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10 **BOARD OF ADMINISTRATION**

11 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

12 In the Matter of the Calculation of Final
13 Compensation of

CASE NO. 2013-1113
OAH NO.

14 DESI ALVAREZ,

STATEMENT OF ISSUES

Respondent,

Hearing Date:

Hearing Location:

and

Prehearing Conf.: None Scheduled

Settlement Conf.: None Scheduled

15 CHINO BASIN WATERMASTER,

Respondent.

16
17 The California Public Employees' Retirement System (CalPERS) states:

18 I

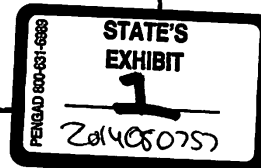
19 CalPERS makes and files this Statement of Issues in its official capacity as
20 such and not otherwise.

21 II

22 Respondent, Desi Alvarez (Alvarez), was employed by respondent Chino Basin
23 Watermaster (Chino) as the Chief Executive Officer. By virtue of his employment,
24 respondent Alvarez was a local miscellaneous member of CalPERS.

25 -1-

STATEMENT OF ISSUES
In Re the Matter of Desi Alvarez



1 On or about May 2, 2012, Alvarez signed an application for service retirement.
2 Alvarez retired for service effective July 2, 2012, with 31.427 years of service credit,
3 and has been receiving his retirement allowance from that date.

4 III

5 Chino is a public agency contracting with CalPERS for retirement benefits for its
6 eligible employees. The provisions of Chino's contract with CalPERS are contained in
7 the Public Employees' Retirement Law (PERL). (California Government Code sections
8 20000 et seq.)

9 IV

10 CalPERS is a defined benefit plan. Benefits for its members are funded by
11 member and employer contributions, and by interest and other earnings on those
12 contributions. The amount of a member's contributions is determined by applying a
13 fixed percentage to the member's compensation. A public agency's contribution is
14 determined by applying a rate to the payroll of the agency. Using certain actuarial
15 assumptions specified by law, the CalPERS Board of Administration sets the employer
16 contribution rate on an annual basis.

17 V

18 The amount of a member's service retirement allowance is calculated by
19 applying a percentage figure, based upon the member's age on the date of retirement,
20 to the member's years of service and the member's "final compensation." In
21 computing a member's retirement allowance, CalPERS staff may review the salary
22 reported by the employer for the member to ensure that only those items allowed
23 ///
24 under the PERL will be included in the member's "final compensation" for purposes of

1 calculating the retirement allowance.

2 VI

3 During a review of Alvarez's reported compensation, it was discovered that
4 Chino reported payments to CalPERS that were not pursuant to a publicly available
5 pay schedule and did not qualify as compensation earnable. Chino reported an annual
6 salary of \$228,000, which calculates to a monthly salary of \$19,000. The \$19,000 per
7 month salary was reported to CalPERS from May 3, 2011 through May 4, 2012.

8 VII

9 Section 5.e. of the Employment Agreement between respondent Alvarez and
10 Chino, effective May 3, 2011, states:

11 Administrative Leave: Executive shall be allowed twelve
12 days per year of administrative leave ("Administrative
13 Leave"), to be used as the Executive's discretion. Unused
14 Administrative Leave shall not accrue to the following year.

15 From, on or about November 9, 2011 through May 4, 2012, Chino
16 placed Alvarez on administrative leave.

17 IX

18 Section 9.a. of the Employment Agreement states:

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

1 Respondent Alvarez continued to receive payment from Chino through May 4,
2 2012, the expiration date of the Employment Agreement, even though he was no
3 longer performing any services in the position of a Chief Executive Officer and his
4 employment status had been severed.

X

5 The following provisions of the Government Code are relevant to the calculation
6 of Alvarez's final compensation:

7 Section 20630 provides:

8 (a) As used in this part, "compensation" means the
9 remuneration paid out of funds controlled by the employer
10 in payment for the member's services performed during
11 normal working hours or for time during which the member
is excused from work because of any of the following:

12 (1) Holidays.

13 (2) Sick leave.

14 (3) Industrial disability leave, during which, benefits are
15 payable pursuant to Sections 4800 and 4850 of the Labor
16 Code, Article 4 (commencing with Section 19869) of
Chapter 2.5 of Part 2.6, or Section 44043 or 87042 of the
Education Code.

17 (4) Vacation.

18 (5) Compensatory time off.

19 (6) Leave of absence.

20 (b) When compensation is reported to the board, the
21 employer shall identify the pay period in which the
22 compensation was earned regardless of when reported or
paid. Compensation shall be reported in accordance with
Section 20636 and shall not exceed compensation
earnable, as defined in Section 20636.

23 Section 20636 provides in part:

1 (a) "Compensation earnable" by a member means the
2 payrate and special compensation of the member, as
3 defined by subdivisions (b), (c), and (g), and as limited by
4 Section 21752.5.

5 (b) (1) "Payrate" means the normal monthly rate of pay or
6 base pay of the member paid in cash to similarly situated
7 members of the same group or class of employment for
8 services rendered on a full-time basis during normal
9 working hours, pursuant to publicly available pay
10 schedules. "Payrate," for a member who is not in a group
11 or class, means the monthly rate of pay or base pay of the
12 member, paid in cash and pursuant to publicly available pay
13 schedules, for services rendered on a full-time basis during
14 normal working hours, subject to the limitations of
15 paragraph (2) of subdivision (e).

16 (2) "Payrate" shall include an amount deducted from a
17 member's salary for any of the following:

18 (A) Participation in a deferred compensation plan.

19 (B) Payment for participation in a retirement plan that meets
20 the requirements of Section 401(k) of Title 26 of the United
21 States Code.

22 (C) Payment into a money purchase pension plan and trust
23 that meets the requirements of Section 401(a) of Title 26 of
24 the United States Code.

25 (D) Participation in a flexible benefits program.

(3) The computation for a leave without pay of a member
shall be based on the compensation earnable by him or her
at the beginning of the absence.

(4) The computation for time prior to entering state service
shall be based on the compensation earnable by him or her
in the position first held by him or her in state service.

(c) (1) Special compensation of a member includes a
payment received for special skills, knowledge, abilities,
work assignment, workdays or hours, or other work
conditions.

(2) Special compensation shall be limited to that which is
received by a member pursuant to a labor policy or

1 agreement or as otherwise required by state or federal law,
2 to similarly situated members of a group or class of
3 employment that is in addition to payrate. If an individual is
4 not part of a group or class, special compensation shall be
5 limited to that which the board determines is received by
6 similarly situated members in the closest related group or
7 class that is in addition to payrate, subject to the limitations
8 of paragraph (2) of subdivision (e).

9 (3) Special compensation shall be for services rendered
10 during normal working hours and, when reported to the
11 board, the employer shall identify the pay period in which
12 the special compensation was earned.

13 (4) Special compensation may include the full monetary
14 value of normal contributions paid to the board by the
15 employer, on behalf of the member and pursuant to Section
16 20691, if the employer's labor policy or agreement
17 specifically provides for the inclusion of the normal
18 contribution payment in compensation earnable.

19 (5) The monetary value of a service or noncash advantage
20 furnished by the employer to the member, except as
21 expressly and specifically provided in this part, is not
22 special compensation unless regulations promulgated by
23 the board specifically determine that value to be "special
24 compensation."

25 (6) The board shall promulgate regulations that delineate
more specifically and exclusively what constitutes "special
compensation" as used in this section. A uniform
allowance, the monetary value of employer-provided
uniforms, holiday pay, and premium pay for hours worked
within the normally scheduled or regular working hours that
are in excess of the statutory maximum workweek or work
period applicable to the employee under Section 201 et
seq. of Title 29 of the United States Code shall be included
as special compensation and appropriately defined in those
regulations.

(7) Special compensation does not include any of the
following:

(A) Final settlement pay.

1 (B) Payments made for additional services rendered
2 outside of normal working hours, whether paid in lump sum
or otherwise.

3 (C) Any other payments the board has not affirmatively
4 determined to be special compensation.

5 (d) Notwithstanding any other provision of law, payrate and
6 special compensation schedules, ordinances, or similar
documents shall be public records available for public
scrutiny.

7 (e) (1) As used in this part, "group or class of employment"
8 means a number of employees considered together
9 because they share similarities in job duties, work location,
10 collective bargaining unit, or other logical work-related
grouping. One employee may not be considered a group or
class.

11 (2) Increases in compensation earnable granted to an
12 employee who is not in a group or class shall be limited
13 during the final compensation period applicable to the
14 employees, as well as the two years immediately preceding
the final compensation period, to the average increase in
15 compensation earnable during the same period reported by
the employer for all employees who are in the same
membership classification, except as may otherwise be
determined pursuant to regulations adopted by the board
that establish reasonable standards for granting exceptions.

16 (f) As used in this part, "final settlement pay" means any
17 pay or cash conversions of employee benefits that are in
18 excess of compensation earnable, that are granted or
awarded to a member in connection with, or in anticipation
of, a separation from employment. The board shall
19 promulgate regulations that delineate more specifically
what constitutes final settlement pay. (f) . . . (f)

20 XI

21 The following regulations, promulgated by the Board of Administration, are
22 relevant to this appeal:

23 California Code of Regulations, Title 2, Division 1, Chapter 2, Subchapter
24 1, Article 4,

1 **Section 570 provides:**

2 **"Final settlement pay" means any pay or cash conversions**
3 **of employee benefits in excess of compensation earnable,**
4 **that are granted or awarded to a member in connection with**
5 **or in anticipation of a separation from employment. Final**
6 **settlement pay is excluded from payroll reporting to PERS,**
7 **in either payrate or compensation earnable.**

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

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

18 **Section 570.5 provides:**

19 **For purposes of determining the amount of "compensation**
20 **earnable" pursuant to Government Code Sections 20630,**
21 **20636, and 20636.1, payrate shall be limited to the amount**
22 **listed on a pay schedule that meets all of the following**
23 **requirements:**

24 **(1) Has been duly approved and adopted by the employer's**
25 **governing body in accordance with requirements of**
26 **applicable public meetings laws;**

27 **(2) Identifies the position title for every employee position;**

28 **(3) Shows the payrate for each identified position, which**
29 **may be stated as a single amount or as multiple amounts**
30 **within a range;**

31 **(4) Indicates the time base, including, but not limited to,**
32 **whether the time base is hourly, daily, bi-weekly, monthly,**
33 **bi-monthly, or annually;**

34 **(5) Is posted at the office of the employer or immediately**
35 **accessible and available for public review from the**
36 **employer during normal business hours or posted on the**
37 **employer's internet website;**

1 (6) Indicates an effective date and date of any revisions;
2

3 (7) Is retained by the employer and available for public
4 inspection for not less than five years; and

5 (8) Does not reference another document in lieu of
6 disclosing the payrate.

7 (b) Whenever an employer fails to meet the requirements of
8 subdivision (a) above, the Board, in its sole discretion, may
9 determine an amount that will be considered to be payrate,
10 taking into consideration all information it deems relevant
11 including, but not limited to, the following:

12 (1) Documents approved by the employer's governing body
13 in accordance with requirements of public meetings laws
14 and maintained by the employer;

15 (2) Last payrate listed on a pay schedule that conforms to
16 the requirements of subdivision (a) with the same employer
17 for the position at issue;

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

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

25 XII

CalPERS reviewed Alvarez's compensation reported by Chino and determined
that his compensation from May 3, 2011 through May 4, 2012, was not eligible to be
included in the calculation of his final compensation.

XIII

By letter dated June 17, 2013, respondent Alvarez and Chino were notified of
CalPERS' determination and were advised of their appeal rights.

///

XIV

By letter dated June 17, 2013, Chino filed a timely appeal, and has requested an administrative hearing.

XV

This appeal is limited to the issue of whether Chino's payment to Alvarez's can be included in the calculation of Alvarez's final compensation.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM

Dated: APR 11 2014 BY


KAREN DeFRANK, Chief
Customer Account Services Division