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

I

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

II

Respondent, Desi Alvarez (Alvarez), was employed by respondent Chino Basin Watermaster (Chino) as the Chief Executive Officer. By virtue of his employment, respondent Alvarez was a local miscellaneous member of CalPERS.
On or about May 2, 2012, Alvarez signed an application for service retirement.

Alvarez retired for service effective July 2, 2012 with 31.427 years of service credit, and has been receiving his retirement allowance from that date.

III

Chino, as a local public agency, contracts with CalPERS for retirement benefits for its eligible employees. The provisions of Chino’s contract with CalPERS are contained in the Public Employees’ Retirement Law (PERL). (California Government Code sections 20000 et seq.)

IV

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

V

The amount of a member’s service retirement allowance is calculated by applying a percentage figure based upon the member’s age on the date of retirement to the member’s years of service and the member’s “final compensation.” In computing a member’s retirement allowance, CalPERS staff may review the salary reported by the employer for the member to ensure that only those items allowed under the PERL will be included in the member’s “final compensation” for purposes of calculating the retirement allowance.
VI

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

VII

Employment Agreement

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

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

Section 9.a. of the Employment Agreement states:

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

Confidential Separation Agreement

On January 23, 2012, Chino and Alvarez executed an expressly
integrated "Confidential Separation Agreement" which provided, inter alia, as
follows:

1. Termination of Active Employment.

Executive's employment in the capacity of Chief Executive Officer of the
Watermaster with all of the powers and duties associated therewith
ceased on November 9, 2011, and the Employment Agreement is hereby
modified effective as of that date. Executive acknowledges and agrees
that he has received all compensation accrued and owing pursuant to the
Employment Agreement as of the date of execution of this Agreement,
including, but not limited to, accrued but unpaid base salary, incentive
compensation, and accrued vacation (all as set forth in Section 5 of the
Employment Agreement) and expense reimbursement.

2. Transition Period.

A. Term

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

B. Duties.

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

C. Compensation and Benefits.

During the Transition Period, Executive shall continue to receive his base salary, less applicable withholdings, at the rate in effect on November 9, 2011, paid in accordance with the Watermaster's normal payroll system. Executive shall continue to accrue vacation at the rate of twenty (20) days per year, accruing pro rata on a bi-weekly basis. In addition, the Watermaster shall permit Executive to continue to participate as an employee in any insurance plans, deferred compensation plans, and retirement plans in which he was a participant prior to the Transition Period, on the same terms and conditions as under the Employment Agreement. The compensation and benefits provided hereunder shall be referred to as the "Severance Compensation." Executive agrees that the Severance Compensation, along with any entitlement to benefits under the California Public Employees' Retirement System ("CalPERS") pursuant to the terms thereof on or after the Separation Date, constitute the entire amount of consideration due to him, and Executive is not entitled to any further or other amounts, including severance and other benefits, whether under the Employment Agreement or any other agreement, or any benefit plan, policy or practice of the Releases, as defined below. Executive agrees that he will not seek any further compensation for any other claimed damage, costs, severance, income, or attorneys' fees. Executive acknowledges that the severance Compensation constitutes good and valuable consideration to which he otherwise would not have been entitled.

6. Confidentiality.

Executive understands and agrees that all discussions, negotiations, and correspondence relating to this Separation Agreement and the terms hereof are strictly confidential and that this confidentiality provision is a material term of this Separation Agreement. Executive agrees not to disclose to anyone (other than his spouse, counsel and tax advisor(s)) the terms of this Agreement or any information concerning the circumstances that resulted in this Agreement unless such disclosure is (i) lawfully required by any government agency of competent jurisdiction; (ii) otherwise required to be disclosed by law (including legally-required financial reporting) and/or by compulsory process or court order; or (iii) necessary in any legal proceeding to enforce any provision of this Agreement Executive agrees to notify the Watermaster in writing within five (5) calendar days of the receipt of any subpoena, court order,
administrative order, or other legal process requiring disclosure of information subject to this confidentiality provision. Executive also shall advise any individual or entity to which he discloses information pursuant to this Paragraph of this confidentiality provision.


This Separation Agreement constitutes the sole agreement between the parties with respect to the subject matter hereof, and supersedes all prior discussions, negotiations, understandings or agreements, whether oral or written, among the parties relating to the subject matter of this Separation Agreement, expressly including the Employment Agreement. Neither the Watermaster nor Executive shall have any further obligations under the Employment Agreement, and the parties' per respective obligations thereunder are hereby extinguished. This Separation Agreement may not be amended, modified or changed (in whole or in part), except by a formal, definitive written agreement expressly referring to this Separation Agreement, which agreement is executed by both of the parties hereto.

IX

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

Section 20056, provides:

"Public Agency" means any ...district, or other local authority or public body of or within this state."

Section 20069, provides:

(a) "State service" means service rendered as an employee or officer (employed, appointed, or elected) of the state, the California Institute for Regenerative Medicine and the officers and employees of its governing body, the university, a school employer, or a contracting agency, for compensation, and only while he or she is receiving compensation from that employer therefor, except as provided in Article 4 (commencing with Section 20990) of Chapter 11.

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FIRST AMENDED STATEMENT OF ISSUES
In Re the Matter of Desi Alvarez
Section 20506 provides:

Any contract heretofore or hereafter entered into shall subject the contracting agency and its employees to all provisions of this part and all amendments thereto applicable to members, local miscellaneous members, or local safety members except those provisions that are expressly inapplicable to a contracting agency until it elects to be subject to those provisions.

Section 20630 provides:

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

(1) Holidays.
(2) Sick leave.
(3) Industrial disability leave, during which, benefits are payable pursuant to Sections 4800 and 4850 of the Labor Code, Article 4 (commencing with Section 19869) of Chapter 2.5 of Part 2.6, or Section 44043 or 87042 of the Education Code.
(4) Vacation.
(5) Compensatory time off.
(6) Leave of absence.

(b) When compensation is reported to the board, the employer shall identify the pay period in which the 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.

Section 20636 provides in part

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

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

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

(A) Participation in a deferred compensation plan.

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

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

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

(3) Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall identify the pay period in which the special compensation was earned.
(4) Special compensation may include the full monetary value of normal contributions paid to the board by the employer, on behalf of the member and pursuant to Section 20691, if the employer's labor policy or agreement specifically provides for the inclusion of the normal contribution payment in compensation earnable.

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

(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.

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

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

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

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

(2) Increases in compensation earnable granted to an employee who is not in a group or class shall be limited during the final compensation period applicable to the employees, as well as the
two years immediately preceding the final compensation period, to
the average increase in 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.

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

[...]

Section 20960, provides:

Except as provided in Article 4 (commencing with Section 20990), time
during which a member is absent from state service without compensation
shall not be allowed in computing service.

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

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

Section 570 provides:

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

For example, final settlement pay may consist of severance pay or
so-called "golden parachutes." It may be based on accruals over
a period of prior service. It is generally, but not always, paid during
the period of final compensation. It may be paid in either lump-
sum, or periodic payments.
Final settlement pay may take the form of any item of special compensation not listed in Section 571. It may also take the form of a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS.

Section 570.5 provides:

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

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

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

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

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

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

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

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

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

(b) Whenever an employer fails to meet the requirements of subdivision (a) above, the Board, in its sole discretion, may determine an amount that will be considered to be payrate, taking into consideration all information it deems relevant including, but not limited to, the following:
(1) Documents approved by the employer’s governing body in accordance with requirements of public meetings laws and maintained by the employer;

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

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

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

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 February 4, 2013, respondent Alvarez and Chino were notified that CalPERS had issued a supplemental determination that Alvarez was not in the employ of Chino after November 9, 2012. Respondents were informed that their existing appeals would be deemed to include this issue raised in the supplemental determination.

XIII

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

\[\text{\textsuperscript{1}}\]

\[\text{\textsuperscript{1}}\] A subsequent version of this letter to correct for an errata was issued February 12, 2015.

FIRST AMENDED STATEMENT OF ISSUES
In Re the Matter of Desi Alvarez
By letters dated April 19, 2013, Chino and Alvarez timely appealed and requested an administrative hearing.

This appeal is limited to the issues of whether:

1. Chino’s payment to Alvarez can be included in the calculation of Alvarez’s final compensation.

2. The period from and after May 3, 2011, if any, that can be included for the purpose of calculating Alvarez’s service credit.

BOARD OF ADMINISTRATION, CALIFORNIA PUBLIC EMPLOYEES’ RETIREMENT SYSTEM

Dated: 2/12/15

BY: RENEE OSTRANDER, Assistant Division Chief
Customer Account Services Division
PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On February 12, 2015, I served the foregoing document described as:

FIRST AMENDED STATEMENT OF ISSUES – In the Matter of the Calculation of the Final Compensation of DESI ALVAREZ, Respondent, and CHINO BASIN WATERMASTER, Respondent. ; Case No. 2013-1113; OAH No. 2014080757.

on interested parties in this action by placing ☑ the original XX a true copy thereof enclosed in sealed envelopes addressed and or e-filed as follows:

John M. Jensen  Office of Administrative Hearings
Law Offices of John Michael Jensen  320 West Fourth Street, Suite 630
11500 W. Olympic Blvd., Suite 550  Los Angeles, CA 90013
Los Angeles, CA 90064  laxfilings@dgs.ca.gov

Bradley J. Herrema  Joe Joswiak
Brownstein Hyatt Farber Schreck, LLP  Chino Basin Watermaster
1020 State Street  9641 San Bernardino Road
Santa Barbara, CA 93101  Rancho Cucamonga, CA 91730

[ ☑ ] BY ELECTRONIC TRANSMISSION: I caused such document(s) to be sent to the addressee(es) at the electronic notification address(es) above. I did not receive within a reasonable time of transmission, any electronic message, or other indication that the transmission was unsuccessful.

Executed on February 12, 2015, at Sacramento, California.

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

Odessa Moore
NAME

☐

SIGNATURE