondent Board then voted to deny petitioner's appeal based upon affirmative conclusions to both questions, and it directed its staff to prepare final Findings of Fact, Conclusions of Law and Decision.

21. In his response and objections to respondent's proposed Findings of Fact, Conclusions of Law and Decision (attached hereto as Exhibit C), petitioner objected to the

possible bifurcation of his appeal, noting that Government Code section 31534(b) did not authorize respondent to make such a "limited" determination, as well as to other material aspects of the proposed decision, but on October 15, 2018, respondent Board adopted the factual findings prepared by staff, with minor modification in response to some of the objections submitted by petitioner. In its final, written denial of petitioner's appeal (attached hereto as Exhibit D), respondent Board reiterated its August 20 determination that "[t]he sole issues in this matter" were whether the 2002 settlement agreement and judgment were binding and whether petitioner's retirement allowance had been calculated in accordance therewith.

22. The inclusion in Resolution 98-001 of "Flexible Benefits" payments for employees retiring prior to 1991 reflected respondent's intent to include OBP payments to the extent not excluded by former Government Code section 31460.1.

23. At the time Resolution 98-001 was adopted, neither former Government Code section 31460.1 nor Orange County Board of Supervisors Resolution 90-115 legally required or permitted respondent to exclude OBP benefits from the calculation of retirement allowances for Superior Court research attorneys such as petitioner who retired after 1990.

24. The 1998 adoption of Resolution 98-001 was not an "action taken by a county . . . prior to the effective date of" the 1992 legislation which repealed former Government Code section 31460.1 (the "savings clause" of S.B. 193).

25. The relinquishment of an existing statutory right to have OBP payments included in the calculation of retirement allowances was neither intended nor bargained for in the 2002 class action settlement agreement.

26. In the 2002 "no opt out" settlement agreement, the parties to the class action litigation agreed, inter alia, "to accept as final and binding the inclusions in and exclusions

from compensation, compensation earnable, and final compensation as more particularly set forth in OCERS' Resolution 98-001 . . . ." However, the agreement elsewhere states, "Nothing herein is intended to nor shall affect any party's rights and obligations under CERL, except as specifically set forth herein." The agreement contains no specific reference to the right of post-1990 retirees, under the CERL, to have cash OBP payments included in the calculation of their retirement allowances, nor to any intended alteration of existing statutory benefit rights or of any prior interlocutory order or ruling relating to such rights in the class action litigation.

27. The pleadings filed in the consolidated class action litigation consisted of a complaint for declaratory relief filed by respondent, a petition for writ of mandate filed by two pro per retirees and the Orange County Attorneys' Association, a complaint in intervention filed by the Orange County Employees Association, and a complaint in intervention filed by the Retired Employees Association of Orange County, as well as responsive pleadings and cross-complaints filed by the parties. The issues raised by petitioner regarding the inapplicability and current ineffectiveness of former Government Code section 31460.1 were never mentioned in these pleadings or in any other document filed during more than four years of litigation in consolidated Orange County Superior Court cases 791315 and 791499. Numerous documents filed in the litigation indicate that the parties proceeded uniformly under the belief that the 1991 cut-off date authorized by former Government Code section 31460.1 remained legally effective in Orange County.

28. Neither the notice of proposed settlement nor the settlement agreement itself provided any indication to class members, or to the trial court, that the agreement would compromise a significant, unlitigated statutory right to retirement benefits under the CERL.

29. The individuals designated as class representatives in consolidated Orange County Superior Court cases 791315 and 791499 had been employed prior to 1991, and no subclasses were created to safeguard the interests of post-1990 employees such as petitioner

who were differently situated with regard to issues such as retroactivity and OBP exclusion.

30. The principal benefit obtained by class members under the settlement, retroactivity of the Ventura decision for pre-Ventura retirees, was of no value to post-Ventura retirees such as petitioner. The settlement agreement's stated affirmance of the inclusions and exclusions set forth in Resolution 98-001 constituted a potentially substantial detriment to petitioner and to other post-1990 retirees participating in the Superior Court's Optional Benefit Plan, in exchange for no identifiable consideration.

31. Petitioner was not a member of any of the organizations which participated in the 1998-2002 class action litigation (i.e., the Orange County Attorneys' Association, the Orange County Employees' Association, and the Retired Employees Association of Orange County), or of any other employee association or bargaining group.

33. Respondent has prejudicially abused its discretion, as described above, by:

a. Failing to proceed in the manner required by law, as set forth in governing statutes and judicial decisions;

b. Making findings of fact not supported by the evidence, specifically:

i. "'Compensation earnable' is defined by Government Code . . . section 31460.1 (adopted by the Orange County Board of Supervisors by Resolution 90-1551) and more specifically by OCERS Board Resolution 98-001." (Findings of Fact, Conclusions of Law and Decision, para. 6.)

ii. "When OCERS calculated Applicant's final compensation, OCERS concluded . . . that the Optional Benefits Plan benefits received by Applicant as healthcare reimbursements during the Measuring Period constituted 'Flexible Benefits ("Cafeteria Plan") provided in-kind' under Resolution 98-001 . . . ." (Findings of Fact, Conclusions

of Law and Decision, para. 7.)

34. Petitioner seeks a writ of mandate pursuant to Code of Civil Procedure section 1094.5 and 1094.6 commanding respondent to perform its duty to correctly apply "compensation" and "compensation earnable" to the calculation of petitioner's retirement allowance, retroactively and prospectively, specifically to include the annual OBP payments to petitioner, in accordance with Government Code sections 31460, 31461 and 31462, as required by the Ventura decision and by the statement of decision issued July 20, 2000, in the consolidated class action litigation.

34. Petitioner has a beneficial interest in the issuance of the writ because his pension benefits are based on the calculation of "final compensation" which is determined by the definitions of "compensation" and "compensation earnable" contained in the Government Code as construed in pertinent judicial decisions.

35. Petitioner has performed all conditions precedent to the filing of this petition by making timely written requests of respondent to perform its duty to include cash OBP payments in the calculation of his retirement allowance in accordance with the Government Code and governing judicial authority, and has exhausted his administrative remedies under respondent's appeal procedures.

36. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law to command respondent to perform its duties, other than the relief sought in this petition.

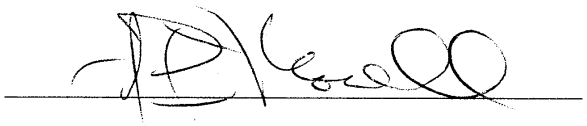
WHEREFORE, petitioner prays:

1. That this Court issue a peremptory writ in the first instance commanding respondent to perform its duty to include cash OBP payments in the calculation of "compensation earnable" and "final compensation."

2. Alternatively, insofar as it may be necessary in order for this Court to grant the peremptory writ, that this Court remand the matter to respondent Board to correct any prejudicial procedural error, including the erroneous exclusion of evidence and the improper application of Government Code section 31534.

3. For costs of this proceeding, including attorney fees as warranted, and for such other and further relief as the court deems just and proper.

Dated this 15th day of January, 2019.



JAMES B. MORELL

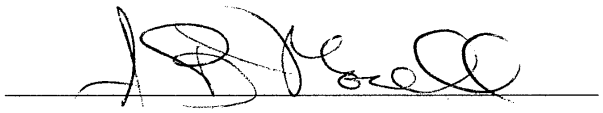
Petitioner in per

VERIFICATION

I, James B. Morell, have written and read the foregoing PETITION FOR WRIT OF MANDATE, and all the facts alleged therein, not otherwise supported by exhibits, or other documents, are true of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of Caolifornia that the foregoing is true and correct.

Dated this 15th day of January, 2019.



James B. Morell

Petitioner in pro per

ORANGE COUNTY EMPLOYEES

RETIREMENT SYSTEM

BOARD OF RETIREMENT POLICY

FOR

ADMINISTRATIVE HEARINGS

POLICY FOR ADMINISTRATIVE HEARINGS

INTENT: The Board of Retirement of the Orange County Employees Retirement System ("OCERS") specifically intends that this Policy for Administrative Hearings shall apply to and shall govern in each administrative appeal taken from a decision made by the Board of Retirement pursuant to the County Employees Retirement Law of 1937, as amended ("CERL").

DEFINITIONS: The following terms shall have the meanings set out in this section. All other words shall have their common meanings. All days are calendar days.

Administrative Record: The Administrative Record includes any documents submitted by an Applicant or on behalf of an Applicant, documents prepared by OCERS or by independent sources that are received by OCERS, or any other documents that are relevant to deciding the issue of an Applicant's request to receive or modify a benefit and that are admitted into evidence by the Hearing Officer after the Parties have had an opportunity to object.

The Administrative Record also includes written correspondence, Party Pre-Hearing Statements, Party Briefs, Hearing Officer Findings and recommendations, Party objections and requests for clarification, rulings on objections and requests for clarification, Hearing transcripts, and other documents that are relevant to deciding the issue of an Applicant's request to receive or modify a benefit.

Applicant: Any member of OCERS or a person or other entity on behalf of a member of OCERS who files an application with OCERS to request or modify a benefit that the Board of Retirement may grant pursuant to its authority set forth in the CERL.

Application: The paper(s) initially filed with OCERS by or on behalf of an Applicant, and/or any amended paper(s) filed with OCERS by or on behalf of an Applicant after the initial filing, to request or modify a benefit provided by OCERS.

Board: The Board of Retirement of OCERS.

Effective Date: The effective date of any disability retirement benefits shall be governed by Government Code §31724.

Hearing: Presentation of sworn testimony, other evidence, and legal argument before a Hearing Officer on the merits of an Application or benefit determination.

Hearing de novo: A new Hearing of a matter, conducted as if the original Hearing or Board determination had not taken place. This means the court or other fact finding body will consider anew all of the evidence submitted without relying upon the past findings of a court, the Board or other fact finding body.

Hearing Officer: A current member of the California State Bar whose name is contained on the approved OCERS' Hearing Officer panel or a member of the Board of Retirement, pursuant to Government Code §31533.

Hearing Rules, Rules: The "Orange County Employees Retirement System Policy for Administrative Hearings".

Medical Witness: A person who by profession is a physician, surgeon, psychologist, optometrist, dentist, podiatrist, or chiropractic practitioner licensed by the State of California or by such other jurisdiction of the United States in which such person maintains his or her regular practice in good standing.

Member Services Director: The Administrative Director in charge of the Member Services Department of OCERS or his/her designee.

Party or Parties: OCERS and / or any Applicant who appealed a decision by the Board.

Pre-Hearing Conference: A Pre-Hearing Conference is a conference between the Applicant(s) and OCERS conducted by the assigned Hearing Officer to discuss preliminary matters related to the Hearing process.

Respondent: OCERS and / or Board.

Rule: A Hearing Rule including all subparagraphs or subdivisions as contained in this Policy.

ADMINISTRATIVE HEARING RULES

1. **HEARING DE NOVO ON APPEAL**: A written request for Hearing must be received by the Board, or its designee, within ninety (90) days after the initial Board determination of the initial application. A Hearing de novo, either by appeal or by Board referral, shall be scheduled before a Hearing Officer. For disability retirement Hearings, the Board on its own referral may limit the issues to be presented to disability, service connection, or effective date only. If not so limited, the disability retirement Hearing will address the issues of disability, service-connection, and effective date. Except as set forth in these Rules, for disability retirement Hearings and all other administrative Hearings, the Hearing Officer shall not make a finding or recommendation on any issue that was not raised before the Board. These Hearing Rules will apply to disability retirement Hearings and all other administrative Hearings.

2. **NOTIFICATION OF REFERRAL TO OR REQUEST FOR HEARING**: Within fourteen (14) days after OCERS receives a request for Hearing or referral to a Hearing, OCERS will notify the Applicant in writing of the name and address of the Hearing Officer to whom the matter has been assigned.

Assignment of Hearing Officer: Hearing Officers are selected and placed on the panel pursuant to the Hearing Officer Selection Policy. As Hearings are requested, the Member Services Director assigns the next Hearing Officer on the list in alphabetical order, subject to the procedures for challenge under Rule 3, below.

3. **PETITION FOR REASSIGNMENT OF HEARING OFFICER**: Each Party shall be entitled to reassignment of the Hearing to another Hearing Officer in accordance with the provisions of this section.

   (a) Peremptory: Each Party is entitled to one automatic challenge to the assignment of the Hearing Officer in accordance with the provisions of this section. That challenge must be submitted in writing, directed to the Member Services Director, within fourteen (14) days after the date of the letter assigning the Hearing Officer. Thereafter, any challenge to the assigned Hearing Officer shall only be for cause.

   At any time before the date of the Hearing if an Applicant obtains new counsel of record, or if OCERS replaces its counsel of record, each new counsel shall be entitled to a peremptory challenge. The challenge must be submitted in writing, directed to the Member Services Director, within fourteen (14) days after the date counsel commences representation.

   (b) Removal for Cause: Each Party is entitled to challenge a Hearing Officer for cause by submitting a written request, with supporting declarations made under penalty of perjury under the laws of the State of California and any other evidence the Party is relying upon, to the Member Services Director, who shall then place the matter on the agenda for the next regularly scheduled Board meeting.

   (c) Removal Due to Unforeseen Circumstances: If the service of a Hearing Officer is discontinued due to unforeseen circumstances, including but not limited to death, termination with or without cause or medical restrictions, each Party is entitled to a peremptory challenge to the new Hearing Officer in accordance with this section.

4. **APPOINTMENT OF THE HEARING OFFICER:** Upon expiration of the time period in 3(a), the Member Services Director shall contact the Hearing Officer by letter notifying the Hearing Officer of his/her assignment, providing the name, address and phone number of the Applicant, Applicant's counsel, if any, and counsel representing OCERS.

5. **PREPARATION OF ADMINISTRATIVE RECORD:** OCERS shall assemble the Administrative Record and provide it to the Applicant or his or her attorney, if any, OCERS's counsel and the Hearing Officer within forty-five (45) days following receipt of the request for a Hearing.

6. **APPLICANT'S PRE-HEARING STATEMENT**: The Applicant shall serve a Pre-Hearing Statement upon the Hearing Officer and OCERS's counsel no later than sixty (60) days before the date on which the Hearing is to be held.

(a) The Pre-hearing Statement shall include the following:

(1) A statement of the issues and contentions of the Applicant, and a brief summary of the evidence to be presented;

(2) A list and copies of any expert's reports, depositions of any witnesses, and any other documentary evidence on which the Applicant will rely, if not already in the Administrative Record;

(3) The names, addresses and telephone numbers of any non-expert witnesses whose testimony the Applicant intends to present at the Hearing and a brief description of the content of that testimony.

(4) The names, addresses and phone numbers of any expert witnesses whom the Applicant intends to call for oral testimony at the Hearing and a synopsis of the expected testimony.

(b) If at any time during the Hearing process the Applicant alleges an injury or disease not listed on the disability retirement application, or raises an issue that was not previously presented to the Board, the Hearing process shall be suspended by OCERS and the Application shall be treated as an amended Application. The amended Application shall be referred back to the Member Services Director to be processed. If the Board denies the amended Application or refers it for Hearing, the Hearing Officer will hear all allegations at the same time. A new Hearing date will be set in accordance with Rule 9 and all Pre-Hearing Statements not already served will be due in accordance with the new Hearing date.

(c) If an Applicant disputes the Effective Date established by the Board, or the Board in its initial decision found that an Applicant asserts that the proper Effective Date for the retirement allowance is a date other than the date of the Application, that Applicant shall raise the Effective Date as an issue and shall state that Applicant's contention in the Pre-Hearing Statement.

7. **RESPONDENT'S PRE-HEARING STATEMENT**: OCERS shall serve a Pre-Hearing Statement upon the Hearing Officer and the Applicant or Applicant's attorney no later than thirty (30) days before the date on which the Hearing is to be held. The Pre-Hearing Statement shall include the following:

(a) A statement of the issues and the contentions of OCERS;

(b) A list and copies of any experts' reports, depositions of any witnesses, and other documentary evidence on which OCERS will rely, if not already in the administrative record;

(c) The names, addresses and telephone numbers of any non-expert witnesses whose testimony OCERS intends to present at the Hearing, and a brief description of the content of that testimony;

(d) The names, addresses and phone numbers of any expert witnesses whom OCERS intends to call for oral testimony at the Hearing and a synopsis of the expected testimony.

8. **SUPPLEMENTAL PRE-HEARING STATEMENTS:** Any Party may submit supplemental Pre-Hearing Statements no later than fourteen (14) days prior to the Hearing date.

9. **APPLICANT'S NON-COMPLIANCE IN SUBMITTING PRE-HEARING STATEMENT**: If an Applicant does not comply with the requirements of Rule 6, the Hearing shall be taken off calendar and the matter placed in suspension until the Pre-Hearing Statement has been filed unless otherwise agreed to by the Parties. Subject to Rule 23, "Dismissal," once the Pre-Hearing Statement has been filed the Hearing will be reset in the same manner as set forth in Rule 10, below. OCERS's Pre-Hearing Statement will be due thirty (30) days before the new Hearing date.

10. **ESTABLISHING A HEARING DATE**: The Hearing Officer will confer with the Parties to set a mutually agreeable Hearing date. The Hearing will be held within the time frame provided by Rule 23. OCERS, at its expense, shall arrange for a court reporter and a Hearing room.

    (a) The Hearing Officer may continue any Hearing upon stipulation of the Parties or for good cause shown, upon receipt of a written request by either Party.

    (b) With the exception of an emergency continuance request, all requests for a continuance as set forth herein shall be made at least thirty (30) days in advance of the Hearing date. If not made thirty (30) days before the Hearing, the Hearing Officer or the Board shall not be obligated to honor the request. Nevertheless, the Hearing Officer is authorized to grant an emergency continuance to the next agreeable Hearing date because of the illness or disability of any Party, witness, attorney, or the Hearing Officer himself or herself, or any family emergency or matter of a similar nature of any Party, witness, attorney, or the Hearing Officer.

    (c) If an Applicant cancels a Hearing less than thirty (30) days prior to the scheduled Hearing date, the Board is authorized to seek reimbursement from the Applicant for actual costs incurred as a result of the cancellation.

    (d) The Applicant or OCERS may request, or the Hearing Officer upon his/her own motion may schedule a Pre-hearing Conference, and in all cases the Hearing Officer shall do so when the Applicant is pro per.

11. **TIME AND PLACE OF HEARINGS**: All Hearings and Pre-Hearing Conferences shall be held at the OCERS offices or telephonically upon agreement of the parties and the Hearing Officer. Hearings that are not concluded within the original time set shall be continued to the next agreeable Hearing date.

12. **DOCUMENTARY EVIDENCE:**

(a) Statement of Policy:

Documentary evidence shall be produced in the form of written medical reports or other documentary evidence attached to the Parties' Pre-Hearing Statements or included in the ~~Administrative~~ Record. A written medical report bearing the signature of the Medical Witness shall be admissible in evidence as the author's direct testimony.

(b) Late Submission of Documentary Evidence:

Submission of a medical report or other documentary evidence after a Party files his, her, or its Pre-Hearing Statement shall be allowed only upon a showing of Good Cause. "Good Cause" means relevant evidence that, in the exercise of reasonable diligence, could not have been previously produced. The Party requesting submission of such evidence shall address a written request to the Hearing Officer. The written request shall state the reason the evidence was not timely produced. The Hearing Officer shall rule on such a request. If the evidence is allowed to be submitted into evidence, the Parties shall have the right to a continuance to engage in further discovery, obtain rebuttal medical evidence, or cross-examine the Medical Witness.

13. **ORAL TESTIMONY OF EXPERT AND NON-EXPERT WITNESSES**:

(a) Hearings: Oral testimony shall be taken as prescribed under Rule 15(a).

(b) Depositions: Witness depositions may be taken by either Party before a certified shorthand reporter and shall be taken under oath or affirmation. The Party taking the deposition shall pay all associated costs. If any Party offers any portion of the deposition testimony into evidence at the Hearing, that Party shall provide a full copy of the deposition transcript to the adverse Party and the Hearing Officer free of charge.

(c) Subpoenas and Related Fees/Costs:

(1) Any Party may request a subpoena for the personal appearance of a witness at the time of Hearing or deposition. The request must be in writing and addressed to the Member Services Director. OCERS will prepare the subpoena, but the requesting Party shall be obligated to serve the subpoena and pay all associated witness fees and costs of service. The Party requesting oral testimony of an expert witness shall in all cases be responsible for any expert witness fees.

(2) Any Party may request a subpoena for the production of documents. The request must be in writing and addressed to the Member Services Director. OCERS will prepare the subpoena, but the requesting party shall be obligated to serve the subpoena and pay all associated costs of service and production.

(3) Any fee disputes between a witness and the requesting Party is independent from any proceeding between the Applicant and OCERS. Those fee disputes shall be resolved by the requesting Party and the witness in the California courts, not in this forum. The Hearing Officer has no authority or jurisdiction to hear evidence or decide any such dispute.

14. **RESOLUTION OF DISPUTES IN REGARD TO DEPOSITIONS AND CONDUCT OF HEARING**: The Hearing Officer shall resolve disputes in regard to depositions and conduct at the Hearing. If not made at a Hearing, a request for resolution of a dispute shall be made in writing and may be supported by declarations, a copy of the deposition or Hearing transcript, a memorandum of points and authorities and a proposed resolution. The adverse Party involved shall have ten (10) days after service of such a request in which to respond. Declarations, a copy of the deposition or Hearing transcript, a memorandum of points and authorities and a proposed resolution may also accompany the response. The Hearing Officer shall notify the Parties and the witness involved of the Hearing Officer's resolution of the dispute within thirty (30) days of receipt of the request for resolution.

15. **CONDUCT OF HEARINGS**:

(a) Oral evidence shall be taken only on oath or affirmation administered by the Hearing Officer or the shorthand reporter.

(1) If an Applicant or witness does not speak or understand English sufficiently to participate in the proceedings or provide testimony, an interpreter certified to provide interpretation services in administrative hearings shall be provided to that Applicant or witness at OCERS' expense. An Applicant or witness who requires interpreting services shall provide OCERS with reasonable notice of the need for an interpreter and the language the Applicant or witness will use during the proceedings so that OCERS has sufficient time to locate and contract with an interpreter.

(2) The Hearing Officer may continue or reschedule a Hearing so that the Applicant or witness requesting an interpreter can be accommodated.

(3) All interpreters in OCERS' Hearings shall be certified to provide interpreting services in administrative hearings pursuant to Gov. Code § 11435.30. The interpreter shall not have had any involvement in the issues of the case prior to the Hearing.

(4) If an Applicant or witness objects to the interpreter provided by OCERS and wishes to locate his or her own interpreter certified under Gov. Code § 11435.30, the Applicant or witness shall provide OCERS with contact information for his or her chosen interpreter. OCERS will pay the chosen interpreter the same amount OCERS would have paid an interpreter hired directly by OCERS. The Applicant or witness shall be responsible for any amounts charged by the interpreter that are over the amount OCERS would have paid to an interpreter hired directly by OCERS. Fee disputes between the interpreter and the Applicant or witness shall not be resolved in this forum, and the Hearing Officer shall have not authority to resolve any fee disputes between interpreters and the Parties.

(b) Each Party shall have these rights: (1) to call and examine witnesses; (2) to introduce exhibits, including reports and depositions of medical witnesses; (3) to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; (4) to impeach any witness regardless of which Party first called the witness to testify; and (5) to rebut adverse evidence. If the Applicant does not testify by direct testimony, OCERS may call and examine him or her under cross-examination.

(c) The Hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the Hearing. Irrelevant and unduly repetitious evidence shall be excluded.

(d) Hearsay evidence may be used for the express purpose of supplementing or explaining other evidence but shall not be sufficient by itself to support a finding unless it would be admissible over objection in civil actions. Every Hearing shall proceed as though each Party had made a standing objection to all inadmissible hearsay at the commencement of the Hearing. This section shall not be applicable to written medical reports received into evidence pursuant to Rule 12.

(e) Each Party shall have the right to submit oral or written argument, as determined by the Hearing Officer. A waiver of argument at the administrative Hearing shall not constitute a waiver of argument on appeal before the Board.

(f) The record shall be closed to new evidence at the conclusion of the final day of Hearing unless each Party stipulates to leave the record open. However, if subsequent to the close of the Hearing, a Party discovers or obtains new evidence that is relevant and not repetitive, that Party may submit that evidence to the Hearing Officer to be considered for inclusion in the administrative record. The Hearing Officer may require the Parties to provide declarations and argument regarding inclusion of the new evidence. If, after showing of Good Cause under Rule 12 (b), the Hearing Officer allows inclusion of the

new evidence, the opposing Party will be provided an opportunity to provide rebuttal evidence in accordance with Rule 12 (b).

16. **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED DECISION OF THE HEARING OFFICER**: The Proposed Findings of Fact, Conclusions of Law and Recommended Decision of the Hearing Officer, shall be served on all Parties or their counsel by the Hearing Officer. Said findings shall be served within sixty (60) calendar days of the date the last brief is received, or within sixty (60) calendar days of the date the Hearing Officer deems the matter closed.

17. **OBJECTIONS AND RESPONSE TO OBJECTIONS TO THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND RECOMMENDED DECISION OF THE HEARING OFFICER**: Any Party shall have thirty (30) days after service of the Proposed Findings of Fact, Conclusions of Law and Recommended Decision to submit written objections or requests for clarification to the Hearing Officer and to serve the objections or requests for clarification on each other Party. Each adverse Party shall then have twenty (20) calendar days in which to respond to those objections or requests for clarification. The objections or requests for clarification and any response shall be incorporated into the Administrative Record to be considered by the Board. Within thirty (30) calendar days after the Hearing Officer has received the objections or requests for clarification, the Hearing Officer may:

    (a) Affirm the findings, conclusions, and recommendations as originally submitted, or

    (b) Make such changes the Hearing Officer deems appropriate in light of the evidence, the objections or requests for clarification submitted by the Parties, and the responses.

18. **CONTENT OF HEARING OFFICER'S PROPOSED FINDINGS OF FACT AND RECOMMENDED DECISION**: The Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Recommended Decision shall include a summary of the following: (1) issues raised by the parties; (2) the testimony; (3) the exhibits offered by the parties, both those received into evidence and those not received; (4) a factual discussion of matters on which the Hearing Officer relied; (5) conclusions of law with citations to legal authority; and (6) recommended action.

19. **ACTION BY THE BOARD**: The Board's staff shall refer to the Board for its consideration the Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Recommended Decision, the objections and any replies to those objections. After reviewing the documents, pursuant to Government Code §31534, the Board may:

    (a) Approve and adopt the proposed findings, conclusions and recommendation of the Hearing Officer; or

    (b) Require a transcript or summary of all the testimony, plus all other evidence received by the Hearing Officer. Upon receipt thereof, the Board shall take such action as in its opinion is indicated by such evidence; or

(c) Refer the matter back, with or without instructions, to the Hearing Officer for further proceedings; or

(d) Set the matter for hearing before itself. At such hearing, the Board shall hear and decide the matter de novo.

20. **ORAL ARGUMENT BEFORE THE BOARD, IN SUPPORT OF OBJECTIONS TO HEARING OFFICER'S RECOMMENDED DECISION**: The Parties shall be provided with written notice of the time and date of the regular meeting where the matter will be placed on the Board's agenda for action. The Parties will have the opportunity to be heard at the Board meeting subject to appropriate time limitations.

21. **BOARD'S DECISION AFTER REVIEW OF THE RECORD**: In any case where the Board makes a decision based upon a transcript or summary of all the testimony, plus other evidence received by the Hearing Officer, or where the Board sets the matter for Hearing before itself, the Board may approve and adopt the Proposed Findings, Conclusions of Law and Recommended Decision of the Hearing Officer; otherwise, the Board shall direct the prevailing Party to prepare Proposed Findings of Fact, Conclusions of Law and Recommended Decision consistent with its tentative decision. The Proposed Findings shall then be served on the unsuccessful Party who shall have ten (10) days after such service to serve and file written objections to the Board. The Board shall then consider such written objections, if any, and then adopt its final decision as it deems appropriate.

22. **ALTERATION OF TIME REQUIREMENTS**: Nothing in these Rules shall be construed to prevent the Parties from stipulating to different intervals than those prescribed in these Rules. The Hearing Officer may for good cause shown, after giving both parties an opportunity to be heard, shorten or lengthen the times specified above as he/she deems necessary.

23. **DISMISSAL WITHOUT PREJUDICE FOR FAILURE TO PURSUE THE HEARING:** Except as otherwise provided, if, as a result of an Applicant's failure to comply with these Rules and / or with any request made by either the Disability Section or Member Services staff, the Applicant's request for an Administrative Hearing or Board referral is not heard within one year after receipt of an Applicant's request for Hearing, or the Board's referral of a case to a Hearing Officer, the case shall be dismissed without prejudice by the Board.

24. **SERVICE OF DOCUMENTS**: Unless otherwise agreed to by the Hearing Officer and Parties in writing, service of documents provided for in these Rules may be made by first class mail, postage pre-paid, or by personal delivery. If sent by first-class mail, the postmark date shall be deemed the date of service. The service date for any documents delivered by facsimile or electronic mail will be the date shown in a delivery receipt generated by the facsimile machine or electronic mail program.

25. **PERIODIC REVIEW OF POLICY FOR ADMINISTRATIVE HEARINGS:** The Board will review the Policy for Administrative Hearings at least every three (3) years to ensure that it remains relevant and appropriate.

POLICY HISTORY:

This policy was adopted by the Board of Retirement on February 19, 2002. It was amended on August 30, 2004, June 18, 2007, May 19, 2008, and, June 18, 2012.

SECRETARY'S CERTIFICATE

I, the undersigned, the duly appointed Secretary of the Orange County Employees Retirement System, hereby certify the adoption of this Policy

Steve Delaney, Secretary to the Board

June 18, 2012
Date

BEFORE THE BOARD OF RETIREMENT OF THE

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

IN THE MATTER OF THE APPLICATION)
FOR RETIREMENT OF:)
)
JAMES MORELL,)
)
APPLICANT.)
)

TRANSCRIPT OF PROCEEDINGS TAKEN AT 2223 WELLINGTON AVENUE, SANTA ANA, CALIFORNIA, BEGINNING AT 10:03 A.M. AND ENDING AT 1:02 P.M. ON FRIDAY, MAY 5, 2017, TAKEN BEFORE VALERIE DESBOROUGH, CERTIFIED SHORTHAND REPORTER NO. 12317.

APPEARANCES:

ROBERT SNIDER, HEARING OFFICER

FOR APPLICANT JAMES MORELL:

BY: JAMES MORELL
ATTORNEY AT LAW
222 AVENUE G
REDONDO BEACH, CALIFORNIA 90277
(424) 304-2865

FOR RESPONDENT ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM:

BY: DAWN MATSUO
ATTORNEY AT LAW
2223 WELLINGTON AVENUE
SANTA ANA, CALIFORNIA 92701
(714) 558-6200

DOCUMENTS.

HEARING OFFICER SNIDER: ALL RIGHT. GOOD. I THINK WE HAVE COVERED THAT.

AND I WANTED, ALSO, TO TURN TO THE QUESTION OF HEARSAY. BY WAY OF BACKGROUND, MR. MORELL GAVE ME AND RESPONDENT A HEADS-UP, INDICATING THAT HE WISHED TO OFFER HEARSAY AT THE HEARING.

I JUMPED THE GUN A LITTLE BIT AND ASKED RESPONDENT TO ADDRESS THAT, WHETHER THERE WAS AN OBJECTION; AND IF SO, ON WHAT BASIS.

RESPONDENT DID RESPOND. MR. MORELL, IN TURN, RESPONDED AGAIN. AND AT THAT POINT I THOUGHT IT'S BEST TO LEAVE THE WHOLE QUESTION TO THE HEARING THIS MORNING AND LET THE PARTIES ADDRESS WHAT IS BEING OFFERED AND THEIR VIEWS AS TO WHETHER OR NOT IT'S HEARSAY. AND THEN I WILL INDICATE, BEFORE THE TESTIMONY STARTS, MY VIEW ON THAT.

MR. MORELL, WOULD YOU LIKE TO GO FIRST?

MR. MORELL: SURE. WELL, AS I INDICATED PREVIOUSLY, THIS TESTIMONY RELATES TO STATEMENTS MADE TO ME DURING A TELEPHONE CONVERSATION BY LEAD CLASS COUNSEL IN THE CONSOLIDATED CLASS ACTION LAWSUIT WHICH WAS SETTLED IN 2002.

THE STATES WERE -- THE STATEMENTS WERE MADE TO ME IN EARLY 2015 AFTER I RECEIVED A LETTER FROM OCERS

DENYING, I GUESS IT WAS, A SECOND-STAGE DENIAL OF MY APPEAL WHERE THEY RAISED, FOR THE FIRST TIME, THE EXISTENCE OF THIS SETTLEMENT OF THE CLASS ACTION LAWSUIT WHICH THEY ASSERT BARS MY -- MY APPEAL.

AND AT THAT POINT, YOU KNOW, I CALLED CLASS COUNSEL AND HAD THE TELEPHONE CONVERSATION. THEY MADE STATEMENTS TO ME.

AND AS I READ THE ADMINISTRATIVE HEARING PROCEDURES RULE 15, RULE 15(D) -- WELL, IT SAYS EXACTLY:

"HEARSAY EVIDENCE MAY BE USED FOR THE EXPRESS PURPOSE OF SUPPLEMENTING OR EXPLAINING OTHER EVIDENCE BUT SHALL NOT BE SUFFICIENT BY ITSELF TO SUPPORT A FINDING UNLESS IT WOULD BE ADMISSIBLE OVER OBJECTION IN CIVIL ACTIONS."

TO ME, THAT'S PRETTY STRAIGHT FORWARD. IT SAYS, IT MAY BE USED FOR A SPECIFIC PURPOSE, WHICH IS TO SUPPLEMENT OR EXPLAIN OTHER EVIDENCE.

AND THEN THE QUALIFICATION IS THAT IT CANNOT BE SUFFICIENT IN ITSELF TO SUPPORT A FINDING IF IT WOULD BE ADMISSIBLE -- IF IT WOULD NOT BE ADMISSIBLE -- UNLESS IT WOULD BE ADMISSIBLE -- EXCUSE ME -- OVER OBJECTION IN CIVIL ACTIONS.

THAT, TO MY MIND, SAYS THAT THE NORMAL RULES OF EVIDENCE THAT APPLY IN A CIVIL COURT CASE WOULD PREVENT

THIS FROM BEING THE SOLE EVIDENCE IN SUPPORT OF A FINDING.

BUT OTHERWISE, THE HEARSAY EVIDENCE MAY BE USED FOR THE EXPRESS PURPOSE OF SUPPLEMENTING OR EXPLAINING OTHER EVIDENCE.

NOW, THE "OTHER EVIDENCE" IN QUESTION THAT THIS IS BEING OFFERED TO SUPPLEMENT, WELL, IT'S BASICALLY TWO DOCUMENTS FROM THE CONSOLIDATED CLASS ACTION LAWSUIT, WHICH BY THEMSELVES ARE CIRCUMSTANTIAL EVIDENCE OF WHAT WAS NOT -- WHAT WAS AND WHAT WAS NOT ADJUDICATED OR ADDRESSED IN THAT ACTION.

BUT CERTAINLY, I THINK, THE STATEMENTS REGARDING CLASS COUNSEL'S ATTORNEY'S UNDERSTANDING OF WHAT WAS LITIGATED AND ISSUES RELATED THERETO, WILL HELP TO EXPLAIN AND SUPPLEMENT THE BEARER OF RECORD OF THE UNDERLYING CLASS ACTION LAWSUIT.

AND FOR THAT REASON I THINK THEY SHOULD BE ADMISSIBLE -- PERMISSIBLE TO BE USED UNDER RULE 15(D).

HEARING OFFICER SNIDER: AND SO THE RECORD IS CLEAR, LET ME READ IN WHAT HAS BEEN PROFFERED.

MR. MORELL, THE E-MAIL YOU SENT US ON APRIL 26TH SUMMARIZING MR. SILVER'S WOULD-BE TESTIMONY, IS THAT, IN EFFECT, THE OFFER THAT YOU --

MR. MORELL: SURE, IF YOU WANT TO UTILIZE THAT. I WAS GOING TO BASICALLY REITERATE THAT IN MY TESTIMONY.

BUT IF YOU PREFER TO READ IT AS I WROTE IT, THAT WORKS FOR ME.

HEARING OFFICER SNIDER: LET ME DO THAT RATHER THAN --

MR. MORELL: SURE. THAT'S --

HEARING OFFICER SNIDER: -- AS TO WHETHER IT'S ADMISSIBLE.

THE OFFER IS AS FOLLOWS:

"MR. SILVER STATED THAT HE HAD NEVER CONSIDERED WHETHER THE MAY 1992 REPEAL OF FORMER GOVERNMENT CODE SECTION 31460.1 MIGHT HAVE HAVE RENDERED THAT STATUTE INEFFECTIVE THEREAFTER; THAT SO FAR AS HE WAS AWARE, NO ONE HAD RAISED A QUESTION AS TO THE APPLICABILITY OR VALIDITY OF FORMER GOVERNMENT CODE SECTION 31460.1 DURING THE COURSE OF THE CONSOLIDATED CLASS ACTION LITIGATION;

"THAT HE HAD NEVER REVIEWED ANY ACTUAL O.B.P. PROVISIONS APPLICABLE TO ORANGE COUNTY EMPLOYEES, (I.E., THE CLASS ACTION MEMBERS HE REPRESENTED); THAT HE WAS UNAWARE OF THE EXISTENCE OF THE O.B.P. PROVISIONS CONTAINED IN THE SUPERIOR COURT'S PERSONNEL POLICIES & REGULATIONS;

"THAT IF THE ANNUAL O.B.P. BENEFITS

WERE INDEED FULLY PAYABLE TO THE EMPLOYEE AS CASH IN THE EVENT NO ANNUAL ALLOCATION WAS MADE, SUCH BENEFITS MIGHT WELL HAVE BEEN TREATED DIFFERENTLY FROM THE TYPE OF PAYABLE-TO-THIRD-PARTIES, QUOTE, FLEXIBLE BENEFIT PLAN, END QUOTE, BENEFITS, WHICH WERE ACTUALLY LITIGATED ELSEWHERE IN THE COORDINATED PROCEEDINGS;

"AND THAT THE SOLE CONSIDERATION RECEIVED BY CLASS ACTION MEMBERS IN EXCHANGE FOR ACCEPTANCE OF THE EXCLUSIONS SET FORTH IN RESOLUTION 98-001 CONSISTED OF CONFIRMATION THAT THE 'VENTURA' DECISION WAS TO BE APPLIED RETROACTIVELY TO EXISTING RETIREES."

MR. MORELL, IS THAT YOUR PROFFER?

MR. MORELL: YES.

HEARING OFFICER SNIDER: ALL RIGHT. I WANT TO HEAR FROM RESPONDENT, BUT BEFORE I DO, MR. MORELL, CAN YOU DISCUSS WHICH PART OF THE RECORD THIS HEARSAY WOULD SUPPLEMENT OR EXPLAIN?

MR. MORELL: WELL, ALL RIGHT. SURE. IN MY SUPPLEMENTAL PREHEARING STATEMENT I SET FORTH A SET OF -- A SERIES OF PROPOSED FACTUAL FINDINGS WITH CITATIONS TO THE RECORD -- ADMINISTRATIVE RECORD, SUPPLEMENTAL ADMINISTRATIVE RECORD.

BUT SPECIFICALLY THEY RELATE TO THE ISSUE RELATED TO THE APPLICANT BELIEVING CONTINUED EFFECTIVENESS OF FORMER GOVERNMENT CODE SECTION 31460.1 AND WHETHER THOSE ISSUES WERE ADDRESSED IN THE CONSOLIDATED CLASS ACTION CASES.

THOSE -- THE REFERENCES IN THE RECORD THAT THIS WOULD SUPPLEMENT FOR THAT ISSUE WOULD BE IN THE ADMINISTRATIVE RECORD AT 19 TO 23, WHICH IS THE LETTER DENYING THE -- 1915 -- 2015 -- EXCUSE ME -- THE 2015 LETTER DENYING MY APPEAL FOR THE SECOND TIME.

IT ALSO RELATES TO THE JUDGMENT IN THE UNDERLYING ACTIONS, THAT WOULD BE AT 29 TO 31; THE ORDER APPROVING THE SETTLEMENT AGREEMENT, WHICH IS AT 32 TO 34; THE SETTLEMENT AGREEMENT ITSELF, AGAIN, BECAUSE HIS UNDERSTANDING INSOFAR AS THERE IS AN ISSUE RELATED TO THE MEANING OF THE SETTLEMENT AGREEMENT, WHAT THE PARTIES' INTENTIONS WERE AND HIS UNDERSTANDING RELATING TO THAT. THAT'S AT 35 TO 53.

AND ALSO THE TENTATIVE DECISION WHICH -- IN THE CASE, WHICH IS SET FORTH AT 54 TO 56, INSOFAR AS OCERS HAS CONTENDED THAT THAT DECISION -- I'M INFERRING, ALTHOUGH I HAVEN'T ACTUALLY DETERMINED THAT THAT'S RES JUDICATA WITH REGARD TO MY APPEAL; AND THAT THAT'S DISPOSITIVE A QUESTION AS TO WHETHER -- AS TO WHAT ISSUES WERE AT ISSUE IN THAT HEARING AND IN THAT RULING.

SO I BELIEVE THAT EXPLAINS AND SUPPLEMENTS THAT EVIDENCE WITH REGARD TO WHAT THE ISSUES WERE IN THAT RULING.

AND THEN, BASICALLY, THE ENTIRE RECORD WHICH I HAVE CITED IN SUPPORT OF ONE OF MY PROPOSED FACTUAL FINDINGS WHICH, IN PARTICULAR, IS THE ISSUE OF WHETHER FORMER GOVERNMENT CODE SECTION 31460.1 WAS FACIALLY APPLICABLE AND WHETHER THE STATUTE REMAINED EFFECTIVE FOLLOWING THIS APPEAL.

AND THOSE -- THAT ISSUE ESSENTIALLY -- YOU COULD LOOK AT THE ENTIRE RECORD. I INCLUDED THE ENTIRE RECORD BECAUSE BASICALLY ONE OF MY CONTENTIONS IS THAT THERE IS NOTHING IN THE RECORD TO INDICATE THAT IT WAS EVER AT ISSUE, RAISED, OR ADJUDICATED IN THAT CONSOLIDATED PROCEEDING.

THEREFORE, I WOULD CITE THE ENTIRE RECORD. THAT WOULD BE AT A.R. -- ADMINISTRATIVE RECORD 60 TO 487 BECAUSE, AGAIN, I'M ARGUING THAT IT'S NOT IN THERE.

SO YOU'D REFERENCE PRESUMABLY THE ENTIRE RECORD OF THE UNDERLYING PROCEEDINGS TO DETERMINE THAT IT'S NOT THERE.

AND FURTHER, THERE IS AN ISSUE IN THIS CASE -- A SIGNIFICANT ISSUE AS TO THE PAYABILITY OF MY ANNUAL OPTIONAL BENEFIT PLAN BENEFIT -- OPTIONAL BENEFIT PLAN BEING THE O.B.P. IN SHORTHAND THROUGHOUT HERE, I GUESS,

MOSTLY -- AND THE FACT THAT THAT IS PAYABLE AS CASH, ARGUABLY MAKES IT DIFFERENT FROM THE TYPES OF OPTIONAL BENEFITS OR FLEXIBLE BENEFITS OR CAFETERIA PLAN BENEFITS.

THOSE HAVE BEEN TREATED INTERCHANGEABLY THROUGHOUT LEGISLATION AND THE HISTORY OF THE UNDERLYING LITIGATION -- CLASS ACTION LITIGATION AND PRESUMABLY IN THESE PROCEEDINGS.

BUT THE FACT THAT MY PARTICULAR BENEFIT THAT IS AT ISSUE IN THIS CASE WAS PAYABLE AS CASH, ARGUABLY MAKES IT DISTINGUISHABLE FROM SOME OF THE RULINGS THAT HAVE BEEN IN PUBLISHED, DECISIONS IN CASE LAW AND ALSO IN -- IN THE CONSOLIDATED ACTION -- CLASS ACTION CASES AND WHAT WAS LITIGATED IN THOSE CASES.

AGAIN, YOU WOULD HAVE TO REFER TO SOME OF THE RECORD TO UNDERSTAND THAT THIS IS SUPPLEMENTING AND EXPLAINING THAT.

AND THOSE PARTS OF THE RECORD WOULD BE, AGAIN, THE TENTATIVE DECISION IN 2001. AND THAT'S AT 54 TO 56 OF THE RECORD.

ALSO, IT RELATES TO -- SORRY. LET ME GET THIS HERE -- OTHER -- OTHER ASPECTS OF THE RECORD WHICH INCLUDE THE PETITION FOR WRIT OF MANDATE AND THE EXHIBITS THERETO. THAT WOULD BE AT 98 TO 101 OF THE RECORD. I BELIEVE THAT'S THE POINTS AND AUTHORITIES IN

SUPPORT OF THE PETITION FOR WRIT OF MANDATE.

ALSO, WE HAVE THE COMPLAINT AND INTERVENTION FILED BY ORANGE COUNTY EMPLOYEES ASSOCIATION. THAT'S AT 232 TO 235, THE -- ALSO AT 242 TO 253.

THE COMPLAINT FILED BY THE RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY IN THE INTERVENTION, THAT WOULD BE AT 264 TO 270; RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE CROSS-PETITION FOR WRIT OF MANDATE, THAI WOULD BE AT 288 TO 289; AND ORANGE COUNTY EMPLOYEES ASSOCIATION'S ANSWER TO THE COMPLAINT, THAT WOULD BE AT 395.

THE OPENING BRIEF OF PLAN MEMBERS REGARDING OBLIGATION OF RETIREMENT ASSOCIATIONS, THAT WOULD BE AT PAGE -- ADMINISTRATIVE RECORD PAGE 440, ALSO 446 TO 458;

AND THERE'S A STATEMENT OF DECISION BY THE COURT IN THE CLASS ACTION LAWSUIT REGARDING INCLUDABILITY OF TERMINATION PAY AND INSURANCE RELATED PAYMENTS AND PICKUPS. THAT WOULD BE AT 467 TO 470 OF THE ADMINISTRATIVE RECORD.

AND, AGAIN, THIS ALL RELATED TO THE FACT THAT THIS ISSUE WAS NOT RAISED. AND BY REFERENCING, MY ARGUMENT IS THE ISSUE WAS NEVER RAISED. YOU CAN DETERMINE THAT, AGAIN, BY OMISSION BY REFERRING TO THESE DOCUMENTS THAT I HAVE JUST CITED.

HOWEVER, THE STATEMENT OF THE ATTORNEY HELPS TO CLARIFY THAT AND TO SUPPLEMENT IT AND TO EXPLAIN WHY THERE IS NO REFERENCE IN THOSE DOCUMENTS TO A TYPE OF OPTIONAL BENEFIT PLAN THAT PAYS CASH.

AND THAT IS BECAUSE IT WASN'T AT ISSUE. AND HE IS OPINING THAT THE TREATMENT OF THE ISSUE MIGHT HAVE BEEN DIFFERENT IF PEOPLE HAD BEEN ADDRESSING THAT ISSUE.

IN OTHER WORDS, IT WAS DISTINGUISHABLE. SO BY REFERENCE TO THE DOCUMENTS I CITED, IT'S POSSIBLE TO DETERMINE WHAT WAS OR WHAT WAS NOT LITIGATED AND THE DISTINCTION IN THAT REGARD.

THIRDLY, THERE IS SOMEWHAT OF A TANGENTIAL ISSUE REGARDING WHETHER THERE WAS ANY CONSIDERATION IN THE SETTLEMENT AGREEMENT FOR PERSONS SUCH AS MYSELF.

AND THE -- THAT PART OF THE RECORD THAT INDICATES THAT THERE WAS NONE WOULD BE THE SETTLEMENT AGREEMENT ITSELF CERTAINLY. THAT'S AT 35 TO 53 OF THE SETTLEMENT AGREEMENT.

ALSO, THERE IS A STATEMENT OF DECISION REGARDING THE INCLUDABILITY OF IN SERVICE CASH-OUTS ACCRUED AND LEAVE BENEFITS. AND THAT IS AT -- EXCUSE ME. I'M SORRY. THAT'S -- STRIKE THAT.

THE NOTICE OF THE PROPOSED SETTLEMENT AND FAIRNESS HEARING, WHICH IS THE NOTICE THAT WAS SENT TO CLASS MEMBERS REGARDING THE PROPOSED SETTLEMENT, THAT IS

AT 483 TO 487.

AND, AGAIN, I'M ARGUING THAT THERE WAS NO CONSIDERATION FOR THE AGREEMENT FOR PERSONS SITUATED SIMILARLY TO MYSELF AND HIS STATEMENT THAT THE ONLY CONSIDERATION THAT, IN HIS VIEW, WAS OBTAINED THROUGH THE SETTLEMENT, AN ADVANTAGE TO CLASS MEMBERS SETTLING IN THAT AGREEMENT THE WAY IT WAS, WAS THAT THE ISSUE OF RETROACTIVITY WAS CONFIRMED; THAT THE VENTURA BENEFITS WERE CONFIRMED TO BE RETROACTIVE, WHICH CONFERRED NO BENEFIT ON ME BECAUSE IT ONLY AFFECTED RETIRED PEOPLE WHO WERE ALREADY RETIRED AT THAT POINT.

OBVIOUSLY, IF I HADN'T RETIRED YET, THERE IS NO BENEFIT TO ME OF SAYING THE RETROACTIVE BECAUSE THAT ONLY APPLIES TO PEOPLE WHO HAD PREVIOUSLY RETIRED.

SO THOSE ARE THE THREE MAIN ISSUES I IDENTIFIED. THERE IS ALSO AN ISSUE, I SHOULD SAY, RELATING TO THE SETTLEMENT OF -- THE CONSTRUCTION OF THE SETTLEMENT AGREEMENT ITSELF, WHICH INSOFAR AS THE SETTLEMENT AGREEMENT IS AMBIGUOUS, PAROL EVIDENCE IS ADMISSIBLE TO SHOW THE INTENT OF THE PARTIES AND THE MEANING OF THE CONSTRUCTION OF THE AGREEMENT.

AND I BELIEVE HIS STATEMENTS SHOULD BE ADMISSIBLE FOR THAT PURPOSE, ALSO, TO SHOW WHAT THE PARTIES HAD IN MIND IN SETTLING THE CASE.

AND THAT WOULD RELATE, AGAIN, PRIMARILY TO THE

SETTLEMENT AGREEMENT ITSELF AS EVIDENCE. THAT WOULD BE 35 TO 53 IN THE ADMINISTRATIVE RECORD.

AND LET ME GO WITH THAT. THAT SHOULD BE SUFFICIENT TO SHOW THAT THE SETTLEMENT AGREEMENT IS AMBIGUOUS.

HEARING OFFICER SNIDER: THANK YOU, MR. MORELL.

MS. MATSUO, WHAT IS RESPONDENT'S VIEW OF MR. SILVER'S WOULD-BE TESTIMONY?

MS. MATSUO: OKAY. AT THIS POINT MY FIRST OBJECTION IS GOING TO BE THE TIMING OF EVERYTHING. AS I STATED IN MY OBJECTIONS PREVIOUSLY, RULE 14 TALKS IN TERMS OF HOW MUCH TIME ONE SHOULD RECEIVE WITH REGARD TO -- LET ME GET THE TITLE -- RULE 14 OF THE ADMINISTRATIVE HEARING PROCEDURES.

IT STATED -- IT'S ENTITLED, RESOLUTION OF DISPUTES ABOUT DEPOSITIONS AND CONDUCT OF HEARINGS.

I KNOW RULE 15 UPON WHICH MR. MORELL IS RELYING. IT'S RULE 15, I BELIEVE, (D), THAT TALKS ABOUT THE HEARSAY EVIDENCE. RULE 15 IS ENTITLED CONDUCT OF HEARINGS.

IT'S MY CONTENTION THAT RULE 14, THEREFORE, GOVERNS THE TIMING AND THE PROCEDURE THAT SHOULD BE FOLLOWED WHEN THERE IS AN ISSUE WITH REGARD TO HEARSAY, WHICH IS CONSIDERED CONDUCT OF HEARINGS.

I KNOW THAT THE HEARING OFFICER INDICATED HIS

BELIEF THAT RULE 15 WAS NOT GOVERNED BY RULE 14. BUT I ASSERT THAT OBJECTION AGAIN AND SAY IT IS.

MY SECOND OBJECTION IS THE FACT THAT I RECEIVED FIRST INDICATION OF HEARSAY APPROXIMATELY A WEEK AND A HALF BEFORE -- OR MAYBE NOT EVEN QUITE TWO WEEKS BEFORE THIS HEARING.

I HAD, BY THE HEARING OFFICER'S INSTRUCTIONS GIVEN ON A SUNDAY EVENING, LESS THAN THREE DAYS -- MONDAY, TUESDAY, WEDNESDAY -- TO RESPOND TO THE HEARSAY AND ASSERT MY OBJECTIONS.

I WAS OUT OF THE OFFICE THE FOLLOWING THURSDAY UNTIL THIS MORNING. I NOTIFIED BOTH MR. MORELL AND THE HEARING OFFICER THAT I WOULD BE OUT OF THE OFFICE AND NOT AVAILABLE UNTIL FRIDAY MORNING.

DESPITE THAT, I WAS GIVEN -- NOT JUST ME, BUT THE HEARING OFFICER -- FROM MR. MORELL ON WEDNESDAY, APRIL 26TH -- WAIT. WAIT. WAIT -- IT LOOKS LIKE THE 26TH AT 11:00 P.M., THE STATEMENTS THAT MR. MORELL CONTENDS ARE THE STATEMENTS -- THE HEARSAY STATEMENTS FROM MR. SILVER THAT MR. MORELL WOULD LIKE TO SUBMIT.

BASED ON BASICALLY THE LIMITED TIME I'VE HAD TO REVIEW AND GO THROUGH THIS, I FEEL I'M AT A GREAT DISADVANTAGE TO RESPOND.

BUT IN LIGHT OF THAT, THE FIRST THING I WOULD LIKE IS A RULING THAT EVIDENCE CODE 1230, WHICH

MR. MORELL FIRST SAID HE WANTED TO SUBMIT MR. SILVER'S STATEMENTS ON WITH REGARD TO INTERESTS, STATEMENTS AGAINST INTEREST, I BELIEVE THAT EVIDENCE CODE SECTION 1230 DOES NOT APPLY; THAT THE STATEMENTS MR. MORELL WOULD LIKE TO HAVE FROM MR. SILVER ARE NOT STATEMENTS AGAINST INTEREST PURSUANT TO EVIDENCE CODE 1230.

FURTHERMORE, EVIDENCE CODE 1230 REQUIRES THAT THE PERSON, MR. SILVER, BE UNAVAILABLE. I BELIEVE THAT MR. MORELL CONCEDES THAT MR. SILVER IS NOT UNAVAILABLE FOR PURPOSES OF EVIDENCE CODE 1230.

SO I WOULD LIKE A RULING ON THOSE TWO GROUNDS; THAT THE HEARSAY EVIDENCE IS HEARSAY AND NOT ADMISSIBLE UNDER EVIDENCE CODE 1230; THAT THE ONLY ISSUE WE ARE ADDRESSING IS WHETHER OR NOT THESE STATEMENTS THAT ARE ATTRIBUTABLE TO MR. SILVER COULD BE BROUGHT IN UNDER RULE 15(D) TO SUPPLEMENT SOME OTHER EVIDENCE IN THE RECORD.

RULE 15(D) ALSO STATES THAT THE PARTY HAS AN ONGOING OBJECTION TO THESE STATEMENTS AT THE HEARING AND THEREAFTER. SO I WOULD LIKE TO ASSERT MY ONGOING OBJECTION.

I THINK THAT GIVEN THE STATEMENTS BY MR. MORELL, THAT THERE IS MULTIPLE PAGES, MULTIPLE AREAS, MULTIPLE STATEMENTS, THAT I SHOULD BE GIVEN THE OPPORTUNITY TO TAKE EACH OF THESE STATEMENTS AND TO BE

ABLE TO LOOK AT THE RECORDS HE IS ASSERTING THAT THIS -- THAT THE INDIVIDUAL STATEMENTS SUPPLEMENT, TO BE ABLE TO SAY, YES, THEY DO SUPPLEMENT OR, NO, THEY DON'T SUPPLEMENT.

THAT'S KIND OF HARD TO DO AT THIS TIME GIVEN THE TIME CONSTRAINTS THAT I'VE HAD. FROM WHAT I CAN TELL, THERE ARE SIX STATEMENTS THAT MR. MORELL WANTS TO BE PRESENTED AS HEARSAY.

MR. SILVER STATED THAT HE HAD NEVER CONSIDERED WHETHER THE MAY 1992 REPEAL OF FORMER GOVERNMENT CODE SECTION 31460.1 MIGHT HAVE RENDERED THE STATUTE INEFFECTIVE.

I THINK THAT'S FACTUAL. I THINK THAT'S SOMETHING THAT WE CAN DETERMINE WHETHER IT SUPPLEMENTS OR DOES NOT SUPPLEMENT ONCE GIVEN THE OPPORTUNITY TO LOOK AT THINGS.

AND THE FIFTH SENTENCE THAT STARTS OUT WITH, IF THE ANNUAL O.B.P. BENEFITS WERE INDEED FULLY PAYABLE TO THE EMPLOYEES AS CASH IN THE EVENT NO ANNUAL ALLOCATION WAS MADE, SUCH BENEFITS MIGHT WELL HAVE BEEN TREATED DIFFERENTLY FROM THE TYPE OF PAYABLE-TO-THIRD-PARTIES FLEXIBLE BENEFIT PLAN BENEFITS WHICH WERE ACTUALLY LITIGATED ELSEWHERE IN THE COORDINATED PROCEEDINGS -- I THINK THAT IS VAGUE AND AMBIGUOUS.

I THINK IT'S AN EXPRESSION OF HIS OPINION, NOT

FACT. I THINK IT'S INAPPROPRIATE FOR HIM TO HAVE A HEARSAY OPINION AS OPPOSED TO HEARSAY FACTS.

SO AT THIS POINT I WOULD JUST SAY I WOULD LIKE TO RESERVE MY OPPORTUNITY TO REVIEW, IN DETAIL, ALL THE DOCUMENTS THAT MR. MORELL HAS INDICATED THESE STATEMENTS SUPPLEMENT AND I'D LIKE TO BE ABLE TO ARGUE IN THE COURSE OF OUR CLOSING BRIEFS WHETHER OR NOT THE STATEMENTS INDIVIDUALLY ARE SUPPORTIVE OF OTHER EVIDENCE IN THE RECORD.

HEARING OFFICER SNIDER: THANK YOU, MS. MATSUO.

WITH RESPECT TO EVIDENCE CODE SECTION 1230, WHETHER OR NOT MR. SILVER'S STATEMENTS WERE AGAINST HIS INTEREST, MR. MORELL, MY UNDERSTANDING IS THAT YOU ARE NOT ASSERTING THAT THEORY ANYMORE?

MR. MORELL: THAT IS CORRECT.

HEARING OFFICER SNIDER: ALL RIGHT. THEN I THINK IT'S MOOT WHETHER OR NOT I THINK IT APPLIES.

AS FAR AS THE -- AND I WILL GIVE YOU AN OPPORTUNITY TO RESPOND, MR. MORELL, SINCE YOU ARE THE MOVING PARTY ON THIS.

BUT I DO THINK THAT RULE 14 DOESN'T APPLY HERE BECAUSE IT RELATES TO DEPOSITIONS, WHICH THIS IS NOT, AND THE CONDUCT OF THE HEARING, WHICH HADN'T BEGUN AT THE TIME THIS ISSUE AROSE.

I THINK WHAT WE ARE REALLY LOOKING AT IS THE

ABSENCE OF RULE AS TO PRETRIAL HEARSAY RULINGS. AND FOR THAT REASON, I THINK 15(D) IS THE CORRECT RUBRIC UNDER WHICH TO PUT THIS ISSUE.

I TAKE MS. MATSUO'S POINT THAT SHE DIDN'T HAVE TEN DAYS' NOTICE. BUT IF YOU MEASURE FROM WHEN MR. MORELL NOTIFIED ME AND THE OPPOSING PARTY OF THE PROFFER, TODAY IS THE NINTH DAY. IT DOESN'T MAKE IT TIMELY, BUT I THINK IT MITIGATES THE PROBLEM.

LET ME TURN TO MR. MORELL TO SEE IF HE WOULD LIKE TO RESPOND TO MS. MATSUO'S POINTS?

MR. MORELL: FIRST, I WOULD JUST POINT OUT THAT SHE DOESN'T DISPUTE MY CONSTRUCTION OF RULE 15(D). I BELIEVE THAT WHAT IT SAYS IS THAT HEARSAY CAN BE USED FOR THE EXPRESS PURPOSE OF SUPPLEMENTING OR EXPLAINING OTHER EVIDENCE IN THE RECORD.

WHICH -- SO TO MY MIND THE ISSUE IS WHETHER THERE IS OTHER EVIDENCE IN THE RECORD SUPPLEMENTING OF WHICH THIS TESTIMONY OR STATEMENT -- HEARSAY STATEMENT WOULD SUPPLEMENT OR EXPLAIN. I THINK IT'S PRETTY CLEAR THAT IT DOES.

I CERTAINLY CAN SYMPATHIZE WITH MS. MATSUO REGARDING THE NEED FOR TIME TO REVIEW EACH OF THE ASPECTS OF THE RECORD THAT I CITED AS BEING SUPPLEMENTED OR EXPLAINED BY ANY STATEMENTS.

HOWEVER, I WOULD POINT OUT THAT ALL OF THESE

ISSUES WERE RAISED IN MY PREHEARING STATEMENT AND EXHAUSTIVELY, I THOUGHT, IN MY SUPPLEMENTAL PREHEARING STATEMENT.

SO I THINK THAT ANYONE REVIEWING THOSE DOCUMENTS, PARTICULARLY THE SUPPLEMENTAL PREHEARING STATEMENT, AND -- CERTAINLY WOULD HAVE HAD THE OPPORTUNITY AND, I WOULD HAVE THOUGHT, THE DESIRE OR MOTIVATION TO ALREADY HAVE REVIEWED THOSE ASPECTS OF THE RECORD AND MADE A DETERMINATION OF THEIR SIGNIFICANCE WITH REGARD TO OBTAINING OR LOOKING FOR EVIDENCE SUPPORTING THE FACTUAL FINDINGS THAT I PROPOSE.

SO I BELIEVE THAT WHATEVER NOTICE WAS REQUIRED WAS PROVIDED ADEQUATELY BY MY SUPPLEMENTAL PREHEARING STATEMENT AND THE CITATIONS IN THERE WHICH ARE THE SAME CITATIONS TO THE SAME PORTIONS OF THE RECORD I JUST GAVE.

AND THEY'RE MERELY IN SUPPORT OF CERTAIN PROPOSED FACTUAL FINDINGS, PARTICULARLY THOSE FACTUAL FINDINGS IN PROPOSED 527 AND -32.

AND SO IN THAT REGARD, SHE HAS HAD MY SUPPLEMENTAL PREHEARING STATEMENT FOR, I BELIEVE IT'S TWO WEEKS NOW, AND CERTAINLY THESE -- THE SAME PORTIONS OF THE CLASS -- THE DOCUMENTS FROM THE CLASS ACTION LAWSUIT REFERENCED IN THAT SUPPLEMENTAL PREHEARING STATEMENT IN SUPPORT OF THOSE FACTUAL FINDINGS.

SO I'M JUST MERELY RECITING THEM. SO I WOULD ARGUE THAT SHE HAS ALREADY HAD ADEQUATE NOTICE OF WHAT MY ARGUMENTS ARE. AND IT'S QUITE EASY, I WOULD THINK -- RELATIVE EASY, I GUESS I SHOULD SAY -- TO DETERMINE WHETHER THESE HEARSAY STATEMENTS SUPPORT OR EXPLAIN THOSE CITED PORTIONS OF THE ADMINISTRATIVE RECORD.

HEARING OFFICER SNIDER: MS. MATSUO, ANYTHING FURTHER?

MS. MATSUO: YES. I TAKE EXCEPTION TO THE FACT THAT THE HEARING OFFICER THINKS I'VE HAD NINE DAYS TO DEAL WITH THESE ISSUES.

MR. MORELL'S E-MAIL CAME IN AT 11:07 P.M. ON WEDNESDAY, APRIL 26TH, AFTER A TIME OF WHICH I HAD NOTIFIED BOTH YOU AND MR. MORELL THAT I WOULD BE OUT OF THE OFFICE AND UNAVAILABLE UNTIL THIS MORNING.

SO THE ONLY TIME THAT I'VE HAD A CHANCE TO REVIEW THIS INFORMATION IS WHEN I GOT IN HERE AT 7:00 O'CLOCK THIS MORNING.

NOW, BASED UPON WHAT MR. MORELL SAID, YES, HE HAS GIVEN ME -- AND PROBABLY CUT DOWN MULTIPLE TREES IN GIVING ME -- ALL THE INFORMATION AND THE STATEMENTS THAT HE THINKS ARE RELEVANT TO HIS CASE, WHICH IS FINE.

BUT WHAT WE ARE LOOKING AT IS SIX SPECIFIC STATEMENTS THAT ARE SUPPOSED TO SUPPORT MULTIPLE PAGES THAT HE HAS MADE REFERENCE TO.

I SHOULD BE GIVEN AN OPPORTUNITY TO HAVE A STANDING OBJECTION TO THESE, SO THAT I CAN LOOK AT THEM INDIVIDUALLY IN THE HEARING AND IN THE CLOSING BRIEF AND SAY, NO, THIS STATEMENT, NUMBER ONE, DOES NOT SUPPORT OR EXPLAIN ANY OTHER EVIDENCE; OR, YES, IT DOES, BASED UPON WHAT HE STATED.

I MEAN, IT'S -- AND THAT'S CONSISTENT WITH RULE 15. AND I'M SAYING AND I WILL CONCEDE WHAT MR. MORELL SAID, IF THESE STATEMENTS SUPPORT OR EXPLAIN OTHER EVIDENCE, THEN RULE 15 ALLOWS THEM TO COME IN. BUT YOU CAN'T JUST ACCEPT PART OF RULE 15 AND THROW AWAY THE REST.

RULE 15 ALSO STATES THAT THE PARTY AT THE BEGINNING OF THE HEARING IS TO ASSERT A CONTINUING OBJECTION TO EACH OF THE HEARSAY RULES.

THAT MEANS IT'S GIVING THE PARTY WHO IS OBJECTING AN OPPORTUNITY TO NOT AT THE HEARING BUT SOMETIME ELSE, TO SAY WHAT STATEMENTS SHOULD BE OR SHOULD NOT BE IN, WHAT SUPPLEMENTED THE EVIDENCE AND WHAT DID NOT.

HEARING OFFICER SNIDER: ALL RIGHT. WELL --

MR. MORELL: CAN I SAY ONE MORE THING?

HEARING OFFICER SNIDER: GO AHEAD, MR. MORELL.

MR. MORELL: YEAH. I'M A LITTLE CONCERNED HERE BECAUSE I'M SENSING THAT MS. MATSUO IS NOT PREPARED TO

DISCUSS HOW ALL THE EVIDENCE I HAVE IN SUPPORT OF EACH OF MY PROPOSED FACTUAL FINDINGS SUPPORTS OR DOES NOT SUPPORT EACH OF MY PROPOSED FACTUAL FINDINGS.

MY UNDERSTANDING IS THAT THAT REALLY IS THE PURPOSE OF THIS HEARING, AS LEAST AS FAR AS I'M CONCERNED.

SO -- AND IF SHE WERE PREPARED TO DO THAT, I THINK THAT SAME EVIDENCE COULD BE EVALUATED RATHER EASILY IN RELATION TO THESE HEARSAY STATEMENTS.

SO I'M HOPING THAT THAT'S NOT WHAT I'M HEARING; THAT SHE IS PREPARED TO DISCUSS THE EVIDENCE IN QUESTION WITH RELATION TO THOSE FACTUAL FINDINGS AND THOSE CONCLUSIONS OF LAW. AS I SAID, TO ME THAT'S WHY WE ARE HERE.

HEARING OFFICER SNIDER: I THINK WHAT MS. MATSUO IS SAYING IS THAT SHE IS NOT UNFAMILIAR WITH THE RECORD, BUT SHE HASN'T HAD TIME TO PREPARE ON THE ISSUE OF WHETHER THE PROFFERED STATEMENTS, IN FACT, SUPPLEMENT THE RECORD.

MR. MORELL: OKAY.

HEARING OFFICER SNIDER: ANYTHING FURTHER FROM EITHER PARTY?

MS. MATSUO: YOU KNOW, MAYBE IT'S BECAUSE MR. MORELL HASN'T BEEN HERE AT THE HEARINGS, AND OUR VIEW OF WHAT GOES ON IN THE HEARINGS ARE DIFFERENT.

I AM NOT PREPARED TO SIT HERE ALL DAY AND GO THROUGH EACH ONE OF HIS FACTS AND HIS ADMINISTRATIVE RECORD.

THAT IS USUALLY NOT WHAT THE HEARINGS ARE FOR. USUALLY THE HEARINGS ARE TO HAVE WITNESSES TESTIFY AND TO PRESENT EVIDENCE.

WE HAVE THE EVIDENCE. NORMALLY, THE EVIDENCE IS SUBMITTED, THE HEARING OFFICER HAS IT, AND THEN WE DO OUR CLOSING BRIEF.

THAT IS WHAT I'M PREPARED HERE TO DO; PRESENT EVIDENCE, HAVE A WITNESS COME, AND THEN DO A CLOSING BRIEF.

HEARING OFFICER SNIDER: ALL RIGHT. I THINK I HAVE HEARD SUFFICIENTLY FROM BOTH PARTIES. AND I HAVE THOUGHTS THAT ARE SOMEWHAT DIFFERENT FROM WHAT BOTH OF YOU SAID.

MY FIRST PROBLEM IS THAT -- WELL, LET ME CLARIFY.

MR. MORELL, WAS APRIL 26TH THE FIRST TIME YOU MENTIONED THIS MR. SILVER'S POSSIBLE TESTIMONY?

MR. MORELL: NO. I BELIEVE, WHEN I -- WHEN I SENT MY WITNESS LIST, I MENTIONED THAT I WOULD BE DISCUSSING MY STATEMENTS WITH COUNSEL AS PART OF WHAT MY PROPOSED TESTIMONY WOULD BE.

HEARING OFFICER SNIDER: LET ME SEE THAT, BECAUSE

THE WITNESS LIST I HAVE ONLY NAMES YOURSELF. WAS THERE REFERENCE TO ANOTHER WITNESS?

MR. MORELL: NO. BUT I DID SAY THAT MY TESTIMONY WOULD INCLUDE STATEMENTS MADE TO ME BY COUNSEL.

HEARING OFFICER SNIDER: YES. THAT IS CORRECT.

MR. MORELL: I BELIEVE THAT WAS MARCH 6TH THAT I SERVED THAT.

HEARING OFFICER SNIDER: YES. THAT'S WHEN I RECEIVED THAT.

MR. MORELL: YES.

HEARING OFFICER SNIDER: THE PROBLEM I HAVE IS THAT MR. SILVER IS BEING OFFERED AS A WITNESS; ALBEIT, A HEARSAY WITNESS. I THINK THE RULES REQUIRE THAT THAT WITNESS BE DISCLOSED ON OR BEFORE APRIL 21ST, WHICH WAS THE DEADLINE FOR THE SUPPLEMENTAL STATEMENT.

MR. MORELL, DID YOU ATTEMPT TO SUBPOENA MR. SILVER?

MR. MORELL: NO, I DID NOT.

HEARING OFFICER SNIDER: ALL RIGHT.

MR. MORELL: AND -- WELL, AND THE REASON I DIDN'T IS BECAUSE I UNDERSTOOD THAT UNDER RULE 15(D), HIS STATEMENTS WOULD BE ADMISSIBLE. SO I RELIED ON THE RULE AS WRITTEN, WHICH IS THAT IT MAY BE USED FOR THE EXPRESS PURPOSE.

AND THERE IS NOTHING IN THERE THAT SAYS

ANYTHING ABOUT PRIOR NOTICE. I -- I GAVE THE PARTIES AND THE REFEREE A HEADS-UP AS A COURTESY.

I WASN'T SEEKING A RULING AND I DON'T BELIEVE I WAS OBLIGATED TO DISCLOSE THAT PRIOR TO THE HEARING, OTHER THAN THE FACT OF THE CONTENT OF MY TESTIMONY AS A WITNESS, WHICH I DID.

SO, I MEAN, WE HAVE GONE THROUGH THIS PROCESS. I WAS TRYING TO AVOID SPENDING AN INORDINATE AMOUNT OF TIME ON THIS ISSUE. I WAS NOT SUCCESSFUL IN THAT REGARD.

BUT I DON'T BELIEVE I WAS OBLIGATED TO DISCLOSE IT PRIOR TO THE HEARING OTHER THAN IN THE CONTENT OF MY TESTIMONY AS A WITNESS, WHICH I BELIEVE I DID.

SO I DON'T BELIEVE THERE IS ANY REQUIREMENT FOR A PRIOR RULING OR PRIOR CONSIDERATION OF HEARSAY TESTIMONY. THAT'S NOT THE WAY IT'S NORMALLY DONE IN TESTIMONY.

IF SOMEONE TESTIFIES WITH HEARSAY, THAT'S THE REASON THEY HAVE A STANDING OBJECTION, SO THAT IN THE COURSE OF THE PROCEEDINGS WE ARE NOT INTERRUPTED BY THESE TYPES OF DISPUTES.

THAT WOULD BE MY THOUGHT ON THAT. LIKE I SAY, NORMALLY, A WITNESS TESTIFIES. IF THERE IS HEARSAY, THERE IS AN OBJECTION.

AND IN THIS CASE THERE IS NO NEED FOR OBJECTION

BECAUSE THERE IS A STANDING OBJECTION PER THE RULES, AND THE OFFICER RULES AT THAT POINT.

THAT'S NORMALLY THE WAY IT'S DONE. THERE IS NO MOTION IN LIMINE INVOLVED OR REQUIRED AS I UNDERSTAND IT.

HEARING OFFICER SNIDER: ALL RIGHT. THE SECOND CONCERN I HAVE IS AS FOLLOWS, AND I WOULD APPRECIATE BOTH PARTIES ADDRESSING THIS:

WHY IS MR. SILVER'S OPINION ABOUT WHAT WAS OMITTED FROM THE LITIGATION RELEVANT?

MR. MORELL: WELL, IT'S NOT OPINION.

HEARING OFFICER SNIDER: WHEN HE SAYS HE HADN'T CONSIDERED THE REPEAL, HE WAS UNAWARE OF THE EXISTENCE, THE BENEFITS MIGHT WELL HAVE BEEN TREATED DIFFERENTLY -- AND I GRANT YOU THAT SOME OF THAT IS FACTUAL TESTIMONY. BUT WHY IS ONE OF THE PARTIES' ATTORNEYS, THE VIEW OF WHAT THE LITIGATION MEANT, RELEVANT?

MR. MORELL: IT GOES TO -- IT GOES TO THE QUESTION OF WHAT WAS ACTUALLY LITIGATED. THAT'S THE QUESTION. THEY ARE ARGUING THAT MY APPEAL IS PRECLUDED BY THE SETTLEMENT AGREEMENT. I'M ARGUING THAT THE SETTLEMENT AGREEMENT DOES NOT COVER THE ISSUE I'M RAISING.

THEREFORE, THE QUESTION OF WHAT THE SETTLEMENT AGREEMENT COVERED IS THE BROADER ISSUE THAT IS IN QUESTION HERE.

AND FOR ALL THE REASONS THAT I HAVE PUT FORTH IN MY PREHEARING STATEMENT AND SUPPLEMENTAL PREHEARING STATEMENT, THIS TYPE OF EVIDENCE GOES TO SHOW WHAT THE PARTIES HAD IN MIND, WHAT THEIR UNDERSTANDING WAS OF WHAT WAS BEING LITIGATED AND SETTLED.

AND PARTICULARLY, INSOFAR AS THE SETTLEMENT AGREEMENT ITSELF IS AMBIGUOUS, THAT TYPE OF EXTENSIVE EVIDENCE IS ADMISSIBLE TO SHOW WHAT THE SCOPE OF THE SETTLEMENT AGREEMENT WAS.

SO THE FACT THAT IT -- AND ALSO FOR PURPOSES OF RES JUDICATA, WHAT -- IT'S THE QUESTION OF WHAT WAS ACTUALLY LITIGATED.

IF THEY'RE ARGUING THAT THE JUDGMENT THAT WAS ENTERED UPON THE SETTLEMENT IS A BAR TO MY APPEAL, THEN THE QUESTION OF WHAT THAT JUDGMENT INCLUDES IS RELEVANT.

AND THE FACT THAT THE ISSUE OF AN OPTIONAL BENEFIT OR FLEXIBLE BENEFIT PLAN WHICH PROVIDED CASH PAYMENTS, WHETHER THAT IS DIFFERENT FROM WHAT WAS ACTUALLY AT ISSUE IN THAT CASE AND LITIGATED AND MAY BE COVERED BY RES JUDICATA IS DIFFERENT DEPENDING ON WHETHER A PLAN -- THE PLAN THAT WAS AT ISSUE IN THE CLASS ACTION CASES WAS SUFFICIENTLY SIMILAR TO MINE, TO THE PLAN THAT I RECEIVED IN THAT REGARD.

SO THAT IS WHY IT'S RELEVANT IF YOU QUESTION THE RELEVANCE OF IT.

HEARING OFFICER SNIDER: MS. MATSUO, ANY COMMENTS ON RELEVANCY?

MS. MATSUO: YOU KNOW, WHAT HE DID OR DIDN'T KNOW IS, IN MY VIEW, IRRELEVANT BECAUSE HE WAS NOT THE ONLY ATTORNEY INVOLVED.

I THINK THAT SOMEWHERE ELSE IN MR. MORELL'S DOCUMENTS IT INDICATES ANOTHER ATTORNEY THAT WAS INVOLVED, AT LEAST TWO ATTORNEYS INVOLVED.

SO ONE DOESN'T KNOW. BIG DEAL. MAYBE THE OTHER DID OR WHAT HAVE YOU. BUT IF THERE IS, YOU KNOW, OTHER DOCUMENTS OR OTHER EVIDENCE THERE, THEN HE CAN BRING THEM IN AS LONG AS I'M GIVEN A CHANCE TO SAY, NO, IT DOESN'T APPLY.

HIS THEORY IS THAT THERE IS AN ISSUE OF WHAT WAS COVERED AND WHAT IS NOT COVERED AND THAT WOULD HAVE A RESULT IN THE OUTCOME OF WHETHER OR NOT THE O.B.P. PLAN SHOULD BE INCLUDED IN THE FINAL COMPENSATION.

OUR POSITION IS THAT IT DOESN'T. IT DOESN'T HAVE AN EFFECT.

HEARING OFFICER SNIDER: ANYTHING FURTHER FROM EITHER PARTY?

MR. MORELL: I WOULD JUST POINT OUT THAT MR. SILVER WAS THE LEAD CLASS COUNSEL DESIGNATED BY THE COURT. SO I BELIEVE THAT IN THAT CAPACITY HE WOULD HAVE BEEN AWARE OF WHAT WAS LITIGATED AND WHAT WAS NOT LITIGATED.

AGAIN, I THINK THAT -- AND WHETHER HE DID OR NOT IS AN EVIDENTIARY ISSUE, A FACTUAL QUESTION. BUT CERTAINLY HIS -- HIS PERSONAL KNOWLEDGE OF WHAT WAS LITIGATED OR NOT LITIGATED, I THINK, IS HIGHLY RELEVANT TO SHOW WHAT WAS LITIGATED OR NOT LITIGATED. SO THAT'S WHAT I WOULD SAY ABOUT THAT.

THERE WERE MANY ATTORNEYS INVOLVED IN THE CASE. BUT HE WAS THE PLAINTIFFS' LEAD CLASS ATTORNEY. AND BY "PLAINTIFFS'" AT THAT POINT IT BECAME A CLASS ACTION THAT INCLUDED THE INDIVIDUAL PLAINTIFF WHO HAD FILED A PETITION FOR WRIT OF MANDATE.

THAT INCLUDED O.C.E.A. THAT INCLUDED R.E. -- R.E.A.O.C., RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY. SO ALL THE PLAINTIFFS, HE REPRESENTED THEM. HE WAS THE LEAD COUNSEL.

FOR THAT REASON, I BELIEVE HE SHOULD HAVE KNOWN WHAT WAS AT ISSUE IN THE CASE. AND I THINK HIS STATEMENTS IN THAT REGARD BEAR EVIDENTIARY SIGNIFICANCE. THEY MAY NOT BE DISPOSITIVE. BUT, AGAIN, IT IS EVIDENCE.

HEARING OFFICER SNIDER: ANYTHING FURTHER FROM THE PARTIES?

MS. MATSUO: NO.

HEARING OFFICER SNIDER: LET'S TAKE A FIVE-MINUTE BREAK. I WILL THINK ABOUT THIS AND GIVE YOU FOLKS A

RULING IN JUST A FEW MINUTES.

(RECESS TAKEN.)

HEARING OFFICER SNIDER: BACK ON THE RECORD IN THE MORELL MATTER.

I UNDERSTAND THAT MR. SILVER'S STATEMENTS ARE BEING OFFERED ON THE ISSUE OF WHAT WAS AND WHAT WAS NOT LITIGATED IN THE SETTLEMENT LITIGATION.

I AM GOING TO DISALLOW THE TESTIMONY FOR -- ON THIS BASIS -- NOT MR. MORELL'S TESTIMONY, BUT THE HEARSAY STATEMENT BY MR. SILVER:

I DON'T THINK MR. SILVER'S VIEW OF WHAT WAS AND WAS NOT LITIGATED IS RELEVANT. I AGREE THAT IT *SUPPLEMENTS THE RECORD. BUT THE PROBLEM I HAVE WITH IT* IS THAT COUNSEL'S CONDUCT -- MR. SILVER'S CONDUCT OF WHAT HE DID IN THE HEARING, WHAT HE CONTEMPLATED, WHAT HE BELIEVED, HOW HE THINKS THE ISSUE MIGHT HAVE BEEN TREATED ISN'T REALLY MATERIAL TO THE QUESTION OF WHAT THE AGREEMENT ACTUALLY SAID AND WHAT WAS LITIGATED.

OR TO PUT IT ANOTHER WAY, THE BEST EVIDENCE OF WHAT WAS OR WHAT WASN'T LITIGATED IS THE PLEADINGS THEMSELVES, THE RECOMMENDED DECISION, AND THE RULING ITSELF.

SO I THINK, YOU KNOW, THE PARTIES MAY DISAGREE ABOUT WHAT WAS LITIGATED AND WE WILL HAVE BRIEFING ON THAT. BUT I DON'T THINK MR. SILVER'S VIEW OF WHAT WAS

LITIGATED REALLY MATTERS ANY MORE THAN MR. GOLD'S -- MAKING UP OPPOSING COUNSEL'S NAME -- VIEW OF WHAT WAS LITIGATED.

I DON'T THINK IT ASSISTS ME AS A FACT-FINDER TO HEAR THE HEARSAY FROM MR. SILVER ABOUT WHAT HE BELIEVES OCCURRED AND WHAT DIDN'T OCCUR.

I APPRECIATE WHY MR. MORELL WOULD LIKE IT IN. BUT I DON'T THINK IT'S MATERIAL ON THE QUESTION OF WHAT THE LITIGATION ACTUALLY ENTAILED.

SO FOR THAT REASON I'M NOT GOING TO ALLOW MR. SILVER'S HEARSAY TESTIMONY. OF COURSE, THE ISSUE CAN BE DEVELOPED IN SOME OTHER WAYS.

HAVING SAID THAT, LET ME TURN TO THE HEARING. OH, BEFORE WE DO THAT, LET ME ADDRESS OF QUESTION OF EXHIBITS.

WE HAD AN ADMINISTRATIVE RECORD SUBMITTED BY OCERS WHICH BROUGHT US TO PAGE 56. MR. MORELL SUPPLEMENTED THE RECORD UP TO PAGE 645.

WITHIN THOSE PAGES, DOES EITHER PARTY HAVE ANY OBJECTIONS TO ANY OF THE DOCUMENTS?

MR. MORELL: I DON'T.

MS. MATSUO: I DON'T HAVE ANY OBJECTIONS TO THE DOCUMENTS BEING ADMITTED. I JUST RESERVE MY RIGHT TO ARGUE THE RELEVANCY OR THE WEIGHT OF EVIDENCE.

HEARING OFFICER SNIDER: ABSOLUTELY, AS DOES

BEFORE THE BOARD OF RETIREMENT OF

THE ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

APPLICANT'S OBJECTIONS TO OCERS STAFF'S

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

In the Matter of the Application of James B. Morell,

a Member of the Orange County Employees Retirement System,

for a Recalculated Retirement Allowance

Pursuant to Rule 21 of the OCERS Administrative Hearing Procedures, Applicant hereby objects, for the reasons stated, to the following specified portions of OCERS Staff's proposed Findings of Fact, Conclusions of Law and Recommended decision:

III. ISSUES: Objection is made to the Board's limiting its consideration to the two specified "sole issues in this matter"

- The actual "sole issue" raised by this appeal is whether Applicant's retirement allowance, as it relates to OBP benefits provided by the Superior Court, was correctly calculated in accordance with applicable law. As is evident from an examination of the record (e.g., AR 1-2, 11-15 and 19-23, and Applicant's Prehearing Statement), Applicant has raised numerous subordinate issues beyond those presented by the Settlement Agreement.

- Government Code section 31534 does not authorize the Board to avoid considering the full record and the full range of issues presented by the appeal. Section 31534(b) expressly requires the Board to consider "*all* the testimony, plus *all* other evidence" adduced in the administrative hearing and to take action based upon "*such* evidence" (emphasis added).

- It is unclear whether, by choosing not to consider issues not directly related to the Settlement Agreement, the Board intends to concede the merit of Applicant's claim with regard to these issues, or whether the Board has left intact the hearing officer's findings of fact and conclusions of law with regard to these other issues.

IV. SUMMARY OF EVIDENCE: Objection is made to the omission, from the list of documents received in evidence, of Applicant's August 13 email response to Ms. Janike, which (according to Ms. Jenike's August 14 email to Applicant) was among the materials before the Board at its August 20 hearing.

V: FINDINGS OF FACT

Paragraph 2: Objection is made to *"elected to receive and"*

- There is no evidence in the record which would support a factual finding that Applicant elected to receive the $3,500 annual OBP benefit. The evidence is to the contrary – as set forth in the Superior Court PP&Rs and the County's Section 125 Plan, the OBP benefit was a standard component of the compensation package for all Superior Court research attorneys, and the $3,500 was paid fully and automatically in cash in the event no allocation was made during the annual open enrollment period. There was no provision to elect to receive or decline the annual benefit, or to "opt-out" of the OBP program. The record further shows that Applicant was not a member of any bargaining unit which might be said to have collectively "elected" to obtain the benefit.

- Nor could it be properly concluded as a matter of law, in light of the foregoing evidence, that Applicant "elected" to receive the OBP benefit merely by virtue of the fact that the benefit was provided. As discussed in Applicant's Reply Brief (pp. 4-5), an election involves an affirmative act on the part of the elector. Moreover, insofar as former Government Code section 31460.1 was the governing law which provided the legal basis for the flexible benefits exclusion of OCERS Resolution 98-001, as OCERS claims, that statute authorized the exclusion of the flexible benefits only for employees "who have elected to participate in a flexible benefits program " – as further discussed in Applicant's briefing, it is a basic rule of statutory construction that the Legislature cannot be presumed to have included superfluous language in its enactments. OCERS cannot choose to embrace one portion of former section 31460.1 while ignoring another portion which limits its scope and renders it inapplicable to Applicant.

Paragraph 6: Objection is made to *"and section 31460.1 (adopted by the Orange County Board of Supervisors by Resolution 90-1551) and more specifically by OCERS Board Resolution 98-001"*

- There is no evidentiary basis for a factual finding to this effect. The assertions clearly constitute legal conclusions, which remain unsupported by legal analysis or authority.

- Former Government Code section 31460.1 was repealed via S.B. 193 effective May 11, 1992. Under the better view of the savings clause contained in Section 2 of S.B. 193, former section 31460.1 operated to exclude OBP benefits only for OCERS members who retired between January 1, 1991, and May 11, 1992. (See Applicant's Prehearing Statement, pp. 13-15.)

- Because Section 2 of S.B. 193 was expressly applicable only to actions taken "prior to the effective date of this act," the adoption of Resolution 98-001 in 1998 was not an action protected by the savings clause.

- Inasmuch as it excludes flexible benefits for post-1991 retirees, such as Applicant, who did not "elect[] to participate" in the Superior Court's OBP plan, Resolution 98-001 deviates materially from the authorization provided by former section 31460.1 and is consequently *ultra vires* and unlawful under Ventura in that regard. (OCERS does not dispute that, apart from former section 31460.1, OBP benefits paid in cash are now pensionable under Government Code sections 31460 and 31461.)

Paragraph 7: Objection is made to *"and that the Optional Benefit Plan benefits received by Applicant as healthcare reimbursements during the Measuring Period constituted 'Flexible Benefits ("Cafeteria Plan") provided in kind' under Resolution 98-001 and therefore should be excluded from Applicant's compensation earnable and final compensation"*

- There is no evidence whatsoever in the record regarding OCERS's treatment of Applicant's OBP reimbursement payments as "in kind" benefits.

- In fact, the undisputed evidence establishes that reimbursements for allocated OBP benefits were paid directly to Applicant as cash, upon Applicant's submission of receipts accompanied by a claim form. (See Superior Court Personnel Policies and Regulations, Art. X, Section 4(C) and (F) (AR 612-613); May 5 transcript at 56:12-57:10, 67:2-15, 72:24-74:21.) The record provides no basis for a finding that the Superior Court obtained or provided the underlying benefits "in kind" on Applicant's behalf. See In re Retirement Cases (2003) 110 Cal.App.4th 426, 478-479: "[t]he bright line drawn by Ventura . . . must be understood to be between those benefits paid in cash to the employee and those that are not."

Paragraph 7: Objection is made to *"for the unmodified option"*

- This language appears to be superfluous, and its meaning is unclear (there is no corresponding reference to modification, or not, of any option).

- There is no apparent evidentiary basis in the record for inclusion of this language.

Paragraph 9: Objection is made to *"Resolution 98-001 was the subject of litigation in the coordinated proceedings . . . ,"* which misleadingly implies that the entirety of Resolution 98-001 was a subject of the litigation.

- As discussed extensively in Applicant's briefings, and never disputed by OCERS, the record shows that very few issues pertaining to Resolution 98-001 were the subject of the litigation, and none of them involved the issues raised herein by Applicant.

- With regard to the 1991 cut-off date for pensionability of OBP benefits, the record establishes that the only issue raised or litigated was whether pre-1990 employees had acquired a vested constitutional right to the inclusion of OBP benefits, an issue inherently irrelevant to Applicant, who was hired after 1991.

- As discussed in Applicant's briefings (e.g., Applicant's Prehearing Statement, pp. 18-24) and never disputed by OCERs, OCERS in its April 1998 filings opposing a demurrer expressly and emphatically denied any intention of litigating additional issues relating to the scope and validity of Resolution 98-001, and OCERS is now judicially estopped from contrarily contending that such additional issues (such as the applicability and continuing effectiveness of former Government Code section 31460.1) were adjudicated in the class action litigation.

Paragraph 11: Objection is made to the omission of additional pertinent language contained in Paragraph 15 of the Settlement Agreement: "Nothing herein is intended to nor shall affect any party's rights and obligations under CERL, except as specifically set forth herein."

- As discussed in Applicant's briefing, the settlement agreement makes no specific mention of former Government Code section 31460.1, or of that statute's applicability or continuing effectiveness. Nor does the incorporation of Resolution 98-001 by reference in Paragraph 3 of the Settlement Agreement indicate in any manner that the incorporation would detrimentally affect the CERL rights of OBP beneficiaries who were employed after 1990.

- The omitted language of Paragraph 15 thus renders the Settlement Agreement ambiguous as to whether the Agreement was intended to deprive post-1990 retirees of their rights under the CERL in the event former Government Code section 31460.1 was inapplicable to Applicant or was no longer effective in Orange County.

Paragraph 13: Objection is made to the entirety of the quoted language, inasmuch as it is intended to support the improper inference that Applicant is precluded from contesting the validity of Paragraph 3 of the Settlement Agreement.

- OCERS does not, and cannot, cite any authority supporting its implicit assertion that an unlawful contractual provision may be given effect via an accompanying waiver of the right to challenge the unlawful provision. Such waivers are expressly barred by Civil Code section 1668. See, e.g., Iskanian v. CLST Transportation Los Angeles, LLC (2014) 59 Cal.4th 348, 382-384: "where . . . an

employment agreement compels the waiver of representative claims under the [Private Attorney General Act], it is contrary to public policy and unenforceable . . . ."

- Nor can OCERS cite any authority for the implicit proposition that an unlawful provision of a settlement agreement may be rendered enforceable via entry of a judgment approving the agreement. Settlement agreement provisions which violate statutory law or public policy will not be enforced by a court, regardless of whether the settlement agreement was reduced to judgment. See Timney v. Lin (2003) 106 Cal.App.4th 1121, 1129: "our Supreme Court and other California courts have rejected the notion that a settlement judge may properly act to 'approve' an illegal contract and thereby shield it from invalidation."

- As discussed extensively in Applicant's briefings, neither the 2002 judgment nor any interim ruling embodied therein operates to bar Applicant's claim under principles of res judicata or collateral estoppel, inasmuch as the issues raised by Applicant were never raised or litigated in the class action litigation.

Paragraph 13: Objection is made to the omission of Paragraph 18 of the Settlement Agreement, which states, in pertinent part:

> "The terms and provisions of this Agreement may . . . be amended, modified, or expanded by written agreement of those Parties affected by the particular amendment sought. . . . The parties agree that the San Francisco Superior Court shall retain jurisdiction . . . to decide whether or not to approve any future amendments . . . , provide [*sic*] that no Court approval need be obtained where (1) Class Members affected by the proposed amendment have been provided at least sixty days advance written notice of the proposed amendment and (2) no affected Class Member submits to the Court and counsel to the affected Party a timely written objection to the proposed amendment."

Obviously, however, utilization of this procedure would presuppose a desire on the part of OCERS to comply with the existing requirements of the CERL.

VI. CONCLUSIONS OF LAW

Paragraph 1: Objection is made to the entire paragraph.

- OCERS and Applicant are not "bound by" the provisions of Paragraph 3 of the Settlement Agreement insofar as those provisions are unlawful and consequently unenforceable. "A contract that conflicts with an express provision of the law is illegal and the rights thereto cannot be judicially enforced." (Vierra v. Workers. Comp. Appeals Bd. (2007) 154 Cal.App. 4th 1142, 1148.)

- As Ventura and its progeny have held, Government Code section 31460 et seq. requires "remuneration paid in cash" to be included in "compensation earnable."

- Binding appellate case law makes clear that the requirements of the CERL cannot be altered by negotiated agreement: "The Ventura decision affected the determination of what items were to be included in 'compensation earnable,' and this is *not* subject to a contract right. . . . [P]lan members could not bargain regarding their . . . 'final compensation'." (In re Retirement Cases (2003) 110 Cal.App.4th 426, 453 (emphasis in original).) As the California Supreme Court stated more than 60 years ago, "[t]he statutory provisions controlling the terms and conditions of civil service employment cannot be circumvented by purported contracts in conflict therewith." (Boren v. State Personnel Board (1951) 37 Cal.2d 634, 641.) OCERS is able to cite no contrary authority, yet insistently seeks such circumvention.

- The State Legislature has clearly and succinctly concurred in these judicial pronouncements via Civil Code section 1599, which states that any part of a contract which is unlawful is void, as well as via section 3513 ("a law established for a public reason cannot be contravened by a private agreement"). For further authority, please see Applicant's Prehearing Statement, pp. 16-17.

- OCERS and Applicant are not "bound by" the provisions of Paragraph 3 of the Settlement Agreement, inasmuch as OCERS is judicially estopped from claiming that unpleaded issues relating to Resolution 98-001 were resolved via the class action litigation (as discussed above and in Applicant's briefings).

Paragraph 2: Objection is made to the entire paragraph.

- If it is truly meant that the calculation was accurate, this would constitute a factual finding; if a conclusion of law is intended, the appropriate word would be "correctly" (which denotes compliance with the law as well as with principles of mathematics). Alternatively, a comma could be placed after "allowance."

- In any event, the retirement allowance does not appear to have been accurately calculated under the Settlement Agreement. As indicated above, Paragraph 15 creates an ambiguity as to whether the Settlement Agreement was specifically intended to abrogate Applicant's right under the CERL and Ventura to have his OBP benefits included in the calculation of his retirement allowance. The scope and effect of a release provision such as that contained in Paragraph 3 of the Settlement Agreement is determined by the ascertainable intent and expectations of the parties. (Paralift, Inc. v. Superior Court (1993) 23 Cal.App.4th 748, 755-756.)

- The parties' intent and expectations may be shown via parol evidence (extrinsic to the Settlement Agreement itself). "[P]arol evidence is properly admitted to construe a written

instrument when its language is ambiguous. The test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears . . . . to be unambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is 'reasonably susceptible.'" (Winet v. Price (1992) 4 Cal.App.4th 1159, 1165.)

- The record shows that the issues specifically identified in the pleadings in the class action litigation included the pensionability of benefit payments made to third party insurers on behalf of employees and the vested rights of pre-1991 employees who retired after 1990. The pleaded issues did not include the applicability of former Government Code section 31460.1 to Superior Court employees or the effect of that statute's repeal upon its validity. (See AR 54-56, 60-149, 180-211, 217-290, 378-421, 440, 446-458, 467-470.)

- As discussed above, OCERS expressly and repeatedly represented during the class action litigation that it had no intention of adjudicating unpleaded issues regarding Resolution 98-001, and it is estopped from now contending otherwise.

- Neither the notice of proposed settlement nor the settlement Agreement itself provided any indication that class members would be compromising significant unlitigated statutory rights. (See Applicant's Prehearing Statement, pp. 25-26.)

- The Settlement Agreement provided no identifiable benefit to Applicant as consideration for relinquishment of his right under Ventura to have cash OBP payments included in the calculation of retirement allowances – the principal benefit obtained by class members, retroactivity of the Ventura decision, was of no value to post-Ventura retirees such as Applicant.

- At the May 5 hearing, Applicant offered testimony that plaintiffs' lead counsel in the class action litigation had in 2015 acknowledged, inter alia, that he had been unaware of any issue regarding the applicability or validity of former section 31460.1. (See May 5 transcript at 10:19-39:11.) (Although the hearing officer excluded this testimony on relevance grounds, this statement of a percipient witness was clearly relevant with regard to the expected scope of the Settlement Agreement, as well as with regard to other issues such as the availability of rescission as a remedy for a mutual mistake of law.[1])

- OCERS has not disputed any of the foregoing, and has offered no parol evidence of its own.

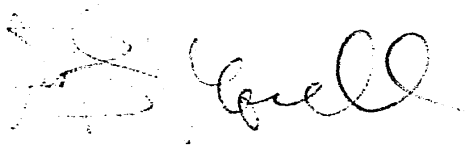
- Notably, Paragraph 3 of the Settlement Agreement does not specifically state that "all" the inclusions and exclusions of Resolution 98-001 are accepted as binding.

[1] At the August 20 hearing, the Board vacated the decisions of the hearing officer, yet the OCERS Staff's proposed Findings of Fact, Conclusions of Law and Recommended Decision has made no recommendation with regard to the admission of this proffered testimony.

- In light of all the foregoing, the better construction is that Paragraph 3 of the Settlement Agreement was intended to apply only to those issues of inclusion and exclusion under Resolution 98-001 which were actually pleaded and litigated in the class action litigation. The unlitigated exclusion relied upon by OCERS in the calculation of Applicant's retirement allowance was therefore not accurately (or correctly) applied under the terms of the Settlement Agreement.

Applicant invites OCERS staff to cite any evidence in the administrative record, or any legal authority, contrary to any of the foregoing. Insofar as it cannot, Applicant respectfully requests the Board reconsider its decision in this matter.[2]

Respectfully submitted,



James B. Morell

Applicant in pro per

[2] Applicant would remind the Board of its obligation, under Paragraph 24 of the Settlement Agreement, "to use good faith in resolving any disputes that may arise in implementing the terms of this agreement."

BEFORE THE BOARD OF RETIREMENT OF
THE ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

**In the Matter of the Application of James B. Morell,
a Member of the Orange County Employees Retirement System,
for a Recalculated Retirement Allowance**

I. INTRODUCTION

This matter involves the application ("Application") by Orange County Employees Retirement System ("OCERS") member, James B. Morell ("Applicant" or "Morell"), for a recalculation of his retirement allowance.

On March 26, 2014, OCERS notified Applicant of his monthly retirement allowance, which is derived from, among other things, the amount of Applicant's final compensation (sometimes referred to as final average salary). In making the determination of Applicant's retirement allowance, OCERS staff excluded from Applicant's final compensation the amount of the annual Optional Benefit Plan (OBP) payment of $3,500 that Applicant received from his employer. Applicant appealed OCERS staff's calculation of his retirement allowance and on March 20, 2015, OCERS' Chief Executive Officer ("CEO") upheld the staff's determination to exclude OBP from the calculation of Applicant's final compensation under the authority of the Board's Resolution 98-001, which excludes from compensation earnable flexible benefits provided in-kind, and flexible benefits paid in cash to employees retiring on or after January 1, 1991.

Applicant appealed the CEO's determination to the Board; and on August 17, 2015, the Board denied Applicant's appeal, upholding the CEO's determination. Applicant timely sought an administrative hearing, and the hearing was held before Hearing Officer Robert M. Snider ("Hearing Officer") on May 5, 2017. The Hearing Officer issued his Proposed Findings of Fact, Conclusions of Law, and Recommended Decision on November 29, 2017, as amended by the Response to Applicant's Objections and Request for Clarifications dated January 31, 2018 (collectively, the "Hearing Officer's Proposed Findings").

The matter was presented to the OCERS Board of Retirement ("Board") for final determination at its duly noticed public meeting on August 20, 2018. In advance of its August 20, 2018 meeting, the Board received and reviewed a transcript and summary of all of the testimony, plus all other evidence received by the Hearing Officer in connection with this matter, pursuant to the County Employees Retirement Law of 1937 (CERL), Government Code section 31534. Subdivision (b) of Government Code section 31534 provides that, upon receipt of the transcript and summary of all evidence, "the board shall take such action as in its opinion is indicated by such evidence."

II. PROCEDURAL BACKGROUND

In advance of its August 20, 2018 meeting, the Board received and reviewed a transcript and summary of all of the testimony, plus all other evidence received by the Hearing Officer in connection with the Application, pursuant to Government Code section 31534. The Board was provided with all of the evidence listed in Section IV, below.

The Board gave actual, timely notice to the Applicant that the matter would be considered as Agenda Item DA-2 at the Board's meeting on August 20, 2018, and the Board duly noticed the meeting and Agenda Item DA-2, as required by law.

At its open and public meeting on August 20, 2018, following the Board's review of the transcript, summary of all testimony, plus all other evidence received pursuant to Government Code section 31534(b), the Board determined to set aside the Hearing Officer's Proposed Findings and limit its consideration to solely the issues of (1) whether OCERS and the Applicant are bound by the Settlement Agreement (defined below) and the Judgment (defined below); and (2) if so, whether OCERS calculated Applicant's retirement allowance in accordance with the Settlement Agreement and Judgment.

After such review and consideration, and after Applicant was given the opportunity to, and did in fact, make an oral presentation to the Board on August 20, 2018, the Board voted unanimously to deny Morell's Application for a recalculated retirement allowance. The Board further directed staff to prepare proposed Findings of Fact, Conclusions of Law and Recommended Decision for final consideration by the Board at a future meeting of the Board, with notice to the Applicant as further provided under Rule 21 of the Board's Administrative Hearing Procedures (adopted February 19, 2002; revised December 14, 2015; and applicable to hearings requested before June 1, 2018).

The audio and video recording of the Board proceedings conducted in this matter on August 20, 2018, and any transcript prepared therefrom, is incorporated herein by this reference and is made part of the administrative record of this matter.

III. ISSUES

The sole issues in this matter, as determined by the Board at its meeting on August 20, 2018, are:

1. Whether OCERS and the Applicant are bound by the Settlement Agreement (defined below) and the Judgment (defined below); and

2. If so, whether OCERS calculated Applicant's retirement allowance in accordance with the Settlement Agreement and Judgment.

IV. SUMMARY OF EVIDENCE

A. *Documentary Evidence*

The following documents were received in evidence:

Description	Date
Letter from Morell to Jenike (OCERS)	6/23/2014
Personnel Policies and Regulations, OC Superior Court	12/18/2013
OCERS Letter to Morell	3/26/2014
Orange County ERS, Retirement Benefit Estimate	3/25/2014
OCERS Letter to Morell	9/9/2014
Letter from Morell to Steve Delaney (OCERS) received 12/01/2014	6/23/2014
OCERs Letter to Morell	3/20/2015
Letter from Morell to Delaney	6/15/2015
Board of Retirement, OCERS RESOLUTION 98-001	2/16/1998
Judgment in Orange County Superior Court Case Nos. 791315 and 791499	11/1/2002
Order Approving Settlement Agreement	11/1/2002
Settlement Agreement	9/12/2002
Judicial Council Coordination Proceeding No. 4049, Tentative Decision Re: Orange County Resolution 90-1551	8/14/2001
Orange County Benefits Center record of Applicant's OBP election for 2011	2010
Orange County Benefits Center record of Applicant's OBP election for 2012	2011
Orange County Benefits Center record of Applicant's OBP election for 2013	2012
Respondent's complaint for declaratory relief	3/6/98
Petition for writ of mandate	3/10/98
Respondent's memorandum of points and authorities in support of ex parte application to enjoin or consolidate	3/13/98
Defendants' opposition to ex parte motion	3/16/98
Defendants' general demurrer to complaint	4/1/98
County's answer to complaint	4/8/98
County's cross-complaint for declaratory relief	4/8/98
Respondent's opposition to demurrer	4/14/98
Defendants' reply to opposition to demurrer	4/24/98
Minute Order	4/28/98
Defendant attorneys' answer to complaint	5/6/98
OCEA complaint in intervention	5/29/98
OCEA memorandum of points and authorities in support of cross-petition for writ of mandate	5/29/98

REAOC complaint in intervention	6/10/98
REAOC memorandum of points and authorities in support of cross-petition for writ of mandate	6/10/98
Declaration of Raymond A. Fleming in support of respondent's opposition to motion for preliminary injunction	6/11/98
County's answer to REAOC cross-complaint for writ of mandate	7/1/98
OCEA notice of motion and application for peremptory writ of mandate	7/22/98
Respondent's answer to OCEA cross-petition for writ of mandate	8/25/98
OCEA's answer to complaint	9/14/98
County's supplemental cross-complaint	10/16/98
Joint case summary	10/30/98
Respondent's answer to supplemental cross-complaint	12/7/98
Respondent's answer to REAOC cross-petition for writ of mandate	4/16/99
Order on matters addressed at August 27, 1999 status conference	11/22/99
Opening brief of plan members regarding obligation or retirement associations	3/30/00
Statement of decision re includability of (1) termination pay; (2) insurance-related payments; and (3) pick-ups	7/20/00
Statement of decision re includability of in service cash-outs of accrued leave benefits	11/8/00
Notice of proposed settlement and fairness hearing	9/11/02
Third Amended and Restated County of Orange Section 125 Plan	6/1/11
Fourth Amended and Restated County of Orange Section 125 Plan	1/1/13
Orange County Superior Court Personnel Policies and Regulations	9/28/07
Orange County Superior Court pay statement	1/7/11
Orange County Superior Court pay statement	1/6/12
Orange County Superior Court pay statement	1/4/13
Orange County Superior Court pay statement	1/3/14
County of Orange Board of Supervisors Resolution 90-115, adopting Government Code section 31460.1	12/18/90
Minutes of Board of Retirement Meeting on August 17, 2015 and materials related to Agenda Item D-11	8/17/15
Pre-Hearing Statement	3/7/2017
Applicant's Witness List	3/6/2017
Applicant's Supplemental Pre-Hearing Statement	4/21/2017
Respondent's Response to Hearing Officer's Request for OCERS' Response to Morell's Request to Present Hearsay Testimony at Hearing	4/26/2018
Respondent's Pre-Hearing Statement	4/5/2017
Respondent's Closing Brief	8/14/2017
Applicant's Reply Brief	9/28/2017
Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommended Decision	11/29/2017
Applicant's Objections and Request for Clarification	12/29/2017

Hearing Officer's Response to Applicant's Objections and Request for Clarification	1/31/2018
Transcript of May 5, 2017 Hearing	5/5/2017
Email from Applicant to Suzanne Jenike (OCERS)	8/13/2018

B. *Oral Evidence*

Applicant was called and sworn as a witness at the May 5, 2017 hearing in this matter (Transcript of May 5, 2017 Hearing).

Adina Bercaru, an employee of OCERS, was also called and sworn as a witness at the May 5, 2017 hearing (Transcript of May 5, 2017 Hearing).

Applicant was present at the August 20, 2018 Board meeting and was again given the opportunity to present, and did present, oral testimony in support of his Application.

V. FINDINGS OF FACT

1. Applicant began working for the Orange County Superior Court as a research attorney on August 13, 1992; he retired on February 21, 2014. Applicant is a member of OCERS.

2. During his final three years of employment, Applicant received Optional Benefit Plan benefits in the amount of $3,500 per year from his employer, which Applicant elected to receive partly in cash and partly as reimbursements for his out-of-pocket healthcare costs.

3. On January 27, 2014, Applicant filed his application for retirement with OCERS.

4. Upon receipt of Applicant's retirement application, OCERS calculated Applicant's retirement allowance based on the following statutory formula:

Final Compensation X Years of Service X Retirement Formula (Plan J/2.7% @ 55/§31676.19)

5. "Final compensation" is defined by section 31462 of the Government Code as the average annual "compensation earnable" by a member during any three years elected by a member at or before the time he or she files an application for retirement, or, if the applicant fails to elect, during the three years immediately preceding his or her retirement (in either case, the "Measuring Period").

6. "Compensation earnable" is defined by Government Code section 31461 and section 31460.1 (adopted by the Orange County Board of Supervisors by Resolution 90-1551) and more specifically by OCERS Board Resolution 98-001. Resolution 98-001, adopted by the Board at its regular board meeting on February 6, 1998, sets forth what elements of remuneration are to be included in, and excluded from, "compensation earnable." Paragraph 2

of Resolution 98-001 excludes from "compensation earnable" the following items (among others):

> Flexible Benefits ("Cafeteria Plan") provided in-kind
>
> Flexible Benefits ("Cafeteria Plan") paid in cash to the extent paid to members retiring on and after January 1, 1991

7. When OCERS calculated Applicant's final compensation, OCERS concluded that the Optional Benefit Plan benefits received by Applicant in cash during the Measuring Period constituted "Flexible Benefits ("Cafeteria Plan") paid in cash to a member retiring on or after January 1, 1991" under Resolution 98-001 and therefore should be excluded from Applicant's compensation earnable and final compensation, and that the Optional Benefit Plan benefits received by Applicant as healthcare reimbursements during the Measuring Period constituted "Flexible Benefits ("Cafeteria Plan") provided in-kind" under Resolution 98-001 and therefore should be excluded from Applicant's compensation earnable and final compensation. Based on these conclusions, OCERS determined that Applicant's monthly final compensation was $11,781.94, and calculated Applicant's monthly retirement allowance to be $6,836.72 (gross) for the unmodified option.

8. Applicant did not contest OCERS' calculation of his retirement allowance except with respect to the exclusion of the Optional Benefit Program benefits from the calculation of his compensation earnable and final compensation.

9. Resolution 98-001 was the subject of litigation in the coordinated proceedings known as the *Retirement Cases*, Judicial Council Coordination Proceeding No. 4049 in the Superior Court of the State of California, City and County of San Francisco (the "Action"). The Action resulted in a settlement agreement ("Settlement Agreement") in 2002 among OCERS, the Orange County Employees' Association, the Retired Employees' Association of Orange County, Inc., the Orange County Attorneys' Association, Jan J. Nolan and Eric W. Snethen, individually and as members and representatives of a class ("Class") consisting of all past, present, and future members of OCERS including but not limited to retirees, deferred retirees, and active employees and all of the members' survivors, beneficiaries, agents, assigns, representatives and successors in interest ("Class Members"), and the County of Orange (collectively, "Parties"). The effective date of the Settlement Agreement was the first business day following the latest of (a) the execution of the Settlement Agreement by the Parties; (b) the date on which the San Francisco County Superior Court entered an order approving the Settlement Agreement; and (c) the date on which the San Francisco County Superior Court entered a Judgment (defined below) in the Action.

10. Applicant was a member of the Class (defined above) by reason of the fact that he was an active member of OCERS at the time the Settlement Agreement and Judgment became effective. Applicant admitted at the August 20, 2018 Board meeting that he was a member of the Class.

11. The Settlement Agreement states in Paragraph 3 that:

> Each of the Parties agrees to accept as final and binding the inclusions in and exclusions from compensation, compensation earnable, and final compensation as more particularly set forth in OCERS' Resolution 98-001, as amended by OCERS' Resolution 98-009, and as further amended by OCERS' action adopting its Resolution 00-003 on or about December 18, 2000.

The referenced resolutions, including Resolution 98-001, were attached as exhibits to and incorporated by reference in the Settlement Agreement.

12. The Settlement Agreement states, in Paragraph 2, the agreement of the Parties that a Judgment in the form attached as Exhibit A to the Settlement Agreement ("Judgment") could be entered by the San Francisco County Superior Court in the Action, and in Paragraph 3, that the Resolutions would be entered into the Judgment.

13. The Settlement Agreement states in Paragraph 5 that:

> The Judgment, when entered by the Court, shall be final and binding on all of the Parties, including each Class Member. Each of the Parties agrees not to appeal from, seek modification of, or otherwise challenge the Judgment.

14. On November 1, 2002, the San Francisco County Superior Court entered both an Order approving the Settlement Agreement and the Judgment. The Judgment states that:

> [A]ll of the terms and provisions of the approved Settlement Agreement, a copy of which is attached hereto and incorporated herein as Appendix "2," shall be binding upon and implemented by all parties to these actions, including all members of the class consisting of all past, present and future members of the Orange County Employees Retirement System, including retirees, deferred retirees, and active employees, and all of the members' survivors, beneficiaries, agents, assigns, representatives and successors in interest.

15. To the extent any of the foregoing Findings of Fact are Conclusions of Law, the Board so concludes.

VI. CONCLUSIONS OF LAW

1. OCERS and Applicant are bound by the Settlement Agreement and Judgment.

2. OCERS accurately calculated Applicant's retirement allowance in accordance with the Settlement Agreement and Judgment.

3. To the extent any of the foregoing Conclusions of Law are Findings of Fact, the Board so finds.

VII. DECISION

The Application of James B. Morell for a recalculated retirement allowance is DENIED.

DATED: 10/18/2018

Chris Prevatt, Chair of the Board of Retirement

Exhibit D

SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES	Reserved for Clerk's File Stamp FILED Superior Court of California County of Los Angeles 08/21/2020 Sherri R. Carter, Executive Officer / Clerk of Court By: N. DiGiambattista Deputy
COURTHOUSE ADDRESS: Stanley Mosk Courthouse 111 North Hill Street, Los Angeles, CA 90012	
PLAINTIFF/PETITIONER: James B. Morell	
DEFENDANT/RESPONDENT: Board of Retirement Orange County Employees Retirement System	
CERTIFICATE OF MAILING	CASE NUMBER: 30-2019-01043847

**I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the Minute Order (HEARING ON PETITION FOR WRIT OF MANDATE
RULING ON SUBMITTED M...) of 08/21/2020 upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.**

Maytak Chin
Reed Smith LLP
101 2nd Street
Suite 1800
San Francisco, CA 94501

James B. Morell
222 Avenue G
Redondo Beach, CA 90277

Dated: 08/21/2020

Sherri R. Carter, Executive Officer / Clerk of Court

By: N. DiGiambattista
Deputy Clerk

CERTIFICATE OF MAILING

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 82

30-2019-01043847
JAMES B. MORELL vs BOARD OF RETIREMENT ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

August 21, 2020
8:30 AM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N. DiGiambattista
Courtroom Assistant: R Monterroso

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: HEARING ON PETITION FOR WRIT OF MANDATE RULING ON SUBMITTED MATTER

The court having taken the above matter under submission on August 20, 2020, now makes its ruling as follows:

Petitioner James B. Morell, in pro per ("Petitioner") petitions for a writ of administrative mandate directing Respondent Board of Retirement, Orange County Employees Retirement System ("Respondent" or "Board") to set aside its final administrative decision excluding Optional Benefit Plan ("OBP") benefits from the calculation of Petitioner's pension. The court heard oral argument on August 20, 2020 after which it took the matter under submission. The court now issues its final decision denying the petition.

The Parties' Requests to Augment the Administrative Record

"As a general rule, a hearing on a writ of administrative mandamus is conducted solely on the record of the proceeding before the administrative agency." (Richardson v. City and County of San Francisco (2013) 214 Cal.App.4th 671, 702.) However, extra-record evidence may be admitted if, in the exercise of reasonable diligence, the relevant evidence could not have been produced or was improperly excluded at the hearing. (CCP § 1094.5(e); Pomona Valley Hosp. Med. Ctr. v. Superior Court (1997) 55 Cal.App.4th 93, 100.) "If the moving party fails to make the required showing [under section 1094.5(e)], it is an abuse of the court's discretion to allow posthearing discovery [or augment the record]." (Pomona Valley, supra at 102.)

In their writ briefs and requests for judicial notice, both Petitioner and Respondent seek to augment the record. Neither has filed a motion to augment. For the reasons stated below, their requests to augment the record are DENIED.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 82

30-2019-01043847
JAMES B. MORELL vs BOARD OF RETIREMENT ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

August 21, 2020
8:30 AM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N. DiGiambattista
Courtroom Assistant: R Monterroso

CSR: None
ERM: None
Deputy Sheriff: None

Petitioner requests judicial notice of three registers of action for court and Judicial Council proceedings, and "of any individual documents listed in these registers of actions which are deemed pertinent and which are not already included in the Administrative Record." (Pet. RJN at pp. 1-2.) To the extent the registers of action or any documents listed therein are already included in the administrative record (see Pet. RJN Exh. 4), judicial notice and a motion to augment are not necessary. However, for any documents not already included in the administrative record, Petitioner has not satisfied the requirements of section 1094.5(e). Petitioner does not discuss the relevance of any documents not part of the record. He also does not show that this evidence, which pre-dates the administrative proceedings, could not have been produced in the administrative proceedings with the exercise of reasonable diligence.

Respondent submits the declaration of Adina Bercaru, a Member Services Manager for Orange County Employees Retirement System who provides testimony about Petitioner's contributions toward OCERS retirement benefits based on her "review of Petitioner James Morell's OCERS member file." (Bercaru Decl. ¶ 1.) Petitioner's objection to this extra-record testimony is SUSTAINED. (See Reply 2, fn. 3.) Respondent does not show that Bercaru's declaration is relevant to the court's review of the administrative decision, which, as Respondent admits, was based solely on the applicability of the 2002 settlement agreement. (See Oppo. 1, 5-6; see AR 2114, 2209.) Respondent also does not show that, in the exercise of reasonable diligence, this evidence based on OCERS' records could not have been produced in the administrative proceedings.

Respondent also requests judicial notice of Petitioner's State Bar "Attorney Licensee Profile." (Resp. RJN Exh. C.) Respondent does not explain the relevance of this evidence in its request for judicial notice. Respondent also does not show that, in the exercise of reasonable diligence, this evidence could not have been produced in the administrative proceedings.

Judicial Notice

Petitioner's Request for Judicial Notice ("RJN"), Exhibits 1-3 – Denied. Petitioner failed to make the required showing under CCP section 1094.5(e) to augment the record with these documents. See analysis above.

Petitioner's RJN of "any individual documents listed in these registers of actions which are deemed pertinent and which are not already included in the Administrative Record" (See RJN 2:5-6.) – Denied. This request for judicial notice does not comply with California Rules of Court, Rule 3.1306(c). Also, Petitioner failed to make the required showing under CCP section

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CSR: None
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1094.5(e) to augment the record with these unspecified documents. See analysis above.

Respondent's RJN Exhibits A, B – Granted. (Evid. Code §§ 452(a), (c), (h).) This legislative history is relevant to the court's interpretation of former Government Code section 31460.1 and the legislature's repeal thereof in Senate Bill 193. Less legible versions of Exhibits A and B are already part of the record. (AR 390, 395-396.)

Respondent's RJN Exhibit C – Denied. Respondent failed to make the required showing under CCP section 1094.5(e) to augment the record with this document. See analysis above.

Factual and Procedural Background

OCERS Excludes Optional Benefit Plan Payments from Petitioner's "Final Compensation"

Orange County Employees Retirement System ("OCERS") is the retirement association for Orange County, administering retirement and other post-employment benefits for employees of Orange County and several participating public agencies within the County. (See County Employees Retirement Law of 1937 ("CERL"); Gov. Code § 31451; AR 2208-2215; and Oppo. 3.)

Petitioner was employed as a research attorney at the Orange County Superior Court from August 1992 to February 2014. (AR 264, 955, 971.) Petitioner became a member of OCERS on October 14, 1994, and retired on February 21, 2014. (AR 17-22, 23, 2160.)

Upon receipt of Petitioner's retirement application, OCERS multiplied his years of service, the applicable statutory formula rate, and final compensation for the measuring period of three years prior to his retirement to calculate his pension benefits. (AR 6, 2160.) In calculating Petitioner's pension, OCERS' staff did not include as "pensionable" $3,500 in Optional Benefit Plan ("OBP") payments paid to him annually as flexible benefits. (AR 1115.) The OCERS staff determined that a settlement agreement, discussed below, applied to him and that the agreement required that item of compensation to be excluded from the benefit calculation. (AR 49-51, 1115.)

The 2002 Settlement Agreement and Related Legal Background

The 2002 Settlement Agreement, upon which OCERS relied in calculating Petitioner's pension, has a somewhat complicated history.

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In 1990, the Legislature modified CERL by enacting Government Code section 31460.1, effective January 1, 1991, which provided in full:

"Compensation" shall not include employer payments, including cash payments, made to, or on behalf of, their employees who have elected to participate in a flexible benefits program, where those payments reflect amounts that exceeds [sic] their employees' salaries.

This section shall not be operative in any county until the time the board of supervisors shall, by resolution adopted by a majority vote, makes [sic] this section applicable in the county. (AR 390; Resp. RJN Exh. A.)

In 1990, the Orange County Board of Supervisors passed Resolution 90-1551 to elect such exclusion pursuant to then-existing Government Code section 31460.1. (AR 372, 1269.)

In May 1992, the Legislature repealed section 31460.1 in Senate Bill 193. However, section 2 of SB 193 provides: "Nothing in this act is intended to, or shall be construed to, affect the validity of any action taken by a county pursuant to Section 31460.1 of the Government Code, prior to the effective date of this act." SB 193 took effect immediately and was approved by the Governor on May 8, 1992. (AR 395-396; Resp. RJN Exh. B.)

In 1997, the California Supreme Court issued a landmark decision affecting public employee pension calculations, Ventura County Deputy Sheriffs' Association v. Board of Retirement (1997) 16 Cal.4th 483 ("Ventura"). Ventura addressed what items of compensation paid to employees in counties subject to CERL should be counted towards calculating a public employee's retirement. Specifically, Ventura involved claims of deputy sheriffs and management employees that the following cash payments should be included in the pension calculation: overtime pay, cash payments of bilingual premium pay, a uniform maintenance allowance, educational incentive pay, additional compensation for scheduled meal periods for designated employees, pay in lieu of annual leave accrual, holiday pay, a motorcycle bonus, a longevity incentive, and a field training officer bonus. (Ventura, supra at 488-489.) Ventura held that "[w]ith the exception of overtime pay, items of 'compensation' paid in cash, even if not earned by all employees in the same grade or class, must be included in the 'compensation earnable' and 'final compensation' on which an employee's pension is based." (Ventura, supra at 487.)

In 1998, in response to Ventura, Respondent (OCERS' Board) adopted a policy ("Resolution 98-001") that specifies what items of an employee's compensation are to be included and excluded

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from the compensation base on which pension benefits are calculated. (AR 281-285, 1274-78.) As relevant here, Resolution 98-001 included as compensation earnable "Flexible Benefits ('Cafeteria Plan') to the Extent paid in Cash (applicable to members retiring before January 1, 1991)." However, Resolution 98-001 excluded as compensation earnable "Flexible Benefits ('Cafeteria Plan') provided in-kind" and "Flexible Benefits ('Cafeteria Plan') paid in cash to the extent paid to members retiring on and after January 1, 1991." (AR 282-283; see also AR 1057-58.) Petitioner contends, citing the record, that "Respondent's use of the January 1, 1991, cut-off date in Resolution No. 98-001 was based upon former Government Code section 31460.1." (OB 3, citing AR 557, 565.) Respondent makes no argument to the contrary.

Following the Ventura decision, litigation sprang up statewide over whether the decision applied retroactively and whether certain items of compensation should or should not be counted. Orange County was one of the venues where active and retired employees of the county and many public agencies within the county filed suits against the retirement system over the calculation of their pension benefits. The statewide litigation was coordinated for trial before a single trial judge and was eventually resolved by the Court of Appeal in In re Retirement Cases (2003) 110 Cal.App.4th 426. Prior to the Court of Appeal's decision, several of the statewide cases were settled, including the case involving OCERS. (See generally In re Retirement Cases (2003) 110 Cal.App.4th 426, 433-438, 436-437, fn. 6.)

In November 2002, the coordinated trial judge, Stuart R. Pollak of Superior Court, San Francisco County, entered a judgment in Orange County Superior Court Case Nos. 791315 and 791499 ("Judgment") approving a settlement agreement, which settled class action litigation in Orange County following Ventura ("Settlement Agreement"). (AR 62-89, 2083-84.)

The Settlement Agreement was entered into between various persons and entities, including OCERS and class representatives of a class consisting of all past, present, and future members of OCERS, including "retirees, deferred retirees, and active employees and all of the members' survivors, beneficiaries, agents, assigns, representatives and successors in interest ('Class Members')." (AR 68.) Petitioner was an OCERS member at the time the Settlement Agreement was approved by the court. (AR 17-22.)

As relevant to the instant litigation, the Settlement Agreement provides:

3. OCERS' Resolutions Final and Binding. Each of the Parties agrees to accept as final and binding the inclusions in and exclusions from compensation, compensation earnable, and final compensation as more particularly set forth in OCERS' Resolution 98-001 … attached hereto as

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Exhibit B and ... incorporated herein by this reference .... (AR 70.)

The Settlement Agreement also states, inter alia, the parties' intent to "settle[], compromise[] and resolve[] all issues among the parties with respect to" pensionable compensation "with respect to all of the items referenced in th[e] Agreement and its attached exhibits," which included Resolution 98-001. (AR 71-72 at ¶ 8.) The "Agreement [was] intended to be complete and final with respect to the issues that it has resolved, and that terms or applicability of the Agreement will not be changed on behalf of any of the Parties, including the Class Members, in response to later court decisions, whether favorable or unfavorable, to any of the Parties[.]" (Ibid.)

Petitioner's Administrative Appeal; Board's Decision

Petitioner appealed OCERS' staff's determination that OBP benefits were excluded from "compensation earnable." (AR 43-47.) Among other things, Petitioner contended that the Settlement Agreement was not valid because it conflicted with CERL and Ventura. (AR 2090-2110.) OCERS referred the appeal to an administrative hearing officer.

In his Proposed Findings of Fact, Conclusions of Law, & Recommended Decision, the administrative hearing officer found, inter alia, that the court-approved Settlement Agreement is final and binding on Petitioner, and that Paragraph 3 excluded from pensionable compensation Petitioner's OBP benefits. (AR 1068-72.) However, the hearing officer also recommended that the Board "reexamine the portion of the settlement agreement that excludes from pensionability flexible benefits received by employees as taxable cash, and that the Board consider pursuing an amendment of the Superior Court judgment ...." (AR 1072.)

Respondent thereafter decided pursuant to Government Code section 31534(b) to set aside the hearing officer's findings and recommendations and to "limit its consideration" solely to the issues of (1) whether Respondent and Petitioner were bound by the 2002 Settlement Agreement and the judgment entered thereon, and (2) whether Petitioner's retirement allowance had been calculated in accordance with the settlement agreement and judgment. (AR 2209.) Following presentation of evidence and argument, the Board determined by unanimous vote that OCERS and Petitioner are bound by the Settlement Agreement and Judgment, and that OCERS accurately calculated Petitioner's retirement allowance in accordance with the Settlement Agreement and Judgment. (AR 2209-2214.)

The Instant Writ Proceeding

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On January 15, 2019, Petitioner filed a petition for writ of mandate pursuant to CCP section 1094.5 and 1094.6. On August 23, 2019, Respondent filed its answer.

On September 12, 2019, at a trial setting conference, the court ordered the parties to meet and confer with respect to any disputes as to the contents of the administrative record. The court's minute order stated: "If no agreement is reached, petitioner may file and serve a motion to augment the record. The motion is to be heard prior to the filing of petitioner's opening brief."

On June 18, 2020, Petitioner filed his opening brief in support of the petition. The court has received Respondent's opposition, Petitioner's reply, the administrative record, and the joint appendix.

Standard of Review

Under CCP section 1094.5(b), the pertinent issues are whether the respondent has proceeded without jurisdiction, whether there was a fair trial, and whether there was a prejudicial abuse of discretion. An abuse of discretion is established if the agency has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. (CCP § 1094.5(b).)

Because Petitioner's public pension benefits concern a fundamental vested right, the court exercises its independent judgment on the record. (See Bixby v. Pierno (1971) 4 Cal.3d 130, 143 (Bixby); Dickey v. Retirement Board (1976) 16 Cal.3d 745, 748-51.) Under the independent judgment test, "the trial court not only examines the administrative record for errors of law, but also exercises its independent judgment upon the evidence disclosed in a limited trial de novo." (Bixby, supra, at 143.) The court must draw its own reasonable inferences from the evidence and make its own credibility determinations. (Morrison v. Housing Authority of the City of Los Angeles Board of Commissioners (2003) 107 Cal.App.4th 860, 868 (Morrison).) "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (Fukuda v. City of Angels (1999) 20 Cal.4th 805, 817.)

The petitioner seeking administrative mandamus has the burden of proof and must cite to the administrative record to support its contentions. (See Bixby v. Pierno (1971) 4 Cal. 3d 130, 143; Steele v. Los Angeles County Civil Service Commission, (1958) 166 Cal. App. 2d 129, 137; see also Alford v. Pierno (1972) 27 Cal.App.3d 682, 691 ["[T]he burden of proof falls upon the party

attacking the administrative decision to demonstrate wherein the proceedings were unfair, in excess of jurisdiction or showed prejudicial abuse of discretion."].)

"'On questions of law arising in mandate proceedings, [the court] exercise[s] independent judgment.' .... Interpretation of a statute or regulation is a question of law subject to independent review." (Christensen v. Lightbourne (2017) 15 Cal.App.5th 1239, 1251.)

Analysis

The Settlement Agreement Applies to Petitioner and Excludes OBP Benefits from Petitioner's Pensionable Compensation

The Board found that OCERS and Petitioner are bound by the Settlement Agreement and Judgment, and that OCERS accurately calculated Petitioner's retirement allowance in accordance with the Settlement Agreement and Judgment. (AR 2209-2214.)

The weight of the evidence supports Board's finding that Petitioner is a class member falling within the ambit of the Settlement Agreement. (AR 2213 ¶ 10.) In his writ briefs, Petitioner does not challenge that specific finding. The parties to the Settlement Agreement include OCERS and settlement class members, defined as "retirees, deferred retirees, and active employees" who are OCERS members. (AR 68.) At the time of the 2002 Settlement, Petitioner, a staff research attorney for Orange County Superior Court, was a member of OCERS. (AR 17, 23; AR 2160 ¶ 1.) In the Board proceedings, Petitioner admitted that he is a class member covered under the Settlement Agreement. (AR 2097-98 [Petitioner: "I'm included. I was a member of the class."]; AR 2213 ¶ 10.)

Petitioner challenges the Board's finding that OCERS properly excluded Petitioner's OBP benefits from his pensionable compensation based on the Settlement Agreement and Judgment. Petitioner contends that "Paragraph 3 does not 'specifically' address the pensionability of OBP benefits under the CERL," and that it is "unclear" whether the incorporation by reference of Resolution 98-001 was "an intended modification of the statutory pensionability of OBP cash benefits." (OB 15-16.)

Petitioner's arguments are not persuasive because the relevant provisions of the Settlement Agreement are clear and unambiguous. The Settlement Agreement expressly requires the exclusion of flexible benefits from pension calculations for OCERS members retiring after January 1, 1991. (AR 70 ¶ 3.) The Settlement Agreement memorialized, as finding and binding,

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the pay item categories that Resolution 98-001 excluded from pensionable treatment when calculating a retiring settlement class member's pension benefits. (AR 70 ¶ 3.) Resolution 98-001 excluded any flexible benefits provided pursuant to a "Cafeteria Plan" and paid to OCERS members, like Petitioner, retiring after January 1, 1991. (AR 1276.) The disputed OBP benefits Petitioner received are flexible benefits that came from the Orange County Superior Court's IRS Section 125 Plan. (AR 37-38, 1646, 1650.) Therefore, the Settlement Agreement and Resolution 98-001, which was incorporated by reference in the agreement, required that OCERS exclude those flexible benefits from calculating Petitioner's pension. "[W]hen a contract is clear and explicit, the parties' intent is determined by reference to the language of the agreement." (Chisom v. Board of Retirement of Fresno County Employees' Retirement Assn. (2013) 218 Cal.App.4th 400, 414.)

Petitioner contends that parole evidence is admissible, and that "[t]he record of the class action litigation proceedings … is devoid of any evidence of an intent to address, much less alter, the pensionability of cash OBP benefits under the CERL." (OB 16.) Because the relevant terms of the Settlement Agreement are clear and unambiguous, it is unnecessary to consider parole evidence. Moreover, even if extrinsic evidence is considered, the record as a whole does not support Petitioner's interpretation. For instance, as discussed in greater detail below, the parties in the underlying litigation disputed the validity of Resolution 98-001's inclusions and exclusions when determining pensionable pay items. (See OB 10:26-11:6; AR 322.) At least one party discussed the impact of section 31460.1 and SB 193 on Board's decision to exclude "flexible benefits" from pension calculations for some OCERS members. (AR 505-510.) The court also notes that Petitioner has the burden of proof to support his interpretation of the 2002 Settlement Agreement, which conflicts with the plain language thereof. Although the administrative record contains numerous documents from the class action litigation, it does not contain the full record of proceedings from the class action litigation. (See Index; Pet. RJN 2:4-8 and Exh. 4; Reply 10, fn. 13.)

Based on the court's independent review of the record and the clear language of paragraph 3 of the 2002 Settlement Agreement, Petitioner's contention that the record lacks evidence of intent to resolve a dispute as to the pensionability of cash OBP benefits under the CERL is not supported. Nor does the parole evidence cited by Petitioner support a different interpretation of paragraph 3.

The weight of the evidence supports Board's findings that OCERS and Petitioner are bound by the Settlement Agreement and Judgment, and that OCERS accurately calculated Petitioner's retirement allowance in accordance with the Settlement Agreement and Judgment.

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Validity of the Settlement Agreement

Petitioner contends that Respondent's exclusion of OBP benefits from Petitioner's pension calculation is "unlawful under the CERL." (OB 6-9.) Relatedly, Petitioner also contends that the Settlement Agreement is "void and unenforceable insofar as it conflicts with the requirements of the CERL." (OB 9.) In essence, Petitioner contends that the court-approved Settlement Agreement, and specifically as it relates to the pensionability of Plaintiff's OBP benefits, is an illegal contract and cannot be enforced. (See OB 10:9-12.)

Petitioner Waived and Released his Attacks on the Validity of the Settlement Agreement

Before reaching Petitioner's contentions, the court must consider whether the terms of the Settlement Agreement preclude Petitioner from attacking its validity. Respondent contends that "[t]he Settlement Agreement here contains express language that bars Petitioner's attacks on its final, binding, and agreed upon determination of unsettled law." (Oppo. 9, discussing Chisom v. Board of Retirement of Fresno County Employees' Retirement Assn. (2013) 218 Cal.App.4th 400.)

Chisom also involved a county retirement system's settlement agreement that settled disputed issues of law on what pay items qualified for pensionable treatment in the post-Ventura era. (Chisom, supra at 406-07.) Similar to the Settlement Agreement here, the agreement in Chisom "included mutual waivers and releases, along with a promise to forbear from any future lawsuits or claims relating to the scope of the Ventura Supreme Court opinion or to the items of compensation to be included for purposes of the CERL." (Id. at 407.) The Chisom settlement agreement clearly and unequivocally expressed the parties' intent for the agreement to "resolve[] all issues among the parties" as "complete and final" with respect to those issues. (Id. at 414.) The Court in Chisom reasoned that this and other language in the settlement agreement indicated the parties' intention to approve and authorize the pensionability of benefits "as expressly set forth" in the settlement agreement. (Id. at 414.)

In Chisom, the appellants -- members of the retirement system -- alleged in causes of action one through four that an "enhanced benefits formula for disability retirement was arguably an implied term of the settlement agreement." (Id. at 404.) The Court of Appeal rejected this assertion: "Since the language of the settlement agreement foreclosed the possibility of additional unexpressed obligations on the part of the County, the trial court correctly held that appellants could not state a cause of action premised on an implied grant of other (i.e., disability

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retirement) enhancements." (Id. at 415-416.) As particularly relevant here, in their fifth cause of action, the appellants also alleged "that, in the event there was no implied contractual right to have disability retirement benefits determined under the enhanced benefits formula, appellants allegedly should be granted such an enhancement based on" the Supreme Court's decision in Ventura. (Id. at 416.) The Court of Appeal also rejected this argument, holding that the settlement agreement provided that "it disposes of all claims and issues among the parties, including those relating to or arising out of the Ventura case" and therefore "appellants have waived and released the claims alleged in the fifth cause of action." (Id. at 416.)

The Chisom Court's analysis of the effect of the waiver and release terms on the fifth cause of action is instructive here. Similar to the agreement in Chisom, the Settlement Agreement states the parties' intent to "settle[], compromise[] and resolve[] all issues among the parties with respect to" pensionable compensation "with respect to all of the items referenced in th[e] Agreement and its attached exhibits," which included Resolution 98-001. (AR 71-72 at ¶ 8.) It further provided that the parties agreed "to accept as final and binding" the exclusions set forth in Resolution 98-001 from pensionable compensation. (AR 70 at ¶ 3.) The "Agreement [was] intended to be complete and final with respect to the issues that it has resolved, and that terms or applicability of the Agreement will not be changed on behalf of any of the Parties, including the Class Members, in response to later court decisions, whether favorable or unfavorable, to any of the Parties," including court decisions that "enlarge, define, narrow or in any other way relate to the scope of the" Ventura decision. (AR 71-72 at ¶ 8.)

In challenging the validity of the Settlement Agreement, Petitioner contends that the Settlement Agreement, as it relates to the pensionability of his OBP benefits, conflicts with CERL as interpreted by Ventura. (See OB 5-6 [discussing Ventura].) However, in the wake of Ventura, the pensionability of Petitioner's OBP benefits was an unresolved question of law. For instance, the parties in the underlying litigation disputed the validity of Resolution 98-001's inclusions and exclusions when determining pensionable pay items. (See OB 10:26-11:6; AR 322 [attorney Nolan contested Board's exclusion in Resolution 98-001 of "Flexible Benefits ('Cafeteria Plan') paid in cash to the extent paid to members retiring on and after January 1, 1991."].) At least one party discussed the impact of section 31460.1 and SB 193 on Board's decision to exclude "flexible benefits" from pension calculations for some OCERS members. (AR 505-510 [asserting that exclusion of contributions to "flexible benefits plan" deprived members of a vested right]; see also AR 311-313 [tentative decision on issue of vested rights].) Although Ventura has general applicability to such issues, it did not consider or resolve contentions about the impact of section 31460.1 and SB 193. The Settlement Agreement here contains express language, summarized above, that bars Petitioner's attacks on its final, binding, and agreed-upon

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determination on those issues.

Petitioner's response to Chisom is not persuasive. (See Reply 4.) Petitioner "concedes that Respondent's argument finds support in a single paragraph at the end of the opinion" concerning the fifth cause of action. (Reply 4.) Nonetheless, Petitioner believes that this paragraph "appears to have been included as … an afterthought, discusses none of the pertinent statutory or decisional authorities … and should not be followed by this court insofar as it conflicts with the well established authority regarding the unenforceability of unlawful contractual agreements." (Ibid.) The paragraph of Chisom concerning the fifth cause of action was important to the Court's holding and is precedent binding on this court. (Chisom, supra at 416.) Petitioner makes no argument to distinguish Chisom.

Based on the foregoing, Petitioner waived and released his claim that the Settlement Agreement, as applied to the pensionability of his OBP benefits, conflicts with CERL. Because the alleged conflict with CERL is the basis for Petitioner's claim of illegality, that claim was also waived and released.

Even if Petitioner's Claims Were Not Waived, Petitioner Has Not Established that the Court-Approved Settlement Agreement Has an Illegal Object

"A settlement agreement is a contract, and the legal principles [that] apply to contracts generally apply to settlement contracts." (Stewart v. Preston Pipeline Inc. (2005) 134 Cal.App.4th 1565, 1585.) A contract must have a lawful object. (Civil Code §1550.) Any contract which has as its object the violation of an express provision of law is unlawful. (Civil Code § 1667(1).) The object of a contract is the thing which it is agreed, on the part of the party receiving the consideration, to do or not to do. (Civil Code § 1595.) The object must be lawful when the contract is made. (Civil Code § 1596.) That part of the contract which is unlawful is void. (Civil Code § 1599.) "A contract that conflicts with an express provision of the law is illegal and the rights thereto cannot be judicially enforced." (Vierra v. Workers' Comp. Appeals Bd. (2007) 154 Cal.App.4th 1142, 1148.)

Even if Petitioner did not waive his attack on the Settlement Agreement, he does not show that the Settlement Agreement, as applied to the pensionability of his OBP benefits, has an unlawful object. (OB 9-10.)

Petitioner contends that the Settlement Agreement, as it relates to the pensionability of his OBP benefits, conflicts with CERL as interpreted by Ventura. (See OB 5-6 [discussing Ventura].)

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However, as discussed above, the pensionability of Petitioner's OBP benefits, including with respect to the impact of section 31460.1 and SB 193, were unresolved questions of law at the time of the Settlement Agreement. The parties' efforts to resolve disputed questions of law as to the pensionability of OBP benefits for OCERS members is not an unlawful object. (See OB 10:26-11:6; AR 322; AR 505-510.)

Petitioner contends that Board, in enforcing the Settlement Agreement, erred in its interpretation of section 31460.1 and SB 193. (OB 6-9.) In its Decision, Board found that "Compensation earnable' is defined by Government Code section 31461 and section 31460.1 (adopted by the Orange County Board of Supervisors by Resolution 90-1551) and more specifically by OCERS Board Resolution 98-001." (AR 2212.)

As noted above, section 31460.1, which became effective January 1, 1991, modified CERL to provide as follows:

"Compensation" shall not include employer payments, including cash payments, made to, or on behalf of, their employees who have elected to participate in a flexible benefits program, where those payments reflect amounts that exceeds [sic] their employees' salaries.

This section shall not be operative in any county until the time the board of supervisors shall, by resolution adopted by a majority vote, makes [sic] this section applicable in the county. (AR 390; Resp. RJN Exh. A.)

In 1990, the Orange County Board of Supervisors passed Resolution 90-1551 to elect such exclusion pursuant to then-existing Government Code section 31460.1. (AR 372, 1269.)

In May 1992, the Legislature repealed section 31460.1 in Senate Bill 193. However, section 2 of SB 193 provides: "Nothing in this act is intended to, or shall be construed to, affect the validity of any action taken by a county pursuant to Section 31460.1 of the Government Code, prior to the effective date of this act." SB 193 took effect immediately and was approved by the Governor on May 8, 1992. (AR 395-396; Resp. RJN Exh. B.)

Petitioner contends that section 31460.1 only applies to employees "who have elected to participate in a flexible benefits program," and that he did not elect to participate in the OBP program. (OB 7.) Petitioner contends that the relevant plan document stated that "if an OBP Eligible Employee fails to complete and submit Enrollment Documentation, such OBP Eligible Employee shall be deemed to have elected all of his or her OBP Dollars as taxable cash." (AR

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 82

30-2019-01043847
JAMES B. MORELL vs BOARD OF RETIREMENT ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

August 21, 2020
8:30 AM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N. DiGiambattista
Courtroom Assistant: R Monterroso

CSR: None
ERM: None
Deputy Sheriff: None

762 [emphasis added].) Such deemed election could be considered an election to participate for purposes of section 31460.1. In any event, whether or not Petitioner had to make an election to participate in the OBP benefits program is immaterial because the Settlement Agreement categorically excluded this pay item.

Petitioner next contends, citing a series of cases from the 1920s, that the savings clause in section 2 of SB 193 "is statutorily problematic, since any continued validity of the resolution itself [i.e. 90-1551] became legally inconsequential when the operative paragraph of former section 31460.1 was repealed." (OB 8:4-15, citing e.g. Ransome-Crummey Co. v. Bennett (1918) 177 Cal. 560, 566-568.) Petitioner does not show that any of the Ransome-Crummey Co. cases are analogous or instructive with regard to the validity of section 2 of SB 193. Petitioner also cites a case stating: "[I]t is the general rule that one legislature cannot enact irrepealable legislation or limit or restrict its own power or the power of its successors as to the repeal of statutes." (United Milk Producers of Cal. v. Cecil (1941) 47 Cal.App.2d 758, 764.) Petitioner does not show that section 2 of SB 193 has the effect of limiting or restricting the power of future legislatures to repeal any statutes.

Petitioner also makes arguments about how the language of section 2 of SB 193 should be interpreted. (OB 8:25-9:15.) For instance, Petitioner states that "section 2 of S.B. 193 did not 'specifically' preserve the validity of actions taken by county boards of supervisors in adopting the operative language of former section 31460.1, although it could have done so if that had been the Legislature's intent." (OB 8.) Petitioner states that "the placement of a comma before 'prior to' in section 2 (AR 395) indicates that the sentence should be read to impliedly preclude the continued application of section 31460.1 after the effective date of S.B. 193." (OB 9.) Petitioner does not show any ambiguity in SB 193 as applied to this case. The word "county" in section 2 is reasonably interpreted to refer to a county's board of supervisors. In 1990, the Orange County Board of Supervisors passed Resolution 90-1551 to elect the permitted exclusion pursuant to then-existing Government Code section 31460.1, effective January 1, 1991. (AR 372, 1269.) Section 2 of SB 193 states the repeal of section 31460.1 shall not be construed to affect the validity of the county's action to pass Resolution 90-1551, which was taken prior to the effective date of SB 193.

To extent there is any ambiguity in section 2 of SB 193 (which Petitioner does not show), the legislative history surrounding SB 193 does not support Petitioner's assertion that the repeal of section 31460.1 made Resolution 98-001's exclusions unauthorized. The Legislature repealed Section 31460.1 because some county retirement systems had misconstrued the section as implicitly requiring the pensionability of flexible benefits if a county board of supervisors did not

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CSR: None
ERM: None
Deputy Sheriff: None

affirmatively elect to exclude such benefits. (Resp. RJN Exh. B at Sec. 3, 4.) "That interpretation was not intended by the Legislature when it enacted that section." (Id. Sec. 4.) Thus, both the plain language and legislative history of SB 193 support Board's implied finding that SB 193 did not invalidate prior county adoption of section 31460.1.

Moreover, Petitioner does not sufficiently explain how his arguments about the repeal of section 31460.1 relate to the legality of the 2002 Settlement Agreement. Petitioner cites no case that addressed the effect of SB 193 on county actions taken pursuant to section 31460.1 prior to the effective date of SB 193 and prior to Ventura. The Court in Ventura did not address that issue. "An opinion is not authority for propositions not considered." (People v. Knoller (2007) 41 Cal.4th 139, 154-55.) Given that the Settlement Agreement settled an unresolved legal question as applied to the pensionabiltiy of Petitioner's OBP benefits, it did not have an "unlawful object" or seek to violate an express provision of law.

Based on the foregoing, Petitioner does not show that the Settlement Agreement has as its object the violation of an express provision of law, or that any object of the contract was unlawful when made. (Civil Code § 1667(1); § 1596.) Accordingly, Petitioner has not shown that the Settlement Agreement, as applied to the pensionabiltiy of his OBP benefits, is illegal.

Petitioner's Remaining Contentions

Petitioner raises two additional arguments, neither of which is persuasive.

Judicial Estoppel

Petitioner contends that Respondent should be judicially estopped from asserting that the class action litigation resolved the issue of OBP benefit exclusion under CERL. (OB 10-14.) Petitioner relies on a statement made by Respondent, in opposition to a demurrer early in the underlying litigation, that "unless and until other parties create an actual controversy so as to require the Board to amend its Verified Complaint to add additional defendants, those issues [raised by parties Nolan, Snethen and the County of Orange] are the only issues to be resolved in this dispute." (OB 12, citing AR 463.)

"Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process." (Jackson v. County of Los Angeles (1997) 60 Cal.App.4th 171, 181.) "Judicial estoppel is especially appropriate where a party has

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

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August 21, 2020
8:30 AM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N. DiGiambattista
Courtroom Assistant: R Monterroso

CSR: None
ERM: None
Deputy Sheriff: None

taken inconsistent positions in separate proceedings." (Ibid.) The doctrine requires the following elements: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (Id. at 183.)

Petitioner does not show that these elements are satisfied. Respondent's statements were made in an opposition brief filed in April 1998, substantially before the 2002 Settlement. (AR 457.) Petitioner does not discuss all relevant history of the litigation and does not show that Respondent's statements in the April 1998 opposition were intended to take a position on claims made in the class action litigation. It is also unclear from the trial court's ruling whether it adopted the specific argument that Petitioner cites. (See AR 473.) Also, as discussed above, parties in the underlying litigation disputed the validity of Resolution 98-001's inclusions and exclusions when determining pensionable pay items. (See OB 10:26-11:6; AR 322; AR 505-510; AR 311-313.) Respondent's statement did not necessarily suggest that the issue of OBP benefit exclusion under CERL was not an issue to be resolved in the litigation. Thus, Petitioner does not show that Respondent was successful in asserting the first position, or that the two positions are totally inconsistent.

The court rejects Petitioner's claim of judicial estoppel.

The Hearing Officer's Exclusion of Petitioner's Hearsay Testimony Regarding Statements Made by Class Counsel Some 15 Years After the Settlement

Petitioner contends that the hearing officer erred in excluding Petitioner's hearsay testimony about statements made by class counsel, Stephen Silver, about the claims at issue in the class action litigation in a telephone call with Petitioner in 2015. (OB 19-20; see AR 913-914.)

Petitioner does not show an abuse of discretion in this evidentiary ruling.
The hearing officer reasonably concluded that Silver's hearsay statements were not relevant to an interpretation of the 2002 Settlement Agreement. Hearsay could only supplement or explain other evidence in the record. As stated by the hearing officer, "the best evidence of what was or … wasn't litigated [in the class action litigation] is in the pleadings themselves, the recommended decision, and the ruling itself." (AR 938.) Silver's hearsay statements from a phone call with Petitioner in 2015, some 15 years after the settlement, were not relevant to that determination.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 82

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JAMES B. MORELL vs BOARD OF RETIREMENT ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

August 21, 2020
8:30 AM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N. DiGiambattista
Courtroom Assistant: R Monterroso

CSR: None
ERM: None
Deputy Sheriff: None

Conclusion

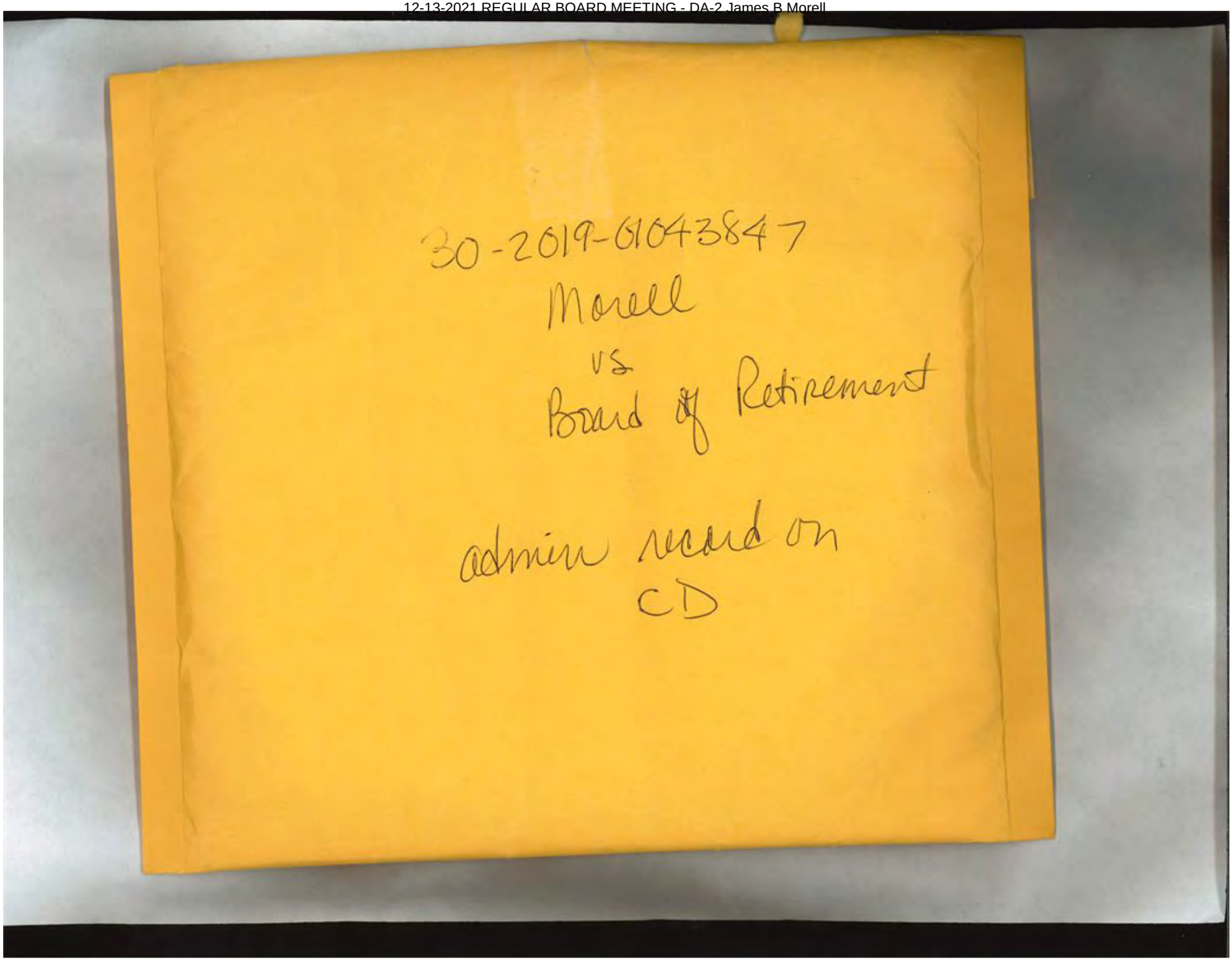
The petition is DENIED. Counsel for Respondents is to prepare and lodge a proposed judgment within 10 days. The court will hold the judgment for 10 days for Petitioner to file any objections as to form.

Petitioner's exhibit 1 is ordered returned forthwith to the party who lodged it, to be preserved unaltered until a final judgment is rendered in this case and is to be forwarded to the court of appeal in the event of an appeal.

.

A copy of this minute order is mailed to petitioner and counsel for respondents.

Certificate of Mailing is attached.


30-2019-01043847
Morell
vs.
Board of Retirement
admin record on
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Morell
v.
OCERS
LASC Case No. 30-2019-01043847
maxell
Administrative Record
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v.
OCERS
LASC Case No. 30-2019-01043847
Administrative Record

- LA Sup Ct
Hill ST
Angeles, CA
90012

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02 4W
0000336112 AUG 21 2020

Harvey Leiderman/
Maytak Chin
Reed Smith LLP
101 Second Street
Suite 1800
San Francisco, CA 94105-
3659

Exhibit E

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

JAMES B. MORELL,

Petitioner,

vs.

BOARD OF RETIREMENT, ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM,

Respondent.

Case Number 30-2019-01043847

PEREMPTORY WRIT OF MANDATE

To the Board of Retirement, Orange County Employees Retirement System, Respondent:

WHEREAS, on 7-16-21, judgment was entered in this action, ordering that a peremptory writ of mandate be issued from this court,

THEREFORE, YOU ARE HEREBY COMMANDED, ~~within 180 days of the date on which a copy of this writ is served on you,~~ to set aside your decision of October 18, 2018, in the proceedings entitled In the Matter of the Application of James B. Morell, a Member of the Orange County Employees Retirement system, for a Recalculated Retirement Allowance, denying Petitioner's application for a recalculated retirement allowance, and to reconsider the matter in light of the Court's judgment. You are directed to not limit the issues for consideration to (1) whether Board and Petitioner were bound by the 2002 Settlement Agreement and the judgment entered thereon, and (2) whether Petitioner's retirement allowance had been calculated in accordance with the Settlement Agreement and judgment. Board shall decide Petitioner's contentions that OCERS improperly excluded OBP benefits from the calculation of his final compensation separate and apart from the Settlement Agreement. .

YOU ARE FURTHER COMMANDED to serve and file, within ~~210~~ 180 days of the date on which a copy of the writ is served on you, a return showing compliance with the writ.

Dated: JUL 16 2021.

Sherri Carter, Clerk.

By: N. Digiambattista.

N. Digiambattista

LET THE FOREGOING WRIT ISSUE

Dated: _____.

The Honorable Mary Strobel

SUPERIOR COURT OF CALIFORNIA · COUNTY OF LOS ANGELES

SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES	Reserved for Clerk's File Stamp FILED Superior Court of California County of Los Angeles 07/16/2021 Sherri R. Carter, Executive Officer / Clerk of Court By: N. DiGiambattista, Deputy
COURTHOUSE ADDRESS: Stanley Mosk Courthouse 111 North Hill Street, Los Angeles, CA 90012	
PLAINTIFF/PETITIONER: James B. Morell	
DEFENDANT/RESPONDENT: Board of Retirement Orange County Employees Retirement System	
CERTIFICATE OF MAILING	CASE NUMBER: 30-2019-01043847

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the Minute Order (CLERK'S CERTIFICATE OF MAILING/NOTICE OF ENTRY OF JUDGMENT AN...) of 07/16/2021 upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Harvey Lewis Leiderman
Reed Smith LLP
101 2nd St Ste 1800
Suite 1800
San Francisco, CA 94105

James B. Morell
222 Avenue G
Redondo Beach, CA 90277

Sherri R. Carter, Executive Officer / Clerk of Court

Dated: 07/16/2021

By: N. DiGiambattista
Deputy Clerk

CERTIFICATE OF MAILING

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 82

30-2019-01043847 July 16, 2021
JAMES B. MORELL vs BOARD OF RETIREMENT ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM 3:38 PM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N. DiGiambattista
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: CLERK'S CERTIFICATE OF MAILING/NOTICE OF ENTRY OF JUDGMENT AND JUDGMENT

The court has read and considered petitioner's proposed judgment and writ, the objections filed by respondent, respondent's proposed judgment and writ as well as petitioner's response to respondent's objections.

.

The court signs and files this date the judgment as modified which was submitted by petitioner. The writ as modified which was submitted by respondent is issued this date.

.

This minute order shall serve as Notice of Entry of Judgment.

.

A copy of this minute order, the judgment and the writ are mailed via U.S. Mail to petitioner and counsel for respondent.

Certificate of Mailing is attached.

Exhibit F

JAMES B. MORELL
222 Avenue G
Redondo Beach, California 90277
Telephone: 424-304-2865

Petitioner in pro per

FILED
Superior Court of California
County of Los Angeles

JUL 16 2021

Sherri R. Carter, Executive Officer/Clerk
By Nancy Diambattista Deputy
N. Diambattista

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

JAMES B. MORELL,

Petitioner,

vs.

BOARD OF RETIREMENT, ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM,

Respondent.

Case No. 30-2019-01043847

~~[PROPOSED]~~ JUDGMENT

Judge: Hon. Mary Strobel

Petition filed: January 15, 2019

On May 20, 2021, the Court issued a minute order which is attached hereto as Exhibit A and incorporated herein by this reference. For the reasons set forth in the order, the petition for writ of mandate is granted, in part, and the matter is remanded for further proceedings pursuant to Code of Civil Procedure section 1094.5(f). A peremptory writ of mandate shall issue commanding Respondent to set aside its decision of October 18, 2018, and to reconsider the matter in light of the Court's order ~~and governing law. All remaining issues in the case are to be addressed and decided, with pertinent factual findings supported by the administrative record.~~

The Court shall retain jurisdiction for purposes of enforcing compliance with the writ ~~and addressing any remaining post-compliance issues~~. Petitioner shall recover costs.

IT IS SO ORDERED, ADJUDGED AND DECREED.

Date: July 16 2021

The Honorable Mary Strobel

JUDGMENT

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 82

30-2019-01043847
JAMES B. MORELL vs BOARD OF RETIREMENT ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

May 20, 2021
1:30 PM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N DiGiambattista
Courtroom Assistant: R Monterroso

CSR: Cindy Cameron/CSR 10315
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Petitioner(s): James B. Morell (Telephonic) (x)

For Respondent(s): Harvey Lewis Leiderman (x) (Telephonic)

NATURE OF PROCEEDINGS: HEARING ON PETITION FOR WRIT OF MANDATE

Matter comes on for hearing and is argued.

Petitioner's exhibit 1 (administrative record) is admitted into evidence.

The court adopts its tentative ruling as the order of the court and is set forth in this minute order.

Petitioner James B. Morell, in pro per ("Petitioner") petitions for a writ of administrative mandate directing Respondent Board of Retirement, Orange County Employees Retirement System ("Respondent" or "Board") to set aside its final administrative decision excluding Optional Benefit Plan ("OBP") benefits from the calculation of Petitioner's pension.

Motions to Augment the Record; and Judicial Notice

The court incorporates by reference its ruling dated August 21, 2020, on the parties' requests to augment the record and requests for judicial notice.

Factual and Procedural Background

OCERS Excludes Optional Benefit Plan Payments from Petitioner's "Final Compensation"

Orange County Employees Retirement System ("OCERS") is the retirement association for Orange County, administering retirement and other post-employment benefits for employees of Orange County and several participating public agencies within the County. (See County Employees Retirement Law of 1937 ("CERL"); Gov. Code § 31451; AR 2208-2215; and Oppo. 3.)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
Civil Division
Central District, Stanley Mosk Courthouse, Department 82

30-2019-01043847
JAMES B. MORELL vs BOARD OF RETIREMENT ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

May 20, 2021
1:30 PM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N DiGiambattista
Courtroom Assistant: R Monterroso

CSR: Cindy Cameron/CSR 10315
ERM: None
Deputy Sheriff: None

Petitioner was employed as a research attorney at the Orange County Superior Court from August 1992 to February 2014. (AR 264, 955, 971.) Petitioner became a member of OCERS on October 14, 1994, and retired on February 21, 2014. (AR 17-22, 23, 2160.)

Upon receipt of Petitioner's retirement application, OCERS multiplied his years of service, the applicable statutory formula rate, and final compensation for the measuring period of three years prior to his retirement to calculate his pension benefits. (AR 6, 2160.) In calculating Petitioner's pension, OCERS' staff did not include as "pensionable" $3,500 in Optional Benefit Plan ("OBP") payments paid to him annually as flexible benefits. (AR 1115.) The OCERS staff determined that a settlement agreement, discussed below, applied to him and that the agreement required that item of compensation to be excluded from the benefit calculation. (AR 49-51, 1115.)

The 2002 Settlement Agreement and Related Legal Background

The 2002 Settlement Agreement, upon which OCERS relied in calculating Petitioner's pension, has a somewhat complicated history.

In 1990, the Legislature modified CERL by enacting Government Code section 31460.1, effective January 1, 1991, which provided in full:

"Compensation" shall not include employer payments, including cash payments, made to, or on behalf of, their employees who have elected to participate in a flexible benefits program, where those payments reflect amounts that exceeds [sic] their employees' salaries.

This section shall not be operative in any county until the time the board of supervisors shall, by resolution adopted by a majority vote, makes [sic] this section applicable in the county. (AR 390; Resp. RJN Exh. A.)

In December 1990, the Orange County Board of Supervisors passed Resolution 90-1551 to elect such exclusion pursuant to then-existing Government Code section 31460.1. (AR 372, 1269.) Resolution 90-1551 states: "BE IT RESOLVED this Board does hereby adopt the provisions of Government Code Section 31460.1 pertaining to the definition of Compensation [in CERL] effective January 1, 1991." (AR 372.)

In May 1992, the Legislature repealed section 31460.1 in Senate Bill 193. Section 2 of SB 193 provides: "Nothing in this act is intended to, or shall be construed to, affect the validity of any

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
Civil Division
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JAMES B. MORELL vs BOARD OF RETIREMENT ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

May 20, 2021
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Judge: Honorable Mary H. Strobel
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CSR: Cindy Cameron/CSR 10315
ERM: None
Deputy Sheriff: None

action taken by a county pursuant to Section 31460.1 of the Government Code, prior to the effective date of this act." SB 193 took effect immediately and was approved by the Governor on May 8, 1992. (AR 395-396; Resp. RJN Exh. B.)

In 1997, the California Supreme Court issued a landmark decision affecting public employee pension calculations, Ventura County Deputy Sheriffs' Association v. Board of Retirement (1997) 16 Cal.4th 483 ("Ventura"). Ventura addressed what items of compensation paid to employees in counties subject to CERL should be counted towards calculating a public employee's retirement. Specifically, Ventura involved claims of deputy sheriffs and management employees that the following cash payments should be included in the pension calculation: overtime pay, cash payments of bilingual premium pay, a uniform maintenance allowance, educational incentive pay, additional compensation for scheduled meal periods for designated employees, pay in lieu of annual leave accrual, holiday pay, a motorcycle bonus, a longevity incentive, and a field training officer bonus. (Ventura, supra at 488-489.) Ventura held that "[w]ith the exception of overtime pay, items of 'compensation' paid in cash, even if not earned by all employees in the same grade or class, must be included in the 'compensation earnable' and 'final compensation' on which an employee's pension is based." (Ventura, supra at 487.)

In 1998, in response to Ventura, Respondent (OCERS' Board) adopted a policy ("Resolution 98-001") that specifies what items of an employee's compensation are to be included and excluded from the compensation base on which pension benefits are calculated. (AR 281-285, 1274-78.) As relevant here, Resolution 98-001 included as compensation earnable "Flexible Benefits ('Cafeteria Plan') to the Extent paid in Cash (applicable to members retiring before January 1, 1991)." However, Resolution 98-001 excluded as compensation earnable "Flexible Benefits ('Cafeteria Plan') provided in-kind" and "Flexible Benefits ('Cafeteria Plan') paid in cash to the extent paid to members retiring on and after January 1, 1991." (AR 282-283; see also AR 1057-58.) Petitioner contends, citing the record, that "Respondent's use of the January 1, 1991, cut-off date in Resolution No. 98-001 was based upon former Government Code section 31460.1." (OB 3, citing AR 557, 565.) Respondent makes no argument to the contrary.

Following the Ventura decision, litigation sprang up statewide over whether the decision applied retroactively and whether certain items of compensation should or should not be counted. Orange County was one of the venues where active and retired employees of the county and many public agencies within the county filed suits against the retirement system over the calculation of their pension benefits. The statewide litigation was coordinated for trial before a single trial judge and was eventually resolved by the Court of Appeal in In re Retirement Cases (2003) 110 Cal.App.4th 426. Prior to the Court of Appeal's decision, several of the statewide cases were

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
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May 20, 2021
1:30 PM

Judge: Honorable Mary H. Strobel
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Courtroom Assistant: R Monterroso

CSR: Cindy Cameron/CSR 10315
ERM: None
Deputy Sheriff: None

settled, including the case involving OCERS. (See generally In re Retirement Cases (2003) 110 Cal.App.4th 426, 433-438, 436-437, fn. 6.)

In November 2002, the coordinated trial judge, Stuart R. Pollak of Superior Court, San Francisco County, entered a judgment in Orange County Superior Court Case Nos. 791315 and 791499 ("Judgment") approving a settlement agreement, which settled class action litigation in Orange County following Ventura ("Settlement Agreement"). (AR 62-89, 2083-84.)

The Settlement Agreement was entered into between various persons and entities, including OCERS and class representatives of a class consisting of all past, present, and future members of OCERS, including "retirees, deferred retirees, and active employees and all of the members' survivors, beneficiaries, agents, assigns, representatives and successors in interest ('Class Members')." (AR 68.) Petitioner was an OCERS member at the time the Settlement Agreement was approved by the court. (AR 17-22.)

As relevant to the instant litigation, the Settlement Agreement provides:

3. OCERS' Resolutions Final and Binding. Each of the Parties agrees to accept as final and binding the inclusions in and exclusions from compensation, compensation earnable, and final compensation as more particularly set forth in OCERS' Resolution 98-001 … attached hereto as Exhibit B and … incorporated herein by this reference …. (AR 70.)

The Settlement Agreement also states, inter alia, the parties' intent to "settle[], compromise[] and resolve[] all issues among the parties with respect to" pensionable compensation "with respect to all of the items referenced in th[e] Agreement and its attached exhibits," which included Resolution 98-001. (AR 71-72 at ¶ 8.) The "Agreement [was] intended to be complete and final with respect to the issues that it has resolved, and that terms or applicability of the Agreement will not be changed on behalf of any of the Parties, including the Class Members, in response to later court decisions, whether favorable or unfavorable, to any of the Parties[.]" (Ibid.)

Petitioner's Administrative Appeal; Board's Decision

Petitioner appealed OCERS' staff's determination that OBP benefits were excluded from "compensation earnable." (AR 43-47.) Among other things, Petitioner contended that the Settlement Agreement was not valid because it conflicted with CERL and Ventura. (AR 2090-2110.) OCERS referred the appeal to an administrative hearing officer.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
Civil Division
Central District, Stanley Mosk Courthouse, Department 82

30-2019-01043847
JAMES B. MORELL vs BOARD OF RETIREMENT ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

May 20, 2021
1:30 PM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N DiGiambattista
Courtroom Assistant: R Monterroso

CSR: Cindy Cameron/CSR 10315
ERM: None
Deputy Sheriff: None

In his Proposed Findings of Fact, Conclusions of Law, & Recommended Decision, the administrative hearing officer found, inter alia, that the court-approved Settlement Agreement is final and binding on Petitioner, and that Paragraph 3 excluded from pensionable compensation Petitioner's OBP benefits. (AR 1068-72.) However, the hearing officer also recommended that the Board "reexamine the portion of the settlement agreement that excludes from pensionability flexible benefits received by employees as taxable cash, and that the Board consider pursuing an amendment of the Superior Court judgment ...." (AR 1072.)

Respondent thereafter decided pursuant to Government Code section 31534(b) to set aside the hearing officer's findings and recommendations and to "limit its consideration" solely to the issues of (1) whether Respondent and Petitioner were bound by the 2002 Settlement Agreement and the judgment entered thereon, and (2) whether Petitioner's retirement allowance had been calculated in accordance with the settlement agreement and judgment. (AR 2209.) Following presentation of evidence and argument, the Board determined by unanimous vote that OCERS and Petitioner are bound by the Settlement Agreement and Judgment, and that OCERS accurately calculated Petitioner's retirement allowance in accordance with the Settlement Agreement and Judgment. (AR 2209-2214.)

The Instant Writ Proceeding

On January 15, 2019, Petitioner filed a petition for writ of mandate pursuant to CCP section 1094.5 and 1094.6. On August 23, 2019, Respondent filed its answer.

On September 12, 2019, at a trial setting conference, the court ordered the parties to meet and confer with respect to any disputes as to the contents of the administrative record. The court's minute order stated: "If no agreement is reached, petitioner may file and serve a motion to augment the record. The motion is to be heard prior to the filing of petitioner's opening brief."

On June 18, 2020, Petitioner filed his opening brief in support of the petition ("OB"). The court received Respondent's opposition ("Oppo."), Petitioner's reply, the administrative record ("AR"), and the joint appendix.

On August 20, 2020, the writ petition came for hearing. After oral argument on the court's tentative ruling, the court took the matter under submission.

On August 21, 2020, the court issued its ruling on submitted matter and denied the writ petition.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
Civil Division
Central District, Stanley Mosk Courthouse, Department 82

30-2019-01043847
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May 20, 2021
1:30 PM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N DiGiambattista
Courtroom Assistant: R Monterroso

CSR: Cindy Cameron/CSR 10315
ERM: None
Deputy Sheriff: None

Petitioner timely moved for reconsideration of the court's ruling on the writ petition, including based on new case authority. On February 11, 2021, after briefing and a hearing, the court granted reconsideration based on Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association (2020) 9 Cal.5th 1032, and on the court's own inherent authority. The court highlighted several topics for the parties to address in supplemental briefing, including: "the potential tension between the definition of 'compensation earnable' discussed in Ventura and Alameda, on the one hand, compared to section 31460.1 and its repeal in SB 193, on the other. Did SB 193 'grandfather' or 'save' ordinances adopted pursuant to section 31460.1 as applied to future retirees?" ((Minute Order dated 2/11/21 at 8-9.)

On March 11, 2021, Petitioner filed his supplemental opening brief ("SOB"). The court has received Respondent's supplemental opposition ("Suppl. Oppo.") and Petitioner's supplemental reply.

Standard of Review

Under CCP section 1094.5(b), the pertinent issues are whether the respondent has proceeded without jurisdiction, whether there was a fair trial, and whether there was a prejudicial abuse of discretion. An abuse of discretion is established if the agency has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. (CCP § 1094.5(b).)

Because Petitioner's public pension benefits concern a fundamental vested right, the court exercises its independent judgment on the record. (See Bixby v. Pierno (1971) 4 Cal.3d 130, 143 (Bixby); Dickey v. Retirement Board (1976) 16 Cal.3d 745, 748-51.) Under the independent judgment test, "the trial court not only examines the administrative record for errors of law, but also exercises its independent judgment upon the evidence disclosed in a limited trial de novo." (Bixby, supra, at 143.) The court must draw its own reasonable inferences from the evidence and make its own credibility determinations. (Morrison v. Housing Authority of the City of Los Angeles Board of Commissioners (2003) 107 Cal.App.4th 860, 868 (Morrison).) "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (Fukuda v. City of Angels (1999) 20 Cal.4th 805, 817.)

The petitioner seeking administrative mandamus has the burden of proof and must cite to the administrative record to support its contentions. (See Bixby v. Pierno (1971) 4 Cal. 3d 130, 143;

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May 20, 2021
1:30 PM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N DiGiambattista
Courtroom Assistant: R Monterroso

CSR: Cindy Cameron/CSR 10315
ERM: None
Deputy Sheriff: None

Steele v. Los Angeles County Civil Service Commission, (1958) 166 Cal. App. 2d 129, 137; see also Alford v. Pierno (1972) 27 Cal.App.3d 682, 691 ["[T]he burden of proof falls upon the party attacking the administrative decision to demonstrate wherein the proceedings were unfair, in excess of jurisdiction or showed prejudicial abuse of discretion."].)

"'On questions of law arising in mandate proceedings, [the court] exercise[s] independent judgment.' .... Interpretation of a statute or regulation is a question of law subject to independent review." (Christensen v. Lightbourne (2017) 15 Cal.App.5th 1239, 1251.)

Analysis

Petitioner Could Not Waive His Claim that the Settlement Agreement Conflicts with CERL; and the Legality of the Settlement Agreement is Not Dispositive

In the original writ briefing, Petitioner challenged the Board's finding that OCERS properly excluded Petitioner's OBP benefits from his pensionable compensation based on the Settlement Agreement and Judgment. (OB 15-16.) In its ruling on the writ petition, the court concluded, in part, that "Petitioner waived and released his claim that the Settlement Agreement, as applied to the pensionability of his OBP benefits, conflicts with CERL." (8/21/20 Minute Order at 12.) The court also concluded that Petitioner did not show that the Settlement Agreement was unlawful when made, and that the weight of the evidence supported Board's finding that OCERS and Petitioner are bound by the Settlement Agreement. (Id. at 9, 15.)

On February 11, 2021, the court reconsidered those parts of the August 21 ruling in light of Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association (2020) 9 Cal.5th 1032 ("Alameda"). The court does not repeat its full discussion of Alameda here, but incorporates its prior analysis. (See 2/11/21 Minute Order.) In the February 11, 2021, ruling, the court concluded that "[b]ecause retirement boards and systems have no authority to enter an agreement that would require them to pursue a policy that conflicts with CERL, Petitioner could not waive – in a settlement agreement with OCERS -- an argument that OCERS' calculation of Petitioner's pensionable compensation contravenes CERL." (2/11/21 Minute Order at 8.) Accordingly, "[w]hether or not any part of the Settlement Agreement could be found to be illegal when made is not dispositive." (Ibid.) The court concluded that if Petitioner's cash OBP benefits are currently pensionable under CERL, the Settlement Agreement cannot change that. (Id. at 8.)

In its administrative decision, Board found that OCERS and Petitioner are bound by the

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Settlement Agreement and Judgment, and that OCERS accurately calculated Petitioner's retirement allowance in accordance with the Settlement Agreement and Judgment. (AR 2209-2214.) However, Petitioner asserted in the administrative proceedings that OCERS did not properly calculate his retirement allowance, specifically the inclusion of OBP benefits, in accordance with CERL. For the reasons stated in the court's February 11, 2021, ruling, Petitioner could not waive such contentions in the Settlement Agreement. Accordingly, Board prejudicially abused its discretion by upholding OCERS' calculation of Petitioner's retirement allowance based solely on the Settlement Agreement and Judgment. (CCP § 1094.5(b).)

Should the Court Remand for a Determination of the Pensionability of Petitioner's OBP Benefits?

Before reaching Petitioner's contentions that his OBP benefits are pensionable separate from the Settlement Agreement, the court must first determine whether the action should be remanded to Board for further findings. Petitioner has asked the court to make a final determination of his claim to retirement benefits. (OB 20; Reply 10; Pet. Prayer ¶ 1.) In the alternative, Petitioner requests a remand so that Board can "render a complete and final decision on the matter." (OB 20; Pet. Prayer ¶ 2.)

Judicial review in an administrative mandamus action is generally limited to issues raised in the administrative proceedings and to the findings made by administrative agency. (See CCP §1094.5(b) ["Abuse of discretion is established if … the order or decision is not supported by the findings, or the findings are not supported by the evidence."]; Dobos v. Voluntary Plan Administrators, Inc. (2008) 166 Cal.App.4th 678, 688.) "The courts review the findings and decision of the administrative agency …." (NBS Imaging Systems, Inc. v. State Bd. of Control (Polaroid Corp.) (1997) 60 Cal.App.4th 328, 335.)

In its administrative decision, Board "limit[ed] its consideration" to the issues of (1) whether Respondent and Petitioner were bound by the 2002 Settlement Agreement and the judgment entered thereon, and (2) whether Petitioner's retirement allowance had been calculated in accordance with the settlement agreement and judgment. (AR 2209.) Board found that OCERS and Petitioner are bound by the Settlement Agreement and Judgment, and that OCERS accurately calculated Petitioner's retirement allowance in accordance with the Settlement Agreement and Judgment. (AR 2209-2214.) Given the express limitation of issues, Board did not address or decide the pensionability of Petitioner's OBP benefits separate from the Settlement Agreement.

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Petitioner contends that Board abused its discretion and failed to proceed as required by law when it limited its consideration to the enforceability of the Settlement Agreement against him. (OB 20, citing Gov Code § 31534(b).) The court agrees, as analyzed above with respect to Alameda. However, contrary to Petitioner's request for a "final determination" of his pension allowance, the usual remedy in such circumstances is a remand to the administrative agency for reconsideration in light of the court's ruling and "to take such further action as is specially enjoined upon it by law." (See CCP § 1094.5(f).)

The remand procedure relates to the doctrine of exhaustion of administrative remedies. Exhaustion of administrative remedies is "a jurisdictional prerequisite to judicial review." (Cal. Water Impact Network v. Newhall County Water Dist. (2008) 161 Cal.App.4th 1464, 1489.) "The principal purposes of exhaustion requirements include avoidance of premature interruption of administrative processes, allowing an agency to develop the necessary factual background of the case, letting the agency apply its expertise and exercise its statutory discretion, and administrative efficiency and judicial economy." (Id. at 1489.) Petitioner contends that he raised all arguments below (see OB 20 and Suppl. OB 13). The exhaustion doctrine counsels for a remand so that Board can apply its expertise to the pensionabiltiy of Petitioner's OBP benefits, not based on Board's finding the Settlement Agreement resolved the issue.

A remand is also justified for reasons particular to this case. Petitioner contends that SB 193 rendered Government Code section 31460.1 and Resolution 90-1551 prospectively inoperative in May 1992. (Suppl. Br. 7-12.) Although Petitioner only seeks relief related to his own retirement calculation, this challenge to the enforceability of Resolution 90-1551, as well as related Resolution 98-001, could plausibly impact other retirees and the retirement system more generally. (See Reply 2:19-3:1 [discussing "similarly situated" retirees].) Board should have the opportunity to apply its expertise to the pensionability of OBP benefits in Orange County. Petitioner also makes factual arguments about his retirement calculation. He contends that even if Government Code section 31460.1 and Resolution 90-1551 remained prospectively operative, the "weight of the evidence in this case establishes that Petitioner did not elect to participate in the OBP program." (Suppl. Br. 13.) Board did not make any findings on this issue.

Petitioner may argue that a remand for further proceedings is futile. In his original reply, he states that "there is no reason to expect Respondent would adhere to … the law if the matter were remanded …." (Reply 10.) "The futility exception is very narrow and will not apply unless the petitioner can positively state that the administrative agency has declared what its ruling will be in a particular case." (Bollengier v. Doctors Medical Center (1990) 222 Cal.App.3d 1115, 1126.) Petitioner does not show, with evidentiary citation, that Board has declared what its ruling would

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be on the pensionability of his OBP benefits. As Petitioner notes, Board limited its decision to the enforceability of the Settlement Agreement and did not reach the separate pensionability issues. (OB 20; Reply 10.)

Respondent contends that the court already decided the pensionability of Petitioner's OBP benefits separate from the Settlement Agreement in its August 21, 2020, minute order. (See Suppl. Oppo. 9, fn. 7.) In that ruling, the court to some extent considered whether OBP benefits were pensionable, but in the context of addressing Petitioner's contention that the Settlement Agreement was unlawful. (8/21/20 Minute Order at 12-15.) Petitioner had argued that the Settlement Agreement, as it relates to the pensionability of his OBP benefits, conflicts with CERL and therefore was unlawful when made. In response to that argument, the court concluded that "the pensionability of Petitioner's OBP benefits, including with respect to the impact of section 31460.1 and SB 193, were unresolved questions of law at the time of the Settlement Agreement." (Ibid.) Given that Board limited its decision to the enforceability of the Settlement Agreement, the issues that could be ruled upon by the court were necessarily limited in scope as well.

Nonetheless, some statements in the August 21, 2020, ruling could be construed as opining on the pensionability of Petitioner's OBP benefits. The court expressly ordered reconsideration of that part of its ruling in light of Alameda. Specifically, in its reconsideration ruling, the court stated: "While the court in its August 21, 2020 ruling found the Settlement Agreement addressed an 'unresolved legal question' and was lawful when made, the court to some extent also considered whether OBP benefits were pensionable, especially in light of section 31460.1 and its repeal. In light of Alameda, and on its own authority, the court will reconsider that part of the court's ruling." (2/11/21 Minute Order at 8-9.) Having granted reconsideration, the court withdraws its prior statements concerning the pensionability of OBP benefits and expressly states no opinion about that issue.

In response to the court's reconsideration order, the parties have briefed the pensionability of Petitioner's OBP benefits. On further reflection and for the reasons stated above, these issues of pensionability – although briefed by the parties – should be determined by Board in the first instance.

Based on the foregoing, the action must be remanded to Board for further proceedings related to the pensionability of Petitioner's OBP benefits.

Petitioner's Remaining Contentions

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The court incorporates by reference its prior rulings on all other issues, including Petitioner's claim of judicial estoppel and Petitioner's hearsay arguments. (See 8/21/20 Minute Order at 15-17; 2/21/21 Minute Order 3-5.)

Conclusion

The petition is GRANTED IN PART. The court will issue a writ directing Board to set aside its decision dated October 18, 2018, and to reconsider the case in light of this court's ruling and judgment. (See AR 2208-2215; CCP § 1094.5(f).) On remand, Board shall not limit the issues for consideration to (1) whether OCERS and Petitioner were bound by the 2002 Settlement Agreement and the judgment entered thereon, and (2) whether Petitioner's retirement allowance had been calculated in accordance with the Settlement Agreement and judgment. (AR 2209.) Board shall decide Petitioner's contentions that OCERS improperly excluded OBP benefits from the calculation of his final compensation separate and apart from the Settlement Agreement.

Petitioner's exhibit 1 is ordered returned forthwith to the party who lodged it, to be preserved unaltered until a final judgment is rendered in this case and is to be forwarded to the court of appeal in the event of an appeal.

Petitioner is to give notice and is to prepare, serve and lodge the proposed judgment and proposed writ within ten days. The court will hold the proposed documents ten days for objections unless approved by opposing counsel as to form.

Amended Exhibit G

RETIREMENT SYSTEM

Online Application For Service Retirement

Date/Time: 1/27/2014 TransID:3198

1. Member Information

Last Name:	First Name:	M.I.	Social Security Number
MORELL	JAMES	B	Redacted
Home/Mailing Address: Redacted			
City: Redacted		State: Redacted	Zip: Redacted
Date of Birth:	Marital Status: Married	Date of Marriage:	
Agency / Job Title: Superior Court /Senior Research Attorney		Phone: Redacted	
Total Service Years: 21.49		Effective Date of Retirement: 2/20/2014	

2. Benefit Payment Election I elect the following payment option: (Choose one)

Unreduced Benefit

- ● Unmodified Payment: Monthly benefit payable for your lifetime. No continuance of monthly benefit after death unless you have an eligible spouse or minor children. Surviving spouse or minor children receive 60% continuance of your monthly benefit upon your death.

Reduced Benefit

- ○ Optional Payment 1: Reduced monthly benefit payable for your lifetime. Surviving beneficiary receives a lump sum payment equal to accumulated contributions less the sum of annuity portion of benefits already received.
- ○ Optional Payment 2: Reduced monthly benefit payable for your lifetime. Surviving beneficiary receives a 100% continuance of your monthly benefits upon your death.
- ○ Optional Payment 3: Reduced monthly benefit payable for your lifetime. Surviving beneficiary receives a 50% continuance of your monthly benefits upon your death.
- ○ Optional Payment 4: Any type of benefit payment approved by the Board.

3. Beneficiary Designation I wish to designate the following:

Beneficiary 1 Type: Primary

Beneficiary Name:	Relationship:	% of Benefit:
MORELL, JASON	Son	50
Date of Birth: Redacted	Social Security Number: Redacted	
Address: Redacted City, State, Zip, Country: Redacted		Phone: Redacted

Beneficiary 2 Type: Primary

Beneficiary Name:	Relationship:	% of Benefit:
MORELL, JESSICA	Daughter	50
Date of Birth: Redacted	Social Security Number: Redacted	
Address: Redacted City, State, Zip, Country: Redacted		Phone: Redacted

FORM:RRT EID:116503589

JAMES_MORELL_0001

RETIREMENT SYSTEM

Online Application For Service Retirement

Beneficiary 3 Type: Alternate TransID:3198

Beneficiary Name:	Relationship:	% of Benefit:
DALTON, DINA	Wife	100
Date of Birth: Redacted	Social Security Number: Redacted	
Address: Redacted City, State, Zip, Country: Redacted		Phone: Redacted

Beneficiary 4 Type:

Beneficiary Name:	Relationship:	% of Benefit:
Date of Birth:	Social Security Number:	
Address: City, State, Zip, Country:		Phone:

Beneficiary 5 Type:

Beneficiary Name:	Relationship:	% of Benefit:
Date of Birth:	Social Security Number:	
Address: City, State, Zip, Country:		Phone:

4. Spouse's Beneficiary Waiver

Your spouse MUST complete a **Spouse's Beneficiary Waiver** if you name, as your primary beneficiary, someone other than your spouse (or in additional to your spouse).

Spouse's Waiver:

I hereby authorize my spouse to name someone other than myself as primary beneficiary. I understand that by providing such authorization, I waive my right to some or all of the benefits payable under the County Employee Retirement Law of 1937.

Recipient Signature _____ Date _____

Notary Public Signature _____ Date _____ Notary Seal _____

5. Member Authorization

I wish to receive my retirement benefit from OCERS in the payment form elected in Section 2. I wish benefits to be paid to my beneficiary(ies) upon my death in accordance with the payment option elected.

I understand that by clicking on the "Submit" button I am placing my electronic signature on this Application for Service Retirement. I further understand that my signature will not be witnessed and that the elections made on this Application will become effective as of the date submitted and my retirement will take place on the date contained in this Application unless I notify Orange County Employees Retirement System of changes prior to the Effective Date of Retirement above.

Member Electronic Signature [X] Date submitted: 1/27/2014

FORM:RRT EID:116503589

JAMES_MORELL_0002

August 17, 2015

MEMORANDUM

TO: Board of Retirement

FROM: David Lantzer, Deputy Chief Counsel

RE: Agenda Item D-11: James Morell Benefit Appeal

RECOMMENDATION:

Find that OCERS properly excluded optional benefit payments from compensation earnable in calculating final average salary and retirement allowance.

Deny member's request to include optional benefit payments in compensation earnable for calculation of final average salary and retirement allowance.

Alternatives: Other actions the Board is authorized to perform may be one of the following:

1. Grant member's request to include optional benefit payments in compensation earnable; or

2. Refer the matter back to staff for a legal opinion from outside counsel and further staff development; or

3. Refer the matter to a hearing officer.

BACKGROUND:

Senior Research Attorney, Orange County Superior Court
Total years of OCERS service: 21.49152
Date of entry into OCERS: 10/14/1994
Date of service retirement: 2/21/2014
Attorney Designation: Pro Per

JAMES_MORELL_0023

ATTACHMENTS:

1. Member letter to Suzanne Jenike dated June 23, 2014
2. Suzanne Jenike letter to member dated September 9, 2014
3. Member letter to Steve Delaney received by OCERS on December 1, 2014
4. Steve Delaney letter to member dated March 20, 2015
5. Member letter requesting appeal to the Board dated June 15, 2015
6. OCERS Resolution 98-001
7. Judgment (*Ventura* settlement) including Settlement Agreement
8. Tentative Decision re. Optional Benefit Payments

STAFF ANALYSIS:

Mr. Morell is a retired Senior Staff Attorney for the Orange County Superior Court. He contends that optional benefit payments in the amount of $3,500 per year should be included as compensation earnable for purposes of calculating his final average salary and retirement allowance.

OCERS does not include optional benefit payments in compensation earnable pursuant to Board of Retirement Resolution 98-001 adopted by the Board on February 6, 1998. Resolution 98-001 states in relevant part:

> Elements to be Excluded From "Compensation Earnable". Remuneration or other value to the employee neither earned or payable in cash to the employee during the final compensation period for working the ordinary time required of other employees in the same grade/class shall be excluded from "compensation earnable", including but not limited to the following items, and others substantially similar to them:
>
> > Flexible Benefits ("Cafeteria Plan") provided in-kind
> >
> > Flexible Benefits ("Cafeteria Plan") paid in cash to the extent paid to members retiring on and after January 1, 1991.

Resolution 98-001 is specifically referenced in the class action settlement agreement entered by OCERS, plan sponsors, and employee groups that settled the *Ventura* litigation for Orange County. The settlement agreement states, "Each of the parties agrees to accept as final and binding the inclusions in and exclusions from compensation, compensation earnable, and final compensation as more particularly set forth in OCERS' Resolution 98-001." The Judgment ratifying the class action settlement states:

> [I]t is hereby ORDERED, ADJUDGED AND DECREED that all of the terms and provisions of the approved Settlement Agreement, a copy of which is attached hereto and incorporated herein as Appendix "2," shall be binding upon and implemented by all parties to these actions, including all members of the class

> consisting of all past, present and future members of the Orange County Employees Retirement System, including retirees, deferred retirees, and active employees, and all of the members' survivors, beneficiaries, agents, assigns, representatives and successors in interest.

Clearly, as a member of OCERS at the time the Settlement Agreement was executed and continuing until his retirement, Mr. Morell was a member of OCERS subject to the terms of the settlement agreement. Therefore, his compensation earnable calculation is subject to Resolution 98-001, which specifically excludes cafeteria plan type benefits from compensation earnable.

This conclusion is bolstered by the decision of the court regarding the inclusion of flexible benefits in compensation earnable. In a tentative decision that was later made the final decision of the court, the court upheld a resolution by the Orange County Board of Supervisors that excluded flexible benefits from compensation earnable pursuant to former Gov. Code § 31460.1. The court stated the exclusion was not an unconstitutional impairment of a contract right. The reason for this was that the issue of whether flexible benefits must be included in compensation earnable was an uncertain issue when the petitioning employees were hired. The court pointed out that when the employees were hired, prior to the enactment of former § 31460.1, flexible benefits were not included in compensation earnable and the members could not have a reasonable expectation that they would be included when they accepted employment.

Likewise, in 1994, when Mr. Morell became a member of OCERS, flexible benefits were not included in compensation earnable. Therefore, Mr. Morell could not have a reasonable expectation that those benefits would be included in compensation earnable.

Finally, neither OCERS nor the Board has taken any steps to collect contributions that would pay for the additional benefits. Payment of unanticipated benefits will cause an unfunded liability that will then be passed on to plan sponsors and ultimately taxpayers. While the amount Mr. Morell seeks for himself may be relatively small in comparison to OCERS' total liabilities, OCERS would have to apply any new rule equally. Therefore, any member who receives flexible benefit payments as part of his or her remuneration would receive additional retirement benefits based on increased compensation earnable. Inclusion of flexible benefit in compensation earnable for all OCERS members would cause a substantial unfunded liability.

Prepared by:

OCERS D.L. - Approved

David Lantzer
Deputy Chief Counsel

JAMES_MORELL_0025

James B. Morell
P.O. Box 1464
Crestline, CA 92325

June 23, 2014

RECEIVED
JUN 23 2014
Orange County Employees
Retirement System

Ms. Suzanne Jenike
Member Services Director
Orange County Employees Retirement System
2223 E. Wellington Avenue, Suite 100
Santa Ana, CA 92701

Dear Ms. Jenike,

On February 21, 2014, I retired from my position as a Senior Research Attorney with the Orange County Superior Court. Because I believe a $3,500.00 annual "optional benefit" was erroneously excluded from the calculation of "compensation" and/or "compensation earnable" in determining my monthly retirement allowance (see enclosed documents), I am presenting this appeal of the calculation.

The compensation at issue consists of $3,500.00 which has been made available to attorneys at OCSC at the beginning of each calendar year as part of their annual compensation package. During most of my time of employment at the Court, at open enrollment each November the attorneys were permitted to elect that these funds be applied to a limited number of options in the manner decided by the attorney: (1) a cash payment (included in the first payroll "check" of the new year), (2) certain health/dental care expenses not covered by insurance, (3) supplemental accidental death and dismemberment coverage, (4) tuition reimbursement for professional coursework (this option was eliminated effective January 1, 2014), or allocation of the funds to the attorney's 457 deferred compensation plan. If options (2), (3) and/or (4) were elected, the amount of designated funds is payable, on a pre-tax basis, as reimbursement for the use elected; if no election is made, $3,500.00 is automatically paid to the attorney as part of his first "paycheck" of the year. Article IX, section 4(B) of the Court's Personnel Policies and Regulations (attached hereto) specifies the purpose of this "Optional Benefit Plan": "to provide options to individual employees to best meet the needs of themselves and dependents while enhancing the employee's expertise and skills on the job."

"'Compensation' means the remuneration paid in cash out of county or district funds, plus any amount deducted from a member's wages for participation in a deferred compensation . . . , but does not include the monetary value of board, lodging, fuel, laundry, or other advantages furnished to a member." (Government Code section 31460.) "'Final compensation' means the average annual compensation earnable by a member during any three years elected by a member at or before the time he or she files an application for retirement, or, if he or she fails to elect, during the three years immediately preceding his or her retirement. . . ." (Government Code section 31462(a).) In construing these statutes, any ambiguities or uncertainties are to be resolved in favor of the pensioner. (Ventura County Deputy Sheriffs' Assn. v. Board of Retirement (1997) 16 Cal.4th 483, 490.)

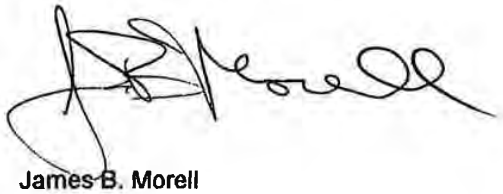
Under Ventura and the express language of section 31460, an annual $3,500.00 pure cash payment (option 1, *supra*) would clearly constitute "compensation," nor would an election to apply any or all of an annual cash payment to a deferred compensation account (option 5) result in exclusion of the deferral from "compensation" or "compensation earnable." In addition, tuition reimbursement for professional coursework (option 4) is a form of educational incentive pay relating to services expected to be performed with special skills or at higher level of competence, and thus is "compensation." (Ventura, *supra*, at p. 498.) The question thus presented is whether (or to what extent) the ability of the attorney to elect to apply some or all of the 3,500.00 to health/dental care expenses (option 2) or to supplemental accident/ dismemberment coverage (option 3) requires the $3,500.00 to be excluded from "compensation" or "compensation earnable." The ability of the attorney to apply the funds in the manner specified in options 2 and 3 on a pre-tax basis should not detract from the monetary value of the funds so applied. Any funds designated for the payment of non-insurance-covered medical/dental expenses (option 2) are paid by the County (on behalf of the Court) into a dedicated health care reimbursement account (aka "flexible spending account," currently administered by third party contractor ADP) for

use by the attorney in accordance with IRS regulations -- although made to the attorney's ADP account for limited use rather than to the attorney's bank account for general use, it is nonetheless a cash payment, and as a lump-sum payment for the attorney's subsequent use it is inherently different from the type of ad hoc reimbursement of miscellaneous employment-related expenses which may otherwise be excluded from "compensation" or "compensation earnable." Similarly, supplemental accidental death/dismemberment coverage (option 3) has been funded via a payroll credit -- again, this would constitute a cash payment out of County funds insofar as the credit results in a higher bi-weekly payment to an attorney who elected option 3. In evaluating the annual "optional benefit" package, it should be born in mind that the Orange County Superior Court has designed the package as a whole for the purpose of enhancing the employee's expertise and skills on the job (Personnel Policies and Regulations, Art. IX, section 4(B)), and that such skill enhancement payments are considered "compensation" under section 31460 (Ventura, *supra*, at p. 498). Perhaps more importantly, the fact an attorney may elect for the entire $3,500.00 to be payable directly to himself or herself in cash, in the same manner as vacation and sick-time pay-offs (in fact, option 1 is the "default option" unless a different election is made), points to treatment of the entire $3,500.00 as "compensation" or "compensation earnable." (See Salus v. San Diego County Employees Retirement Ass'n (2004) 117 Cal.App.4th 734, 739: "In Ventura the court found that the payments the officers received in lieu of annual leave were earnable compensation within the meaning of sections 31460 and 31461 for the self-evident reason the officers had the *ability* to receive the pay in cash rather than in time off" (emphasis added); cf. In re Retirement Cases (2003) 110 Cal.App.4th 426, 477-481 holding flexible benefit plans to be excluded from "compensation" because they had not been payable directly to the employee.) "In contrast to the result reached in Ventura, the court in In re Retirement Cases . . . found that under Ventura sick leave or annual leave which was not *or could not be* converted to cash before retirement is not final compensation." (Salus v. San Diego County Employees Retirement Ass'n, *supra*, 117 Cal.App.4th at p. 739 (emphasis omitted and added).)

Even if the annual $3,500.00 "optional benefit" as a whole might not constitute "compensation" or "compensation earnable," Ventura nonetheless requires the calculation of my retirement benefit to be based upon my own individual remuneration as a member of the class of attorneys to which the "optional benefit" package has been made available. During my employment with the Orange County Superior Court, I elected to apply a portion of my annual "optional benefit" towards health/dental care not covered by insurance (option 2, supra) and to take the remainder of the $3,500.00 as a cash payment included in the first payroll payment of the year. Specifically, in January 2014 I received a cash "optional benefit" payment in the amount of $2,500.00, in January 2013 I received a cash "optional benefit" payment in the amount of $1,000.00, and in January 2012 I received a cash "optional benefit" payment in the amount of $2,800.00 (the Court's HR Department can verify these amounts). Regardless of whether the portion of my annual "optional benefit" payment applied to health/dental care may be treated "compensation" or "compensation earnable," these annual cash payments (averaging $2,100.00 during the three-year period preceding my retirement) were required to be included in the calculation of my average annual compensation earnable under sections 31460 and 31462(a). "[I]tems of 'compensation' paid in cash, even if not earned by all employees in the same grade or class, must be included in the 'compensation earnable' and 'final compensation' on which an employee's pension is based." (Ventura, *supra*, at p. 87; see also Salus v. San Diego County Employees Retirement Ass'n, *supra*, 117 Cal.App.4th at p. 736: "final compensation under CERL involves three requirements: compensation in the form of cash, rather than in the form of in-kind goods and services or time off; cash earned during a usual work period, as opposed to cash earned for overtime; and cash earned before retirement, rather than at or after retirement.")

I therefore request that my average annual compensation earnable be increased by $3,500.00, or, at minimum, $2,100.00.

Respectfully submitted,



James B. Morell

JAMES_MORELL_0035

ORANGE COUNTY
OCERS
EMPLOYEES RETIREMENT SYSTEM

Serving the Active and Retired Members of:

CITY OF SAN JUAN CAPISTRANO

COUNTY OF ORANGE

ORANGE COUNTY CEMETERY DISTRICT

ORANGE COUNTY CHILDREN & FAMILIES COMMISSION

ORANGE COUNTY DEPARTMENT OF EDUCATION (CLOSED TO NEW MEMBERS)

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

TRANSPORTATION CORRIDOR AGENCIES

UCI MEDICAL CENTER AND CAMPUS (CLOSED TO NEW MEMBERS)

September 9, 2014

Mr. James Morell
P.O. Box 1464
Crestline, CA 92325

Re: Member Appeal

Dear Mr. Morell,

This is in response to your letter of June 23, 2014 regarding your monthly retirement allowance and your request to have the $3,500.00 Optional Benefit Payment (OBP) you received included in your final average salary.

Resolution No. 98-001 as adopted by the Board of Retirement in February 1998 specifically identifies the categories of pay that are included and excluded from a retiring member's compensation earnable. This resolution is used in conjunction with the applicable employee Memorandums of Understanding or salary agreements to determine in each retiring member's calculations which pay items are included or excluded from consideration.

The Resolution specifically excludes flexible benefit payments for employees retiring after January 1, 1991 from being considered compensation earnable. The Optional Benefit Payment you received is a flexible benefit payment and since you retired after January 1, 1991, your OBP payment(s) is excluded from your compensation earnable. Your appeal therefore must be denied.

If you do not agree with this determination, you may file an appeal within 90 days of the above date, by sending a letter to the attention of Steve Delaney, CEO, at OCERS, 2223 E. Wellington Avenue, Suite 100, Santa Ana, CA, 92701.

Very truly yours,

ORANGE COUNTY EMPLOYEES
RETIREMENT SYSTEM

Suzanne Jenike
Assistant CEO, External Operations

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM ◆ *2223 E. Wellington Avenue, Suite 100, Santa Ana, CA 92701*
Telephone (714) 558-6200 Fax (714) 558-6234

JAMES_MORELL_0048

James B. Morell
P.O. Box 1464
Crestline, CA 92325

June 23, 2014

RECEIVED
DEC 01 2014
Orange County Employees
Retirement System

Mr. Steve Delaney
Chief Executive Officer
Orange County Employees Retirement System
2223 E. Wellington Avenue, Suite 100
Santa Ana, CA 92701

Dear Mr. Delaney,

By letter of September 9, 2014, OCERS denied my June 23 letter appeal (attached hereto and incorporated herein by reference), wherein I requested that the $3500.00 annual benefit I received under the Superior Court's "Optional Benefit Plan" be included in "compensation earnable" for purposes of determining my retirement allowance. The denial was based upon Resolution No. 98-001, which was adopted by the Board of Retirement in February 1998 following the California Supreme Court decision in Ventura County Deputy Sheriffs' Assn. v. Board of Retirement and which specifically excluded "Flexible Benefits ('Cafeteria Plan') paid in cash to the extent paid to members retiring on and after January 1, 1991" from "compensation earnable."

The basis for the January 1, 1991, cut-off date is not stated in either Resolution No. 98-001 or the September 9 denial letter. Presumably, this is not an arbitrary date, inasmuch as arbitrary exclusion of a certain class of retirees from a full calculation of "compensation" and "compensation earnable" would clearly be unlawful under the County Employees Retirement Law as construed by Ventura and other decisional authority. "With the exception of overtime pay, items of 'compensation' paid in cash, even if not earned by all employees in the same grade or class, must be included in the 'compensation earnable' and 'final compensation' on which an employee's pension is based." (Ventura County Deputy Sheriffs' Assn. v. Board of Retirement (1997) 16 Cal.4th 483, 488.) While correctly including benefits "paid in Cash" under a "Cafeteria Plan" for members who had retired prior to 1991, Resolution No. 98-001 excludes those benefits for members retiring after January 1, 1991, and it makes no mention of "Cafeteria Plan" benefits which are "payable" (whether or not actually paid). Because Resolution No. 98-001 was enacted several months after the Ventura decision became final it does not reflect later appellate decisions which further clarified the pertinent definitional requirements of the County Employees Retirement Law of 1937.

Insofar as the January 1, 1991, date might be based upon provisions of an unspecified bargaining agreement, Resolution No. 98-001 would appear to be unlawfully overbroad to the extent that date is made applicable to persons, such as myself, who have never been represented by a bargaining unit and have never been party to any such bargaining agreement. Moreover, decisional law subsequent to Resolution No. 98-001 has made clear that the statutory definition of "compensation" under the County Employees Retirement Law may not be altered via negotiated bargaining agreements. "The Ventura decision affected the determination of what items were to be

included in 'compensation earnable,' and this is *not* subject to a contract right. . . . [P]lan members could not bargain regarding their contribution rates or their 'final compensation.'" (In re Retirement Cases (2003) 110 Cal.App.4th 426, 453 (emphasis in original).) *A fortiori*, the pertinent statutory definition(s) may not be altered unilaterally by a retirement board in order to exclude a certain class of retirees based upon date of retirement.

Based upon inquiries made of staff, it appears the January 1, 1991, cut-off date in Resolution No. 98-001 may relate to former Government Code section 31460.1, which was enacted in 1990 via A.B. 3146 and became effective at the start of 1991. Section 31460.1 provided,

> "Compensation" shall not include employer payments, including cash payments, made to, or on behalf of, their employees who have elected to participate in a flexible benefits program, where those payments reflect amounts that exceeds [sic] . . . their employees' salaries.
>
> This section shall not be operative in any county until the time the board of supervisors shall, by resolution adopted by a majority vote, makes [sic] this section applicable in the county.

(Howard Jarvis Taxpayers' Assn. v. Board of Supervisors (1996) 41 Cal.App.4th 1363, 1367.) The first paragraph of section 31460.1 apparently became operative in Orange County on June 11, 1991, when the Board of Supervisors adopted a resolution pursuant to Government Code section 31525 approving a revision of the entire "Bylaws and Regulations" of the Orange County Employees Retirement System which referenced section 31460.1 (as well as section 31460) and specifically excluded "flexible benefits paid under a cafeteria plan" from the definition of "compensation earnable." "[A] provision in legislation delaying the 'operative' date is simply a component of a statute subject to the usual rules of statutory construction and interpretation." (Johnston v. Alexis (1984) 153 Cal.App.3d 33, 41.)

The operative language of former Government Code section 31460.1 appears to be facially inapplicable to the Optional Benefit Plan in question, however, inasmuch as the statute was made expressly applicable only to employees who had "elected to participate in" such a flexible benefits program. As previously noted, the Optional Benefit Plan provided to research attorneys at the Orange County Superior Court did not require -- or permit -- any election, other than an opportunity to allocate some or all of the $3500.00 annual benefit among certain non-cash options (non-covered health/dental expenses, accidental death/dismemberment coverage, or tuition reimbursement). If no such election was made during the open enrollment period in any year, the full $3500.00 was automatically paid as taxable cash via inclusion in the first payroll payment of the new year. The Optional Benefit Plan was thus "optional" only with regard to the allocation of the $3500.00 benefit, not with regard to its provision, and was treated throughout my period of employment as an integral part of the overall compensation package provided to research attorneys at the Superior Court. The distinction is significant, inasmuch as former section 31460.1 appears to have been intended to apply only to plans which were elective and which provided payments in excess of employees' normal compensation. (See now Government Code section 31461(b)(1)(B).) (Cf. Hudson v. Board of Admin. of Public Employees' Retirement System (1997) 59 Cal.App.4th 1310, involving election to convert certain in-kind benefits to salary).)

Even if section 31460.1 were otherwise applicable, the operative language contained in the first paragraph of the statute became ineffective when it was repealed without reenactment on May 11, 1992, via S.B. 193. (Cf. Government Code section 20636(g)(4)(K), which continues to govern calculation of "compensation earnable" for State employees under the Public Employees' Retirement System.) Although S.B. 193 contained a declaration that the Legislature never considered inclusion of flexible benefits to be mandatory under the County Employees Retirement Law (Section 3 of Stats.1992, c. 45), subsequent case law has given effect to this retroactive expression of legislative intent only with regard to "in-kind" benefits -- "consistent with the interpretation of CERL as set forth in Ventura," flexible benefits which are payable as cash, such as the Optional Benefit Plan, are to be included in "compensation earnable." (In re Retirement Cases, *supra*, 110 Cal.App.4th at 479-481 and n. 26, noting that flexible benefits payable as cash which were authorized by Los Angeles County in 1992 were required to be included in "compensation earnable" until legislation specifically permitting "a county of the first class" to exclude those benefits was enacted in 1993; cf. Government Code sections 31461.1 and 31461.4, which are inapplicable to Orange County.) The Legislature has now codified its approval of the holding of In re Retirement Cases. (Government Code section 31461(c).) As early as 1999, the Legislature's evolving post-Ventura view of flexible benefit plans was reflected in an analysis of the statute which added section 31461.4 to the Government Code: "Current law requires that contributions to employee cafeteria or flexible benefit plans be included in the calculation of compensation and compensation earnable when computing retirement benefits in counties . . . that operate independent retirement systems under authority granted by the 1937 County Retirement Act. [¶] For current Los Angeles County represented employees first hired prior to January 1, 1996, that portion of the County contribution toward the employee's cafeteria plan that may be taken as cash . . . is included in the definition of compensation or compensation earnable." (California Bill Analysis, A.B. 288 Assem., 2/18/1999.)

Resolution No. 98-001 may have reflected the view that exclusion of flexible plan benefits was unaffected by the 1992 repeal of Government Code section 31460.1 because the statute had become "grandfathered" into law for Orange County when it was made effective by the Board of Supervisors in June 1991. In repealing section 31460.1, S.B. 193 provided, "Nothing in this act is intended to, or shall be construed to, affect the validity of any action taken by a county pursuant to Section 31460.1 of the Government Code, prior to the effective date of this act." (Section 2 of Stats.1992, c. 45.) However, construing "action taken" to refer to the Board of Supervisors's adoption of the June 1991 resolution which made former section 31460.1 operative is statutorily problematic, since any continued validity of the resolution itself became legally inconsequential when the operative provisions of former section 31460.1 were repealed. (See Ransome-Crummey Co. v. Bennett (1918) 177 Cal. 560, 566-568, holding that an assessment exemption adopted by municipal ordinance pursuant to statutory authorization was abrogated by the subsequent repeal of the authorizing statute -- "the legislative repeal of section 20 of the Vrooman Act operated to repeal the power conferred upon the city of San Jose in the matter . . . . [W]hen in its wisdom the Legislature sees fit to withdraw this favor the exemption is at an end"; Ransome-Crummey Co. v. Coulter (1920) 50 Cal.App. 150, 152-153, rejecting the contention that the continued validity of the ordinance gave continuing legal effect to the exemption notwithstanding the statutory repeal; cf. Ransome-Crummey Co. v. Fikes (1921) 53 Cal.App. 180, 182-183, giving effect to the exemption as to work completed prior to the repeal.) "It is usual for legislative bodies to use the word 'repealed,' and, when used, the act referred to is abrogated, -- done away with." (Thomason v. Ruggles (1886) 69 Cal. 465, 470; see Government Code section 9606.) "[I]t is the general rule that one legislature cannot enact irrepealable legislation or limit or restrict its own power or the power of its successors as to the repeal of statutes." (United Milk Producers of Cal. v. Cecil (1941) 47 Cal.App.2d 758, 764.) The second paragraph of former section 31460.1 thus did not permit the Board of Supervisors to render the first paragraph permanently operative regardless of any

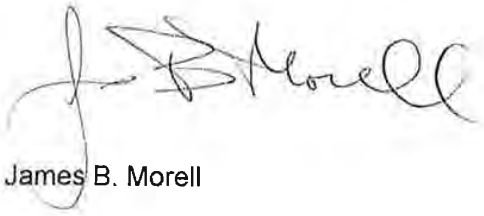
subsequent action by the Legislature or the Board. (See, e.g., Government Code section 31658(h), whereby the Legislature effectively terminated operation of section 31658 in 2013 notwithstanding any such prior adoption by the board of supervisors; also Government Code section 31462.1(b).) The Legislature merely utilized a commonly employed "trigger" for operation of the first paragraph, which was not self-executing and remained inoperative in any county "until" it was activated by the board of supervisors (cf., e.g., Government Code sections 31453(b)(2), 31454(b)(2), 31458.4(b), 31462.3(c), 31469.4, 31469.8(c), 31470.12, 31470.14(e), 31610, 31662.8, 31663, 31681.51-31681.54, 31685.96). The better view would be that "action taken . . . pursuant to Section 31460.1" in S.B. 183 refers instead to the clerical exclusion of flexible benefits from "compensation earnable" for employees who retired while former section 31460.1 was operative -- the statutorily authorized exclusion might remain effective for retirements which occurred between June 11, 1991, and May 11, 1992, in Orange County, but not for those which occurred before or after. (See Government Code section 31481.) "The presumption is, that the Legislature did not intend to pass any law that would affect past transactions, or work injustice." (People ex rel. Thorne v. Hays (1854) 4 Cal. 127, 138.) "Any ambiguity or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner, . . . consistent with the clear language and purpose of the statute." (Ventura County Deputy Sheriffs' Assn. v. Board of Retirement, *supra*, 16 Cal.4th at 490; see also Taylor v. Board of Ed. of City of San Diego (1939) 31 Cal.App.2d 734, 742: "Under well recognized principles of law, a legislative act which would, if construed to be a contract, limit or extinguish the power of the government completely to control the subject matter of the enactment, will not be so construed unless the legislative intention to create a contract clearly appears, and all doubts must be resolved in favor of the continuance of the power of the government.") Moreover, the integrated "Bylaws and Regulations" approved by the Board of Supervisors on June 11, 1991, evidently have themselves been repealed and/or superseded, inasmuch as the current OCERS bylaws make no mention of the flexible benefit exclusion, which now appears to be merely a policy of OCERS rather than a regulation (cf. Government Code sections 31526 and 31527, defining permissible subjects of Board regulations) -- insofar as the adoption of the "Bylaws and Regulations" via the Board of Supervisors resolution of June 11, 1991, made former section 31460.1 operational in Orange County, the subsequent repeal of those same "Bylaws and Regulations" after S.B. 193 became effective in May 1992 would have operationally negated any grandfathered effect of section 31460.1. (See Rigley v. Board of Retirement of San Diego County Emp. Retirement (1968) 260 Cal.App.2d 445, 450: "The By-Laws and Regulations adopted by the Board, pursuant to Government Code, Section 31525 . . . were binding until abrogated . . ."; Mack v. Jastro (1899) 126 Cal. 130, 132: "whenever it becomes apparent that a later statute is revisory of the entire matter of an earlier statute, and is declared as a substitute for it, the later statute will prevail, and the earlier statute will be held to have been superseded, even though there be found no inconsistencies or repugnancies between the two"; Bond v. Farmers & Merchants Nat. Bank, Los Angeles (1944) 64 Cal.App.2d 842, 846: "The enactment of the new statute will not be considered as repealing by implication but rather is it to be understood that the later legislative attempt is a revision of the entire subject matter embodied in the successive legislative enactments and that the latest was designed as a substitute for all preceding acts. Whatever of the old is excluded from the new must be ignored.")

Prior to Ventura, it was recognized that "flexible benefit" plans such as the Superior Court's Optional Benefit Plan may be properly included as part of "compensation" and "compensation earnable" under Government Code sections 31460 and 31461. (See Howard Jarvis Taxpayers' Assn. v. Board of Supervisors, *supra*, 41 Cal.App.4th at 1374: "There is no dispute that such flexible benefit payments constitute "remuneration" which may permissibly be taken into account in determining "compensation earnable" for retirement plan purposes.") Post-Ventura decisional law has endorsed application of "a bright-line rule that requires the employee to *receive*

a cash payment from the employer" in order for the benefit to be included. (In re Retirement Cases, *supra*, 110 Cal.App.4th at 477 n. 24 (emphasis in original).) Because the entire $3500.00 annual benefit conferred by the Optional Benefit Plan is payable directly to the employee as cash, the Ventura decision now precludes the Retirement Board from exercising discretion to exclude that benefit from "compensation earnable" and "final compensation." (Cf. In re Retirement Cases, *supra*, 110 Cal.App.4th at 478: "Here, the employee is receiving an insurance premium, not a cash payment. Thus, it is an in-kind benefit, which is not "compensation" under section 31460"; see also id. at 481 n. 26, noting that, in the absence of a specific statutory exclusion, inclusion of flexible benefits is mandatory where the benefits are payable as cash.) "The court in Ventura emphasized that while only cash payments received by an employee qualify as compensation within the meaning section 31460, when cash is paid in lieu of other in-kind benefits, those payments qualify as compensation." (Salus v. San Diego County Employees Retirement Ass'n (2004) 117 Cal.App.4th 734, 739.)

Thus, insofar as former Government Code section 31460.1 may have been applicable to the type of flexible benefit plan at issue here, Resolution No. 98-001 appears to misapply that statute by excluding "payable as cash" flexible benefit plans from "compensation earnable" for retirements which occurred while section 31460.1 was inoperative -- i.e., during January 1 through June 10, 1991, and after May 11, 1992. In addition, the Resolution is inconsistent with Ventura and other decisional law insofar as it provides for inclusion of "Cafeteria Plan" benefits only "to the Extent paid in Cash" -- as discussed above and in my June 23 appeal letter, post-Ventura court decisions have consistently held that "compensation" and "compensation earnable" under the County Employees Retirement Law includes not only benefits which are actually paid in cash but also those which are *payable* in cash, regardless of the amount actually paid in cash in a particular year. (See Salus v. San Diego Employees Retirement Ass'n, *supra*, 117 Cal.App.4th at 739.) Insofar as the Chief Executive Officer and staff believe Resolution No. 98-001 to be nonetheless binding with regard to the disposition of this appeal, I would request that this matter be brought to the attention of the Retirement Board, so that the Board may take appropriate action to modify the Resolution or take other steps to bring treatment of the Optional Benefit Plan in question into conformity with current applicable law.

Respectfully submitted,



James B. Morell

JAMES_MORELL_0047

ORANGE COUNTY
OCERS
EMPLOYEES RETIREMENT SYSTEM

March 20, 2015

Serving the Active and Retired Members of:

CITY OF SAN JUAN CAPISTRANO

COUNTY OF ORANGE

ORANGE COUNTY CEMETERY DISTRICT

ORANGE COUNTY CHILDREN & FAMILIES COMMISSION

ORANGE COUNTY DEPARTMENT OF EDUCATION (CLOSED TO NEW MEMBERS)

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SUPERIOR COURT OF CALIFORNIA COUNTY OF ORANGE

TRANSPORTATION CORRIDOR AGENCY

UCI MEDICAL CENTER (CLOSED TO NEW MEMBERS)

James Morell
P.O. Box 1464
Crestline, CA 92325

Re: Member Appeal – Final Average Salary / Optional Benefits Plan

Dear Mr. Morell:

Thank you for your letter that OCERS received on December 1, 2014. I apologize that it has taken some time for me to write back to you. Your appeal letter presents some complex issues that required extensive staff time to research.

My understanding is that you are appealing the determination by OCERS' Member Services Department that optional benefit plan ("OBP") benefits are not included in the calculation of your final average salary.

I have reviewed your correspondence with OCERS, OCERS' return correspondence, your member file, relevant court decisions, and OCERS' resolution regarding compensation earnable. I find that your request to include OBP payments in the calculation of your final average salary was properly denied by the OCERS Member Services Department.

Your correspondence indicates you received $3,500 per year under your employer's OBP. You received some of the benefit in the form of insurance premiums and some as cash payments. Your contention is that at least the cash payments should be included in your final average salary calculation because the benefits were paid in cash out of employer funds.

Enclosed with this letter, please find a copy of the Board of Retirement Resolution No. 98-001 ("Resolution") adopted by the Board on February 6, 1998. The Resolution was adopted by the Board in response to the *Ventura* case and the settlement agreement between OCERS, the county, OCAA, and other parties that followed *Ventura*. The Resolution enumerates elements of remuneration that are to be included and excluded from compensation earnable.

The Resolution provides elements that are to be excluded from compensation earnable. The Resolution states, "Remuneration or other value to the employee neither earned or payable in cash to the employee during the final compensation

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Telephone (714) 558-6200 Fax (714) 558-6234
www.ocers.org

JAMES_MORELL_0049

period **for working the ordinary time required of other employees in the same grade / class** shall be excluded from 'compensation earnable.'" OCERS' practice since passage of the Resolution has been to exclude items on this list and "others substantially similar to them" in conformity with the Resolution.

Among the items specifically excluded from compensation earnable in the resolution are "Flexible Benefits ('Cafeteria Plan') provided in-kind" and "Flexible Benefits ('Cafeteria Plan') paid in cash to the extent paid to members retiring on and after January 1, 1991." Your OBP benefits fall within the category of Flexible Benefits under the Resolution whether paid in-kind or in cash.

The Resolution is supported by the Tentative Decision Re: Orange County Resolution 90-1551 that I have enclosed for your review. In its tentative decision the court considered cash payments made in lieu of flexible benefits. The court found that these benefits were not includable in compensation earnable. The tentative decision became the final decision of the court.

The reasoning for the court's decision was that the Board of Retirement did not anticipate inclusion of flexible benefits in compensation earnable. Since flexible benefits were not an anticipated factor in compensation earnable, OCERS did not collect employee or employer contributions based on those benefits.

In order for OCERS to remain actuarially sound, it must collect sufficient contributions to pay for benefits. The court recognized that inclusion of unanticipated benefits in compensation earnable would have a negative effect on OCERS' actuarial soundness. For your information, inclusion of OBP in compensation earnable would also increase the cost of the plan for employees and employers.

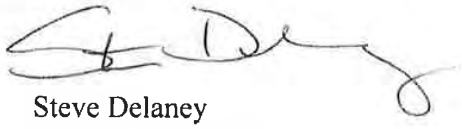
I understand that you dispute whether the Resolution is applicable to you since you were not a direct party to the *Ventura* case or the settlement agreement that arose from that case. *Ventura* was a class action case that led to the *In re Retirement Cases* consolidated action. I have enclosed a copy of the Judgment in the Orange County portion of the *In re Retirement Cases* matter. The Judgment states that it "shall be binding upon and implemented by all parties to these actions, including all members of the class consisting of **all past, present and future members of the Orange County Employees Retirement System**, including retirees, deferred retirees, and active employees, and all of the members' survivors, beneficiaries, agents, assigns, representatives and successors in interest." (Emphasis added)

In addition, the Settlement Agreement attached to the Judgment specifically references Resolution 98-001, and states, "Each of the parties agrees to accept as final and binding the inclusions and exclusions from compensation, compensation earnable, and final compensation as more particularly set forth in OCERS' Resolution 98-001." The Settlement Agreement also states that the class represented in the Settlement Agreement includes all past, present, and future members of OCERS. Therefore, the Settlement Agreement and Resolution 98-001 are binding on you as a member of OCERS regardless of whether your specific employer or employee group signed the Settlement Agreement.

Based on my review of correspondence, the Resolution, and relevant court decisions, I find that OCERS Member Services Department properly advised you regarding exclusion of OBP from compensation earnable and final average salary calculations. Therefore, your appeal is denied.

If you do not agree with this decision, you have the right to request an appeal through the Board of Retirement. If you choose to exercise this right, please send a letter to my attention at OCERS, 2223 E. Wellington Avenue, Suite 100, Santa Ana, CA, 92701, within 90 days of the date of this letter, requesting that your matter be placed on the Retirement Board's agenda to be discussed at a future Retirement Board meeting. You will receive a letter with the date and time of the meeting and instructions for submitting any documentation for the Board's consideration.

Very truly yours,



Steve Delaney
Chief Executive Officer

James B. Morell
P.O. Box 1464
Crestline, CA 92325

June 15, 2015

Mr. Steve Delaney
Chief Executive Officer
Orange County Employees Retirement System
2223 E. Wellington Avenue, Suite 100
Santa Ana, CA 92701

Dear Mr. Delaney,

Pursuant to your letter of March 20, I hereby further appeal the exclusion of the $3500.00 annual benefit I received under the Superior Court's "Optional Benefit Plan" from "compensation earnable" for purposes of determining my retirement allowance. I request that the matter be placed on the Retirement Board's agenda to be discussed at a future Board meeting. Set forth herein is a summary of the basis for my appeal, and I request that this summary be made available to Board members and counsel prior to the meeting.

In 1997 the California Supreme Court clarified the treatment of cash remuneration under the County Employees Retirement Law: "With the exception of overtime pay, items of 'compensation' paid in cash, even if not earned by all employees in the same grade or class, must be included in the 'compensation earnable' and 'final compensation' on which an employee's pension is based." (Ventura County Deputy Sheriffs' Assn. v. Board of Retirement (1997) 16 Cal.4th 483, 488.) "The court in Ventura emphasized that while only cash payments received by an employee qualify as compensation within the meaning section 31460, when cash is paid in lieu of other in-kind benefits, those payments qualify as compensation." (Salus v. San Diego County Employees Retirement Ass'n (2004) 117 Cal.App.4th 734, 739.) The Supreme Court further held that any ambiguity or uncertainty in the statutory scheme is to be resolved in favor of the pensioner. (Ventura County Deputy Sheriffs' Assn. v. Board of Retirement, *supra*, 16 Cal.4th at 490.)

The initial denial of my appeal in September 2014 cited only Resolution No. 98-001, which was adopted by the Board of Retirement in February 1998 following the Ventura decision and which specifically excluded "Flexible Benefits ('Cafeteria Plan') paid in cash to the extent paid to members retiring on and after January 1, 1991" from "compensation earnable." As is clear from the analysis provided by OCERS attorney Harvey Leiderman at a meeting of the Ad Hoc Committee of the Board of Retirement on January 21, 1998, the 1991 cut-off date was based upon a resolution adopted by the Orange County Board of Supervisors pursuant to former Government Code section 31460.1, which was enacted in 1990 and became effective January 1, 1991. For several reasons, I contend the conclusion of Mr. Leiderman, that the Board of Supervisors resolution had been "grandfathered into the law" and continued to authorize the exclusion of "paid in cash" flexible benefits from "compensation earnable," was misplaced, at least with respect to the flexible benefit plan in which I was a participant.

JAMES_MORELL_0052

(1) Former Government Code section 31460.1, which authorized the exclusion of "employer payments, including cash payments, made to, or on behalf of, their employees who have elected to participate in a flexible benefits program" from "compensation earnable," was facially inapplicable to the Optional Benefit Plan in question, which apparently is unique to a few hundred attorneys and management personnel at the Superior Court. I never "elected to participate in" any flexible benefits program. The Court's "Optional Benefit Plan" does not require -- or permit -- any election, other than an opportunity to allocate some or all of the $3500.00 annual benefit payment as tax-free reimbursement for certain out-of-pocket expenses (non-covered health/dental expenses, accidental death/dismemberment insurance, and/or professional tuition). If no such allocation is made during the open enrollment period in any year, the full $3500.00 is automatically paid as taxable cash in the first payroll payment of the new year. The Optional Benefit Plan is thus "optional" only with regard to the allocation of the $3500.00 benefit, not with regard to its provision. By making former section 31460.1 applicable only to employees who "elected to participate in" a flexible benefits program, the Legislature intended the statute to apply only to voluntary plans which were supplemental to salary and which provided payments in excess of employees' normal compensation, not to plans such as the Court's Optional Benefit Plan, which are an integral part of the employee's overall compensation. Because former section 31460.1 was inapplicable to the flexible benefit plan in which I was a participant, the exclusionary language of Resolution No. 98-001 was unlawfully overbroad, and to that extent invalid, insofar as it encompassed that plan.

(2) Even if Government Code section 31460.1 had been applicable to the Superior Court's Optional Benefit Plan, the operative language contained in the first paragraph of the statute became ineffective when section 31460.1 was repealed without reenactment on May 11, 1992, via S.B. 193. (Cf. the similar language of Government Code section 20636(g)(4)(K), which continues to govern calculation of "compensation earnable" for State employees under the Public Employees' Retirement System; Government Code sections 31461.1 and 31461.4, which are inapplicable to Orange County.) S.B. 193 contained a declaration that the Legislature never considered inclusion of flexible benefits to be mandatory under the County Employees Retirement Law (Section 3 of Stats.1992, c. 45), but subsequent case law has given effect to this retroactive expression of legislative intent only with regard to non-cash "in-kind" benefits. (See In re Retirement Cases (2003) 110 Cal.App.4th 426, 479-481 and n. 2; Government Code section 31461(c).) Although S.B. 193 also contained a savings clause ("Nothing in this act is intended to, or shall be construed to, affect the validity of any action taken by a county pursuant to Section 31460.1 of the Government Code, prior to the effective date of this act" -- evidently the language relied upon by attorney Leiderman in 1998), the better view would appear to be that "action taken by a county pursuant to Section 31460.1" refers to the clerical action of excluding flexible benefit payments from "compensation earnable" for employees who retired during 1991-1992 while former section 31460.1 was operative (see Government Code section 31481) -- construing "action taken" to refer to the Board of Supervisors's adoption of the resolution making former section 31460.1 operative is problematic, since the continued validity of the resolution itself became legally inconsequential when the operative provisions of former section 31460.1 were repealed. (See Ransome-Crummey Co. v. Bennett (1918) 177 Cal. 560, 566-568, holding that an assessment exemption adopted by municipal ordinance pursuant to statutory authorization was abrogated by the subsequent repeal of the authorizing statute -- "the legislative repeal of section 20 of the Vrooman Act operated to repeal the power conferred upon the city of San Jose in the matter . . . . [W]hen in its wisdom the Legislature sees fit to withdraw this favor the exemption is at an end"; Ransome-Crummey Co. v. Coulter (1920) 50 Cal.App. 150, 152-153, rejecting the contention that the continued validity of the ordinance gave continuing legal effect to the exemption notwithstanding the statutory repeal; cf. Ransome-Crummey Co. v. Fikes (1921) 53 Cal.App. 180, 182-183, giving effect to the exemption as to work completed prior to the repeal.) "It is usual for legislative bodies to use the word

'repealed,' and, when used, the act referred to is abrogated, -- done away with." (Thomason v. Ruggles (1886) 69 Cal. 465, 470; see Government Code section 9606.)

(3) Any exclusion of "flexible benefit" payments from "compensation earnable" in Orange County pursuant to former Government Code section 31460.1 has been abrogated by subsequent actions taken by OCERS and/or the Board of Supervisors. On June 11, 1991, the Orange County Board of Supervisors adopted a resolution pursuant to Government Code section 31525 approving an integrated revision of the entire "Bylaws and Regulations" of the Orange County Employees Retirement System, a revision which referenced section 31460.1 and specifically excluded "flexible benefits paid under a cafeteria plan" from the definition of "compensation earnable. These "Bylaws and Regulations" (the predecessor of Resolution No. 98-001, which evidently did not receive similar approval from the Board of Supervisors) have apparently now been repealed and/or superseded themselves, since the current OCERS bylaws make no mention of the flexible benefit exclusion and since the exclusion now appears to be merely a policy of OCERS rather than a regulation. (Cf. Government Code sections 31526 and 31527.) Insofar as the adoption of such "Bylaws and Regulations" by the Board of Supervisors rendered former section 31460.1 operational in Orange County, the subsequent repeal of those same "Bylaws and Regulations" after S.B. 193 became effective in May 1992 would have operationally negated any grandfathered effect of section 31460.1. (See Rigley v. Board of Retirement of San Diego County Emp. Retirement (1968) 260 Cal.App.2d 445, 450: "The By-Laws and Regulations adopted by the Board, pursuant to Government Code, Section 31525 . . . were binding until abrogated . . ."; Mack v. Jastro (1899) 126 Cal. 130, 132: "whenever it becomes apparent that a later statute is revisory of the entire matter of an earlier statute, and is declared as a substitute for it, the later statute will prevail, and the earlier statute will be held to have been superseded, even though there be found no inconsistencies or repugnancies between the two"; Bond v. Farmers & Merchants Nat. Bank, Los Angeles (1944) 64 Cal.App.2d 842, 846: "The enactment of the new statute will not be considered as repealing by implication but rather is it to be understood that the later legislative attempt is a revision of the entire subject matter embodied in the successive legislative enactments and that the latest was designed as a substitute for all preceding acts. Whatever of the old is excluded from the new must be ignored.")

As set forth in the March 20 letter, the second denial of my appeal did not dispute any of the foregoing, relying instead upon the outcome of class action litigation (the "Retirement Cases," OCSC case nos. 791315 and 791499) of which I had previously been unaware (I do not recall receiving any notice regarding this litigation or the settlement thereof, but at this time I am unable to prove I did not receive it). Specifically, the letter cited "Tentative Decision Re: Orange County Resolution 90-1551," issued August 14, 2001, in the coordinated Retirement Cases. However, it is clear from the Tentative Decision that the sole issue presented and determined was the *constitutionality* of Resolution 90-1551, which had been adopted by the Orange County Board of Supervisors in December 1990 in order to implement former Government Code section 314601 -- the court ruled only that the Resolution did not impair vested contractual rights of retirees who had been employed prior to its adoption:

> "The remaining issue for determination in the includability phase of the Orange County litigation concerns the effect of Orange County Resolution 90-1551, passed pursuant to former Government Code section 31460.1, on the includability in pension calculations of cash payments made in lieu of flexible benefits. . . . Plan members argue that Resolution 90-1551 is invalid as to those who were employed prior to its adoption

> because it unconstitutionally impairs a vested contractual right. . . . When plan members accepted employment prior to the enactment of former section 31460.1 and the adoption of Resolution 90-1551, the parties could not reasonably have anticipated that the cash payments in question would be included in pension calculations. Certainly, the OCERS Board had no such expectation . . . . Hence, neither section 31460.1 nor Resolution 90-1551, both adopted to clear up confusion that had arisen on the subject, can be deemed to have impaired a vested right."

Contrary to the assertion in the March 20 letter, the basis for the Tentative Decision was not solely "that the Board of Retirement did not anticipate inclusion of flexible benefits in compensation earnable," nor was the Tentative Decision based upon considerations of actuarial soundness as such -- rather, the reasonable expectations of the parties was addressed because the existence of an unconstitutional impairment of a vested contractual right is determined in large part by reference to such expectations. (Allen v. Board of Administration (1983) 34 Cal.3d 114, 119-120.) In contrast, the issues which I have addressed above regarding the applicability and validity of former section 31460.1 and Resolution 98-001 involve pure issues of law and statutory construction, without regard to the expectations of OCERS or myself. The August 2001 Tentative Decision makes no mention of these issues, and cannot be said to have addressed or resolved them. It simply has no bearing upon this appeal.

As a further basis for the denial of my appeal, the March 20 letter cites the 2002 settlement agreement and the judgment entered thereon in the Retirement Cases, which, it is asserted, has bound me as an OCERS participant to accept the provisions of Resolution No. 98-001, including the 1991 cut-off date for inclusion of "flexible benefit" payments in "compensation earnable," regardless of the validity or applicability of Resolution No. 98-001 or of former Government Code section 31460.1. This assertion fails for at least two reasons:

(1) It is a basic principle of civil litigation that the issues to be adjudicated in a case are delineated and bounded by the pleadings -- just as res judicata cannot be asserted against a party if the claim was not presented for adjudication in the prior action, a settlement agreement cannot be raised as a bar to a claim which was not placed at issue by the pleadings in the settled case. None of the various pleadings filed in OCSC case nos. 791315 and 791499 specifically challenged the applicability or validity of former Government Code section 31460.1 or Resolution 98-001 on the grounds stated above. The mandamus petitioners in OCSC case no. 791499, joined by intervenors OCEA and REAOC, specifically challenged the "flexible benefit" exclusion on the ground that it unconstitutionally impaired the vested contractual rights of pre-1991 retirees, and this was the sole issue adjudicated by the court (in the Tentative Decision) regarding the validity of the "flexible benefit" exclusion under former section 31460.1. Although the complaint for declaratory relief filed by the Board of Retirement in OCSC case no. 791315 alleged more generally that the defendants were subject to the exclusions set forth in Resolution No. 98-001, the Board subsequently made clear in its opposition to defendants' demurrer that, "unless and until other parties create an actual controversy so as to require the Board to amend its Verified Complaint to add additional defendants," the only issues presented for adjudication were those raised by the defendants (as set forth in OCSC case no. 791499) and that "[t]ne Board thus seeks no 'advisory opinion' from this Court, but rather a complete and final determination of the specific issues in dispute." Having thus argued successfully that the Retirement Cases litigation did not involve a general adjudication of the validity of the inclusions and exclusions contained in Resolution No. 98-001, but rather was confined to the specific claims asserted by the other parties, OCERS is estopped from now claiming that the settlement of the Retirement Cases resolved different issues such as those presented in this appeal or otherwise bars them from being asserted. Further

evidence that the settlement does not bar this appeal is found in Section 7 of the Notice of Proposed Settlement sent to class members on September 11, 2002, which makes clear that the only claims and causes of action encompassed by the Release of Claims are those which were to be "dismissed on the merits and with prejudice" upon approval of the settlement agreement -- because they were not part of the Retirement Cases, the claims forming the basis for this appeal could not have been so dismissed, and they consequently are not precluded by the Release of Claims referenced in the settlement agreement.

(2) It is well established that settlement agreements are treated as contracts and are subject to the general rules governing enforcement of contracts. Case law published subsequent to the 2002 settlement of the Orange County portion of the Retirement Cases has made clear that the statutory definitions of "compensation" and "compensation earnable" under the County Employees Retirement Law may not be altered via negotiated agreements. "The Ventura decision affected the determination of what items were to be included in 'compensation earnable,' and this is *not* subject to a contract right. . . . [P]lan members could not bargain regarding their contribution rates or their 'final compensation.'" (In re Retirement Cases (2003) 110 Cal.App.4th 426, 453 (emphasis in original).) Insofar as the settlement agreement purports to bind OCERS participants to accept a bargained-for unlawful definition of "compensation earnable" in derogation of existing statutory requirements, the settlement agreement is consequently unenforceable.

Respectfully submitted,



James B. Morell

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JUN 16 2015
Orange County Employees Retirement System

JAMES_MORELL_0056

Resolution No. 98-001
Adopted by the Board of Retirement
February 6, 1998, Board Meeting

BOARD OF RETIREMENT
ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

RESOLUTION

Subject: Action of the Board of Retirement With Regard to Implementing the Ventura Decision

WHEREAS, On October 1, 1997, the decision of the California Supreme Court in the case, Ventura County Deputy Sheriffs' Association v. Board of Retirement of Ventura County Employees' Retirement Association (1997) 16 Cal.4th 483 ("Ventura") became final.

WHEREAS, The Supreme Court in Ventura mandated a change in the method for calculating pension benefits for members and their beneficiaries by retirement systems governed by the County Employees Retirement Law of 1937 ("CERL").

WHEREAS, On November 18, 1997, the Board of Retirement ("Board") of the Orange County Employees Retirement System ("OCERS") established an Ad Hoc Committee of the Board to analyze Ventura and its effect on the retirement system, and to make recommendations to the Board for implementing the mandate of the Supreme Court.

WHEREAS, The Ad Hoc Committee analyzed Ventura, retained the services of independent legal counsel, its actuary and other advisors, conducted a series of open public hearings to consider the impact of Ventura on the retirement system, its members and their beneficiaries, the County of Orange and other plan sponsors, and adopted its Recommendations to this Board on January 21, 1998.

WHEREAS, The Board of Retirement is charged with the responsibility for determining "compensation" and "compensation earnable" for the purpose of calculating the "final compensation" of retiring members, pursuant to Sections 31460, 31461, 31462 and 31462.1 of the Government Code.

WHEREAS, The Board of Retirement finds that the proper exercise of its statutory duties under the Government Code requires it to prevent the improper manipulation of compensation for purposes of determining compensation earnable, and to avoid the artificial inflation of pension benefits.

WHEREAS, After considering all of the information available to the Board, the Recommendations of the Ad Hoc Committee, and exercising its judgment in the matter,

RESOLVED, (A) That the Board hereby adopts the following policies and guidelines, which shall be separate from the Board's Bylaws and the Board's Regulations:

Resolution No. **98-001**
Adopted by the Board of Retirement
February **6, 1998,** Board **Meeting**

1. Elements to be Included in "Compensation Earnable". Remuneration earned and receivable in cash (under applicable MOU) to the retiring employee during the final compensation period for working the ordinary time required of other employees in the same grade/class shall be included in "compensation earnable", including but not limited to the following items of compensation, and others substantially similar to them:

Base Salary and Wages
Bilingual Premium Pay
Educational Incentive ("POST") Pay
Aircraft Rescue Firefighting
Paramedic Pay
Motorcycle Bonus
Emergency Dispatch Pay
Field Training Officer Bonus
Shift differential pay
Confined Space Pay
Longevity Incentive
Automobile Allowance (paid in cash or to extent automobile provided for personal use and declared as income)
Uniform Allowance
Uniform Maintenance Allowance
Payoffs of Vacation and Sick Leave and Holiday to the extent earned (pro-rated on a monthly basis), not taken as time off and permitted to be cashed-out (pro-rated on a monthly basis) under the applicable MOU regardless of when actually cashed-out
Employee Contributions to Deferred Compensation Plan
"Overtime" required to be worked that is ordinarily worked by others in same grade/class/rate of pay
Compensatory Time (if not excluded as "true overtime" (see definition in section 2) and to the extent in excess of minimum required reserve)
"Madera" Pay
Additional Compensation for Scheduled Meal Periods
Flexible Benefits ("Cafeteria Plan") to the Extent paid in Cash (applicable to members retiring before January **1,** 1991)

2. Elements to be Excluded From "Compensation Earnable".
Remuneration or other value to the employee neither earned or payable in cash to the employee during the final compensation period for working the ordinary time required of other employees in the same grade/class shall be excluded from "compensation earnable", including but not limited to the following items, and others substantially similar to them:

- True Overtime (amounts paid for working in excess of the time required and ordinarily worked by others in the same grade/class.)
- Employer Contributions to Deferred Compensation Plan
- Employer Contributions to Retirement System
- Employer "Pick-up" of Employee Contributions to Retirement System
- Payoffs of Vacation and Sick Leave and Holiday Pay, to the extent neither earned nor permitted to be cashed-out under the applicable MOU, regardless of when actually cashed-out
- Flexible Benefits ("Cafeteria Plan") provided in-kind
- Flexible Benefits ("Cafeteria Plan") paid in cash to the extent paid to members retiring on and after January 1, 1991
- Terminal ("Final") Pay, to the extent not included per Sec. 1, above
- Expense Reimbursements
- In-kind Advantages (e.g., food, lodging, board, laundry, fuel)
- Fees, Licenses, Memberships provided to member by the employer

3. Calculation of "Compensation Earnable".
The retiring employee's compensation shall be "regularized" to what would have been received had the employee been paid for a normal work schedule during the Final Compensation Period. The Board shall calculate "compensation earnable" by creating a fraction, the numerator of which is the amount of the employee's qualifying compensation and the denominator of which is the number of ordinary work hours for which the employee was actually paid. The Board shall multiply that fraction by the number of paid hours ordinarily required to be worked by others in the same grade/class. The result shall be the retiring employee's "compensation earnable" for the Final Compensation Period.

4. Application of Policies and Guidelines.
The Board shall apply these policies and guidelines to all benefit payments to members and their beneficiaries due on and after October 1, 1994, as requested by members retiring before October 1, 1997, and automatically for all members retiring thereafter.

5. Changes in Contribution Rates.
The Board shall calculate on an actuarial basis the effect on the retirement system of any increases in anticipated final compensation going forward, and shall adopt appropriate adjustments to employer and employee contribution rates effective July 1, 1998.

6. Arrears Contributions of Active Members.
The Board shall determine the shortfall, if any, in (1) each active member's Member Contribution Account, and, (2) in the future, the Member Contribution Account of each prior member returning to active status who wishes to purchase prior service. Effective July 1, 1998, the Board shall collect the shortfall by a lump-sum payment from a member, or through an extended payment program amortizing the shortfall over a period not to exceed five years. Any member who is allowed to extend the payment of arrears contributions must agree to toll the statute of limitations provided for in California Code of Civil Procedure section 338(d), as it applies to Board recovery of arrears contributions, during the period of any such extension (such agreement shall survive any revocation of the extension).

7. Interim Retirees' Final Compensation Period.
The Board shall permit all members retiring during the period October 1, 1997 through February 10, 1998 to redesignate their Final Compensation Period by no later than March 31, 1998.

8. Arrears Contributions of Retirees.
To the extent there is a shortfall in a retiree's Member Contribution Account, the Board shall collect the shortfall from the member, either by payment in full, through a voluntary assignment and offset from the retiree's past-due benefits, or through an extended payment program requiring full application of the amount of the past-due benefit check payable plus not less than 2/3 of the increase in the amount of each future benefit payment until the full arrears contribution has been satisfied. Payment or satisfactory arrangement for payment of arrears contributions thereon shall be a condition precedent to the payment of any increased benefits to a retiree.

9. Claims Procedure for Retirees; Recalculation of Benefits and Contributions.
The Board hereby directs the Administrator to establish a claims procedure for all existing retirees who wish to make a claim, for the purpose of facilitating adjustment of their monthly pension benefits. The Board shall offer the retirees the opportunity to have their final compensation recalculated, and have the Board calculate both the additional benefits, plus interest, due to them and the additional contributions, plus interest, that the Board must collect from them before they are entitled to receive the increased benefits. Adjustments in benefit payments due to retirees shall be paid as of July 1, 1998 or as soon thereafter as the retiree's claim can be processed.

10. Tolling of Statute of Limitations.
To the extent that a three-year period of limitations for commencing legal action under 'Section 338(a) of the California Code of Civil Procedure shall be applied to the claims of any member or member's beneficiaries concerning the calculation of such member's compensation **earnable** under these policies and guidelines, the Board hereby agrees to toll (suspend) the running of such period of limitations for the period October 1, 1997 to through June 30, 1998. After June 30, 1998, the running of the period of limitations shall recommence.

11. Member and Sponsor Education.
The Board shall make available to all members and plan sponsors these policies and guidelines, together with examples of how these policies and guidelines affect the pension benefits of typical members and their beneficiaries.

RESOLVED, (B) That this Resolution shall be effective immediately upon adoption.

I hereby certify that on the 6TH day of FEBRUARY, 1998, the Board of Retirement of the Orange County **Employees Retirement** System made and adopted this Resolution.

Raymond A. Fleming, Secretary to the
Board of Retirement
Orange County Employees Retirement System

E)l13995

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Liaison Counsel and Attorneys for
BOARD OF RETIREMENT OF ORANGE COUNTY
EMPLOYEES RETIREMENT SYSTEM

FILED
San Francisco County Superior Court
NOV - 1 2002
GORDON PARK-LI, Clerk
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

Coordination Proceeding

Special Title (Rule 1550(b))

RETIREMENT CASES

CASE NO. JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4049

~~[PROPOSED]~~ **JUDGMENT IN ORANGE COUNTY SUPERIOR COURT CASE NOS. 791315 AND 791499**

Date: November 1, 2002
Time: 3:30
Dept: 304
Judge: Hon. Stuart R. Pollak

BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM, a local public entity,

Plaintiffs,

v.

JAN J. NOLAN, an individual, ERIC W. SNETHEN, an individual, COUNTY OF ORANGE, a political subdivision of the State of California, and DOES 1-30,000, inclusive,

Defendants.

ORANGE COUNTY CASE NO. 79315

ONE EMBARCADERO CENTER · 30TH FLOOR SAN FRANCISCO, CA 94111
A PROFESSIONAL CORPORATION
Telephone: 415/788-0900 · Facsimile: 415/788-2019

COUNTY OF ORANGE, a political subdivision of the State of California, Cross-Complainant and Defendant, v. BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES' RETIRMENT SYSTEM, a local public entity, Cross-Defendant and Plaintiff.	
JAN J. NOLAN, ERIC W. SNETHEN, ORANGE COUNTY ATTORNEYS' ASSOCIATION, Plaintiffs, v. BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES' RETIREMENT SYSTEM, a local public entity, Defendant.	ORANGE COUNTY CASE NO. 791499

SIEGEL, LEVITT & WEISS
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Pursuant to the ORDER APPROVING SETTLEMENT AGREEMENT issued by this Court on November 1, 2002, a copy of which is attached hereto and incorporated herein as Appendix "1," it is hereby ORDERED, ADJUDGED AND DECREED that all of the terms and provisions of the approved Settlement Agreement, a copy of which is attached hereto and incorporated herein as Appendix "2," shall be binding upon and implemented by all parties to these actions, including all members of the class consisting of all past, present and future members of the Orange County Employees Retirement System, including retirees, deferred retirees, and active employees, and all of the members' survivors, beneficiaries, agents, assigns, representatives and successors in interest.

Pursuant to California Rules of Court 1859(h), and the ORDER APPROVING SETTLEMENT AGREEMENT, the Court retains jurisdiction over the parties to enforce the

terms of this Judgment and to decide whether or not to approve any future amendments to the Settlement Agreement, provided that no Court approval need be obtained where (1) class members affected by the proposed amendment have been provided at least sixty days advance written notice of the proposed amendment and (2) no affected class member submits to the Court a timely written objection to the proposed amendment.

Pursuant to California Rule of Court 1861, notice of this Judgment shall be given to the class by providing a copy thereof (without its Appendix 2, which already has been made available for public review as set forth in the Notice of Fairness Hearing attached to the Settlement Agreement as Exhibit E) to each current active employee member and deferred retiree member of the system, each person currently receiving any benefit payments from the retirement system, and each recognized employee organization for any current active employee member of the system by mailing, payroll distribution, or any other means reasonably calculated to provide notice. The copy of this Judgment and its Appendix 1 may be reduced in font size to the same font size as used for the Notice of Fairness Hearing for the purposes of providing the above-referenced notice of the Judgment.

Dated: November 1, 2002

HON. STUART R. POLLAK
JUDGE OF THE SUPERIOR COURT

ONE EMBARCADERO CENTER · 30TH FLOOR · SAN FRANCISCO, CA 94111
A PROFESSIONAL CORPORATION
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ENDORSED
FILED
San Francisco County Superior Court

NOV - 1 2002

GORDON PARK-LI, Clerk
BY: ANDR[illegible] CARNEY
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Liaison Counsel for Plan Members and Co-Counsel for Class Representatives

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF SAN FRANCISCO

Coordination Proceeding Special Title (Rule 1550(b)) RETIREMENT CASES	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4049 ~~[PROPOSED]~~ ORDER APPROVING SETTLEMENT AGREEMENT [ORANGE COUNTY SUPERIOR COURT CASE NOS. 791315 AND 941499] Honorable Stuart R. Pollak Department No. 304
BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM, a local public entity Plaintiff, v. JAN J. NOLAN, an individual, ERIC W. SNETHEN, an individual, COUNTY OF ORANGE, a political subdivision of the State of California, and DOES 1-30,000, inclusive Defendants,	Orange County Superior Court Case No. 791315 DATE: November 1, 2001 TIME: 3:30 p.m. DEPT: 304

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COUNTY OF ORANGE, a political subdivision of the State of California,

Cross-Complainant and Defendant,

v.

BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES' RETIREMENT SYSTEM, a local public entity,

Cross-Defendants and Plaintiff.

ORANGE COUNTY EMPLOYEES' ASSOCIATION,

Intervenor and Cross-Petitioner,

v.

BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES' RETIREMENT SYSTEM, a local public entity,

Plaintiff, Cross-Defendant and Cross-Respondent.

COUNTY OF ORANGE,

Real Party in Interest, Defendant and Cross-Complainant.

ORANGE COUNTY ATTORNEYS' ASSOCIATION; JAN J. NOLAN; and ERIC W. SNETHEN,

Petitioners,

v.

BOARD OF RETIREMENT, ORANGE COUNTY RETIREMENT SYSTEM,

Respondent.

Orange County Superior Court Case No. 791499

On November 1, 2002, this matter came before this Court, in Department 304, at 3:30 p.m. upon the Application of Liaison Counsel for Plan Members and Co-Counsel for Class Representatives for approval of the Settlement Agreement, notice of which was mailed to all members of the class on or about September 17, 2002. The Notice advised all members of the terms of the Settlement Agreement and the right of any class member to object and appear at the Fairness Hearing on November 1, 2002, at 3:30 p.m. No objections were received from any class members.

GOOD CAUSE APPEARING THEREFOR, it is ORDERED, ADJUDGED AND DECREED that the Settlement Agreement attached to Liaison Counsel for Plan Members and Co-Counsel for Class Representatives' APPLICATION FOR ORDER APPROVING SETTLEMENT AGREEMENT is fair and reasonable and in the best interests of the members of the class, and therefore is hereby APPROVED by the Court. The contents of the Settlement Agreement are adopted as the Order of this Court. The Court retains jurisdiction to decide whether or not to approve any future amendments to the Settlement Agreement, provided that no Court approval need be obtained where (1) class members affected by the proposed amendment have been provided at least sixty days advance written notice of the proposed amendment and (2) no affected class member submits to the Court a timely written objection to the proposed amendment.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: NOV - 1 2002

STUART R. POLLAK

JUDGE STUART R. POLLAK

03445.pld

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into as of the Effective Date, as defined herein, by and among each of the following persons and entities: Orange County Employees' Association; Retired Employees' Association of Orange County, Inc.; Orange County Attorneys' Association; Jan J. Nolan, an individual; and Eric W. Snethen, an individual (collectively the "Class Representatives"), individually and as members and representatives of a class consisting of all past, present, and future members of the Orange County Employees Retirement System ("OCERS"), including, but not limited to, retirees, deferred retirees, and active employees and all of the members' survivors, beneficiaries, agents, assigns, representatives and successors in interest ("Class Members"); the County of Orange, a California political subdivision ("County"); and OCERS, a California public agency created pursuant to the County Employees Retirement Law of 1937, as amended, California Government Code Section 31450, *et seq.* ("CERL"). These persons and entities are sometimes referred to herein individually as a "Party" and collectively as the "Parties."

RECITALS

A. The Parties are parties to one or both of the related cases of *Board of Retirement of Orange County Employees Retirement System v. Nolan, et al.*, Orange County Superior Court Case No. 791315, and *Orange County Attorneys' Association, et al. vs. Orange County Employees Retirement System*, Orange County Superior Court Case No. 791499 (the "Orange County Cases"). The Orange County Cases were coordinated with a number of other similar cases pending in other county Superior Courts and included in the *Retirement Cases*, Judicial Council Coordination Proceeding No. 4049 in the Superior Court of the State of California, City and County of San Francisco before the Honorable Stuart R. Pollak (hereinafter the "Action").

B. The Class Representatives have been named by the San Francisco County Superior Court to represent a certified no-opt-out class (i.e., the Class) consisting of all Class Members.

C. As used in this Agreement, the term "Class Counsel" shall mean the following attorneys:

Stephen H. Silver, Esq.
Silver, Hadden & Silver
1428 Second Street
P.O. Box 2161
Santa Monica, CA. 90407-2161;

Richard Rockwell, Esq.
Rockwell & Meyer
315 Centennial Way
Tustin, CA 92780

Paul Crost, Esq.
Reich, Adell, Crost & Cvitan
501 Shatto Pl, Suite 100
Los Angeles, CA 90020

Jan J. Nolan, Esq.
23522 Long Meadow
Mission Viejo, CA 92692

Eric W. Snethen, Esq.
P.O. Box 742
Searchlight, NV 89046-0742

D. As used in this Agreement, "compensation," "compensation earnable" and "final compensation" shall have the meanings ascribed to them under CERL.

E. Judge Pollak has entered the following orders and rulings in the Action (the "Orders and Rulings"):

1. Order on Matters Addressed at August 27, 1999 Status Conference issued on November 22, 1999, pertaining to class certification;

2. Order Granting (1) Board of Retirement of Orange County Employees Retirement System's Motion for Summary Adjudication of Conflict of Interest of Board Members; and Denying (2) County of Orange's Motion for Summary Judgment on Conflict of Interest Allegations, issued on March 6, 2000;

3. Statement of Decision Re Includability: (1) Termination Pay; (2) Insurance –Related Payments; and (3) Pick-Ups, issued on July 20, 2000;

4. Statement of Decision re Includability of in-Service Cash-Outs of Accrued Leave Benefits, issued on November 8, 2000;

5. Tentative Decision re Orange County Resolution 90-1551, issued on August 14, 2001; and

6. Statement of Decision Re: Retroactivity, issued on August 31, 2001.

F. The Orders and Rulings have not disposed of all contested causes of action in the Orange County Cases. Among the remaining contested causes of action ("Remaining Contested Claims") are (1) the County's allegations concerning OCERS'

use of excess earnings, (2) OCERS' claims to attorneys fees against the County, and (3) other Parties' claims to attorneys fees.

G. The Parties now wish to compromise and settle their disputes, as stated in the Orange County Cases and in the Action, and to avoid the risks and costs of continued litigation, on the terms and conditions set forth in this Agreement.

NOW THEREFORE, FOR GOOD AND VALUABLE CONSIDERATION, THE RECEIPT AND SUFFICIENCY OF WHICH IS HEREBY ACKNOWLEDGED, THE PARTIES AGREE AS FOLLOWS:

AGREEMENT

1. Recitals. The foregoing Recitals are true and correct and are incorporated herein by this reference.

2. Orders and Rulings Final and Binding. The Parties agree that the Orders and Rulings shall be final and binding, are incorporated herein by this reference, and that a Judgment in the form attached hereto as Exhibit A (with each of its contemplated Exhibits) may be entered by the San Francisco County Superior Court in the Action. Each of the Parties agrees to do all things reasonably necessary and appropriate to obtain entry of the Judgment in the Action, and any other related judgment(s) in the Orange County Superior Court in either or both of the Orange County Cases, as appropriate.

3. OCERS' Resolutions Final and Binding. Each of the Parties agrees to accept as final and binding the inclusions in and exclusions from compensation, compensation earnable, and final compensation as more particularly set forth in OCERS' Resolution 98-001, as amended by OCERS' Resolution 98-009, and as further amended by OCERS' action adopting its Resolution 00-003 on or about December 18, 2000. Resolution 98-001, including its amendment by Resolution 00-003, are attached hereto as Exhibit B and are incorporated herein by this reference. Resolution 98-009 is attached hereto as Exhibit C and is incorporated herein by this reference. Each of these Resolutions shall also be entered into the Judgment by the San Francisco County Superior Court in the Action.

4. Dismissal of Remaining Contested Claims. Each of the Parties agrees to dismiss, with prejudice, any and all Remaining Contested Claims it may have in the Orange County Cases. Each of the Parties agrees to file a dismissal, with prejudice, of its Remaining Contested Claims in the Orange County Cases, if any, within ten (10) days following the Effective Date.

5. No Further Appeals or Challenges. The Judgment, when entered by the Court, shall be final and binding on all of the Parties, including each Class Member. Each of the Parties agrees not to appeal from, seek modification of, or otherwise challenge the Judgment.

6. Calculation of Retirement Allowances.

a. OCERS has applied Resolution 98-001, as amended, to calculate and recalculate the retirement allowances received by all Class Members on and after October 1, 1994, subject to the statute of limitations provisions in paragraph 10 of Resolution 98-001. The Parties agree that the allowances recalculated pursuant to Resolution 98-001, as amended, have and shall continue to use the final compensation periods already in effect for all retired Class Members, which final compensation periods shall remain unchanged. The Parties further agree that all retirement allowances of all retired Class Members whose final compensation is not adjusted as a result of this Agreement shall remain unchanged and all retirement allowances of retired Class Members whose benefits already have been adjusted as a result of OCERS' application of OCERS Resolution 98-001, as amended, shall also remain unchanged.

b. To the extent that OCERS has not already adjusted members' retirement allowances consistent with Resolution 98-001, the Parties agree that the burden of showing actual receipt of any newly-included pay item during the time period used to compute final compensation will remain with each Class Member upon timely filing of a claim with OCERS. Although the burden of proof will remain with the Class Member, the Parties agree that the burden may be satisfied from evidence in the employer records to the extent that such records can be located by the employer (using reasonable efforts), even if the Class Member has no independent documentary evidence in his or her own possession to show receipt of an included pay item within the final compensation period.

c. Any retroactive payments due for past increased retirement allowance amounts not already paid in accordance with the claim procedure established by OCERS pursuant to OCERS Resolution 98-001 will be paid, plus interest, upon timely filing of a claim by a member and verification of the accuracy of, and entitlement to, the claimed amount by OCERS.

7. Arrears Contributions. The Parties agree that OCERS' Resolution 98-009 shall be final and binding. All Parties agree that no contributions to OCERS for pay periods preceding July 1, 1998 will be due from the Class Members by reason of the elements of pay newly included in compensation, compensation earnable, and final compensation pursuant to OCERS' Resolution 98-001, as amended, or this Agreement. Since on and after July 1, 1998, normal cost contributions, as defined under CERL, have and shall continue to reflect the changes to compensation, compensation earnable and final compensation. Any increase in unfunded actuarial accrued liability of OCERS as a result of the inclusion of the pay items included by Resolution 98-001, as amended, and by this Agreement, which liability was not funded by the application of excess earnings pursuant to OCERS' Resolution 98-009, shall be paid by the County and other districts participating in the retirement system on an amortized basis pursuant to the regular amortization schedule set by the Board of Retirement and as authorized by CERL.

8. Binding Effect of Agreement. The Parties agree that this Agreement settles, compromises and resolves all issues among the Parties with respect to the

compensation, compensation earnable, final compensation, employer contributions, and employee contributions respecting retirement allowances due to the Class Members under CERL with respect to all of the items referenced in this Agreement and its attached exhibits, as well as the right to, amount of, and statute of limitations applicable to such retirement allowances. All Parties further agree that this Agreement is intended to be complete and final with respect to the issues that it has resolved, and that the terms or applicability of the Agreement will not be changed on behalf of any of the Parties, including the Class Members, in response to later court decisions, whether favorable or unfavorable, to any of the Parties hereto. Each of the Parties agrees that any subsequent determinations by a court or courts of competent jurisdiction that enlarge, define, narrow or in any other way relate to the scope of the decision of the California Supreme Court in *Ventura County Deputy Sheriffs' Association v. Board of Retirement*, 16 Cal. 4th 483 (1997) ("*Ventura County*") or the items of compensation to be included or excluded for benefit purposes under CERL shall have no effect on the terms or applicability of this Agreement. Notwithstanding the foregoing, nothing in this Agreement is intended to nor shall it expand or limit, or affect in any way, either positively or negatively, whatever rights any Party may have regarding the future continuation, modification or elimination of any item of compensation or other employment benefit by such Party's employer.

9. Retiree Health Benefits. The County and OCERS are parties to that certain Memorandum of Understanding Agreement dated January 5, 1993, as amended by that certain First Amendment to Memorandum of Understanding Agreement dated January 5, 1993, dated November 1, 1996, concerning the funding of a health benefit program for retired employees of the County who are members of OCERS, and their eligible beneficiaries and other matters (the "ARBA Agreement"). County and OCERS have agreed independently to enter into an Amended and Restated Memorandum of Understanding Agreement re: Additional Retiree Benefit Account ("New ARBA Agreement"), a true and correct copy of which is attached hereto as Exhibit D. As set forth in the New ARBA Agreement, the agreement provides for a greater level of assurance for funding County retiree health benefits grants. Notwithstanding this Agreement, County and OCERS reserve the right to amend the New ARBA Agreement in all respects. Nothing in this Agreement is intended to, nor shall, create any vested right in any Class Member under the New ARBA Agreement, nor confer jurisdiction over the New ARBA Agreement on the Superior Court of the City and County of San Francisco.

10. Attorneys' Fees and Costs. County agrees to pay the sum of $250,000.00 to Silver, Hadden & Silver, in full and complete satisfaction of Class Counsels' claims to attorneys' fees and costs against any of the Parties hereto in the Orange County Cases and the Action. Except as expressly so provided, each of the Parties shall bear its own attorneys' fees and costs in connection with the Orange County Cases, the Action, the execution, implementation and obtaining of court approval of this Agreement, and obtaining the Judgment. Each Class Counsel agrees not to seek further fees or costs from any of the Parties hereto arising out of any such matters.

11. Mutual Releases and Covenant Not to Sue. As of the Effective Date, each Party hereto, on its own behalf and on behalf of each of its respective members, officers, directors, supervisors, boards, managers, employees, attorneys, actuaries, accountants, agents, servants, representatives, beneficiaries, survivors, predecessors, successors, assigns, heirs and executors (collectively, each Party's "Related Persons") hereby releases and discharges each other Party and such Party's Related Persons from any and all claims, demands, causes of action, obligations, damages, expenses and liabilities, known and unknown, suspected and unsuspected, that it, or any of its Related Persons, now owns or holds, or at any time heretofore or hereafter may have, that were asserted, or that could have been asserted in connection with, or that in any way relate to matters stated in any of the pleadings on file in the Orange County Cases and/or the Action (including, but not limited to, the Remaining Contested Claims), in OCERS' Resolution 98-001 as amended, in OCERS' Resolution 98-009, and/or in the Judgment, including any exhibits to any such documents ("Released Claims"). Notwithstanding the foregoing, this mutual release and discharge expressly does not include any Released Claims first arising out of and by virtue of the terms of this Agreement or the Parties' respective rights and obligations hereunder. Each Party hereto covenants and agrees never to sue upon or otherwise attempt to assert any of the Released Claims that are the subject of this mutual release.

12. Waiver and Relinquishment of Unknown Claims. It is understood and agreed that with respect to the mutual releases set forth in Paragraph 11 of this Agreement, all rights and benefits provided under California Civil Code section 1542 and any similar law of any state or territory of the United States are hereby expressly waived and relinquished by each of the Parties. Section 1542 reads as follows:

> **CERTAIN CLAIMS NOT AFFECTED BY GENERAL RELEASE.** A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS, WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

In waiving and relinquishing the provisions and benefits of section 1542 of the California Civil Code, each of the Parties acknowledges that it may hereafter discover facts, information or evidence in addition to or different from those facts, information or evidence which they now believe to exist or be true, with respect to the Released Claims, including the possibility of further clarifications and development in the case law pertaining to the inclusion or exclusion of items referenced in this Agreement or its attached exhibits in compensation, compensation earnable, or final compensation under the provisions of CERL. Each Party agrees that it has taken that possibility into account in determining the amount of consideration to be given under this Agreement. Further, the Parties agree that the releases given herein shall remain in effect as a full and complete general release of the matters described above, notwithstanding discovery of the

existence of any such additional or different facts, information or evidence, or developments in the case law.

13. Notice to Class of Hearing to Approve Agreement. The Parties agree to jointly seek the approval of the San Francisco Superior Court of the notice to be given to Class Members of the hearing to approve this Agreement, in the form attached hereto as Exhibit E. After approval of the form of notice, OCERS shall disseminate the notice of the hearing for the Court to consider objections and to approve or reject this Agreement to the Class Members, as required by the Court.

14. Effective Date. The Effective Date of this Agreement shall be the first business day following the last to occur of the following events, each of which shall be a condition precedent to the effectiveness of this Agreement:

a. The execution of this Agreement by the Parties hereto;

b. The date on which the San Francisco County Superior Court enters an order approving this Agreement; and

c. The date on which the San Francisco County Superior Court enters the Judgment in the Action.

In the event that the Effective Date does not occur on or before November 30, 2002, unless the Parties through their attorneys of record jointly agree otherwise, then:

a. This Agreement shall be null and void and shall have no force or effect, and no Party shall be bound by any of its terms;

b. This Agreement, all of its provisions, and all negotiations, statements, and proceedings relating to it shall be without prejudice to the rights of any of the Parties;

c. All Parties shall be restored to their respective positions existing immediately before the execution of this Agreement; and

d. Neither the provisions of this Agreement, nor the fact of its having been made, shall be admissible or entered into evidence in either of the Orange County Cases or the Action for any purpose whatsoever.

15. Entire Agreement. This Agreement represents the Parties' entire agreement and constitutes the only existing and binding agreement between them with respect to the matters stated herein, except for those certain agreements being entered into simultaneously between the County and OCERS entitled, "Master Settlement Agreement," "Amended and Restated Memorandum of Understanding Agreement re Additional Retiree Benefit Account" and "Amended and Restated Investment Account Agreement." This Agreement supersedes any and all prior agreements, representations, promises and understandings of any kind, whether oral or written, express or implied,

between the Parties regarding the subject matters of this Agreement. Nothing herein is intended to nor shall affect any party's rights and obligations under CERL, except as specifically set forth herein. In entering into this Agreement, each Party disclaims any reliance upon any representation, fact or opinion that is not otherwise set forth in writing in this Agreement.

16. Interpretation. Each of the Parties agrees that this Agreement was drafted by the respective counsel for the Parties at arm's length. Each Party, and counsel for each Party, has reviewed and revised, or has had the opportunity to review and revise, this Agreement, and accordingly, any rules of construction to the effect that any ambiguities are to be resolved against the drafting party, including, but not limited to, California Civil Code Section 1654, shall not be employed in the interpretation of this Agreement or any amendment of it.

17. No Admissions. This Agreement and the negotiations and court proceedings relating to this Agreement shall not be construed as, or offered as, any type of admission or concession of any liability or wrong doing on the part of any person or entity. Each of the Parties denies any wrongdoing alleged in the Orange County Cases and the Action and does not admit or concede any actual or potential fault, wrongdoing or liability in connection with any facts or claims that were alleged or could have been alleged in the Orange County Cases or the Action.

18. Amendments; Court Approval. The terms and provisions of this Agreement may only be amended, modified, or expanded by written agreement of those Parties affected by the particular amendment sought. The Parties agree that the San Francisco Superior Court shall retain jurisdiction over them to enforce the terms of this Agreement and the Judgment, and to decide whether or not to approve any future amendments to either, provide that no Court approval need be obtained where (1) Class Members affected by the proposed amendment have been provided at least sixty days advance written notice of the proposed amendment and (2) no affected Class Member submits to the Court and counsel to the affected Party a timely written objection to the proposed amendment.

19. Authority. Class Representatives hereby represent that they are seeking to protect the interests of the entire Class, including each and every Class Member. Each person executing this Agreement represents that s/he has read this Agreement and agrees to its terms both individually and as a representative of the Party or Parties on whose behalf s/he is executing this Agreement; and that s/he is authorized to enter into this Agreement on behalf of the Party for whom s/he is executing this Agreement.

20. Choice of Law. This Agreement and any ancillary agreements to be executed in order to carry out its terms shall be governed by, and interpreted according to, the laws of the State of California, as applied to domiciliaries thereof.

21. Jurisdiction; Venue. Any action to enforce this Agreement shall be commenced and maintained in the Retirement Cases Judicial Council Coordinated Proceeding No. 4049 in the San Francisco County Superior Court, if that proceeding is

still pending before that court. Otherwise any action to enforce this Agreement shall be commenced and maintained in the Orange County Superior Court, and shall not be commenced or maintained in any other court or tribunal. Each of the Parties stipulates and agrees to personal and subject matter jurisdiction and venue in the foregoing courts.

22. Matters Excluded From Agreement. Nothing in this Agreement shall be interpreted as preventing the County or OCERS, and each of their respective agents and employees, from communicating with the Class Members within the ordinary course of their business activities.

23. Binding Nature. This Agreement shall be binding upon and for the benefit of each of the Parties hereto, their respective predecessors, successors, devisees, assigns, heirs, executors, survivors, beneficiaries, affiliates, representatives, members, officers, directors, supervisors, boards, managers, agents, employees, attorneys, actuaries, accountants, servants and representatives.

24. Good Faith Efforts. The Parties undertake to implement the terms of this Agreement in good faith and in a timely manner, and to use good faith in resolving any disputes that may arise in implementing the terms of this Agreement. The Parties agree to cooperate fully with one another, to use their best efforts, and to execute all documents necessary to obtain Superior Court approval of this Agreement.

25. Counterpart Execution. This Settlement Agreement may be signed in counterparts, each of which shall constitute a duplicate original and taken together shall constitute one and the same Agreement.

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement on the following dates, through their authorized representatives as designated below.

[signatures appear on following pages]

NAMED CLASS REPRESENTATIVES

APPROVED AND AGREED TO BY AND ON BEHALF OF THEMSELVES INDIVIDUALLY AND AS CLASS REPRESENTATIVES ON BEHALF OF THE CLASS MEMBERS:

ORANGE COUNTY EMPLOYEES ASSOCIATION

By: Mil Thornton Dated: Sept 12, 2002
Mil Thornton
President, Orange County Employees Association

RETIRED EMPLOYEES' ASSOCIATION
OF ORANGE COUNTY, INC.

By: _____ Dated: _____
H. William Kirkwood
President, Board of REAOC

ORANGE COUNTY ATTORNEYS' ASSOCIATION

By: _____ Dated: _____
Christopher Kralick
President, Orange County Attorneys' Association

INDIVIDUALS AND AS ATTORNEYS IN PRO PER

By: _____ Dated: _____
Jan J. Nolan

By: _____ Dated: _____
Eric W. Snethen

NAMED CLASS REPRESENTATIVES

APPROVED AND AGREED TO BY AND ON BEHALF OF THEMSELVES INDIVIDUALLY AND AS CLASS REPRESENTATIVES ON BEHALF OF THE CLASS MEMBERS:

ORANGE COUNTY EMPLOYEES ASSOCIATION

By: _____ Dated: _____
Mil Thornton
President, Orange County Employees Association

RETIRED EMPLOYEES' ASSOCIATION
OF ORANGE COUNTY, INC.

By: _____ Dated: 09.16.02
H. William Kirkwood
President, Board of REAOC

ORANGE COUNTY ATTORNEYS' ASSOCIATION

By: _____ Dated: _____
Christopher Kralick
President, Orange County Attorneys' Association

INDIVIDUALS AND AS ATTORNEYS IN PRO PER

By: _____ Dated: _____
Jan J. Nolan

By: _____ Dated: _____
Eric W. Snethen

NAMED CLASS REPRESENTATIVES

APPROVED AND AGREED TO BY AND ON BEHALF OF THEMSELVES INDIVIDUALLY AND AS CLASS REPRESENTATIVES ON BEHALF OF THE CLASS MEMBERS:

ORANGE COUNTY EMPLOYEES ASSOCIATION

By: _____ Dated: _____
Mil Thornton
President, Orange County Employees Association

RETIRED EMPLOYEES' ASSOCIATION
OF ORANGE COUNTY, INC.

By: _____ Dated: _____
H. William Kirkwood
President, Board of REAOC

ORANGE COUNTY ATTORNEYS' ASSOCIATION

By: Christopher Kralick Dated: Sept 14, 2002
Christopher Kralick
President, Orange County Attorneys' Association

INDIVIDUALS AND AS ATTORNEYS IN PRO PER

By: _____ Dated: _____
Jan J. Nolan

By: _____ Dated: _____
Eric W. Snethen

JAMES_MORELL_0079

NAMED CLASS REPRESENTATIVES

APPROVED AND AGREED TO BY AND ON BEHALF OF THEMSELVES INDIVIDUALLY AND AS CLASS REPRESENTATIVES ON BEHALF OF THE CLASS MEMBERS:

ORANGE COUNTY EMPLOYEES ASSOCIATION

By: _____ Dated: _____
Mil Thornton
President, Orange County Employees Association

RETIRED EMPLOYEES' ASSOCIATION
OF ORANGE COUNTY, INC.

By: _____ Dated: _____
H. William Kirkwood
President, Board of REAOC

ORANGE COUNTY ATTORNEYS' ASSOCIATION

By: _____ Dated: _____
Christopher Kralick
President, Orange County Attorneys' Association

INDIVIDUALS AND AS ATTORNEYS IN PRO PER

By: Jan J. Nolan Dated: 9/16/02
Jan J. Nolan

By: _____ Dated: _____
Eric W. Snethen

NAMED CLASS REPRESENTATIVES

APPROVED AND AGREED TO BY AND ON BEHALF OF THEMSELVES INDIVIDUALLY AND AS CLASS REPRESENTATIVES ON BEHALF OF THE CLASS MEMBERS:

ORANGE COUNTY EMPLOYEES ASSOCIATION

By: _____ Dated: _____
Mil Thornton
President, Orange County Employees Association

RETIRED EMPLOYEES' ASSOCIATION
OF ORANGE COUNTY, INC.

By: _____ Dated: _____
H. William Kirkwood
President, Board of REAOC

ORANGE COUNTY ATTORNEYS' ASSOCIATION

By: _____ Dated: _____
Christopher Kralick
President, Orange County Attorneys' Association

INDIVIDUALS AND AS ATTORNEYS IN PRO PER

By: _____ Dated: _____
Jan J. Nolan

By: _____ Dated: 9-12-02
Eric W. Snethen

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

By: _____ Dated: 9/12/02

Frank E. Eley
Chair, Board of Retirement

COUNTY OF ORANGE

By: _____ Dated: _____

Chair, Board of Supervisors

APPROVED AS TO FORM:

BENJAMIN P. de MAYO, COUNTY COUNSEL
and Deborah M. Gmeiner, ASSISTANT

By: _____ Dated: _____

Deborah M. Gmeiner, Assistant
Attorneys for COUNTY OF ORANGE

STEEFEL, LEVITT & WEISS
A Professional Corporation

By: _____ Dated: 9/12/02

Harvey I. Leiderman
Attorneys for BOARD OF RETIREMENT OF
ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

By: _____ Dated: _____
Frank E. Eley
Chair, Board of Retirement

COUNTY OF ORANGE

By: Cynthia P. Coad Dated: 9-5-02
Chair, Board of Supervisors

APPROVED AS TO FORM:

BENJAMIN P. de MAYO, COUNTY COUNSEL
and Deborah M. Gmeiner, ASSISTANT

By: Deborah M. Gmeiner Dated: September 4, 2002
Deborah M. Gmeiner, Assistant
Attorneys for COUNTY OF ORANGE

STEEFEL, LEVITT & WEISS
A Professional Corporation

By: _____ Dated: _____
Harvey L. Leiderman
Attorneys for BOARD OF RETIREMENT OF
ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

SIGNED AND CERTIFIED THAT A COPY OF
THIS DOCUMENT HAS BEEN DELIVERED TO
THE CHAIRMAN OF THE BOARD
ATTEST: Helen Stiefler for
DARLENE J. BLOOM
CLERK OF THE BOARD OF SUPERVISORS
ORANGE COUNTY, CALIFORNIA

CLASS COUNSEL:

SILVER, HADDEN & SILVER

By: _____ Dated: 9/2/21
Stephen H. Silver

ROCKWELL & MEYER

By: _____ Dated: _____
Richard S. Rockwell

REICH, ADELL, CROST & CVITAN

By: _____ Dated: _____
Paul Crost

CLASS COUNSEL:

SILVER, HADDEN & SILVER

By: _____ Dated: _____
Stephen H. Silver

ROCKWELL & MEYER

By: _____ Dated: 9/16/02
Richard S. Rockwell

REICH, ADELL, CROST & CVITAN

By: _____ Dated: _____
Paul Crost

CLASS COUNSEL:

SILVER, HADDEN & SILVER

By: _____ Dated: _____
Stephen H. Silver

ROCKWELL & MEYER

By: _____ Dated: _____
Richard S. Rockwell

REICH, ADELL, CROST & CVITAN

By: _____ Dated: 9/16/02
Paul Crost

ENDORSED
FILED
San Francisco County Superior Court
AUG 1 4 2001
GORDON PARK-LI, Clerk
BY: JAMES BAUBEL
Deputy Clerk

CALIFORNIA SUPERIOR COURT

COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER 304

Coordination Proceeding Special Title (Rule 1550(b))	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4049
RETIREMENT CASES	TENTATIVE DECISION RE: ORANGE COUNTY RESOLUTION 90-1551
	The Honorable Stuart R. Pollak

The remaining issue for determination in the includability phase of the Orange County litigation concerns the effect of Orange County Resolution 90-1551, passed pursuant to former Government Code section 31460.1, on the includability in pension calculations of cash payments made in lieu of flexible benefits. Under this court's prior ruling, cash payments made in lieu of flexible benefits are "compensation" under CERL. Former section 31460.1 authorized the counties, however, to adopt a resolution excluding such payments from compensation for this purpose. The Orange County Board of Supervisors adopted Resolution 90-1551 pursuant to former section 31460.1 on December 1, 1990, to become effective January 1, 1991. Plan members argue that

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Resolution 90-1551 is invalid as to those who were employed prior to its adoption because it unconstitutionally impairs a vested contractual right.

It is well established that "upon acceptance of public employment [one] acquire[s] a vested right to a pension based upon the system then in effect." (*Miller v. State of California* (1977) 18 Cal.3d 808, 814.) Such pension rights are "obligations protected by the contract clause of the federal and state Constitution." (*Ibid.*) Not all changes in pension calculations necessarily impair plan members' vested rights. (*Allen v.Board of Administration* (1983) 34 Cal.3d 114, 119.) "The constitutional prohibition against contract impairment does not exact a rigid literal fulfillment; rather it demands that contracts be enforced according to their just and reasonable purport." (*Id.* at 119-120.) "The impairment provision does not prevent laws which restrict a party to the gains reasonably to be expected from the contract." (*Ibid.*)

When former section 31460.1 was enacted, the obligation to include cash payments received in lieu of flexible benefits in compensation was at best uncertain. This case therefore is unlike those cited by plan members where legislation purported to alter an unambiguous benefit held to have been vested. (See *Allen v. City of Long Beach* (1955) 45 Cal.2d 128; *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095.) When plan members accepted employment prior to the enactment of former section 31460.1 and the adoption of Resolution 90-1551, the parties could not reasonably have anticipated that the cash payments in question would be included in pension calculations. Certainly the OCERS Board had no such expectation since, even prior to the adoption of resolution 90-1551, these benefits were not being included in pension calculations, and the reasonable expectation of the plan members must have been affected accordingly. Hence, neither section 31460.1 nor Resolution 90-1551, both adopted to clear up

confusion that had arisen on the subject, can be deemed to have impaired a vested right. Even if the explicit exclusion of the cash benefits disadvantaged employees without providing a corresponding advantage, the clarification of an existing uncertainty in the law was sufficient to support the provision. (*Cf.* Restatement of Contracts 2d. §74(1)(a)). Whether the legislation impaired the reasonable expectations of the parties cannot turn on a court's decision ten years later establishing what their expectations should have been.

However, affected retirees are entitled to have these cash payments included in the calculation of their retirement benefits up to the date on which the Orange County resolution became effective.

Pursuant to California Rule of Court, Rule 232(a), this Tentative Decision shall be the Statement of Decision with respect to the issues addressed herein unless within ten days any party specifies controverted issues or makes proposals not covered in the Tentative Decision.

Dated: 8/15/01

STUART R. POLLAK
Judge of the Superior Court

PERSONNEL POLICIES

AND REGULATIONS

Adopted by the Orange County Superior Court
December 18, 2013

ARTICLE IX - REIMBURSEMENT PROGRAMS

Section 1. Mileage Reimbursement

A. An employee who is authorized to use a private automobile in the performance of duties shall be reimbursed for each mile driven in the performance of his or her duties during each monthly period, subject to the Administrative Office of the Court's Travel Rate Guidelines.

B. An employee who is required by the Court to furnish a privately owned vehicle for the performance of his or her duties shall receive a minimum of ten (10) dollars in any month in which the actual mileage reimbursement would otherwise be less than ten (10) dollars. The minimum shall not apply in any month:

1. in which the employee has not actually worked eighty (80) hours;

2. unless the employee claims the ten (10) dollar minimum and the Court certifies that the employee was required to use a privately owned vehicle on Court business.

Section 2. Personal Property Reimbursement

Employees shall, in proper cases, be reimbursed for the repair or replacement of personal property damaged in the line of duty without fault of the employee. The amount of reimbursement for articles of clothing shall be the depreciated value based on the age and condition of the article. Reimbursement for a watch shall be limited to the functional value of the watch.

Section 3. Attorney Bar Fees

Upon request and as permitted by policies set forth by the Administrative Office of the Courts and/or the Judicial Council, the Court shall: 1) reimburse eligible regular or limited term status employees as of January 1 of each year in Attorney or other classifications as approved by the Chief Executive Officer, for their active State Bar dues; and 2) reimburse eligible Superior Court Commissioners and Court Referees holding regular positions for inactive State Bar dues.

Section 4. Optional Benefit Plan

A. Effective January 1, 2008, each eligible employee shall be entitled to select benefits from those listed below not to exceed three thousand five hundred (3,500) dollars.

B. The purpose of the plan is to provide options to individual employees to best meet the needs of themselves and dependents while enhancing the employee's expertise and skills on the job.

The options available shall include the following types of benefits such as:

1. cash (taxable);

2. health/accident;

   a. health programs (employee and/or dependents) such as physical, mental and/or emotional health related counseling for individual and/or family not covered or partially covered through existing plans;

   b. employee's share of health insurance premiums (employee and/or dependents). Also includes payment of Accidental Death and Dismemberment coverage for employee and dependents available through the County;

   c. health care and/or dental (employee and/or dependents) excluded or partially included under the County's insurance plans. Examples of items covered under this provision include deductibles, eye care, lenses and frames.

3. County administered 457 Deferred Compensation Plan.

C. The County Chief Human Resources Officer administers the plan. Each employee to be eligible must file An Intent to Participate statement and follow instructions prepared by the County Chief Human Resources Officer. If an employee does not file An Intent to Participate form prior to the commencement of the plan, the employee may only receive cash for any period prior to the first of the month following the date the employee files an Intent to Participate form. Employee designations are irrevocable unless they have a change in family status. For expenses to be eligible, they must be incurred after the filing of An Intent to Participate form and during a plan period in which an employee is eligible. Claims may be filed at any time during the plan period and all claims must be filed no later than one month following the close of the plan period. The Chief Human Resources Officer shall notify the Auditor-Controller in writing of payments to be made to employees. Such notification shall constitute authorization for the County's Claims Administrator to make payments.

D. Eligibility - a regular, limited term or probationary employee is eligible to receive the optional benefit provided he or she is continuously employed in a regular full-time capacity in the Confidential/Management/Professional Group as set forth in Article XIX. Employees hired or promoted after the commencement of a plan will be eligible for the optional benefit on a pro rata basis the first day of the month following the twenty-eighth day in an eligible classification. Employees in eligible classifications who work part-time will be eligible to receive the optional benefit consistent with County of Orange policy for part-time employees.

E. Any portion of the optional benefit not incurred within the plan period shall remain Court or County funds.

F. Claims shall be made on forms provided by the County on which claimant declares the category of service received as defined in the plan, the dates the expenses were incurred by the claimant or eligible dependents, by whom service was provided and the amount being claimed. The County Claims Administrator shall pay claims submitted with a declaration under penalty of perjury signed by the claimant and approved by the County of Orange. The County will approve for payment only those claims which are accompanied by documentation that an eligible expense has been incurred during the plan period.

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
BOARD OF RETIREMENT
2223 E. WELLINGTON AVENUE, SUITE 100
SANTA ANA, CALIFORNIA

REGULAR MEETING
August 17, 2015
9:00 a.m.

MINUTES

The Chair called the meeting to order at 9:00 a.m. and read the opening statement into the record. Attendance was as follows:

Present: Chuck Packard, Chair; Roger Hilton, Vice Chair; David Ball; Tom Beckett; Frank E. Eley; Wayne S. Lindholm; Chris Prevatt

Absent: Thomas E. Flanigan; Shari L. Freidenrich; and Eric Gilbert

Also Present: Steve Delaney, Chief Executive Officer; Suzanne Jenike, Assistant CEO, External Operations; Girard Miller, Chief Investment Officer; Brenda Shott, Assistant CEO, Finance and Internal Operations; Robert Valer, Chief Legal Officer; Tracy Bowman, Director of Finance; Cynthia Hockless, Director of Administrative Services; David James, Director of Internal Audit; David Lantzer, Deputy Chief Counsel; Jenny Sadoski, Director of Information Technology; Robert Kinsler, Communications Manager; Anthony Beltran, Visual Technician; Megan Cortez; Disability Coordinator; and Michelle Brinker, Recording Secretary

Harvey Leiderman, Esquire, ReedSmith, LLP
Ms. Annette Paladino, Disability Retirement Consultant

Vice Chair Hilton led the Pledge of Allegiance.

Chair Packard, OCERS, administered Oath of Office to Vice Chair Hilton.

CONSENT AGENDA

All matters on the Consent Agenda are to be approved by one action unless a Board Member or a member of the public requests separate action on a specific item.

Mr. Delaney pulled C-8 Legislative Update.

Following discussion, a **motion** was made by Mr. Lindholm, **seconded** by Mr. Beckett to move the remainder. The **motion carried unanimously.**

BENEFITS

Mr. Eley
Mr. Hilton
Mr. Prevatt
Chair Packard
Mr. Flanigan
Ms. Freidenrich
Mr. Lindholm

Suzanne Jenike, Assistant CEO, External Operations, presented D-11 to the Board along with the staff recommendation.

D-11: James Morell
Senior Research Attorney, Orange County Superior Court

STAFF RECOMMENDATION IS TO DENY MEMBER'S REQUEST TO INCLUDE OPTIONAL BENEFIT PAYMENTS IN COMPENSATION EARNABLE FOR CALCULATION OF FINAL AVERAGE SALARY AND RETIREMENT ALLOWANCE. (D-11)

Following discussion, a **motion** was made by Mr. Eley, **seconded** by Mr. Beckett to deny member's request to include optional benefit payments in compensation earnable for calculation of final average salary and retirement allowance. The **motion carried 5-0** with voting as follows:

AYES	NAYS	ABSTAIN	ABSENT
Mr. Beckett			Mr. Ball
Mr. Eley			Mr. Flanigan
Mr. Hilton			Ms. Freidenrich
Mr. Prevatt			Mr. Lindholm
Chair Packard			

*** * * * * * * * END OF DISABILITY APPLICATIONS/MEMBER APPEALS AGENDA * * * * * * ***

Mr. Delaney requested to agendize an item to the August 17, 2015 Board Agenda. It is a matter of urgency for the Board to address, which arose since the posting of the agenda. It is a matter that would involve a closed session.

After discussion, a **motion** was made by Mr. Eley, **seconded** by Mr. Beckett to itemize a closed session topic according to Government Code Section 45956.9D. The **motion carried unanimously**.

CLOSED SESSION ITEM

E-1 CONFERENCE WITH LEGAL COUNSEL REGARDING INITATING LITIGATION (Government Code § 54954.B2)

Recommendation: Take appropriate action.

After Board members met, Chair Packard stated that there was no reportable action.

*** * * * * * * END OF CLOSED SESSION ITEMS AGENDA * * * * * ***

JAMES_MORELL_0101

ORANGE COUNTY
OCERS
EMPLOYEES RETIREMENT SYSTEM

Serving the Active and Retired Members of:

CITY OF SAN JUAN CAPISTRANO
COUNTY OF ORANGE
ORANGE COUNTY CEMETERY DISTRICT
ORANGE COUNTY CHILDREN & FAMILIES COMMISSION
ORANGE COUNTY DEPARTMENT OF EDUCATION (CLOSED TO NEW MEMBERS)
ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
ORANGE COUNTY FIRE AUTHORITY
ORANGE COUNTY IN-HOME SUPPORTIVE SERVICES PUBLIC AUTHORITY
ORANGE COUNTY LOCAL AGENCY FORMATION COMMISSION
ORANGE COUNTY PUBLIC LAW LIBRARY
ORANGE COUNTY SANITATION DISTRICT
ORANGE COUNTY TRANSPORTATION AUTHORITY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
TRANSPORTATION CORRIDOR AGENCY
UCI MEDICAL CENTER (CLOSED TO NEW MEMBERS)

November 4, 2015

James B. Morell
P.O. Box 1464
Crestline, CA 92325

Re: Benefit Determination Appeal

Dear Mr. Morell:

In response to your request for a hearing, we have tentatively assigned your benefit determination appeal to be heard by Referee Snider.

You have the right to object if you do not agree with the Referee assignment. In order to exercise this right, you must file this objection in writing within fourteen (14) days of the date of this letter. Please send your objection to Orange County Employees Retirement System, ATTN: Suzanne Jenike, Assistant CEO, External Operations, 2223 E. Wellington Avenue Suite 100, Santa Ana, California 92701.

We are in the process of assembling the Administrative Record in this matter. The Legal department shall assemble the Administrative Record within forty-five (45) days following receipt of the request for a hearing. Upon completion, the Administrative Record will be forwarded to you, Referee Snider and Counsel representing the retirement system.

Once the Referee receives the Administrative Record, the Referee will contact the parties involved to set a mutually agreeable hearing date.

If you have any questions please feel free to contact me.

Sincerely,

Suzanne Jenike
Assistant CEO, External Operations

cc: Dawn Matsuo, OCERS Counsel

RESOLUTION OF THE BOARD OF SUPERVISORS OF

ORANGE COUNTY, CALIFORNIA

December 18, 1990

On motion of Supervisor Roth, duly seconded and carried, the following Resolution was adopted:

BE IT RESOLVED this Board does hereby adopt the provisions of Government Code Section 31460.1 pertaining to the definition of Compensation in the County Employees Retirement Law of 1937, effective January 1, 1991.

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OFFICE OF COUNTY COUNSEL ORANGE COUNTY

F -210 (5/77)

Chairman of the Board of Supervisors

SIGNED AND CERTIFIED THAT A COPY
OF THIS DOCUMENT HAS BEEN DELIVERED
TO THE CHAIRMAN OF THE BOARD

LINDA D. RUTH
Clerk of the Board of Supervisors
of Orange County, California

AYES: SUPERVISORS DON R. ROTH, GADDI H. VASQUEZ, ROGER R. STANTON, HARRIETT M. WIEDER AND THOMAS F. RILEY

NOES: SUPERVISORS NONE

ABSENT: SUPERVISORS NONE

STATE OF CALIFORNIA)
) ss.
COUNTY OF ORANGE)

I, LINDA D. RUTH, Clerk of the Board of Supervisors of Orange County, California, hereby certify that the above and foregoing Resolution was duly and regularly adopted by the said Board at a regular meeting thereof held on the 18th day of December, 1990, and passed by a unanimous vote of said Board members present.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 18th day of December, 1990.

LINDA D. RUTH
Clerk of the Board of Supervisors
of Orange County, California

OFFICE OF
COUNTY COUNSEL
ORANGE COUNTY

F0192-210 (5/77)

JAMES_MORELL_2057

THIRD AMENDED AND RESTATED

COUNTY OF ORANGE

SECTION 125 PLAN

Plan Document

Amended and Restated
Effective June 1, 2011

COUNTY OF ORANGE SECTION 125 PLAN

PREAMBLE

Effective January 1, 1990, the County of Orange (the "Employer") adopted the County of Orange Section 125 Plan (the "Plan").

The Employer adopted the first amended and restated Plan effective January 1, 2005.

The Employer adopted this second amended and restated Plan effective January 1, 2010.

The purpose of this Plan is to offer the eligible employees of the Employer an opportunity to forgo taxable income in exchange for paying premiums for health care coverage on a tax-free basis and for paying for certain health care and dependent care on a tax-free basis. The Plan is intended to comply with the requirements of Sections 105, 106, 125, and 129 of the Internal Revenue Code of 1986 (the "Code").

SECTION 1

DEFINITIONS

1.1 Accidental Death and Dismemberment Premium Payroll Credit Account

Accidental Death and Dismemberment Premium Payroll Credit Account means the account established for a Participant pursuant to this plan to which OBP Dollars may be credited and from which all allowable Accidental Death and Dismemberment Premium Expenses may be reimbursed. Such Accidental Death and Dismemberment Premium Payroll Credit Account is not a real account, but is established and maintained for bookkeeping purposes only.

1.2 Accidental Death and Dismemberment Premium Payroll Credit Plan

Accidental Death and Dismemberment Premium Payroll Credit Plan means the plan of benefits contained in this Section 125 Plan document, which provides for the reimbursement of eligible Accidental Death and Dismemberment Premium Expenses incurred by a Participant.

1.3 Accidental Death and Dismemberment Premium Expense

Accidental Death and Dismemberment Premium Expense means any premium paid by the Participant for voluntary Accidental Death and Dismemberment coverage offered by the Employer under an Employer-provided welfare benefit plan. Such premium must be paid on an after-tax basis to qualify as an Accidental Death and Dismemberment Premium Expense.

1.4 Administrator

Administrator means the Human Resources Director for the County of Orange.

1.5 Benefit

Benefit means each of the optional benefit choices available to a Participant as outlined in Section 4.1.

1.6 Claims Administrator

Claims Administrator means the individual or individuals appointed by the Administrator to carry out the administration of the Plan as provided in Section 9.

1.7 Compensation

Compensation means the total cash payment received by the Participant from the Employer during a Contribution Period prior to any reductions pursuant to a Salary Redirection Agreement authorized hereunder.

1.15 Eligible Employee

Eligible Employee means each individual employed by the Employer who has satisfied the eligibility requirements pursuant to Section 2.1 and is regularly scheduled to work at least 40 hours per week as a regular full-time, limited-term, or probationary employee, or at least 20 hours per week as a regular part-time, limited-term, or probationary employee.

1.16 Employer

Employer means the County of Orange.

1.17 Employment-Related Dependent Care Expenses

Employment Related Dependent Care Expenses means the amounts paid for expenses of a Participant for household services for the care of a Qualifying Dependent, to the extent that such expenses are incurred to enable the Participant to be gainfully employed for any period for which there are one or more Qualifying Dependents with respect to such Participant; provided, however, that: (i) if such amounts are paid for expenses incurred outside the Participant's household, they shall constitute Employment-Related Dependent Care Expenses only if incurred for a Qualifying Dependent as defined in item (i) of 1.36, or for a Qualifying Dependent as defined in item (ii) of Section 1.36 who regularly spends at least 8 hours per day in the Participant's household; and (ii) if the expense is incurred outside the Participant's home at a facility that provides care for a fee, payment or grant for more than 6 individuals who do not regularly reside at the facility, the facility must comply with all applicable state and local laws and regulations, including licensing requirements, if any; and (iii) Employment-Related Dependent Care Expenses of a Participant shall not include amounts paid or incurred to a child of such Participant who is under the age of 19 (determined as of the close of the taxable year) or to an individual who is a dependent of such Participant or such Participant's Spouse.

1.18 Enrollment Documentation

Enrollment Documentation means the documentation, whether by paper form or electronic submission, established and provided by Employer for use by the Participant to elect the type of benefits and the amount of Salary Redirection contributions and the amount of OBP Dollar credit allocations he or she desires, or to change or discontinue contributions or allocations altogether.

1.19 General Employee

General Employee means each Eligible Employee who is not eligible for the Optional Benefits Program.

1.20 Health Care Expenses

Health Care Expenses means any expense for health care of a Participant, his or her Spouse or Dependents within the meaning of the term "medical care" or "medical expense" as defined in Section 213(d) of the Code (excluding long-term care expenses and any premium expenses associated with long-term care) as a deduction in determining

his or her tax liability under the Code.

1.21 Health Care Reimbursement Account

Health Care Reimbursement Account means the account established for a Participant pursuant to this Plan to which part of his or her Salary Redirection and/or OBP Dollars may be credited and from which all allowable Health Care Expenses may be reimbursed. Such Health Care Reimbursement Account is not a real account, but is established and maintained for bookkeeping purposes only.

1.22 Health Care Reimbursement Account Plan

Health Care Reimbursement Account Plan means the plan of benefits contained in this Plan document, which provides for the reimbursement of eligible Health Care Expenses incurred by a Participant or his or her Dependents.

1.23 Insurance Contract

Insurance Contract means any contract issued by an Insurer underwriting a Benefit that supports such underwriting as listed in Appendix A.

1.24 Insurer

Insurer means any insurance company that underwrites a Benefit.

1.25 IUOE Employee

IUOE Employee means each Eligible Employee who is a member of IUOE.

1.26 Leased Employee

Leased Employee means any person (other than an employee of the recipient) who pursuant to an agreement between the recipient and any other person ("leasing organization") has performed services for the recipient (or for the recipient and related persons determined in accordance with IRC Section 414(n)(6)) on a substantially full-time basis for a period of at least one year, and such services are performed under the primary direction or control of the recipient employer.

1.27 Open Enrollment

Open Enrollment means the period designated by the Employer each year, during which Employees elect Salary Redirection amounts and OBP Dollar allocations for the following Plan Year (except for any Employee who first becomes eligible to be a Participant during a Contribution Period, in which case Section 4.5 shall apply).

1.28 Optional Benefits Program (OBP)

Optional Benefits Program (OBP) means a program offered to judges, attorneys who are employed in the "Attorney Unit", elected officials, executive management, and administrative management where OBP credits can be allocated to pay for certain benefits, including Benefits offered under this Section 125 Plan.

1.29 OBP Eligible Employee

OBP Eligible Employee means each Eligible Employee who receives benefits under the Optional Benefits Program and who is not a General Employee.

1.30 OBP Dollars

OBP Dollars means the amounts, other than Salary Redirection amounts, credited to an OBP Eligible Employee and attributable to contributions made by the Employer on behalf of a Participant to be allocated in accordance with the Participant's Benefit elections under Section 3. The amounts of OBP Dollars are described in Section 4.2.

1.31 Participant

Participant means any Eligible Employee who elects to become a Participant as provided in Section 2.

1.32 Part-time Ineligible Employee

Part-time Ineligible Employee means an employee whose regular work schedule is less than forty (40) hours per pay period.

1.33 Plan

Plan means the County of Orange Section 125 Plan.

1.34 Plan Year

Plan Year means the 12-month period from January 1 to December 31.

1.35 Premium Only Plan Benefits

Premium Only Plan Benefits means the benefits offered pursuant to Section 4.1(A) herein.

1.36 Qualifying Dependent

Qualifying Dependent means, for Dependent Care Reimbursement Account Plan purposes, any Dependent (including Spouses) for whom the Participant is entitled to an exemption under Section 152 of the Code, (i) who is under the age of 13, or (ii) who is physically or mentally incapable of caring for himself or herself.

1.37 Salary Redirection

Salary Redirection means the portion of Benefits attributable to contributions made by the Employer on behalf of Participants pursuant to Section 3.1 of the Plan.

1.38 Salary Redirection Agreement

Salary Redirection Agreement means an agreement set forth in the Enrollment Documentation between the Participant and the Employer under Section 3.1 of the Plan where the Participant agrees to reduce his or her Compensation and to have such amounts contributed by the Employer to the Plan on the Participant's behalf. The Salary Redirection Agreement shall apply only to Compensation that has not been actually or constructively received by the Participant as of the date of the Salary Redirection

Agreement (after taking this Plan and Code Section 125 into account) and, subsequently does not become currently available to the Participant.

1.39 Same Sex Spouse

A person of the same sex as the Eligible Employee whose marriage to the eligible Employee is legally recognized by the State of California.

1.40 Self-Funded Plan

Self-Funded Plan means any plan providing health care benefits, issued by the Employer, that is funded primarily by Employer contributions as listed in Appendix A.

1.41 Spouse

Spouse means a Participant's legally married husband or wife who is recognized as a spouse under federal law.

SECTION 2

PARTICIPATION

2.1 Eligibility

Each Eligible Employee participating in the Plan on January 1, 2010, shall be eligible to continue participating in this Plan as of such date.

Eligible Employees not participating on January 1, 2010, shall be eligible to participate in the Plan effective as of the first day of the month following 28 days of employment with the Employer.

Additionally, the following eligibility rules shall apply:

(A) General Employees who are not Court Employees shall be eligible to become a Participant in the Benefits offered in Section 4.1(A), (B), and (C) and shall not be eligible for the Benefits offered in Section 4.1(D).

(B) General Employees who are Court Employees shall be eligible to become a Participant in the Benefits offered in Section 4.1(A) and (C) and shall not be eligible for the Benefits offered in Section 4.1(B) or (D).

(C) OBP Eligible Employees shall be eligible to become a Participant in the Benefits offered in Section 4.1(A), (B), (C) and (D).

2.2 Application to Participate

Any Eligible Employee shall, during the applicable Open Enrollment Period, complete and submit to the Administrator Enrollment Documentation. The election made pursuant to the Enrollment Documentation shall be irrevocable until the end of the applicable Contribution Period unless the Participant is entitled to change his or her elections pursuant to Section 4.6 hereof.

A Participant shall not continue participating in the Plan for subsequent Contribution Periods unless he or she completes and submits new Enrollment Documentation during each Open Enrollment Period.

2.3 Change of Status as Eligible Employee

If a Participant ceases to be an Eligible Employee because of a change in employment status (e.g., terminating employment, becoming a Part-time Ineligible Employee or moving to an ineligible job classification), the Participant shall terminate participation in this Plan for the remainder of the Contribution Period in which such change of employment status occurs. No further Salary Redirection contributions may be made on behalf of the Participant, and all Benefit elections shall cease. However, any balances in

Termination of Participation

A Participant shall terminate (i) upon his or her termination of employment, (ii) as of the day the Participant became ineligible because of a change in employment status (e.g., becoming a Part-time Ineligible Employee), (iii) the termination of this Plan, (iv) upon the Participant's election to cease making contributions for the next Contribution Period, or (v) upon the Participant's failure to elect to continue participation for the next Contribution Period. Notwithstanding the above, the Participant's period of reimbursement for claim payment purposes shall continue to the end of the Contribution Period in which the Participant's termination of employment or ineligibility under the Plan occurred.

2.6 Death of the Participant

If a Participant dies, his or her participation in the Plan shall cease. However, such Participant's beneficiaries, or the representative of his or her estate, may submit claims for expenses or health care benefits for the remainder of the Plan Year. A Participant may designate a specific beneficiary for this purpose. If no such beneficiary is specified, the Administrator may designate the Participant's Spouse, one of his or her dependents, or a representative of his or her estate.

SECTION 3

CONTRIBUTIONS

3.1 Salary Redirection and Allocation of OBP Dollars

Once an Eligible Employee who is also an OBP Eligible Employee elects to participate in this Plan, his or her OBP will be allocated and his or her Compensation will be reduced in an amount equal to the amount of contributions elected pursuant to Section 4. Once an Eligible Employee, who is not an OBP Eligible Employee, elects to participate in this Plan, his or her Compensation will be reduced in an amount equal to the amount of contributions elected pursuant to Section 4. Such reduction shall be his or her Salary Redirection, which will be available to pay for the Benefits he or she elected and shall continue through the end of the Contribution Period. Salary Redirection and allocation of OBP Dollars shall not continue for each subsequent Contribution Period unless the Participant elects to continue his or her contributions as provided herein. Each Participant's annual Salary Redirection will be determined as part of the Benefit selection process.

3.2 Limitation on Use of Salary Redirection/OBP Dollars to Fund Health Care Reimbursement Account

Notwithstanding any provision contained in this Plan to the contrary, no more than $5,000 of Salary Redirection and OBP Dollars combined may be applied to a Participant's Health Care Reimbursement Account in or on account of any Contribution Period. The minimum contribution that may be applied to a Participant's Health Care Reimbursement Account must equal at least one dollar per paycheck.

OBP Dollars allocated toward the Health Care Reimbursement Account must be applied first when calculating the remainder of the maximum contribution limit available for Salary Redirection.

3.3 Limitation on Use of Salary Redirection to Fund Dependent Care Reimbursement Account

Notwithstanding any provisions contained in this Plan to the contrary, no more than the lesser of $5,000, $2,500 for a married person filing separately, or the earned income limitation described in Section 129(b) of the Code, of Salary Redirection may be applied to a Participant's Dependent Care Reimbursement Account in or on account of any Contribution Period. The minimum contribution that may be applied to a Participant's Dependent Care Reimbursement Account must equal at least one dollar per paycheck. OBP Dollars may not be contributed to a Participant's Dependent Care Reimbursement Account.

3.4 Limitation on Use of OBP Dollars to Fund Accidental Death and Dismemberment Premium Payroll Credit Account

Notwithstanding any provision contained in this Plan to the contrary, no more than the Eligible Employee's projected annualized Accidental Death and Dismemberment Premium Expenses based upon the monthly premium cost of the insurance amount elected may be applied to a Participant's Accidental Death and Dismemberment Premium Payroll Credit Account in or on account of any Contribution Period.

3.5 Allocation of Salary Redirection/OBP Dollars

As soon as reasonably practicable after each payroll period the Employer shall apply the aggregate Salary Redirection and OBP Dollars to provide the contributions elected by the affected Participants. Any contributions allocated or withheld for a Health Care Reimbursement Account, Dependent Care Reimbursement Account, or Accidental Death and Dismemberment Premium Payroll Credit Account shall be credited to such account.

3.6 Benefits Paid Solely from General Assets

The benefits provided under this Plan will be paid solely from the general assets of the Employer. Nothing in this Plan will be construed to require the Employer or the Administrator to maintain any fund or segregate any amount for the benefit of any Participant, and no Participant or other person shall have any claim against, right to, or security or other interest in, any fund, account or assets of the Employer from which any payment under the Plan may be made.

3.7 Limitation of Liability

The Employer does not guarantee Benefits payable under any Insurance Contract or other similar contract described or referred to in this Plan, and any benefits under this Plan shall be the exclusive responsibility of the Insurer or other entity that is required to provide such Benefits under such Insurance Contract.

The Employer shall not be liable for any individual tax liabilities resulting from improper benefit payments or claims payments provided under this Plan.

SECTION 4

ELECTION OF BENEFITS

4.1 Benefit Options

Each Eligible Employee may elect to have the amount of his or her Salary Redirection and OBP Dollars credited to any one or more of the following optional Benefits as specifically noted in such Benefit Options, except OBP Dollars may not be credited to the Benefits set forth in subsections (A) and (C) below.

(A) Premium Only Plan Benefits

Each Eligible Employee may choose to enroll in the following Benefit to be paid for on a pretax basis using Salary Redirection only:

(1) Medical coverage

To the extent the Benefits offered under this Section 4.1(A) are provided through Insurance Contracts and Self-funded Plans, such Insurance Contracts and Self-Funded Plan and any summary plan descriptions or booklets describing the Benefits are incorporated herein by reference. The rights and conditions with respect to Premium Only Plan Benefits payable shall be determined from such Insurance Contracts and Self-Funded Plans, summary plan descriptions or booklets.

(B) Health Care Reimbursement Account Benefit

Each Eligible Employee may choose to apply Salary Redirection and each OBP Eligible Employee may also choose to allocate OBP Dollars to this Health Care Reimbursement Account Benefit option, in which case Section 5 shall apply. However, any General Employee who is a Court Employee shall not be eligible for this Benefit. OBP Eligible Employees who work in the courts may only fund this Benefit with OBP Dollars, but not Salary Redirection.

(C) Dependent Care Reimbursement Account Benefit

Each Eligible Employee may choose to apply Salary Redirection to a Dependent Care Reimbursement Account Benefit option, in which case Section 6 shall apply. OBP Dollars may not be used to fund this Benefit Option.

(D) Accidental Death and Dismemberment Premium Payroll Credit Benefit

Each OBP Eligible Employee may choose to allocate OBP Dollars to an Accidental Death and Dismemberment Premium Payroll Credit Benefit option, in which case Section 7 shall apply. Salary Redirection may not be used to fund this Benefit Option.

4.2 OBP Dollars

The Employer will credit OBP Eligible Employees with a specific amount of OBP Dollars each Plan Year. OBP Dollars are based on the job classifications of each OBP Eligible Employee and are determined by the Employer in its discretion.

4.3 Taxable Cash Benefits

An OBP Eligible Employee may elect to receive in taxable cash compensation, the total amount or any portion of OBP Dollars if such OBP Eligible Employee elects to receive all or part of his or her OBP Dollars as taxable cash in his or her Enrollment Documentation each year. Additionally, if an OBP Eligible Employee fails to complete and submit Enrollment Documentation, such OBP Eligible Employee shall be deemed to have elected all of his or her OBP Dollars as taxable cash. Taxable Cash Benefits shall be paid in one lump sum amount on the first paycheck of the Plan Year.

4.4 Annual Elections

During the Open Enrollment Period preceding the Effective Date or any later Contribution Period, each Participant shall be given the opportunity to elect, by completing and submitting Enrollment Documentation, which Benefit Options he or she wishes to select and purchase with his or her Salary Redirection or OBP Dollars. Any such election shall be effective for any Benefit expenses incurred during the Contribution Period. The Contribution Period begins on the first day of each following Plan Year.

4.5 Elections by New Employees

An Eligible Employee who is first employed during a Contribution Period may elect to participate in this Plan for the remainder of such Contribution Period. For the purpose of this Plan, the new employee's Open Enrollment Period shall be a 30 day period that begins on the first day of the new Employee's employment with the Employer. If the new employee completes and submits Enrollment Documentation to the Administrator during this period, Benefits will be effective as of the first day the Eligible Employee satisfied the requirements of Section 2.1.

4.6 Change of Elections

This Section 4.6 applies to Salary Redirection elections, but does not apply to OBP Dollar allocations.

Any Eligible Employee may change a benefit election after the Contribution Period (to which such election relates) has commenced and make new elections with respect to the remainder of such Contribution Period only as permitted under this Section 4.6.

An Eligible Employee may elect to discontinue or change contributions towards his or her elections only during an Open Enrollment Period or within 30 days of the time such Eligible Employee has a Change in Status (as defined in Section 4.6(A)) or experiences a Special Enrollment Event (as defined in Section 4.6(B)).

4.7 Failure to Elect

If an employee who is an Eligible Employee does not complete and submit Enrollment Documentation pursuant to Section 4.4 or 4.5, he or she will be deemed to have made an election to decline participation in all Benefits offered under this Plan for the Contribution Period. However, if the employee is an OBP Eligible Employee, he or she will receive Taxable Cash Benefits under Section 4.3 if the OBP Eligible Employee fails to submit completed Enrollment Documentation.

4.8 Adjusting Election of Highly Paid Participants to Pass Nondiscrimination Requirements

If at any time during the Contribution Period it appears that the Plan may not satisfy the applicable nondiscrimination requirements, the Administrator shall adjust, in a nondiscriminatory manner, the election levels of the highly paid Participants. Such adjustments shall be made to a level necessary to allow the Plan to satisfy the nondiscrimination requirements.

SIGNATURE PAGE

IN WITNESS WHEREOF, the County of Orange has executed this Plan document this 19th day of May, 2011.

COUNTY OF ORANGE

By: _____

Title: Patricia M. Gilbert, Assistant Director of Human Resources

Approved as To Form:

_____

Nikhil Daftary, Deputy County Counsel

1.15 Eligible Employee

Eligible Employee means each individual employed by the Employer who has satisfied the eligibility requirements pursuant to Section 2.1 and is regularly scheduled to work at least 40 hours per week as a regular full-time, limited-term, or probationary employee, or at least 20 hours per week as a regular part-time, limited-term, or probationary employee.

1.16 Employer

Employer means the County of Orange.

1.17 Employment-Related Dependent Care Expenses

Employment Related Dependent Care Expenses means the amounts paid for expenses of a Participant for household services for the care of a Qualifying Dependent, to the extent that such expenses are incurred to enable the Participant to be gainfully employed for any period for which there are one or more Qualifying Dependents with respect to such Participant; provided, however, that: (i) if such amounts are paid for expenses incurred outside the Participant's household, they shall constitute Employment-Related Dependent Care Expenses only if incurred for a Qualifying Dependent as defined in item (i) of 1.36, or for a Qualifying Dependent as defined in item (ii) of Section 1.36 who regularly spends at least 8 hours per day in the Participant's household; and (ii) if the expense is incurred outside the Participant's home at a facility that provides care for a fee, payment or grant for more than 6 individuals who do not regularly reside at the facility, the facility must comply with all applicable state and local laws and regulations, including licensing requirements, if any; and (iii) Employment-Related Dependent Care Expenses of a Participant shall not include amounts paid or incurred to a child of such Participant who is under the age of 19 (determined as of the close of the taxable year) or to an individual who is a dependent of such Participant or such Participant's Spouse.

1.18 Enrollment Documentation

Enrollment Documentation means the documentation, whether by paper form or electronic submission, established and provided by Employer for use by the Participant to elect the type of benefits and the amount of Salary Redirection contributions and the amount of OBP Dollar credit allocations he or she desires, or to change or discontinue contributions or allocations altogether.

1.19 General Employee

General Employee means each Eligible Employee who is not eligible for the Optional Benefits Program.

1.20 Health Care Expenses

Health Care Expenses means any expense for health care of a Participant, his or her Spouse or Dependents within the meaning of the term "medical care" or "medical expense" as defined in Section 213(d) of the Code (excluding long-term care expenses and any premium expenses associated with long-term care) as a deduction in determining

his or her tax liability under the Code.

1.21 Health Care Reimbursement Account

Health Care Reimbursement Account means the account established for a Participant pursuant to this Plan to which part of his or her Salary Redirection and/or OBP Dollars may be credited and from which all allowable Health Care Expenses may be reimbursed. Such Health Care Reimbursement Account is not a real account, but is established and maintained for bookkeeping purposes only.

1.22 Health Care Reimbursement Account Plan

Health Care Reimbursement Account Plan means the plan of benefits contained in this Plan document, which provides for the reimbursement of eligible Health Care Expenses incurred by a Participant or his or her Dependents.

1.23 Insurance Contract

Insurance Contract means any contract issued by an Insurer underwriting a Benefit that supports such underwriting as listed in Appendix A.

1.24 Insurer

Insurer means any insurance company that underwrites a Benefit.

1.25 IUOE Employee

IUOE Employee means each Eligible Employee who is a member of IUOE.

1.26 Leased Employee

Leased Employee means any person (other than an employee of the recipient) who pursuant to an agreement between the recipient and any other person ("leasing organization") has performed services for the recipient (or for the recipient and related persons determined in accordance with IRC Section 414(n)(6)) on a substantially full-time basis for a period of at least one year, and such services are performed under the primary direction or control of the recipient employer.

1.27 Open Enrollment

Open Enrollment means the period designated by the Employer each year, during which Employees elect Salary Redirection amounts and OBP Dollar allocations for the following Plan Year (except for any Employee who first becomes eligible to be a Participant during a Contribution Period, in which case Section 4.5 shall apply).

1.28 Optional Benefits Program (OBP)

Optional Benefits Program (OBP) means a program offered to judges, attorneys who are employed in the "Attorney Unit", elected officials, executive management, and administrative management where OBP credits can be allocated to pay for certain benefits, including Benefits offered under this Section 125 Plan.

1.29 OBP Eligible Employee

OBP Eligible Employee means each Eligible Employee who receives benefits under the Optional Benefits Program and who is not a General Employee.

1.30 OBP Dollars

OBP Dollars means the amounts, other than Salary Redirection amounts, credited to an OBP Eligible Employee and attributable to contributions made by the Employer on behalf of a Participant to be allocated in accordance with the Participant's Benefit elections under Section 3. The amounts of OBP Dollars are described in Section 4.2.

1.31 Participant

Participant means any Eligible Employee who elects to become a Participant as provided in Section 2.

1.32 Part-time Ineligible Employee

Part-time Ineligible Employee means an employee whose regular work schedule is less than forty (40) hours per pay period.

1.33 Plan

Plan means the County of Orange Section 125 Plan.

1.34 Plan Year

Plan Year means the 12-month period from January 1 to December 31.

1.35 Premium Only Plan Benefits

Premium Only Plan Benefits means the benefits offered pursuant to Section 4.1(A) herein.

1.36 Qualifying Dependent

Qualifying Dependent means, for Dependent Care Reimbursement Account Plan purposes, any Dependent (including Spouses) for whom the Participant is entitled to an exemption under Section 152 of the Code, (i) who is under the age of 13, or (ii) who is physically or mentally incapable of caring for himself or herself.

1.37 Salary Redirection

Salary Redirection means the portion of Benefits attributable to contributions made by the Employer on behalf of Participants pursuant to Section 3.1 of the Plan.

1.38 Salary Redirection Agreement

Salary Redirection Agreement means an agreement set forth in the Enrollment Documentation between the Participant and the Employer under Section 3.1 of the Plan where the Participant agrees to reduce his or her Compensation and to have such amounts contributed by the Employer to the Plan on the Participant's behalf. The Salary Redirection Agreement shall apply only to Compensation that has not been actually or constructively received by the Participant as of the date of the Salary Redirection

Agreement (after taking this Plan and Code Section 125 into account) and, subsequently does not become currently available to the Participant.

1.39 Same Sex Spouse

A person of the same sex as the Eligible Employee whose marriage to the eligible Employee is legally recognized by the State of California.

1.40 Self-Funded Plan

Self-Funded Plan means any plan providing health care benefits, issued by the Employer, that is funded primarily by Employer contributions as listed in Appendix A.

1.41 Spouse

Spouse means a Participant's legally married husband or wife who is recognized as a spouse under federal law.

SECTION 2

PARTICIPATION

2.1 Eligibility

Each Eligible Employee participating in the Plan on January 1, 2010, shall be eligible to continue participating in this Plan as of such date.

Eligible Employees not participating on January 1, 2010, shall be eligible to participate in the Plan effective as of the first day of the month following 28 days of employment with the Employer.

Additionally, the following eligibility rules shall apply:

(A) General Employees who are not Court Employees shall be eligible to become a Participant in the Benefits offered in Section 4.1(A), (B), and (C) and shall not be eligible for the Benefits offered in Section 4.1(D).

(B) General Employees who are Court Employees shall be eligible to become a Participant in the Benefits offered in Section 4.1(A) and (C) and shall not be eligible for the Benefits offered in Section 4.1(B) or (D).

(C) OBP Eligible Employees shall be eligible to become a Participant in the Benefits offered in Section 4.1(A), (B), (C) and (D).

2.2 Application to Participate

Any Eligible Employee shall, during the applicable Open Enrollment Period, complete and submit to the Administrator Enrollment Documentation. The election made pursuant to the Enrollment Documentation shall be irrevocable until the end of the applicable Contribution Period unless the Participant is entitled to change his or her elections pursuant to Section 4.6 hereof.

A Participant shall not continue participating in the Plan for subsequent Contribution Periods unless he or she completes and submits new Enrollment Documentation during each Open Enrollment Period.

2.3 Change of Status as Eligible Employee

If a Participant ceases to be an Eligible Employee because of a change in employment status (e.g., terminating employment, becoming a Part-time Ineligible Employee or moving to an ineligible job classification), the Participant shall terminate participation in this Plan for the remainder of the Contribution Period in which such change of employment status occurs. No further Salary Redirection contributions may be made on behalf of the Participant, and all Benefit elections shall cease. However, any balances in

SECTION 3

CONTRIBUTIONS

3.1 Salary Redirection and Allocation of OBP Dollars

Once an Eligible Employee who is also an OBP Eligible Employee elects to participate in this Plan, his or her OBP will be allocated and his or her Compensation will be reduced in an amount equal to the amount of contributions elected pursuant to Section 4. Once an Eligible Employee, who is not an OBP Eligible Employee, elects to participate in this Plan, his or her Compensation will be reduced in an amount equal to the amount of contributions elected pursuant to Section 4. Such reduction shall be his or her Salary Redirection, which will be available to pay for the Benefits he or she elected and shall continue through the end of the Contribution Period. Salary Redirection and allocation of OBP Dollars shall not continue for each subsequent Contribution Period unless the Participant elects to continue his or her contributions as provided herein. Each Participant's annual Salary Redirection will be determined as part of the Benefit selection process.

3.2 Limitation on Use of Salary Redirection/OBP Dollars to Fund Health Care Reimbursement Account

Notwithstanding any provision contained in this Plan to the contrary, no more than $2,500 of Salary Redirection and OBP Dollars combined may be applied to a Participant's Health Care Reimbursement Account in or on account of any Contribution Period. The minimum contribution that may be applied to a Participant's Health Care Reimbursement Account must equal at least one dollar per paycheck.

OBP Dollars allocated toward the Health Care Reimbursement Account must be applied first when calculating the remainder of the maximum contribution limit available for Salary Redirection.

3.3 Limitation on Use of Salary Redirection to Fund Dependent Care Reimbursement Account

Notwithstanding any provisions contained in this Plan to the contrary, no more than the lesser of $5,000, $2,500 for a married person filing separately, or the earned income limitation described in Section 129(b) of the Code, of Salary Redirection may be applied to a Participant's Dependent Care Reimbursement Account in or on account of any Contribution Period. The minimum contribution that may be applied to a Participant's Dependent Care Reimbursement Account must equal at least one dollar per paycheck. OBP Dollars may not be contributed to a Participant's Dependent Care Reimbursement Account.

SECTION 4

ELECTION OF BENEFITS

4.1 Benefit Options

Each Eligible Employee may elect to have the amount of his or her Salary Redirection and OBP Dollars credited to any one or more of the following optional Benefits as specifically noted in such Benefit Options, except OBP Dollars may not be credited to the Benefits set forth in subsections (A) and (C) below.

(A) Premium Only Plan Benefits

Each Eligible Employee may choose to enroll in the following Benefit to be paid for on a pretax basis using Salary Redirection only:

(1) Medical coverage

To the extent the Benefits offered under this Section 4.1(A) are provided through Insurance Contracts and Self-funded Plans, such Insurance Contracts and Self-Funded Plan and any summary plan descriptions or booklets describing the Benefits are incorporated herein by reference. The rights and conditions with respect to Premium Only Plan Benefits payable shall be determined from such Insurance Contracts and Self-Funded Plans, summary plan descriptions or booklets.

(B) Health Care Reimbursement Account Benefit

Each Eligible Employee may choose to apply Salary Redirection and each OBP Eligible Employee may also choose to allocate OBP Dollars to this Health Care Reimbursement Account Benefit option, in which case Section 5 shall apply. However, any General Employee who is a Court Employee shall not be eligible for this Benefit. OBP Eligible Employees who work in the courts may only fund this Benefit with OBP Dollars, but not Salary Redirection.

(C) Dependent Care Reimbursement Account Benefit

Each Eligible Employee may choose to apply Salary Redirection to a Dependent Care Reimbursement Account Benefit option, in which case Section 6 shall apply. OBP Dollars may not be used to fund this Benefit Option.

(D) Accidental Death and Dismemberment Premium Payroll Credit Benefit

Each OBP Eligible Employee may choose to allocate OBP Dollars to an Accidental Death and Dismemberment Premium Payroll Credit Benefit option, in which case Section 7 shall apply. Salary Redirection may not be used to fund this Benefit Option.

4.2 OBP Dollars

The Employer will credit OBP Eligible Employees with a specific amount of OBP Dollars each Plan Year. OBP Dollars are based on the job classifications of each OBP Eligible Employee and are determined by the Employer in its discretion.

4.3 Taxable Cash Benefits

An OBP Eligible Employee may elect to receive in taxable cash compensation, the total amount or any portion of OBP Dollars if such OBP Eligible Employee elects to receive all or part of his or her OBP Dollars as taxable cash in his or her Enrollment Documentation each year. Additionally, if an OBP Eligible Employee fails to complete and submit Enrollment Documentation, such OBP Eligible Employee shall be deemed to have elected all of his or her OBP Dollars as taxable cash. Taxable Cash Benefits shall be paid in one lump sum amount on the first paycheck of the Plan Year.

4.4 Annual Elections

During the Open Enrollment Period preceding the Effective Date or any later Contribution Period, each Participant shall be given the opportunity to elect, by completing and submitting Enrollment Documentation, which Benefit Options he or she wishes to select and purchase with his or her Salary Redirection or OBP Dollars. Any such election shall be effective for any Benefit expenses incurred during the Contribution Period. The Contribution Period begins on the first day of each following Plan Year.

4.5 Elections by New Employees

An Eligible Employee who is first employed during a Contribution Period may elect to participate in this Plan for the remainder of such Contribution Period. For the purpose of this Plan, the new employee's Open Enrollment Period shall be a 30 day period that begins on the first day of the new Employee's employment with the Employer. If the new employee completes and submits Enrollment Documentation to the Administrator during this period, Benefits will be effective as of the first day the Eligible Employee satisfied the requirements of Section 2.1.

4.6 Change of Elections

This Section 4.6 applies to Salary Redirection elections, but does not apply to OBP Dollar allocations.

Any Eligible Employee may change a benefit election after the Contribution Period (to which such election relates) has commenced and make new elections with respect to the remainder of such Contribution Period only as permitted under this Section 4.6.

An Eligible Employee may elect to discontinue or change contributions towards his or her elections only during an Open Enrollment Period or within 30 days of the time such Eligible Employee has a Change in Status (as defined in Section 4.6(A)) or experiences a Special Enrollment Event (as defined in Section 4.6(B)).

PERSONNEL POLICIES

AND REGULATIONS

Adopted by the Orange County Superior Court
September 28, 2007

ARTICLE II - PAY PRACTICES

Section 1. Method of Compensation for Employees

A. Employees shall receive compensation at the biweekly or hourly rate within the range or at the flat rate assigned to the class in which they are employed.

B. The pay rate(s) for each class is (are) set forth in a table of class titles, pay rates and salary schedules as adopted by the Chief Executive Officer.

C. Notwithstanding any provision in these Policies to the contrary, the Court may direct that any officer or employee of the Court be compensated at any step of the salary range either at the time of or at any time subsequent to the date of his or her employment by the court.

Section 2. Salary Payment Procedure

A. A pay period shall cover fourteen (14) calendar days and shall start on a Friday and end with the second Thursday thereafter. Employees and officers shall be paid approximately eight (8) days after the end of a pay period, usually on a Friday.

B. Compensation for each employee for whom compensation is established shall be paid out of the Trial Court Trust Fund or such other fund as may be provided by ordinance or by law upon certification by the Chief Executive Officer to the Auditor-Controller that such employee has performed the services set forth in said certificate. When an employee separates from Court service and use of the regularly scheduled certification would create an inequitable delay, the Chief Executive Officer may immediately file a special payroll certification of such separation with the Auditor-Controller. The Auditor-Controller may draft the warrant for the period of time and/or pay due said employee up to the time of separation. Notice of such separation shall be immediately filed with County Human Resources.

C. Before the Auditor-Controller shall deliver to the Court designee his or her salary warrant, the designee shall file a written certificate with the Auditor-Controller to the effect that each of his or her employees, during said pay period, has performed services for the Court as required by law. If there is any exception, the Chief Executive Officer shall so state in the certificate. The Court shall retain a copy.

Section 3. Authorization for Salary Increases

The Court Human Resources Director shall notify the Auditor-Controller in writing of all salary increases and such notifications shall constitute authorization for the Auditor-Controller to make payments to the employee at the higher rate.

Section 4. Limitations Upon Compensation

A. Unless otherwise provided by Rule of Court, all fees, commissions and mileage (other than mileage reimbursement received pursuant to the Administrative Office of the Court's mileage reimbursement provisions), received by an employee by virtue of his or her office shall be deposited with the Court for each calendar month not later than the fifth of the succeeding month and be deposited into the General Fund of the Court, or such other fund as may be provided by law, and shall become the property of the Court immediately upon its receipt, by such employee. The provisions of Section 70 of the Penal Code,

ARTICLE X - REIMBURSEMENT PROGRAMS

Section L. Mileage Reimbursement

A. An employee who is authorized to use a private automobile in the performance of duties shall be reimbursed for each mile driven in the performance of his or her duties during each monthly period, subject to the Administrative Office of the Court's Travel Rate Guidelines.

B. An employee who is required by the Court to furnish a privately owned vehicle for the performance of his or her duties shall receive a minimum of ten (10) dollars in any month in which the actual mileage reimbursement would otherwise be less than ten (10) dollars. The minimum shall not apply in any month:

1. in which the employee has not actually worked eighty (80) hours;

2. unless the employee claims the ten (10) dollar minimum and the Court certifies that the employee was required to use a privately owned vehicle on Court business.

Section 2. Personal Property Reimbursement

Employees shall, in proper cases, be reimbursed for the repair or replacement of personal property damaged in the line of duty without fault of the employee. The amount of reimbursement for articles of clothing shall be the depreciated value based on the age and condition of the article. Reimbursement for a watch shall be limited to the functional value of the watch.

Section 3. Attorney Bar Fees

Upon request and as permitted by policies set forth by the Administrative Office of the Courts and/or the Judicial Council, the Court shall reimburse eligible employees holding regular positions as Attorney or other positions as approved by the Chief Executive Officer, for their Active State and County Bar fees, and Commissioners for their State Bar Fees.

Section 4. Optional Benefit Plan

A. Effective January 1, 2008, each eligible employee shall be entitled to select benefits from those listed below not to exceed three thousand five hundred (3,500) dollars.

B. The purpose of the plan is to provide options to individual employees to best meet the needs of themselves and dependents while enhancing the employee's expertise and skills on the job.

The options available shall include the following types of benefits such as:

1. cash (taxable);

2. professional conferences which are job related (employee only) including fees and other expenses while attending;

3. professional memberships, licenses and certificates which arejob related (employee only);

4. professional journals and periodicals (employee only) which are job related;

5. health/accident;

   a. health programs (employee and/or dependents) such as physical, mental and/or emotional health related counseling for individual and/or family not covered or partially covered through existing plans;

   b. employee's share of health insurance premiums (employee and/or dependents). Also includes payment of Accidental Death and Dismemberment coverage for employee and dependents available through the County;

   c. health care and/or dental (employee and/or dependents) excluded or partially included under the County's insurance plans. Examples of items covered under this provision include deductibles, eye care, lenses and frames.

6. County administered 457 Deferred Compensation Plan.

C. The County Human Resources Director administers the plan. Each employee to be eligible must file An Intent to Participate statement and follow instructions prepared by the County Human Resources Director. If an employee does not file An Intent to Participate form prior to the commencement of the plan, the employee may only receive cash for any period prior to the first of the month following the date the employee files an Intent to Participate form. Employee designations are irrevocable unless they have a change in family status. For expenses to be eligible, they must be incurred after the filing of An Intent to Participate form and during a plan period in which an employee is eligible. Claims may be filed at anytime during the plan period and all claims must be filed no later than one month following the close of the plan period. The Human Resources Director shall notify the Auditor-Controller in writing of payments to be made to employees. Such notification shall constitute authorization for the County's Claims Administrator to make payments.

D. Eligibility - a regular, limited term or probationary employee is eligible to receive the optional benefit provided he or she is continuously employed in a regular full-time capacity in the Confidential, Management and Professional Compensation Group as set forth in Article XX. Employees hired or promoted after the commencement of a plan will be eligible for the optional benefit on a pro rata basis the first day of the month following the twenty-eighth day in an eligible classification. Employees in eligible classifications who work part-time will be eligible to receive the optional benefit consistent with County of Orange policy for part-time employees.

E. Any portion of the optional benefit not incwred within the plan period shall remain Court or County funds.

F. Claims shall be made on fonns provided by the County on which claimant declares the category of service received as defined in the plan, the dates the expenses were incurred by the claiment or eligible dependents, by whom service was provided and the amount being claimed. The County Claims Administrator shall pay claims submitted with a declaration under penalty of perjury signed by the claimant and approved by the County of Orange. The County will approve for payment only those claims which are

accompanied by documentation that an eligible expense has been incurred during the plan period.

JAMES MORELL,

HAVING BEEN FIRST DULY SWORN, WAS EXAMINED, AND TESTIFIED AS FOLLOWS:

THE WITNESS: I DO.

HEARING OFFICER SNIDER: AND, MR. MORELL, ANY TIME YOU'RE READY.

DIRECT EXAMINATION

THE WITNESS: SURE. OKAY. I WORKED AS A RESEARCH ATTORNEY IN THE ORANGE COUNTY SUPERIOR COURT FROM AUGUST 1992 TO FEBRUARY 2014.

THROUGHOUT MY EMPLOYMENT AS PART OF MY STANDARD COMPENSATION PACKAGE FOR COURT RESEARCH ATTORNEYS, I RECEIVED AN ANNUAL, QUOTE, OPTIONAL BENEFIT ALLOWANCE, WHICH I WAS PERMITTED TO ALLOCATE TO CERTAIN SPECIFIED USES ON A PRETAX BASIS PURSUANT TO INTERNAL REVENUE CODE SECTION 125, OR IT COULD BE TAKEN AS CASH.

AND IN THAT REGARD -- WELL, LET ME JUST CONTINUE. I'M SORRY.

UNDER THIS OPTIONAL BENEFIT PLAN, NO ELECTION TO PARTICIPATE WAS REQUIRED OR OFFERED. THERE WAS NO FORM OR ANYTHING. NOBODY ASKED EVERY YEAR WHETHER YOU

WANT TO PARTICIPATE IN THE OPTIONAL BENEFIT PLAN.

IF NO ALLOCATION WAS MADE BY ME OR BY ANY RESEARCH ATTORNEY DURING THE OPEN-ENROLLMENT PERIOD EACH NOVEMBER, THE ENTIRE AMOUNT OF THE ANNUAL OPTIONAL BENEFIT WAS PAID AS TAXABLE CASH IN THE FIRST PAYROLL PERIOD OF THE NEW YEAR.

FOR THE YEARS 2011 TO 2014, WHICH ARE THE YEARS UPON WHICH MY RETIREMENT ALLOWANCE WAS CALCULATED, THE AMOUNT RECEIVED BY EACH RESEARCH ATTORNEY UNDER THE OPTIONAL BENEFIT PLAN WAS $3500. THAT'S WHAT I RECEIVED.

IN EACH OF THOSE YEARS I ELECTED TO RECEIVE AND DID RECEIVE A PORTION OF THAT AMOUNT IN CASH AND A PORTION OF THE REMAINDER OF THE PORTION WAS CASH REIMBURSEMENT, WHICH I RECEIVED FOR UNINSURED HEALTHCARE EXPENSES; FOR EXAMPLE, CO-PAYMENTS, DEDUCTIBLES, AND THAT SORT OF THING.

SO IN 2011 I RECEIVED $1,000 IN CASH. $2500 OF THE REMAINDER OF THE 3500 WAS RECEIVED BY ME AS CASH REIMBURSEMENT FOR HEALTH INSURANCE -- FOR HEALTHCARE COSTS THAT WERE ELIGIBLE UNDER THE I.R.S. SECTION 125 PROVISION.

IN THE YEAR 2012 I RECEIVED $2800 CASH IN THE FIRST PAY PERIOD IN JANUARY, THE REMAINING $700 BEING RECEIVED BY ME AS HEALTHCARE EXPENSE REIMBURSEMENTS.

IS SET FORTH AT 566 TO 641 OF THE RECORD, THAT WAS -- WENT INTO EFFECT IN 2007.

AND THE PORTIONS RELATING TO THE OPTIONAL BENEFIT PLAN WHICH ARE SET FORTH -- LET ME GET THAT PAGE FOR YOU -- SET FORTH AT 611 TO 613 OF THE ADMINISTRATIVE RECORD, THOSE REMAINED UNCHANGED UP UNTIL THE 2013 AMENDMENT OR REVISION OF THE COURT PERSONNEL POLICIES AND REGULATIONS WHICH ARE SET FORTH AT 3 TO 5 OF THE ADMINISTRATIVE RECORD -- PAGES 3 TO 5.

THAT VERSION WENT INTO EFFECT IN DECEMBER OF 2013 AND, ESSENTIALLY, IS IRRELEVANT. I INCLUDED IT IN MY INITIAL APPEAL BECAUSE I DIDN'T HAVE ACCESS TO THE 2017 VERSION WHICH WAS IN --

HEARING OFFICER SNIDER: YOU MEAN, 2007?

THE WITNESS: 2007. EXCUSE ME.

AND I INCLUDED IT BASICALLY AS AN EXAMPLE, BECAUSE THE ESSENTIAL PROVISIONS RELATING TO CASH REIMBURSEMENT AND TO HEALTHCARE REIMBURSEMENT EVEN REMAINED UNCHANGED IN THE 2013 VERSION.

HOWEVER, THE 2013 VERSION, WHICH IS, AGAIN, AT ADMINISTRATIVE RECORD PAGES 3 TO 5, BECAUSE IT WENT INTO EFFECT IN DECEMBER 2013, HAD NO BEARING ON MY ALLOCATIONS, BECAUSE MY ALLOCATIONS FOR THE YEAR 2014, WHICH WAS THE LAST YEAR OF EMPLOYMENT, HAD ALREADY BEEN MADE IN NOVEMBER DURING THE OPEN-ENROLLMENT PERIOD,

OPTION. BUT THAT IS A CHANGE THAT WAS MADE.

HEARING OFFICER SNIDER: UNDERSTOOD.

MS. MATSUO, ANYTHING FURTHER BASED ON MY QUESTIONS OR FURTHER QUESTIONS THAT YOU MIGHT HAVE?

MS. MATSUO: JUST BRIEFLY.

BY MS. MATSUO:

Q OKAY. SO YOU STARTED WORKING WITH THE COURT IN 1992?

A I BELIEVE IT WAS AUGUST 13, 1992. YES.

Q OKAY. AND IT'S YOUR UNDERSTANDING THAT THE COURT SYSTEM SEPARATED FROM THE COUNTY WHEN?

A IT WAS THE LATE '90'S. THIS IS SOMETHING THAT YOU CAN LOOK UP. I BELIEVE IT WAS 1998, 1999. AND I CAN'T REMEMBER THE EXACT NAME OF THE ACT. BUT I THINK IT WAS THE TRIAL COURT -- SOMETHING TO DO WITH THE TRIAL COURT CONSOLIDATION ACT, I WANT TO SAY.

BUT IT WAS A STATE LAW THAT BASICALLY CHANGED THE CHARACTER OF TRIAL COURTS -- OF SUPERIOR COURTS. AND ONE OF THE REASONS IT AFFECTED ME IN PARTICULAR IS BECAUSE I WORKED ON APPEALS.

I WORKED IN THE APPELLATE DEPARTMENT. AND THERE WAS AN ISSUE AS TO WHAT THE STATUS OF THE APPELLATE DIVISION -- THE APPELLATE DEPARTMENT IT HAD BEEN CALLED IN THE SUPERIOR COURT PRIOR TO THIS LEGISLATION.

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED DECISION

**In the Matter of the Application of James B. Morell,
a Member of the Orange County Employees Retirement System,
for a Recalculated Retirement Allowance**

November 29, 2017

PURSUANT TO GOVERNMENT CODE SECTION 31533, a hearing was conducted on May 5, 2017, into the application of James B. Morell for a recalculated retirement allowance. Mr. Morell ("Applicant"), who is an attorney, appeared in propria persona. The Orange County Employees Retirement System ("Respondent") was represented by Staff Attorney Dawn M. Matsuo. Pursuant to Rule 16 of OCERS's Administrative Hearing Procedures, the following Proposed Findings of Fact, Conclusions of Law, and Recommended Decision are submitted.

I. PROCEDURAL HISTORY

Applicant started working as a Superior Court research attorney on August 13, 1992. (RT 55, 64, 71.) He retired on February 21, 2014. (AR 6; RT 55, 70.) On March 26, 2014, OCERS staff notified Applicant of his monthly retirement allowance based on his final average salary from February 7, 2011, to February 6, 2014. (AR 6-7.) OCERS's letter invited Applicant to appeal if he disagreed with the determination. (AR 6; RT 42.)[1]

On June 23, 2014, Applicant appealed, asserting that his $3,500 annual optional benefit was erroneously excluded from the compensation earnable used to determine his allowance. (AR 1; RT 42.) On September 9, 2014, an OCERS administrator replied that under a Board of Retirement resolution, No. 98-001, flexible benefit payments are not considered compensation earnable for employees retiring after January 1, 1991. (AR 10; RT 42.) Resolution 98-001 is the basis for OCERS's current practices. (RT 86-87.)

Applicant was permitted to appeal further to OCERS's chief executive officer, and he did so on or about December 1, 2014. (AR 10-11.) He asked that the issue be brought before the Board of Retirement for its reconsideration of Resolution No. 98-001. (AR 15.) On March 20, 2015, OCERS's chief executive officer upheld the staff's decision denying the pensionability of Applicant's optional benefit payments. (AR 16.) He advised Applicant of his right to appeal to the Board. (AR 18.)

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[1] "RT" denotes the reporter's transcript of the administrative hearing. "AR" denotes the administrative record.

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advantages furnished to the member and is not compensation under Government Code section 31460 or In re Retirement Cases (2003) 110 Cal.App.4th 426.

3. The 1992 repeal of Government Code section 31460.1, which had excluded from compensation all employer payments made toward flexible benefits programs, did not invalidate the Board of Retirement's Resolution No. 90-1551, which reiterated former section 31460.1.

4. The Board's subsequent adoption of Resolution No. 98-001 was and is contrary to statutory and judicial authority treating flexible benefits as pensionable compensation when received directly as cash.

5. Applicant has not demonstrated by a preponderance of the evidence that he is exempt from the terms of the 2002 settlement agreement.

6. Even if Applicant had so demonstrated, the Hearing Officer is not empowered to void the settlement agreement in a manner that would enable the Board to recalculate Applicant's retirement benefit allowance in his favor.

V. RECOMMENDED DECISION

Accordingly, IT IS RECOMMENDED that the computation of Applicant's retirement allowance be maintained as accurate in light of the 2002 agreement that settled the litigation between OCERS and its membership class and associations.

IT IS FURTHER RECOMMENDED that the Board reexamine the portion of the settlement that excludes from pensionability flexible benefits received by employees as taxable cash, and that the Board consider pursuing an amendment of the Superior Court judgment on the basis that it precludes taxable cash received under the Optional Benefit Plan from counting in the determination of final compensation.

Dated: November 29, 2017.

Respectfully submitted,

ROBERT M. SNIDER
Hearing Officer

§ 31460. "Compensation"

"Compensation" means the remuneration paid in cash out of county or district funds, plus any amount deducted from a member's wages for participation in a deferred compensation plan established pursuant to Chapter 8 (commencing with Section 18310) of Part 1 of Division 5 of Title 2 or pursuant to Article 1.1 (commencing with Section 53212) of Chapter 2 of Part 1 of Division 2 of Title 5, but does not include the monetary value of board, lodging, fuel, laundry, or other advantages furnished to a member.

Added Stats 1947 ch 424 § 1; Amended Stats 1949 ch 1338 § 1; Stats 1951 ch 576 § 1; Stats 1959 ch 1184 § 1; Stats 1961 ch 1852 § 1; Stats 1972 ch 1370 § 10.

Prior Law: Based on Stats 1937 ch 677 § 8 p 1898.

Amendments:

1949 Amendment: Added (1) "(a)" at the beginning of the section; and (2) subd (b) which read: "In respect to employees of district as defined in subdivision (c) of Section 31468, 'compensation' means the remuneration paid in cash out of funds of the district plus the monetary value, as determined by the board, of board, lodging, fuel, laundry, and other advantages furnished to a member in payment for his services."

1951 Amendment: Added "and (d)" after "(c)" in subd (b) as added.

1959 Amendment: (1) Substituted "and shall not include the monetary value" for "plus the monetary value, as determined by the board," after "supervisors" in subd (a); (2) deleted "in payment for his services" at the end of subd (a); (3) substituted "and shall not include" for "plus" after "district" in subd (b); and (4) deleted "as determined by the board," after "monetary value" in subd (b).

1961 Amendment: Deleted (1) "(a)" at the beginning of the section; (2) "controlled by the board of supervisors" after "district funds"; and (3) former subd (b) as added and amended.

1972 Amendment: (1) Inserted all that which follows "district funds" down to and including "Title 5,"; and (2) substituted "but does" for "and shall" before "not include".

Collateral References:

Compensation earnable"

Compensation earnable" b member means the average compe tion as determined by the board. period under consideration upon the basis of the average numoer of days ordinarily worked by s in the same grade or class of positions during the period, and at the same rate of pay. The putation for any absence shall be based on the compensation of the position held by the member at ginning of the absence. ***Compensation, as defined in Section 31460, that has been deferred shall be d "compensation earnable" when earned, rather than when paid.***

* * *

Amended Stats 1993 ch 396 § 3 (AB 1659); Stats 1995 ch 558 § 1 (SB 226).

Amendments:

1993 Amendment: (1) Designated the former section to be subd (a); (2) substituted "the member" for "him" after "position held by" in subd (a); and (3) added subd (b).

1995 Amendment: (1) Deleted former subdivision designation (a); (2) substituted the period for "shall be based on the compensation of the position held by the member at the beginning of the absence" after "for any absence"; (3) added the last sentence; and (4) deleted former subd (b) which read: "(b) In a county of the first class, as defined by Section 28020, as amended by Chapter 1204 of the Statutes of 1971, and Section 28022, as amended by Chapter 43 of the Statues of 1961, in addition to subdivision (a), compensation that has been deferred shall be deemed "compensation earnable" when earned, rather than when paid."

Note—Stats 1993 ch 396 provides:

SECTION 1. The Legislature hereby finds and declares that the Legislature, in enacting this act, does not intend in any manner to affect Chapter 45 of the Statutes of 1992.

§ 31462. "Final compensation"

"Final compensation" means the average annual compensation earnable by a member during any three years elected by a member at or before the time he files an application for retirement, or, if he fails to elect, during the three years immediately preceding his retirement. If a member has less than three years of service, his final compensation shall be determined by dividing his total compensation by the number of months of service credited to him and multiplying by 12.

Added Stats 1947 ch 424 § 1; Amended Stats 1951 ch 572 § 1; Stats 1969 ch 416 § 1.

Prior Law: Based on Stats 1937 ch 677 § 9 p 1899.

Amendments:

1951 Amendment: Added "during any three years elected by a member at or before the time he files an application for retirement, or, if he fails to elect,".

1969 Amendment: Added the second sentence.

David E. Sundstrom
Auditor-Controller

County of Orange
Payroll Certificate

Issued

Employee Name:	JAMES B MORELL
Employee ID:	040269
Fed Tax Status:	14 M
State Tax Status:	16 M
Agency:	11A **Unit:** 1301 **Pay Loc:** 11A009
Payment Advice/Check #:	01110000015700 **TYPE:** REGULAR
Issue Date:	01/07/2011
Pay Period (#):	1
Begin – Ending Date:	12/17/2010 - 12/30/2010

Current Pay Period		Year-to-Date	
Total Gross Pay(Pay Elements):	6,117.60	**YTD Gross:**	6,117.60
Total Deductions:	1,836.89	**YTD Taxable Gross:**	5,621.70
Net Pay:	[redacted]		

Description	Rate	Hours (Hrs:Min)	Amount	Year to Date
Pay Elements:				
REGULAR	63.9700	72:00	4,605.84	
HOLIDAY PAY	63.9700	8:00	511.76	
OBP LUMP SUM			1,000.00	
Deductions:				
DC LOAN PLAN			433.24	433.24
457 DC PLAN			10.00	10.00
FEDERAL TAX			533.30	533.30
HEALTH SURW			23.02	23.02
MEDICARE-EE			89.04	89.04
RET 401 PICKUP			154.22	154.22
RET 2.0% EE-EE			354.70	354.70
ST TAX WHELD			285.41	285.41
Reimbursable Expenses:				

Leave Category	Curr. Bal (Hrs:Min)
SICK LEAVE	507:36
VAC ACCRUAL	378:50
FURLOUGH	72:00

Disclaimer:

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JAMES_MORELL_1796

COUNTY OF ORANGE, CALIFORNIA

JAMES B MORELL
Payroll Number:11A
Pay Period End Date:12-29-2011
Check Date:01-06-2012
Check Number:011200000014616
Control Number:1528452

Employee Department:V110
Pay Location:11A009
Total Gross Amt:$7,917.60
YTD Gross Amt:$7,917.60
Total Deductions Amt:$2,621.18
Net Pay Amt:$5,296.42

Employee Unit:1301
Federal Exemptions:14
Tax Status Claimed:M
State Exemptions:16
State Tax Status Claimed:M

EARNINGS

Description	Pay Rate	Input Amount	Pay Amount
HOLIDAY PAY	63.9700	8:00	$511.76
OBP LUMP SUM	0.0000	0.00	$2,800.00
REGULAR	63.9700	72:00	$4,605.84

DEDUCTIONS

Description	Deduction Amount	YTD Deduction Amount
DC LOAN PLAN	$433.24	$433.24
457 DC PLAN	$250.00	$250.00
FEDERAL TAX	$900.87	$900.87
HEALTH SHRWL	$-23.02	$-23.02
MEDICARE-EE	$115.14	$115.14
RET-2-GEN-EE	$353.67	$353.67
RET-CT PCKUP	$154.22	$154.22
STTAX WHELD	$437.06	$437.06

LEAVE

Description	ACCRUAL	USAGE	CURRENT BALANCE
COMP TIME	00:00	00:00	00:00
FLSA COMP	00:00	00:00	00:00
SICK LEAVE	3:42	00:00	516:48
VAC ACCRUAL	7:42	00:00	395:02
FURLOUGH	00:00	00:00	00:00

FRINGE BENEFITS

Description	Amount	YTD Amount

Employee Cafeteria Benefit Program

enefit Code	Description	Employee Benefit Cost	Employer Contribution Applied	Employer Contribution Applied YTD

PAYPERIOD #01(12/16/11) - (12/29/11) - PAYDAY 01/06/12

643

JAMES_MORELL_1797

COUNTY OF ORANGE, CALIFORNIA

JAMES B MORELL
Payroll Number:11A
Pay Period End Date:12-27-2012
Check Date:01-04-2013
Check Number:011300000014792
Control Number:2159109

Employee Department:V110
Pay Location:11A009
Total Gross Amt:$6,117.60
YTD Gross Amt:$6,117.60
Total Deductions Amt:$2,210.94
Net Pay Amt:$3,906.66

Employee Unit:1301
Federal Exemptions:08
Tax Status Claimed:M
State Exemptions:09
State Tax Status Claimed:M

EARNINGS

Description	Pay Rate	Input Amount	Pay Amount
HOLIDAY PAY	63.9700	8:00	$511.76
OBP LUMP SUM	0.0000	0.00	$1,000.00
REGULAR	63.9700	48:00	$3,070.56
VACATION PAY	63.9700	24:00	$1,535.28

DEDUCTIONS

Description	Deduction Amount	YTD Deduction Amount
DC LOAN PLAN	$110.84	$110.84
457 DC PLAN	$500.00	$500.00
FEDERAL TAX	$543.47	$543.47
HEALTH SHRNL	$-23.02	$-23.02
MEDICARE-EE	$89.04	$89.04
RET-2-GEN-EE	$610.19	$610.19
RET-CT PCKUP	$154.22	$154.22
STTAX WHELD	$226.20	$226.20

LEAVE

Description	ACCRUAL	USAGE	CURRENT BALANCE
COMP TIME	00:00	00:00	00:00
FLSA COMP	00:00	00:00	00:00
SICK LEAVE	3:42	00:00	576:00
VAC ACCRUAL	7:42	00:00	387:14
FURLOUGH	00:00	00:00	00:00

FRINGE BENEFITS

Description	Amount	YTD Amount

Employee Cafeteria Benefit Program

enefit Code	Description	Employee Benefit Cost	Employer Contribution Applied	Employer Contribution Applied YTD

PAYPERIOD #01(12/14/12) - (12/27/12) - PAYDAY 01/04/13

644

JAMES_MORELL_1798

COUNTY OF ORANGE, CALIFORNIA

JAMES B MORELL
Payroll Number:11A
Pay Period End Date:12-26-2013
Check Date:01-03-2014
Check Number:011400000015343
Control Number:2859352

Employee Department:V110
Pay Location:11AC02
Total Gross Amt:$7,645.60
YTD Gross Amt:$7,645.60
Total Deductions Amt:$3,075.02
Net Pay Amt:$4,570.58

Employee Unit:1301
Federal Exemptions:08
Tax Status Claimed:M
State Exemptions:09
State Tax Status Claimed:M

EARNINGS

Description	Pay Rate	Input Amount	Pay Amount
HOLIDAY PAY	65.5700	8:00	$524.56
O&P LUMP SUM	0.0000	0.00	$2,400.00
REGULAR	65.5700	60:00	$3,934.20
VACATION PAY	65.5700	12:00	$786.84

DEDUCTIONS

Description	Deduction Amount	YTD Deduction Amount
DC LOAN PLAN	$411.57	$411.57
457 DC PLAN	$500.00	$500.00
FEDERAL TAX	$883.35	$883.35
HEALTH SHRWL	$-23.02	$-23.02
MEDICARE-EE	$111.19	$111.19
RET-2-GEN-EE	$661.74	$661.74
RET-CT PCKUP	$158.06	$158.06
STTAX WHELD	$372.13	$372.13

LEAVE

Description	ACCRUAL	USAGE	CURRENT BALANCE
COMP TIME	00:00	00:00	00:00
FLSA COMP	00:00	00:00	00:00
SICK LEAVE	3:42	00:00	616:12
VAC ACCRUAL	7:42	00:00	447:26
FURLOUGH	00:00	00:00	00:00

FRINGE BENEFITS

Description	Amount	YTD Amount

Employee Cafeteria Benefit Program

Benefit Code	Description	Employee Benefit Cost	Employer Contribution Applied	Employer Contribution Applied YTD

PAYPERIOD #01(12/13/13) - (12/26/13) - PAYDAY 01/03/14

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JAMES_MORELL_1799

ORANGE COUNTY OCERS EMPLOYEES RETIREMENT SYSTEM

Memorandum

DATE: August 20, 2018

TO: Board of Retirement

FROM: Gina M. Ratto, General Counsel

SUBJECT: James Morell – OCERS Staff Position Regarding Hearing Officer's Recommendation

Recommendation

Staff recommends that the Board, pursuant to California Government Code Section 31534(b):

1. Review the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommended Decision[1] ("Hearing Officer's Report") as a summary of testimony and evidence in the case;
2. Based on such evidence, adopt the following Conclusions of Law:
   - Government Code Section 31460.1 (effective January 1, 1991; repealed May 11, 1992) excluded from the definition of "compensation" cash payments to employees that are part of a flexible benefit plan;
   - The Orange County Board of Supervisors adopted Government Code section 31460.1 by Resolution 90-1551;
   - The 1992 repeal of Government Code section 31460.1 did not invalidate Resolution 90-1551;
   - OCERS Board Resolution 98-001 was validated by the court-approved 2002 Settlement Agreement (defined below) and excludes from compensation earnable flexible benefits paid in cash to the extent paid to members retiring on and after January 1, 1991; and
   - Applicant, James Morell ("Morell") is not exempt from the terms of the 2002 Settlement Agreement;
3. Enter its Decision upholding staff's calculation of Morell's retirement allowance, which excluded flexible benefits from final average salary; and
4. Direct staff to prepare Final Findings of Fact, Conclusions of Law and Decision and serve them on Morell. Morell will have ten days from such service to file and serve written objections with the Board. The matter will be placed on the agenda of the next available regular meeting of the Board at which time the Board will take final action.

Alternatives

Alternatively, the Board may:

- Approve and adopt the Hearing Officer's Report as proposed, without modification;
- Refer the matter back, with or without instructions, to the Hearing Officer for further proceedings; or

[1] Proposed Findings of Fact, Conclusions of Law, and Recommended Decision of November 29, 2017, as amended by the Hearing Officer's Response to Applicant's Objections and Request for Clarifications on January 31, 2018.

ORANGE COUNTY OCERS EMPLOYEES RETIREMENT SYSTEM

Memorandum

- Set the matter for hearing before itself. At such hearing the board shall hear and decide the matter as if it had not been referred to the Hearing Officer.

Background/Discussion

Morell was employed as a research attorney for the Orange County Superior Court beginning August 3, 1992. On February 21, 2014, Morell filed his application for retirement with OCERS. On March 26, 2014, OCERS notified Morell of his monthly retirement allowance based on his final average salary. In making the determination of Morell's retirement allowance, OCERS staff excluded from his final average salary the amount of his annual Optional Benefit Plan (OBP) payment of $3,500. Morell appealed the staff's determination and the matter was eventually decided by OCERS' CEO. On March 20, 2015, the CEO upheld the staff's determination to exclude OBP from the calculation of Morell's final average salary, under the authority of the Board's Resolution 98-001, which excludes from compensation earnable flexible benefits provided in-kind, and flexible benefits paid in cash to employees retiring on or after January 1, 1991.

Morell appealed the CEO's determination to the Board and on August 17, 2015, the Board denied Morell's appeal, upholding the CEO's determination. Morell timely sought an administrative hearing, and the hearing was held on May 5, 2017.

Issue on Appeal and First and Second Recommended Decisions

The sole issue on appeal to the Hearing Officer was simply whether OCERS staff properly excluded flexible benefits from Morell's final average salary when staff calculated Morell's retirement allowance. According to the Hearing Officer's First Recommended Decision, the answer to that question is "yes."[2] Staff is in agreement. As more fully set forth below, exclusion of flexible benefits from Morell's final average salary was appropriate under both Government Code section 31460.1, which was adopted for OCERS by the Orange County Board of Supervisors by Resolution 90-1551, and under OCERS Board Resolution 98-001, which was validated by a 2002 court-approved and binding settlement agreement (the "2002 Settlement Agreement").

Although the First Recommended Decision conclusively answers the question on appeal and effectively disposes of the case, and despite having found both that Government Code section 31460.1 applies in Orange County and that Morell is bound by the terms of the 2002 Settlement Agreement, the Hearing Officer proceeds to question the validity of OCERS Board Resolution 98-001 in light of the decision of the court in *Ventura County Deputy Sheriff's Assn. v. Board of Retirement* (1997) 16 Cal.4th 483 ("*Ventura County*") and Government Code section 31460. This leads to the Hearing Officer's Second Recommended Decision that "the Board [should] reexamine the portion of the settlement that excludes from pensionability flexible benefits received by employees as taxable cash, and that the Board consider pursuing an amendment of the Superior Court judgment on the basis that it precludes taxable cash received under the Optional Benefit Plan from counting in the determination of final compensation." With this, staff is most certainly not in agreement.

[2] The First Recommended Decision states "IT IS RECOMMENDED that the computation of Applicant's retirement allowance be maintained as accurate in light of the 2002 agreement that settled the litigation between OCERS and its membership class and associations."

ORANGE COUNTY OCERS EMPLOYEES RETIREMENT SYSTEM

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The Board's Options Respecting the Hearing Officer's Report

Government Code section 31534[3] outlines the Board's options with respect to the Hearing Officer's Report. Section 31534 states, in pertinent part, as follows:

> . . . Upon receiving the proposed findings of fact and the recommendations of the referee, the board may:
>
> (a) Approve and adopt the proposed findings of fact and the recommendations of the referee, or
>
> (b) *Require a* transcript or *summary of all the testimony, plus all other evidence received by the referee. Upon receipt thereof the board shall take such action as in its opinion is indicated by such evidence*, or
>
> (c) Refer the matter back with or without instructions to the referee for further proceedings, or
>
> (d) Set the matter for hearing before itself. At such hearing the board shall hear and decide the matter as if it had not been referred to the referee.
>
> (Emphasis added.)

Staff concurs in the ultimate outcome of the Hearing Officer's Report as set forth in the First Recommended Decision[4], which found that the computation of Morell's retirement allowance was accurate, but strongly disagrees with the Second Recommended Decision and the Proposed Conclusions of Law that support the Second Recommended Decision.

Staff therefore recommends the Board, pursuant to Government Code section 31534(b):

(1) Review the Hearing Officer's Report as "a summary of all the testimony, plus other evidence received by the referee"; and

(2) Take "such action as in its opinion is indicated by such evidence."

And, the action that the Board should take, based on such evidence, is to uphold staff's computation of Morell's retirement allowance, which excluded OBP from final average salary. The bases for staff's recommendations are set forth below.

Bases for the Recommendation

Exclusion of Flexible Benefits from Final Average Salary is Proper Under Government Code section 31460.1

In 1990, the Legislature enacted Government Code Section 31460.1 (effective January 1, 1991), which excluded from the definition of "compensation" cash payments to employees that are part of a flexible benefit plan.

[3] Section 19 of OCERS Board Policy – Administrative Hearing Procedures (adopted February 19, 2002) mirrors the provisions of Government Code section 31534.

[4] See footnote 2, above.

ORANGE COUNTY OCERS EMPLOYEES RETIREMENT SYSTEM

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Section 31460.1 stated as follows:

> "Compensation" shall not include employer payments, including cash payments, made to, or on behalf of, their employees who have elected to participate in a flexible benefits program, where those payments reflect amounts that exceeds [*sic*] . . . their employees' salaries.
>
> This section shall not be operative in any county until the time the board of supervisors shall, by resolution adopted by majority vote, makes [*sic*] this section applicable in the county.

Section 31460.1 was adopted by the Orange County Board of Supervisors on December 18, 1990, by Resolution 90-1551.

In 1992, the Legislature repealed Section 31460.1, but specifically stated that the repeal was not intended to affect the validity of any action taken by a county pursuant to Section 31460.1 prior to the effective date of the repeal. The Hearing Officer agreed and stated, "The 1992 repeal of Government Code section 31460.1, which had excluded from compensation all employer payments made toward flexible benefits programs, did not invalidate the Board of Retirement's Resolution No. 90-1551[5], which reiterated former section 31460.1." (Proposed Conclusion of Law #3.) Staff agrees that Section 31460.1 applies to OCERS and excludes flexible benefits from final average salary.

Exclusion of Flexible Benefits from Final Average Salary is Proper Under Resolution 98-001 and the 2002 Settlement Agreement

In 1998, the OCERS Board adopted Resolution 98-001, and defined the items of pay that would be included and excluded in compensation earnable for OCERS. Resolution 98-001 specifically *excluded* from compensation earnable flexible benefits paid in cash, such as the OBP payments paid to Morell.

Several years of litigation regarding the propriety of Resolution 98-001 ensued after its adoption. Ultimately, the litigation was settled, by the 2002 Settlement Agreement, on a class action basis, binding all past, current, and future OCERS members including but not limited to retirees, deferred retirees, active employees and all of the members' survivors, beneficiaries, agents, assigns, representatives and successors in interest. The court-approved settlement agreement provided that Resolution 98-001 was final and binding; and that the parties, including each class member, would not appeal from, seek modification of, or otherwise challenge the judgment.

At the hearing on this matter, Morell argued that the 2002 Settlement Agreement either does not bind him or is invalid. The Hearing Officer disagreed, and stated, "Applicant has not demonstrated by a preponderance of the evidence that he is exempt from the terms of the 2002 settlement agreement," (Proposed Conclusion of Law #5) and "[e]ven if Applicant so demonstrated, the Hearing Officer is not empowered to void the settlement agreement in a manner that would enable to Board to recalculate Applicant's retirement benefit allowance in his favor." (Proposed Conclusion of Law #6.) The Hearing Officer therefore recommended in the First Recommended Decision that "the computation of Applicant's retirement allowance be maintained as accurate in light of the 2002 agreement that settled the litigation between OCERS and its membership class and associations." Staff agrees. And the Hearing Officer should have stopped there.

[5] Resolution 90-1551 is a resolution of the Orange County Board of Supervisors, not of the OCERS Board.

ORANGE COUNTY OCERS EMPLOYEES RETIREMENT SYSTEM

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Instead, the Hearing Officer went far beyond the scope of his engagement and the matter presented to him by delving into case law (*Ventura County*) that is not relevant in light of Board Resolution 98-001 and questioning the wisdom of a binding court-approved settlement that was entered into 16 years ago.

In Proposed Conclusion of Law #4, the Hearing Officer concluded that the Board's adoption of Resolution 98-001 conflicted with statutory and judicial authority treating flexible benefits as pensionable compensation when received directly as cash. Staff respectfully disagrees.

First, Resolution 98-001 is clearly valid. With respect to flexible benefit payments, Resolution 98-001 was based upon Government Code section 31460.1; notably (and not coincidentally), Resolution 98-001 excluded OBP paid in cash to members retiring on or after January 1, 1991, the effective date of section 31460.1. Although section 31460.1 was subsequently repealed by the Legislature, the repeal specifically did not invalidate actions taken pursuant to 31460.1, including Resolution 90-1551, which reiterated 31460.1. Moreover, after years of litigation, Resolution 98-001 was declared valid by the 2002 Settlement Agreement, a court-approved settlement agreement that even the Hearing Officer acknowledged (in Proposed Conclusion of Law #5) is binding upon Morell.

Second, the finding by the Hearing Officer that Resolution 98-001 conflicted with statutory and judicial authority was quite obviously unnecessary to disposition of Morell's appeal because even with this finding, the Hearing Officer concluded, in the First Recommended Decision, that the calculation of Morell's benefit, which excluded OBP, was accurate. The Hearing Officer should have stopped there – he did not need to consider whether Resolution 98-001 conflicted with statutory and judicial authority in order to determine that Morell's benefit was accurately calculated. Proposed Conclusion of Law #4 therefore exceeds the scope of the Hearing Officer's engagement and is unnecessary to the disposition of Morell's appeal.

Similarly, Proposed Conclusion of Law #1,[6] which discusses cash payments received in lieu of reimbursement for in-kind advantages under Government Code section 31460 and the *Ventura County* decision, and Proposed Conclusion of Law #2,[7] which discusses OBP for in-kind benefits not paid as cash, are irrelevant and unnecessary to the matter at hand in light of Resolution 98-001, which clearly excludes OBP whether provided in-kind or paid in cash, and the 2002 Settlement Agreement, which validated Resolution 98-001.

The Hearing Officer's Second Recommended Decision recommends that "the Board reexamine the portion of the settlement that excludes from pensionability flexible benefits received by employees as taxable cash, and that the Board consider pursuing an amendment of the Superior Court judgment on the basis that it precludes taxable cash received under the Optional Benefit Plan from counting in the determination of final compensation." The court-approved settlement that the Hearing Officer thinks should now be "reexamined" by OCERS and amended dates back 16 years, followed after several years of litigation, was reflected in a judgment issued by the court and was made binding upon all past, current, and future OCERS members, and expressly

[6] Proposed Conclusion of Law #1 states, "Under Government Code section 31460 and *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, cash payments received in lieu of reimbursement for in-kind advances comprise compensation earnable for purposes of the County Employees Retirement Law."

[7] Proposed Conclusion of Law #2 states, "Payments through flexible benefit programs for in-kind benefits such as health care are not compensation for retirement law purposes. Such payment constitutes the monetary value of advantages furnished to the member and is not compensation under Government Code section 31460 or *In re Retirement Cases* (2003) 110 Cal.App.4th 426."

ORANGE COUNTY OCERS EMPLOYEES RETIREMENT SYSTEM

Memorandum

stated that the parties, including OCERS and each class member, would not appeal from, seek modification of, or otherwise challenge, it.

Staff submits that it would not be appropriate (or even permissible under the terms of the 2002 Settlement Agreement and judgment) for OCERS to reexamine or seek a modification of the 16-year old settlement and judgment. Moreover, Staff submits that the Hearing Officer has acted beyond the scope of his engagement and authority in including in the Second Recommended Decision in his findings.

Conclusion

For all of the aforementioned reasons, staff recommends that the Board:

1. Adopt, as its own, the following Conclusions of Law:
   - Government Code Section 31460.1 (effective January 1, 1991; repealed May 11, 1992) excluded from the definition of "compensation" cash payments to employees that are part of a flexible benefit plan;
   - The Orange County Board of Supervisors adopted Government Code section 31460.1 by Resolution 90-1551;
   - The 1992 repeal of Government Code section 31460.1 did not invalidate Resolution 90-1551;
   - OCERS Board Resolution 98-001 was validated by the court-approved 2002 Settlement Agreement (defined below) and excludes from compensation earnable flexible benefits paid in cash to the extent paid to members retiring on and after January 1, 1991; and
   - Morell is not exempt from the terms of the 2002 Settlement Agreement;
2. Enter its Decision upholding staff's calculation of Morell's retirement allowance, which excluded flexible benefits from final average salary; and
3. Direct staff to prepare Final Findings of Fact, Conclusions of Law and Decision consistent with the aforementioned recommendations.

Although staff's recommendation would not affect the ultimate result of the Administrative Hearing, and would not affect the calculation of Morell's benefit as determined by the Hearing Officer, out of an abundance of caution staff recommends the Board direct staff to serve the Final Findings of Fact, Conclusions of Law and Recommended Decision on Morell and provide him with ten days from such service to file and serve written objections with the Board. The matter would then be placed on the agenda of the next available regular meeting of the Board at which time the Board will take final action. In addition, Morell will have the opportunity to further appeal the Board's decision by filing a Petition for Writ of Mandate in the Superior Court.

Attachments

(1) Proposed Findings of Fact, Conclusions of Law, and Recommended Decision of November 29, 2017

(2) Hearing Officer's Response to Applicant's Objections and Request for Clarifications on January 31, 2018

Memorandum

Submitted by:



Gina M. Ratto
General Counsel

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
BOARD OF RETIREMENT
2223 E. WELLINGTON AVENUE, SUITE 100
SANTA ANA, CALIFORNIA

REGULAR MEETING
Monday, August 20, 2018
9:00 a.m.

MINUTES

Chair Prevatt called the meeting to order at 9:06 a.m.

Attendance was as follows:

Present: Chris Prevatt, Chair; Chuck Packard, Vice-Chair; David Ball; Roger Hilton; Shawn Dewane; Frank Eley; Russell Baldwin, and Wayne Lindholm

Also Present: Steve Delaney, Chief Executive Officer; Brenda Shott, Assistant CEO, Finance and Internal Operations; Suzanne Jenike, Assistant CEO, External Operations; Molly Murphy, Chief Investment Officer; Jenny Sadoski, Director of Information Technology; Gina Ratto, General Counsel; Anthony Beltran, Visual Technician; Cammy Torres, Recording Secretary.

Absent: Shari Freidenrich and Harvey Leiderman

Mr. Baldwin led the Pledge of Allegiance.

Mr. Jeremy Vallone was sworn in by Mr. Hilton, OCERS Board Member.

Ms. Shott introduced Matt Eakin, Director of Cyber Security, to the OCERS Board.

CONSENT AGENDA

All matters on the Consent Agenda are to be approved by one action unless a Board Member or a member of the public requests separate action on a specific item.

A **motion** was made by Mr. Ball **seconded** by Mr. Baldwin to approve the consent agenda.

Motion passed **unanimously**.

BENEFITS

C-1A OPTION 4 RETIREMENT ELECTION

Recommendation: Grant service connected disability retirement with an effective date of February 19, 2016.

DC-9 DISABILITY APPLICATION-DANIEL QUINTANA
Laborer, Orange County Waste and Recycling, General Member

Recommendation: Grant non-service connected disability retirement with an effective date of December 7, 2017.

CLOSED SESSION
(Government Code sections 54957 and 54956.9)

The Board will adjourn to Closed Session pursuant to Government Code sections 54957 or 54956.9 to discuss matters relating to member applications or appeals. The member may request that the discussion relating to his or her application or appeal take place in Open Session.

Chair Prevatt called item DA-2. He announced that the Board will first go into closed session to get advice on procedural matters from its fiduciary counsel.

The Board adjourned to closed session at 10:04a.m.

The Board reconvened from closed session at 10:30a.m.

No reportable action taken.

ACTION ITEMS

DA-1: INDIVIDUAL ACTION ON ANY ITEM TRAILED FROM THE DISABILITY CONSENT AGENDA

DA-2: MEMBER BENEFIT APPEAL - JAMES MORELL
Research Attorney, Orange County Superior Court, General Member

Recommendation: Staff recommends that the Board, pursuant to California Government Code Section 31534(b):

1. Review the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommended Decision ("Hearing Officer's Report") as a summary of testimony and evidence in the case;
2. Based on such evidence, adopt the following Conclusions of Law:
   - Government Code Section 31460.1 (effective January 1, 1991; repealed May 11, 1992) excluded from the definition of "compensation" cash payments to employees that are part of a flexible benefit plan;

- The Orange County Board of Supervisors adopted Government Code section 31460.1 by Resolution 90-1551;
- The 1992 repeal of Government Code section 31460.1 did not invalidate Board Resolution 90-1551;
- Board Resolution 98-001 was validated by the court-approved 2002 Settlement Agreement (defined below) and excludes from compensation earnable flexible benefits paid in cash to the extent paid to members retiring on and after January 1, 1991; and
- Applicant, James Morell (Morell) is not exempt from the terms of the 2002 Settlement Agreement;

3. Enter its Decision upholding staff's calculation of Morell's retirement allowance, which excluded flexible benefits from final average salary; and
4. Direct staff to prepare Final Findings of Fact, Conclusions of Law and Decision and serve them on Morell. Morell will have ten days from such service to file and serve written objections with the Board. The matter will be placed on the agenda of the next available regular meeting of the Board at which time the Board will take final action.

Mr. Ball stepped out at 10:38a.m.
Mr. Ball returned at 10:41a.m.

A **motion** was made by Mr. Packard, **seconded** by Mr. Hilton to accept staff recommendation and proceed under section 31534(b).

Motion passed **unanimously**.

Chair Prevatt announced: "On advice of Fiduciary Counsel, we are setting aside the Hearing Officer's report and recommendations; that will not be on the table before us. What we intend to address is solely the issue of whether OCERS and the Applicant are bound by the 2002 Settlement Agreement and Judgment, and whether OCERS calculated Applicant's allowance in accordance with the Settlement Agreement and Judgment. We will consider the evidence on that issue only. That is the evidence that led the Hearing Officer to conclude that the Applicant is not entitled to have his Optional Benefits cash payments included in the calculation of his retirement allowance. The burden is on the Applicant to show that the parties are not bound by the Settlement Agreement and Judgment or that OCERS was not in compliance with them."

Mr. Morell, applicant, addressed the OCERS Board.

Mr. Dewane stepped out at 10:48a.m.
Mr. Dewane returned at 10:50a.m.

After further discussion, a second **motion** was made by Mr. Eley, **seconded** by Mr. Packard to deny the application.

Motion passed **unanimously**.

Chair Prevatt stated: "The Chair directs Staff to prepare Proposed Findings, Conclusions of Law and Recommended Decision (Rule 21, OCERS Admin Hearing Procedures) – limited to our determination (a) that OCERS and the Applicant are bound by the Settlement Agreement and Judgment, and (b) that OCERS did calculate Applicant's retirement allowance in accordance with the Settlement Agreement

and Judgment. The Parties are to follow the timetable in the Rules and the matter likely will come back before the Board for entry of our final determination at the October regular Board meeting. This concludes Item DA-2."

Ms. Ratto assured Mr. Morell that his statements were all included in the administrative record that was provided to the OCERS Board.

BOARD MEMBER COMMENTS

N/A

CHIEF EXECUTIVE OFFICER/STAFF COMMENTS

OCERS is in the early stages of preparing for the upcoming 75th anniversary, which will take place in 2020.

In gearing up for that milestone, Ms. Anna Crosson, who began her OCERS career when hired by the County of Orange in May 1946, attended the August 20, 2018 Board meeting.

The Board watched a video interview of Ms. Crosson and then presented her with a welcome cake.

Ms. Hockless provided the August 2018 staff updates.

Board recessed to break at 11:35a.m.
Board reconvened from break at 11:42a.m.

COUNSEL COMMENTS

N/A

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ADJOURNMENT: (IN MEMORY OF THE ACTIVE MEMBERS, RETIRED MEMBERS, AND SURVIVING SPOUSES WHO PASSED AWAY THIS PAST MONTH)

Retired Members
Batchelder, Norman
Blohm, Pauline
Bruney, Joseph
Crum, Arlene
Descoteaux, Normand
Dickson, Donald
Enright, James
Fobber, Melinda
Herbel, Glenn
Hernandez, Leticia
Hill, Celestina
Irvin, Richard
Kim, Itara

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
BOARD OF RETIREMENT

IN RE:)
)
ITEM DA-2:)
)
MEMBER BENEFIT APPEAL -)
JAMES MORELL.)
_____)

REPORTER'S TRANSCRIPT OF
EXCERPTED PORTION OF VIDEOTAPED PROCEEDINGS
Monday, August 20, 2018
Santa Ana, California

Reported by:
LAURIE HELD-BIEHL
CA CSR No. 6781
IL CSR No. 084002860
NJ CCR No. 30XI00239100
TX CSR No. 8555
RPR/CRR No. 32836
JOB No. 311266

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
BOARD OF RETIREMENT

IN RE:)
)
ITEM DA-2:)
)
MEMBER BENEFIT APPEAL -)
JAMES MORELL.)
_____)

Reporter's Transcript of Excerpted Portion of Videotaped Proceedings, pages 1 through 51, proceedings dated Monday, August 20, 2018, transcribed Monday, February 18, 2019, in Irvine, California, by LAURIE HELD-BIEHL, California Certified Shorthand Reporter No. 6781, Illinois Certified Shorthand Reporter No. 084002860, New Jersey Certified Court Reporter No. 30XI00239100, Texas Certified Shorthand Reporter No. 8555, and Registered Professional Reporter, Certified Realtime Reporter No. 32836.

APPEARANCES:

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
BOARD OF RETIREMENT TRUSTEES:

CHRIS PREVATT, Chairman
CHUCK PACKARD, Vice Chairman
DAVID BALL, Trustee
ROGER HILTON, Trustee
SHAWN DEWANE, Trustee
FRANK ELEY, Trustee
RUSSELL BALDWIN, Trustee
WAYNE LINDHOLM, Trustee

GINA RATTO, ESQ., General Counsel
HARVEY LEIDERMAN, ESQ., Fiduciary Counsel
REED SMITH, LLP

JAMES MORELL, ESQ., In Propria Persona

STEVE DELANEY, Chief Executive Officer

BRENDA SHOTT, Assistant CEO, Finance and Internal Operations
SUZANNE JENIKE, Assistant CEO, External Operations

MOLLY MURPHY, Chief Investment Officer

JENNY SADOSKI, Director of Information Technology
ANTHONY BELTRAN, Visual Technician
CAMMY TORRES, Recording Secretary

Santa Ana, California

Monday, August 20, 2018

CHAIRMAN PREVATT: All right.

What's next?

VICE CHAIRMAN PACKARD: DA-2, member benefit appeal.

CHAIRMAN PREVATT: Okay. DA-2 is a member appeal.

I'm going to have the Board go into closed session to -- with our fiduciary counsel to discuss -- to discuss our options and things that we can do.

Anything I need to add to that, Mr. Leiderman?

Okay. Cool.

All right. So we're going to go back into the back for probably five, ten minutes; we'll be back.

(Closed session - not on public record.)

CHAIRMAN PREVATT: All righty. Gina, you ready for us?

Okay. I'm going to call us back into session.

Nothing to report out of closed session.

Gina.

MS. RATTO: Thank you very much.

For the record, this is agenda item DA-2, member benefit appeal by OCERS member James Morell.

I wanted to get a couple things on the record before we start today.

First of all, I am Gina Ratto and I'm the OCERS general counsel. And in this matter, I am acting in the capacity as advocate for the OCERS staff position in this case.

Conversely, Mr. Leiderman, of the law firm of Reed Smith, who serves as the Board's fiduciary counsel, will today be serving in the role of the Board's legal advisor on this matter.

I would also note for the record that the Applicant, Mr. James Morell, is in the audience.

And, finally, that we are in open session, as the member requested that we conduct this meeting or this portion of our meeting in open session.

Before the Board today are the proposed findings of fact, conclusions of law and recommended decision of the Hearing Officer, Robert Snyder, following an administrative hearing that took place on May 5, 2017.

Staff's recommendation is that the Board review the Hearing Officer's findings as a summary of the testimony and evidence in this case and then, based on such evidence, adopt its own decision.

The Board has also been provided with a copy of the over-900-page administrative record in this case, which includes a transcript of the hearing.

The decision that staff is recommending today is that the Board uphold the staff's calculation of the member's retirement allowance on the authority of former Government Code Section 31460.1, OCERS Board Resolution 98-001 and the 2002 Settlement Agreement in the re: retirement cases.

The question before the Board today, and the question that was before the Hearing Officer in May of 2017, was simply whether OCERS staff properly excluded from Mr. Morell's compensation earnable the $3,500 in flexible benefits Mr. Morell received partly in cash and partly in healthcare reimbursements. The answer is yes.

The answer is yes under former Government Code Section 31460.1, adopted by the Orange County Board of Supervisors in 1990. And the answer is yes under OCERS Board Resolution 98-001.

Resolution 98-001 was adopted by this Board over 20 years ago and has been relied upon by OCERS staff to calculate retirement benefits of thousands of OCERS members.

The resolution lists, with specificity, the items of remuneration that will be included in and excluded from an OCERS -- OCERS member's compensation earnable. It expressly states that "flexible benefits, to the extent paid in cash to members retiring on or after January 1, 1991, are to be excluded from compensation earnable." It also states that "flexible benefits provided in kind will be excluded."

The portion of the resolution that excludes flexible benefits paid in cash to members like Mr. Morell, who retire on or after January 1, 1991, is based on a res- -- based on a section of the CERL, Section 31460.1, that was made operative in Orange County by the Board of Supervisors in 1990.

This section of the CERL defined "compensation" to "exclude employer payments, including cash payments, made to or on behalf of employees who have elected to participate in a flexible benefits program."

Government Code Section 31460.1 was

subsequently repealed by the legislature; however, the legislature was clear that the repeal would not affect the validity of any action taken by a county pursuant to the section prior to the effective date of the appeal -- repeal.

Further, to the extent that there is any question about the language of Section 31460.1 and whether it applies to Mr. Morell, because he claims to not have elected his flexible benefits, I disagree with that argument. But in addition, the question is moot because Section 31460.1 is memorialized and incorporated into Resolution 98-001.

And, further, any questions regarding the validity of Resolution 98-001 have been fully and finally resolved by a Class Action Settlement Agreement entered into in 2002 among OCERS' various employee organizations and a class of plaintiffs consisting of all past, present and future members of OCERS, including Mr. Morell.

The 2002 Settlement Agreement stated that "each of the parties agreed to accept as final and binding the inclusions in and exclusions from compensation earnable as set forth in Resolution 98-001."

The Settlement Agreement was re- -- reviewed

and approved by the Court and stated that "The Court's judgment would be final and binding on all of the parties." And that "Each of the class members agreed to not appeal from, seek modification of, or otherwise challenge the judgment."

The Settlement Agreement could not be more clear. Resolution 98-001 could not be more clear.

And under the plain and unambiguous words of Resolution 98-001, the flexible benefits that Mr. Morell received, partly in cash and partly in kind as healthcare reimbursements, are properly excluded from the calculation of his compensation earnable.

Staff asks that the Board enter its decision in this matter upholding the staff's calculation of Mr. Morell's benefit, again, under the authority of Government Code Section 31460.1, Resolution 98-001 and the 2002 Settlement Agreement.

CHAIRMAN PREVATT: And do I have a motion with regard to staff's recommendation?

VICE CHAIRMAN PACKARD: So moved.

CHAIRMAN PREVATT: Moved by Mr. Packard.

TRUSTEE HILTON: I'll second.

CHAIRMAN PREVATT: Second by Mr. Hilton.

Discussion from Trustees?

Any comment from staff or the member?

Mr. Morell, you --

(Inaudible comment from member of the audience.)

CHAIRMAN PREVATT: Mr. Morell, if you would like to speak on this particular issue related to the staff recommendation, you may approach the podium and speak.

MR. MORELL: Well --

CHAIRMAN PREVATT: I'm sorry, Mr. Morell.

I need you to speak at the podium because the meetings are recorded.

TRUSTEE ELEY: And state your name.

MR. MORELL: I -- I'm not sure whether the -- this opportunity to speak is the only opportunity for --

CHAIRMAN PREVATT: It's not. It's not.

There will be another opportunity --

MR. MORELL: Well, however you'd like me to do it.

I mean, the -- the issues she raised are the same issues I'd like to talk about. I can do it as a response to her. It wouldn't be particularly in response to her because they're the same issues that the Referee addressed, he discussed -- addressed them

all; so I guess how you'd like to do it is up to you really.

CHAIRMAN PREVATT: Okay. Let me defer to Mr. Hilton, he's the chair of the Disability Committee.

TRUSTEE HILTON: Just for safety purposes, can you put your briefcase on the ground?

Thank you.

MR. MORELL: Oh, sure.

TRUSTEE ELEY: And for the record could he state his name?

TRUSTEE HILTON: And I need you to speak into the mic, too.

Thank you.

CHAIRMAN PREVATT: And state your name, please.

I'm sorry.

MR. MORELL: James Morell.

CHAIRMAN PREVATT: Okay. So what this opportunity would be for is for you to address us related to the recommendation by staff for finding --

I'm sorry, Gina, refresh my memory, (b)? I'm sorry, staff recommendation to proceed under 31534(b) and then --

MR. MORELL: Which is what? I'm sorry.

MS. RATTO: So this Board has four different

options whenever considering a Hearing Officer's decision.

The -- the first is to adopt the Hearing Officer's decision outright;

The second -- all of these are outlined in Government Code Section 31534, Subdivision (b).

The second opportunity or option is to accept the -- or is to review the Hearing Officer's -- or review a summary of the testimony and evidence in the case and then, based on that evidence, reach its own decision in the matter. That is the option that we're recommending.

And then a further option is for the Board to hold its own hearing in this matter.

MR. MORELL: I -- I -- I have no problem with that recommendation.

CHAIRMAN PREVATT: Okay.

MR. MORELL: I think it would be probably the most useful way to proceed, frankly.

CHAIRMAN PREVATT: All righty. So on that particular issue, we're in agreement; so you can go ahead and have -- have a seat.

MR. MORELL: Sure.

CHAIRMAN PREVATT: And then we'll have -- probably have another opportunity for you to speak.

MR. MORELL: Sure.

CHAIRMAN PREVATT: Okay. Thank you.

All right. Go ahead.

MR. DELANEY: I'm sorry, Counsel, just to -- I want to make sure counsel keeps this on the straight and narrow here.

So the motion by boardmembers was to accept staff's recommendation.

Do we understand that to be acting under 31534(b), is that the full set of the motion? Or do you understand the motion by the Board to be broader than that?

MS. RATTO: I understand the motion to be what you first stated, that -- to make a -- to accept the --

To review the Hearing Officer's proposed findings of fact, conclusions of law and recommended decision as a summary of testimony and evidence in the case under 31534, Subdivision (b), and make its own decision based on that evidence. And the -- and the decision that we are recommending is that the Board uphold staff's recommended -- or staff's calculation of -- of the retirement benefit.

MR. DELANEY: Thank you for that.

CHAIRMAN PREVATT: Thank you.

Mr. Leiderman.

MR. LEIDERMAN: Thank you, Mr. Chairman.

As a procedural matter, if I understood the motion and the -- and the Chair's instruction to the Applicant, those would be split. The first would --

The Board would act on whether or not to adopt staff's recommendation to proceed in the manner that staff outlined under (b), and that would be voted on by the Board, and then there would be consideration of the matter on its merits, if I understand the maker of the motion correctly.

TRUSTEE HILTON: Obviously, I seconded it.

CHAIRMAN PREVATT: Say yes.

TRUSTEE HILTON: Second.

CHAIRMAN PREVATT: No. No.

You made the motion; you're in agreement?

VICE CHAIRMAN PACKARD: I'm in agreement, yes.

TRUSTEE HILTON: Second it. The second is also in agreement.

CHAIRMAN PREVATT: Okay. All righty.

So on -- on the motion, please vote on your machines.

That was even too quick for me.

Okay. That motion carries unanimously.

Okay. On advice of fiduciary counsel, we're

setting aside the Hearing Officer's report and recommendations, that will not be on the table before us. What we intend to address is solely the issue of whether OCERS and the Applicant are bound by the 2002 Settlement Agreement and Judgment, and whether OCERS calculated the Applicant's allowance in accordance with the Settlement Agreement and Judgment.

We will consider the evidence on that issue only; that is evidence that led the Hearing Officer to conclude that the Applicant is not entitled to have its optional benefits cash payments included in the calculation of his retirement allowance.

The burden is on the Applicant to show that the parties are not bound by the Settlement Agreement and Judgment, or that OCERS was not in compliance with them.

And so I'd like to open for staff and Applicant presentations.

I'll start with staff.

MS. RATTO: The -- the Settlement Agreement that was entered into in 2002, first of all, it grew out of a -- a -- a -- an action that was filed by OCERS for declaratory relief seeking a declaration that Resolution 98-001 was valid. As a result of that --

Then there were subsequently several

lawsuits that were filed by members and the cases were then consolidated into one case which then subsequently produced the 2002 Settlement Agreement.

The 2002 Settlement Agreement, as I mentioned, is -- is very clear. It incorporates the provisions and attaches the pro- -- Board Resolution 98-001 which this Board had adopted subsequent to the -- the case decision in the Ventura County cases.

The -- the Settlement Agreement, in incorporating Resolution 98-001, very clearly delineates and -- and blesses, if you will, this Board's determination of what items of compensation will be included in what is known as compensation earnable.

The -- the Settlement Agreement was -- it was a class action lawsuit that was binding on all current, past, and future members of OCERS.

There was notice given, pursuant to the Court's instruction, to all of the parties and an opportunity to opt out of the Settlement Agreement. Ultimately, there were no challenges to the Settlement Agreement and it was approved by the Court and memorialized in a judgment by the Court.

It's also very clear that the -- that the

settlement was not only binding but that it could not be challenged. There was a provision in it that -- that specifically stated that no party to it could, in the future, seek an amendment, modification of it, or challenge it; so very -- very strong language on that -- on that point.

I would also point out that in the 19- -- I'm sorry, the 2013 decision of the Court in Chisom v. Board of Retirement of Fresno County, the -- the Court was reviewing a -- a similar settlement agreement that came out of similar lawsuit and challenge. It was actually not the Ventura County case but it's called the Ven- -- Ventura County 2 cases because there were many cases that were filed subsequent to the Ventura County case.

But in any event, the -- the Court in Chisom found that a settlement agreement with similar language as the one that -- that's before us today, or in question today, that the effect of that was to waive and release the retirement system's members' subsequent claims that they had a right to enhanced benefits that would contradict the express terms of the settlement agreement.

So here we have a Settlement Agreement that expressly incorporates the terms of

Resolution 98-001. It is, without question, binding on all of the parties, including OCERS and including Mr. Morell.

And in my opinion, that's the end of the discussion.

CHAIRMAN PREVATT: Okay. Any questions for staff?

TRUSTEE ELEY: Not on that part.

CHAIRMAN PREVATT: Great.

Mr. Morell.

MR. MORELL: I'm not sure exactly what we just did procedurally. I --

Can I assume that the record that was created through the hearing -- the administrative hearing process is still valid? Or do we have to start just totally de novo from scratch?

VICE CHAIR PACKARD: He has three minutes.

CHAIRMAN PREVATT: Mr. Leiderman --

MR. MORELL: I mean, there was a lot of evidence taken in this case.

CHAIRMAN PREVATT: Right.

MR. MORELL: I just want to know do we throw out the entire hearing --

CHAIRMAN PREVATT: Mr. Leiderman, could you answer that for me?

MR. MORELL: -- administrative hearing procedure or --

CHAIRMAN PREVATT: Okay. Mr. Morell, let me have Mr. Leiderman answer that question for us.

MR. LEIDERMAN: Thank you, Mr. Chairman.

The entire record that was submitted to the Board is still before the Board under the sub- -- under Subsection (b). The Board is considering that but the Board is not -- is not considering the findings and recommendations of the Hearing Officer.

CHAIRMAN PREVATT: Okay.

MR. MORELL: As -- as such, I guess.

I -- I -- I would hope that the -- the Board would, nonetheless, consider the reasoning of the Hearing Officer that's embodied in his decisions.

CHAIRMAN PREVATT: We would not be doing that.

MR. MORELL: I'd be happy --

Okay. This is going to take a while, then. Sorry.

CHAIRMAN PREVATT: Yeah.

I mean, Mr. Morell, just to clarify --

MR. MORELL: Sure.

CHAIRMAN PREVATT: -- what we're asking you to do is to explain to us or demonstrate to us why we are not bound by the Settlement Agreement, both you

and OCERS, and --

MR. MORELL: Sure.

CHAIRMAN PREVATT: -- and --

And with regards to that; so that's --

TRUSTEE ELEY: And why he's exempt.

CHAIRMAN PREVATT: And why you would be exempt from that decision; so that's --

MR. MORELL: Okay. This may take a while.

I didn't realize we were actually throwing out the Referee's rulings. I -- I thought we were just deciding not to adopt his recommendations as such, which, obviously, they were adverse to me based on the Settlement Agreement, that's why I didn't want them to be adopted as such.

TRUSTEE BALL: Mr. Chairman --

CHAIRMAN PREVATT: Yes.

TRUSTEE BALL: -- just is a point of clarification.

We're not attempting to create a new record are we, Mr. Leiderman?

MR. LEIDERMAN: Under the statute, the Board has decided to consider all the record, the evidence in the record, which includes the testimony and the evidence that was submitted to the Hearing Officer, and make its own independent judgment based on that

on the issues that the -- the Board wishes to hear, which is whether or not the Settlement Agreement is a binding document and whether or not OCERS calculated the Applicant's benefits in accordance with the Settlement Agreement.

MR. MORELL: Okay. Now, I got the record -- the evidence part.

What about the briefs that I submitted?

I submitted a 40-page brief, okay, and a -- a prehearing statement which set forth my arguments, and -- and a supplemental prehearing statement which proposed specific factual conclusions and -- factual findings and conclusions of law. Those --

I would -- I would be happy to rest on that --

CHAIRMAN PREVATT: Okay.

MR. MORELL: -- if -- if --

I would -- I would hope that that is also still before the Board.

CHAIRMAN PREVATT: Ms. --

MR. MORELL: I spent an awful lot of time on that. I can --

CHAIRMAN PREVATT: Right.

MR. MORELL: I can read them, if you'd like, into the record; that would probably take us well

into the afternoon.

CHAIRMAN PREVATT: Yes.

We have received all of your information and have reviewed everything that is part of the administrative record thus far.

MR. MORELL: Okay. And that includes the briefs?

CHAIRMAN PREVATT: So we've reviewed all of that material. It does.

MR. MORELL: All right. Great. Thank you. Then I won't --

In that case, good. Thank you, I can just proceed.

I've got a -- kind of a two-page summary here; I'll just try to hit the highlights.

CHAIRMAN PREVATT: Cool.

MR. MORELL: Feel free to interrupt if you have questions about anything. This is, to my mind at least, somewhat complex.

Okay. I retired in February 2014 from my position as a senior research attorney at the Orange County Superior Court. I had been hired in 1992, August 1992, which was after some of these statutory events occurred.

As you know, there is an Optional Benefit

Plan which -- which says you get $3,500, which you can then -- each year, annually, you can then allocate, during the open enrollment period, to certain specified uses, in which case you get the money to use on a pretax basis under the IRS Code. Or if you do nothing, or if you make a specific election to take part of that money as cash, you will get the cash in the -- in the first pay period of the new year.

Now, that amount was $3,500. Each November the attorneys were permitted to make --

This is an irrevocable election. Most of the elections, at least the ones I took -- I chose to elect, the allocations involved reimbursement for specific expenses, mainly the healthcare deductibles for -- for health insurance.

Now, I received -- well, it's in the record.

Suffice it to say, for the pertinent years in question I took part in cash and part in -- in -- in reimbursement payments.

Now, there's an issue I'll get to about whether those reimbursement payments should be considered as cash. I mean, they are cash payments, paid reimbursements, but they're still cash, but anyway.

Now, prior to 1990 there was no statute specifically relating to flexible benefits in the CERL. Prior to Ventura, it was generally assumed, I think, that retirement boards had discretion in -- in those matters.

Now, after Ventura, which was decided in 1997, the -- the OCERS attorney, Mr. Leiderman, actually, I'd -- I'd like to quote him, there were -- the -- the --

OCERS was considering how to respond in -- in response to the Ventura decision. And ultimately that resulted in Resolution 98-001.

Mr. Leiderman made a couple presentations -- presentations, one to an ad hoc committee, and this is in the record, and also to the full Board, one that came before the full Board, regarding the adoption of the Resolution 98-001.

I'd just like to quote what he said at one point. And this is in the administrative --

Maybe you guys want to take notes, it might be helpful here.

-- administrative record, page 334, this is right in there.

"In many instances the employer will arrange for certain benefits, insurance, and the like, to be

made available to the employee, or in some instances the employer will make cash available...a certain sum of cash available to the employee, for the purpose of the employee going out and obtaining the benefit. Flexible benefits, these flex benefits" -- "flex benefits, Cafeteria Plan Benefits that are paid in cash, under Ventura would be included in compensation earnable; however, in 1990 the State Legislature passed a law, an amendment to the '37 Act, which allowed Boards of Supervisors in each '37 Act County to step in and exclude all fringe benefits from the calculation of compensation and compensation earnable."

Now, the key point here, at least for my mind, what -- what I think everybody at least at that time, what the Board and Mr. Leiderman and everybody seemed to be in agreement on, was where he says "Cafeteria Plan Benefits that are paid in cash, under Ventura would be included in compensation earnable," but for the 1990 law which had been repealed at that point.

Okay. So then this -- this 19- --

Section 31460.1 said, and I'll quote it -- again, this is in the record at various points, I don't have a cite to it, but really you need to look

at it a little bit because there are some things about it, but --

I wish I had a PowerPoint here or something but I don't, unfortunately.

It says "Compensation," quote-unquote, "shall not include employer payments, including cash payments made to or on behalf of their employees who have elected to participate in a flexible benefits program where the" -- "where those payments reflect amounts that exceeds (sic)...their employees' salaries. This section" --

The second paragraph is "This section shall not be operative in any county until the time the board of supervisors shall, by resolution adopted by a majority vote, makes," again "(sic)," "this section applicable in the county."

Now, there are at least three noteworthy things about this statute. One is the distinction that makes of the type of benefits that were at issue, where they say "cash payments made to or on behalf of their employees"; so they're drawing a distinction there, "cash payments made to or on behalf of."

"On behalf of" is referring to -- I think everybody can agree, is -- is what's called in-kind

benefits, where a county will, as part of the pay package, provide certain benefits.

For example, the Superior Court, we have MCLE, minimum continuing education. The Court, each year, would buy a -- I forget what they call it but it's a -- it's a pass, it was a pass to certain State Bar provider courses where they bought that and the attorneys could go and attend the courses. That's something that was provided to the attorneys as a benefit. We didn't have to go out and pay for MCLE courses ourselves, we could use the pass provided by the Court.

CHAIRMAN PREVATT: Right.

MR. MORELL: That was an in-kind benefit.

Now, the other -- where they say "cash payments made to or on behalf of their employees," there is case law that -- that says that in-kind -- the reason it matters, in-kind benefits clearly are not recoverable under Ventura and -- and the subsequent decisions in- -- interpreting Ventura.

On the other hand, if it's simple direct cash payments, and it is clearly under C-E-R -- C-E-R-L. And, again, this is in the Referee's report, but I can't -- I guess I can't reference that but --

So it's -- it's in the statute. It's in -- I discuss it in my brief. And the -- it says "paid in cash"; so that's the standard under C-E-R-L, expressly under the statute, and under Ventura, "paid in cash."

Now --

So we've got case law that says if it's in-kind, it's not -- it can't be compensable -- included; if it's paid in cash, it must be included.

And the problem is -- it's considered a problem, for us at least in resolving this, is that in Orange County the -- it's -- at least as far as the reimbursements go, there's -- there's two things about the -- the OBP plan in Orange County that make it a little in between. It is in between.

First of all, this -- it's not a pure in-kind benefit. The -- the OB- -- the OBP benefits are not provided -- the county doesn't provide the benefits. What they do is they allow you to allocate the $3,500.

Now, if you do is -- what I -- if you do what I did, you'd get part of it in cash, which pretty clearly, I think everybody seems to agree, is a cash payment for purposes of the C-E-R-L and Ventura and -- and what -- and Mr. Leiderman's

analysis of it; however, when you have a reimbursement --

What these reimbursements do, they go through an agency. It's a third-party administrator that the county has set up to --

CHAIRMAN PREVATT: Mr. Morell -- Mr. Morell, I'm going to interrupt you a little bit.

MR. MORELL: Sure.

CHAIRMAN PREVATT: If you can help us by narrowing your conversation to how you're exempt from the Settlement Agreement and how this compensation is exempt from the Settlement Agreement --

MR. MORELL: Okay. Just --

CHAIRMAN PREVATT: -- that -- that would be helpful because we are bound by that and so we don't really have any --

MR. MORELL: I'm going to get to that.

CHAIRMAN PREVATT: -- discretion over that; so if you can get me to that, I'd appreciate it.

MR. MORELL: I promise I'm going to get to that, if you can bear with me --

I think, you know, frankly, from my perspective, even if -- even if the Settlement Agreement is not enforceable, which is really the -- it's not an issue of exemption, per se.

I mean, I know that the Referee put that in there and I don't -- I don't claim to be exempt, I don't claim to be exempt.

"Exemption" is an interesting word, it means the thing somehow excludes me.

No, it doesn't exclude me, I'm included. I was a member of the class. I wasn't represented in the litigation except by a class action counsel who I can --

I actually have correspondence from him I can read to you, who is not interested in helping me at this point.

I pointed out to Mr. Silver, who represented OCEA in the class action litigation, that as far as I'm aware, he's still class -- he's still class counsel. He's still represents -- supposed to represent me. Okay?

I'm a member of the class. I asked him to come down here today and assist in resolving this matter. He declined. I can read you the E-mail.

He also said that to his knowledge, to the best of his recollection, the non-issues -- this would -- okay, I'm kind of digressing here but this -- this issue of flexible benefits and their -- and their status under Resolution 98-001 was

never litigated in the class action lawsuit.

It was included, apparently Mr. Leiderman cleverly got it in, and -- on behalf of OCERS. And good job to him and good job to you.

But nobody raised the issue of whether this statute, which had been repealed, was still enforceable and still valid in regard to Orange County; that issue was not litigated.

Everyone assumed and there -- I have various citations to the record, you can read the brief, I'm arguing that the brief -- that the settlement is subject to rescission on the grounds of mistake of law. And that is a valid --

You can read it -- read my brief. You can read my brief. It is a valid grounds for setting aside any agreements where the parties are mistaken as to -- as to the applicable rules of law.

Now, it's quite clear everyone believed that 314. -- 31460.1 was still applicable in Orange County. Now, we have --

To get to all this, this is why -- you know, I -- you're kind of forcing me to produce all of this piecemeal. I want to talk about why it's not applicable in Orange County before I get to why the settlement is not -- is not binding.

It's a -- it's a long story. I mean, this is the route we've taken here --

CHAIRMAN PREVATT: Right.

MR. MORELL: -- it's a 40-page brief, I commend it to you, I can --

CHAIRMAN PREVATT: Well, we have -- we have read your material.

MR. MORELL: Okay. Well, all right.

CHAIRMAN PREVATT: We have read everything that you have presented.

MR. MORELL: All right. I'd like to just run through this. I know it's -- it's a little -- some of you are probably already aware of this; if you are, I apologize.

But, like I said, even if -- even if the -- even if the Settlement Agreement is not binding and I win on that point, there's still an issue, as far as I'm concerned, as to whether the reimbursement payments I received should be included or not; so there are a lot of issues here.

I don't -- I don't know --

A reimbursement is something that's paid in cash. It was paid from, like I say, a third party; the county puts money in on my behalf when I make an allocation to those pretax uses, it's then paid to me

for -- as reimbursement. That is cash to me.

Arguably -- I mean, the Referee concluded otherwise, we're not considering that. But that's an issue. Okay? We --

She didn't talk about it but it was paid -- ultimately it was paid to me as cash; so on a purely -- strict cash it came into my pocket, it was a reimbursement check, it was cash. Anyway, that's an issue.

And I don't know -- this is something I don't -- I'm not aware of.

You know, they -- under 98-001 you do allow these flexible benefits to be included for people who retired prior to 1991. I don't know, I'm assuming that you don't include reimbursement payments in that amount, I don't know.

Or do you include the full amount of the -- of the OBP benefit in that calculation for people who did retire prior to 1991? I don't -- I don't know how --

CHAIRMAN PREVATT: Yeah. I'm not prepared to answer that and I don't think it's relevant.

MR. MORELL: Okay. It's something to think about. I don't know.

I would be happy to --

CHAIRMAN PREVATT: Well, what I am going to ask you to do, though, is --

MR. MORELL: Yeah. Sure.

CHAIRMAN PREVATT: -- to take about five, seven minutes or so, summarize your argument to the best of your ability.

MR. MORELL: Okay.

CHAIRMAN PREVATT: We're narrowly constrained at this point by our decisions to consider whether or not --

MR. MORELL: Okay.

CHAIRMAN PREVATT: -- the staff has pursued the rules --

MR. MORELL: Right. Okay.

CHAIRMAN PREVATT: -- as established under the agreements that we have.

MR. MORELL: Okay. I'm doing my best. I'm sorry.

Like I say, this is --

CHAIRMAN PREVATT: No. And I understand --

MR. MORELL: Like I said, I filed a brief, it's a 40-page brief and it's --

CHAIRMAN PREVATT: Right.

And I want you to know --

MR. MORELL: Sure.

CHAIRMAN PREVATT: -- we have received all of the materials --

MR. MORELL: Okay. Okay.

CHAIRMAN PREVATT: -- more than 1,000 pages --

MR. MORELL: I -- I appreciate that.

CHAIRMAN PREVATT: -- so we've reviewed these, so --

MR. MORELL: Okay. So anyway, the -- two things about former section now.

This is the -- the issue, then, if 98-001 relied on 31460.1, I think would you agree that 31460.1 was no longer in effect at the time Resolution 98-001 is invalid, then 98-001 has no authority under Ventura. Or under anything. You have to go with what the C-E-R-L says.

I mean, as I said, I quoted this to you from Mr. Leiderman, "Cafeteria Plan Benefits that are paid in cash, under Ventura would be included in compensation earnable"; however, in "1990 the State Legislature passed a law," et cetera, et cetera.

So the only reason not to include these benefits is because of this repealed law.

Two things about it. As I read it, it says "Employees who have elected to participate in a flexible benefits program." The reason that

matters --

Well, first of all, people say, well, don't -- don't you, just by accepting the benefit, thereby elect to participate? Well, several things about that.

First of all, it's -- it's included in the part of the standard compensation package. You can go on to several websites for various county agencies that are still trying to hire people, job bulletins, it's put up there, these OBP benefits are put up there as part of the compensation package, they're advertised as such. And it's standard to -- this is included for management or whoever else is eligible. There's no election involved.

And -- and to say that anybody who receives this has thereby elected to participate in this system, there's no procedure for opting out. And -- and you can't just ignore those words.

There's a general rule of statutory construction that says "The Legislature is presumed to have included all language in a statute," and they -- and you don't assume that any of it is a surplusage.

And -- and Ms. Ratto would, I guess, just have us read that out, read out the words "who have

elected to participate."

Secondly, there's also case law which I cited in -- in my filings which says that an election, which is what they're referring to when you say "elect to participate" is an affirmative act. It's something you do positively. It's not something passive where you -- something just happens to you, that's not an election. An election is an affirmative act and there's case law quoted in my briefs.

Now, the other thing is the repeal of it. Now, the reason --

And -- and, again, I -- I hope you've read the Referee's report and -- and you may -- there's a subtlety in there.

There is language that -- savings language in the -- in the repeal statute that says "Nothing in this act" -- this is quoting now, "Nothing in this act is intended to or shall be construed to affect the validity of any action taken by a county pursuant to Section 31460.1 of the Government Code prior to the effective date of this act." Right.

And, clearly, the Board -- the County Board adopted -- adopted this repealed statute prior to the effective date of this act; however, there's case law

which I cited in -- in my -- in my brief again which is on point that says that generally when you repeal a statute like this, you can't keep relying on it. Okay? Now, to make the argu- -- to make the --

What this -- what this savings clause says, it says "The validity of any action taken by a county prior to the effective date of this act."

Well, when was Resolution 99-001 (sic) adopted? It was adopted in 1998. The act was appealed (sic) in 1991.

This is where the Referee went with this, this was my argument; this was an action by the county after the act was appealed. The savings clause only applies to actions taken by a county prior to the effective date of the act.

Resolution 98-001 was enacted years later after Ventura, after Ventura made it clear that these things should have been included in the statute; so what OCERS is relying on in -- or doing in adopting -- or did in adopting Resolution 98-001 was doing something which was outside the scope of the savings clause.

This was an action taken by the county, assuming OCERS -- you're treating OCERS as a county agency. It was not prior to the effective date of

this act.

The effective date of the act was May 14th -- May 11, rather, sorry, 1992; so anything after May 11, 1992, pursuant to the repealed statute, is no longer protected.

Now, yes, the -- the County Board still was there and -- and the Referee concluded, and I think it's the correct conclusion, that once -- once -- particularly once Ventura came down, it was clear that that Board action in itself was no longer, in and of itself, sufficient under -- because -- because under Ventura it conflicted -- it then conflicted with the C-E-R-L; so you no longer had the benefit of the savings clause at that point after -- after May 11, 1992 by the very terms of the savings clause.

CHAIRMAN PREVATT: Mr. Morell, one-minute warning.

MR. MORELL: One minute? Okay.

All right. Now, in my -- in my -- in my objections, which I -- I trust you have before you, I cited many cases. This am- -- she cited --

Ms. Ratto, I respect that and everything, I -- I'm still waiting to hear a case cited that says a settlement agreement or any other agreement that is contrary to state statute is -- is valid.

And -- and regardless of all the other stuff in there about how you can't appeal this and that, first of all, there are procedures right in the Settlement Agreement, actually it's a 60-day consent modification procedure which was cited in the Referee's report. I'm sure Mr. Leiderman is aware of this.

There are procedures for modifying it and this is the reason you want.

And I would hope the Board would do the right thing here. I mean, we can have litigation or whatever. But I think, you know, the very fact that the Referee saw my view on this and understood, there's solid case law.

And I would particularly commend the Salus case, 117 Cal. App. 4th --

It might help if you take note.

-- 117 Cal. App. 4th at 772 confronted this very question where they tried to -- the Court was confronted with a class action settlement agreement that varied -- that was contrary to the C-E-R-L and -- and what the Court was construing. And in less than a page the Court said "No, forget that, it's not happening, that" -- "that is not valid."

And there's ample case law that an unlawful

settlement agreement can be set aside and should be set aside.

Also, I'd --

As I say, I would really commend to you my supplemental prehearing statement. I went to a lot of trouble. There was proposed -- quote-unquote proposed findings of fact and proposed conclusions of law. Each one of those contains cites -- citations to the record.

Opposing counsel at that point mentioned that they were going to redline it and respond to it. I never got a response to that. I'm very interested in --

If counsel is able to contravene or dispute any of those facts based on the record, I would challenge her to do so, rather than simply saying "Well, the resolution says this," and "The settlement says that," that really begs the question of whether those documents are -- are binding today and -- insofar as they're contrary to Ventura and they're contrary to the C-E-R-L.

CHAIRMAN PREVATT: Okay. Thank you very much, Mr. Morell.

Mr. Leiderman, is there --

MR. MORELL: Might I have --

One more thing. I'm sorry, nevermind.

CHAIRMAN PREVATT: No. Sorry. I've got to call it.

Mr. Leiderman, you were our counsel back at that time.

Is there anything that would allow us to diverge from the settlement decision in these matters?

MR. LEIDERMAN: Well, good. We're -- we're in open session with the Applicant present; so I --

The documents speak for themselves on the face, as -- as does the judgment.

CHAIRMAN PREVATT: Okay.

MR. LEIDERMAN: Challenges to the Settlement Agreement were expressly waived by all parties, including those bound by the Settlement Agreement.

That agreement is clear and it's adopted in the judgment of the Court.

Your record, the page -- the one page that's relevant is page 37 of the record before you where the parties all agree that the Settlement Agreement and Judgment are final and binding, the OCERS Resolution 98-001 is final and binding, there will be no further challenges or appeals by anybody bound by the agreement, and all other claims are dismissed; so

there's really nothing I can add --

CHAIRMAN PREVATT: Okay.

MR. LEIDERMAN: -- to what this Board has adhered to for the last two decades.

CHAIRMAN PREVATT: Okay. Ms. Ratto, any final comments?

MS. RATTO: No final comments.

I -- I just want to assure Mr. Morell that his prehearing statement, supplemental prehearing statement and his reply brief, he didn't file a closing brief but he -- because he -- he relied on his supplemental prehearing statement, but his reply brief were all included in the administrative record that was provided to -- to the Board.

I just wanted to clarify that.

CHAIRMAN PREVATT: Okay. Thank you.

For the Board, I'd like us to then consider a motion to either grant or deny the application.

TRUSTEE ELEY: Move to deny, Mr. Chair.

VICE CHAIRMAN PACKARD: Second.

CHAIRMAN PREVATT: Moved by Mr. Eley, second by Mr. Packard.

Any discussion, Mr. Eley?

TRUSTEE ELEY: I just have one last question.

You know, like, on your memorandum,

Ms. Ratto, page 5 of 7, you know, you -- you say repeatedly first, "Resolution 98-001 is clearly valid," and yet I've heard numerous times from Mr. Morell that it is contrary to CERL, that it is not valid, yet we've operated that it is valid. I believe we've even gone, like, to the State Supreme Court on certain other issues on how we actually implemented the Ventura decision.

And then time and time again, I mean, on -- in my history here, I think I was Chair, like, in 2002; so it was upheld repeatedly, that we implemented it correctly.

So is it -- is it valid, is it?

And 98-001 was based on 31460.1, right?

CHAIRMAN PREVATT: Mr. Morell, you may be --

Sit down. Sit down.

MS. RATTO: It -- it was -- it included the language --

Well, it -- it states that for in-kind flexible benefits, they will be excluded from compensation earnable and flexible benefits paid in cash, to the extent paid to members retiring on or after January 1, 1991, they will be excluded.

So the -- the language with respect to cash, to the extent paid to members retiring on or after

January 1, 1991, was a reference back, it's not specifically stated. But the date of it coincides with the date of the applicability of the Government Code Section 31460.1.

So regardless of -- of the -- any arguments about whether or not 31460.1 technically applies here, because Mr. Morell claims to not have elected the optional benefit payments, and -- and I can go on at length about why I think he did elect, but it's irrelevant because the provisions of the -- of the statute were, in effect, incorporated into 98-001 and it is absolutely valid.

There is a Settlement Agreement and there is a -- a judgment that approves the Settlement Agreement that says that it's valid. I -- I -- I -- I'm not sure what more we -- we could have.

TRUSTEE ELEY: No. Thank you. Yeah, that's exactly what I thought.

CHAIRMAN PREVATT: Any additional comments from the Board?

Okay. I have been reminded that I do need to open for --

Is there anyone for public comment on the motion?

Okay. We will be voting on our machines; so

please vote.

VICE CHAIRMAN PACKARD: And a "yes" vote means --

CHAIRMAN PREVATT: A "yes" vote means upholding staff -- I'm sorry, denying the application.

Okay. That motion carries unanimously.

At this point, the Chair directs staff to prepare proposed findings and conclusions of law and recommended decision, Rule Number 21 OCERS Administrative Hearing Procedures, limited to our determination that, A, OCERS and the Applicant are bound by the Settlement Agreement and Judgment, and that OCERS did calculate the Applicant's retirement allowance in accordance with the Settlement Agreement and Judgment.

The parties are to follow the timetable in the rules and -- in the rules and the matter will likely be -- come back to the Board for entry of our final determination at the October regular meeting of the Board.

That concludes item DA-2.

MR. MORELL: Question.

CHAIRMAN PREVATT: Okay. I'll -- I'll --

MR. MORELL: I'll --

CHAIRMAN PREVATT: -- I'll accept a question.

What's your question?

MR. MORELL: If I may.

CHAIRMAN PREVATT: Go ahead.

MR. MORELL: The Referee made a very significant evidentiary ruling regarding hearsay testimony that I proffered at the hearing.

CHAIRMAN PREVATT: Okay. That is --

MR. MORELL: Is his ruling regarding that --

CHAIRMAN PREVATT: That is not --

Again, the -- the findings of the Board have -- have been made, we're moving this to --

MR. MORELL: I'm talking -- I'm just asking as far as the record goes, is that evidentiary ruling --

CHAIRMAN PREVATT: Everything --

MR. MORELL: -- before you?

Or are you going to be making your own separate finding on that issue of hearsay evidence? Or are you going to stand on what the Referee ruled?

CHAIRMAN PREVATT: Okay. I'm going to defer -- I'm going to defer to fiduciary counsel.

MR. MORELL: Okay.

MR. LEIDERMAN: Under the Board's procedures, staff -- as I understand the direction from the Chair, staff has been directed to prepare proposed findings and conclusions for adoption by the Board.

There is a process that that will be shared with the Applicant in advance of it coming back to the Board; so I would look to that document to see what is being proposed.

MR. MORELL: Okay. I -- I guess I'm still not clear on --

CHAIRMAN PREVATT: Okay.

MR. MORELL: -- as far as the procedure --

CHAIRMAN PREVATT: I will -- I will let you discuss that with staff offline, we're not going to have it here in the midst of public session because I can't answer your questions; this becomes an administrative process that our staff can work through with you.

MR. MORELL: I appreciate that.

I just wanted to alert you to the issue there of -- of the evidentiary ruling made by the Referee and whether you're reopening that evidentiary issue here or whether -- or whether --

CHAIRMAN PREVATT: I am certain that either Mr. Leiderman or Ms. Ratto, at the end of the meeting, may be able to provide you with the answer to that question. I'm not an attorney, I'm not going to pretend to be one.

MR. MORELL: I just wanted to raise that issue.

CHAIRMAN PREVATT: Okay. Thank you.

MR. MORELL: Thank you.

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I, the undersigned, a Certified Shorthand Reporter of the State of California, State of Illinois and the State of Texas, a Certified Court Reporter in the State of New Jersey, and Registered Professional Reporter/Certified Realtime Reporter, do hereby certify:

That the foregoing videotaped proceedings were transcribed before me at the time and place herein set forth;

That a verbatim record of the videotaped proceedings was made by me using machine shorthand, to the best of my ability, based on the quality of the videotaped, and same was thereafter transcribed under my direction;

Further, that the foregoing is an accurate transcription of said videotaped proceedings, again, to the best of my ability, and not having personally been in attendance at said videotaped proceedings.

I further certify that I am neither financially interested in the action nor a relative

or employee of any attorney of any of the parties.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: MAR 2 1 2019

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BEFORE THE BOARD OF RETIREMENT OF

THE ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

APPLICANT'S OBJECTIONS TO OCERS STAFF'S

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

In the Matter of the Application of James B. Morell,

a Member of the Orange County Employees Retirement System,

for a Recalculated Retirement Allowance

Pursuant to Rule 21 of the OCERS Administrative Hearing Procedures, Applicant hereby objects, for the reasons stated, to the following specified portions of OCERS Staff's proposed Findings of Fact, Conclusions of Law and Recommended decision:

III. ISSUES: Objection is made to the Board's limiting its consideration to the two specified "sole issues in this matter"

- The actual "sole issue" raised by this appeal is whether Applicant's retirement allowance, as it relates to OBP benefits provided by the Superior Court, was correctly calculated in accordance with applicable law. As is evident from an examination of the record (e.g., AR 1-2, 11-15 and 19-23, and Applicant's Prehearing Statement), Applicant has raised numerous subordinate issues beyond those presented by the Settlement Agreement.

- Government Code section 31534 does not authorize the Board to avoid considering the full record and the full range of issues presented by the appeal. Section 31534(b) expressly requires the Board to consider "*all* the testimony, plus *all* other evidence" adduced in the administrative hearing and to take action based upon "*such* evidence" (emphasis added).

- It is unclear whether, by choosing not to consider issues not directly related to the Settlement Agreement, the Board intends to concede the merit of Applicant's claim with regard to these issues, or whether the Board has left intact the hearing officer's findings of fact and conclusions of law with regard to these other issues.

IV. SUMMARY OF EVIDENCE: Objection is made to the omission, from the list of documents received in evidence, of Applicant's August 13 email response to Ms. Janike, which (according to Ms. Jenike's August 14 email to Applicant) was among the materials before the Board at its August 20 hearing.

V: FINDINGS OF FACT

Paragraph 2: Objection is made to *"elected to receive and"*

- There is no evidence in the record which would support a factual finding that Applicant elected to receive the $3,500 annual OBP benefit. The evidence is to the contrary – as set forth in the Superior Court PP&Rs and the County's Section 125 Plan, the OBP benefit was a standard component of the compensation package for all Superior Court research attorneys, and the $3,500 was paid fully and automatically in cash in the event no allocation was made during the annual open enrollment period. There was no provision to elect to receive or decline the annual benefit, or to "opt-out" of the OBP program. The record further shows that Applicant was not a member of any bargaining unit which might be said to have collectively "elected" to obtain the benefit.

- Nor could it be properly concluded as a matter of law, in light of the foregoing evidence, that Applicant "elected" to receive the OBP benefit merely by virtue of the fact that the benefit was provided. As discussed in Applicant's Reply Brief (pp. 4-5), an election involves an affirmative act on the part of the elector. Moreover, insofar as former Government Code section 31460.1 was the governing law which provided the legal basis for the flexible benefits exclusion of OCERS Resolution 98-001, as OCERS claims, that statute authorized the exclusion of the flexible benefits only for employees "who have elected to participate in a flexible benefits program " – as further discussed in Applicant's briefing, it is a basic rule of statutory construction that the Legislature cannot be presumed to have included superfluous language in its enactments. OCERS cannot choose to embrace one portion of former section 31460.1 while ignoring another portion which limits its scope and renders it inapplicable to Applicant.

Paragraph 6: Objection is made to *"and section 31460.1 (adopted by the Orange County Board of Supervisors by Resolution 90-1551) and more specifically by OCERS Board Resolution 98-001"*

- There is no evidentiary basis for a factual finding to this effect. The assertions clearly constitute legal conclusions, which remain unsupported by legal analysis or authority.

- Former Government Code section 31460.1 was repealed via S.B. 193 effective May 11, 1992. Under the better view of the savings clause contained in Section 2 of S.B. 193, former section 31460.1 operated to exclude OBP benefits only for OCERS members who retired between January 1, 1991, and May 11, 1992. (See Applicant's Prehearing Statement, pp. 13-15.)

- Because Section 2 of S.B. 193 was expressly applicable only to actions taken "prior to the effective date of this act," the adoption of Resolution 98-001 in 1998 was not an action protected by the savings clause.

- Inasmuch as it excludes flexible benefits for post-1991 retirees, such as Applicant, who did not "elect[] to participate" in the Superior Court's OBP plan, Resolution 98-001 deviates materially from the authorization provided by former section 31460.1 and is consequently *ultra vires* and unlawful under Ventura in that regard. (OCERS does not dispute that, apart from former section 31460.1, OBP benefits paid in cash are now pensionable under Government Code sections 31460 and 31461.)

Paragraph 7: Objection is made to "*and that the Optional Benefit Plan benefits received by Applicant as healthcare reimbursements during the Measuring Period constituted 'Flexible Benefits ("Cafeteria Plan") provided in kind' under Resolution 98-001 and therefore should be excluded from Applicant's compensation earnable and final compensation*"

- There is no evidence whatsoever in the record regarding OCERS's treatment of Applicant's OBP reimbursement payments as "in kind" benefits.

- In fact, the undisputed evidence establishes that reimbursements for allocated OBP benefits were paid directly to Applicant as cash, upon Applicant's submission of receipts accompanied by a claim form. (See Superior Court Personnel Policies and Regulations, Art. X, Section 4(C) and (F) (AR 612-613); May 5 transcript at 56:12-57:10, 67:2-15, 72:24-74:21.) The record provides no basis for a finding that the Superior Court obtained or provided the underlying benefits "in kind" on Applicant's behalf. See In re Retirement Cases (2003) 110 Cal.App.4th 426, 478-479: "[t]he bright line drawn by Ventura . . . must be understood to be between those benefits paid in cash to the employee and those that are not."

Paragraph 7: Objection is made to "*for the unmodified option*"

- This language appears to be superfluous, and its meaning is unclear (there is no corresponding reference to modification, or not, of any option).

- There is no apparent evidentiary basis in the record for inclusion of this language.

Paragraph 9: Objection is made to "*Resolution 98-001 was the subject of litigation in the coordinated proceedings . . .*," which misleadingly implies that the entirety of Resolution 98-001 was a subject of the litigation.

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- As discussed extensively in Applicant's briefings, and never disputed by OCERS, the record shows that very few issues pertaining to Resolution 98-001 were the subject of the litigation, and none of them involved the issues raised herein by Applicant.

- With regard to the 1991 cut-off date for pensionability of OBP benefits, the record establishes that the only issue raised or litigated was whether pre-1990 employees had acquired a vested constitutional right to the inclusion of OBP benefits, an issue inherently irrelevant to Applicant, who was hired after 1991.

- As discussed in Applicant's briefings (e.g., Applicant's Prehearing Statement, pp. 18-24) and never disputed by OCERs, OCERS in its April 1998 filings opposing a demurrer expressly and emphatically denied any intention of litigating additional issues relating to the scope and validity of Resolution 98-001, and OCERS is now judicially estopped from contrarily contending that such additional issues (such as the applicability and continuing effectiveness of former Government Code section 31460.1) were adjudicated in the class action litigation.

Paragraph 11: Objection is made to the omission of additional pertinent language contained in Paragraph 15 of the Settlement Agreement: "Nothing herein is intended to nor shall affect any party's rights and obligations under CERL, except as specifically set forth herein."

- As discussed in Applicant's briefing, the settlement agreement makes no specific mention of former Government Code section 31460.1, or of that statute's applicability or continuing effectiveness. Nor does the incorporation of Resolution 98-001 by reference in Paragraph 3 of the Settlement Agreement indicate in any manner that the incorporation would detrimentally affect the CERL rights of OBP beneficiaries who were employed after 1990.

- The omitted language of Paragraph 15 thus renders the Settlement Agreement ambiguous as to whether the Agreement was intended to deprive post-1990 retirees of their rights under the CERL in the event former Government Code section 31460.1 was inapplicable to Applicant or was no longer effective in Orange County.

Paragraph 13: Objection is made to the entirety of the quoted language, inasmuch as it is intended to support the improper inference that Applicant is precluded from contesting the validity of Paragraph 3 of the Settlement Agreement.

- OCERS does not, and cannot, cite any authority supporting its implicit assertion that an unlawful contractual provision may be given effect via an accompanying waiver of the right to challenge the unlawful provision. Such waivers are expressly barred by Civil Code section 1668. See, e.g., Iskanian v. CLST Transportation Los Angeles, LLC (2014) 59 Cal.4th 348, 382-384: "where . . . an

employment agreement compels the waiver of representative claims under the [Private Attorney General Act], it is contrary to public policy and unenforceable . . . ."

- Nor can OCERS cite any authority for the implicit proposition that an unlawful provision of a settlement agreement may be rendered enforceable via entry of a judgment approving the agreement. Settlement agreement provisions which violate statutory law or public policy will not be enforced by a court, regardless of whether the settlement agreement was reduced to judgment. See Timney v. Lin (2003) 106 Cal.App.4th 1121, 1129: "our Supreme Court and other California courts have rejected the notion that a settlement judge may properly act to 'approve' an illegal contract and thereby shield it from invalidation."

- As discussed extensively in Applicant's briefings, neither the 2002 judgment nor any interim ruling embodied therein operates to bar Applicant's claim under principles of res judicata or collateral estoppel, inasmuch as the issues raised by Applicant were never raised or litigated in the class action litigation.

Paragraph 13: Objection is made to the omission of Paragraph 18 of the Settlement Agreement, which states, in pertinent part:

> "The terms and provisions of this Agreement may . . . be amended, modified, or expanded by written agreement of those Parties affected by the particular amendment sought. . . . The parties agree that the San Francisco Superior Court shall retain jurisdiction . . . to decide whether or not to approve any future amendments . . . , provide [*sic*] that no Court approval need be obtained where (1) Class Members affected by the proposed amendment have been provided at least sixty days advance written notice of the proposed amendment and (2) no affected Class Member submits to the Court and counsel to the affected Party a timely written objection to the proposed amendment."

Obviously, however, utilization of this procedure would presuppose a desire on the part of OCERS to comply with the existing requirements of the CERL.

VI. CONCLUSIONS OF LAW

Paragraph 1: Objection is made to the entire paragraph.

- OCERS and Applicant are not "bound by" the provisions of Paragraph 3 of the Settlement Agreement insofar as those provisions are unlawful and consequently unenforceable. "A contract that conflicts with an express provision of the law is illegal and the rights thereto cannot be judicially enforced." (Vierra v. Workers. Comp. Appeals Bd. (2007) 154 Cal.App. 4th 1142, 1148.)

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- As Ventura and its progeny have held, Government Code section 31460 et seq. requires "remuneration paid in cash" to be included in "compensation earnable."

- Binding appellate case law makes clear that the requirements of the CERL cannot be altered by negotiated agreement: "The Ventura decision affected the determination of what items were to be included in 'compensation earnable,' and this is *not* subject to a contract right. . . . [P]lan members could not bargain regarding their . . . 'final compensation'." (In re Retirement Cases (2003) 110 Cal.App.4th 426, 453 (emphasis in original).) As the California Supreme Court stated more than 60 years ago, "[t]he statutory provisions controlling the terms and conditions of civil service employment cannot be circumvented by purported contracts in conflict therewith." (Boren v. State Personnel Board (1951) 37 Cal.2d 634, 641.) OCERS is able to cite no contrary authority, yet insistently seeks such circumvention.

- The State Legislature has clearly and succinctly concurred in these judicial pronouncements via Civil Code section 1599, which states that any part of a contract which is unlawful is void, as well as via section 3513 ("a law established for a public reason cannot be contravened by a private agreement"). For further authority, please see Applicant's Prehearing Statement, pp. 16-17.

- OCERS and Applicant are not "bound by" the provisions of Paragraph 3 of the Settlement Agreement, inasmuch as OCERS is judicially estopped from claiming that unpleaded issues relating to Resolution 98-001 were resolved via the class action litigation (as discussed above and in Applicant's briefings).

Paragraph 2: Objection is made to the entire paragraph.

- If it is truly meant that the calculation was accurate, this would constitute a factual finding; if a conclusion of law is intended, the appropriate word would be "correctly" (which denotes compliance with the law as well as with principles of mathematics). Alternatively, a comma could be placed after "allowance."

- In any event, the retirement allowance does not appear to have been accurately calculated under the Settlement Agreement. As indicated above, Paragraph 15 creates an ambiguity as to whether the Settlement Agreement was specifically intended to abrogate Applicant's right under the CERL and Ventura to have his OBP benefits included in the calculation of his retirement allowance. The scope and effect of a release provision such as that contained in Paragraph 3 of the Settlement Agreement is determined by the ascertainable intent and expectations of the parties. (Paralift, Inc. v. Superior Court (1993) 23 Cal.App.4th 748, 755-756.)

- The parties' intent and expectations may be shown via parol evidence (extrinsic to the Settlement Agreement itself). "[P]arol evidence is properly admitted to construe a written

instrument when its language is ambiguous. The test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears . . . . to be unambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is 'reasonably susceptible.'" (Winet v. Price (1992) 4 Cal.App.4th 1159, 1165.)

- The record shows that the issues specifically identified in the pleadings in the class action litigation included the pensionability of benefit payments made to third party insurers on behalf of employees and the vested rights of pre-1991 employees who retired after 1990. The pleaded issues did not include the applicability of former Government Code section 31460.1 to Superior Court employees or the effect of that statute's repeal upon its validity. (See AR 54-56, 60-149, 180-211, 217-290, 378-421, 440, 446-458, 467-470.)

- As discussed above, OCERS expressly and repeatedly represented during the class action litigation that it had no intention of adjudicating unpleaded issues regarding Resolution 98-001, and it is estopped from now contending otherwise.

- Neither the notice of proposed settlement nor the settlement Agreement itself provided any indication that class members would be compromising significant unlitigated statutory rights. (See Applicant's Prehearing Statement, pp. 25-26.)

- The Settlement Agreement provided no identifiable benefit to Applicant as consideration for relinquishment of his right under Ventura to have cash OBP payments included in the calculation of retirement allowances – the principal benefit obtained by class members, retroactivity of the Ventura decision, was of no value to post-Ventura retirees such as Applicant.

- At the May 5 hearing, Applicant offered testimony that plaintiffs' lead counsel in the class action litigation had in 2015 acknowledged, inter alia, that he had been unaware of any issue regarding the applicability or validity of former section 31460.1. (See May 5 transcript at 10:19-39:11.) (Although the hearing officer excluded this testimony on relevance grounds, this statement of a percipient witness was clearly relevant with regard to the expected scope of the Settlement Agreement, as well as with regard to other issues such as the availability of rescission as a remedy for a mutual mistake of law.[1])

- OCERS has not disputed any of the foregoing, and has offered no parol evidence of its own.

- Notably, Paragraph 3 of the Settlement Agreement does not specifically state that "all" the inclusions and exclusions of Resolution 98-001 are accepted as binding.

[1] At the August 20 hearing, the Board vacated the decisions of the hearing officer, yet the OCERS Staff's proposed Findings of Fact, Conclusions of Law and Recommended Decision has made no recommendation with regard to the admission of this proffered testimony.

JAMES_MORELL_2170

- In light of all the foregoing, the better construction is that Paragraph 3 of the Settlement Agreement was intended to apply only to those issues of inclusion and exclusion under Resolution 98-001 which were actually pleaded and litigated in the class action litigation. The unlitigated exclusion relied upon by OCERS in the calculation of Applicant's retirement allowance was therefore not accurately (or correctly) applied under the terms of the Settlement Agreement.

Applicant invites OCERS staff to cite any evidence in the administrative record, or any legal authority, contrary to any of the foregoing. Insofar as it cannot, Applicant respectfully requests the Board reconsider its decision in this matter.[2]

Respectfully submitted,

James B. Morell

Applicant in pro per

[2] Applicant would remind the Board of its obligation, under Paragraph 24 of the Settlement Agreement, "to use good faith in resolving any disputes that may arise in implementing the terms of this agreement."

JAMES_MORELL_2171

- In light of all the foregoing, the better construction is that Paragraph 3 of the Settlement Agreement was intended to apply only to those issues of inclusion and exclusion under Resolution 98-001 which were actually pleaded and litigated in the class action litigation. The unlitigated exclusion relied upon by OCERS in the calculation of Applicant's retirement allowance was therefore not accurately (or correctly) applied under the terms of the Settlement Agreement.

Applicant invites OCERS staff to cite any evidence in the administrative record, or any legal authority, contrary to any of the foregoing. Insofar as it cannot, Applicant respectfully requests the Board reconsider its decision in this matter.[2]

Respectfully submitted,



James B. Morell

Applicant in pro per

[2] Applicant would remind the Board of its obligation, under Paragraph 24 of the Settlement Agreement, "to use good faith in resolving any disputes that may arise in implementing the terms of this agreement."

JAMES_MORELL_2172

PROOF OF SERVICE

I declare that I am unemployed in Los Angeles County, California, that I am over 18 years old, and that I am not a party to the within action. My residential address is 222 Avenue G, Redondo Beach, California 90277.

On the date set forth below, I served the foregoing APPLICANT'S OBJECTIONS TO OCERS STAFF'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION on interested parties to this action by placing a true copy of said document in a sealed envelope in the following manner:

I placed such envelopes addressed as shown below in a mailbox at Redondo Beach, California.

Suzanne Jenike
Assistant CEO, External Operations
Orange County Employees Retirement System
2223 E. Wellington Avenue, Suite 100
Santa Ana, CA 92701

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on September 17, 2018, at Redondo Beach, County of Los Angeles, California,

Dina D. Dalton

Dina D. Dalton

JAMES_MORELL_2173

ORANGE COUNTY OCERS EMPLOYEES RETIREMENT SYSTEM

Memorandum

DATE: October 15, 2018

TO: Board of Retirement

FROM: Gina M. Ratto, General Counsel

SUBJECT: *In the Matter of the Application of James B. Morell for a Recalculated Retirement Allowance* – Adoption of Findings of Fact, Conclusions of Law and Decision

Recommendation

Staff recommends the Board adopt as presented Staff's proposed Findings of Fact, Conclusions of Law and Decision in the *Matter of the Application of James B. Morell for a Recalculated Retirement Allowance*.

Background/Discussion

The Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Recommended Decision in the *Matter of the Application of James B. Morell ("Applicant") for a Recalculated Retirement Allowance* was presented to the OCERS Board of Retirement ("Board") on August 20, 2018.

On August 20, 2018, the Board:

1. Accepted Staff's recommendation to proceed under Government Code Section 31534(b) to consider the record in the matter, but limited its consideration to:
    a. Whether OCERS and Applicant are bound by the Settlement Agreement ("Settlement Agreement") attached as Appendix 2 to the Judgment entered by the Superior Court in and for the City and County of San Francisco on November 1, 2002 ("Judgment") in the Coordinated Proceeding known as *In Re Retirement Cases*, and the Judgment; and if so,
    b. Whether OCERS calculated Applicant's retirement allowance in accordance with the Settlement Agreement and Judgment;
2. Denied the Application of James B. Morell for a Recalculated Retirement Allowance; and
3. Directed Staff to prepare (proposed) Findings of Fact, Conclusions of Law and Decision (Rule 21 of the OCERS Administrative Hearing Procedures), limited to the determination that:
    a. OCERS and Applicant are bound by the Settlement Agreement and Judgment; and
    b. OCERS did calculate Applicant's retirement allowance in accordance with the Settlement Agreement and Judgment.

Staff's proposed Findings of Fact, Conclusions of Law and Decision were served on Applicant on August 31, 2018; and Applicant was provided until September 17, 2018 to file written objections. Applicant timely filed Objections to Staff's proposed Findings of Fact, Conclusions of Law and Decision.

Staff's proposed Findings of Fact, Conclusions of Law and Decision and Applicant's Objections are attached.

ORANGE COUNTY OCERS EMPLOYEES RETIREMENT SYSTEM

Memorandum

Submitted by:

Gina M. Ratto

Gina M. Ratto
General Counsel

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
BOARD OF RETIREMENT
2223 E. WELLINGTON AVENUE, SUITE 100
SANTA ANA, CALIFORNIA

REGULAR MEETING
Monday, October 15, 2018
9:00 a.m.

MINUTES

Chair Prevatt called the meeting to order at 9:01 a.m.

Attendance was as follows:

Present: Chris Prevatt, Chair; Chuck Packard, Vice-Chair; David Ball; Roger Hilton; Shawn Dewane; Frank Eley; Russell Baldwin, Shari Freidenrich and Wayne Lindholm

Also Present: Steve Delaney, Chief Executive Officer; Brenda Shott, Assistant CEO, Finance and Internal Operations; Suzanne Jenike, Assistant CEO, External Operations; Molly Murphy, Chief Investment Officer; Jenny Sadoski, Director of Information Technology; Gina Ratto, General Counsel; David Kim, Director of Internal Auditor; Anthony Beltran, Visual Technician; Cammy Torres, Recording Secretary.

Guests: Harvey Leiderman

Chair Prevatt led the Pledge of Allegiance.

CONSENT AGENDA

All matters on the Consent Agenda are to be approved by one action unless a Board Member or a member of the public requests separate action on a specific item.

A **motion** was made by Mr. Ball **seconded** by Mr. Dewane to approve the consent agenda.

Motion passed **unanimously**.

Mr. Lindholm arrived at 9:11am.
Ms. Freidenrich arrived at 9:13am.

BENEFITS

C-1 OPTION 4 RETIREMENT ELECTION

DISABILITY/MEMBER BENEFITS AGENDA

DA-2: DISABILITY APPEAL-CONRADO PORTILLO
Coach Operator, Orange County Transportation Authority

Recommendation: Staff recommendation is to approve and adopt the findings and recommendations of the Hearing Officer as set forth in the Proposed Decision and grant Applicant's application for service connected disability retirement benefits with an effective date of December 13, 2014, the day after the last day Applicant received regular compensation.

The Board voted unanimously to adopt the staff recommendation as presented.

The following items were conducted in Open Session

DA-3: DISABILITY APPEAL-ROBERT BOLEN
Power Equipment Operator III, Orange County Public Works

Recommendation: Staff recommendation is to approve and adopt the Summary of Evidence, Findings of Fact, Conclusions of Law, and Recommendations of the Hearing Officer and deny Applicant's request for an earlier effective date.

Ms. Cortez presented item DA-3

A **motion** was made by Mr. Packard, **seconded** by Mr. Dewane to approve and adopt the Summary of Evidence, Findings of Fact, Conclusions of Law, and Recommendations of the Hearing Officer and deny Applicant's request for an earlier effective date. The motion carried **9-0** with voting as follows:

AYES	NAYS	ABSTAIN	ABSENT
Chair Prevatt			
Mr. Dewane			
Mr. Ball			
Mr. Baldwin			
Mr. Packard			
Mr. Eley			
Mr. Hilton			
Mr. Lindholm			
Ms. Freidenrich			

DA-4: BENEFIT APPEAL-JAMES MORELL
Research Attorney, Orange County Superior Court, General Member

Recommendation: Staff recommends the Board adopt as presented Staff's proposed Findings of Fact, Conclusions of Law and Decision in the Application of James B. Morell for a Recalculated Retirement Allowance.

Mr. Morell requested that the discussion in this matter take place in open session.

Ms. Cortez presented item DA-4

Mr. Leiderman stated two changes that should be adopted by the Board on page five of the report. He recommends that these changes be adopted by the Board.

- Page five under "proposed findings" – Mr. Leiderman suggested to add the email that the applicant sent to Ms. Jenike on August 13, 2018 to be included in the record.

- A correction under roman numeral "V", Finding #2 – Mr. Leiderman suggest a slight change in the language. "During his final 3 years of employment applicant ~~elected to receive and~~ received optional benefit planned benefits in the amount of $3,500 per year from his employer which applicant [insert language] "elected to receive" partly in cash and partly in reimbursements for his out of pocket heath care cost.

Ms. Ratto stated that staff is in agreement with the two changes suggested by Mr. Leiderman. Staff recommends that the Board approve the findings and decisions as they accurately reflect the actions taken by the Board at the August 20th meeting.

Mr. Morell pleaded his case.

A **motion** was made by Mr. Dewane, **seconded** by Mr. Packard to adopt as presented Staff's proposed Findings of Fact, Conclusions of Law and Decision in the Application of James B. Morell for a Recalculated Retirement Allowance. The motion carried **9-0** with voting as follows:

AYES	NAYS	ABSTAIN	ABSENT
Chair Prevatt			
Mr. Dewane			
Mr. Ball			
Mr. Baldwin			
Mr. Packard			
Mr. Eley			
Mr. Hilton			
Mr. Lindholm			
Ms. Freidenrich			

OPEN SESSION

REPORT OF ACTIONS TAKEN IN CLOSED SESSION

BOARD MEMBER COMMENTS

CHIEF EXECUTIVE OFFICER/STAFF COMMENTS

Ms. Hockless provided Staff updates as of October 15, 2018.

COUNSEL COMMENTS

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
BOARD OF RETIREMENT

IN RE:)
)
ITEM DA-4:)
)
MEMBER BENEFIT APPEAL -)
JAMES MORELL.)
_____)

REPORTER'S TRANSCRIPT OF
EXCERPTED PORTION OF VIDEOTAPED PROCEEDINGS
Monday, October 15, 2018
Santa Ana, California

Reported by:
LAURIE HELD-BIEHL
CA CSR No. 6781
IL CSR No. 084002860
NJ CCR No. 30XI00239100
TX CSR No. 8555
RPR/CRR No. 32836
JOB No. 311314

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
BOARD OF RETIREMENT

IN RE:)
)
ITEM DA-4:)
)
MEMBER BENEFIT APPEAL -)
JAMES MORELL.)
_____)

Reporter's Transcript of Excerpted Portion of Videotaped Proceedings, pages 1 through 28, proceedings dated Monday, October 15, 2018, transcribed Monday, March 11, 2019, in Irvine, California, by LAURIE HELD-BIEHL, California Certified Shorthand Reporter No. 6781, Illinois Certified Shorthand Reporter No. 084002860, New Jersey Certified Court Reporter No. 30XI00239100, Texas Certified Shorthand Reporter No. 8555, and Registered Professional Reporter, Certified Realtime Reporter No. 32836.

APPEARANCES:

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
BOARD OF RETIREMENT TRUSTEES:

CHRIS PREVATT, Chairman
CHUCK PACKARD, Vice Chairman
DAVID BALL, Trustee
ROGER HILTON, Trustee
SHAWN DEWANE, Trustee
FRANK ELEY, Trustee
RUSSELL BALDWIN, Trustee
WAYNE LINDHOLM, Trustee

GINA RATTO, ESQ., General Counsel
HARVEY LEIDERMAN, ESQ., REED SMITH, LLP
Independent Fiduciary Counsel

JAMES MORELL, ESQ., In Propria Persona

STEVE DELANEY, Chief Executive Officer

BRENDA SHOTT, Assistant CEO, Finance and Internal Operations
SUZANNE JENIKE, Assistant CEO, External Operations

MOLLY MURPHY, Chief Investment Officer

JENNY SADOSKI, Director of Information Technology
DAVID KIM, Director of Internal Audit
ANTHONY BELTRAN, Visual Technician
CAMMY TORRES, Recording Secretary
MEGAN CORTEZ, Disability Coordinator

Santa Ana, California
Monday, October 15, 2018

CHAIRMAN PREVATT: ...with staff report.

And, Mr. Morell, you can stay up there if you want.

MS. CORTEZ: DA-4 is for James Morell.

Staff recommends the Board adopt as presented staff's proposed findings of fact, conclusions of law and decision in the application of James B. Morell for a recalculated retirement allowance.

CHAIRMAN PREVATT: Okay. With that, I'm going to go to Mr. Leiderman.

MR. LEIDERMAN: Thank you, Mr. Chairman.

Harvey Leiderman, Reed Smith, independent fiduciary counsel to the board.

As you know, my responsibility is to separately, independently, advise the Board on these matters, separate and apart from staff's position, as advocate on behalf of OCERS.

And so this matter comes before you following the Board's decision on August 20th at its regular Board meeting on this matter. At that time, the Board took action and directed staff to return,

pursuant to OCERS' policies, and bring back proposed findings of fact, conclusions of law and a proposed decision to reflect the Board's position and decision at -- that was made on August 20th. Staff has brought back to you those proposed findings, et cetera.

Mr. Morell, the Applicant, has submitted to you, and you have in front of you, Applicant's objections to OCERS staff's proposed findings of fact, conclusions of law and decision. They are in your packet in the Board materials.

My review of both of those and my recommendation to you this morning is that there are two changes that I would suggest to the proposed findings and conclusions. Those were items that were brought up by the Applicant. And I'd like to suggest to you two minor -- well, I won't call them "minor," I won't characterize them, just two items that appear on page 5.

I'm trying to figure out what page it is in your materials, the findings; it may be on page 432 in your materials, although -- yeah, it's -- I think it's been revised since I received my copy of that.

In any event, the two changes I'm going to recommend that the Board consider in adopting the

proposed findings, as I say, appear on the fifth page of the proposed findings.

The -- the third, fourth and the -- over-running to the top of the fifth page are documents that were presented to the Board; it's a big chart. At the end of that chart, at the request of Mr. Morell, the Applicant, I do believe that we should add the E-mail that the Applicant sent to Ms. Jenike here at OCERS that is dated August 13, 2018, to fill out that last item, at the request of the Applicant, that that be included in the record before the Board, as it was at the time before the Board's decision on the August -- on August 20th.

Then, also, just a correction on that same page; if -- if you're not on that page let me know and we'll try to get you there.

Under Romanette v, findings of fact, finding number (ii), I want to suggest a slight change in the language as pointed out by the Applicant. After --

In the first line it says "During his final three years of employment" --

MS. CORTEZ: 432.

I was just telling him, he asked what page number it was and I said 432.

MR. LEIDERMAN: Gotcha.

Are we all on the same page now?

Under findings of fact, finding number (ii), I would recommend it read as follows: "During his final three years of employment Applicant," and then I would strike the words "elected to receive and" so that it would then read "Applicant received optional benefit plan benefits in the amount of 3,500 per year from his employer, which Applicant," and then I would insert there the two words "elected to" and change "received," past tense, "to receive"; so it would say "which Applicant elected to receive partly in cash and partly as reimbursements for his out-of-his pocket healthcare costs."

With those two changes on page 5, as your independent counsel, I -- I believe that the findings and conclusions and decision accurately reflect the Board's action on August 20th and I recommend that it be adopted finally by the Board.

Of course, at this time you should hear from both the Applicant and from staff, to the extent they have further comments.

I will make --

The final observation I'll make, I thought these two comments were appropriate to accurately reflect the record. Much of the Applicant's other

objections are essentially rearguing the matter that the Board had already determined. And on -- on that basis, my recommendation to you is that no further changes are needed since you've already made your decision.

Thank you, Mr. Chairman.

CHAIRMAN PREVATT: Ms. Cortez, do you have anything to add?

Ms. Ratto, do you have anything to add?

MS. RATTO: I would only add that staff is in agreement with the two changes that Mr. Leiderman has suggested.

The Applicant's E-mail to Ms. Jenike dated August 13, 2018 was, in fact, included in the administrative record that was presented to the Board in conjunction with the August 20th Board meeting. It was on pages 981 to 982 of 997 pages of the administrative record that was presented. It was staff's oversight to not include that or list it in the chart that was presented in the Board's materials today.

And also -- we also agree with the changing that Mr. Leiderman has suggested in Roman Numeral v (ii) in the findings of fact.

And with those changes, staff recommends

that the Board approve these proposed findings and decision. And we believe that it -- that they accurately reflect the action that was taken by the Board on August 20th.

Thank you.

CHAIRMAN PREVATT: Okay. Mr. Morell, before I go to you, what I want to preface this with is partly what Mr. Leiderman touched on is that we are not rehearing the issue. We're not discussing or changing the determination we made on the 20th of August.

I'd encourage you to limit your comments to any objections to the findings of fact but not to rearguing the case as we have already made our decision and will not be revisiting that decision in this meeting.

So with that, the floor is yours.

MR. MORELL: Thank you.

First of all, I want to say I appreciate the -- the first correction and -- and the second one as well, although the continued use of the word "elected to receive" is potentially somewhat confusing, I chose to receive that but partly --

CHAIRMAN PREVATT: Can I get you to pull the microphone a little bit up towards you?

Thank you so much.

MR. MORELL: Is it turned on?

Hello? Is that working?

CHAIRMAN PREVATT: Yes. Good.

MR. MORELL: All right. Anyway, yes. Yes. I -- I'm in agreement with that.

I just want to say --

Well, first of all, you know, you don't want me to discuss the -- I guess the underlying issues or whatever, but, I mean, the entire structure of the proposed decision is largely objectionable; so I don't see how I can avoid that.

It doesn't comport with the record, it doesn't comport with law, I think it's legitimate to object on those grounds; so on that basis, if you'll bear with me.

And I -- I do want to -- I'll try to take not even the full 15 minutes this time but I would --

I want to try to lead you through kind of a logical progression on this. And I would encourage you, if any of you disagree with anything I'm saying at any point, please feel free to interject so we can maybe discuss it. Maybe you'll see -- maybe I can clarify why I'm saying what I'm saying if you don't understand, or, I don't know, you just want to do

what you do.

But anyway, let me just try to keep this simple and brief.

First of all, I -- I think everybody is in agreement that under current State law, benefits that are paid as cash are -- are -- are supposed to be included in the calculation of the retirement allowance.

No?

CHAIRMAN PREVATT: Not necessarily.

TRUSTEE ELEY: No. No.

MR. MORELL: Okay. Well, that's what the statute says, pay it as cash.

CHAIRMAN PREVATT: Okay. And but --

Again --

MR. MORELL: Okay. Well --

CHAIRMAN PREVATT: -- this is not going to be a dialogue between us.

MR. MORELL: That's fine, that's your choice.

CHAIRMAN PREVATT: So I need to ask you to focus --

MR. MORELL: Okay.

CHAIRMAN PREVATT: -- on objections to the matter.

MR. MORELL: Well, that's what the statute says

and that's what the Ventura decision says and all the courts that have followed it; so if you want to disagree with that, that's okay, that's up to you I guess.

I don't know the basis for that disagreement, I'd love to find out. I've been litigating this case for four years, I still -- still haven't seen any case law or a statute cited that says otherwise.

So anyway, paid as cash, that's what the statute says, that's what the case law says; this was paid as cash. I --

It had been my impression that you all agreed that were it not for this settlement agreement, that this would be a conclusion of law; so that's my only point is that generally if -- if something is paid as cash, part of your remuneration, then -- then it should be included.

So the question is, then, what would be the basis for not including it? Well, you've -- you've reframed the issues here.

I'll try to address this in the manner that -- which your decision has framed this, which is based on the settlement agreement, two aspects of it.

One is that essentially we're bound by it,

so --

My position is it's not enforceable. The case law is quite clear, statutes are quite clear; if -- if a private agreement, which this is, an agreement between private parties in settlement -- the settlement agreement, cannot contravene State statutes.

I mean, think about it. If -- if -- if two people suddenly decided they wanted to opt out of, let's say, the municipal laws governing who -- what governments govern certain territory, the City of Santa Ana; if my -- me and my neighbor lived in Santa Ana, we'd suddenly make an agreement between ourselves not to be governed by the City of Santa Ana anymore.

Can we do that you think? No. The answer is no. And the reason is State law must control. You can't have people just willy-nilly running around making private agreements which just have their own law, so --

And case law has held specifically with regard to these -- the C-E-R-L requirements that they cannot be changed by private agreement.

This issue has come up. It's been addressed in published decisions. It's all there. I refer you

to the case law; so that's point number one.

Then the question becomes, well, what is the law if -- if -- if this is not enforceable? How do you -- how do you determine, you know, what it is?

You've chosen to avoid the issue of -- of the construction and continuing validity of the former Government Code 31460.1. I guess I'm okay with that. I -- I don't really understand it.

I appreciate the -- the change that's been made to the proposed decision, which really, to my mind, was kind of -- the way it was framed, it implied a conclusion which was inconsistent with what you had chosen to do, which was just to limit your decision to the -- to the effects of the agreement.

And then you'd just say, well, I elected to do that. Well, that's a big issue that I raised but apparently you don't want to deal with that. And I'm not quite clear, frankly, where that leaves us with regard to those issues.

If you just choose to ignore them, which I don't really know that the statute governing these -- these Board decisions, I -- I don't have the Government Code that you guys are familiar with in front of me. But it only permits, as I read it, you to -- to, on your own, consider -- reconsider all of

the evidence and -- and based on such evidence, it says, reach -- reach a conclusion.

You have chosen to limit your consideration to part of the evidence in the record -- in the administrative record and reach a -- a narrower conclusion. You've chosen to ignore it. And I don't know where that leaves all the other issues that I raised and litigated.

Does that mean you're conceding them? I'd be happy to -- to be informed on that.

Does that mean you're -- you just want to ignore them and -- and hope they go away? Or you're planning on relitigating them? If you suddenly -- or later on lose on this issue of the enforceability of the settlement, then you want to come back and relitigate -- relitigate these other issues?

I'm not sure you get two bites at the apple this way. This is supposed to be --

I mean, it's already been, what, almost five years; so I -- I don't know what your thinking is on that. But I can only infer that -- and I don't --

Apparently, you vacated or nullified the referee's conclusions with regard to those matters; so you just kind of leave the law hanging. And that -- I don't really know what to make of that. If

anybody can clarify that, I'd really appreciate it.

But, anyway, so the case law is pretty clear. You can't have an agreement in contravention of the C-E-R-L.

And I -- and I think, like I said, if you think about it, the reason is -- is pretty clear, because the legislature has decided this is the way it's going to be. And you can't just opt out of that by making a side agreement and saying, no, we're going to have our own little, you know, law and system over here. It doesn't work that way. You could opt out of the entire retirement system if that were the case.

CHAIRMAN PREVATT: Okay.

MR. MORELL: Anyway --

CHAIRMAN PREVATT: Mr. Morell --

MR. MORELL: Yes.

CHAIRMAN PREVATT: -- I'm going to remind you that you're -- you're focusing on items that we have already made a determination on; so we are not going to go back over that.

MR. MORELL: Okay. Okay.

CHAIRMAN PREVATT: There is a --

What you -- what we have provided you is with the list of findings of fact.

MR. MORELL: Uh-huh.

CHAIRMAN PREVATT: If there are any specific items that you would like to object to, I'd encourage you to point that out and then we can determine whether or not we wish to consider that additional objection.

MR. MORELL: Sure.

CHAIRMAN PREVATT: Our counsel has already advised us on some changes and has advised us related to the other objections that you've made, has indicated that your objections seem to be retreading the ground that was previous covered.

MR. MORELL: Well, I -- I --

Clearly, I'm not -- my message is not getting through; so I'm trying to, you know, rephrase it as best I can.

I just want to point out this is -- it's for proposed findings of fact, conclusions of law and decision, any -- any portions of which could be objectionable, including the conclusions of law, which are very thin in here, I might point out, but so --

I mean, the decision itself can be objectionable and I think it is; so I -- there's -- I don't see --

CHAIRMAN PREVATT: Right.

MR. MORELL: -- why you're trying to limit me to my two objections relating purely to findings of fact.

CHAIRMAN PREVATT: Because we have already made the decision so we are not going back over the decision that we've made.

MR. MORELL: Okay. But I'd like to state for the record --

CHAIRMAN PREVATT: These are summarizing the actions that we reviewed and considered at the last meeting, and this is merely a reconciliation of that information --

MR. MORELL: Okay.

CHAIRMAN PREVATT: -- so that it can be part of the final record.

MR. MORELL: Well, I --

CHAIRMAN PREVATT: Should you choose to take other courses of action subsequent to our action of approving this item, you're more than able to do that.

It's just I need to point out that we're not going to change any of our previous decisions. But if there are issues of wording or something like that that we can fix --

MR. MORELL: Okay.

CHAIRMAN PREVATT: -- we're certainly willing to look at that.

MR. MORELL: Okay. Thank you.

Well, I -- as I say, I would just object to a lot of the omissions -- omissions which make this decision essentially conclusory.

I mean, this decision, as a legal matter, would not pass a bar exam. There's no legal analysis --

CHAIRMAN PREVATT: Well, given that I'm not an attorney, and I rely on my attorneys to tell me that, my attorneys are not telling me that.

MR. MORELL: Okay. All right. Anyway, I --

So I think my objections are fairly well stated --

CHAIRMAN PREVATT: Okay.

MR. MORELL: -- and -- and --

However, like I say, I -- I do --

One big objection to me is -- is, like I said, maybe I could just harp on that, because it wasn't addressed in the prior hearing, is this issue of -- of what happens to the other issues, particularly the issues relating to former Government Code 31460.1. What --

Is -- the Board is just choosing to ignore that, those issues?

I -- I don't really understand how you can only choose to address and -- and make your decision by limiting --

You're carving up my appeal. You're saying we're only going to address this portion of his appeal. What happens to the rest of it? That's all I want to know.

CHAIRMAN PREVATT: All right. Mr. Leiderman, can you answer that for me, please?

MR. LEIDERMAN: The rest of it was rejected by the Board on August 20th.

CHAIRMAN PREVATT: Thank you.

MR. MORELL: That's not reflected in the decision, though.

CHAIRMAN PREVATT: Okay.

MR. MORELL: Why isn't it reflected in the decision if that was an action taken by the Board?

This decision, I -- I assume -- in my understanding, this is the decision of the Board on August 20th, right? So if that was rejected, if that was an issue that was addressed and disposed of, why is that not reflected in this decision?

I would object to that. And I -- I don't

understand why that is.

CHAIRMAN PREVATT: Mr. Leiderman.

MR. MORELL: It's -- it's very shoddy. I'm sorry. It --

CHAIRMAN PREVATT: Ma'am?

MR. MORELL: I don't know what to make it of.

CHAIRMAN PREVATT: All right. I understand.

Mr. Leiderman, anything else to add?

MR. LEIDERMAN: No.

I believe in here, and I can't come to it immediately, there is a reference to the -- the Board's determination to reject the findings, conclusions, other than the ones that are presented here --

CHAIRMAN PREVATT: Okay.

MR. LEIDERMAN: -- that were presented to the hearing officer.

CHAIRMAN PREVATT: So if I'm understanding you correctly, at our hearing in August, we considered those other matters, we rejected those, with the exception of the ones that we've moved forward; is that reasonably correct?

MR. LEIDERMAN: That's correct.

That's found in Roman Numeral Section II, procedural background, in the third paragraph, which

is the second page of the proposed findings, conclusions and decision.

CHAIRMAN PREVATT: Mr. Morell, I'll give you a couple minutes to summarize if you would like --

MR. MORELL: Sure.

CHAIRMAN PREVATT: -- and then I need to take us to an action.

MR. MORELL: I'd -- let me -- if I can just read what that paragraph says.

"As its" -- "At its August 20th meeting the Board determined to set aside the hearing officer's proposed findings and limit its consideration to solely the issues of one and two," which you've chosen to address for me with the settlement agreement.

Well, that's -- that's all very nice. But if you set aside the proposed findings, you're not dealing with my issues.

You set aside the referee's treatment and his determination of my issues. And you're choosing now to ignore a good portion of the issues that I raised which the referee did address.

Now, if you're going to set aside the referee's decisions and analysis and conclusions with regard to those aspects of my appeal, then it seems

incumbent upon you to substitute your own conclusions with regard to those matters. Either that, or acknowledge that you're conceding them.

The -- the -- the paragraph does not say what Mr. Leiderman said. You did not reject my contentions. What you set aside was the -- was the referee's conclusions and that's fine, but it still leaves my contentions, they didn't go away.

I don't know how I can make it any more clear.

MR. LEIDERMAN: If I may, Mr. Chairman, the purpose of the hearing officer is not to make a determination, the purpose of the hearing officer is to advise the Board on matters that the Board wishes advice on, including gathering of evidence, and then to bring that back to the Board.

It's the Board's prerogative, the Board has the constitutional and statutory obligation to determine what is compensation earnable and what the benefits are. The Board has chosen to consider this matter itself and the Board has stated on the record and publicly what it considers to be appropriate and relevant.

By stating affirmatively what the Board considers to be appropriate and relevant to this

application, it necessarily has rejected all of the other arguments presented by the Applicant. And that is the record as it stands today.

I hope that helps the Applicant understand the state of the record.

MR. MORELL: I appreciate that clarification. I don't know of any authority for that. And if that's the case, why bother to issue any decision at all?

By implication, you could just reject all it out of hand. Why -- why bother writing any of this? Which is -- I mean, it's, like I said, mostly conclusory. It -- it cites a bunch of provisions of the settlement agreement without any discussion of how they may or may not apply in light of applicable law and the record in this case, so --

CHAIRMAN PREVATT: All right. Thank you very much, Mr. Morell.

MR. MORELL: Thank you.

CHAIRMAN PREVATT: All right. I am ready to entertain a motion from the Board.

Mr. Dewane.

TRUSTEE DEWANE: I'll move approval of staff's recommendations.

VICE CHAIRMAN PACKARD: Second.

CHAIRMAN PREVATT: I have a motion by

Mr. Dewane, a second by Mr. Packard.

Any discussions?

TRUSTEE HILTON: Before we go, should we add the -- as part of the motion, the parts that Mr. Leiderman discussed?

TRUSTEE DEWANE: If you would like to amend the motion, the maker will agree.

CHAIRMAN PREVATT: Okay. Mr. Leiderman --

TRUSTEE DEWANE: Yes. I'll amend my motion to include Mr. Leiderman's comments.

And then, I guess perhaps just to close the loophole, is it possible in the motion that we also include language that we reject the contentions raised by Mr. Morell?

That's to Mr. Leiderman.

CHAIRMAN PREVATT: I'll let Mr. Leiderman answer it.

TRUSTEE DEWANE: Or is it necessary?

CHAIRMAN PREVATT: I don't think it's necessary but let me let Mr. Leiderman confirm.

MR. LEIDERMAN: I would think that that's clear on the face of the record as it stands but the --

If I understand correctly, the motion is to move staff's recommendation with the two amendments that I previously proposed to the Board.

TRUSTEE DEWANE: Yes, sir, that's correct.
CHAIRMAN PREVATT: Confirmed by Mr. Packard?
VICE CHAIRMAN PACKARD: Second agrees.
CHAIRMAN PREVATT: Say yes.
VICE CHAIRMAN PACKARD: Yes.
CHAIRMAN PREVATT: Okay. Second agrees.
Okay. With that, we're going to vote on the machines.
All right. That motion carries unanimously. And this concludes the disability portion of our agenda.
/
/

I, the undersigned, a Certified Shorthand Reporter of the State of California, State of Illinois and the State of Texas, a Certified Court Reporter in the State of New Jersey, and Registered Professional Reporter/Certified Realtime Reporter, do hereby certify:

That the foregoing videotaped proceedings were transcribed before me at the time and place herein set forth;

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IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: MAR 2 1 2019

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CA CSR No. 6781, IL CSR No. 084002860,
NJ CRR No. 30XI00239100, TX CSR No. 8555
RPR/CRR No. 32836

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BEFORE THE BOARD OF RETIREMENT OF
THE ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

**In the Matter of the Application of James B. Morell,
a Member of the Orange County Employees Retirement System,
for a Recalculated Retirement Allowance**

I. INTRODUCTION

This matter involves the application ("Application") by Orange County Employees Retirement System ("OCERS") member, James B. Morell ("Applicant" or "Morell"), for a recalculation of his retirement allowance.

On March 26, 2014, OCERS notified Applicant of his monthly retirement allowance, which is derived from, among other things, the amount of Applicant's final compensation (sometimes referred to as final average salary). In making the determination of Applicant's retirement allowance, OCERS staff excluded from Applicant's final compensation the amount of the annual Optional Benefit Plan (OBP) payment of $3,500 that Applicant received from his employer. Applicant appealed OCERS staff's calculation of his retirement allowance and on March 20, 2015, OCERS' Chief Executive Officer ("CEO") upheld the staff's determination to exclude OBP from the calculation of Applicant's final compensation under the authority of the Board's Resolution 98-001, which excludes from compensation earnable flexible benefits provided in-kind, and flexible benefits paid in cash to employees retiring on or after January 1, 1991.

Applicant appealed the CEO's determination to the Board; and on August 17, 2015, the Board denied Applicant's appeal, upholding the CEO's determination. Applicant timely sought an administrative hearing, and the hearing was held before Hearing Officer Robert M. Snider ("Hearing Officer") on May 5, 2017. The Hearing Officer issued his Proposed Findings of Fact, Conclusions of Law, and Recommended Decision on November 29, 2017, as amended by the Response to Applicant's Objections and Request for Clarifications dated January 31, 2018 (collectively, the "Hearing Officer's Proposed Findings").

The matter was presented to the OCERS Board of Retirement ("Board") for final determination at its duly noticed public meeting on August 20, 2018. In advance of its August 20, 2018 meeting, the Board received and reviewed a transcript and summary of all of the testimony, plus all other evidence received by the Hearing Officer in connection with this matter, pursuant to the County Employees Retirement Law of 1937 (CERL), Government Code section 31534. Subdivision (b) of Government Code section 31534 provides that, upon receipt of the transcript and summary of all evidence, "the board shall take such action as in its opinion is indicated by such evidence."

II. PROCEDURAL BACKGROUND

In advance of its August 20, 2018 meeting, the Board received and reviewed a transcript and summary of all of the testimony, plus all other evidence received by the Hearing Officer in connection with the Application, pursuant to Government Code section 31534. The Board was provided with all of the evidence listed in Section IV, below.

The Board gave actual, timely notice to the Applicant that the matter would be considered as Agenda Item DA-2 at the Board's meeting on August 20, 2018, and the Board duly noticed the meeting and Agenda Item DA-2, as required by law.

At its open and public meeting on August 20, 2018, following the Board's review of the transcript, summary of all testimony, plus all other evidence received pursuant to Government Code section 31534(b), the Board determined to set aside the Hearing Officer's Proposed Findings and limit its consideration to solely the issues of (1) whether OCERS and the Applicant are bound by the Settlement Agreement (defined below) and the Judgment (defined below); and (2) if so, whether OCERS calculated Applicant's retirement allowance in accordance with the Settlement Agreement and Judgment.

After such review and consideration, and after Applicant was given the opportunity to, and did in fact, make an oral presentation to the Board on August 20, 2018, the Board voted unanimously to deny Morell's Application for a recalculated retirement allowance. The Board further directed staff to prepare proposed Findings of Fact, Conclusions of Law and Recommended Decision for final consideration by the Board at a future meeting of the Board, with notice to the Applicant as further provided under Rule 21 of the Board's Administrative Hearing Procedures (adopted February 19, 2002; revised December 14, 2015; and applicable to hearings requested before June 1, 2018).

The audio and video recording of the Board proceedings conducted in this matter on August 20, 2018, and any transcript prepared therefrom, is incorporated herein by this reference and is made part of the administrative record of this matter.

III. ISSUES

The sole issues in this matter, as determined by the Board at its meeting on August 20, 2018, are:

1. Whether OCERS and the Applicant are bound by the Settlement Agreement (defined below) and the Judgment (defined below); and

2. If so, whether OCERS calculated Applicant's retirement allowance in accordance with the Settlement Agreement and Judgment.

IV. SUMMARY OF EVIDENCE

A. *Documentary Evidence*

The following documents were received in evidence:

Description	Date
Letter from Morell to Jenike (OCERS)	6/23/2014
Personnel Policies and Regulations, OC Superior Court	12/18/2013
OCERS Letter to Morell	3/26/2014
Orange County ERS, Retirement Benefit Estimate	3/25/2014
OCERS Letter to Morell	9/9/2014
Letter from Morell to Steve Delaney (OCERS) received 12/01/2014	6/23/2014
OCERs Letter to Morell	3/20/2015
Letter from Morell to Delaney	6/15/2015
Board of Retirement, OCERS RESOLUTION 98-001	2/16/1998
Judgment in Orange County Superior Court Case Nos. 791315 and 791499	11/1/2002
Order Approving Settlement Agreement	11/1/2002
Settlement Agreement	9/12/2002
Judicial Council Coordination Proceeding No. 4049, Tentative Decision Re: Orange County Resolution 90-1551	8/14/2001
Orange County Benefits Center record of Applicant's OBP election for 2011	2010
Orange County Benefits Center record of Applicant's OBP election for 2012	2011
Orange County Benefits Center record of Applicant's OBP election for 2013	2012
Respondent's complaint for declaratory relief	3/6/98
Petition for writ of mandate	3/10/98
Respondent's memorandum of points and authorities in support of ex parte application to enjoin or consolidate	3/13/98
Defendants' opposition to ex parte motion	3/16/98
Defendants' general demurrer to complaint	4/1/98
County's answer to complaint	4/8/98
County's cross-complaint for declaratory relief	4/8/98
Respondent's opposition to demurrer	4/14/98
Defendants' reply to opposition to demurrer	4/24/98
Minute Order	4/28/98
Defendant attorneys' answer to complaint	5/6/98
OCEA complaint in intervention	5/29/98
OCEA memorandum of points and authorities in support of cross-petition for writ of mandate	5/29/98

REAOC complaint in intervention	6/10/98
REAOC memorandum of points and authorities in support of cross-petition for writ of mandate	6/10/98
Declaration of Raymond A. Fleming in support of respondent's opposition to motion for preliminary injunction	6/11/98
County's answer to REAOC cross-complaint for writ of mandate	7/1/98
OCEA notice of motion and application for peremptory writ of mandate	7/22/98
Respondent's answer to OCEA cross-petition for writ of mandate	8/25/98
OCEA's answer to complaint	9/14/98
County's supplemental cross-complaint	10/16/98
Joint case summary	10/30/98
Respondent's answer to supplemental cross-complaint	12/7/98
Respondent's answer to REAOC cross-petition for writ of mandate	4/16/99
Order on matters addressed at August 27, 1999 status conference	11/22/99
Opening brief of plan members regarding obligation or retirement associations	3/30/00
Statement of decision re includability of (1) termination pay; (2) insurance-related payments; and (3) pick-ups	7/20/00
Statement of decision re includability of in service cash-outs of accrued leave benefits	11/8/00
Notice of proposed settlement and fairness hearing	9/11/02
Third Amended and Restated County of Orange Section 125 Plan	6/1/11
Fourth Amended and Restated County of Orange Section 125 Plan	1/1/13
Orange County Superior Court Personnel Policies and Regulations	9/28/07
Orange County Superior Court pay statement	1/7/11
Orange County Superior Court pay statement	1/6/12
Orange County Superior Court pay statement	1/4/13
Orange County Superior Court pay statement	1/3/14
County of Orange Board of Supervisors Resolution 90-115, adopting Government Code section 31460.1	12/18/90
Minutes of Board of Retirement Meeting on August 17, 2015 and materials related to Agenda Item D-11	8/17/15
Pre-Hearing Statement	3/7/2017
Applicant's Witness List	3/6/2017
Applicant's Supplemental Pre-Hearing Statement	4/21/2017
Respondent's Response to Hearing Officer's Request for OCERS' Response to Morell's Request to Present Hearsay Testimony at Hearing	4/26/2018
Respondent's Pre-Hearing Statement	4/5/2017
Respondent's Closing Brief	8/14/2017
Applicant's Reply Brief	9/28/2017
Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommended Decision	11/29/2017
Applicant's Objections and Request for Clarification	12/29/2017

Hearing Officer's Response to Applicant's Objections and Request for Clarification	1/31/2018
Transcript of May 5, 2017 Hearing	5/5/2017
Email from Applicant to Suzanne Jenike (OCERS)	8/13/2018

B. *Oral Evidence*

Applicant was called and sworn as a witness at the May 5, 2017 hearing in this matter (Transcript of May 5, 2017 Hearing).

Adina Bercaru, an employee of OCERS, was also called and sworn as a witness at the May 5, 2017 hearing (Transcript of May 5, 2017 Hearing).

Applicant was present at the August 20, 2018 Board meeting and was again given the opportunity to present, and did present, oral testimony in support of his Application.

V. **FINDINGS OF FACT**

1. Applicant began working for the Orange County Superior Court as a research attorney on August 13, 1992; he retired on February 21, 2014. Applicant is a member of OCERS.

2. During his final three years of employment, Applicant received Optional Benefit Plan benefits in the amount of $3,500 per year from his employer, which Applicant elected to receive partly in cash and partly as reimbursements for his out-of-pocket healthcare costs.

3. On January 27, 2014, Applicant filed his application for retirement with OCERS.

4. Upon receipt of Applicant's retirement application, OCERS calculated Applicant's retirement allowance based on the following statutory formula:

Final Compensation X Years of Service X Retirement Formula (Plan J/2.7% @ 55/§31676.19)

5. "Final compensation" is defined by section 31462 of the Government Code as the average annual "compensation earnable" by a member during any three years elected by a member at or before the time he or she files an application for retirement, or, if the applicant fails to elect, during the three years immediately preceding his or her retirement (in either case, the "Measuring Period").

6. "Compensation earnable" is defined by Government Code section 31461 and section 31460.1 (adopted by the Orange County Board of Supervisors by Resolution 90-1551) and more specifically by OCERS Board Resolution 98-001. Resolution 98-001, adopted by the Board at its regular board meeting on February 6, 1998, sets forth what elements of remuneration are to be included in, and excluded from, "compensation earnable." Paragraph 2

of Resolution 98-001 excludes from "compensation earnable" the following items (among others):

> Flexible Benefits ("Cafeteria Plan") provided in-kind
>
> Flexible Benefits ("Cafeteria Plan") paid in cash to the extent paid to members retiring on and after January 1, 1991

7. When OCERS calculated Applicant's final compensation, OCERS concluded that the Optional Benefit Plan benefits received by Applicant in cash during the Measuring Period constituted "Flexible Benefits ("Cafeteria Plan") paid in cash to a member retiring on or after January 1, 1991" under Resolution 98-001 and therefore should be excluded from Applicant's compensation earnable and final compensation, and that the Optional Benefit Plan benefits received by Applicant as healthcare reimbursements during the Measuring Period constituted "Flexible Benefits ("Cafeteria Plan") provided in-kind" under Resolution 98-001 and therefore should be excluded from Applicant's compensation earnable and final compensation. Based on these conclusions, OCERS determined that Applicant's monthly final compensation was $11,781.94, and calculated Applicant's monthly retirement allowance to be $6,836.72 (gross) for the unmodified option.

8. Applicant did not contest OCERS' calculation of his retirement allowance except with respect to the exclusion of the Optional Benefit Program benefits from the calculation of his compensation earnable and final compensation.

9. Resolution 98-001 was the subject of litigation in the coordinated proceedings known as the *Retirement Cases*, Judicial Council Coordination Proceeding No. 4049 in the Superior Court of the State of California, City and County of San Francisco (the "Action"). The Action resulted in a settlement agreement ("Settlement Agreement") in 2002 among OCERS, the Orange County Employees' Association, the Retired Employees' Association of Orange County, Inc., the Orange County Attorneys' Association, Jan J. Nolan and Eric W. Snethen, individually and as members and representatives of a class ("Class") consisting of all past, present, and future members of OCERS including but not limited to retirees, deferred retirees, and active employees and all of the members' survivors, beneficiaries, agents, assigns, representatives and successors in interest ("Class Members"), and the County of Orange (collectively, "Parties"). The effective date of the Settlement Agreement was the first business day following the latest of (a) the execution of the Settlement Agreement by the Parties; (b) the date on which the San Francisco County Superior Court entered an order approving the Settlement Agreement; and (c) the date on which the San Francisco County Superior Court entered a Judgment (defined below) in the Action.

10. Applicant was a member of the Class (defined above) by reason of the fact that he was an active member of OCERS at the time the Settlement Agreement and Judgment became effective. Applicant admitted at the August 20, 2018 Board meeting that he was a member of the Class.

11. The Settlement Agreement states in Paragraph 3 that:

> Each of the Parties agrees to accept as final and binding the inclusions in and exclusions from compensation, compensation earnable, and final compensation as more particularly set forth in OCERS' Resolution 98-001, as amended by OCERS' Resolution 98-009, and as further amended by OCERS' action adopting its Resolution 00-003 on or about December 18, 2000.

The referenced resolutions, including Resolution 98-001, were attached as exhibits to and incorporated by reference in the Settlement Agreement.

12. The Settlement Agreement states, in Paragraph 2, the agreement of the Parties that a Judgment in the form attached as Exhibit A to the Settlement Agreement ("Judgment") could be entered by the San Francisco County Superior Court in the Action, and in Paragraph 3, that the Resolutions would be entered into the Judgment.

13. The Settlement Agreement states in Paragraph 5 that:

> The Judgment, when entered by the Court, shall be final and binding on all of the Parties, including each Class Member. Each of the Parties agrees not to appeal from, seek modification of, or otherwise challenge the Judgment.

14. On November 1, 2002, the San Francisco County Superior Court entered both an Order approving the Settlement Agreement and the Judgment. The Judgment states that:

> [A]ll of the terms and provisions of the approved Settlement Agreement, a copy of which is attached hereto and incorporated herein as Appendix "2," shall be binding upon and implemented by all parties to these actions, including all members of the class consisting of all past, present and future members of the Orange County Employees Retirement System, including retirees, deferred retirees, and active employees, and all of the members' survivors, beneficiaries, agents, assigns, representatives and successors in interest.

15. To the extent any of the foregoing Findings of Fact are Conclusions of Law, the Board so concludes.

VI. CONCLUSIONS OF LAW

1. OCERS and Applicant are bound by the Settlement Agreement and Judgment.

2. OCERS accurately calculated Applicant's retirement allowance in accordance with the Settlement Agreement and Judgment.

3. To the extent any of the foregoing Conclusions of Law are Findings of Fact, the Board so finds.

VII. **DECISION**

The Application of James B. Morell for a recalculated retirement allowance is DENIED.

DATED: 10/18/2018

Chris Prevatt, Chair of the Board of Retirement

JAMES_MORELL_2215

ORANGE COUNTY
OCERS
EMPLOYEES RETIREMENT SYSTEM

Serving the Active and Retired Members of:

CITY OF SAN JUAN CAPISTRANO

COUNTY OF ORANGE

ORANGE COUNTY CEMETERY DISTRICT

ORANGE COUNTY CHILDREN & FAMILIES COMMISSION

ORANGE COUNTY DEPARTMENT OF EDUCATION (CLOSED TO NEW MEMBERS)

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

ORANGE COUNTY FIRE AUTHORITY

ORANGE COUNTY IN-HOME SUPPORTIVE SERVICES PUBLIC AUTHORITY

ORANGE COUNTY LOCAL AGENCY FORMATION COMMISSION

ORANGE COUNTY PUBLIC LAW LIBRARY

ORANGE COUNTY SANITATION DISTRICT

ORANGE COUNTY TRANSPORTATION AUTHORITY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

TRANSPORTATION CORRIDOR AGENCIES

UCI MEDICAL CENTER AND CAMPUS (CLOSED TO NEW MEMBERS)

October 18, 2018

James B. Morell
Redacted

Re: In the Matter of the Application of James B. Morell, a Member of the Orange County Employees Retirement System, for a Recalculated Retirement Allowance

Dear Mr. Morell:

The OCERS Board of Retirement ("Board") considered Staff's proposed Findings of Fact, Conclusions of Law and Decision in the above-referenced matter on October 15, 2018. The Board adopted the Findings of Fact, Conclusions of Law and Decision as presented by Staff with the following changes:

- Add, to the table of Documentary Evidence (Section IV.A.), the following item of evidence:

  "Email from Applicant to Suzanne Jenike (OCERS) 8/13/2018"

- Replace #2 of the Findings of Fact (Section V) with the following Finding of Fact:

  "2. During his final three years of employment, Applicant received Optional Benefit Plan benefits in the amount of $3,500 per year from his employer, which Applicant elected to receive partly in cash and partly as reimbursements for his out-of-pocket healthcare costs."

The Board's decision in this matter is now final.

Pursuant to California Code of Civil Procedure section 1094.6, any legal action in Superior Court to challenge the Board's decision must be filed within 90 days of the date of that decision (unless such time is extended pursuant to subdivision Code of Civil Procedure section 1094.6(d)). Accordingly, legal action must be filed not later than January 16, 2019.

Sincerely,

Suzanne Jenike
Assistant CEO, External Operation

PROOF OF SERVICE

I do hereby declare that I am employed in the County of Orange, over 18 years old and that my business address is 2223 Wellington Avenue, Santa Ana, California. I am not a party to the within action.

On October 18, 2018, I served the foregoing **Notice of Board Action** on all other parties to this action by placing a true copy of said document in a sealed envelope in the following manner:

[X] (BY U.S. MAIL) I placed such envelope(s) addressed as shown below for collection and mailing at Santa Ana, California following our ordinary business practices. I am readily familiar with this office's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

[] (BY AIRBORNE EXPRESS) I placed such envelope(s) addressed as shown below for collection and delivery by Airborne Express with delivery fees paid or provided for in accordance with this office's practice. I am readily familiar with this office's practice for processing correspondence for delivery the following day by Airborne Express.

[] (BY FACSIMILE) I caused such document to be telefaxed to the addressee(s) and number(s) shown below, wherein such telefax is transmitted that same day in the ordinary course of business.

[] (BY PERSONAL SERVICE) I caused such document to be hand-delivered to the addressee(s) shown below. A proof of service signed by the authorized courier will be filed forthwith.

[X] (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed October 18, 2018, at Santa Ana, California.

Sonal Sharma

NAME AND ADDRESS OF EACH PERSON TO WHOM SERVICE WAS MADE

James B. Morell Redacted	

JAMES_MORELL_2217

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

BOARD OF RETIREMENT

IN RE:	)
	)
ITEM D-11:	)
	)
MEMBER BENEFIT APPEAL -	)
JAMES MORELL.	)
	)

REPORTER'S TRANSCRIPT OF

EXCERPTED PORTION OF VIDEOTAPED PROCEEDINGS

Monday, August 17, 2015

Santa Ana, California

Reported by:

LAURIE HELD-BIEHL

CA CSR No. 6781

IL CSR No. 084002860

NJ CCR No. 30XI00239100

TX CSR No. 8555

RPR/CRR No. 32836

JOB No. 311309

JAMES_MORELL_0104

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
BOARD OF RETIREMENT

IN RE:)
)
ITEM D-11:)
)
MEMBER BENEFIT APPEAL -)
JAMES MORELL.)
_____)

Reporter's Transcript of Excerpted Portion of Videotaped Proceedings, pages 1 through 29, proceedings dated Monday, August 17, 2015, transcribed Monday, March 18, 2019, in Irvine, California, by LAURIE HELD-BIEHL, California Certified Shorthand Reporter No. 6781, Illinois Certified Shorthand Reporter No. 084002860, New Jersey Certified Court Reporter No. 30XI00239100, Texas Certified Shorthand Reporter No. 8555, and Registered Professional Reporter, Certified Realtime Reporter No. 32836.

APPEARANCES:

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
BOARD OF RETIREMENT TRUSTEES:

CHUCK PACKARD, Chairman
ROGER HILTON, Vice Chair
DAVID BALL, Trustee
TOM BECKETT, Trustee
FRANK ELEY, Trustee
WAYNE LINDHOLM, Trustee
CHRIS PREVATT, Trustee

DAVID LANTZER, Deputy Chief Counsel

HARVEY LEIDERMAN, ESQ., REED SMITH, LLP

JAMES MORELL, ESQ., In Propria Persona

STEVE DELANEY, Chief Executive Officer

SUZANNE JENIKE, Assistant CEO, External Operations
GIRARD MILLER, Chief Investment Officer
BRENDA SHOTT, Assistant CEO, Finance and Internal Operations

ROBERT VALER, Chief Legal Officer

TRACY BOWMAN, Director of Finance

CYNTHIA HOCKLESS, Director of Administrative Services
DAVID JAMES, Director of Internal Audit
JENNY SADOSKI, Director of Information Technology

ROBERT KINSLER, Communications Manager

DAVID KIM, Director of Internal Audit

ANTHONY BELTRAN, Visual Technician

APPEARANCES (Continued):

MEGAN CORTEZ, Disability Coordinator
MICHELLE BRINKER, Recording Secretary
ANNETTE PALADINO, Disability Retirement Consultant

Santa Ana, California

Monday, August 17, 2015

CHAIRMAN PACKARD: Okay. Now, D-11.

MS. JENIKE: D-11, Mr. Chair --

CHAIRMAN PACKARD: Yes.

MS. JENIKE: -- members of the Board, is for retired member James Morell.

Staff recommendation is to find that OCERS properly excluded optional benefit payments from compensation earnable in calculating final average salary and the member's retirement allowance. And deny the member's request to include the optional benefit payments in his compensation earnable for the calculation of final average salary and his retirement allowance.

TRUSTEE ELEY: So moved, Mr. Chair.

CHAIRMAN PACKARD: Second?

TRUSTEE BECKETT: Second.

CHAIRMAN PACKARD: Second by Mr. Beckett.

Discussion? No discussion by the -- the Board.

Please state your name for the record.

MR. MORELL: My name is James Morell. I'm the --

CHAIRMAN PACKARD: You -- you didn't speak into the microphone; that doesn't do us any good.

MR. MORELL: James Morell. I'm the retiree here.

Yeah. I -- I just -- I understand I have three minutes; if I could just take a minute or two to summarize the situation, it's a little bit complicated. Some legalistic issues, I am a former senior research attorney; so I guess I sort of focused on that. But I do feel that's the issue really.

I'm sure you're all aware the Ventura decision 15 or so years ago essentially said that compensation which is payable -- paid or payable as cash is -- sort of the rule of thumb, it should be included in compensation, compensation earnable for purposes of determining the retirement allowance.

What I am dealing with here is a -- is a flexible benefit plan that's offered by the Superior Court, it's called an optional benefit plan. The way it works is every year, as part of our salary package, $3,000 is given to us; if -- if you do nothing, it's paid to you the first paycheck of the year, it's $3,000 cash, right, into your pocket.

You have the opportunity to allocate some or

part or all -- or all, if you want to, of those funds to certain tax-free pretax -- however you do it.

Basically the IRS gives you a pretax application of those funds to be used for certain limited purposes, like healthcare, paying for deduction costs, things like that; so that's -- that's the -- the issue I'm dealing with.

The reason -- the basis for -- for the Board's previous exclusion -- existing exclusion of that is based on a 1990 law, Government Code 31460.1, which authorized boards -- county boards to pass resolutions saying that those benefits should not be included in the -- in the calculation. Orange County did that immediately within months and that became effective 1991.

The legislature, subsequently, in '90 -- no, '91 -- '91, I think effective '92, repealed that law; so that's --

Well, first of all, the -- the law actually said for persons who -- who have elected to participate in flexible benefit programs, the -- the flexible benefit should be excluded; so because these -- this particular type of optional benefit program is -- is paid, the default option is payment of $3,000 as part of your income, there was no

election to participate.

My argument is the statute was facially inapplicable; therefore, the exclusion by the Board previously as to this particular optional benefit provision had no lawful basis, essentially.

I don't think this argument has ever been raised before.

Another argument, which I don't believe has ever been raised before, it's the effect of repealing the statute.

There's case law that says when you repeal a statute like that, it effectively nullifies the whole thing, including any actions taken pursuant to the statute; so Orange County has been excluding this benefit based on a repealed statute for more than two decades.

That doesn't necessarily have to be all undone at this point but -- regardless, that -- that --

For my situation, I'm arguing going forward that I don't believe that that statute provides a lawful basis for the exclusion of that -- of that calculation.

Now, there was litigation 10 or 15 years ago after the Ventura decision, the Retirement Cases.

There was -- there was --

None of the issues that were raised, alleged, pleaded in that case, or litigated, involved Ventura issues, per se. There was a tentative decision --

There was an issue raised about the vested -- the effect -- the vested -- for people who retired prior to the enactment of that statute in 1990. The argument raised by retirees was that the statute deprived them of vested constitutional rights unconstitutionally. It was a constitutional argument. I'm not making a constitutionality argument.

The arguments that I'm raising here were never litigated in the Retirement Cases. They were never pleaded, never litigated; therefore, I don't believe, under the law, that the settlement of those -- of that -- of those cases can bar my arguments.

Generally, if you have a settlement of a case, the issues settled are the only -- are only the issues raised in the pleadings and -- and litigated. And -- and the reason is otherwise --

You can't control everything. There's no way of determining what a settlement concerns or

applies to. And that's --

And also there -- there's also subsequent case law that says that these -- these benefits are a statutory right and they can't be bargained away. And effectively what that -- what that settle- -- what that settlement did is bargain away those rights. And -- and I question the legality of that, whether -- whether that's lawful to have done that.

And -- and I'm not interested, really, in challenging the whole settlement agreement but certainly at least as to this provision. And I --

I'll just say a couple of things. There's issues that have been raised about the cost of this. I'd say several things. One --

First of all, that was true with all the Ventura decisions; there were always costs that were unfunded, there were ways of dealing with that.

Number two --

And I don't think that's an appropriate way to determine whether benefits should be allowed. I mean, it would -- the law is what the law is. And the -- and the funding to implement the law should follow what the law is, not vice versa.

Secondly, it's my understanding that this particular optional benefit applies only to several

hundred people in the Orange County Superior Court.

And -- and based on my calculations, it would affect my retirement allowance by about $150 a month, which means a little less than $2,000 a year. If you multiply that by a couple hundred people, you're talking maybe a half million dollars a year. That said, that's not inconsequential; on the other hand, it's not -- I don't think it would bankrupt the OCERS retirement system.

Thirdly, there are ways of handling this.

All of the previous people who have previously retired and not raised this issue, as I am in an appeal in the calculation of the retirement allowance, arguably have waived this issue. And any decision you made with regard to me wouldn't necessarily have to involve a recalculation of all the previous retirees because arguably they've waived their right by not doing what I'm doing, standing here and pointing out that -- that the decision is erroneous -- of excluding it is erroneous.

That's one way to go.

CHAIRMAN PACKARD: I need to interrupt you.

You have three minutes to make your case and you've had five already.

MR. MORELL: Okay. I'm sorry. I'm about --

CHAIRMAN PACKARD: So if you could sum it up, we'd really appreciate that.

MR. MORELL: I'm pretty much done. I apologize.

It's -- it's kind of complicated. I was trying to be summary.

If you have any questions, I'm -- I'm happy to try to answer them. I'm interested in -- in -- in trying to clarify any -- any uncertainties you may have.

TRUSTEE ELEY: Before our attorneys talk about this --

Sir, did you ever read the decision by the San Francisco judge? You know, it was not appealed.

It was a 9-0 decision of the Supreme Court and then it was appealed and then it went up to the San Francisco judge, because he was outside of the system, and he litigated on all the areas that OCERS adopted in 98.001.

Did you ever read that decision?

MR. MORELL: I'm not aware of any such decision.

TRUSTEE ELEY: Okay. All right.

MR. MORELL: When you say --

TRUSTEE ELEY: We'll let -- we'll let Mr. Leiderman update you.

MR. MORELL: The -- the Retirement Cases involve

very specific issues that were raised by the parties.

They raised this constitutional issue of it being a deprivation of a vested right. That was the only issue they argued, they did not argue Ventura.

As far as I know, it was never --

TRUSTEE ELEY: Well, may- -- maybe I'm mistaken, I apologize. But we'll let our attorneys handle that.

Sorry.

MR. MORELL: That's my understanding.

TRUSTEE ELEY: Sorry.

MR. MORELL: If I'm wrong, I apologize. But I'm not aware of it.

TRUSTEE ELEY: Okay.

CHAIRMAN PACKARD: No more questions? Any other comments?

Can we have -- can we have Harvey reply?

VICE CHAIR HILTON: Counsel --

Let's let counsel go and then I might have something to add.

CHAIRMAN PACKARD: Or David reply, excuse me.

MR. LANTZER: Yes.

Mr. Chair, members of the Board, basically it --

OCERS has what we call Resolution 98-001

that came out of this -- the Ventura case. That resolution is part of a settlement agreement that is -- that resolved the Ventura class action for all OCERS members, past, present and future, that's in the settlement agreement. It's in -- and the court ratified that settlement agreement and said that, you know, this is in compliance with the Ventura decision, this is the law of the land for OCERS and its past, present and future members and beneficiaries. Basically --

And it's -- it's cited in the memo that is the cover memo for this -- this matter on your iPads and -- if I can get to that section.

But basically it says -- it provides a list of items that are to be included and excluded from compensation earnable.

Two of the items that are excluded from compensation earnable are "flexible benefits (cafeteria plan), provided in kind," which would be payment of insurance premiums, things like that, that go into flexible spending accounts and the like. And then also "flexible benefits (cafeteria plan) paid in cash, to the extent paid to members retiring on and after January 1, 1991."

Mr. Morell clearly fits into the retiring

after January 1, 1991; so Resolution 98.001 excludes his -- any cafeteria plan benefits paid to him in kind.

Like I said, this -- this was ratified by the court as part of the In Re: Retirement Cases and as part of the settlement of the Ventura matter, so --

And this is -- this has been OCERS practice -- this was OCERS practice when Mr. Morell was hired. He had -- never had any --

Well, according to the court's tentative decision that's in your packet, Mr. Morell would never have any reasonable expectation that his cafeteria plan benefits would be excluded -- included into his compensation earnable because they weren't included at the time he was hired, they've never been included since the day he was hired until the day he retired; so there's another point that's -- and I believe that that's discussed in the memo as well.

Finally, I'd like to correct something that Mr. Morell said that is not -- that is clearly not true. And -- and while costs of granting a benefit may be a secondary conclusion or a secondary concern from a board, Mr. Morell and his 100 or so colleagues at the Superior Court are not the only people in the

County who received flexible benefits. And we have to treat all of our members equally; so if we were going to include flexible benefits in -- in compensation earnable, we would have to do that.

I know that OCMA has -- the Manager's Association has a similar plan. I believe that the Executive -- County Executive Staff has a similar plan. I'm not sure about the other plan sponsors. But this would be a -- a large number of people that would be affected by this, potentially.

MR. MORELL: I would just ask --

Insofar as that is a factor, I would just ask the Board to actually find out exactly how many people would be affected. Like I said, and my understanding is -- I've been told by OCERS' own staff, that this is -- this particular type of plan, where the default option is to pay cash if you do nothing, every -- every time in the fall you get the opportunity to elect to include the -- make an election, apply some of these $3,000 to other things; if you don't, it's part of your $3,000 -- it's part of your annual salary, the $3,000.

What they've done is essentially carved out $3,000 from your annual salary and permitted you to take advantage of what the IRS offers as using these

funds on a pretax basis for certain purposes. The default option, like I say, is to pay the $3,000.

Insofar as that may be a consideration of how many other people would be affected by this, I would argue that -- that -- the fact that the default option is payment as cash puts it squarely within the Ventura decision. And I -- I would just ask the Board to determine how many other of these other plans are -- are -- are similar in that regard and -- and not just based on a generalization insofar as that would be a factor.

And -- I'm sorry, and also with regard to the reasonable expectation, that -- that is a specific part of the analysis of the vested right inquiry that the court -- that the court performed -- performed in order to resolve the contention that these were vested rights in that -- in the -- in the Retirement Cases. This is --

And I don't -- I don't know if any of you are attorneys, but when you're -- when you're deciding a legal issue you apply certain -- certain tests based on what the issues in the case were. Under that constitutional question, one of the issues was what was the reasonable expectations of the parties? That is essential to determining whether a

vested right existed.

I'm not arguing that there's a vested right. I'm arguing purely what the statute requires, it's a purely statutory argument. I'm not arguing it's an anticipated benefit, I'm arguing it's a statutory right; so that's --

CHAIRMAN PACKARD: Mr. Eley.

TRUSTEE ELEY: You know, and by further extension, you know, at the County, the people who work also at the Superior Court, can pick different insurance plans. And if you're already covered under somebody else's insurance, say your spouse works for Boeing, you can pick Wellwise. And Wellwise pays you some money, right, from that?

MR. MORELL: I believe it does.

TRUSTEE ELEY: Yeah, it does. And -- every month you get 50 dollars or something like that.

And -- and that actual question was brought up by the court, if I recall, and it was reaffirmed that 98.001 was right to exclude those because -- and the reasoning given by the judge at the time kind of shocked a lot of people who were on Wellwise thinking that they would switch to Wellwise in their last three years or something like that, because he said those are health insurance monies and it was never,

never thought to be something that would add to your retirement as a Ventura item.

MR. MORELL: Okay. And -- and I don't necessarily disagree with that reasoning.

I don't think it applies here because, like I say, these $3,000 are -- $3,000 is actually part of the compensation package. And if you do nothing, you get paid $3,000; so it's a -- it's not the same thing as -- as -- as -- as getting a certain type of health benefit.

And -- and that's not part of your -- your salary, so to speak. That's -- that's -- that's kind of a collateral benefit, kind of like a rewards points for your credit card or something, you know, it's -- that's not really considered income generally I don't think, but --

This is something where -- where it's -- it's part of the standard salary package for attorneys at the court, at least.

CHAIRMAN PACKARD: Mr. Hilton.

TRUSTEE ELEY: My city does the same thing.

VICE CHAIR HILTON: Mr. Morell, you kept me up late last night reading this, which is okay, that's my job. It was a lot of reading.

As far as the amount of people that get

this, it's irrelevant. You know, every Deputy District Attorney gets this $3500, every public defender gets this $3500 and many administrators get it but it's not really that relevant how many people get it.

Really, when it got down to it, I went back to 98.001 and everything your optional benefit plan covers is -- is excluded in here. And that's employer contributions, you know, to your deferred comp, that's -- that's one of the things that are excluded.

Your flexible benefits, which is -- which you can using some of that money for is -- that's excluded.

And then, you know, I know a part of that $3,500 is supposed to be in lieu of paying some of your fees and licenses and things you have to get.

But, you know, I go back and I went through all of the case law just as much as I can, I'm not an attorney, but when I get back -- when I really got back to it, I went back to 98.001 and everything your optional benefit could apply to is excluded.

And, obviously, the decision of this Board is not going to bar you from doing something further.

But I -- I'm just saying after -- after I

was all done with this, I went back to this and I've read all your stuff, I read everything on there, and I've researched some of it. But I think I go back to 98.001 and I'm going to apply it.

MR. MORELL: And I don't -- and I don't dispute that that's what 98.001 says. I'm questioning whether -- whether that is overbroad and invalid as to this particular plan.

VICE CHAIR HILTON: No, I understand your argument. I just want --

MR. MORELL: I don't believe the argument has ever been raised before.

VICE CHAIR HILTON: No, I understand your argument and they're good arguments, actually. I -- I appreciate good arguments and the --

You know, I'm just saying -- I just want to tell you my reasoning. In the end, I just went back and --

But I did read it all and I did appreciate the -- the work you put into it.

TRUSTEE ELEY: Just one more question.

Mr. -- Mr. Leiderman, because you argued this before, is that correct what I'm saying about the history of it was that we adopted it immediately, it was appealed by the County or something, because

they didn't want us to include any of those things; is that correct?

What was the --

I mean, refresh -- because since you actually --

Your name is actually on these things, pleadings and stuff; so what -- what was the history on that, 98.001?

MR. LEIDERMAN: 98.001 was the result of a settlement agreement that the Applicant is a party to and bound by.

The settlement agreement was a class action in which he was represented as an active member in the retirement system.

98.001 was an exhibit to the settlement system and it was approved by Judge Pollak of the San Francisco Superior Court and endorsed by the First District Court of Appeals in the In Re: Retirement Cases case. That's entirely, completely dispositive of this claim.

And if -- if I might, because it's fairly recent, perhaps, you know, through the Chair, I can offer a research assignment to the Applicant.

If you want to look at the 2013 decision of Chisom versus Fresno County Employees Retirement

System where a similar argument was made and disposed of by the post-Ventura settlement agreement, to which that Applicant was also a party through a class action representation, that might be useful in your analysis.

But this -- as Mr. Lantzer said, this was fully and completely disposed of by a binding settlement agreement between this Applicant and this retirement system --

How many years ago? 1998.

TRUSTEE ELEY: Well, '98. But the appeal took a couple years.

MR. LEIDERMAN: About 17 years ago.

TRUSTEE ELEY: Yes.

MR. LEIDERMAN: And that agreement has been binding on this retirement system and on the members of the retirement system for the last 18 years. 17 years, pushing 18.

TRUSTEE ELEY: But to say it wasn't ever brought up in court; it has been brought up, it was fully affirmed by the --

MR. LEIDERMAN: It was brought up. It was brought up directly in court.

TRUSTEE ELEY: Yes. Thank you.

MR. LEIDERMAN: OCERS settled -- that case

settled before the final decision on appeal.

OCERS' settlement was held up as a model by the Court of Appeals for the exercise of discretion and judgment by the retirement system.

If -- if you have other questions, I'm happy to answer them.

CHAIRMAN PACKARD: Okay. A quick response and then we have to go to vote.

MR. MORELL: Yeah.

I just want to point out that in their demurrer -- in their opposition to the demurrer --

And Mr. Leiderman, with all due respect.

-- did -- did acknowledge that -- that the -- the Board was seeking no advisory opinion. And that their complaint, which is the legal pleading defining the issues present in the case, was -- was -- was defined by the issues brought by the retirees.

He says "In paragraph 25 of its verified complaint, the Board requests the Court to make a determination as to the specific controversies raised by Defendants. Presently, the only parties who have raised actual controversies to the Board's legal duties and their legal rights are Defendants Nolan, Snethen and the County of Orange. Therefore, unless

and until all other parties create an actual controversy so as to require the Board to amend its verified complaint to add additional defendants, those issues are the only issues to be revolved in this dispute."

Now, what -- what he's -- what that's referring to is the pleadings raised by the other parties. The parties, the retirees, the -- Snethen, Nolan and the County of Orange, and the retirees raised very specific issues.

The issue that they raised with regard to the flexible plan was that there was deprivation as a vested right. It was a constitutional argument. The argument that I'm making was never pleaded, never raised.

He says it was. I -- I -- I -- I -- all I can say is he has a bad memory.

But it's not reflected in the pleadings, it's not reflected anywhere in the paperwork that I could find.

And their demurrer has -- I mean, their opposition to the demurrer -- in order to survive the demurrer, he specifically said "The Board thus requests no advisory opinion from this Court," because the demurrer had alleged that the Board's

pleading was invalid because it sought advisory opinions as to matters such as the matter I'm raising now, matters extraneous to the issues that were specifically alleged.

Now, what is happening is the Board is now coming back in and saying "No, it was not an advisory opinion. These actually" -- "These issues, even though they were not pleaded, not litigated, are actually encompassed by the settlement agreement."

It's a nice legal issue. I think it's wrong because the general rule is the pleadings define what is litigated -- what -- what the case stands for. When you settle a case, those are the issues that are settled. These --

This issue that I'm raising was never raised. And the settlement cannot settle issues which were not pleaded or litigated. It's just a standard rule of litigation. And there's --

CHAIRMAN PACKARD: Mr. Prevatt.

TRUSTEE PREVATT: Mr. Morell, you know, appreciate all the information you've provided us.

I'm not really convinced by your argument. You have what might be a good legal argument and you're free to pursue that. And I'm kind of leaning towards what our legal counsel has told us and what

we've set as a model of doing with 98.001.

You know, if you want to give -- have this particular question argued and decided, more power to you, but I don't think you'll get very far. But I'm just --

I mean, from my perspective, I'm not convinced that what you're saying -- the fine distinction you're making is really a distinction that exempts these earnings from the exclusion; so I think we should just vote.

CHAIRMAN PACKARD: Okay. All right. Let's go to vote.

Did everyone vote?

Okay. It passes unanimously.

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I, the undersigned, a Certified Shorthand Reporter of the State of California, State of Illinois and the State of Texas, a Certified Court Reporter in the State of New Jersey, and Registered Professional Reporter/Certified Realtime Reporter, do hereby certify:

That the foregoing videotaped proceedings were transcribed before me at the time and place herein set forth;

That a verbatim record of the videotaped proceedings was made by me using machine shorthand, to the best of my ability, based on the quality of the videotaped, and same was thereafter transcribed under my direction;

Further, that the foregoing is an accurate transcription of said videotaped proceedings, again, to the best of my ability, and not having personally been in attendance at said videotaped proceedings.

I further certify that I am neither financially interested in the action nor a relative

or employee of any attorney of any of the parties.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: MAR 2 1 2019

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BEFORE THE BOARD OF RETIREMENT OF THE

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

In the Matter of the Service Retirement Benefit of **JAMES B. MORELL** Petitioner.	**PETITIONER'S OPENING BRIEF ON REMAND FROM SUPERIOR COURT** Date: December 13, 2021 Time: 9:30 a.m.

More than seven years after Petitioner's retirement, the issue of whether cash Optional Benefit Plan payments are pensionable is back before the Board on remand from the Superior Court.

BACKGROUND

Petitioner was employed as a research attorney at the Orange County Superior Court from August 1992 to February 2014.[1] As part of his standard attorney compensation

[1] AR 264, 955:12-14, 971:7-9. The parties have stipulated that the record in these remand proceedings includes the entire administrative record previously presented to the Superior Court (referred to herein as "AR"), as well as certain documents filed in the Superior Court. Morell decl., Exh. A. The documents contained in the record at AR 258-901, originally Bates numbered 1-645 (at lower right), were received into evidence without objection by the hearing officer in May 2017. AR 939:16-940:5.

package during his employment at the Court, Petitioner received cash payments under an Optional Benefit Plan (hereinafter "OBP") administered by Orange County pursuant to section 125 of the Internal Revenue Code.[2] During the pertinent time period (2011-2014),[3] the OBP provided an annual benefit in the amount of $3,500.00.[4] At open enrollment each November, Court attorneys were permitted to make an irrevocable allocation of these funds among a limited number of options, which included, *inter alia*: a taxable lump sum cash payment included in the first payroll disbursement of the new year; cash reimbursement on a non-taxable (pre-tax) basis for certain health/dental care expenses not covered by insurance; and allocation of the funds to the attorney's section 457 deferred compensation plan.[5] If no allocation were made, a cash payment of $3,500.00 was automatically included in the attorney's first payroll disbursement of the new year.[6] In accordance with the allocations he made, Petitioner received non-taxable reimbursement payments for health/dental care in the amount of $2,500.00 in 2011, $700.00 in 2012, $2,500.00 in 2013, and $1,100.00 in early 2014, the remainder of the annual benefit being paid to Petitioner as taxable cash in his January payroll distribution ($1,000.00 in 2011, $2,800.00 in 2012, $1,000.00 in 2013, and $2,400.00 in 2014).[7]

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[2] AR 955:15-20, 964:2-12, 985:17-986:1; see AR 753 at 1.28, 756 at 2.1, 792 at 1.28, 795 at 2.1, 867-869.

[3] Under Government Code section 31462(a), Petitioner's retirement allowance was based upon his average annual "compensation earnable" during the final three years of his employment.

[4] AR 762 and 801 at 4.2, 867 at section 4(A), 956:7-10.

[5] AR 756 at 2.2, 761, 762 at 4.4, 795 at 2.2, 800, 801 at 4.4, 867 at section 4(B). The portions of the annual benefit allocated to health/dental care expenses were paid directly to Petitioner and other Court research attorneys on a pre-tax basis by Orange County as cash reimbursement for expenses incurred within the selected category. AR 868 at section 4(C), (F); 956:12-957:10; 967:11-15. Paragraph 7 of the "findings of facts" contained in the Board's final decision of October 18, 2018, stated, "When OCERS calculated Applicant's final compensation, OCERS concluded . . . that the Optional Benefit Plan benefits received by Applicant as healthcare reimbursements during the Measuring Period constituted 'Flexible Benefits' ('Cafeteria Plan') provided in-kind' under Resolution 98-001 and therefore should be excluded from Applicant's compensation earnable and final compensation." AR 2213. There is no evidence in the record that OCERS made such a determination, and any such conclusion would have been erroneous, since, as the trial court explained in the class action litigation, payments made directly to an employee, as the reimbursement payments were, are considered "cash payments," whereas goods or services obtained by the employer for the benefit of the employee are "in kind benefits." AR 723-724, 726-727.

[6] Morell decl., Exh. C at 956:2-6; AR 762 and 801 at section 4.3.

[7] AR 57-59, 314-316, 642-645, 898-901, 956:7-957:10, 959:5-20.

Upon retiring in February 2014, Petitioner learned that the annual Optional Benefit Plan payments which he had been receiving would be excluded from the calculation of his retirement allowance. The authority cited as a basis for the exclusion was OCERS's Resolution 98-001, which was predicated on former Government Code section 31460.1 (repealed in 1992) as well as a 2002 class action settlement agreement and judgment which purported to bind all retirees to the terms of the Resolution. Petitioner appealed the exclusion in accordance with OCERS' administrative procedures, and in 2017 Referee Robert M. Snider upheld Petitioner's contention that the CERL required cash OBP payment to be included in "compensation earnable" but found that the parties were nonetheless bound by the terms of the 2002 settlement agreement unless and until the settlement agreement was adjudicated in court or voluntarily modified.[8] Declining, on advice of counsel, to modify the settlement agreement, the Board elected to set aside the referee's decision pursuant to Government Code section 31534(b) and to "limit its consideration" to the sole issues of whether the parties were bound by the 2002 settlement agreement and judgment and whether Petitioner's retirement allowance had been calculated in accordance with the settlement agreement and judgment. On October 18, 2018, over Petitioner's objection, the Board answered both questions in the affirmative and denied Applicant's claim.[9]

Petitioner filed a timely petition for writ of mandate in the Superior Court, and Judge Mary H. Strobel ultimately agreed with Applicant's contentions, ruling in early 2021 that the decision of the California Supreme Court in Alameda County Deputy Sheriffs Association v. Alameda County Employees Retirement Association (2020) 9 Cal.5th 1032 precluded OCERS from invoking a settlement agreement at variance with the CERL and that the Board had abused its discretion by failing to address the entirety of

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[8] Morell decl. Exh. D, AR 1065-1068, 1070-1072.

[9] AR 2208-2209, 2212-2215.

Petitioner's claim.[10] By judgment entered July 16, 2021, the Court remanded the matter to the Board for reconsideration in light of the Court's ruling and awarded Petitioner costs. A peremptory writ of mandate issued on the same date directed the Board to set aside its October 2018 decision, to "decide Petitioner's contentions that OCERS improperly excluded OBP benefits from the calculation of his final compensation separate and apart from the Settlement Agreement," and to show compliance via a return to be filed 180 days from the date of service of the writ.[11]

THE CERL REQUIRES CASH FLEXIBLE BENEFIT PAYMENTS TO BE INCLUDED IN "COMPENSATION" AND "COMPENSATION EARNABLE" FOR THE PURPOSE OF CALCULATING APPLICANT'S RETIREMENT BENEFIT ALLOWANCE

Under the CERL, "'[c]ompensation' means the remuneration paid in cash out of county or district funds, plus any amount deducted from a member's wages for participation in a deferred compensation plan . . . , but does not include the monetary value of board, lodging, fuel, laundry, or other advantages furnished to a member."[12] In construing these statutes, any ambiguities or uncertainties are to be resolved in favor of the pensioner.[13] The Orange County Superior Court intended the OBP benefit to enhance its employees' expertise and skills on the job,[14] and payments made for such skill enhancement are generally considered "compensation" under Government Code section

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[10] Exhibit A to July 16 Judgment, at pages 7-9.

[11] Service of the writ was accepted by Respondent's counsel on July 27, 2021.

[12] Government Code section 31460; see also Government Code sections 31461 (defining "compensation earnable") and 31462 (defining "final compensation").

[13] Ventura County Deputy Sheriffs' Assn. v. Board of Retirement (1997) 16 Cal.4th 483, 490.

[14] AR 867 at section 4(B).

31460.[15] Prior to the 1997 Ventura decision, it had been recognized that "flexible benefit" plans such as the Superior Court's Optional Benefit Plan could be included in "compensation" and "compensation earnable" under Government Code sections 31460 and 31461.[16] Under Ventura, the inclusion of such cash payments is mandatory: "With the exception of overtime pay, items of 'compensation' paid in cash, even if not earned by all employees in the same grade or class, must be included in the 'compensation earnable' and 'final compensation' on which an employee's pension is based."[17]

> The court in Ventura emphasized that while only cash payments received by an employee qualify as compensation within the meaning section 31460, when cash is paid in lieu of other in-kind benefits, those payments qualify as compensation. . . . In Ventura the court found that the payments the officers received in lieu of annual leave were earnable compensation within the meaning of sections 31460 and 31461 for the self-evident reason the officers had the ability to receive the pay in cash rather than in time off. . . . [T]he court in In re Retirement Cases . . . found that under Ventura sick leave or annual leave which was not or could not be converted to cash before retirement is not final compensation.[18]

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[15] Ventura County Deputy Sheriffs' Assn. v. Board of Retirement, *supra*, 16 Cal.4th at 498.

[16] See, e.g., Howard Jarvis Taxpayers' Assn. v. Board of Supervisors (1996) 41 Cal.App.4th 1363, 1374: "There is no dispute that such flexible benefit payments constitute 'remuneration' which may permissibly be taken into account in determining "compensation earnable" for retirement plan purposes." Howard Jarvis cited and followed the prior court of appeal decision in Guelfi v. Marin County Employees' Retirement Assn., which had held that inclusion of cash benefit payments in the calculation of retirement allowance was permissive, a holding disapproved by the California Supreme Court in Ventura when it held inclusion of such cash payments to be mandatory.

Flexible benefits payable as cash which had been authorized by Los Angeles County in 1992 were required to be included in "compensation earnable" until legislation specifically permitting the exclusion of those benefits was enacted in 1993. In re Retirement Cases (2003) 110 Cal.App.4th 426 at 481 n. 26.

[17] Ventura County Deputy Sheriffs' Assn. v. Board of Retirement, *supra*, 16 Cal.4th at 488.

[18] Salus v. San Diego County Employees Retirement Ass'n (2004) 117 Cal.App.4th 734, 739 (emphasis omitted); cf. also In re Retirement Cases, *supra*, 110 Cal.App.4th at 478-479: "Here, the employee is receiving an insurance premium, not a cash payment. Thus, it is an in-kind benefit, which is not 'compensation' under section 31460. . . . [W]e agree with the trial court that . . . 'the bright line drawn by Ventura . . . must be understood to be between those benefits paid in cash to the employee and those that are not.'" The Legislature has codified its approval of the holdings of In re Retirement Cases and Salus. Government Code section 31461(c).

As early as 1999, the Legislature's post-Ventura view of flexible benefit plans was reflected in an analysis of the statute which added section 31461.4 to the Government Code: "Current law requires that contributions to employee cafeteria or flexible benefit plans be included in the calculation of compensation and compensation earnable when computing retirement benefits in counties . . . that operate independent retirement systems under authority granted by the 1937 County Retirement Act. [¶] For current Los Angeles County represented employees first hired prior to January 1, 1996, that portion of the County contribution toward the employee's cafeteria plan that may be taken as cash . . . is included in the definition of compensation or compensation earnable."[19]

Although payments under flexible benefit plans were not at specifically issue in Ventura and consequently were not addressed in that opinion, the Supreme Court's recent decision in Alameda makes clear that the Ventura decision applied equally to cash benefits received under such plans.

> [W]e began with the statutory definition of compensation as "remuneration paid in cash . . . , but [not] the monetary value of board, lodging, fuel, laundry, or other advantages furnished to a member" (§ 31460; see Ventura County, at 490-491.) Accepting the implications of a literal reading of this language, we held that the term includes all compensation paid in cash, while excluding any benefits conferred in a form other than cash. (Ventura County, at p. 497.) We applied this ruling to hold that a wide variety of cash payments that supplement an employee's base pay are included in "compensation" . . . .[20]

The Supreme Court elaborated further on its prior decision, making clear that the Ventura definition of "compensation" under Government Code section 31460 applied to "virtually any" item of cash paid as remuneration.[21] Respondent has offered no basis for reading this language in a manner which would not include the cash OBP payments received by

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[19] California Bill Analysis, A.B. 288 Assem., 2/18/1999.

[20] Alameda County Deputy Sheriff's Assn. v. Alameda County Employee Retirement Assn., *supra*, 9 Cal.5th at 1085-1086.

[21] Id. at 1088.

Petitioner. In fact, in the discussions preceding adoption of Resolution 98-001, the paid-in-cash vs. paid-in-kind distinction was acknowledged and endorsed by fiduciary counsel, who concluded that cash OBP payments were generally pensionable and further advised that "Cafeteria Plan benefits that are paid in cash, under Ventura would be included in compensation earnable" were it not for former Government Code section 31460.1.[22]

FORMER GOVERNMENT CODE SECTION 31460.1 DOES NOT AUTHORIZE THE EXCLUSION OF CASH OPTIONAL BENEFIT PLAN PAYMENTS FROM THE CALCULATION OF RETIREMENT ALLOWANCES FOR POST-REPEAL RETIREES

In 1990, the Legislature modified the CERL by enacting Government Code section 31460.1, effective January 1, 1991, which in its entirety provided,

> "Compensation" shall not include employer payments, including cash payments, made to, or on behalf of, their employees who have elected to participate in a flexible benefits program, where those payments reflect amounts that exceeds *[sic]* their employees' salaries.
>
> This section shall not be operative in any county until the time the board of supervisors shall, by resolution adopted by a majority vote, makes *[sic]* this section applicable in the county.[23]

On December 18, 1990, the Orange County Board of Supervisors passed Resolution 90-1551, the operative language of which stated, "this Board does hereby adopt the provisions of Government Code section 31460.1 . . . effective January 1, 1991."[24] In 1992, however, the Legislature repealed section 31460.1 in its entirety via SB 193, an urgency statute which was approved by the Governor and took effect May 11, 1992.[25] Section 2 of SB 193

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[22] Morell decl., exh. B, AR 555, 591. See also AR 606 for counsel's explanation of why automobile usage was considered pensionable "as cash income."

[23] AR 390, 724 at n. 9.

[24] AR 372-373.

[25] AR 395-396.

contained a "saving clause" intended to define the effect of the repeal upon actions already taken pursuant to the repealed law: "Nothing in this act is intended to, or shall be construed to, affect the validity of any action taken by a county pursuant to Section 31460.1 of the Government Code, prior to the effective date of this act."

In 1997, the California Supreme Court issued the landmark Ventura decision clarifying the pensionability of various aspects of compensation and benefits received by county employees. In order to align its calculation of retirement allowances with Ventura, the Board undertook a comprehensive review of various employee benefits, culminating in the adoption of Resolution 98-001. During initial discussions in the Ad Hoc Committee tasked with making recommendations to the Board, fiduciary counsel stated

> Flexible benefits that are paid in cash before December of 1990 . . . this is a bit stange, but in 1990, the Board of Supervisors, having been authorized by an amendment to the '37 Act to exclude all flex benefits from compensation earnable did so, and passed a resolution doing that, and so from 1990 on, the Board of Supervisors dictated for the entire system that flex benefits will not be included. While the law authorizing that action to take place was later repealed, the repeal of that did not affect the effectiveness of actions taken by Boards of Supervisors under the prior law, and so there is a line here of December 18, 1990, for employees who retired before that date, if they received flex benefits in cash, that would be treated as remuneration because the Board of Supervisors didn't act until December of 1990. After December of 1990, that action has been grandfathered into the law and flex benefits paid to employees after that date, whether in cash or in fringe benefits, have effectively been barred from being included in compensation earnable.[26]

Apart from counsel's conclusion that former section 31460.1 had been grandfathered into law in Orange County, the statement is noteworthy in that it acknowledged that the Ventura decision required cash OBP payments to be included in the calculation of retirement allowances for employees who retired before former section 31460.1 became

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[26] Morell decl., Exh. B, AR 557.

effective – and, presumably, for any other employees not covered by the repealed statute.[27] In response to questioning, counsel told the Ad Hoc Committee it would be prudent "to study that a little bit more with the sponsor to find out just what the characteristics of [the OBP] are . . . ,"[28] but two weeks later counsel reported only that he had "taken another look at" Resolution 90-1551 and determined that it had become effective on January 1, 1991, rather than on the date of its adoption.[29] On February 6, 1998, the Board adopted Resolution 98-001, which adhered to counsel's guidance, expressly excluding "Flexible Benefits ('Cafeteria Plan') paid in cash to the extent paid to members retiring on and after January 1, 1991" from "compensation earnable," while expressly including "Flexible Benefits ('Cafeteria Plan') to the Extent paid in Cash (applicable to members retiring before January 1, 1991."[30]

As is explained more fully in the supplemental brief filed by Petitioner in the Superior Court earlier this year,[31] a statute which is expressly and completely repealed without amendment can by definition have no further prospective operative effect. Section 31460.1 consequently could not itself have provided authority under the CERL for the exclusion of cash OBP payments following its repeal in 1992. Nor could Resolution 90-1551, as a local ordinance in conflict with the post-Ventura CERL, have provided independent authority for the post-repeal exclusion contained in Resolution 98-001. The California Supreme Court made clear more than a century ago that outright repeal of an

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[27] In a subsequent statement to the Board, fiduciary counsel stated unequivocally, "Cafeteria Plan benefits that are paid in cash under Ventura would be included in compensation earnable" but for former section 31460.1 and Resolution 90-1551. Morell decl., Exh. B, AR591.

[28] Morell decl., Exh. B, AR 565. Counsel further stated, erroneously, "When the Legislature repealed that right to exclude, it specifically said that the repealer [*sic*] will not affect any action taken by a Board of Supervisors based on the previous law." Id. In fact, Section 2 of SB 193 specifically preserved the validity of "any action taken by a *county*." By misreading "county" as "Board of Supervisors," counsel effectively misrepresented the scope and effect of the saving clause, since, as discussed herein, it appears the saving clause was intended to apply to clerical actions taken by County *agencies* such as OCERS as well as to the December 1990 action taken by the Board of Supervisors.

[29] Morell decl., Exh. B, AR 591-592.

[30] AR 58-59.

[31] Morell decl., Exh. E, pp. 7-12.

enabling statute such as former section 31460.1 renders inoperative not only the statute itself but also the power of local agencies to take any further action pursuant to the repealed statute.[32]

By its terms, the saving clause in Section 2 of SB193 validated "actions" taken by a "county" prior to May 11, 1992. It did not validate actions taken after that date which were inconstant with the CERL as construed in Ventura and Alameda. While fiduciary counsel might have read Section 2 as simply preserving the validity of the 1990 adoption of section 31460.1 via Resolution 90-1551, it is clear that Section 2 was intended to apply also to pre-repeal actions taken by county agencies such as OCERS.[33] In Section 3 of SB 193 (subsections (7)-(8)), the Legislature stated that repeal of section 31460.1 was necessary both to eliminate a source of misconstrued legislative intent and to permit the reversal of "any county actions taken on the basis of that misconstruction,"[34] explaining that the reversal of such "county actions" would not unconstitutionally impair the contractual rights of county workers.[35] The "county actions taken" in Section 3 clearly refers to administrative and clerical actions involving the processing of retirement applications rather than to resolutions of county boards of supervisors adopting section 31460.1, and

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[32] Ransome-Crummey Co. v. Bennett (1918) 177 Cal. 560, 566-568, clarified in Ransome-Crummey Co. v. Coulter (1920) 50 Cal.App. 150, 152-153.

[33] If the Legislature had desired to enact a saving clause providing only that prior triggering actions "taken by a county board of supervisors" pursuant to the second paragraph of section 31460.1 would be unaffected, it could simply have done so, and this would necessarily also have preserved any other county "action" previously taken pursuant to the repealed statute. By employing instead the broader term "any action," the Legislature included actions other than the mere triggering of the statute, such as the clerical action of calculating retirement allowances for employees who retired in Orange County while section 31461.1 was in effect. Again, ambiguity in such pension legislation must be resolved in favor of the pensioner, consistent with the language and purpose of the statute. Ventura County Deputy Sheriffs' Assn. v. Board of Retirement, *supra*, 16 Cal.4th at 490.

[34] As stated in Section 3, the enactment of section 31460.1 had been intended to enable county boards of supervisors to restrict the ability of county retirement boards to include flexible benefit payments in the calculation of retirement allowances, but the statute had been misconstrued as eliminating the pre-Ventura discretion of retirement boards in counties where section 31460.1 had not been adopted. As discussed in Petitioner's supplement brief (Morell decl., Exh. E), it is legally significant that the Legislature chose to repeal the entire statute rather than to cure the misconstruction via amendment.

[35] AR 396.

there is no indication the Legislature intended "any action taken by a county" in Section 2 to have a different, more limited meaning.

Although the validity of Resolution 90-1551 itself and of pre-repeal clerical actions by OCERS pursuant to section 31460.1 have been preserved by Section 2 of SB 193, *post*-repeal actions taken by OCERS are not within the scope of the saving clause, since they were by definition not "taken . . . prior to the effective date of" SB 193, i.e., prior to May 11, 1992. The saving clause did not encompass subsequent actions by OCERS, including the adoption of Resolution 98-001 in 1998 and the determination of Petitioner's retirement allowance in 2014. These actions were not governed by the repealed statute or by Resolution 90-1551, but rather by the existing CERL, and they were unlawful under Ventura insofar as they excluded the cash OBP payments received by Petitioner.

FORMER GOVERNMENT CODE SECTION 31460.1 DID NOT AUTHORIZE THE EXCLUSION OF CASH OPTIONAL BENEFIT PLAN PAYMENTS FROM THE CALCULATION OF RETIREMENT ALLOWANCES FOR RETIREES WHO HAD NOT ELECTED TO PARTICIPATE IN THE PLAN

Former Government Code section 31460.1 was by its terms made expressly applicable only to employees "who elected to participate in a flexible benefits program." In analyzing the effect of former section 31460.1 for the Board in 1998, fiduciary counsel failed to address this limitation.[36] As a result, the Board made no effort to account for retirees who did not elect to participate in the OBP program, and the language of Resolution 98-001 adopted by the Board exceeded the stated statutory authority insofar as it excluded cash OBP payments for such retirees. The evidence in this matter is undisputed that Petitioner never elected to participate in the OBP program,[37] nor was

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[36] Morell decl., Exh. B, AR 557, 565, 569, 591-592.

[37] AR 955:15-956:11, 966:3-12, 961:12-21; see also AR 762 and 801 at section 4.3. The referee expressly found Petitioner's testimony on this issue credible. Morell decl. Exh. D, AR 1069.

Petitioner, as a Superior Court research attorney, a member of any employee association which might have agreed to participate in the OBP program via a collective bargaining agreement.[38] Former section 31460.1 consequently could not have provided authority for the exclusion of Petitioner's cash OBP payments even if the statutory "carve out" had remained effective in Orange County following its repeal.

Respectfully submitted,



JAMES B. MORELL
Petitioner in pro per

[38] AR 957:11-18, 967:18-968:9, 972:12-22. The referee also made an express finding in this regard. Morell decl. Exh. D, AR 1093.

PROOF OF SERVICE BY U.S. MAIL

I declare that I am unemployed in Los Angeles County, California, that I am over 18 years old, and that I am not a party to the within action. My residential address is 222 Avenue G, Redondo Beach, California 90277.

On the date set forth below, I served the foregoing PETITIONER'S OPENING BRIEF ON REMAND FROM SUPERIOR COURT on interested parties to this action by in the following manner:

I placed true copies of said document in sealed envelopes and placed such envelopes addressed as shown below, with postage fully prepaid, in a mailbox at Redondo Beach, California.

Dawn M Matsuo
Orange County Employees Retirement System
2223 E. Wellington Ave.
Suite 100
Santa Ana, CA 92701

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on October 21, 2021, at Redondo Beach, County of Los Angeles, California,

Dina D. Dalton

JAMES B. MORELL
222 Avenue G
Redondo Beach, California 90277
Telephone: 424/304-2865

Applicant in pro per

BEFORE THE BOARD OF RETIREMENT OF THE

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

In the Matter of the Service Retirement Benefit of **JAMES B. MORELL** Petitioner.	**DECLARATION OF JAMES B. MORELL IN SUPPORT OF PETITIONER'S OPENING BRIEF ON REMAND FROM SUPERIOR COURT** Date: December 13, 2021 Time: 9:30 a.m.

I, James B. Morell, declare as follows:

1. As Petitioner in this action, I make this declaration in support of Petitioner's Opening Brief on Remand From Superior Court. The matter is scheduled to be heard by the Retirement Board at 9:30 a.m. on December 13, 2021.

2. The facts set forth herein are based on my own personal knowledge, and if called to testify as a witness in this action, I could and would testify competently thereto.

3. The parties in this matter have entered into a stipulation regarding the administrative record. A true and correct copy of the stipulation is attached hereto as Exhibit A. The

documents contained in the prior administrative record are Bates numbered at bottom left, and the documents among them which were received into evidence without objection by the hearing officer in May 2017 (AR 258-901) are Bates numbered 1-645 at lower right.

4. Exhibits B-E attached hereto are submitted pursuant to the stipulation in support of Petitioner's Opening Brief on Remand From Superior Court.

5. Attached hereto as Exhibit B, for the Board's convenience, are true and correct copies of the minutes of the Board of Retirement Ad Hoc Committee meeting of January 21, 1998, and of the Board of Retirement special meeting of February 6, 1998, both of which were attached to the Declaration of Raymond A. Fleming filed June 11, 1998, in Orange County Superior Court case no. 791315. The minutes are included in the prior administrative record at AR 553-613.

6. Attached hereto as Exhibit C, for the Board's convenience, is true and correct copy of the entire testimony presented at the administrative hearing of May 5, 2017, excerpted from the reported transcript of proceedings. The reported testimony is included in the prior administrative record at AR 955-1019.

7. Attached hereto as Exhibit D, for the Board's convenience, is true and correct copy of Hearing Officer Snider's Proposed Findings of Fact, Conclusions of Law, and Recommended Decision, dated November 29, 2017, and his Response to Applicant's Objections and Requests for Clarification, dated January 31, 2018. These documents are included in the prior administrative record at AR 1054-1073 and 1091-1094.

8. Attached hereto as Exhibit E is true and correct copy of Petitioner's Supplemental Brief in support of Renewal of Petition for Writ of Mandate, which was filed March 11, 2021, in Superior Court case no. 30-2019-01043847.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 21st day of October, 2021, at Redondo Beach, California.

By: _____
James B. Morell

PROOF OF SERVICE BY U.S. MAIL

I declare that I am unemployed in Los Angeles County, California, that I am over 18 years old, and that I am not a party to the within action. My residential address is 222 Avenue G, Redondo Beach, California 90277.

On the date set forth below, I served the foregoing DECLARATION OF JAMES B. MORELL IN SUPPORT OF PETITIONER'S OPENING BRIEF ON REMAND FROM SUPERIOR COURT on interested parties to this action by in the following manner:

I placed true copies of said document in sealed envelopes and placed such envelopes addressed as shown below, with postage fully prepaid, in a mailbox at Redondo Beach, California.

Dawn M Matsuo
Orange County Employees Retirement System
2223 E. Wellington Ave.
Suite 100
Santa Ana, CA 92701

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on October 21, 2021, at Redondo Beach, County of Los Angeles, California,

Dina D. Dalton

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
2223 Wellington Avenue
Santa Ana, California 92701
Telephone: 714/558-6220

Dawn M. Matsuo
Attorney for Orange County Employees
Retirement System

BEFORE THE BOARD OF RETIREMENT OF THE

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

In the Matter of the Service Retirement Benefit **JAMES B. MORELL** Petitioner.	) STIPULATION RE:) Administrative Record on Remand

Petitioner James B. Morell and Respondent Board of Retirement for the Orange County Employees' Retirement System (together "Parties"), through their respective undersigned counsel, hereby stipulate as follows:

WHEREAS, on October 18, 2018, Respondent rendered its final decision in the prior administrative proceeding entitled *In re Matter of Application of James B. Morell, a Member of the Orange County Employees Retirement System, for a Recalculated Retirement Allowance* ("October 18, 2018 Administrative Decision")

WHEREAS, on January 19, 2019, Petitioner filed his Petition for Writ of Mandate Pursuant to Code of Civil Procedure Sections 1094.5 and 1094.6;

WHEREAS, the Parties fully briefed the administrative writ proceeding matter before the Honorable Judge Mary H. Strobel of the Superior Court of Superior Court of Los Angeles County ("Superior Court");

WHEREAS, on July 16, 2021, the Superior Court issued its Judgment and Peremptory Writ of Mandate ("July 16, 2021 Judgment and Writ"), commanding that Respondent set aside its prior October 18, 2018 Administrative Decision and reconsider the case on remand;

WHEREAS, on September 17, 2021, Respondent sent Petitioner a Notice Letter regarding the Procedures for Remand on James B. Morell's Writ Petition, setting forth the briefing and hearing procedures; and

WHEREAS, the Parties have met and conferred on the scope of the administrative record on remand and have come to an agreement on what materials may be included in that administrative record, as provided below;

WHEREFORE IT IS HEREBY STIPULATED:

1) The administrative record for the remand proceeding pursuant to the July 16, 2021 Judgment and Writ shall include the:

   a. Prior administrative record as outlined in the index attached hereto as Exhibit 1;

   b. Judgment dated July 16, 2021 (including Exhibit A attached thereto);

   c. The Peremptory Writ of Mandate dated July 16, 2021; and

   d. Any document previously filed in case # 30-2019-01043847 which is submitted by October 21, 2021 in this remand proceeding in support of a citation in either the Petitioner's or Respondent's Opening Brief.

2) The administrative record as outlined above will be provided to the Board of Retirement by the Orange County Employees Retirement System's staff.

SO STIPULATED AND AGREED.

Dated: October 13, 2021

By: _____
Petitioner James B. Morell

Dated: October 13, 2021

By: Dawn M. Matsuo
Dawn M. Matsuo
Attorney for Respondent

Morell v. OCERS
Los Angeles County Superior Court
Case No. 30-2019-01043847
Index to Administrative Record

Bates Number	Date	Description
0001 – 0002	1/27/14	Application for Service Retirement
0003 – 0022	3/18/14	Retirement Benefit Estimate – FINAL -Final Average Salary Calculation Sheet
August 17, 2015 OCERS Board Meeting Documents for Agenda Item D-11		
0023 – 0025	8/17/2015	OCERS Memo to Board of Retirement Re: Recommendation Regarding Petitioner's Appeal (Initial Denial), Agenda Item D-11
0026 – 0033	8/17/2015	Agenda for Board of Retirement Regular Board Meeting
0034 – 0042 0043 – 0047 0048 0049 – 0051 0052 – 0056 0057 – 0061		**Back-Materials for Item D-11** -6/23/2014 - Petitioner Letter to Suzanne Jenike Re: Benefit Calculation with Attachments: O. C. Superior Court Personnel Policies and Regulations dated 12/18/13; Letter to Petitioner Re: Monthly Benefits dated 3/26/14; Retirement Benefit Estimate Provided to Petitioner dated 3/25/14 -6/23/2014 - Petitioner Letter to Steve Delaney Re: Denial of Appeal of Monthly Retirement Allowance Calculation -9/9/2014 -- Letter from Suzanne Jenike to Petitioner in Response to the 6/23/14 Letter Regarding Monthly Retirement Allowance -3/20/2015 -- Letter from Steve Delaney to Petitioner Re: Appeal of Final Average Salary / Optional Benefits Plan -6/15/2015 - Petitioner Letter to Steve Delaney Re: Further Appeal of Monthly Retirement Allowance -OCERS Resolution 98-001

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12-13-2021 REGULAR BOARD MEETING - DA-2 James B Morell

0062 – 0086 0087 - 0089		- Judgment (*Ventura* settlement) including Order Approving Settlement Agreement, Settlement Agreement - Tentative Decision Re: Orange County Resolution 90-1551
0090 - 0103	8/17/2015	Meeting Minutes for Board of Retirement Regular Board Meeting
0104 - 0138	8/17/2015	Certified Transcript of Excerpted Portion of Regular Board Meeting
OCERS Policies		
0139 - 0150		Board of Retirement Policy for Administrative Hearings (Rev. 6/18/12)
Hearing Officer Proceeding		
0151 0152 – 0153 0154 - 0189 0190 – 0193 0194 – 0212 0213 – 0242 0243 – 0244 0245 - 0249		-11/4/2015 Letter from Suzanne Jenike Re: Benefit Appeal and Assignment of Hearing Officer -3/6/2017 Petitioner's Witness List -3/7/2017 Petitioner's Pre-Hearing Statement -4/5/2017 Respondent's Pre-Hearing Statement -4/21/2017 Petitioner's Supplemental Pre-Hearing Statement -4/21/2017 Petitioner's email re Supplemental Pre-Hearing Statement with attachments -4/23/2017 Hearing Officer's Response to Petitioner's April 21 Email (Submitted via email) -4/26/2017 Respondent's Response to Hearing Officer's Request for OCERS' Response to Petitioner's Request to Present Hearsay Testimony at Hearing

12-13-2021 REGULAR BOARD MEETING - DA-2 James B Morell

0250 – 0251		-4/26/17 Petitioner's Response to OCERS Objections to Hearsay Testimony at Hearing (Submitted via email)
0252 – 0254		-4/27/17 Hearing Officers Response to Petitioner and OCERS Regarding Hearsay Testimony at Hearing (Submitted via email)
0255 - 0901		-5/5/2017 Documents Received Into Evidence by Hearing Officer (with indexes)
0902 – 1029		-5/5/2017 Transcript of Administrative Hearing
1030 – 1042		-8/14/2017 Respondent's Closing Brief
1043 – 1053		-8/14/2017 Petitioner's Reply Brief
1054 – 1073		-11/29/2017 Hearing Officer Proposed Findings of Fact, Conclusions of Law, & Recommended Decision
1074 – 1083		-12/29/2017 Petitioner's Objections and Requests for Clarification
1084 – 1089		-1/23/2018 Respondent's Response to Petitioner's Objections
1090		-1/24/2018 Petitioner's Objections to OCERS Response (Submitted via email)
1091 – 1094		-1/31/2018 Hearing Officer's Response to Petitioner's Objections and Request for Clarification
August 20, 2018 OCERS Board Meeting Documents for Agenda Item DA-2		

12-13-2021 REGULAR BOARD MEETING - DA-2 James B Morell

1095 – 1113	8/13/2018	Email From Petitioner to Suzanne Jenike (OCERS) with 3 Attachments
1114 - 1120	8/20/2018	8/20/2018 OCERS Memo to Board of Retirement Re: OCERS Staff Position Regarding Hearing Officer's Recommendation (Denial & Set aside Hearing Officer's Findings) Agenda Item DA-2
1121 - 1128	8/20/2018	Board of Retirement Regular Board Meeting Agenda
1129 – 1148 1149 – 2055 2056 -- 2057		**Back-Up Materials for Item DA-2** -11/29/2017 Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommended Decision -Administrative Record from Hearing Officer Proceeding (with Indexes) -12/18/1990 County of Orange Board of Supervisors Resolution 90-1151
2058 – 2068	8/20/2018	Board of Retirement Regular Board Meeting Minutes
2069 – 2129	8/20/2018	Certified Transcript of Excerpted Portion of Regular Board Meeting (Videotaped Proceedings)
		October 15, 2018 OCERS Board Meeting Documents for Agenda Item DA-4
2130 – 2031	10/15/2018	OCERS Memo to Board of Retirement Re: Adoption of staff's proposed Findings of Facts, Conclusions of Law and Decision) Agenda Item DA-4
2132 – 2140	10/15/2018	Board of Retirement Regular Board Meeting Agenda
2141 – 2155	10/15/2018	Board of Retirement Regular Board Meeting Minutes
2156 - 2163		- Not Dated OCERS Staff Findings of Fact, Conclusions of Law and Decision (Unsigned)

12-13-2021 REGULAR BOARD MEETING - DA-2 James B Morell

2164 - 2173		- Petitioner's Objections to OCERS Staff's Proposed Findings of Fact, Conclusions of Law and Decision
2174 - 2207	10/15/2018	Certified Transcript of Excerpted Portion of Regular Board Meeting (Videotaped Proceedings)
2208 - 2215	10/18/2018	Findings of Fact, Conclusions of Law and Decision (Signed by Board of Retirement Chairman Christopher Prevatt) (including Attached Documents Received in Evidence)
2216 - 2217	10/18/2018	OCERS Letter to Petitioner (*Final denial*)

12-13-2021 REGULAR BOARD MEETING - DA-2 James B Morell

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
2223 WELLINGTON AVENUE, SANTA ANA, CA 92701

AD HOC COMMITTEE
SPECIAL MEETING
WEDNESDAY, JANUARY 21, 1998

MINUTES

The Chairman called the meeting to order at 10:31 a.m. Attendance was as follows:

Members present: Thomas N. Fox, Chairman
Thomas J. Lightvoet
Bruce A. Moore
Bert Scott

Others in attendance were:

Raymond A. Fleming, Administrator; Thomas Bogdan, Assistant Administrator; Harvey Leiderman and Ashley Ilanwga of Steefel, Levitt & Weiss; Tim Marnell, Actuary, of Towers Perrin; Robin M. Schachter of Jeffer, Mangels, Butler & Marmaro LLP; Jean Pearce, Management Analyst; James Buck, Retirement Program Supervisor; Alicia Maiden, Benefits; Anthony Beltran, Data Processing; Javier Lara, Audio/Visual Technician; and Dolores Kramer, Recording Secretary.

Mr. Fox stated that for meeting protocol, the Committee would adhere to the five-minute rule as contained in OCERS' Bylaws. After going through the presentations, public comments would be taken and speakers would be held to no longer than five minutes. Mr. Fox said attendees would be allowed to make public comments or ask questions of the sitting Committee, counsel, or the actuary; however, Mr. Fox said he would not allow a legal debate to develop over the legal analysis and opinion being heard this morning.

Mr. Fox said the Committee now has an implementation plan, and they have approximately 95% of the pay elements classified. The remaining 5% will be clarified in the very near future.

Mr. Fox reminded everyone of the Committee's opening remarks about fairness and objectivity made on November 20, 1997, at the first meeting. He said he believes the Committee has done that and further stated that our findings are fair, objective and equitable to all parties.

Mr. Fox said the summary being presented this morning would start with the legal analysis by Mr. Leiderman, and then the meeting would be turned over to Mr. Marnell of Towers Perrin who would explain the actuarial side of the matter. Mr. Fox further advised that following public comments, he would read the four-page Resolution into the record. Once adopted by the Ad Hoc Committee, the Resolution would be sent to the full Board for ratification.

Mr. Fox stated that during these presentations, all of the critical dates would be covered, and the Committee would be putting out information in the near future to all retirees and active members covering all of those critical dates so that nobody will miss any of them.

Mr. Fox said he didn't feel it was necessary for staff to go through all the various pay code elements during the meeting today. He said there were too many and it would put everyone to sleep if we were to go into each of them. Mr. Fox said he intended to have staff send our completed work product back to the plan sponsors for review and comment before implementation.

Mr. Fox then introduced his colleagues, Bruce Moore, Bert Scott, Tom Lightvoet, and the Executive Officer Ray Fleming. Further, we have Mr. Harvey Leiderman and Ms. Ashley Ilangwa from Steefel, Levitt & Weiss; Mr. Robin Schachter of Jeffer, Mangels, Butler & Marmaro, and Tim Mamell from Towers Perrin, who has worked with us for quite some time as our actuary. With that I would like to turn the floor over to Mr. Harvey Leiderman.

Mr. Leiderman stated he had been asked to discuss the new infamous *Ventura* Decision, and the analysis and conclusions of this Committee and recommendations it intends to make to the Board of Retirement. And, of course, what all this is about is how the *Ventura* Decision affects the pensions for the public employees, both active and retired, for Orange County. For the benefit of the attendees, Mr. Leiderman requested that the resolution mentioned previously by Mr. Fox be projected on the screens in the Board Room Continuing, Mr. Leiderman said the *Ventura* County Decision was a decision involving the Deputy Sheriffs' Association and three retired Deputy Sheriffs in *Ventura* County. It is, in fact, the California Supreme Court's first declaration on the proper method of determining pension benefits under the 1937 Act that governs this system and nineteen others throughout the counties of California.

Mr. Leiderman said that in looking at this issue, he would like everyone to understand there are certain guiding principles of interpretation that we, as counsel, have applied and have encouraged the Ad Hoc Committee to apply. Of course, counsel has looked at the law as it is stated both in the cases, specifically the *Ventura* case, and in the statutes. As important as that is looking at what we call equity; i.e., stepping back and seeing just what is fair and equitable not only to individual retirees and active members, but as between the participants in the System and with the System, itself. So as we go though this, you should constantly be asking yourself, is this fair and is this the fair approach. The Committee believes that this approach is fair to all and is a fair reading of the law as it exists. Frankly, the other element simply put is plain old common sense and practicality. It makes no sense to interpret a ruling of the Supreme Court of this state in a way that causes twists and turns that were never intended by either the Legislature or the other courts and the Supreme Court in going through it. The *Ventura* Decision is complicated; it is a bit mysterious in places, and it leaves some blanks in other places. The Committee has attempted to use its common sense and good judgment in filling in those blanks and making this thing work in a practical manner for everyone who is affected by it. I also want to make a point that where *Ventura* does not address certain things, other cases do and other statutes do, and the *Ventura* Decision by the Supreme Court relied in great part on the PERS statute, for example, and on other cases interpreting the PERS statute where it is consistent with the 37 Act that governs this system. For those areas where *Ventura* does not provide an answer, but gives support to prior cases in law, we have looked to those, as well.

Let's take a quick look at the fundamental law. I am not going to make this a legal lecture, but you need to know what the basic building blocks are. They come out of the statute297

Section 31460 defines compensation, and the important language here is that compensation is remuneration paid in cash – and that is very critical. It also includes amounts deducted from a member's wages for participating in a 457 plan, but essentially the guiding light here is going to be what is paid, or in some cases payable, in cash to the employee. This definition of compensation then is plugged into something called compensation earnable. This is one of the statues that is complicated and difficult. The language is not terrific, it has been amended a few times, and the easiest thing to do is to step back and ask what do the words "compensation earnable" really mean. Essentially, what compensation earnable means is just that – compensation that is cash compensation that is earnable during a particular period of time by an employee. If we keep that in mind, that will help guide our further review of the *Ventura* case. Note also that we are talking about compensation that is calculated in the manner that is measured by that which people in the same class and grade ordinarily work, and that will also guide further consideration. Once you determine what the elements of compensation are, and whether they are earnable during the particular measuring period of time, the statute goes to what is called final compensation. This is essentially the development of the number on which the retirement benefit is calculated. For Tier I, it is the one year period selected by the member at the time he or she applies for retirement, and for Tier II it is a three-year period. Notice that the language of the statute, itself, talks about compensation that falls within the period of employment – not at termination – but within the period of employment. Now what does *Ventura* say about all this? In *Ventura*, the Supreme Court basically affirms what the statute says – that compensation means remuneration paid in cash and any amounts paid for a deferred comp plan that are deducted from the member's wages. What *Ventura* says about compensation earnable is a change from what prevailed in the minds of all the twenty 37 Act Counties in the past. *Ventura* says that putting the compensation into compensation earnable, you are averaging the monthly pay, excluding overtime, received by the retiring employee, and now here is this period that has to be normalized. The average number of days worked in a month by employees in the same job classification at the same base pay level. The difference here is that up until the *Ventura* case came down, previous cases, including one in Marin County called Gwalfi found that you didn't include in compensation any of the employee's earnings that were not also earned by every other employee in the same class or grade. *Ventura* changes that. *Ventura* says you first look to the individual's compensation and then you determine what that person would have received had he or she worked the ordinary number of days that all employees in that classification would work. What that does is give us some big categories of things that we can exclude right away from what goes into compensation earnable. First is true overtime. I mean to distinguish true overtime from what may be for payroll purposes called overtime. Some people work 8 ½ hour days as part of their regular ordinary work week. That is not overtime. That half hour over an 8 hour day is not overtime under *Ventura*. True overtime is that which is worked beyond the amount that is ordinarily worked by employees in the same grade or class. So if your classification or your pay grade requires you to work an 8 ½ hour day instead of an 8 hour day, that is not overtime. Nor is it overtime if it is characterized as overtime only for FLSA purposes. For example, for firefighters who work extended hours, but under FLSA get some of that characterized as overtime premium pay. If it is expected and ordinarily worked by employees in the class or grade, it would not be excluded from your compensation that goes into the analysis, but true overtime is excluded.

The second large category that is excluded from compensation earnable is remuneration that the employee did not earn in the measuring period. Now let me be very specific here. *Ventura*, and the specific facts before the court in *Ventura*, did not have to deal with this issue. The retirees and the active members there did not present to the Supreme Court facts that dealt with the aggregation of accrued leave, for example, that was earned from period prior to the final compensation period – what we call the measuring period. So it did not come up in *Ventura*. On the other hand, *Ventura* gives some direction, because in its analysis of what goes into the compensation earnable pot, *Ventura* approves cases that were based on the PERS statute and finds the PERS statute persuasive and consistent with the 37 Act, and also approves those cases that talk about compensation earnable should not allow the artificial inflation or the loading into the measuring period, the final period, of remuneration earned from other periods. There are a number of cases that the Legislature, in its comments in passing a number of statues and a number of Appellate Court decisions, uniformly criticize acts that are taken to lump into the final compensation analysis leave, for example, or other remuneration that was not literally earned in the measuring period.

Finally, an exclusion that comes out of this analysis in *Ventura* is that also excluded should be compensation that the employee earned during the period, but could not have received in cash during the measuring period. The Supreme Court gives substantial weight to the prevailing MOU between the bargaining unit, the employee, and the employer, and, in that regard, indicates that if compensation is cash, only that which could have been received in cash during the measuring period should be included in compensation earnable. For example, as I understand the treatment of vacation in the County payroll system, under the MOU Tier I and Tier II, management employees are entitled to cash out up to 80 hours per year of what they earned during that year. That would be the ceiling under *Ventura* for the amount of vacation that could be treated, if taken in cash rather than as time off, under the MOU that could go into the compensation earnable calculus. For nonmanagement employees in Tier I and Tier II, there is a limit of 40 hours per year that can be cashed out, and that would impose a ceiling on that which could be included the compensation earnable calculation. So *Ventura* again looks to the MOU, the governing document, for direction as to how much could be received in cash and how much was earned that could be received in cash during the period of time.

Mr. Fox said that before we leave this point, we need to stress that this is elective and does not have to be taken in cash to be counted in compensation.

Mr. Leiderman said that is correct, that the MOU permits that if it is cashable, but by the employee's election the employee elects to defer it to another year, it was still earned and could have been taken in cash, *Ventura* says that election by the employee to defer that cash-out of vacation or sick leave, for example, into another period, would still be treated as if it had been cashed during the measuring period. That is part of the equity of this whole analysis. You would not want to come up with a rule that made a distinction between somebody who cashed out 40 hours during that period of time and somebody who cashed out 20 hours, but elected to cash out 20 hours in another period of time or at termination. There is no reason why those people should not be treated alike under the *Ventura* analysis.

So let's go to some of the things that are then included specifically in *Ventura*, and this is probably the largest change from the previous law. Up until now, the understanding had been, and what had been applied, is that base salary was it. Take your base salary in the measuring period selected by the employee, and that became the basis for calculating your pension benefits. *Ventura* has changed all that. *Ventura* has added things into the base salary that increase what will be compensation earnable. They include premiums, bonuses, and incentive payments. These are the things that were identified in *Ventura*, such as bilingual premium pay, educational incentive pay, motorcycle bonuses, field training officer bonuses, shift differential pays, longevity incentives. All of these cash benefits that are paid to the individual employee, whether or not they are received by everyone else in the class or grade, are included now under *Ventura*. When we went through the pay codes, and there are hundreds of pay codes in the plan sponsors in the System, those are simply some of the items that spring out. There are literally dozens of other elements of pay in those pay codes that we have now been able to earmark under the rule of *Ventura* as being includable as premiums, bonuses, and incentive payments, or allowances such as automobile allowances or uniform maintenance allowances, and that type of payment.

Elements that also are included in compensation earnable under the statute are employee contributions to a deferred compensation plan. As I mentioned before, overtime...this is the overtime that is characterized as overtime for purposes other than calculating retirement benefits...this is overtime that is required by the employer of the entire grade or class, that is not true overtime...that time, the value of the compensation for that time, is included in compensation earnable, and that would be things that are commonly known as madera pay, for example.

Compensatory time, so long as it does not derive from true overtime, would be included. Flexible benefits that are paid in cash before December of 1990...this is a bit strange, but in 1990, the Board of Supervisors, having been authorized by an amendment to the 37 Act to exclude all flex benefits from compensation earnable did so, and passed a resolution doing that, and so from 1990 on, the Board of Supervisors dictated for the entire system that flex benefits will not be included. While the law authorizing that action to take place was later repealed, the repeal of that did not affect the effectiveness of actions taken by Boards of Supervisors under the prior law, and so there is a line here as of December 18, 1990, for employees who retired before that date, if they received flex benefits in cash, that would be treated as remuneration because the Board of Supervisors didn't act until December of 1990. After December of 1990, that action has been grandfathered into the law and flex benefits paid to employees after that date, whether in cash or in fringe benefits, have effectively been barred from being included in compensation earnable.

Okay, let's talk about cashed out vacation, sick leave, and holiday pay. I think I have alluded to this already that there are restrictions if you cashed out these items during the compensation period, and the restrictions are...again, the MOU must allow the employee the election to cash out the leave or holiday pay during the measuring period, not as part of final pay at retirement...final pay or terminal pay as some people refer to it, but being able to cash it out during the measuring period...that is, take it in cash at that time. A cap on that is leave or holiday pay that must have been earned during the measuring period, so if you earned six weeks vacation or allowed to cash out two, whether or not you actually do cash it out, that is what y[illegible]

will be allowed to put in compensation earnable. If you have carried over ten weeks of vacation from prior periods and you have cashed that out rather than taking the time off during the measuring period, that amount that has been accrued from other periods under *Ventura*, and the cases *Ventura* relies on, would be excluded. This inclusion and exclusion related to earnings and cashable is consistent with the cases in *Ventura* that deal with spiking and the artificial inflation of pension benefits, and the courts are uniformly looking for ways to strike down activity that creates behavioral problems or distinctions between people simply because the chose to inflate during a particular year that which otherwise was not earned during that year.

All right, these things are now excluded from compensation earnable. True overtime...we've discussed that. Employer contributions to the deferred comp plan for 57 Plan are not included. It is not additional compensation to the employee. Employee contributions to the retirement system – the same. There are, under some MOU's, the employer...I know the County does this...picks up a portion of the employee contributions to the pension plan. These are not changes to the gross salary and are not additional remuneration paid in cash to the employee, and that would be excluded. We've talked about flex benefits paid in kind being excluded, and we have also discussed flex benefits paid in cash to employees who retired after December 18, 1990, being excluded because of the act of the Board of Supervisors.

Terminal final pay...now to the extent that there is some vacation, sick leave, or holiday pay that could have been cashed out during the measuring period, but was put into terminal pay and taken at that time, that would be included in compensation earnable. Other terminal pay is excluded, the statute specifically excludes it, and this creates substantial equity between retiring employees.

Expense reimbursements are just that...they are not additional salary or wages for services rendered. They are excluded, and any other miscellaneous deductions from salary would be excluded.

Anything that is given "in kind" where one would have to calculate the value...that is, that is not given in cash, and the statute in *Ventura* specifically referred to food and lodging, board, fuel and laundry, if it is given "in kind" it would not be additional remuneration paid in cash and that is excluded. The same would be true for fees and licenses that are paid to third parties or if the employee, himself, happens to incur the expense and gets reimbursed, those would not be included.

So the question is, to whom will all of this apply? Sometimes known as the retroactivity issue. There has been an awful lot of talk throughout the State of California on whether *Ventura* is applied retroactive. The question really is to whom does it apply, because if it is applied retroactively to benefits prior to the date that it was announced, it will affect more people and different benefits than it will if it's only prospectively applied. As a rule, judicial decisions in California do apply retroactively, and I should emphasize that again, as a rule, there are exceptions to that rule. They are narrow...we have examined, and this Committee has examined in detail, each of the exceptions under California law that might apply to go against the general rule, and in each instance we believe that an exception does not apply, that this Decision must be applied retroactively. In fact, in two cases directly on point, not Supreme Court cases, but Co

of Appeal cases, including the one in Marin County that the firefighters brought and was decided in 1994, the courts had absolutely no difficulty applying changes in benefits retroactively. *Ventura*, itself, talks about not perpetuating an erroneous interpretation and, in fact, if it were not applied retroactively to the recalculation of someone's benefits...someone who is retired now but is still receiving benefits, of course, if those benefits did not reflect these changes, they would, in fact, be perpetuating an erroneous interpretation of the law. So we find that there is no exception to retroactivity and that, in fact, *Ventura* should be deemed the proper interpretation of the 37 Act as of the effective date that this plan went into effect in Orange County, which was July 1, 1962.

So now let's ask ourselves, whose benefits will be affected by this? All retirees and active members have a right to claim increased benefits. To what extent will those benefits be affected by *Ventura*? Well, each monthly benefit payment under the law is treated as a separate obligation, so that a retiree could make claim...a separate claim as to each particular monthly benefit payment. How far back does this go? California law says that actions to recover pension benefits are governed by a three year statute of limitations. That's in the Civil Procedure Code. A number of cases bar actions to recover adjustments in monthly benefit checks prior to three years before those claims are filed. So, as a consequence, all retirees and all active employees have a right to have their pension benefit payments recalculated and increased, where appropriate, and it's likely that in each instance that will happen, with interest, on those payments, from three years before the date *Ventura* became final; i.e., as if claims were all filed on that date and going forward. That is, October 1, 1994, and going forward.

Well, here's the second big question I guess. Let's talk about existing retirees right now. Will retirees have to pay for the increased benefits? Well this system is a contributory system, so the answer is yes. Under California law, a retiree is not entitled to adjusted increased pension benefits unless he or she has paid the contribution, with interest, that would have been required under the 37 Act to support the benefit. The same thing is going on right now in Marin County. After that case was decided in 1994, the process they are engaged in right now is increasing benefit checks and collecting contributions, with interest, from those whose checks are being increased.

How will retirees pay for these increased benefits? Before OCERS pays a retiree increased benefits, the system has to receive the contributions and interest sufficient to support that additional benefit. That can either be done in a lump sum payment directly from the retiree, it can be done as a voluntary deduction from the past-due benefit check, and by that I mean for the period between October 1, 1994, to the date that the Board is able to implement these changes. There is going to be a lump sum past-due increase in benefits due to most retirees. From that check, the retiree could voluntarily agree to have deducted the amount to pay for the additional contributions, with the agreement of OCERS, or any other method that OCERS, in its prudent judgment, believes is appropriate for payment of the amount due over time.

So how is this all going to work? The Board should establish a claims process. Now not everybody is going to necessarily, and we shouldn't suppose that every retiree is going to want to have a recalculation of their benefits, so the process needs to be established so that retirees can seek information on how this case will specifically affect their own personal pension benefits. They can submit their claims and any necessary payroll information from their measuring yea

for calculation by OCERS' staff. We sincerely trust and expect that the County will facilitate the gathering of this information as necessary, because it is likely that the County has the data necessary...in most instances probably more so than the employee will have. That information can be submitted for calculation by OCERS' staff, a model can be demonstrated, the retiree can in this process decide with OCERS how best to pay for the increased benefits.

So that takes care of how this affects retirees. Now let's talk about active members. Active members, as we have said, will also be affected by this and, in fact, there will be increases in active members' pension benefits into the future as a result of this Decision. Will active members have to pay for the retroactive increase in benefits? Again, yes. At the date of implementation of this, which we are projecting to be July 1, 1998, if there is any deficit in the member contribution account; i.e., the member's account at OCERS, as with retirees, OCERS must receive contributions, and interest on those contributions, required to support those additional benefits. Again, that can be done in a lump-sum payment or through some extended payment program that OCERS may adopt.

How will active members pay for future increased benefits? OCERS will recalculate actuarially the expected pension benefit for all active and future members of the System and will adjust contribution rates accordingly starting July 1, 1998.

Finally, the question of whether Plan Sponsors will have to pay for the increase in benefits, and, of course, yes, that will be done through arrears contributions and adjustments to future contribution rates.

Mr. Chairman, that concludes the summary of the analysis of this Committee, and if anybody wants to play games now up on that screen, we could do that, but I thank you for giving me the opportunity to work with you and to make this presentation this morning.

Mr. Fox: Thank you Mr. Leiderman. Mr. Marnell, is yours warmed up and ready to go.

Mr. Marnell: Based upon the analysis that you just heard from Mr. Leiderman, what I am going to follow up with now is a very brief summary of some of the financial impact that this *Ventura* County Decision has on both contribution rates, as well as retirement benefits. What I'm going to do is review the impact that it has on retired members, then active members, and finally employer contributions. Before I do that, though, I thought it might be helpful for everyone to see an estimate of how much *Ventura* County may change people's benefits. What I've done is estimated that for general members Tier I, it's on average about an 8% increase in benefits; Tier II about a 4% increase in benefits. For safety members, those numbers are 13% Tier I and 9% Tier II. These should be viewed as rough estimates at this point. We still need a good bit of date which we will collect with the 12/31/97 actuarial valuation, and will be able to fine tune these numbers. But just going thorough some of the MOU's and listening to various staff members, these estimates are probably as good as we are going to get right now.

For retired members, as Mr. Leiderman pointed out, the retiree can request a recalculation of the pension benefit based upon this different compensation earnable. That request will likel

and in virtually every case it will, generate an increase in benefits payable, but there will also be a corresponding shortfall in the member contribution account balance at retirement. This increase in retirement benefits, what we're recommending is, that this be implemented on July 1, 1998, the member account contribution shortfall will be reduced based on length of retirement, essentially the long you've been retired the lower the shortfall; and then the increase in benefits, with interest, from October 1, 1994, or retirement if later, through June 30, 1998, will be paid as a lump sum on or about July 1, 1998, but we're first going to reduce that lump sum by any shortfall in the member contribution account. Any remaining shortfall will be taken from the increase in the pension check until paid. In other words, we're going to look at how much the pension check increased because of the *Ventura* County Decision. If there's any remaining shortfall, we will take some of that shortfall...pay some of that shortfall from only the increase in the pension check until the shortfall has been completely paid. Only recent retirees...in other words, those who have retired within the last 18 to 24 months, will have any remaining shortfall after the lump sum payment. If you retired more than 24 months ago, the lump sum ought to be more than sufficient to pay for the shortfall in the member contribution account. Those who retired in the last one, two, or three months will obviously have a much bigger payment.

For active members, this is a little bit easier. There will be an increase when the member actually retires. There will be an increase in that member's retirement benefit because of *Ventura* County, but there is also going to be an increase in the member contribution rates and the same shortfall in the member contribution account. Again, what we are recommending is that that increase in contribution rates be implemented on July 1, 1998, following the actuarial valuation, so that we only change these rates once. We normally go in on the start of the fiscal year and if we're going to adopt changes, that's when the changes go into place, so the recommendation would be we do these two things together. We finish the valuation, make any changes necessary coming out of that valuation, and then also roll into that any changes because of the *Ventura* County ruling.

The increase will include an amortization over five years of any shortfall in the member contribution account. Any questions on this so far from the Committee, because what I'm going to do now is roll into employer contributions. As Mr. Leiderman pointed out, employer contributions also need to increase because of the *Ventura* County ruling, and basically there's a couple of pieces to the employer contribution. One is normal costs. This basically will increase by those same increases that we saw in compensation earnable back a few slides ago. There's an increase in the actuarial accrued liability and, consequently, a corresponding increase in the unfunded actuarial accrued liability. An then somewhat more subtle, but an increase in the pickup costs...an increase in the cost for the County to pick up a portion of the member contributions. This is much smaller than the first two. On a dollar basis, first year the employer contributions for normal cost and amortization of the unfunded liability will increase by approximately $14 Million for general members and about $8 Million for safety members; obviously a total of about $22 Million. That's all employers who participate in the System, so each of the employers will obviously pay something less than that. Then, again, there's this pickup cost which will also increase. This piece is certainly less than $1 Million; probably even less than $500,000, but I didn't want people to forget that the pickup costs will also increase.

If I can summarize real briefly; again, retirees can request a recalculation of retirement benefits, and then, if applicable, will see that increase in their pension check in the July 1, 1998, pension check. Active members will see higher contribution rates beginning July 1, 1998. Two reasons; one because of the shortfall in the member contribution account, the other being simply compensation earnable is larger. The active members will also see larger benefits at retirement coming out of the *Ventura* County ruling. On the employer's side, everything is kind of going into place as of July 1, 1998, so employer contributions will increase beginning at the start of the 1998 – 1999 fiscal year.

Mr. Fox: Mr. Marnell, did you keep any of the examples that we looked at yesterday.

Mr. Marnell: I have them.

Mr. Fox: I think this would help people understand. We've thrown a lot of stuff out here and it's a complicated issue, so if you could .....

Mr. Marnell: Mr. Fox, did you want to do actives or retirees.

Mr. Fox: Let's go through a few examples of both. If you feel a little lost out there, it's sort of how some of us felt in the beginning when we were trying to grapple with some of these things, and I think it helps, at least it helped me, to look at some examples of live people and what the impact would be. So that's where these examples come from.

Mr. Marnell: Unfortunately, Mr. Fox, some of the additions to these screens I did not add yesterday, so I'll have to talk through them. I left them just like they were yesterday. What I did, I chose various examples. This is a general Tier I person, and I actually chose actual people from the System and then rounded some of the numbers. This is a person, general Tier I, making about $48,000 is base compensation. This is what would have been reported to the System last year – in other words, before *Ventura* County. This person entered the System at 27 and is today about 53, so they've been in the System for a while now. They have a member contribution account currently of about $64,000. Again, this is general Tier I, and I'm guessing about an 8% increase in compensation earnable. That means there is a $5,000+ shortfall in the member contribution account. This is just simply the $64,000 x 8%. If that number gets amortized at 5% over a five-year period, assuming that there are 26 pay periods a year, it means that the repayment amount is about $44.00 each paycheck.

Mr. Scott: Actually, because of the nature of this being pre-tax dollars, it would be reduced by whatever the tax rate is on that employee.

Mr. Marnell: That's a real good point. The dollar amount will not be reduced, but the effect on take-home pay will be reduced because you are right, this $44.00 would come out of a person's paycheck pre-tax.

Mr. Scott: So if the total tax rate on this particular employee is 25% state and federal, then the drop in the net pay of the paycheck would be $33.00.

Mr. Mamell: Correct.

Mr. Fox: I know it isn't on here, but just for the audience's sake, would you calculate in your head and come up with what this means in dollars to a person at retirement.

Mr. Mamell: Well, if the 8% increase in compensation earnable is accurate, this person would see an 8% increase in their pension benefit, but this is not one I am going to be able to do quickly in my head I'm afraid. There are too many factors, but this would probably be worth something like, assuming no pay change, in other words the person leaves making a base pay of $48,000.00, this probably means $2,800.00 to $3,000.00 a year more in their first pension check, so it is a fairly significant increase in their pension check. A safety Tier I – not a great deal of difference here, $55,000.00 of annual compensation, entered at about age 31, currently, if I remember this person right, is about 43 years old, member contribution account of about $46,000.00. Safety Tier I, I am estimating more like a 13% increase in compensation earnable, about a $6,000.00 shortfall in that member contribution account. Again, about a $52.00 pre-tax amortization each pay check. Probably in the neighborhood of about $40.00 or so after tax – net take home pay, put it that way. Tier II, I pulled up some of the same type of people, with the difference being two-fold; one, there is a lesser increase in compensation earnable for Tier II v. Tier I. This has to do with some of the MOU's that they are subject to. The other thing is just Because they are Tier II have not been in the System as long, so the member contribution account balance isn't as large. So the shortfall here is just a little bit over $1,000.00, and the amount needed each pay check is only $10.00 before tax to make up that shortfall over a five-year period. The same type of individual under safety, the big difference here is a 9% increase in compensation earnable, almost a $2,000.00 shortfall in the member contribution account resulting in about a $17.00 amortization payment each pay check.

Let me quickly go through a couple of retirees, and again I chose four retirees; one from each class in each tier.

This is a person who retired January 1, 1980, so they have been retired for quite a while now. Their member contribution account at retirement was $38,000.00. They entered the System on June 1, 1973. A monthly benefit as of June 30, 1998, of about $3,000.00, I increased this benefit for the cost of living that I'm assuming will be in place April 1, 1998. The increase in monthly benefit resulting from *Ventura* for this person is about $238.00 per month. Life expectancy at date of entry to the System is about 81 ½, and this is important because of how we are going to adjust the shortfall in the member contribution account balance. The increase in the member contribution account balance, because of the 8% increase in the monthly benefit, is about $7,500.00. This shortfall fraction, this is the adjustment because the person has been retired for quite a while, is 4.6. In other words, we're going to ask this retiree to pay 46% of the $7,500.00. That's where we're going to apply this shortfall fraction. The missed payments for this person, and I have to tell you that this missed payments do not include interest, so it actually understates the amount of the missed payments...the missed payments for this person, in other words the increase in the benefits because of *Ventura* that haven't been paid all the way back to October 1, 1994, those payments adjusted for cost of living, but simply summed up, is a little bit over $10,000.00. So on July 1, 1998, there would be a retro payment of about $10,000.00, but a payment due to the System for this increase in the member contribution account of ab

$3,700.00, which would come out of the $10,000.00, and the net amount would be paid to the retiree.

Tier I, a much more recent retirement – January 1, 1994, a much bigger member contribution account at retirement - $71,000.00, entered the System December 1959. Like I said, these are actual people that we took out of the data. About a $4,100.00 benefit, would see a $535.00 increase in their monthly benefit. This assumes that my 13% estimate for a Safety Tier I member is accurate. Life expectancy just shy of 81 years of age. The necessary increase in member contribution account at June 30, 1998, is $11,500.00. This person's shortfall fraction is almost one (1) because they have been retired such a short time, since 1994, so it's a .96 fraction. In other words, they would be expected to pay 96% of that $11,500.00. Again, these retro payments are actually more than $23,000.00, and this is without interest, so it is going to be larger once we put interest on top of it. Again, this person would receive a net check on July 1, 1998, after subtracting out the $11,500.00 that's necessary to increase the member contribution account.

General Tier II – some of the same kinds of numbers we've seen before. A smaller increase in the monthly benefit because, again, the General Tier II people are only going to see a 4% increase in their benefit. Life expectancy of about 81 years of age. The increase in the member contribution account is just shy of $1,400.00. For this person, the shortfall fraction is one (1). It is really related to the period of time you've been retired before October 1, 1994. This person retired after October 1, 1994, so the shortfall fraction is one (1). Again, these retro payments without interest are over $2,400.00. This person would get a new check July 1, 1998.

Similar numbers for a Safety Tier II person. I'm not going to bother to spend a lot of time with this one. The bottom line is this person also on July 1, 1998, will get a net check coming from the System to make up for these retro payments.

Basically, anybody who has retired in the last 18 to 24 months probably will end up with a net check on July 1, 1998. Those people who have retired in the last 12 months, for example, will definitely owe something to make up for this increase in the member contribution account balance.

Mr. Fox: We have obviously put a lot of stuff out here this morning and it can be, at times, complex. I will now go to public comments and ask anybody who would like to step up to identify themselves and state what agency you are with.

Mr. Hendry: Ed Hendry with the Orange County Sheriff's Department, and my question is a clarification on flexible benefits paid in cash. Many employees just received anywhere from $1,000.00 to $2,000.00 stipends in the last month. Is that considered a flexible benefit paid in cash?

Mr. Leiderman: Response inaudible.

Mr. Hendry: Yes, rather than give us a pay raise, they gave us a bonus check this last year, and depending upon your classification, it ranged anywhere from $1,000.00 to some people got up to $2,000.00 in cash.

Mr. Leiderman: Response inaudible.

Mr. Fleming:: Mr. Leiderman, for purposes of the record you're going to have to speak into the microphone.

Mr. Leiderman: If this was characterized as a bonus and was, in fact, a true bonus payment and is not a payment for fringe benefits, cafeteria plan benefits, flex plan benefits, bonuses under *Ventura* paid in cash within the measuring period are treated as compensation and go into the compensation earnable calculation.

Mr. Hendry: Okay. Then the statement you just made, cafeteria plans are excluded, so management gets an optional benefit plan cash amount each year – that is not counted as cash?

Mr. Leiderman: Can you identify what that is for?

Mr. Hendry: It's an amount of money allowed to be used for professional uses, education, or for club memberships, or you can take it in cash. It's called "the optional benefit plan."

Mr. Leiderman: I think we would have to study that a little bit more with the sponsor to find out just what the characteristics of that are and whether they are, in fact.....

Mr. Scott: Mr. Leiderman, he's referring to the cafeteria flex that you have excluded. It's the one that you'd would have to have retired before December 18th of .....

Mr. Leiderman: Well, the Board of Supervisors by specific ordinance has excluded those kinds of benefits, even if they are paid in cash, since 1990, and that exclusion continues to be in effect even though the authority for that exclusion has since been repealed. When the Legislature repealed that right to exclude, it specifically said that the repealer will not affect any action taken by a Board of Supervisors based on the previous law.

Mr. Hendry: What we commonly call the cafeteria plan is what you call the cafeteria plan, and would be excluded?

Mr. Leiderman: Yes.

Mr. Fox: Just a comment on the first issue you raised, which is the cash stipend, Mr. Leiderman may not have been in on all of the conversation, but this Board took that issue up in December, and we had, on advice of counsel, received the Opinion that the stipend was a benefit paid in cash and should be subject to retirement. However, there were no arrangements for that and we have put people on notice that retirement contributions should be taken out of that and it will be counted.

Mr. Kirkwood: Bill Kirkwood, President of the Retirees Association, and I do want to thank the Ad Hoc Committee for making these sessions public. I know you didn't have to, but it makes us all feel a lot better that we're able to see how you arrived at these decisions and to develop some meaningful, if not always intelligent, questions to ask you. I would also suggest that you print this in your newsletter, in the Periscope, so that all retirees can get information in a cogent manner, if you can do it. I would also suggest that you set up a hot line so our retirees can call in and can get specific questions answered by one of your staff. Thanks again for your great presentation.

Ms. Nolan: Good morning. Jan Nolan of the Orange County District Attorney's office. I also would like to compliment counsel and the Board for the excellent presentation of some very difficult issues in this case. I have a couple of questions that I would like to ask. I want to follow up on the Sheriff's question on the Optional Benefit Plan. Where do we look to find that resolution, and where do we look to find the case law, or the law that you referred to when the authority to adopt the resolution was repealed?

Mr. Leiderman: I can provide to you at the close of this session both of those items in reference to the Board of Supervisors resolution from 1990, and I can also give you a copy of the former section which was 31460.1, which now has been re-enacted, but only to apply to Los Angeles. But that former section and the repeal I would be happy to make available to you after our session today.

Ms. Nolan: Thank you. I would appreciate that. Second question, you indicated that, and I agree with you, that the *Ventura* case relies on the various MOU's to a large extent, and I know that I'm not mistaken, our MOU goes by fiscal year, not annual. So when we're talking about cashing in vacation – in other words, if you earn five weeks vacation a year, that's 200 hours. Our MOU, at least the PSR, states you can cash in 80 hours per fiscal year, which by my calculation would be 160 hours during the measuring period which you have referred to. So does that mean that 160 hours, since you can earn 200 hours that's within the earnable period, and the measuring period of the 12 months, that would mean 160 hours of accrued vacation time rather than 80 hours according to the PSR.

Mr. Leiderman: I'm glad you raised that, because I should have mentioned that was an issue, the idea of straddling two fiscal years. The fact is, no, you cannot straddle and lump in total amounts. I have to go back to *Ventura*. *Ventura* talks about averaging the monthly compensation and compensation earnable. The vacation that is allowed to be cashed out is on an annual fiscal year basis. So it would have to be prorated over the months of that fiscal year. One way or another, your measuring period year, if it's a year, is only going to be 12 months. So you are going to prorate the vacation that you got in the portion from one fiscal year and prorate the portion that you got from the other fiscal year, so that you have 12 months worth of earned and cashable vacation, but not two years worth of earned and cashable vacation put into one single year simply because you are straddling two fiscal years.

Ms. Nolan: I appreciate that. I obviously disagree with that interpretation, but since the Chairman has asked us not to make legal argument at this time, I won't.

Mr. Fox: Well, while you're there, go ahead and state what your objection is to it, or what you disagree with. You never know from my perspective when you are sitting up here how many people are going to be in the audience that want to, let's say, challenge an opinion, and so I say that to try and maintain a level of order, but I'm more than willing to give you an opportunity to speak to that issue for a few minutes and make your argument.

Ms. Nolan: The reason I disagree with that is, as you said and as we all agree with, the *Ventura* Decision relies very heavily on the MOU, and the MOU specifically says "on a fiscal basis." Now the earning period that a retirement benefit is based, is on 12 consecutive months that the retiree chooses. Therefore, if you can cash in 80 hours of vacation in June, the end of a fiscal year, 80 hours in July, the beginning of the fiscal year, and that falls within the 12 month period that the retiree chooses, and also if it's 160 hours and you're able to earn 200 hours, it comes within, as you say, the measuring period and is not more than you can earn in any 12 month period. Therefore, *Ventura* relies on the MOU. We should be able to rely on the MOU, and when the MOU says "per fiscal year," that gives us 160 hours the way I read it and the way I believe the *Ventura* case relies on our MOU.

Mr. Leiderman: Well, I think if we look at the MOU, it allows, for example, if you're in the category that allows 80 hours to be aggregated during the fiscal year, it's over an entire fiscal year, on a monthly basis that's going to be 1/12 of that amount per month. Only some of those months of each fiscal year are going to fall within that one year measuring period. It's not as if you earned all 80 and were able to cash out. Remember, it's "earned and cashable," and you earn it for the entire fiscal year, you get 80 full hours cashed out. So, you cannot pack in two 12 month periods worth of earnings of vacation time into a single 12 month period, simply by the fortuity that you elected to put it, to actually cash it out in June and July. The 80 hours that you get is pro-rated under the MOU, it's what you earned and can cash out for a fiscal year – not for a month in the fiscal year. You get 1/12 each month of that amount, and so it seems clear to me that what you are talking about and, in equity, to avoid the behavioral problems of people trying to do exactly this and straddle a fiscal year and load into a single 12 month period more than 12 months worth of earned vacation, that that is the proper interpretation under *Ventura*.

Mr. Fox. Thank you.

Mr. Clayton: Steve Clayton with Public Facilities and Resources. It appears with all of the people who might be eligible for this that it's going to be a tremendous amount of work for the retirement office staff. I understand you have three benefits specialists at this point. I was just wondering what plans are to increase your staff or to handle this workload.

Mr. Fox. Well, we have limitations placed on us in terms of what we have in the way of an operating budget. There are no plans at this time to increase the staff; however, we've over the past week had people working additional hours trying to clear up caseloads, etc., so we could begin to do these calculations. It will take some time, and this is, if you will, a landmark decision – something that the 37 Act counties have never gone through before, at least that I know of or can find in history, and so we're going to be feeling our way through this process. If we have a large number of people inundate us at the start with, we may all be here rolling up our

sleeves. We may do some group sessions and try and put people together with an individual so we can work with 8 to 10 people at a time. We're still trying to form an accurate strategy on how we'll do that, but we will accomplish it. That's kind of the best answer I can give you at the moment because I'm not sure how many people are going to line up on our doorstep out here on February 11.

Mr. Novello: My name is Ron Novello. I'm a County of Orange retiree, and I want to compliment the entire Committee for an excellent presentation. Although I may not agree with you on everything, I think you've done a tremendous job of bringing the information forward very candidly, and I think the detail was excellent today. I would like to ask you some questions which are more procedural. Will you be publishing a report that would have more details as to what items of compensation you have already decided to include or exclude, more specifically than what was discussed?

Mr. Fox. Yes, sir. When we finish with the public comments section, I have the resolution that this Committee will then make to the full Board, and it has the majority of those things in it, although not all of them. In a couple of particular areas and, just to be specific, there are several things in here, one of the things being shift differential pay, there is some standby pay, there are about 50 different elements, and we didn't list all of them although they will be calculated into the compensation issue when an employee goes to retire. But all of that information will be in the record when we finish today. It is my intent to provide all of the plan sponsors and all of the organized labor representative units with a copy of this, and copies of our summary presentation, along with REAOC. I think we can probably, according to our conversations yesterday, be able to get that out by Friday. Friday afternoon we will have copies of these items available at our front counter for people to pick up.

Mr. Novello: Are your Minute available yet. I haven't received a copy.

Mr. Fox: They should be. The ones for the last meeting I know is finished, because I signed it; however, it may not have been mailed to everyone.

Mr. Novello: When you present this to the Board on February 10, will they make a decision at that time?

Mr. Fox: That's our intent, yes.

Mr. Novello: Does this have to be concurred by the plan sponsors?

Mr. Fox: No, sir.

Mr. Scott: Mr. Chairman, back to Mr. Novello's last question. The special meeting of the Board is on February 10 at what time.

Mr. Fox: It's at 9:00 in the morning, I believe.

Mr. Novello: Mr. Fox, you can imagine there will be an awful lot of claims. Some of us have already submitted them. Would it be in your best interests to develop a simplified form to…..I know you don't want to write to every retiree and ask them to fill it out, but if you had a form available, I know I've turned in a detailed two-page letter, and someone else may send in 20 pages. You're going to be overwhelmed with varying text and things to read.

Mr. Fox: Your point is well taken. We have received a number of forms or claims in various fashions, and those claims will all be honored. We are in the process of working on a simplified form that will ask for just the information we need in order to accomplish that process.

Mr. Novello: I know Bert's familiar with it, but the County of Orange has a standard risk management claim form that we used in County government that was a lot more expedient. Something like that might help you. I'd like to ask a couple specific questions. I won't argue the law, though. With regard to flex pay, I simply don't understand it. I want to make sure I understand what your position is before I leave. If I understood the gentleman correctly, what you're saying is that flex pay, even though we receive some of this as taxable income, I want you to be aware of that, if we had an allowance we could choose some of the options mentioned, but we didn't – it was a cash out and it was fully taxable under IRS regulations, it was like any other pay. Even though the Board passes resolutions, doesn't the *Ventura* case stand ahead of that? Again, I don't know the law, so I'm asking the rationale for that. If *Ventura* says earnable cash, and in this case it's taxable cash, doesn't it stand the test of being included?

Mr. Leiderman: But the statute specifically, even today, specifically says flex benefits that have been excluded by an act of the Board of Supervisors are excluded. So, *Ventura* does not deal with flex benefits. *Ventura* does not deal with that subject. Just as the statute says that certain things are in and certain things are out, the statute has also permitted a broad exclusion if the Board of Supervisors that governs a particular county wants to have that excluded, that leaves no discretion to the retirement system which is otherwise charged with the full determination of what goes into compensation earnable. That act, which has been grandfathered into the law to this day, continues to preclude the Board from considering flex benefits paid, whether in kind or in cash, that were ruled out by that ordinance.

Mr. Moore: Ron, what happens is, in simplified terms, a county can go to the State Legislature and say, "we want a particular amendment to the Government Code just for our county, just for these specific things," and that's what happened in this case. The county looked at that and said, "we do not want to have this as compensation earnable," went up there and got specific, very narrow, legislation. Los Angeles has also done the very same thing in some of the other kinds of things they want to consider as compensation earnable

Mr. Novello: Thank you. That does help my understanding. May I ask about sick pay? You gave a good example on vacation and I understood it. How are you interpreting sick pay? Sick pay, for example, we're allowed to take actually up to a third payoff of our balances, and there's the other set of facts that we earn so much per year, which is an amount less than that. So we take the third, it does exceed what we would earn in a period. I am assuming you're going to allow sick pay as included. If you are, you should clarify that. How do you interpret that calculation?

less than that? In other words, although we're allowed to cash in a third each fiscal year, we only earn 96, so are you saying it's 96 hours that will be credited.

Mr. Leiderman: That would be the maximum, since that's the maximum that could be earned, and of that which is earned could be taken in cash. If you've aggregated, for example, 500 hours...as I understand, you can't go below 280, so you could take a third, so long as you do not go below 280. So let's say you had 880, we'll make it easy, and say you had 600 hours greater than that - I'm probably not doing this right but maybe it makes the calculation – you could say, "well, I could cash out 200 hours of sick leave," but if you can only earn 96 hours of sick leave in a year, that would put a cap on that. All 200 hours, even though you took it in cash, would not included in your compensation earnable.

Ms. Nolan: Okay, so it would be 96 hours would be maximum for sick leave because that's how much is earned within a year's period of time. But if it's analogous, excuse me if I'm beating this horse to death, but if it's analogous to vacation time, which I agree with you that it is, and you've earned 200 hours of vacation time during the year, why is it that you can only claim the sale of 80 hours for purposes of retirement?

Mr. Leiderman: Well, because that's the other leg. As I understand it, the MOU, while you may get 200 hours of vacation in any particular year, the MOU provides that you're only allowed to cash out 80 of those in any fiscal year, prorated for each month in the fiscal year.

Ms. Nolan: Which, then, it should be the maximum would be 160 hours which you could cash out for (inaudible).

Mr. Leiderman: I don't think it would be productive for us to continue to argue about it.

Ms. Nolan: Okay, I was just trying to compare the sick leave to vacation, and I guess that's what (inaudible).

Mr. Leiderman: There are two elements we are talking about. What can be earned in a year, and of what can be earned can be cashed, and you have to satisfy both tests.

Ms. Nolan: So would I be correct, then, your analysis is 96 hours of sick leave can be earned and cashed within one year.

Mr. Leiderman: Correct.

Mr. Moore: Mr. Chairman, I would just like to state that Ms. Nolan has been a participant and has written some things, so we appreciate, at least I as a Trustee appreciate, her analysis. Jan, my heart is with you on some liberal interpretations here, but I still have to put on my fiduciary cap and listen to counsel, but I do appreciate the input you've given this Committee.

Mr. Fox: All four of us up here have been in the middle of the road and on both sides of it, and have argued it from every angle that we think we could have argued it from, and the some, but it is noteworthy and it is interesting from our perspective up here to hear the arguments and questions that are being raised, some of them we have answered and some are just subject to interpretation, but sort of the bottom line that we all have to come in here, and we said that in the beginning, is while three of us sitting up here are either active or retired County employees is when we come through the door and sit in this body here, the hat we have to wear is that of a fiduciary of the System. I spent a week at the University of Pennsylvania to learn a simple equation – contributions plus earnings equal benefits. We can't pay a benefit unless we've had the contribution and we've gotten the earnings on it. What we do is distribute money. It comes in, we grow it a little while, and then we distribute it, and we're attempting to do that in the best fashion we can. That's a real simplified version.

Mr. Bye: My name is Al Bye, a recent retiree, about three years ago. The question I have is in the process. Is it a legal requirement that each retiree must submit a claim, or can the retirement office just automatically recalculate everybody's benefits due.

Mr. Fox: As a retiree, that's your option. Active members don't have that option, but as a retiree, if I'm understanding things, you don't necessarily have to ....

Mr. Bye: Take the benefit increase?

Mr. Fox: Right.

Mr. Bye: Oh, okay. So we do have to request the recalculation. Is it simple enough just to request the recalculation or do we have to provide a bunch of....I heard we had to provide...it looked like we had to provide a bunch of payroll records. That isn't necessary, is it"

Mr. Fox: We will attempt to recalculate based on all available information we can. We may, though, have to ask you for something that....

Mr. Bye: Twenty or thirty years of pay stubs?

Mr. Fox: No, we certainly wouldn't do that, but something a little more recent than that that isn't brown around the edges of the paper.

Mr. Bye: Okay, thank you.

Mr. Leiderman: Let me comment, the recalculation that has to take place is going to be a recalculation of what was earned during the particular year selected by the retiree, whenever that was. It could have been 1983, it could have been 1976, and there is no way for the Retirement System to determine that information unless it comes from the two places that could possibly have the information of what was paid as base salary and other benefits, and incentives and bonuses, and that's the employee and the employer. So, somehow working together, that information has got to come. As I understand the System does not have any way of

understanding now, or developing the data for what you, as a retiree, made during the year you selected as your compensation earnable year. So it is that information that this claim process is going to have to encourage people to...and their employers, whether it's the County or Fire Authority, or OCTA, whoever it is, to have that information made available. Otherwise, there's nothing...the Board can exercise its discretion, but it is not a Ouija board. It has to have facts and data. That's why there is this process that has to be gone through, because the Board can't create the information, itself. You must submit it to the Board and, hopefully, that information will be available in County records. That's a "finger-crossed."

Mr. Fox: What I'd like to do is, I'll take one more comment and then I'd like to suspend it for just a minute, because one of my colleagues has to leave and what I'd like you to indulge me in is I'm going to read the resolution, and I think it's important for the record that all of the members of this Committee vote on it this morning. I'd like to do that, and then I will come back and I will take comments or questions for whatever period of time we need to do that. With that...

Carol Jacklyn: Good morning. My name is Carol Jacklyn. I am a management employee in San Juan Capistrano. My question has to do with the shortfall on the member contribution. By MOU, the City is required to pay the employee's portion. I am expecting the City would have to make up the shortfall, as well. Would you tell me how I go about doing that?

Mr. Moore: Just write a nice, kind letter to the City. I'm sure....

Ms. Jacklyn: I'm surprised they're not here behind me.

Mr. Moore: Mr. Interpretation, and this is probably Mr. Marnell's area, is this is a pick-up cost, right Mr. Marnell, a 100% pick-up cost.

Mr. Marnell: If it's true that an employee of the City of San Juan Capistrano does not have a member contribution account, in other words, an account that they have contributed to, the shortfall is zero, because the shortfall is simply going to be a percentage of that account.

Mr. Bogdan: May I make a correction. The City does pick up a part of the employee contribution and it does go into their account.

Mr. Moore: With that information, Mr. Marnell, could you give us another answer.

Mr. Marnell: No.

Mr. Moore: Could this be handled as a pick-up cost, and if the employer...that she has...correct, Mr. Bogdan, an individual account, everybody here has an individual account within the System, correct?

Mr. Bogdan: I'll say "correct" to that information, but if you're asking for a conclusion I would say you had better talk to counsel.