ATTACHMENT A

THE PROPOSED DECISION
BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES’ RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Appeal Regarding the Final Compensation Calculation of:

FARIBORZ SHAHIDI,
Respondent.

and

CITY OF LONG BEACH,
Respondent.

Case No. 2018-0940
OAH No. 2018110941

PROPOSED DECISION

This matter was heard by David Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 21, 2019, in Orange.

Elizabeth Yelland, Senior Attorney, represented Renee Ostrander (complainant). Fariborz Shahidi (respondent) was present and represented himself. There was no appearance on behalf of the City of Long Beach (the City).

Evidence and argument was offered. The record was closed and the matter was deemed submitted for decision on May 21, 2019.

During the hearing, a protective order was issued to redact personal or confidential information contained in the exhibits.

During the hearing, respondent objected that exhibit 13, an amendment to a contract, was not relevant. The objection was taken under submission. The objection is overruled because the document meets the definition in Evidence Code section 210 of evidence that “has a tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the actions.” Exhibit 13 is admitted into evidence.

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CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
FILED May 31 2019

[Signature]
SUMMARY

In the year before respondent signed an application for service retirement and retired on August 2, 2014, the City incorrectly reported respondent’s lump sum bonus to CalPERS, which used that information to calculate and pay respondent’s retirement allowance. CalPERS discovered the error, determined that respondent was receiving more than he was entitled to, and started recouping the overpayment by reducing respondent’s monthly retirement allowance. Respondent contends that CalPERS should not reduce his monthly retirement allowance. CalPERS also contends that the City should repay to CalPERS any overpayments made to respondent due to the City’s incorrect reporting of information about the bonus.

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Statement of Issues and Amended Statement of Issues were filed by complainant in her official capacity as the Chief of the Employer Account Management Division of the California Public Employees’ Retirement System (CalPERS).

2. On December 23, 1985, respondent first became employed by the City. On August 2, 2014, respondent signed an application for service retirement from his position as project manager.

3. By letters dated June 15, 2018, respondent and the City were notified of CalPERS’ decision that respondent’s retirement allowance was inflated due to the City being out of compliance with reporting requirements for a lump sum bonus. Respondent and the City were advised of their appeal rights.

4. By letter dated May 22, 2018, respondent filed a timely appeal and requested an administrative hearing.

5. There was no evidence of any appeal filed by the City. The City was properly served with notice of the hearing. Based on the City’s failure to appear at the hearing, its default is noted under Government Code section 11520.1

Respondent’s Hiring, Firing, Compensation, and Retirement Allowance

6. By virtue of his employment, respondent was a local miscellaneous member of CalPERS.

1 Ms. Yelland stated on the record that she had contacted Gavin Curran, City Director, who informed her that the City would not appear for the administrative hearing.
7. CalPERS is a defined benefit plan. Benefits for its members are funded by employee and employer contributions, as well as by interest and other earnings on those contributions. The amount of an employee's contributions is determined by applying a fixed percentage to the member's compensation. A public agency/employer's contribution is determined by applying a rate to the payroll of the agency. Using certain actuarial assumptions specified by law, CalPERS' Board of Administration (Board) sets employer contribution rates annually.

8. 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," which is defined by statute and discussed in more detail below. In computing a member's retirement allowance, CalPERS staff may review the salary reported by the employer to ensure that only those items allowed under the California Public Employees' Retirement Law (the PERL) (Gov. Code, § 20000 et seq.) will be included in the member's "final compensation" for purposes of calculating the retirement allowance.

9. The City contracts with CalPERS for retirement benefits for its eligible employees. The provisions of the City’s contract with CalPERS are governed by the PERL. An amendment to the contract, effective April 2, 2012, includes that the City will indemnify CalPERS from certain claims. More specifically, the City will "indemnify, defend and hold harmless" CalPERS, the Board, and the CalPERS retirement fund "from any claims, demands, actions, losses, liabilities, damages, judgments, expenses and costs" which arise from the City’s "election to provide retirement benefits, provisions or formulas under this Contract that are different than the retirement benefits, provisions or formulas provided under the [City's] prior non-CalPERS retirement program." (Exhibit 16, Amendment to Contract, paragraph A.3.a.)

10. In the City’s memorandum of understanding (MOU) with respondent’s union, an Exceptional Performance Plan allows employees to receive a lump sum bonus “for employees whose performance merits such an increase.” (Exhibit 5, section 24.0.)

11. On May 25, 2017, CalPERS completed a Public Agency Review Audit (Audit) of compensation reported by the City. The Audit discovered that the City inaccurately reported special compensation of bonus pay for numerous employees, including respondent, in lump sum amounts, as opposed to the requirement to report the bonus pay over the correct earned period; that is, the period over which the bonus was earned or attributable. The Audit report recommended that the City work with CalPERS to “identify and make adjustments, if necessary, to any impacted active and retired member accounts pursuant to Government Code section 20160.” (Exhibit 13, p. A-56.)

Although the payment of the bonus complied with the City’s MOU with respondent’s union, it was not in compliance with the PERL, as discussed below.
12. The City agreed with the findings and recommendations of the Audit report and agreed to work with CalPERS to make the necessary adjustments. With the cooperation of the City, CalPERS identified the active and retired member accounts wherein the lump sum bonus payments had been incorrectly reported by the City. The City reversed the incorrect reporting of the bonus payments as a single lump sum, and then correctly reported them to CalPERS as being earned over the year for which the bonus was earned.

13. By letter dated May 16, 2018, CalPERS informed respondent that it identified compensation that did not comply with the PERL; that is, the City erroneously reported bonus pay as a lump sum amount, but that special compensation must be reported in the pay period in which it was earned. Based on the information provided by the City, CalPERS informed respondent that there would be a reduction in his retirement allowance.

The Effect of the Correction on Respondent's Retirement Allowance

14. As noted above, respondent's retirement allowance is determined using a formula including the amount of his final compensation. Respondent's retirement was effective August 2, 2014. The 12-month period of final compensation, to be used in this formula was initially determined to be September 2013 to August 2014, and included an annual lump sum bonus of $2,965, paid on January 5, 2014. Respondent's final compensation amount was $8,497.20, including the lump sum bonus. His monthly retirement allowance was calculated and paid as $6,325.98.

15. The City agreed that it incorrectly reported the bonus as a lump sum when it should have been reported as earned over the entire previous reporting period; i.e., the year in which respondent earned the bonus. The City reversed the incorrect information, and then correctly reported respondent's bonus to CalPERS as attributable to the period from December 19, 2012, to December 19, 2013. Therefore, portions of respondent's bonus were now included in the 12-month period of his final compensation (from September to December 2013). Before the correction, the entire bonus was included in respondent's final compensation.

16. Using this new information, respondent's final compensation was recalculated, and decreased by $61.98, to $8,435.22. When the decreased amount was used in the formula, his monthly retirement allowance was reduced by $46.14, to $6,279.84.

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^ During the administrative hearing, the only bonus referred to was the one paid on January 5, 2014, and related to respondent's work period of December 2012 to December 2013, as confirmed in writing by the City (see exhibit A, p. 5.) However, in its Closing Brief (exhibit 19, pp. 4-5), complainant refers to two bonuses, the first received on January 6, 2013, and the second on January 5, 2014. On the state of the evidence on the record, it cannot be determined if the 2013 bonus played any part in the correction of respondent's final compensation.
17. Due to payment of the incorrect monthly retirement allowance from 2014 to 2018, an overpayment was created in the amount of $2,105.38 as of June 2018. CalPERS sought repayment of this overpayment from respondent and the City.

18. However, CalPERS can only look back a maximum of three years to seek this type of overpayment (Gov. Code, § 20164). CalPERS determined that $1,616.55 of the overpayment had been paid in the prior three years. To recoup this amount, starting September 1, 2018, CalPERS reduced respondent’s monthly retirement allowance by $44.90, and has made such reductions through at least the date of this hearing. CalPERS will continue the monthly reduction until the amount of $1,616.55 has been recouped or there is an intervening order as a result of this hearing.4

Further Correction to Respondent’s Retirement Allowance

19. Based on further information received from the City, in October 2018 CalPERS determined that an adjustment was needed in the period for which respondent’s bonus was attributable. Previously, CalPERS had used the period December 19, 2012, to December 19, 2013. It now used the period December 24, 2012, to December 22, 2013. This change resulted in a recalculation of final compensation to add $7, which resulted in a retroactive adjustment to increase respondent’s retirement allowance in an amount not determinable from the evidence. It also resulted in a one-time amount due to respondent of $258.91. By letter dated November 7, 2018, CalPERS informed respondent that $258.91 had been added to his December 2018 retirement warrant, along with a cost of living adjustment (COLA). (Exhibits 20 and C.)

Parties Contentions and Relevant Evidence

20. CalPERS contends, correctly, that respondent is entitled to no more in his retirement allowance than is required by law. Therefore, it had to adjust respondent’s retirement allowance and recoup the overpayment.

21. In the Amended Statement of Issues, CalPERS contends that the City owes CalPERS, under the indemnification clause in the contract, the total amount of $2,540.49, computed as $44.57 x 57 months = $2,540.49, plus Cost Of Living Adjustments.

22. Respondent raises many contentions, some of which are discussed below. If not discussed, the contention was without merit as lacking in evidentiary support and/or legal support.

23. Respondent contends that he relied upon representations made by CalPERS about the amount of retirement allowance he could expect, and based his decision to retire on

4 A rough computation of the amount recouped to the date of hearing: nine months x $44.90 per month = $404.10; leaving a balance of $1,212.45 still to be recouped from respondent.
those representations. Had he known the correct information, he would have delayed retirement and thereby increased his retirement allowance. Respondent relies upon his retirement allowance for living expenses and contends it would be unfair to penalize him for errors made by the City and, based thereon, errors made by CalPERS.

24. Respondent contends that the evidence about the Audit and the City’s reversal and adjustment of its reporting is suspect, noting that the date of the City’s reply (January 13, 2016; exhibit 14) predates the date of the Audit (May 2017; exhibit 13). Testimony was provided by Angel Gutierrez, a CalPERS employee of over 20 years who works in the Compensation Review Unit. Mr. Gutierrez reviewed respondent’s account for purposes of testifying. He did not do any of the work at CalPERS related to respondent’s retirement allowance. Mr. Gutierrez testified credibly that the May 2017 version of the Audit is the final version, and that an earlier draft was sent to the City with a request for its position concerning the audit findings. After receiving the draft, the City had ongoing contact with CalPERS concerning the findings.

25. Respondent also noted that he is not aware of any city that pays an annual bonus spread over the employee’s entire year of work. Further, respondent spoke with other City employees who received lump sum bonuses and retired prior to him, and none of those persons had an adjustment to their retirement allowance based on the bonus issue. With respect to these other prior employees, it is likely that, due to the three-year limit on CalPERS’ ability to seek repayment of an overpayment, CalPERS would be unable to do so. Further, each case relies on its own specific facts.

LEGAL CONCLUSIONS

The City’s Default

1. Under Government Code section 11520, when the City failed to file a notice of defense and failed to appear for the hearing, the matter could proceed in its absence.

Burden and Standard of Proof

2. The person against whom a statement of issues is filed generally bears the burden of proof at the hearing regarding the issues raised. (Coffin v. Department of Alcoholic Beverage Control (2006) 139 Cal.App.4th 471, 476.)

3. In McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051, and footnote 5, the court generally considered the issue of burden of proof in an administrative hearing concerning retirement benefits and found “the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence.”
4. In the absence of a contrary statutory provision, an applicant for a benefit has the burden of proof to establish a right to the claimed entitlement or benefit, and that burden is unaffected by the general rule that pension statutes are to be liberally construed. (Glover v. Board of Retirement (1989) 214 Cal.App.3d 1327, 1332.)

5. CalPERS' interpretation of the PERL and its accompanying regulations is generally entitled to deference, since CalPERS is the agency charged with enforcing the law. (City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System (2012) 211 Cal.App.4th 522, 539.)

6. Based on the above, respondent has the burden of establishing by a preponderance of the evidence that he is entitled to an amount of final compensation that includes his bonus pay as a lump sum, as initially included in his final compensation.

Final Compensation

7. The formula for determining a member's retirement benefit takes into account: (1) years of service; (2) a percentage figure based on age on the date of retirement; and (3) final compensation. (Gov. Code, §§ 20037, 21350, 21352, 21354.5; City of Sacramento v. Public Employees Retirement System (1991) 229 Cal.App.3d 1470, 1479.) The issue presented in this case relates to the computation of respondent's final compensation.

8. Final compensation is determined, in part, by calculating a member's compensation earnable. Government Code section 20630, subdivision (a), generally defines compensation as "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" holidays, sick leave, industrial disability leave, vacation, compensatory time off, and leave of absence.

9. Government Code section 20630, subdivision (b), states in part: "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." The City did not comply with this requirement when it reported respondent's bonus as a lump sum.

10. Compensation earnable means payrate and special compensation, as defined in Government Code section 20636. As applicable here, special compensation is defined to include pay for special skills, knowledge and abilities, and must be offered under a labor agreement. (Id., subd. (c)(1) and (2).) Such special compensation must "identify the pay period in which the special compensation was earned." (Id., subd. (c)(3)(A).)

11. The Board promulgated California Code of Regulations, title 2, section 571, subdivisions (a) and (b)(5), which includes that a bonus, such as for merit, must be paid periodically as earned.
Correction of Errors; Respondent’s Contentions

12. Under Government Code section 20160, corrections can be made to a member’s account under various conditions. Of significance, subdivision (a)(3) provides, in pertinent part:

“The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part.”

Under subdivision (d): “The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).”

Subdivision (e) provides, in pertinent part: “Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time.”

13. Corrections are also governed by Government Code section 20163, which provides, in relevant part: “Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person . . . will receive the actuarial equivalent of the allowance to which the member is entitled.”

14. A statute of limitations exists for adjustment of errors which, as related to this matter is found in Government Code section 20164, subdivision (b)(1), which provides:

“(b) For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160,20163, or 20532, or otherwise, the period of limitation of actions shall be three years, and shall be applied as follows:

“(1) In cases where this system makes an erroneous payment to a member or beneficiary, this system’s right to collect shall expire three years from the date of payment.”

15. The governing law, particularly Government Code section 20160 and 20163, dictates that respondent is only entitled to the benefits and status which the law allows. Although the City made errors on which CalPERS and respondent relied, and there were delays in finding those errors, correcting them, and notifying respondent, nevertheless he is only entitled to the benefits that he is allowed under law and not any overpayment.

16. Respondent contends that he relied on the errors and retired before he would have based on those errors, and that CalPERS is therefore required to pay a pension based on those errors. The legal theory behind these contentions is called estoppel. As noted below, estoppel will not be applied to the circumstances of this case.
The Public Employees’ Retirement System is a creation of statutes, codified in
the Government Code, which grant it certain powers. CalPERS has no authority other than
that granted by those statutes. It has the authority to pay benefits to a member only when the
statutes authorize it and then only in the amount authorized. (See Hudson v. Posey (1967)
255 Cal.App.2d 89.)

Estoppel cannot be used to enlarge the powers of the Public Employees’
Retirement System (Page v. City of Montebello (1981) 112 Cal.App.3d 658 at 667; Board of
230; and Boren v. State Personnel Board (1951) 37 Cal.App.2d 634) or to provide a benefit
to a retiree which is not otherwise statutorily authorized because public employee benefits
are wholly statutory. (Hudson v. Posey, supra.)

Estoppel is an equitable doctrine that is centuries old. It seeks to prevent a
person or entity from profiting from their own wrongdoing. As the Court of Appeal noted in
California School Employees Association v. Jefferson Elementary School District (1975) 45
Cal.App.3d 683, at page 692: “The vital principle is that he who by his language or conduct
leads another to do what he would not otherwise have done shall not subject such person to
loss or injury by disappointing the expectations upon which he acted . . . . [Citations.]” In
determining whether or not estoppel shall be applied to a given situation, the burden of
establishing that all of the requirements have been met is upon the party asserting the
estoppel. The California Supreme Court in the case of City of Long Beach v. Mansell (1970)
3 Cal.3d 462, 489 (Mansell), stated that the claiming party must establish the following four
elements for estoppel to apply:

“(1) the party to be estopped must be apprised of the facts;
“(2) he must intend that his conduct shall be acted upon, or must so act that the
party asserting the estoppel had a right to believe it was so intended;
“(3) the other party must be ignorant of the true state of facts; and
“(4) he must rely upon the conduct to his injury.”

Even if respondent established the four requisite elements, for the doctrine of
equitable estoppel to be applied to a governmental entity, there must be a further showing.

The California Supreme Court in Mansell noted that estoppel should be
applied to a governmental agency only in rare circumstances and discussed the limitations of
applying estoppel to governmental agencies as follows: “The government may be bound by
an equitable estoppel in the same manner as a private party when the elements requisite to
such an estoppel against a private party are present and, in the considered view of a court of
equity, the injustice which would result from a failure to uphold estoppel is of sufficient
dimension to justify any effect upon public interest or policy which would result from the
raising of an estoppel.” (Id. at p. 499.)

The Court of Appeal in Crumpler v. Board of Administration, Public
Employees’ Retirement System (1973) 32 Cal.App.3d 567, at p. 584, held that estoppel will
not be applied to preclude a proper reclassification prospectively, that is from the time of the proper reclassification forward.

“We will not, however, extend estoppel to preclude the board from reclassifying petitioners prospectively from the date of the board’s decision. Public interest and policy would be adversely affected if petitioners, despite the discovery of the mistaken classification, were required to be continued to be carried as local safety members when all other contract members of the retirement system throughout the state performing like duties and functions are classified as miscellaneous members. Manifestly, it would have a disruptive effect on the administration of the retirement system. The conclusion we have reached respecting the extent to which the board should be estopped is in keeping with, if not compelled, by the provisions of section 20160 pertaining to the duty of the board to correct errors.”

23. Estoppel will not be applied against the government if doing so effectively nullifies a strong rule of policy adopted for the benefit of the public. (Lentz v. McMahon (1989) 49 Cal.3d 393; County of San Diego v. Cal. Water (1947) 30 Cal.2d 817.)

24. Similar logic applies to this case regarding the correction of the amount of respondent’s retirement allowance. Assuming there is a foundational showing of the four factors referenced in Mansell, respondent is unable to overcome the sound public policy argument raised by the Board. To do as respondent requests would enlarge the authority of the Public Employees’ Retirement System regarding the granting of a beneficiary’s allowance to an amount in excess of the amount authorized by statute. It would be detrimental to the public policy behind the creation of the Public Employees’ Retirement System. CalPERS may pay respondent only that which it is statutorily authorized to pay. It is not estopped from reducing his retirement allowance from an incorrect amount to a correct amount. Judging the facts against the statutory and decisional law, estoppel is not established against CalPERS because to do so would violate a strong public policy.

25. The Board owes a fiduciary duty of trustee to a trust and its beneficiaries. It cannot ignore a mistake that benefits one person any more than it can refuse to correct one that inures to its benefit. To find an estoppel in this case would be sufficiently adverse to public interest or policy. Here, the Board has a primary obligation to protect the retirement fund for the benefit of all its beneficiaries and to minimize the employers’ costs of providing benefits. To allow respondent to continue to have a lifetime retirement allowance higher than permitted by the statutory formula would result in an unfunded liability, and would also have a direct impact on his former employer, the City, against whose reserves his lifetime allowance will be drawn. The unfunded liability would pass to the employer in the form of increased contributions and higher future contribution rates to fund its miscellaneous members’ account. This would be a windfall to respondent or, in equivalent legal terms, unjust enrichment.

26. To find an estoppel here would, in essence, grant to CalPERS powers that were not ceded to it by the Legislature. The grant of power was to administer a plan based
upon a specific statutory retirement benefit formula. To find an estoppel here would allow CalPERS to unilaterally alter the statutory retirement benefit formula without benefit of statutory authorization. That is the task of the Legislature, not the board.

27. If this were a matter solely driven by the equities of the situation then respondent would have a stronger case. He did not make the mistakes, the City did. However, there are public policy considerations that inform and condition the decision-making process in this administrative hearing.

28. The key issue is whether respondent’s benefit is higher or lower than that of other retirees whose statutory retirement formula is exactly the same. The statutory retirement allowance is determined by a formula. To allow respondent to have a higher allowance, based on an error, would be to treat him unequally in violation of the mandate given to CalPERS by the Legislature. This is against public policy.

29. The analytical approach taken above is similar to the approach taken in Precedential Board Decision 98-02 (In the Matter of Harvey Henderson. CalPERS Case No. 1558, OAH No. L-1997120250; Exhibit 18). A precedential decision may be so designated under Government Code section 11425.60 if it contains a significant legal or policy determination. The CalPERS Board’s interpretation and application of the statutes it administers is given great weight. (City of Sacramento v. Public Employees Retirement System (1991) 229 Cal.App.3d 1470, 1478.) Particularly applicable here, the “contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight” unless it is clearly erroneous or unauthorized. (Coca-Cola Co. v. State Bd. of Equalization (1945) 25 Cal.2d 918, 921.) Under Government Code section 20125, the board “is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system.”

Further, under Evidence Code section 664, there is a general presumption that a public agency has performed its official duty. CalPERS’ adoption of Precedential Decision 98-02, and the manner in which CalPERS made corrections to respondent’s account, are administrative constructions consistent with the statutory language governing implementation of retirement allowances.

30. Respondent’s contentions that CalPERS is bound by the City’s erroneous reporting of his bonus is not convincing, as it lacks evidentiary support and/or legal support.

Liability of the City of Long Beach

31. CalPERS’ request for the City to reimburse the overpayment to respondent is based on the contract and amendment between them, under the indemnification clause.

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5 In this context, “system” is a reference to the Public Employees’ Retirement System; see section 20002.
32. As noted in Factual Finding 9, the indemnification language is specific. As pleaded and briefed, the indemnification would be broad; that is, for any claims or liabilities which arise from the City’s “election to provide retirement benefits.” However, the indemnification agreement includes additional language beyond that which is quoted. The indemnification is for the City’s “election to provide retirement benefits, provisions or formulas under this Contract that are different than the retirement benefits, provisions or formulas provided under the [City’s] prior non-CalPERS retirement program.” (Exhibit 13, paragraph A.3.a.) This contract language requires a comparison between City retirement benefits as contracted with CalPERS as against City retirement benefits under its “prior non-CalPERS retirement program.” There was no evidence of the City’s retirement benefits under its prior non-CalPERS retirement program. Without such evidence, no indemnification can be considered or determined.

ORDER

1. The appeal of respondent Fariborz Shahidi is denied.

2. The request of the California Public Employees’ Retirement System for indemnification from the City of Long Beach is denied.

DATED: May 31, 2019

David B. Rosenman
Administrative Law Judge
Office of Administrative Hearings

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6 In the Statement of Issues and CalPERS's Closing Brief, the indemnification clause is not quoted in its entirety.