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Employees' Retirement System

BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Calculation of Final Compensation of	)	CASE NO. 2013-1113
	)	OAH NO. 2014080757
	)	
DESI ALVAREZ,	)	FIRST AMENDED STATEMENT OF ISSUES
	)	
Respondent,	)	Hearing Date: 3/11-13/2015
	)	Hearing Location: Glendale, CA
and	)	
	)	
CHINO BASIN WATERMASTER,	)	
	)	
Respondent.	)	

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

I

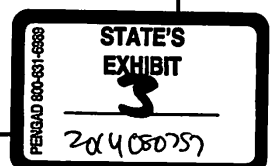
CalPERS makes and files this Statement of Issues in its official capacity as such and not otherwise.

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.

-1-

FIRST AMENDED 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, as a local public agency, contracts with CalPERS for retirement benefits  
6 for its eligible employees. The provisions of Chino's contract with CalPERS are  
7 contained in the Public Employees' Retirement Law (PERL). (California Government  
8 Code sections 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 contribution 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 member compensation as reported by the  
15 agency. Using certain actuarial assumptions specified by law, the CalPERS Board of  
16 Administration sets the employer 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 under the PERL will be included in the member's "final compensation" for purposes of  
24 calculating the retirement allowance.

1 VI

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

7 VII

8 Employment Agreement

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  
Administrative Leave shall not accrue to the following year.

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

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

22 ///

23 ///

24 ///

**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

1 forthwith may undertake consulting work on his own account and may  
2 pursue any other business, provided that he does not act to the detriment  
of the Watermaster or in violation of his continuing duties thereto.

3 **C. Compensation and Benefits.**

4 During the Transition Period, Executive shall continue to receive his base  
5 salary, less applicable withholdings, at the rate in effect on November 9,  
2011, paid in accordance with the Watermaster's normal payroll system.  
6 Executive shall continue to accrue vacation at the rate of twenty (20)  
7 days per year, accruing pro rata on a bi-weekly basis. In addition, the  
Watermaster shall permit Executive to continue to participate as an  
8 employee in any insurance plans, deferred compensation plans, and  
retirement plans in which he was a participant prior to the Transition  
9 Period, on the same terms and conditions as under the Employment  
Agreement. The compensation and benefits provided hereunder shall be  
10 referred to as the "Severance Compensation." Executive agrees that the  
Severance Compensation, along with any entitlement to benefits under  
11 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  
12 entitled to any further or other amounts, including severance and other  
benefits, whether under the Employment Agreement or any other  
13 agreement, or any benefit plan, policy or practice of the Releases, as  
defined below. Executive agrees that he will not seek any further  
14 compensation for any other claimed damage, costs, severance, income,  
or attorneys' fees. Executive acknowledges that the severance  
15 Compensation constitutes good and valuable consideration to which he  
otherwise would not have been entitled.

16 ~~¶¶...¶¶~~

17 **6. Confidentiality.**

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

1 administrative order, or other legal process requiring disclosure of  
2 information subject to this confidentiality provision. Executive also shall  
3 advise any individual or entity to which he discloses information pursuant  
4 to this Paragraph of this confidentiality provision.

5 [¶]...[¶]

6 **13. Entire Agreement: Modifications.**

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

19 **IX**

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

22 Section 20056, provides:

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

25 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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1 "Payrate," for a member who is not in a group or class, means the  
2 monthly rate of pay or base pay of the member, paid in cash and  
3 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).

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

6 (A) Participation in a deferred compensation plan.

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

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

11 (D) Participation in a flexible benefits program.

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

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

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

18 (2) Special compensation shall be limited to that which is received  
19 by a member pursuant to a labor policy or agreement or as  
otherwise required by state or federal law, to similarly situated  
20 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  
21 compensation shall be limited to that which the board determines  
is received by similarly situated members in the closest related  
22 group or class that is in addition to payrate, subject to the  
limitations of paragraph (2) of subdivision (e).

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



1  
2 (4) Special compensation may include the full monetary value of  
3 normal contributions paid to the board by the employer, on behalf  
4 of the member and pursuant to Section 20691, if the employer's  
5 labor policy or agreement specifically provides for the inclusion of  
6 the normal contribution payment in compensation earnable.

7  
8 (5) The monetary value of a service or noncash advantage  
9 furnished by the employer to the member, except as expressly and  
10 specifically provided in this part, is not special compensation  
11 unless regulations promulgated by the board specifically  
12 determine that value to be "special compensation."

13  
14 (6) The board shall promulgate regulations that delineate more  
15 specifically and exclusively what constitutes "special  
16 compensation" as used in this section. A uniform allowance, the  
17 monetary value of employer-provided uniforms, holiday pay, and  
18 premium pay for hours worked within the normally scheduled or  
19 regular working hours that are in excess of the statutory maximum  
20 workweek or work period applicable to the employee under  
21 Section 201 et seq. of Title 29 of the United States Code shall be  
22 included as special compensation and appropriately defined in  
23 those regulations.

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

25 (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

1 two years immediately preceding the final compensation period, to  
2 the average increase in compensation earnable during the same  
3 period reported by the employer for all employees who are in the  
4 same membership classification, except as may otherwise be  
5 determined pursuant to regulations adopted by the board that  
6 establish reasonable standards for granting exceptions.

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

13 [¶] . . . [¶]

14 Section 20960, provides:

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

18 X

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

21 California Code of Regulations, Title 2, Division 1, Chapter 2, Subchapter  
22 1, Article 4,

23 Section 570 provides:

24 "Final settlement pay" means any pay or cash conversions of  
25 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.

1 Final settlement pay may take the form of any item of special  
2 compensation not listed in Section 571. It may also take the form  
3 of a bonus, retroactive adjustment to payrate, conversion of  
special compensation to payrate, or any other method of payroll  
reported to PERS.

4 Section 570.5 provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 **XI**

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

13 **XII**

14 By letter dated February 4, 2013, respondent Alvarez and Chino were notified  
15 that CalPERS had issued a supplemental determination that Alvarez was not in the  
16 employ of Chino after November 9, 2012.<sup>1</sup> Respondents were informed that their  
17 existing appeals would be deemed to include this issue raised in the supplemental  
18 determination.

19 **XIII**

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

22 **///**

23  
24 <sup>1</sup> A subsequent version of this letter to correct for a errata was issued February 12, 2015.

**XIV**

By letters dated April 19, 2013, Chino and Alvarez timely appealed and requested an administrative hearing.

**XV**

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: Dana Heavely for

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:

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[ x ] 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