FRESNO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION

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DATE: December 17, 2014

TO: Board of Retirement

FROM: Donald C. Kendig, CPA
Retirement Administrator

STAFF CONTACT: Becky Van Wyk, CPA
Assistant Retirement Administrator

SUBJECT: Gary Johnson, Petitioner/Appellant v. Fresno County Employees' Retirement Association, Respondent/Appellee – RECEIVE AND FILE

Background and Discussion

This is a court action relating to an FCERA member's claim that FCERA should pay him a higher retirement allowance. The Board rejected the member's claim in 2011 and the trial court upheld that rejection in May 2014. The attached document is FCERA's brief filed with the Court of Appeal. We expect that the Court of Appeal will issue its ruling within the next three to nine months.

Fiscal and Financial Impacts

None, with the exception of continued legal expenses.

Recommended Action

No action is requested of the Board at this time.

Attachments

1. Respondent's Appendix
2. Respondent's Appellee FCERA Brief

Case No. F069503

In the Court of Appeal of the State of California

Fifth Appellate District

Gary Johnson,
Petitioner/Appellant,

v.

Fresno County Employees' Retirement Association,
Respondent/Appellee.

RESPONDENT/APPELLEE FRESNO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION'S BRIEF

On Appeal from The Superior Court for the County of Fresno, Honorable Debra J. Kazanjian; Case No. 12CECG00759

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, Fifth **APPELLATE DISTRICT, DIVISION**	Court of Appeal Case Number: F069503
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Jeffrey R. Rieger (215855) Reed Smith LLP 101 Second Street, Suite 1800 San Francisco, CA 94105 TELEPHONE NO.: 415-659-4883 FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* jrieger@reedsmith.com ATTORNEY FOR *(Name):* Fresno County Employees' Retirement Association	Superior Court Case Number: 12CEGC00759 *FOR COURT USE ONLY*
APPELLANT/PETITIONER: Gary Johnson RESPONDENT/REAL PARTY IN INTEREST: FCERA	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Fresno County Employees' Retirement Association

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: December 2, 2014

Jeffrey R. Rieger
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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I. INTRODUCTION

Appellant Gary Johnson ("Appellant") is a former employee of the County of Fresno ("County"). He is also a retired member of the Fresno County Employees' Retirement Association ("FCERA"). Appellant receives a monthly retirement allowance and other benefits from FCERA.

FCERA's Board of Retirement ("Board") has "plenary authority and fiduciary responsibility" to administer FCERA. *See* Cal. Const., art. XVI, sec. 17. The County Employees' Retirement Law of 1937, Government Code section 31450, *et seq.* ("CERL") governs FCERA. Under the CERL, an FCERA member's retirement allowance is determined based on a formula that accounts for years of service, age at retirement and the member's "final compensation."

In the late 1990s a certified plaintiff class, which included and bound Appellant, argued that *Ventura County Deputy Sheriffs' Association v. Board of Retirement* (1997) 16 Cal.4th 483, required FCERA to include items in FCERA members' "final compensation" that FCERA historically had not included. Those consolidated class actions, generally referred to as the "*Ventura II*" litigation, were resolved by a settlement agreement, which was entered as a Judgment by a Superior Court in December 2000 ("Settlement Agreement"). Under the Settlement Agreement, the plaintiff class waived and released the rights of all class members to assert that FCERA had improperly excluded amounts from FCERA members' "final compensation." In exchange for this waiver and release of

claims, the class members received a substantially more advantageous service retirement formula, which resulted in Appellant receiving a much higher retirement allowance than he otherwise would have received under the CERL.

Appellant asks this Court to read the CERL and the Settlement Agreement in ways that would award him a massive windfall that must be paid by the County. Three years after his retirement, and eight years after he began participating in the CalWIN program, Appellant asked the Board to include in his "final compensation" over $47,000 that was paid to him in each of the last four years at end of his career, to reimburse him for costs he incurred as a result of his participation in the statewide CalWIN program. Including Appellant's CalWIN reimbursements in his "final compensation" would increase his FCERA retirement allowance by over $37,000 annually. Appellant and the County did not pay member or employer contributions to FCERA based on Appellant's CalWIN reimbursement amounts at any time. Thus, if granted, Appellant's windfall will not have been funded.

The Board denied Appellant's request after hearing competing arguments in an administrative process. The Board's decision is reviewed under the highly deferential "abuse of discretion" standard. The Board did not abuse its discretion and therefore the trial court was correct to deny Appellant's writ petition.

First, contrary to Appellant's argument in his Opening Brief, *Ventura County Deputy Sheriffs' Association v. Board of Retirement* (1997) 16 Cal.4th 483, does not require FCERA to include in Appellant's "final compensation" the more than $47,000 annual

reimbursement for the costs he incurred as a result of his participation in the CalWIN program. As we explain in Section IV(A), *infra*, a careful reading of the *Ventura* decision and the precedent it cited more reasonably supports the opposite conclusion. At minimum, the Board's interpretation of the CERL and the *Ventura* decision was one of two reasonable readings of those authorities. It is well-settled that this Court should not substitute its judgment for the judgment of the Board when the Board has adopted one of two reasonable readings of the law that the Board is constitutionally charged with administering.

Second, Appellant waived and released any right he may have had to pursue a claim for inclusion of his CalWIN reimbursements in his "final compensation." The Settlement Agreement was intended to prevent future claims for inclusion of amounts in "final compensation" that the FCERA Board had not previously included. It is undisputed that CalWIN reimbursements were being made to FCERA members, and were not being included in FCERA members' "final compensation," *before* the Settlement Agreement was executed, yet Appellant claims that the administrative change to a "flat monthly allowance" model to reimburse the *same* CalWIN expenses was a "sea change" that should result in a dramatically higher retirement allowance for Appellant. Appellant's Opening Brief ("AOB") at 16. It was not an abuse of discretion for the Board to reject Appellant's form-over-substance argument, which would result in an unintended, unfunded and unreasonable windfall for Appellant at the expense of the County.

II. LEGAL AND FACTUAL BACKGROUND

A. The Board's Determination Of "Final Compensation"

FCERA is a public employees' retirement system that was established by action of the Fresno County Board of Supervisors. FCERA is a public entity independent from county government. The diverse FCERA Board is comprised of four members of FCERA elected by the FCERA membership, the County Treasurer and four members appointed by the County. *See* CERL § 31520.1. The FCERA Board is constitutionally entrusted with "plenary authority and fiduciary responsibility for ... administration of the system." Cal. Const., art. XVI, sec. 17. Thus, it is Board's job to determine the proper retirement allowance due to members of the system like Appellant. *See McIntyre v. Santa Barbara County Employees' Ret. Sys.* (2001) 91 Cal.App.4th 730, 734 (a retirement board is "required to administer the retirement system in a manner to best provide benefits to the participants of the plan. It cannot fulfill this mandate unless it investigates applications and pays benefits only to those members who are eligible for them.") (internal citations and quotation marks omitted); *see also Stillman v. Board of Retirement* (2011) 198 Cal.App.4th 1355 (this Court upholding the FCERA Board's interpretation of the CERL); *Chisom v. Board of Retirement of Fresno County Employees' Association* (2013) 218 Cal.App.4th 400 (this Court upholding the FCERA Board's interpretation of the CERL and the Settlement Agreement).

The Board determines a member's retirement allowance by applying a statutory formula that multiplies a member's "final

compensation" by an age factor that accounts for the member's years of service for an FCERA employer. For example, Appellant's basic retirement formula is found in CERL section 31676.14.

The California Supreme Court has explained how "final compensation" must be determined: "[T]here is a logical progression in the statutory framework under which a [CERL] 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 ... 31462.1." *Ventura, supra*, 16 Cal.4th at 493-94; *see also Stillman, supra,* 198 Cal.App.4th at 1361 ("The definitions build upon each other, with final compensation ultimately providing the basis for calculation of retirement benefits.")

At issue on this appeal is the definition of "compensation." Government Code section 31460 provides: "'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 ... but does not include the monetary value of board, lodging, fuel, laundry, or other advantages furnished to a member." As we explain in Section IV(A), *infra*, reimbursements of expenses that a member incurs as a result of employment are not "remuneration."

B. The CalWIN Reimbursements That Were Paid Before The Settlement Agreement

Beginning in February 2000, Fresno County employees on assignment to the CalWIN project were "reimbursed only for actual, authorized expenditures." Appellant's Appendix ("AA") 132 (par. 35(a)) and AA 185.

Beginning in May 2000, "CalWIN workers could obtain cash advances and reimbursement on a monthly basis for meals and incidentals; they did not need to provide proof of expenses unless it was requested." AA 132 (par. 35(c)).

C. The Settlement Agreement

In *Ventura County Deputy Sheriffs' Association v. Board of Retirement* (1997) 16 Cal.4th 483, the California Supreme Court ruled that CERL retirement systems across the state had improperly excluded certain items from "compensation," "compensation earnable" and "final compensation."

The *Ventura* decision led to further litigation in numerous counties across the state, which was commonly referred to as the *Ventura II* litigation. In Fresno, a plaintiff class sought, among other things, a ruling that FCERA improperly excluded pay items from "final compensation" that must be included under *Ventura*. *See* AA 237 (par. 1). The Plaintiff class included all FCERA members, including Appellant. AA 238 (par. 5).

In Fresno, the *Ventura II* litigation was resolved by the Settlement Agreement, effective December 15, 2000. Under the Settlement Agreement, the class received a substantially increased service retirement formula comprised of both a statutory benefit and

a "supplemental" benefit that is found only in its Settlement Agreement. AA 239 (par. 6) and AA 259. For Appellant, who retired at age 56 with over 30 years of service, the "supplemental" benefit granted to him under the Settlement Agreement increased his retirement allowance by almost 17% of his "final compensation." AA 259.

In exchange for the increased service retirement formula, the class waived and released all claims that FCERA was required to include additional amounts in the class members' "final compensation." The release applied to "all items of compensation which were included or could have been included" in the settled actions. AA 244 (par. 13) and AA 249 (par. 29).

Last year, in *Chisom v. Board of Retirement of Fresno County Employees' Retirement Association* (2013) 218 Cal.App.4th 400, this Court described the very same Settlement Agreement, in pertinent part, as follows:

> By its terms, the settlement agreement purported to be a compromise that was meant to fully resolve and settle all of the Fresno County *Ventura II* lawsuits and all issues between the parties therein, and it included mutual waivers and releases, along with a promise to forbear from any future lawsuit or claim relating to the scope of the *Ventura* Supreme Court opinion or to the items of compensation to be included for purposes of CERL. Not only was the settlement agreement intended to settle "all issues among the [p]arties," but it was expressly agreed that it was "complete and final" with respect to those issues. *Id.* at 406-07.

D. The Administrative Change To How CalWIN Reimbursements Were Paid After The Settlement Agreement

In December 2001, Fresno County replaced its prior reimbursement policy with "a flat monthly allowance (FMA) for staff members assigned to the project on a long term basis." AA 132 (par. 36). The purpose of the change was for administrative convenience: "This Policy minimizes tracking and reporting requirements." AA 194. The policy was designed for "total reimbursement" to the employee. AA 193. It required an employee to certify under penalty of perjury the distance between the employee's county headquarters and the project site, the amount of monthly rent or mortgage at the project cite and that the employee would continue to maintain his or her primary residence. AA 193. It also required the employee to semi-annually submit, and sign under penalty of perjury, suitable documentation to show that the employee was continuing to incur expenses for lodging in the Sacramento area. *Id.* The "flat monthly allowance" would decrease if the participant did not continue to maintain both a primary residence in Fresno and a "project residence" in the Sacramento area. AA 194. A significant portion of the FMA was a "'gross up' to account for federal and state taxation," in order to make Appellant completely whole for the expenses he incurred as a result of his participation in the CalWIN program. AA 171.

E. Appellant's Receipt Of The CalWIN Reimbursements At The End of His Career

At the end of his more than 30-year career, Appellant received the flat monthly allowance during his participation in the CalWIN program from March 2003 through December 2007. AA 130 (par. 18-20). Although Appellant was not required to submit receipts each month to receive the flat monthly allowance, he "provided documentation when he first moved to Folsom, and every six months after that he provided proof that he continued to rent housing in Folsom." AA 130-131 (par. 22).

Appellant's and the County's contributions to FCERA during his employment were based on his "compensation earnable," as determined by the FCERA Board, and did not include any contributions based on the CalWIN reimbursements that he received through his flat monthly allowance. AA 173 and AA 195 ("At the hearing before the Referee, the parties stipulated that Johnson's and the County's periodic contributions to the Retirement Fund were based on Johnson's salary, and did not include Johnson's FMA").

Appellant retired in August 2008 and he has received a retirement allowance, based on the Board's interpretation of the CERL and the Settlement Agreement ever since. AA 131 (par. 23-26).

F. Appellant's Request That The Board Increase His Retirement Allowance

In 2011, about three years after Appellant retired and about eight years after he began receiving the CalWIN reimbursements, he asked the Board to include the CalWIN reimbursements in his "final compensation." AA 131 (par. 29-30). Based on Appellant's age at retirement (56) and years of service (30.78), an increase of over $47,000 to his "final compensation" would increase his annual retirement allowance by over $37,000 (plus increases to cost of living adjustments and survivor benefits based on his allowance). AA 257 and AA 259.[1] Thus, the long-term value of the additional benefits Appellant seeks could easily be worth over $1 million.

In December of 2011, the FCERA Board rejected Appellant's claim for a higher retirement allowance after hearing competing arguments in an administrative appeal process in which evidence and arguments were developed before a hearing referee. AA 135 (par. 46). In rejecting Appellant's claim, the Board also rejected the hearing referee's proposed decision to grant his claim. AA 169-176. The essential facts were undisputed, but the Board disagreed with the hearing referee's interpretation of the CERL and the Settlement Agreement. *See* AA 182-83 (Board's decision based on grounds stated in County Counsel's argument) and AA 192-203 (County's Counsel's argument).[2]

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[1] Appellant's benefit is the sum of a statutory benefit calculated under CERL section 31676.14 (AA 257) and a "supplemental" benefit provided exclusively under the Settlement Agreement (AA 259).

[2] Appellant claims that "[e]very other county participating in CalWIN has included the FMA in their pension calculations in some

III. STANDARD OF REVIEW

A. Appellant Has The Burden Of Proving That The Board Abused Its Discretion

The trial court did not make any findings based on disputed questions of fact. Thus, Appellant is correct that it is appropriate for this Court to conduct a *de novo* review of the trial court's judgment. Absent from Appellant's Opening Brief, however, is any reference to the highly deferential "abuse of discretion" standard of review that applies on a writ petition challenging the Board's calculation of a member's retirement allowance.

In the trial court, Appellant conceded that "abuse of discretion" was the correct standard of review. AA 221-222. Appellant's concession on this point was warranted under well-settled law. *See, e.g., Shelden v. Marin County Employees' Retirement Association* (2010) 189 Cal.App.4th 458, 462 ("Many cases have held that the question of whether a retirement board

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form." AOB 23. This statement is unsupported by any evidence in the record. Appellant merely cites to oral argument at a hearing in the trial court. To the extent this Court gives any weight to what Appellant claims other county retirement systems do, it will see that the discussion at oral argument related to three other counties (not "every other county participating in CalWIN") and those three counties have different *Ventura II* settlement agreements than FCERA. *See* Reporter's Transcript at 15:24-16:26. Further, one of those counties only included a portion of the CalWIN "flat monthly allowance" and its agreement to include that portion was part of a negotiated settlement of disputed claims. *Id.* The actions by three other systems in three different counties with three different *Ventura II* settlement agreements is irrelevant to this appeal.

calculated benefits correctly under applicable laws must be reviewed under principles of ordinary mandamus.)[3]

Under the "abuse of discretion standard," the courts review the challenged administrative action to determine "whether it was arbitrary, capricious, or entirely lacking in evidentiary support, or whether the agency failed to follow the procedure and give the notices the law requires." *Id.* at 462-63. Appellant does not make any procedural challenge to the Board's decision and therefore this case turns on whether that decision was "arbitrary, capricious, or entirely lacking in evidentiary support."

As the California Supreme Court has explained: "In determining whether an abuse of discretion has occurred, a court may not substitute its judgment for that of the administrative board, and if reasonable minds may disagree as to the wisdom of the board's action, its determination must be upheld." *Manjares v. Newton* (1966) 64 Cal.2d 365, 370-71 (internal citations omitted).

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[3] In *Shelden*, a retirement board governed by the CERL determined a member's retirement allowance after voluntarily deciding to conduct a hearing to develop evidence and arguments before making its determination. That is exactly what happened in the present case. The court in *Shelden* rejected the member's argument that the "independent judgment" standard applied and held that the "abuse of discretion" standard applied. *Id.* at 462-63.

B. The Board's Interpretation Of The CERL Is "Presumptively Correct"

Although this Court reviews legal questions *de novo*, under well-settled law part of that *de novo* review involves this Court giving deference to the FCERA Board's interpretation of the CERL. *See, e.g., Mason v. Retirement Board* (2003) 111 Cal.App.4th 1221, 1228 ("courts must give great weight and respect to an administrative agency's interpretation of a statute governing its powers and responsibilities"); *O'Connor v. State Teachers' Ret. Sys.* (1996) 43 Cal.App.4th 1610, 1620 ("[T]he administrative agency's construction is entitled to great weight, and if there appears to be a reasonable basis for it, a court will not substitute its judgment for that of the administrative body.")

In *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, the court gave substantial deference to a retirement board's interpretation of its governing law, explaining: "[W]here our review requires that we interpret the PERL or a PERS regulation, the court accords great weight to PERS interpretation. This is in recognition of the fact that as the agency charged with administering PERL, PERS has expertise and technical knowledge as well as an intimate knowledge of the problems dealt with in the statute and the various administrative consequences arising from particular interpretations." *Id.* at 539 (internal citation and quotation marks omitted). Indeed, that court explained that a retirement board's decision in cases like the present one are "presumptively correct." *Id.*

Appellant argues for the first time on appeal that the Board's decision is entitled to little deference because it was allegedly "not based on long-standing practice, an interpretive rule, or public comment, but rather on a single memorandum prepared by an attorney assigned to oppose Johnson's position." AOB at 11.

Appellant's argument ignores the fact that FCERA's exclusion of the CalWIN reimbursements from Appellant's and others members' "final compensation" dates back to the origin of CalWIN program over eleven years before the Board rejected Appellant's individual claim. Further the Board's rejection of Appellant's claim occurred at an open meeting after the Board considered written and oral arguments from Appellant's counsel and County Counsel. Appellant's argument also ignores the Board's quasi-legislative Earn Code Resolution, which ratified FCERA staff practices dating back to 1998 and was adopted by the Board at an open meeting in 2006.[4] *See* AA 195 (referring to the 2006 Earn Code Resolution); Respondent's Appendix at 4 (Earn Code Resolution's exclusion of reimbursements). Finally, the Board was interpreting its own governing law, which is "technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion" (particularly

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[4] Review of these types of long-standing quasi-legislative policy decisions is particularly deferential: "The appropriate degree of judicial scrutiny in any particular case is perhaps not susceptible of precise formulation, but lies somewhere along a continuum with nonreviewability at one end and independent judgment at the other. Quasi-legislative administrative decisions are properly placed at that point of the continuum at which judicial review is more deferential; ministerial and informal actions do not merit such deference, and therefore lie toward the opposite end of the continuum." *Western States Petroleum Ass'n v. Superior Court* (1995) 9 Cal.4th 559, 575-76.

in light of FCERA's unique Settlement Agreement), which further weighs in favor of substantial deference, under Plaintiffs' own cited case. *See Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12; *see also City of Pleasanton, supra,* 211 Cal.App.4th at 539 (retirement board's interpretation of governing retirement law "presumptively correct").

In sum, if the Court were to find that the FCERA Board and Appellant both offer reasonable interpretations of Government Code section 31460, it should defer to the FCERA Board's reasonable interpretation, which is "presumptively correct."

C. This Court Reviews The Correctness Of The Trial Court's Judgment; Not The Correctness Of The Trial Court's Reasoning

As this court has explained: "It is judicial action not judicial reasoning which is the proper subject of appellate review." *In re A.A.* (2008) 167 Cal.App.4th 1292, 1313. In another case, this Court explained that "a ruling that is correct will not be reversed simply because it may have been based on an incorrect reason." *NMSBPCSLDHB v. County of Fresno* (2007) 152 Cal.App.4th 954, 966.

As we explain in Section IV(B), *infra*, this rule of appellate review is particularly important in the present case because, read out of context of the arguments that FCERA made to the trial court, the trial court's order denying Appellant's Petition appears to adopt a reading of the Settlement Agreement that is much broader than FCERA has ever argued.

IV. ARGUMENT

A. The Board's Interpretation Of Government Code Section 31460 Was Reasonable

To support his interpretation of CERL section 31460, Appellant relies entirely on *Ventura, supra,* 16 Cal.4th 483. Appellant argues that, because the Supreme Court found that an annual uniform maintenance allowance of $675 qualified as "compensation" under CERL section 31460, Appellant's annual CalWIN reimbursements of $47,000 also must qualify as "compensation" under CERL section 31460. *Ventura* is much more nuanced than Appellant suggests.

As an initial matter, the $47,000 paid annually to the few FCERA members who chose to participate in the CalWIN program is fundamentally different than the $675 annual uniform maintenance allowance that was paid to every single Deputy Sheriff in Ventura County under a collective bargaining agreement. *See Ventura, supra*, 16 Cal.4th at 488 & fn.3. If the CalWIN reimbursements had been before the Supreme Court in *Ventura*, the Supreme Court likely would have distinguished the CalWIN reimbursements from the uniform maintenance allowance, because (1) only a few employees received the CalWIN reimbursements, (2) the CalWIN reimbursements were received because those employees voluntarily chose to participate in the CalWIN program, and (3) the CalWIN reimbursements would have a much greater impact on a retirement allowance than the uniform maintenance allowances, if they were included in a member's "final compensation." *See* Section IV(D),

infra (discussing how statutory construction must favor reasonable results).

But, more important than these equitable considerations, there is a conceptual discussion within *Ventura* demonstrating that the CalWIN reimbursements are materially distinguishable from the uniform maintenance allowances that were at issue in *Ventura*.

In determining that the "uniform maintenance allowance" in *Ventura* should be included in a member's "compensation" the Supreme Court followed the logic of *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926. *See Ventura, supra,* 16 Cal.4th at 496-97. In *Rose*, the appellate court had distinguished an "ammunition allowance" from a "uniform allowance," explaining:

> The issue is whether or not the allowance provides an "advantage" to the *employee*. While it is accurate to say that uniformity of attire provides a benefit to the employer in that it makes these civil servants readily identifiable to the public, it is at the same time accurate to say that the uniform allowance provides a benefit to the employee in that the uniform substitutes for personal attire which the employee would otherwise be forced to acquire with personal resources. Therefore, the uniform allowance must be included in the computation of pension benefits.
>
> Appellants contend that an ammunition allowance is directly analogous to a uniform allowance. We disagree. In fact, the ammunition allowance is not an "advantage" to the employee in the same sense as is a uniform allowance. The uniform allowance provides an employee with funds with which to purchase clothing, a good which the employee would have to purchase regardless of the nature of his occupational duties. Ammunition is simply not analogous. While it is true in one sense that the employee "benefits" from the

> ammunition in that it protects him, the employee would not need to purchase the ammunition *but for* his employment. *Rose, supra,* 126 Cal.App.3d at 943-44 (internal citations omitted) (emphasis in original).

Just like in *Rose*, the Supreme Court's conclusion that the allowance at issue in *Ventura* was "compensation" under CERL section 31460 was based on its review of the Legislature's intended meaning of "remuneration," which was tied to "advantages." *Ventura, supra,* 16 Cal.4th at 495-97. The Supreme Court quoted from *Rose* and followed the logic of *Rose* with respect to what constitutes and "advantage" and what does not. *Id.*

Here, the CalWIN reimbursements should not be considered an "advantage" and therefore should not be considered "remuneration" under the Legislature's intended use of that word in CERL section 31460. The fact that, for administrative convenience, the County replaced its prior reimbursement method with the "flat monthly allowance" reimbursement method demonstrates that these payments were always considered reimbursements and not an "advantage." AA 132-33 (par. 35-36). Further, although Appellant was not required to submit his receipts every month to receive the flat monthly allowance, he did have to submit "documentation when he first moved to Folsom" and he also had to provide "proof that he continued to rent housing in Folsom" every six months after that, or else his "flat monthly allowance" would have been reduced. AA 130-131 (par. 22) and AA 194. This further demonstrates the

reimbursement nature of the flat monthly allowance.[5] In the words of the *Rose* court (italicize by that court for emphasis), he would not need to incur these expenses "*but for*" his employment. *Rose, supra,* 126 Cal.App.3d at 943-44.

The point here is that, like the ammunition allowance in *Rose*, the CalWIN reimbursements were designed to make Appellant whole for the additional expenses he incurred *because* of his CalWIN assignment; not to provide an "advantage" to him.[6] Appellant's "two homes" argument (AOB at 21-22) misses the mark entirely and flips the *Rose* analysis on its head. Appellant only needed that "second home" in Folsom because of his assignment to

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[5] The fact that Appellant paid taxes on the CalWIN reimbursements is irrelevant to the question of whether the CalWIN reimbursements must be included in his "final compensation." There is nothing in the definition of "compensation" that turns on the complicated (often counter-intuitive) taxation rules that exist for an entirely different purpose than the rules of "compensation" under the CERL. For example, some "in-kind" benefits are taxable, but all "in-kind" benefits are excluded from "compensation" under the plain terms of CERL section 31460. *See* IRS Publication 15-B, at http://www.irs.gov/publications/p15b/ar02.html (relating to taxation of in kind "fringe benefits"). Further, the fact that the FMA included a "'gross up' to account for federal and state taxation" further demonstrates that the purpose was to make Appellant whole for the costs he would incur as a result of his participation in the CalWIN program. AA 171.

[6] Appellant narrowly focuses on the phrase "mitigate[s] the risk inherent in employment" in *Rose*, to suggest that the "mitigation" of a "risk" to the member was dispositive in *Rose*. *See* AOB at 22. The logic of *Rose* did not turn on a the "mitigation" of a "risk"; it turned on the distinction between and "advantage" that provides value to the member outside of the member's employment and a reimbursement that makes the member whole for expenses that would not have been incurred "*but for*" the member's employment.

the CalWIN project. That is what matters under the "*but for*" test established in *Rose*.

Perhaps reasonable minds might see these matters differently, because the CalWIN reimbursements are not identical to either a uniform maintenance allowance or an ammunition allowance. Perhaps the CalWIN reimbursements fall somewhere in the middle of the continuum between a uniform maintenance allowance and ammunition allowance. The point here simply is that it was *reasonable* for the FCERA Board to find that the CalWIN "flat monthly allowance" was more appropriate characterized as a continuation of a policy for the delivery of reimbursements than as an employment "advantage." That is all that matters under the "abuse of discretion" standard of review, because a reasonable determination of the diverse Board with expertise in these matters is not "arbitrary, capricious, or entirely lacking in evidentiary support." *Shelden, supra,* 189 Cal.App.4th at 463.

B. The Board's Interpretation Of The Settlement Agreement Was Reasonable

Without any support, Appellant improperly attributes an out-of-context reading of the trial court's order to FCERA: "FCERA contends that the Agreement forever insulates the County from any legal challenge to its pension policy, no matter what changes the County made or will make to that policy in the future." AOB at 16.

FCERA never made that contention in the trial court and does not make that contention on this appeal. *See* AA 105-108 and 273-275. In a different case, with different facts, a member might be

able to pursue a claim that FCERA improperly excludes amounts that were first paid to members after the Settlement Agreement, *if those amounts had no connection to amounts paid to FCERA members before the Settlement Agreement.* Here, the CalWIN reimbursements were paid to FCERA members before the Settlement Agreement.

Appellant argues that the CalWIN reimbursements are not covered by the Settlement Agreement because the County had not switched to the "flat monthly allowance" method for delivering those CalWIN reimbursements until a year after the Settlement Agreement was executed. Appellant argues that this administrative decision by the County was a "sea change" from the prior reimbursement model. AOB at 16. Appellant relies on a mighty shallow sea. His argument is classic form-over-substance.

"The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the 'mutual intention' of the parties." *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, 27; *see also* Civil Code § 1636.

Here, the members of the class, including Appellant, expressly agreed to "forbear bringing any future demand, claim or lawsuit seeking to enlarge, define, narrow, or in any other way relate to the scope of the decision of the California Supreme Court in [*Ventura*], or the items of compensation to be included for benefit purposes under [CERL] [and] [a]ll parties agree[d] that this forbearance agreement applie[d] to all items of compensation which

were included ***or which could have been included*** in [the settled actions]." AA 244 (emphasis added).

It is undisputed that Fresno County employees were receiving reimbursements for their participation in the CalWIN program *before* the Settlement Agreement was executed in December 2000 and those amounts were never included in "compensation" before the Settlement Agreement was executed. AA 132 (par. 35(a)); *see also* Respondent's Appendix at 4 (Earn Code Resolution's exclusion of reimbursements). Some of the CalWIN reimbursements paid to FCERA members before the Settlement Agreement were made as advances and did not require regular submission of receipts. AA 132 (par. 35(c)). These CalWIN expense reimbursements surely "could have been included" in the settled actions, based on the same reading of *Ventura* that Appellant advances herein. Indeed, the "flat monthly allowance" is materially indistinguishable from portions of the reimbursement policy that existed since May 2000, *before the Settlement Agreement*, under which "CalWIN workers could obtain cash advances and reimbursement on a monthly basis for meals and incidentals; they did not need to provide proof of expenses unless it was requested." AA 132 (par. 35(c)). These payments are materially indistinguishable from the per diems that public employees across the state regularly receive when traveling for work. No court has suggested that such per diems should be treated as pensionable "compensation," which would distort the *Ventura* decision beyond recognition. As for the housing costs, Appellant had to submit proof of those costs every six months to continue

receiving the portion of the "flat monthly allowance" that was attributable to those costs. AA 130-131 (par. 22).

In sum, (a) both before and after the Settlement Agreement, the reimbursement for meals, travel and incidentals was made in flat amount and did not require proof of those expenses, and (b) the only change to reimbursement for housing costs after the Settlement Agreement was that proof of those expenses was required only every six months. Thus, boiled down to its essence, Appellant's argument is that the CalWIN reimbursements became "compensation" merely because the proof of housing costs was required less frequently and the label of the reimbursement program changed to "flat monthly allowance." Surely the parties to the Settlement Agreement did not intend that such minor administrative changes would lead to the type of dramatic increase to a member's retirement allowance that Appellant seeks from this Court.[7]

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[7] Plaintiffs discussion of *Nelson v. Equifax Information Services, LLC* (C.D. Cal. 2007) 522 F.Supp.2d 1222, and Plaintiffs efforts to distinguish the cases that the trial court cited in its ruling, relate to Plaintiff's attack of the *trial court's* reading of the Settlement Agreement, not the narrower reading that the Board adopted and argued at all stages of this litigation. *Nelson* related to new conduct that clearly occurred after the settlement agreement had been executed in that case. The cases that the trial court cited related to conduct that clearly occurred before a settlement agreement was executed in those cases. At issue here is a more nuanced situation in which the all materially elements of the "conduct" (exclusion of the CalWIN reimbursements from "final compensation") existed prior to the Settlement Agreement, but a minor administrative change to that "conduct" (the method of how those reimbursements were made) occurred after the Settlement Agreement.

Further, the Settlement Agreement included broad waivers of Civil Code section 1542 as to future, unknown claims. AA 249-250 (par. 29-31). Appellant's release applies to such future, unknown claims, "notwithstanding the discovery of the existence of any such additional or different facts, information or evidence, or developments in the case law." AA 250 (par. 31).

It is evident from the entirety of the Settlement Agreement and the nature of the litigation that it resolved that the intent of the parties was to establish with clarity which items would be included as "compensation" and which items would be excluded. Appellant's argument that the CalWIN reimbursements became "compensation" simply because, for convenient administrative record keeping, the *method* of reimbursement changed a year after the Settlement Agreement became effective, would be inconsistent with the parties' expressed intent and it would result in a windfall to Appellant for which the parties did not bargain.

Appellant had the burden of proof[8] and he did not submit one shred of evidence that during his employment he believed that his flat monthly allowance would be included in his "final compensation," much less that the County actually *intended* to convert the CalWIN reimbursements to pensionable "compensation" when it changed to the flat monthly allowance reimbursement model. Neither the County nor Appellant ever paid pension

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[8] *See California Correctional Peace Officers Ass'n v. State Personnel Board* (1995) 10 Cal.4th 1133, 1153 ("In a petition for writ of mandate brought pursuant to Code of Civil Procedure section 1085 ... the petitioner bears the burden of pleading and proving the facts on which the claim for relief is based.")

contributions to FCERA on his CalWIN "flat monthly allowance," sufficient to support the cost of counting those amounts as "pensionable" upon his retirement. AA 173 and AA 195.

Further, if there is an ambiguity in a written contract, the parties' "course of performance" should be considered to resolve that ambiguity. As one court explained:

> The conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties' intentions. This rule of practical construction is predicated on the common sense concept that "actions speak louder than words." Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent. *Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 921.

Here, the Settlement Agreement was executed in December 2000 and Appellant began receiving the CalWIN reimbursements in the form of his "flat monthly allowance" in March 2003. Appellant received that "flat monthly allowance" without paying retirement contributions on those amounts for over four years. AA 173. Then, three years after he retired, and eight years after he began receiving the CalWIN reimbursements, he first asked the Board to include those amounts in his "final compensation" in order to dramatically increase his retirement allowance. AA 131 (par. 29-30).

In *Shelden,* when denying the member's request for a higher "final compensation," the Court discussed how its denial was "procedurally fair," explaining: "Shelden made contributions to the

retirement system for the time he worked on his regular shifts, but he did not make any payments to the retirement system for the time he spent working on the arrest warrant service team. Thus, not only was MCERA's decision consistent with how *both* parties treated that work when it was being performed, it helped avoid the possibility that MCERA would be faced with an unfunded retirement liability that it had no reason to anticipate." *Shelden*, *supra*, 189 Cal.App.4th at 464 (emphasis in original).

In sum, the FCERA Board's interpretation of the Settlement Agreement is more consistent with the intent of the parties as expressed in the terms of the Settlement Agreement, it is confirmed by the parties' course of performance for many years after the Settlement Agreement was executed and it is "procedurally fair" in light of the fact that contributions were never made to FCERA based on Appellant's CalWIN reimbursements.

Again, the issue here is not whether the Board's interpretation of the Settlement Agreement was the only possible interpretation of the Settlement Agreement or whether reasonable minds might reach different conclusions. All that matters is that the Board's interpretation was a *reasonable* interpretation, because a reasonable interpretation by the diverse Board with expertise in these matters is not "arbitrary, capricious, or entirely lacking in evidentiary support." *Shelden, supra,* 189 Cal.App.4th at 463.

C. The Settlement Agreement Is Not Against Public Policy

Appellant argues that the FCERA Settlement Agreement is against public policy and therefore it is void. AOB 16-18. Appellant did not raise this argument in the trial court and presumably is only raising it now to attack the trial court's interpretation of the Settlement Agreement, which is much broader than FCERA's interpretation. To the extent Appellant argues that the Settlement Agreement, *as interpreted by FCERA*, is against public policy, Appellant waived that argument by failing to raise it in the trial court. *See, e.g., North Coast Bus. Park v. Nielsen Constr. Co.* (1993) 17 Cal.App.4th 22, 28-29.

In any event, properly construed, the Settlement Agreement is not against public policy, because parties are permitted to settle disputed questions of law in ways that preclude a party to the settlement agreement from pursuing legal rights they might otherwise have.

For example, in *Fireman's Fund Insurance Company v. Workers' Compensation Appeals Board* (2010) 181 Cal.App.4th 752, California Insurance Guarantee Association ("CIGA") sought to re-open a stipulated award when a later published opinion clearly established that the award was in excess of what the law permitted. The future Chief Justice of the California Supreme Court, joined by two other Justices on the Third District Court of Appeal, recognized that even though the case law in the workers' compensation field allows for awards to be reopened and amended based on good cause, which includes clarifications of the law (*id.* at 768), it is not good

cause to reopen a stipulated an award "when the parties knowingly take the risk of unsettled law and their settlement agreement reflects such basis for their settlement." *Id.* at 769. The court explained: "[W]here the law is unsettled regarding CIGA's liability, a party negotiating with CIGA should ordinarily be entitled to rely on CIGA's reasoned evaluation of its own authority. If this were not the rule, then settlements involving CIGA would risk being meaningless and a prudent party knowing such risk would likely take all disputes to trial." *Id.* at 770-771; *see also State Farm General Ins. Co. v. Workers' Comp. Appeals Bd.* (2013) 218 Cal.App.4th 258, 270 (following *Fireman's Fund*).

The rationale in *Fireman's Fund* applies equally to public retirement boards. If their settlement agreements resolving disputed questions of law could be invalidated as Appellant argues here, those settlement agreements would be meaningless. As a result, settlement would not be a viable option for a "prudent person" on either side of any case involving disputed questions of retirement law. Money that should be devoted for paying benefits and the efficient administration of the retirement systems would have to be spent on litigation, with an uncertain outcome, even if a "prudent person" might otherwise believe settlement to be a superior option and in the public interest.

Indeed, in *Chisom v. Board of Retirement of Fresno County Employees' Association* (2013) 218 Cal.App.4th 400, this Court enforced the exact same waiver and release provisions that are at issue here, explaining:

> 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 that the parties would forbear from bringing any future suit under the *Ventura* case. The forbearance agreement was applicable "to all items of compensation which were included or which could have been included in [the *Ventura II* litigation]." Further, the settlement agreement included language releasing and discharging all claims that were or could have been asserted in connection with the *Ventura II* litigation. We conclude that, as a matter of law, appellants have waived and released the claims alleged in the fifth cause of action. *Id.* at 416 (emphasis in original).

Finally, Appellant's argument that the Settlement Agreement is void merely highlights the windfall he seeks. Appellant enjoys the benefits of the Settlement Agreement (with its "supplemental" benefit that increased his retirement allowance by about 17% of his "final compensation"), yet at the same time he seeks to void the very waiver and release that he gave in exchange for those benefits.

D. The Court Should Resolve Any Ambiguity In Favor Of Interpretations That Lead To Reasonable Results

Even if the Court believes it can reasonably read the CERL and the Settlement Agreement in more than one way, it must reject a reading that would lead to unreasonable results. *See Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 ("[I]f a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed"); *Webster v. Superior Court* (1988) 46 Cal.3d 338, 343 (a court should "favor the construction that leads to the more reasonable result.") As the Supreme Court explained: "Because the language of a statute should not be given a

literal meaning if doing so would result in absurd consequences, which the Legislature did not intend, our task becomes to determine a more reasonable interpretation consistent with the apparent intent of the framers and effectuating the statute's purpose." *California School Empl. Ass'n v. Governing Bd.* (1994) 8 Cal.4th 333, 341 (internal citations and quotation marks omitted). Put another way, courts should not construe statutes in ways that result in a "semantic lottery" under which statutory language is taken out of context to reach results that the Legislature never intended. *Id.* at 340. Further, since the Settlement Agreement supplements FCERA member's statutory rights, these same rules should apply to the Court's interpretation of the Settlement Agreement.

Appellant argues that he was a "life-long" public servant who "[a]t the twilight of his career" voluntarily took on the CalWIN assignment, and the flat monthly allowance lessened the hardship of that assignment. AOB at 23. This argument just makes FCERA's point. There is nothing unreasonable about Appellant receiving the CalWIN allowance for four-and-a-half years at the end of his career. What *is* unreasonable is allowing that reimbursement allowance to spike his retirement allowance, which is based on over 30 years of service credit. All 30 years of Appellant's service credit are applied to the same formula that takes account of a single "final compensation" that Appellant seeks to inflate.

The "apparent intent of the framers" of the CERL was to provide a reasonable mechanism for determining members' retirement allowances, which would be reasonably funded throughout the member's career. The "apparent intent" of the

parties to the Settlement Agreement was to ensure that members would not later sue for an expanded definition of "compensation." The FCERA Board's interpretations of the CERL and the Settlement Agreement are consistent with these intents of the Legislature and the parties to the Settlement Agreement. Appellant's interpretations result in him receiving an unreasonable and unfunded windfall, at the expense of the County. The purpose of the "flat monthly allowance" was to reimburse Appellant for expenses he incurred as a result of his CalWIN assignment; not to dramatically inflate the retirement allowance he would receive for the rest of his life upon retirement. The fact that the County decided, for administrative convenience, to implement a "flat monthly allowance" reimbursement model should not result in Appellant hitting the jackpot in a "semantic lottery," which must be paid with public funds. *California School Empl. Ass'n, supra,* 8 Cal.4th at 340.

V. CONCLUSION

For these reasons, FCERA and its Board respectfully request that the Court affirm the trial court's judgment.

DATED: December 2, 2014.

REED SMITH LLP

By _____
Jeffrey R. Rieger
Attorneys for the FCERA

CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Court 8.204(c), and in reliance on the word count of the computer program used to prepare this brief, I certify that this brief contains 7,651 words, not including the words in the Table of Contents, Table of Authorities and this Certificate of Compliance.

DATED: December 2, 2014.

REED SMITH LLP

By _____
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PROOF OF SERVICE

Johnson v. Fresno County Employees' Retirement Association
Cal. Court of Appeal, Fifth Appellate District, Case No. F069503
(Fresno County Superior Court Case No. 12CECG00759)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, California 94105-3659. On December 2, 2014, I served the following document(s) by the method indicated below:

RESPONDENT/APPELLEE FRESNO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION'S BRIEF

☐ by transmitting via facsimile on this date from fax number +1 415 391 8269 the document(s) listed above to the fax number(s) set forth below. The transmission was completed before 5:00 PM and was reported complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the parties, confirmed in writing. The transmitting fax machine complies with Cal.R.Ct 2003(3).

☑ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

☐ by placing the document(s) listed above in a sealed envelope(s) and by causing personal delivery of the envelope(s) to the person(s) at the address(es) set forth below. A signed proof of service by the process server or delivery service will be filed shortly.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below. A copy of the consignment slip is attached to this proof of service.

☐ by transmitting via email to the parties at the email addresses listed below:

PLEASE SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 2, 2014, at San Francisco, California.

Julie A. Little

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Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Case No. F069503

In the Court of Appeal of the State of California

Fifth Appellate District

Gary Johnson,
Petitioner/Appellant,

v.

Fresno County Employees' Retirement Association,
Respondent/Appellee.

RESPONDENT'S APPENDIX

On Appeal from The Superior Court for the County of Fresno, Honorable Debra J. Kazanjian; Case No. 12CECG00759

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Exempt From Filing Fees: Gov't Code §6103

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Final

BOARD OF RETIREMENT
FRESNO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION

RESOLUTION

Subject: Action of the Board of Retirement With Regard to Determination of Compensation Earnable

WHEREAS, The Board of Retirement has the sole and exclusive responsibility for determining compensation earnable for the purpose of calculating the final compensation of retiring members, pursuant to Sections 31461, 31462 and 31462.1 of the County Employees Retirement Law of 1937 ("CERL") and the California Constitution, Article XVI, Section 17.

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 (the "*Ventura* Decision") became final.

WHEREAS, The Supreme Court in the *Ventura* Decision mandated a change in the method for calculating pension benefits for members and their beneficiaries by retirement systems governed by CERL.

WHEREAS, Following the *Ventura* Decision, the practice of the Fresno County Employees' Retirement Association ("FCERA") has been to follow lists of pensionable and non-pensionable earn codes regarding pay items paid by the County of Fresno ("County") and the County Superior Court, which were developed in early 1998 and supplemented from time to time thereafter. The pensionable earn code list is attached to this Resolution as Exhibit 1; the non-pensionable earn code list is attached to this Resolution as Exhibit 2.

WHEREAS, In early 1998, FCERA, the Board of Retirement, and the County were sued in three separate, and later consolidated, actions (the "Fresno *Ventura 2* Cases") by a class of members consisting of all retirees, deferred retirees, beneficiaries and employees who were at that time members of FCERA ("FCERA Class Members").

WHEREAS, On December 15, 2000, the San Francisco Superior Court issued a Judgment in the Fresno *Ventura 2* Cases approving a Revised Settlement Agreement that sought to resolve all outstanding issues relating to the determination of "compensation earnable," pursuant to Section 31461 of CERL, as between the County, FCERA Class Members, FCERA and the Board of Retirement ("Settlement Agreement").

WHEREAS, Since the Court's approval of the Settlement Agreement, additional earn codes reflecting bilingual pay and differential pay have been added to the non-

pensionable earn code list (Exhibit 2). The *Ventura* Decision held, however, that such earn codes must be included in compensation earnable.

WHEREAS, By the Settlement Agreement, all FCERA Class Members (including but not limited to new members first hired after the effective date of the Settlement Agreement) waived any right to have "stand-by" and "on-call" pay be included in their compensation earnable.

WHEREAS, The Board of Retirement finds that the proper exercise of its statutory duties under CERL requires it to take action both (1) to ratify prior calculations of compensation earnable made by FCERA staff that were consistent with applicable law; and (2) to determine compensation earnable pursuant to Section 31461 of CERL and other applicable law on a prospective basis.

WHEREAS, After considering all of the information available to the Board, and exercising its judgment in the matter,

RESOLVED, (A) That the Board of Retirement hereby ratifies FCERA's past practices, limited specifically to the inclusion in, and exclusion from, compensation earnable of items of compensation as set forth in the lists attached hereto as Exhibit 1 and Exhibit 2, respectively, *except the Board of Retirement does not ratify the following*:

(1) FCERA's prior exclusion from compensation earnable of bilingual pay first provided to eligible employees effective October 2, 2001, consistent with the *Ventura* Decision; and

(2) FCERA's prior exclusion from compensation earnable of certain earn code for "differential" pay first provided to eligible employees effective January 21, 2002, consistent with the *Ventura* Decision.

RESOLVED, (B) That the Board of Retirement hereby adopts the following Policies and Guidelines, which shall be separate from the Board's Bylaws and the Board's Regulations:

1. Elements to be Included in "Compensation Earnable".

Remuneration earned and received in cash by the employee during the "final compensation period" as defined in Sections 31462 and 31462.1 of CERL 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

"Differential" Pay Provided to Nurses Working on Weekends (and other additional compensation paid to employees for special skills or services they provide or special circumstances of their employment)

Bilingual Premium Pay

Uniform Allowance (paid in cash, not in-kind)

Educational Incentive ("POST") Pay

Longevity Incentive

Payoffs of Vacation and Sick Leave and Holiday to the extent earned (1) not taken as time off, (2) permitted to be cashed-out (pro-rated on a monthly basis) under the applicable MOU, (3) cashed-out prior to separation, and (4) not "true overtime" (see definition below)

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 below) and to the extent in excess of minimum required reserve)

Court Transcript Fees and per diems paid to Court Reporters To the extent earned (pro rated on a daily basis over the period of time between the date of the order and date of filing of the completed transcript) and received prior to separation

Flexible Benefits to the extent paid in cash to FCERA members

Stand-by and On-Call for those members not bound by the Settlement Agreement

Such additional elements as the Board may determine in the future.

2. Elements to be Excluded From "Compensation Earnable".

Remuneration or other value received by the employee neither earned or

paid 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

Flexible Benefits provided in-kind (payments to 3d-party providers or otherwise)

Terminal Pay

Expense Reimbursements

In-kind Advantages (e.g., food, lodging, laundry, fuel)

Fees, Licenses, Memberships provided to FCERA members by their employers

Stand-by and On-Call for those members bound by the Settlement Agreement

Such additional elements as the Board may determine in the future.

3. Application of Policies and Guidelines.

The Board of Retirement shall apply these Policies and Guidelines to the compensation earnable calculations of FCERA members and their beneficiaries who retire on and after the date of this Resolution.

In addition, these Policies and Guidelines shall be applied as follows:

(a) Any retired FCERA member who received bilingual pay on or after October 2, 2001 and during his or her final compensation period, which amount was not included in the member's compensation earnable, may file a claim with FCERA no later than July 1, 2006, to have such compensation earnable and final compensation recalculated. Any additional amount owing to such member shall be paid with interest, with

additional contributions owed by the member to be deducted, with interest, from the additional amounts to be paid.

(b) Any retired FCERA member who received differential pay on or after January 21, 2003 and during his or her final compensation period, which amount was not included in the member's compensation earnable, may file a claim with FCERA no later than July 1, 2006, to have such compensation earnable and final compensation recalculated. Any additional amount owing to such member shall be paid with interest, with additional contributions owed to the member to be deducted, with interest, from the additional amounts to be paid.

4. Claims Procedure.

The Board of Retirement hereby directs the Administrator to establish a claims procedure to implement the portion of these Policies and Guidelines set forth in items 3(a)- 3(b) above.

5. Future Earn Codes and Procedures. The Board of Retirement hereby directs the Administrator to establish (a) procedures for including or excluding from "compensation earnable" future earn codes established by the County and districts participating in FCERA and (b) procedures for implementing recalculations of final compensation of members, and the necessary collection or refund of employer and employee contributions, plus interest, consistent with these Policies and Guidelines.

RESOLVED, (C) That this Resolution shall be effective immediately upon adoption.

Chair, Board of Retirement

Secretary, Board of Retirement

I hereby certify that on the 6 day of December, 2006, the Board of Retirement of the Fresno County Employees' Retirement Association made and adopted this Resolution.

Roberto L. Pella, Retirement Administrator

Fresno County Employees' Retirement Association

Amended Classification of Earn Codes to be Excluded from Compensation Earnable

As Modified by the Board of Retirement on December 6, 2006

N - Nonpensionable earn code

Earn Code	Effective Date	Status	Description	Not Included in Pensionable Income	
00	1/1/1900	I	Leave Payoff Trigger (At Term)	N	
10	1/1/1900	A	Break Consecutive Days	N	
10	12/14/1998	A	Break Consecutive Days	N	
10	10/14/2002	A	Break Consecutive Days	N	
10	5/24/2004	A	Break Consecutive Days	N	
24	1/1/1900	A	Hol Cr Acr (On normal day off)	N	
25	1/1/1900	A	Holiday Worked - Paid at 1 1/2	N	
28	1/1/1900	A	Overtime - Paid at 1 1/2	N	
29	1/1/1900	A	Overtime - Paid at Double Time	N	
29	12/14/1998	A	Overtime - Paid at Double Time	N	
29	10/14/2002	A	Overtime - Paid at Double Time	N	
29	5/24/2004	A	Overtime - Paid at Double Time	N	
30	1/1/1900	A	Compensatory Time Accr @ 1 1/2	N	
31	1/1/1900	A	Compensatory Time Accr @ Dbl	N	
37	1/1/1900	A	Dock Time	N	
37	6/15/1998	A	Dock Time	N	
38	1/1/1900	A	Holiday Worked-Accrued @ 1 1/2	N	
39	1/1/1900	A	Old Annual Leave Payoff	N	
40	1/1/1900	A	New Ann Lv/Ann Lv 2 Payoff	N	
40	9/16/2002	A	New Ann Lv/Ann Lv 2 Payoff	N	
41	1/1/1900	A	AL II Payoff (TEMP)	N	
41	12/18/1995	I	AL II Payoff (TEMP)	N	
41	12/14/1998	A	Vacation 99 Payoff	N	
41	9/16/2002	A	Vacation 99 Payoff	N	
42	1/1/1900	A	Holiday Payoff	N	
43	1/1/1900	A	Compensatory Time Payoff	N	
43	6/15/1998	A	Compensatory Time Payoff	N	
46	1/1/1900	A	Training Cash Out-ALII (TEMP)	N	
46	12/18/1995	I	Training Cash Out-ALII (TEMP)	N	
46	10/14/2002	A	Vacation 2002 Payoff	N	
47	1/1/1900	A	Retirement Refund	N	
50	1/1/1900	A	Leave Without Pay (< 2 PP)	N	
50	6/15/1998	A	Leave Without Pay (< 2 PP)	N	

Fresno County Employees' Retirement Association

Amended Classification of Earn Codes to be Excluded from Compensation Earnable

As Modified by the Board of Retirement on December 6, 2006

N - Nonpensionable earn code

Earn Code	Effective Earn Date	Status	Description	Not Included in Pensionable Income
54	1/1/1900	I	For Loading Balances Only	N
58	1/1/1900	A	Shift 12% + OT (TEMP)	N
58	12/18/1995	I	Shift 12% + OT (TEMP)	N
60	1/1/1900	A	Annual Lv Payoff -Gol Hnd Sh	N
61	1/1/1900	A	PR Adj - No FICA/Med/SDI/SUI	N
64	1/1/1900	A	Shift 15% (TEMP)	N
64	12/18/1995	I	Shift 15% (TEMP)	N
64	12/14/1998	A	Adjust Vacation 99	N
65	1/1/1900	A	Shift 10% + OT (TEMP)	N
65	12/18/1995	I	Shift 10% + OT (TEMP)	N
65	12/14/1998	A	Sick Leave 99-Adjustment	N
66	1/1/1900	A	TOC Payback	N
66	10/20/1997	A	TOC Payback	N
66	6/11/2001	I	TOC Payback	N
66	8/26/2001	A	TOC Payback	N
66	8/6/2001	A	TOC Payback	N
66	9/16/2002	A	Voluntary Furlough Payback	N
68	1/1/1900	A	Adj Payback TOC	N
68	10/20/1997	A	TOC Adj	N
68	9/16/2002	A	VF Adj	N
69	1/1/1900	A	Adj Prior Year TOC Payback	N
69	10/20/1997	A	TOC Adj For Prior Year	N
69	9/16/2002	A	VF Adj For Prior Year	N
71	1/1/1900	A	PR Adj-No FIT/SCA/SDI/SUI	N
73	1/1/1900	A	Cont Education - U07 (7/70)	N
75	1/1/1900	A	Holiday Worked Ovr Sched-Paid	N
75	12/14/1998	A	Holiday Worked Ovr Sched-Paid	N
75	10/14/2002	A	Holiday Worked Ovr Sched-Paid	N
75	5/24/2004	A	Holiday Worked Ovr Sched-Paid	N
77	1/1/1900	A	Prior Year TOC Payback	N
77	10/20/1997	A	Prior Year VF Payback	N
78	1/1/1900	A	Holiday Worked Ovr Sched-Accru	N
79	1/1/1900	A	Payroll Adjustment-No SDI/SUI	N

Fresno County Employees' Retirement Association

Amended Classification of Earn Codes to be Excluded from Compensation Earnable

As Modified by the Board of Retirement on December 6, 2006

N - Nonpensionable earn code

Earn Code	Effective	Status	Description	Not Included in Pensionable Income	
79	9/17/2001	A	Payroll Adjustment-No SDI/SUI	N	
80	1/1/1900	A	Pay Adjustment	N	
80	9/17/2001	A	Pay Adjustment	N	
81	1/1/1900	A	Adj OAL For Mandatory Usage	N	
82	1/1/1900	A	Adj AL For Mandatory Usage	N	
83	1/1/1900	A	Old Annual Leave Adjusted	N	
84	1/1/1900	A	Annual Lv/Annual Lv II Adj	N	
85	1/1/1900	A	Prior Sick Adjustment	N	
86	1/1/1900	A	Hours to Labor Distribution	N	
087	1/1/1900	A	Job Injury - Old Annl Lv 7/70	N	
87	1/1/1900	A	Adjust Compensatory Time	N	
88	1/1/1900	A	Adjust Holiday Time Balance	N	
89	1/1/1900	A	Adjust OAL $ Value	N	
90	1/1/1900	A	FLSA Overtime	N	
91	1/1/1900	A	Non Taxable Pay Adjustment	N	
92	1/1/1900	A	FLSA Adjustment	N	
93	11/3/1997	A	FDSA Annual Lv Bank	N	
93	5/24/2004	A	FDSA Annual Lv Bank	N	
101	1/17/2005	A	Annual Leave Bank	N	
102	1/17/2005	A	Vac 1999 Leave Bank	N	
114	2/13/2006	A	Unit 14 Annual Leave Bank	N	*
124	2/13/2006	A	Unit 14 Vacation 02 Leave Bank	N	*
164	10/14/2002	A	Adjust Vacation 2002	N	
165	10/14/2002	A	Sick Leave 2002 Adjustment	N	
293	11/11/2002	A	FDSA Vac 2002 Lv Bank	N	
440	5/24/2004	A	Annual Leave 2004 Payoff	N	
482	5/24/2004	A	Adj AL2004 Mandatory Usage	N	
484	5/24/2004	A	Annual Leave 2004 Adjustment	N	
514	2/13/2006	A	Unit 14 Banked hours	N	*
527	1/1/1900	A	Educational Leave 7/70	N	
527	10/14/2002	I	Educational Leave 7/70	N	
667	1/1/1900	A	TOC Payback 7/70	N	
667	10/14/2002	I	TOC Payback 7/70	N	

Fresno County Employees' Retirement Association

Amended Classification of Earn Codes to be Excluded from Compensation Earnable

As Modified by the Board of Retirement on December 6, 2006

N - Nonpensionable earn code

Earn Code	Effective Date	Status	Description	Not Included In Pensionable Income	
737	1/1/1900	A	Cont Education - U07 7/70	N	
737	10/14/2002	I	Cont Education - U07 7/70	N	
777	1/1/1900	A	Prior Year TOC Payback	N	
777	10/14/2002	I	Prior Year TOC Payback	N	
993	11/11/2002	A	FDSA Vac 99 Bank	N	
70A	1/1/1900	A	770 Annual Leave Adj Code	N	
70A	10/14/2002	I	770 Annual Leave Adj Code	N	
70C	1/1/1900	A	770 Comp Time Adjustment	N	
70C	10/14/2002	I	770 Comp Time Adjustment	N	
70O	1/1/1900	A	770 Old Annual Leave Adj	N	
70O	10/14/2002	I	770 Old Annual Leave Adj	N	
70P	1/1/1900	A	770 Prior Sick Leave Adjustmnt	N	
70P	10/14/2002	I	770 Prior Sick Leave Adjustmnt	N	
AA	1/1/1900	A	Employer Provided Vehicle	N	
AA	6/15/1998	A	Employer Provided Vehicle	N	
AAR	1/22/2001	A	Adjust Mile Reimb 2001(nontax)	N	
AAR	2/5/2001	A	Adjust Mile Reimb 2001(nontax)	N	
ALD	1/1/1900	A	Annual Leave Donated	N	
ALR	1/1/1900	A	Annual Leave Received	N	
AM	1/1/1900	A	95 Mileage Reimburs (Nontax)	N	
AM	1/1/1998	A	98 Mileage Reimburs (Nontax)	N	
AM	1/1/1999	A	98 Mileage Reimburs (Nontax)	N	
AM	5/17/1999	A	98 Mileage Reimburs (Nontax)	N	
AM	12/13/1999	A	98 Mileage Reimburs (Nontax)	N	
AM	12/11/2000	A	98 Mileage Reimburs (Nontax)	N	
AM	12/10/2001	A	2002 Mileage Reimburs (Nontax)	N	
AMT	1/1/1900	I	Mileage Reimbursement(Taxable)	N	
AMT	6/30/1997	I	Mileage Reimbursement(Taxable)	N	
AMT	1/1/1998	A	1998 Mileage Reimburs(Taxable)	N	
AMT	1/1/1999	A	1998 Mileage Reimburs(Taxable)	N	
AMT	5/17/1999	A	1998 Mileage Reimburs(Taxable)	N	
AMT	12/13/1999	A	1998 Mileage Reimburs(Taxable)	N	
AMT	12/11/2000	I	1998 Mileage Reimburs(Taxable)	N	

Fresno County Employees' Retirement Association

Amended Classification of Earn Codes to be Excluded from Compensation Earnable

As Modified by the Board of Retirement on December 6, 2006

N - Nonpensionable earn code

Earn Code	Effective	Status	Description	Not Included in Pensionable Income	
AMT	3/5/2001	I	State Reimburse Rate Taxable	N	
AN	1/1/1900	I	Mileage reimbursement(Taxable)	N	
AN	1/1/1999	I	99 Mileage Reimburs (Nontax)	N	
AN	2/8/1999	I	99 Mileage Reimburs (Nontax)	N	
AN	5/17/1999	I	99 Mileage Reimburs (Nontax)	N	
AN	12/13/1999	I	99 Mileage Reimburs (Nontax)	N	
AN	12/11/2000	I	99 Mileage Reimburs (Nontax)	N	
AN	1/1/2003	A	03 Mileage Reimburs (Nontax)	N	
AN	2/3/2003	A	03 Mileage Reimburs (Nontax)	N	
ANT	1/1/1999	A	1999 Mileage Reimburs(Taxable)	N	
ANT	5/17/1999	A	1999 Mileage Reimburs(Taxable)	N	
ANT	12/13/1999	A	1999 Mileage Reimburs(Taxable)	N	
ANT	12/11/2000	I	1999 Mileage Reimburs(Taxable)	N	
AO	1/1/1900	I	1996 Nontaxable Mileage	N	
AO	1/1/1998	I	1996 Nontaxable Mileage	N	
AO	7/1/1999	I	7/1/99 Non-Taxable Miles	N	
AO	12/27/1999	I	7/1/99 Non-Taxable Miles	N	
AO	2/21/2000	I	7/1/99 Non-Taxable Miles	N	
AO	12/11/2000	I	7/1/99 Non-Taxable Miles	N	
AO	12/8/2003	A	2004 Non-Taxable Mileage	N	
AOT	1/1/1900	A	1996 Taxable Mileage	N	
AOT	6/30/1997	A	1996 Taxable Mileage	N	
AOT	1/1/1998	A	1996 Taxable Mileage	N	
AOT	7/1/1999	A	7/1/99 Taxable Mileage	N	
AOT	12/27/1999	A	7/1/99 Taxable Mileage	N	
AOT	12/11/2000	I	7/1/99 Taxable Mileage	N	
AP	1/1/1900	I	1996 Taxable Mileage	N	
AP	1/1/2000	A	2000 Non-Taxable Mileage	N	
AP	1/1/2005	A	2004 Non-Taxable Mileage	N	
AQ	1/1/1900	A	Mileage Reimb 1994 (Nontax)	N	
AQ	7/1/1996	A	Mile Reimb 7/1/96 (Nontax)	N	
AQ	1/1/1998	A	Mile Reimb 7/1/96 (Nontax)	N	
AQ	5/15/2000	A	Mile Reimb 5/15/00(Nontax)	N	

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Fresno County Employees' Retirement Association

Amended Classification of Earn Codes to be Excluded from Compensation Earnable

As Modified by the Board of Retirement on December 6, 2006

N - Nonpensionable earn code

Earn Code	Eff. Date	Status	Description	Not Included in Pensionable Income	
AQT	7/1/1996	A	Mileage Reimb 7/1/96 (Taxable)	N	
AQT	6/30/1997	A	Mileage Reimb 7/1/96 (Taxable)	N	
AQT	1/1/1998	A	Mileage Reimb 7/1/96 (Taxable)	N	
AQT	5/15/2000	A	Mileage Reimb 7/1/96 (Taxable)	N	
AQT	5/29/2000	I	Mileage Reimb 7/1/96 (Taxable)	N	
AR	1/1/1900	I	Mileage Reimb 1994 (Taxable)	N	
AR	1/1/1997	A	Mileage Reimb 1997(Nontax)	N	
AR	1/1/1998	A	Mileage Reimb 1997(Nontax)	N	
AR	5/17/1999	A	Mileage Reimb 1997(Nontax)	N	
AR	1/1/2000	A	Mileage Reimb 1997(Nontax)	N	
AR	1/1/2001	A	Mileage Reimb 2001(Nontax)	N	
AR	1/22/2001	A	Mileage Reimb 2001(Nontax)	N	
ART	1/1/1900	I	Mileage Reimb 1/1/97(Taxable)	N	
ART	1/1/1997	A	Mileage Reimb 1/1/97(Taxable)	N	
ART	1/1/1998	A	Mileage Reimb 1/1/97(Taxable)	N	
ART	5/17/1999	A	Mileage Reimb 1/1/97(Taxable)	N	
ART	1/1/2000	A	Mileage Reimb 1/1/97(Taxable)	N	
ART	1/1/2001	I	Mileage Reimb 1/1/97(Taxable)	N	
AT1	1/1/1900	I	Adjust Taxes for AL Buybacks	N	
AT2	1/1/1900	I	Adjust Spec Accumulator: BUY	N	
ATB	1/1/1900	A	Adj Txs: Wrkrs Cmp AL Buybacks	N	
BA	1/1/1900	A	Stand-by $20/Unit	N	
BA	6/15/1998	A	Stand-by $20/Unit	N	
BA	7/8/2002	A	Stand-by $40/Unit	N	
BAA	4/25/2005	A	Stand-by $20/Unit	N	
BB	1/1/1900	A	On Call (Unit 43)	N	
BB	6/15/1998	A	On Call (Unit 43)	N	
BC	3/17/2003	A	Standby Pay $20/Unit	N	
BD	1/1/1900	A	Stand-by $15/Unit (Units 6&29)	N	
BD	6/15/1998	A	Stand-by $15/Unit (Units 6&29)	N	
BE	1/1/1900	A	Stand-by $2.50/Hr (Units12&39)	N	
BE	6/15/1998	A	Stand-by $2.50/Hr (Units12&39)	N	
BF	1/1/1900	A	Stand-by - 25% (Unit 43)	N	

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Fresno County Employees' Retirement Association

Amended Classification of Earn Codes to be Excluded from Compensation Earnable

As Modified by the Board of Retirement on December 6, 2006

N - Nonpensionable earn code

Earn Code	(Old) Effective Date	Status	Description	Not Included in Pensionable Income	
BF	3/23/1998	A	Stand-by-25% (Units 43, 22,07)	N	
BF	6/15/1998	A	Stand-by-25% (Units 43, 22,07)	N	
BF	12/11/2000	A	Stand-by-25% Units 43,22,19,07	N	
BG	1/1/1900	A	Stand-by - 37 1/2% (Unit 43)	N	
BG	6/15/1998	A	Stand-by - 37 1/2% (Unit 43)	N	
BH	1/1/1900	A	Stand-by - 50% (Unit 43)	N	
BH	6/15/1998	A	Stand-by - 50% (Unit 43)	N	
BI	5/14/2001	A	Stand-by - $40/shift (Unit 19)	N	
BL	10/1/2001	A	Bilingual Pay - Courts	N	
BP	7/8/2002	A	Bilingual Pay	N	
BR	1/1/1900	A	Emergency Stand-by(Ovr 1/2 Hr)	N	
BR	6/15/1998	A	Emergency Stand-by(Ovr 1/2 Hr)	N	
BS	1/1/1900	A	Court Stand-by 37 1/2% of Hrly	N	
BS	6/15/1998	A	Court Stand-by 37 1/2% of Hrly	N	
BSC	1/1/1900	I	Blue Shield Prem Credit	N	
BT	1/1/1900	A	Stand-by $7.50/Unit	N	
BT	6/15/1998	A	Stand-by $7.50/Unit	N	
BUY	1/1/1900	A	Annual Leave Buyback	N	
CA	1/1/1900	A	Call Back (Comp Time Accrual)	N	
CA	6/15/1998	A	Call Back (Comp Time Accrual)	N	
CA	8/1/2005	A	Call Back (Comp Time Accrual)	N	
CB	1/1/1900	A	Call Back (Minimum 4 Hours)	N	
CB	6/15/1998	A	Call Back (Minimum 4 Hours)	N	
CC	1/1/1900	A	Call Back (Minimum 2 Hours)	N	
CC	6/15/1998	A	Call Back (Minimum 2 Hours)	N	
CC7	1/1/1900	A	Call Back (Min 2 Hours) 7/70	N	
CC7	6/15/1998	A	Call Back (Min 2 Hours) 7/70	N	
CD	1/1/1900	A	Call Back (Minimum 3 Hours)	N	
CD	6/15/1998	A	Call Back (Minimum 3 Hours)	N	
CE	1/1/1900	A	Call Back (Minimum 2 Hours)U43	N	
CE	6/15/1998	A	Call Back (Minimum 2 Hours)U43	N	
CF	1/1/1900	A	Call Back (Over Minimum) U43	N	
CF	6/15/1998	A	Call Back (Over Minimum) U43	N	

Fresno County Employees' Retirement Association

Amended Classification of Earn Codes to be Excluded from Compensation Earnable

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N - Nonpensionable earn code

Earn Code	End Date	Status	Description	Not Included in Pensionable Income	
CG	1/1/1900	A	Call Back (Comp Accru)U43 Min	N	
CG	6/15/1998	A	Call Back (Comp Accru)U43 Min	N	
CH	1/1/1900	A	Call Back (Comp Acc)U43 Ov Min	N	
CH	6/15/1998	A	Call Back (Comp Acc)U43 Ov Min	N	
CJ	12/20/2004	A	Court Interpreter Premium	N	
CK	12/20/2004	A	Court Interpreter Excess $25	N	
CL	12/20/2004	A	Court Interpreter 1/2 day rate	N	
CM	1/1/1900	A	Call Back (Minimum 2 Hours)U07	N	
CM	6/15/1998	A	Call Back (Minimum 2 Hours)U07	N	
CM7	1/1/1900	A	Call Back (Min 2 Hrs)U07 7/70	N	
CM7	6/15/1998	A	Call Back (Min 2 Hrs)U07 7/70	N	
CN	1/1/1900	A	Call Back (Over Minimum) U07	N	
CN	6/15/1998	A	Call Back (Over Minimum) U07	N	
CN7	1/1/1900	A	Call Back (Over Min) U07 7/70	N	
CN7	6/15/1998	A	Call Back (Over Min) U07 7/70	N	
CO	1/1/1900	A	Call Back (Over Minimum)	N	
CO	6/15/1998	A	Call Back (Over Minimum)	N	
CO7	1/1/1900	A	Call Back (Over Minimum) 7/70	N	
CO7	6/15/1998	A	Call Back (Over Minimum) 7/70	N	
CS	12/10/2001	A	CPS - 5% (Unit 03 and 36)	N	
CS	1/31/2005	A	5% (U03,U36,& select JCN's)	N	
CSS	1/31/2005	A	5% Additional Pay (Select JCNs	N	
CU	12/20/2004	A	Court 1% Differential (U15)	N	
CV	12/20/2004	A	Court 2% Differential (U15)	N	
CW	12/20/2004	A	Court 5% Differential (U15)	N	
DG	1/1/1900	I	Ld Sup Pay- For Balances only	N	
DY	1/1/1900	A	Court Pay Accrual (Min 4 Hrs)	N	
IBY	5/24/2004	A	Annual Leave 2004 Buyback	N	
LHD	5/24/2004	A	Annual Leave 2004 Donated	N	
LHR	5/24/2004	A	Annual Leave 2004 Received	N	
ME	1/1/1900	A	Doctors Meal Allowance	N	
MTO	2/13/2006	A	Mandatory Over time	N	*
N/A	1/1/1900	A	Filler EC For HOL on Pay Group	N	

Fresno County Employees' Retirement Association

Amended Classification of Earn Codes to be Excluded from Compensation Earnable

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N - Nonpensionable earn code

Payroll Earn Code	Effective Date	Status	Description	Not Included in Pensionable Income
OA	1/1/1900	A	On Call RN's(1/2 Hrly Rate)	N
OA7	1/1/1900	A	On Call RN's(1/2 Hrly Rt) 7/70	N
OD	1/1/1900	A	Off-Duty Phone Calls	N
OE	1/1/1900	A	On Call RN's(45% Hrly Rate)	N
OE7	1/1/1900	A	On Call RN's(45% Hrly Rt) 7/70	N
OLD	1/1/1900	A	Old Leave Donated	N
OLR	1/1/1900	A	Old Leave Received	N
OP	1/1/1900	A	On Call Public Administrator	N
OVP	1/1/1900	A	Arrears Bal Creat.-Rev/Adjs	N
PCB	5/9/2005	A	Psych Over Shift Call Back	N
PCE	5/9/2005	A	Psych Over Shift Week Ends	N
PCN	5/9/2005	A	Psych Over Shift Week Nights	N
PWE	5/9/2005	A	Psych Over Shift Wk Ends $520	N
PWN	5/9/2005	A	Psych over Shift Wk Night $225	N
RND	1/1/1900	A	Rounding Correction Flag	N
RO	1/1/1900	A	Reserve Officer Pay	N
RO	12/18/1995	I	Reserve Officer Pay	N
RPY	1/1/1997	A	Repayment	N
SBB	10/14/2002	A	Sick Leave 2002 BuyBack (OJI)	N
SBY	12/14/1998	A	Sick Leave99 Buyback (OJI)	N
SG	1/1/1900	A	Shift B (OT @ 1.0)- 8% (TEMP)	N
SG	12/18/1995	I	Shift B (OT @ 1.0)- 8% (TEMP)	N
SH	1/1/1900	A	Shift B (OT @ 1.5)- 8% (TEMP)	N
SH	12/18/1995	I	Shift B (OT @ 1.5)- 8% (TEMP)	N
SI	1/1/1900	A	Shift B (OT @ 2.0)- 8% (TEMP)	N
SI	12/18/1995	I	Shift B (OT @ 2.0)- 8% (TEMP)	N
SKD	10/14/2002	A	Sick Leave 2002 Donated	N
SKR	10/14/2002	A	Sick Leave 2002 Received	N
SLD	12/14/1998	A	Sick Leave 99 Donated	N
SLR	12/14/1998	A	Sick Leave 99 Received	N
SQ	1/1/2002	A	State Rate Mileage Reimburse	N
SR	1/1/2000	A	State Rate Mileage Reimburs	N
ST	2/8/2000	A	Personal State Rt Mile-Taxable	N

Fresno County Employees' Retirement Association

Amended Classification of Earn Codes to be Excluded from Compensation Earnable

As Modified by the Board of Retirement on December 6, 2006					
N - Nonpensionable earn code					
[illegible] Code	[illegible] Eff. Date	[illegible] Status	[illegible] Description	Not Included in Pensionable Income	
ST	7/7/2002	A	Personal State Rt Mile-Taxable	N	
ST	1/1/2004	A	Personal State Rt Mile-Taxable	N	
ST	1/1/2005	A	Personal State Rt Mile-Taxable	N	
TAJ	5/24/2004	A	Time Off Bank Adjustment	N	
TBY	5/24/2004	A	Time Off Bank Buyback	N	
THD	5/24/2004	A	Time Off Bank Donated	N	
TOC	1/1/1900	I	TOC Hours Bought	N	
TPB	1/1/1900	I	TOC Payback	N	
TPO	10/20/1997	A	TOC Payoff	N	
TPY	10/20/1997	A	Prior Year TOC Payoff	N	
TXA	11/27/2000	A	LC4850 TAX ADJUSTMENT	N	
TXA	12/11/2000	I	LC4850 TAX ADJUSTMENT	N	
UA	9/26/2005	A	10% Regional/Multi-County duty	N	
VAD	12/14/1998	A	Vacation 99 Donated	N	
VBB	10/14/2002	A	Vacation 2002 Buyback (OJI)	N	
VBY	12/14/1998	A	Vacation99 Buyback (OJI)	N	
VCD	10/14/2002	A	Vacation 2002 Donated	N	
WK	1/21/2002	A	5% Differential (U07 only)	N	
XDP	12/20/2004	A	Domestic Partner Excess	N	

PROOF OF SERVICE

Johnson v. Fresno County Employees' Retirement Association
Cal. Court of Appeal, Fifth Appellate District, Case No. F069503
(Fresno County Superior Court Case No. 12CECG00759)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, California 94105-3659. On December 2, 2014, I served the following document(s) by the method indicated below:

RESPONDENT'S APPENDIX

☐ by transmitting via facsimile on this date from fax number +1 415 391 8269 the document(s) listed above to the fax number(s) set forth below. The transmission was completed before 5:00 PM and was reported complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the parties, confirmed in writing. The transmitting fax machine complies with Cal.R.Ct 2003(3).

☑ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

☐ by placing the document(s) listed above in a sealed envelope(s) and by causing personal delivery of the envelope(s) to the person(s) at the address(es) set forth below. A signed proof of service by the process server or delivery service will be filed shortly.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below. A copy of the consignment slip is attached to this proof of service.

☐ by transmitting via email to the parties at the email addresses listed below:

PLEASE SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 2, 2014, at San Francisco, California.

Julie A. Little

SERVICE LIST

VIA U.S. MAIL

Attorneys for Plaintiff/Petitioner/Appellant
Gary Johnson

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VIA U.S. MAIL

Fresno County Superior Court
Hon. Debra J. Kazanjian [one copy]
1130 O Street
Fresno, CA 93721-2220

By electronic service through Court of Appeal e-submission, California Rules of Court, Rule 8.212 (c)(2)

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797