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10
11 **IN ARBITRATION PROCEEDINGS PURSUANT TO**
12
13 **THE LAWS OF THE STATE OF CALIFORNIA**
14

15 In the Matter of the Arbitration between)

16 CASE (All Affected),)

17 Grievants,)

18 vs.)

19 CALIFORNIA PUBLIC EMPLOYEES)
20 RETIREMENT SYSTEM,)

21 Respondent.)

GRIEVANTS' CLOSING BRIEF

CalHR No.: 22-02-0004

Arbitration Dates:
November 7, 2023
November 30, 2023
February 7, 2024

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1 **ISSUE STATEMENTS**

2 The parties agreed upon the following issue statements.

- 3 1. Is the grievance timely?
- 4 2. Did CASE make a valid “employee request” to telework, pursuant to section 6.4 of the 2021-
- 5 2022 BU2 MOU, such that the rights and obligations of section 6.4 were triggered?
- 6 3. If so, was CalPERS’s denial of CASE’s request based on operational needs, as required by
- 7 section 6.4 (Telework) of the 2021-2022 BU2 MOU?
- 8 4. Did CalPERS violate section 3.1 (State’s Rights) by allegedly failing to uniformly apply its
- 9 telework policy to all similarly situated employees?
- 10 5. What remedy, if any, is appropriate under the MOU?

11 (RT 8-9.)¹

12 **PROCEDURAL HISTORY**

13 On March 7, 2022, after virtually all attorneys at CalPERS had been working successfully
14 from home during the COVID-19 pandemic, CASE sent a letter to CalPERS CEO Marcie Frost,
15 objecting to the previously announced mandate that all CalPERS employees, including all BU2
16 members employed at CalPERS, work in the office a minimum of three days per week. (J1, pp.
17 32-34.)² CASE urged CalPERS to reconsider the in-office mandate. (J1, p. 34.)

18 On March 17, 2022, CalPERS responded, noting that it “appreciate[s] the request to
19 expand telework for the attorneys,” but nevertheless denied CASE’s request. (J1, p. 36.) CalPERS
20 twice asserted in the letter that it would re-evaluate the in-office mandate “over the next 12
21 months.” (J1, pp. 35, 36.) CalPERS stated the reevaluations were to ensure the mandate “supports
22 the goals and objectives of CalPERS” and “meets the operational needs of” CalPERS’ business
23 objectives. (Ibid.) However, after more than 12 months, the three-day-in-office mandate remains
24 in place. (RT 444.)

25 _____
26 ¹ Citations to the Reporter’s Transcript in this case follow the following convention: “RT”
27 followed by the page number. Although there are three volumes of reporter’s transcripts in this
28 case (one for each day of arbitration) they are paginated consecutively.

² Citations to exhibits follow the following convention: The letter “J” (for Joint Exhibits), “U”
(for Union’s Exhibits) or “R” (for Respondent’s Exhibits, followed by the exhibit number,
followed by a page number. Thus, J1, pp. 32-34 refers to Joint Exhibit 1, pages 32 through 34.

1 On March 22, 2022, CASE filed the instant grievance. (J1, p. 2.) The grievance requested
2 as a remedy, inter alia, that “CalPERS attorneys be allowed to telework as much as possible and
3 only be required to go into the office when necessary.” (J1, pp. 8-9.)

4 On April 21, 2022, CalPERS denied the grievance in a letter from CalPERS General
5 Counsel Matt Jacobs. (J1, p. 40.) The denial recognized that section 6.4 of the MOU required
6 CalPERS to set forth operational needs when denying telework requests, but claimed that
7 “management determines those operational needs.” (J1, p. 41.) The denial then purported to set
8 forth various operational needs, including “the need to improve and maintain CalPERS’ culture”
9 (J1, p. 42), “the need to maintain and increase collaboration” (J1, p. 43), “the need to maintain
10 productivity” (J1, p. 45), “the need to assimilate new team members” (J1, p. 46), and “the need to
11 have the same requirements apply to all team members.” (J1, pp. 46-47.)

12 This matter was originally set for arbitration on March 2 and 3, 2023, before a different
13 arbitrator. On or about January 31, 2023, the State suddenly refused to participate in a number of
14 previously scheduled arbitrations all raising similar issues, including this one. The March 2-3
15 dates were vacated and CASE instituted proceedings in superior court to compel arbitration.
16 (U15.) After several months, on June 28, 2023, the superior court found that this matter was
17 arbitrable. (U15.)³ However, the delay caused by the State’s intransigence required many of the
18 previously scheduled arbitrations to be cancelled or rescheduled months later. This matter was set
19 for arbitration November 7, 2023, before the instant arbitrator by mutual agreement of the Parties.

20 On October 9, 2023, per Arbitrator Thomson’s subpoena policy, CASE emailed a
21 Subpoena Duces Tecum (SDT) to her for her review and approval. Arbitrator Thompson approved
22 the Grievants’ SDT, in its entirety, the same day.

23 On October 10, 2023, CASE served the SDT on Respondent’s custodian of records
24 through its counsel, Mr. Villalba. The SDT requested the custodian of records to appear in person
25 and produce documents on the first day of the arbitration. However, the SDT stated that the
26 custodian of records did not have to appear in person if the documents were produced earlier, but

27 _____

28 ³ The State appealed the decision, but the appeal was summarily denied.

1 no later than October 27, 2023. Instead of producing documents by the October 27, 2023,
2 deadline, Respondent filed a Motion to Quash the SDT. The motion contained 3 documents
3 purportedly responsive to a few of the 20 Requests and even those productions were incomplete.
4 The SDT requested certain documents for a timeframe of January 1, 2020, to the present (October
5 2023), however, only current documents were produced. For example, Request A requested
6 Respondent’s organizational charts for its Legal Office. Respondent produced a current
7 organizational chart, dated October 2023, but did not produce organizational charts for calendar
8 years 2020, 2021, 2022.

9 On October 30, 2023, Grievants filed its Opposition to the Motion to Quash. Arbitrator
10 Thomson ruled on the motion that same day. Grievants’ Requests E, M and I were quashed in their
11 entirety. Requests J and K were partially quashed but only if responsive documents were
12 confidential. Arbitrator Thomson’s ruling concluded by stating “The Employer has had weeks to
13 comply with the subpoena and must comply promptly.”

14 On November 2, 2023, Respondent provided its written response to the SDT and also
15 produced nine (9) Commute Reports and one (1) report regarding certain teleworking statistics.
16 However as set forth below, it is clear that the production was incomplete and responsive
17 documents existed but were not produced.

18 Notwithstanding the failure of Respondent to produce necessary documents, this matter
19 proceeded to arbitration on November 7, 2023, with additional hearing days on November 30,
20 2023, and February 7, 2024. The Parties agreed to submit simultaneous closing briefs. (RT 525-
21 526.)

22 **STATEMENT OF FACTS**

23 Austa Wakily, an attorney at CalPERS, testified that in March of 2020 when COVID
24 struck, everybody was ordered home to work fully remote. (RT 26.) Prior to COVID,
25 teleworking for attorneys was not infrequent, but was not full-time. (RT 25-26.) Ms. Wakily
26 chose to work in the office as the environment at home at the time was not conducive to full-time
27 telework. (RT 27.) Most of the other attorneys worked from home for approximately two years.
28 (RT 27.)

1 Now, while all attorneys have to be in the office three days per week, each attorney is
2 allowed to choose the days. (RT 28-29.) When Ms. Wakily is in the office, sometimes it is
3 empty, and sometimes there are other colleagues present. But she generally just closes the door to
4 her office and does her work without much personal interaction with her colleagues. (RT 29-30.)

5 Even when in the office she communicates with colleagues via phone or email. (RT 30.)
6 At the weekly staff meetings, some people attend in person, others attend virtually by Zoom. (RT
7 30-31.) She believes the staff meetings are just as effective in hybrid form as they were prior to
8 the pandemic. (RT 32.)

9 All her work is solo, meaning there is no co-counsel. She is assigned her own caseload
10 with no other attorneys assigned. (RT 24-25.)

11 When she was hired in 2016, attorney turnover and vacancies at CalPERS were very rare.
12 (RT 32.) When the return-to-office mandate was announced, vacancies soared. (RT 33.)
13 CalPERS Legal lost eight attorneys out of a total of about 25. (RT 33.) The level of attrition was
14 unprecedented. (RT 34.) Every one of her colleagues that left told her that the telework policy
15 was a factor in their decision to leave. (RT 34.) There was also severe attrition in the non-
16 attorney staff, which did not happen prior to COVID. (RT 35.) The attorneys who left were often
17 the more senior attorneys with years of experience with the Public Employees' Retirement Law
18 (PERL.) (RT 36.) Between the loss of experienced attorneys, and the loss of non-attorney
19 program staff, the work for the attorneys who remain is a lot more complicated and voluminous.
20 (RT 37.)

21 Prior to the pandemic, CalPERS was a "destination employer." (RT 24.) Now, morale is
22 very low as many employees are unhappy with the in-office requirement. (RT 38.) Several
23 attorneys left CalPERS specifically because of the return-to-office mandate. (RT 67-68.)

24 Currently, the vacancy rate is so high that they have had to send a fair amount of work to
25 the Attorney General's Office, which they did not have to do prior to COVID. (RT 39-40.) Using
26 the Attorney General's Office became necessary due to the vacancies at CalPERS, and the Deputy
27 Attorneys General ("DAGs") there were doing the same work as the attorneys at CalPERS. (RT
28 40-41.) However, since the DAGs are not familiar with the PERL, the CalPERS attorneys spend a

1 lot of time consulting with the DAGs on the outsourced cases, in addition to working on their own
2 cases. (RT 41-42.) Yet all of the DAGs are teleworking full-time, meaning CalPERS lost
3 attorneys coinciding with the return-to-office mandate, and is now sending work over to the
4 Attorney General to be done by attorneys teleworking full time. (RT 42; 128-129.)

5 During COVID, the message from Marcie Frost and management generally was that
6 productivity was up during the period of remote work; there were no messages indicating a loss in
7 productivity. (RT 53.) Attorneys were repeatedly told that remote work was working well with
8 no problems. (RT 144-145.)

9 Ms. Wakily was initially skeptical that full time remote work would actually work, but she
10 was happy to learn that productivity increased, and CEO Frost confirmed that during multiple
11 webchats. (RT 54-55.) Ms. Wakily believes that the return-to-office mandate has had a very
12 negative effect on CalPERS. (RT 60.)

13 Ms. Wakily did not perceive any additional benefit in terms of collaborating with her
14 colleagues whether it was in person or via email. (RT 62-63.) Now that she is one of the more
15 experienced attorneys, newer attorneys ask her questions, typically via email rather than in person.
16 (RT 64-65.) In her experience, meeting with clients in-person is the same as via Zoom, and in fact
17 has benefits in light of the fact that the hearings are virtual. (RT 65.) The attorneys would
18 socialize outside the office during COVID and remote work. (RT 48-49.)

19 David Van Der Griff is an Attorney V at CalPERS, working there since 2011. (RT 92.) He
20 mostly worked in the office during COVID when everyone else was working remotely. (RT 93.)
21 His legal work is mostly solo, but when he does need to consult with colleagues, he can do so by
22 Zoom, phone, or email. (RT 94-95.) His interaction was not negatively impacted by not seeing his
23 colleagues in person. (RT 95.) He does not interact with members of the public in his job. (RT
24 95-96.) There are more attorney vacancies now at CalPERS than ever before in his tenure. (RT
25 98-99.) Several attorneys in his unit left specifically because of the return-to-office policy. (RT
26 107-109.)

27 John Shipley was an attorney at CalPERS from 2015 to 2023. (RT 113.) His work at
28 CalPERS was mostly solo. (RT 114-115.) When COVID hit he worked from home for about two

1 years. (RT 117-118.) He left CalPERS primarily due to the telework policy and went to work at
2 another State agency with more flexible remote work options. (RT 118.) He regularly mentored
3 younger attorneys, and his ability to do so was not affected by remote work, because even before
4 COVID, he would often communicate via phone or email rather than in person. (RT 120-121.)
5 During the two years of remote work, where he never saw colleagues in person, he had no
6 difficulties in completing his work. (RT 124-125.) CalPERS' office-centric policy did not have a
7 positive effect on recruitment and retention, because the department lost a lot of really good
8 employees because of it. (RT 152.) CalPERS had only 3 vacant attorney positions out of 28 in
9 March of 2020, but the vacancies rose to 10 positions in August, 2023, after the return-to-office
10 mandate had been imposed. (RT 204-205; U14.)

11 CASE President Tim O'Connor testified that of the more than 100 departments that
12 employ attorneys for the State, only about 10 of those have in office mandates. (RT 170-171.) Mr.
13 O'Connor reviewed several articles from various industry publications discussing the fact that
14 allowing employees to work remotely promoted diversity, morale, and employee's sense of well-
15 being. (RT 176-183; U9-U12.)

16 The Parties stipulated that Rama Maline, if called to testify, would state that all 1100
17 Deputy Attorneys General at DOJ are permitted to work fully remotely, and further that DOJ bills
18 client agencies like CalPERS \$220 per hour for attorney services. (RT 520, U19.)

19 Justin Delacruz worked briefly at CalPERS in 2022. (RT 192.) He left because he thought
20 he would be able to telework but was instead required to be in the office full-time. (RT 193-196.)

21 CalPERS General Counsel Matt Jacobs interpreted the grievance as requesting full-time
22 telework for the attorneys. (RT 221-222.) He reiterated the operational needs set forth in his
23 April 21, 2022, letter. (RT 223.) With regard to culture, he claimed that it involved everyone
24 having the same mission, and also claimed that he wanted his team to have high ethical standards.
25 (RT 223.) He also claimed that "culture" involved ensuring that his attorneys to treated
26 adversaries with the utmost respect. (RT 223-224.) He claimed that team bonds weakened while
27 people were working fully remotely, due to a lack of physical contact. (RT 224.)

28 However, he acknowledged that there was no way to quantitatively measure whether

1 CalPERS employees have a common sense of mission. (RT 255.) Instead, he claimed it was
2 based on management’s “sense” and “inputs from [] team members about the extent to which they
3 are working together.” (RT 256.) He admitted that during the two years of fully remote work,
4 from March 2020 through March 2022, he never communicated to his attorneys that he had
5 noticed a deterioration in the collective sense of mission. (RT 256-257.) Neither did he believe
6 that ethical standards suffered during that same two-year period. (RT 257.) He also admitted that
7 he had no knowledge that his attorneys were not treating adversaries with respect. (RT 258.)
8 With regard to weakening bonds, he also admitted that he was unaware of how frequently his team
9 members communicated with each other during the pandemic but claimed that in-person
10 communication was qualitatively better than telephone, email, and Zoom calls. (RT 258-259.)

11 He also admitted when the attorneys returned to the office three days per week, he saw no
12 improvement in ethical standards, and no change in the respect given to adversaries (RT 260.)

13 With regard to collaboration, he acknowledged that most of the work done by the attorneys
14 was solo, but that what was left was collaborative work. (RT 260-261.) However, he
15 acknowledged that collaboration could be done on a virtual platform like Zoom or Teams, but
16 claimed that the communication on such platform was not as good. (RT 261-262.) Specifically, he
17 acknowledged that attorneys could collaborate over Zoom, over email and over the telephone.
18 (RT 275-276.) However, he claimed the “volume” of collaboration was not as high, although he
19 was unable to specify how much worse it was than in person. (RT 276.) Also, with regard to
20 collaboration, he claimed that CalPERS’ work was very complex, and collaboration was very
21 important. (RT 225-227.) He claimed both the quantity and quality of collaboration suffered
22 during full-time telework. (RT 227-228.)

23 He admitted that his litigation attorneys conduct hearings over Zoom with the Office of
24 Administrative Hearings, and further admitted that the “large majority” of the hearings are virtual
25 rather than in-person. (RT 277-278.)

26 With regard to the difference between in-person meetings, and Zoom meetings, he
27 acknowledged that often before the in-person meeting starts, people will chit-chat with each other.
28 Yet, he never tried to incorporate that into the Zoom meetings. (RT 280.) He also never tried to

1 have his team members talk to each other over Zoom without him being present. (RT 280-281.)
2 Although he claimed that some people appeared uninvolved during zoom meetings, he never
3 adopted strategies to get them more involved. (RT 281-282.)

4 Despite claiming to want to replicate causal conversations that occur when popping into a
5 colleague's office, he admitted that he never tried to replicate that on Zoom by, for example,
6 asking about a colleague's cat when it appeared on screen, as he might do if they were both in the
7 office. (RT 285-287.) He claimed it was difficult to do such things on Zoom, and that he was
8 mostly focused on moving through his agenda. (RT 286-287.)

9 He claimed that a "social norm developed" where people didn't just pick up the phone and
10 call a colleague, and thus there was no analog to just popping into someone's office. (RT 228.)
11 However, he admitted that he never did anything to try to break that social norm, like calling
12 attorneys at random just to simulate popping into their office. (RT 282-283.)

13 He also claimed physical presence was necessary in order for people to observe facial
14 expressions, body language, and tone of voice. (RT 229.) He also claimed that since the return-
15 to-office mandate, collaboration had increased, but he admitted that it was not back to pre-
16 pandemic levels due to not everyone being in the office at the same time. (RT 231-232.)

17 He admitted he never encouraged his attorneys to make more use of group emails to ask
18 questions of the whole group. (RT 284-285.)

19 With regard to productivity, Mr. Jacobs claimed that uniform policies lead to a better
20 product, and a better product means better productivity. (RT 232-233.) He admitted he had no
21 metrics showing there was a decrease in productivity in the legal office. (RT 287.) He had no
22 quantitative evidence of any decrease in productivity. (RT 324.)

23 With regard to assimilating new team members, he claimed that training and mentoring
24 suffered during full-time telework. (RT 233-234.) However, he admitted that the mentoring and
25 information exchange could be done over the phone or via Zoom. (RT 288.)

26 With regard to having the same policies apply to all team members, he claimed that it was
27 important for all team members to be treated "fairly and equally." (RT 235). He also observed
28 that during the pandemic, "there was a lot of grumbling from the support staff" about the fact that

1 the attorneys were allowed to work remotely. (RT 236.)⁴ Matt Jacobs asked the CEO to provide
2 an extra day of telework to the attorneys, because he was losing attorneys as a result of the three-
3 day-in-office mandate. (RT 239.) He also recognized that the morale of the attorneys was
4 suffering. (RT 240-241.) CEO Frost denied the request based on “fairness,” i.e. the idea that if an
5 exception was made for attorneys, other units might make similar requests. (RT 241.) Mr. Jacobs
6 explained that he needed to give deference to his clients “desires and needs.” (RT 242.) And he
7 later admitted that there was a difference between a “want” and a “need.” (RT 318.) Mr. Jacobs
8 was unable to explain how he could value consistency in having the same rule apply to all team
9 members, while at the same time asking CEO Frost for an extra day of telework just for the
10 attorneys, but he did admit that he believed CalPERS’ operational needs could be met with giving
11 the attorneys more telework. (RT 303-306.)

12 He acknowledged that there were several units in CalPERS that were allowed to continue
13 working fully remotely even after the return-to-office mandate was applied to everyone else. Two
14 were units of 14 people in the IT section. (RT 237-238.) Another was the call center (RT 238-
15 239.) As to the IT personnel, he claimed their permission to work fully remotely was due to a
16 misunderstanding, that it predated COVID-19, but that CalPERS failed to correct that
17 misunderstanding after the pandemic, even though CalPERS was ordering all other employees
18 back into the office after working fully remotely for two years. (RT 289-290.) As for the call
19 center personnel who were allowed to work remotely, Mr. Jacobs acknowledged that it was
20 because their job was particularly suited to remote work, but also acknowledged that a lot of
21 attorney work could be done remotely, and in fact had been done remotely for two years during
22 the pandemic. (RT 292-293.)

23 He acknowledged that CalPERS is getting fewer applications for attorney positions
24 currently than they have historically. (RT 306-307.) He also acknowledged that the amount of
25 legal work being sent to the DOJ was increased compared to prior to the pandemic. (RT 307.) He
26 claimed that it was an operational need to send legal work to DOJ even though the DOJ attorneys

27 _____
28 ⁴ The support staff were coming into the office during the pandemic which created a sense of
unfairness and low morale. (RT 386-387.)

1 are allowed to telework full-time. (RT 309-310.)

2 Mr. Jacobs reviewed several articles that he believed supported CalPERS' denial of
3 CASE's grievance. (RT 247.) However, he acknowledged that these articles were not considered
4 by CalPERS in formulating the in-office mandate; rather he researched and found those articles
5 specifically to support his client's decision to deny CASE's grievance. (RT 324-325.) Moreover,
6 he rejected any articles that were favorable to CASE's position. (RT 326.)

7 Although the articles suggested that employers should employ scientific methodology to
8 define shared culture, he was unable to identify any such methodology used by CalPERS to define
9 its culture. (RT 327-328.) Nor was he able to identify "baselines" for CalPERS' culture as
10 suggested by the articles. (RT 328.) However, he did mention an employee survey but
11 acknowledged it did not show any deterioration in culture. (RT 328-329.) He later claimed the
12 employee survey established a baseline but could not say what it was. (RT 329-330.) He
13 ultimately acknowledged that he did not cite the employee survey when denying the grievance,
14 because it "didn't seem relevant." (RT 352.) When questioned about other threshold
15 recommendations from the various articles he relied upon, he repeatedly referenced the employee
16 survey, but was unable to provide any details about it. (RT 330-331.) Another article was a study
17 of the effects of telework on interns, but Mr. Jacobs acknowledged that CalPERS does not employ
18 any interns. (RT 332-333.) Another article was a study of IT workers in a foreign country in
19 Asia, which he conceded were different than attorneys working in California. (RT 334-335.)

20 Ultimately, Mr. Jacobs believed that bonds could be formed over virtual platforms, but that
21 such bonds just are not quite as strong as they would be in person. (RT 297-299.) He
22 acknowledged that not a single attorney had been disciplined during the two-year fully remote
23 period of the pandemic. (RT 301.)

24 Deputy General Counsel Renee Salazar claimed there was an "intangible quality" of in-
25 person communication that could not be replicated with other means of communication. (RT 368,
26 372, 403-404.) She claimed that an email from Mr. Jacobs to the legal unit congratulating them
27 on "another amazingly productive year" at the end of 2021 was not really a reflection on
28 productivity, because it was meant only to help morale. (RT 384-385; U1.) After extolling the

1 virtues of in-person interaction she acknowledged that because the attorneys were not in the office
2 on the same three days per week, they often still had to schedule time to meet with their colleagues
3 on a mutually convenient day. (RT 393.) She also acknowledged that there are still lots of Zoom
4 calls and telephone calls between colleagues even though the in-office mandate has been in place
5 for two years. (RT 394.)

6 Despite bemoaning the lack of interaction during the pandemic, she admitted she never
7 directed her attorneys to engage in regular communication to help replace the loss of in-person
8 interaction. (RT 406.) Although she claimed that the quality of legal writing deteriorated, she
9 never gave any specific examples and later clarified that it just meant she had to edit some
10 documents; it was not enough to give any attorneys a counseling memo. (RT 408.)

11 Labor Relations Manager Julie Morgan testified about various meet and confer sessions in
12 2021 and early 2022 between CalPERS and CASE in which CASE requested that the CalPERS
13 attorneys be allowed to telework as much as possible. (RT 420, 423-424, 427.) Ms. Morgan did
14 not consider the March 7, 2022, letter from CASE to be an employee request for telework, because
15 it did not follow CalPERS' internal procedures. (RT 428-429.) However, she also acknowledged
16 that CalPERS had failed to follow the its own policy when deciding to mandate all job
17 classifications to return to the office three days per week without doing a job-specific analysis.
18 (RT 435-437.)

19 She acknowledged that none of the CalPERS attorneys were able to benefit from the \$50
20 per month stipend for remote centered workers that had been negotiated between CASE and the
21 State. (RT 444-445; see J3.) She acknowledged that she told the Department of General Services
22 that CalPERS did not suffer any loss in productivity due to telework as of September 30, 2022.
23 (RT 450-452.) She never communicated to DGS that full-time telework was not working at
24 CalPERS. (RT 463.)

25 CalPERS CEO Marcie Frost claimed that she knew that the decision to impose a three-
26 day-per-week-in-office mandate would cause employees to leave. (RT 477-478.) She stated that
27 she denied General Counsel Matt Jacobs' request for an additional day of telework for the
28 attorneys because she did not see any way in which attorneys were distinct from other employees.

1 (RT 480-481.) She does not believe collaboration can occur via virtual platforms. (RT 484-485.)
2 She believes collaboration must occur sitting in a room together. (RT 485-486.)

3 Ms. Frost previously stated in a web chat that she “would not be comfortable” with full-
4 time telework. (U6, p. 14.) However, she acknowledged that as CEO, she had to make decisions
5 that make her uncomfortable. (RT 486.) She acknowledged CalPERS did not do an analysis of
6 each job classification to determine its suitability for telework and was not aware of anyone at
7 CalPERS who did. (RT 489.)

8 She claimed that there were limitations to her ability to communicate with team members
9 during the two years of the pandemic. (RT 493.) She acknowledged that she could call people
10 working at home but claimed that because the work at CalPERS was unique, calling people was
11 not the “same experience.” However, she ultimately admitted that remote forms of communication
12 do indeed work. (RT 493.) She claimed that telephone, email, text, and virtual platforms were
13 worse than in-person communication but could not describe how. (RT 494-495.)

14 CEO Frost was asked to name one operational need that suffered during the pandemic, and
15 though she said a lot of words, she failed to articulate a single operational need that was not met
16 while attorneys were working fully remotely. (RT 495-498.)

17 She characterized her web chats as town halls. (RT 498.) She claimed that when she said
18 in a web chat that the numbers were positive, and productivity was up, she was really only
19 referring to a portion of the organization, even though she did not say anything to limit it in any
20 way. (RT 499-502.) Similarly, when she said in another web chat that CalPERS was hitting all of
21 its performance targets, and that productivity was high, she was only talking about part of the
22 organization. (RT 502-504.) She also acknowledged previously saying that she knew full-time
23 telework worked for half of the organization, and believed it worked for the other half. (RT 506-
24 507.) Despite being asked about how the productivity for attorneys dropped during the pandemic,
25 she was unable to identify any metric, or even any example, other than to state that productivity is
26 different during a health pandemic. (RT 508-511.) She acknowledged previously stating that
27 CalPERS policies might be different than other State departments, but assured her employees that
28 they would not be so different as to hurt recruitment and retention. (RT 513.)

1 **ARGUMENT**

2 **I. RESPONDENT FAILED TO PRODUCE DOCUMENTS CAUSING PREJUDICE**
3 **TO CASE**

4 Notwithstanding the arbitrator’s clear and unequivocal ruling on the Motion to Quash,
5 CalPERS nevertheless refused to provide all the documents to which CASE was entitled. The
6 failures as to each request in the SDT are detailed below.

7 **Request A** CalPERS’ organizational chart for its Legal Office.

8 **Response** Respondent produced the current organizational chart dated October 2023.

9 **Argument** The SDT specifically requested documents for the time period of January 1, 2020
10 present (October 2023). Respondent failed to produce its organizational charts for 3 calendar years
11 - 2020 through 2022. Grievants were seeking organizational charts for past years to compare and
12 assess vacancy rates in the Legal Office over the course of those years.

13 **Request H** Any and all documents evidencing CalPERS’ telework program maintained or
14 improved “employee productivity” in accordance with the Policy.

15 **Response** No responsive documents.

16 **Argument** Austa Wakily and John Shipley testified about a Service Level Agreement (SLA),
17 which is an agreement that was implemented by legal management. It is an agreement between the
18 CalPERS Legal Office and its various program clients. Essentially it is an internal deadline system
19 so that the Legal Office sets an appeal hearing within 120 days of receiving a referral from its
20 program client. The SLA is a tracking system that keeps track of the percentage of deadlines being
21 met which directly correlates to the Legal Office’s productivity (Wakily, Vol. 1, 43:22 – 47:16 and
22 Shipley, Vol. 1, 121:6-20.)

23 Wakily and Shipley testified about KPI’s. Ms. Wakily could not recall exactly what the
24 acronym stood for, and Mr. Shipley could not recall what the “K” stood for but recalled the “PI”
25 was for performance index. However, both witnesses understood, and testified that it was a way to
26 monitor the productivity of the Legal Office (Wakily, Vol. 1, 50:16-25 and Shipley, Vol. 1, 148:4-
27 24.)

1 The Department of General Services (“DGS”) maintains a Statewide Telework Dashboard.
2 This dashboard contains statistical information for each State department regarding their telework
3 programs. On a monthly basis, each State Department was required to submit data to DGS. CASE
4 submitted a Public Records Act request to DGS requesting documents that contained
5 Respondent’s telework data. DGS produced several documents including but not limited to emails,
6 commute information, and telework data. Several of these documents were not produced by
7 Respondent including a document called Telework Program Evaluation Survey. Mr. Whalen
8 asked witness Julie Morgan about this document during her cross-examination. This document, a
9 survey, asks questions regarding the Respondent’s implementation of telework. One of the
10 questions asked was if Respondent’s productivity changed by implementing telework.
11 Respondent’s response was that productivity had not changed and that it was the same amount of
12 productivity as a result of implementing telework. This document, and several others obtained by
13 CASE via its Public Records Act request, were not produced by Respondent.

14

15 **Request L** Any and all documents created by or originating from CalPERS’ Telework
16 Coordinator that evidence the reporting of metrics to ascertain the effectiveness of its telework
17 program, in accordance with and required by the Policy.

18 **Response** Produced DGS reports for December 2022 through September 2023.

19 **Argument** The argument for this request is the same as the argument in Request H above.

20

21 **Request R** Any and all documents created by or originating from CalPERS indicating the
22 measures or metrics used to determine productivity, in accordance with and required by the Policy.

23 **Response** No responsive documents.

24 **Argument** The argument for this request is the same as the argument in Request H above.

25

26 **Request S** Any and all documents created by or originating from CalPERS indicating the
27 productivity as a result of its telework program.

28 **Response** No responsive documents.

1 **Argument** The argument for this request is the same as the argument in Request H above.

2

3 Further, during the cross-examination of Matthew Jacobs (“Jacobs”), he testified about the
4 existence of an “engagement survey” that is used to establish a baseline culture at CalPERS. Mr.
5 Whalen requested that Jacobs provide the survey to Mr. Villalba. Jacobs stated that he would talk
6 to Mr. Villalba and Human Resources. In response, Mr. Whalen said “Look forward to it.” (RT
7 330-331.) The testimony and Mr. Whalen’s response presumably inferred that a copy of the survey
8 would be provided to CASE, or CASE would be informed if Respondent objected to its
9 production. Arbitrator Thomson also questioned Jacobs regarding the engagement survey (RT
10 351-352.) During an off the record discussion, Mr. Whalen argued that the engagement survey
11 may have been responsive to the SDT. CASE has heard nothing further from Respondent about
12 the engagement survey and none has been produced.

13 The fact that Respondent did not produce all responsive documents and still has not
14 produced further documents per the Arbitrator’s ruling and instruction during off record
15 discussion on November 30, 2023, make it clear that Respondent is playing games. Arbitrator
16 Thomson, in one instance, also made mention of “gameplaying” when Mr. Whalen attempted to
17 move into evidence Union Exhibit 3, which is the response by CalPERS to a Public Records Act
18 request from CASE. Mr. Villalba argued there was a lack of foundation regarding Exhibit 3.
19 Arbitrator Thomson stated the exhibit was a “CalPERS’ response.” Mr. Villalba then responded
20 that he did not know if it was or if it wasn’t. After some discussion, Arbitrator Thomson told Mr.
21 Villalba that he should know whether or not this came from the State, and that she found that to be
22 “game playing” (RT 352-354.)

23 CASE lost the opportunity to obtain relevant evidence, to review that evidence prior to the
24 arbitration, and to share that evidence with its witnesses. Although there is no remedy at this late
25 date that can ameliorate CalPERS’ failure to comply with the subpoena, the arbitrator should
26 nevertheless draw an adverse inference from CalPERS’ misconduct. If a party “fails to produce
27 evidence that would naturally have been produced he must take the risk that the trier of the fact
28 will infer, and properly so, that the evidence, had it been produced, would have been adverse.”

1 (*Breland v. Traylor Eng'g & Mfg. Co.* (1942) 52 Cal. App. 2d 415, 426; see also *Maaso v. Signer*
2 (2012) 203 Cal. App. 4th 362, 371; *Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994,
3 1010.) Accordingly, should there be any failure of proof on CASE's part that can reasonably be
4 attributed to the documents that were not produced by CalPERS, an adverse interest against
5 CalPERS should be drawn on those points.

6 **II. THE GRIEVANCE WAS TIMELY FILED**

7 CASE filed the instant grievance on March 22, 2022. (J1, p. 2.) The grievance specifically
8 identified March 17, 2022, as the date of action causing the grievance. (Ibid.) On that date,
9 CalPERS sent CASE a letter responding to CASE's letter of March 7, 2022. (J1, p. 35.) The
10 author of the letter, Julie Morgan, testified that during meet and confer sessions in the months
11 preceding the CASE letter of March 7, CASE had consistently requested that its attorneys be
12 allowed maximum flexibility regarding telework, and that they not be subject to any mandate to be
13 in the office an arbitrary number of days per week. (RT 420, 423-424, 427.) The March 7 letter
14 from CASE expressly asked CalPERS to reconsider that mandate. (J1, p. 34.) The March 22,
15 2022, CalPERS response expressly noted CASE's "request to expand telework for the attorneys."
16 (J1, p. 36.) Thus, there is no doubt that the March 17, 2022, letter from CalPERS was denying the
17 request made by CASE for maximum telework flexibility for its members at CalPERS. The March
18 7, 2022, letter from CASE was different in one material respect from the prior meet and confer
19 sessions: it was specifically addressed to CalPERS CEO Marcie Frost. (J1, p. 32.)⁵ Thus, the
20 March 17, 2022, response from CalPERS represents the official and final denial of CASE's
21 request from the highest-ranking person at CalPERS. Having exhausted all available remedies,
22 CASE then filed the instant grievance five days later.

23 Article 7 of the MOU specifies the grievance and arbitration procedure. (J2, p. 34.) In
24 general, the MOU provides that CASE must file a grievance within 21 days of the incident giving
25 rise to the grievance, or 21 days from the denial of the grievance at the previous level. (See, e.g.,
26 MOU Secs. 7.7.A.2, 7.8, 7.9.A; J2, pp. 34-36.) The instant grievance was filed at the department

27 _____
28 ⁵ Ms. Morgan was cc'd on the letter. (J1, p. 34.)

1 level as it was an all-affected grievance on behalf of all BU2 members at CalPERS. Since it was
2 filed within 5 days of the March 17, 2022, letter from CalPERS, it was timely filed.

3 CalPERS' own conduct supports the conclusion that timeliness is not at issue. Neither the
4 March 17, 2022, response to CASE's March 7, 2022 letter, nor the April 21, 2022 formal denial of
5 the grievance asserted untimeliness; rather, both addressed CASE's claims on the merits.
6 Accordingly, since CalPERS treated the grievance as being timely filed, the State cannot now
7 assert that it was not.

8 **III. CASE'S REQUEST FOR TELEWORK WAS PROPER UNDER SECTION 6.4**

9 Section 1.1.C of the MOU recognizes CASE as the exclusive representative of BU2. (J2,
10 p. 10.) Section 1.1.A makes clear that the agreement is pursuant to the Dills Act, appearing at
11 Government Code section 3512, et seq. (Ibid.) That very same Dills Act specifies that
12 "[e]mployee organizations shall have the right to represent their members in their employment
13 relations with the state." (Government Code section 3515.5.) Unions like CASE represent their
14 members in a variety of ways. Sometimes they meet and confer with the employer on behalf of all
15 their members which may include proposals to address the change in working conditions which
16 the union was noticed on. (See, e.g., RT 422-424.) Sometimes they file "all-affected" grievances.
17 (See, e.g., J1, p. 2.) And, as in this case, they sometimes make requests of management on behalf
18 of all employees as part of the meet and confer process.

19 Section 6.4 of the MOU provides as follows:

20 6.4 Telework

21 A. The State and CASE recognize that telework has been proven to
improve employee morale, reduce traffic congestion and improve productivity.

22 B. Employee requests to telework shall not be denied except for
operational needs.

23 When teleworking requests are denied, the reason shall be put in writing,
24 if requested by the employee. Employees who believe their request to telework
25 was denied in violation of this subsection, may file a grievance that can be
appealed to the fourth level of the grievance procedure.

26 CalPERS may argue that in this specific situation, only the individual employee – and not
27 CASE acting on their behalf – can make a request for telework under section 6.4 of the MOU.
28 While it is true that the language of section 6.4 refers to "employee requests," it does not contain

1 any language indicating that employees may not make such requests through their exclusive
2 representative.

3 More importantly, the very argument CalPERS is making has been rejected by the superior
4 court. Specifically, in the Minute Order compelling the parties to arbitrate this grievance, the
5 court found as follows:

6 Alternatively, CalHR argues in opposition that the petition must be denied
7 as Section 6.4 only covers “individual employee requests” for telework, and not
8 “requests for wholesale changes to the state’s telework policies.” (Oppos., p. 17:
9 21-22.) *According to CalHR, because the grievances here are brought by CASE on
10 behalf of all BU2 employees, such requests would not constitute “individual”
11 employee requests to telework as covered by Section 6.4. (Oppos., p. 18: 5-10.)
12 This argument is not well taken.*

13 As CASE aptly highlights in reply, Section 7.2 expressly provides that a
14 “grievance is a dispute between the State and CASE, or between the State and one
15 or more employees, involving the interpretation, application, or enforcement of the
16 express terms of this MOU.” (MOU, § 7.2.A.) *Considering this language, the
17 Court is not persuaded that the sole fact the grievances are brought by CASE on
18 behalf of multiple employees would otherwise exempt applicability of Section 6.4.*

19 (U15, p. 7, emphasis added.) As the highlighted language from the court’s opinion
20 indicates, the State already tried this argument, and it was rejected. Inasmuch as the Parties were
21 the same⁶ and the issue was the same, the issue is res judicata and cannot be adjudicated in
22 CalPERS’ favor in this proceeding. (*Ass'n of Irrigated Residents v. Dep't of Conservation* (2017)
23 11 Cal. App. 5th 1202, 1219 [describing the elements of res judicata].) Alternatively, but to the
24 same effect, the determination that CASE’s requests on behalf of all of its members is sufficient to
25 trigger section 6.4 of the MOU is law of the case. (*People v. Stanley* (1995) 10 Cal. 4th 764, 786
26 [explaining that the law of the case doctrine applies to civil as well as criminal matters, and
27 dictates that a court’s adjudication of an issue in the case must be adhered to throughout all
subsequent phases of litigation].)

28 Thus, there can be no doubt that CASE’s various requests on behalf of its members for
maximum telework constituted a valid “employee request” under section 6.4 of the MOU. To
hold otherwise would upset decades of statutory and decisional law clearly holding that unions can

⁶ Counsel for the Union and the State for arbitration of this matter was the same as for the Motion to Compel Arbitration . (See U15, p. 9.)

1 act on behalf of their members.

2 CalPERS may nevertheless argue that CASE did not follow CalPERS' internal procedure
3 for making modifications to employee telework schedules. (See, e.g., RT 428-429.)⁷ But as the
4 evidence in this case made clear, employees were told repeatedly that the mandate to be in the
5 office three days per week was across the board, applicable to everyone. CEO Marcie Frost said
6 so in her town hall web chats. (See, e.g., RT 478.) General Counsel Matt Jacobs made clear that
7 the three/two hybrid schedule applied to everyone. (RT 236.) The attorneys who testified
8 understood it was a mandatory requirement, and not optional. (RT 28.) Some attorneys even left
9 because of the directive. (RT 118, 193-196.) It was clear that everyone understood it would be
10 futile to request more telework beyond the two days per week allowed under the mandatory,
11 department-wide policy. As such, any failure of individual employees or CASE to fill out the
12 specific CalPERS forms designated for requesting modifications to telework schedules is
13 inconsequential. Doing so would have been an idle act. (*Gueyffier v. Ann Summers, Ltd.* (2008)
14 43 Cal. 4th 1179, 1185 [upholding arbitrator's decision to excuse nonperformance of a contractual
15 condition when it would be an idle act to do so].)

16 Finally, any argument that the rights and obligations of section 6.4 were not triggered by
17 CASE's requests on behalf of its members is belied by CalPERS' own response to CASE. In the
18 April 21, 2022, denial of the grievance, CalPERS General Counsel Matt Jacobs took pains to
19 articulate the various operational needs that purportedly justified the mandate to be in the office
20 three days per week. (J1, pp. 40-46.) The primary "rights and obligations" of section 6.4 are to
21 have operational needs stated, in writing, for any telework request that is denied. CalPERS'
22 response to the grievance indicates quite clearly that it believed those rights and obligations were
23 triggered, because it responded *exactly as required by the MOU*. As such, any argument now that
24 such rights and obligations were not triggered lacks credibility. Moreover, the conduct of the
25 parties after execution of the contract can be considered in construing the meaning of disputed

26 _____
27 ⁷ It is apparent from CalPERS' own witness that it does not believe rigid adherence to its telework
28 policies are actually required, as Ms. Morgan acknowledged that CalPERS had failed to follow the
policy with regard to analyzing which job classifications were suitable for telework. (RT 435-
437.)

1 contractual provisions. (*Cedars-Sinai Med. Ctr. v. Shewry* (2006) 137 Cal. App. 4th 964, 983.)
2 Thus, CalPERS' act of treating the grievance as though it triggered the rights and obligations of
3 section 6.4 is persuasive evidence that the Parties intended that to be the case.

4 For all of the foregoing reasons, CASE's request to CalPERS triggered the rights and
5 obligations of section 6.4.

6 **IV. CALPERS FAILED TO IDENTIFY ANY OPERATIONAL NEEDS SUPPORTING**
7 **THE DENIAL OF MAXIMUM TELEWORK FLEXIBILITY FOR BU2 MEMBERS**

8 As explained more specifically below, the testimony elicited at the hearing revealed the
9 following. All of the rank-and-file attorneys who testified explained that their work at CalPERS
10 was largely solo in nature and could be accomplished at home just as well, if not better, as in the
11 office. They also explained that they were able to communicate and collaborate with their
12 colleagues using the telephone, email, text message, or virtual platforms like Zoom, Teams, and
13 Webex, even when they were in the office. CalPERS management, on the other hand, reluctantly
14 conceded that employees could communicate virtually, but opined that it just was not quite as
15 good as in person, even if they could not identify any particular operational need that was unmet
16 during the two years that attorneys were working fully remotely.

17 **A. THE LANGUAGE OF SECTION 6.4 PUTS THE BURDEN ON CALPERS TO**
18 **DEMONSTRATE AN OPERATIONAL NEED**

19 While CASE is the grievant and ordinarily has the burden to prove a violation of the MOU,
20 the instant case presents a situation where the language of the MOU effectively puts the burden on
21 the employer. Specifically, MOU section 6.4.A first sets forth the parties' agreement as to the
22 effect of telework: it improves morale, reduces traffic congestion and improves productivity.
23 Then, with that context, section 6.4.B states "Employee requests to telework shall not be denied
24 except for operational needs." This language indicates that the default rule is for telework requests
25 to be granted, unless the exception applies. In other words, the employer must grant a telework
26 request unless operational needs justify a denial.

27 But in order for this language to mean anything, the phrase "operational needs" must
28 actually mean something. The phrase is not otherwise defined in the MOU. Here, CalPERS
proffers an interpretation that would render the phrase meaningless. CalPERS Labor Relations

1 Manager Julie Morgan testified that because section 6.4 did not define “operational needs,” the
2 State had the right to enact whatever mandate it deemed appropriate. (RT 441, 455.) CalPERS
3 General Counsel made this position even more clear in his letter denying CASE’s grievance.

4 Now CalPERS recognizes, as the Grievance points out, that section 6.4 of the
5 MOU provides that "requests for telework shall not be denied except for
6 operational needs." But management determines those operational needs within
7 the broader framework of its authority as set out in section 3.1(B) and California
8 law. With this proper framework in mind, we turn to CalPERS' operational needs,
9 which management has determined currently require its attorneys to be in the
10 office at least three days a week.

11 (J1, p. 41.) Thus, according to CalPERS, it is unilaterally entitled to determine the operational
12 needs. But this cannot be the rule. If the State can assert any operational need whatsoever, then
13 the exception becomes nugatory. For example, if CalPERS asserted an “operational need” to have
14 “butts-in-seats” (see J1, p. 34) then it could use that supposed operational need to justify denying
15 any and all telework requests. Contractual terms must not be interpreted in a way to render any
16 clauses nugatory. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68
17 Cal. App. 4th 445, 473.)

18 On the contrary, where a contractual term is not defined, it must be given its ordinary and
19 popular meaning. (*Santisas v. Goodin* (1998) 17 Cal. 4th 599, 609 [interpreting the term
20 “prevailing party” which was otherwise undefined in the contract].) According to Webster,
21 “operational” is defined as “of, relating to, or based on operations.” ([https://www.merriam-
22 webster.com/dictionary/operational](https://www.merriam-webster.com/dictionary/operational)). And “operations,” in turn, is defined as “performance of a
23 practical work or of something involving the practical application of principles or processes.”
24 (<https://www.merriam-webster.com/dictionary/operations>). Thus, the term “operational” denotes
25 something related to performing work. It does not denote any particular social friendships that
26 may develop incidental to performing work.

27 Turning to the second word in the phrase, “need” denotes something that is required, as
28 opposed to something that is merely desired or preferred. In this respect, it is important to note
29 that a “need” is different than a “want.”⁸ Thus, combining the two words, the phrase “operational

28 ⁸ See generally, “You Can’t Always Get What You Want” (1969) M. Jagger & K. Richards.

1 need” must be interpreted to mean something that is required in order to perform the work.

2 Thus, to qualify as an exception to the default rule that telework requests should be
3 granted, a State department must articulate a reason why the work cannot be performed without
4 being physically in the office.

5 **B. CALPERS’ VARIOUS ASSERTED OPERATIONAL NEEDS ARE NOT**
6 **SUPPORTED BY THE EVIDENCE**

7 In the denial of the grievance, and during testimony at the arbitration, CalPERS asserted
8 five categories of operational needs that it claimed supported the denial of CASE’s request for
9 maximum telework on behalf of its members. Each will be discussed in turn.

10 **1. The Operational Need to Maintain and Improve CALPERS Culture is so**
11 **Subjective That it Is Rendered Meaningless**

12 CalPERS’ first asserted operational need refers to “culture”, but that term is never clearly
13 defined, and even when aspects of “culture” are defined, they are internally inconsistent.
14 CalPERS General Counsel Matt Jacobs explained “culture” as involving everyone having the
15 same mission, and he also claimed that it meant ensuring that his team had high ethical standards.
16 (RT 223.) He also claimed it meant his attorneys treat adversaries with the utmost respect. (RT
17 223-224.) He claimed that team bonds weakened while people were working fully remotely, due
18 to a lack of physical contact. (RT 224.)

19 However, he acknowledged that there was no way to quantitatively measure whether
20 CalPERS employees have a common sense of mission. (RT 255.) Instead, he claimed it was
21 based on management’s “sense” and “inputs from [] team members about the extent to which they
22 are working together.” (RT 256.) He admitted that during the two years of fully remote work,
23 from March 2020 through March 2022, he never communicated to his attorneys that he had
24 noticed a deterioration in the collective sense of mission. (RT 256-257.) Neither did he believe
25 that ethical standards suffered during that same two-year period. (RT 257.) He also admitted that
26 he had no knowledge that his attorneys were not treating adversaries with respect. (RT 258.)
27 With regard to weakening bonds, he also admitted that he was unaware of how frequently his team
28 members communicated with each other during the pandemic but claimed that in-person
communication was qualitatively better than telephone, email, and Zoom calls. (RT 258-259.) He

1 also admitted when the attorneys returned to the office three days per week, he saw no
2 improvement in ethical standards, and no change in the respect given to adversaries (RT 260.)

3 In short, Mr. Jacobs was unable to identify any element of “culture” that deteriorated in
4 any way during the two years of working fully remote during the pandemic. At most, he conveyed
5 that his own subjective sense was that the culture was different than it was prior to the pandemic.
6 But that mere difference is not enough to establish an operational need. Indeed, even if it was
7 accepted that the culture was *objectively worse* with full-time telework than it was before the
8 pandemic – a proposition CASE does not concede and which the State failed to prove – CalPERS’
9 argument would still fail. This is so for two reasons. First, CalPERS adduced no evidence that the
10 mandate to return to the office three days per week would meaningfully improve the culture. This
11 failure was partly due to the inarticulate definition of culture that was offered by CalPERS, and the
12 fact that by CalPERS’ own admission, there is no way to measure culture. But the notion was
13 actually affirmatively disproven by the evidence in the record. Multiple attorneys left CalPERS
14 precisely because of the return to office mandate. The vacancy rates for attorneys after the
15 mandate was implemented were unprecedented and higher than anyone could recall. (RT 34, 98-
16 99, 204-205.) The attorneys who remained had very low morale and were unhappy due to the
17 telework policy. (RT 38.) The vacancy rate in the legal unit was so high that more work than ever
18 before was being sent over to the DOJ. (RT 307.) Whatever culture means, the evidence
19 demonstrates that the culture got worse as a result of the return to office mandate.

20 Second, CalPERS failed to establish that an improved culture was *necessary to the*
21 *operations*, as opposed to simply desired as a nice working environment. While it may be
22 preferable to have a positive culture at the workplace, it is by no means essential or necessary.
23 Many people can attest to having been employed in worksites where the culture is toxic, or
24 otherwise not conducive to forming close personal relationships. That is fundamentally different
25 from a workplace that fails to perform its mission. Indeed, in many cases, a highly regimented
26 workplace may be very efficient at performing its mission, even if the employees are unhappy or
27 don’t like the “culture.” Thus, for multiple reasons, the notion that “culture” justifies CalPERS’
28 denial of maximum telework must be rejected.

1 **2. The Operational Need to Maintain and Increase Collaboration is Not**
2 **Supported by The Evidence**

3 General Counsel Matt Jacobs acknowledged that most of the work done by the attorneys
4 was solo but claimed that what was left was collaborative work. (RT 260-261.) However, the
5 attorneys testified their work was almost all solo, except for occasionally consulting with
6 supervisors; there was no co-counsel assigned to their cases. (RT 24-25, 114.) But even if that
7 factual discrepancy is resolved in CalPERS’ favor, Mr. Jacobs acknowledged that collaboration
8 could be done on a virtual platform like Zoom or Teams but claimed that the communication on
9 such platform was not as good. (RT 261-262.) Specifically, he acknowledged that attorneys
10 could collaborate over Zoom, over email and over the telephone. (RT 275-276.) However, he
11 claimed the “volume” of collaboration was not as high, although he was unable to specify how
12 much worse it was than in person. (RT 276.) Thus, CalPERS was unable to offer any quantifiable
13 or articulable difference between in-person collaboration and remote collaboration, but simply
14 insisted that in-person was better. CalPERS was unable to say how much better it was, and of
15 course was unable to show how the difference – however great or small it was – actually impeded
16 CalPERS’ ability to carry out its mission or effectively collaborate.

17 The truth that emerged from the testimony is that Mr. Jacobs is somewhat old-fashioned
18 and prefers in-person communication and some of the behavioral interactions associated with that,
19 but he also admitted that he failed to even try to replicate those behavioral interactions in the
20 remote setting. For example, with regard to the difference between in-person meetings, and Zoom
21 meetings, he acknowledged that often before the in-person meeting starts, people will chit-chat
22 with each other. Yet, he never tried to incorporate that into the Zoom meetings. (RT 280.) He
23 also never tried to have his team members talk to each other over Zoom without him being
24 present. (RT 280-281.) Although he claimed that some people appeared uninvolved during zoom
25 meetings, he never adopted strategies to get them more involved. (RT 281-282.)

26 He claimed that a “social norm developed” where people didn’t just pick up the phone and
27 call a colleague, and thus there was no equivalent to just popping into someone’s office. (RT 228.)
28 However, he admitted that he never did anything to try to break that social norm, like calling
attorneys at random just to simulate popping into their office. (RT 282-283.) He admitted he

1 never encouraged his attorneys to make more use of group emails to ask questions of the whole
2 group. (RT 284-285.)

3 Despite claiming to want to replicate causal conversations that occur when popping into a
4 colleague’s office, he admitted that he never tried to replicate that on Zoom by, for example,
5 asking about a colleague’s cat when it appeared on screen, as he might do if they were both in the
6 office. (RT 285-287.) He claimed it was difficult to do such things on Zoom, and that he was
7 mostly focused on moving through his agenda. (RT 286-287.) And it is this last admission that is
8 most telling, because it illustrates the difference between an operational need, and a mere
9 preference. By his own admission, he used his Zoom meetings to focus on the substance of the
10 work and the agenda he wanted to discuss with his attorneys; he did not devote time to “chit-chat”
11 or other non-substantive topics. In other words, he met the operational needs of the office *without*
12 replicating – or even attempting to replicate – those in-person interactions that he claims are so
13 important. His own conduct demonstrates that the type and nature of the collaboration he claims
14 was missing during remote work was not in fact essential, and thus it was not an operational need.

15 **3. The Operational Need to Maintain Productivity is Illusory Because**
16 **Productivity Did Not Suffer During Full-Time Remote Work**

17 The “productivity” argument is perhaps the most disingenuous one put forward by
18 CalPERS, as the evidence – most of it from management’s own words – demonstrates that there
19 was no decline in productivity for attorneys or anyone else.

20 CalPERS’ initial attempt to demonstrate a decline in productivity appeared in the March
21 17, 2022, letter from Julie Morgan, where she claimed that the Service Level Agreement (“SLA”)
22 was met 97% of the time in the year prior to the pandemic, but fell to 85% during the pandemic.
23 (J1, p. 36.) That would arguably be statistically significant evidence of a decrease in productivity,
24 if it were true. In his April 21, 2022, letter denying CASE’s grievance, Mr. Jacobs did not even
25 mention SLA at all, and instead admitted that there is no quantitative measure of attorney
26 productivity. (J1, p. 45.) Moreover, in his testimony he acknowledged that the SLA deadline was
27 a purely internal deadline, and failing to meet it had no real consequences. (RT 295-296.)
28 Moreover, multiple witnesses testified that the SLA rule was suspended during COVID, so the

1 procedure for seeking an exemption was not used. So, the decline in SLA rate is not a fair
2 measure of the loss of productivity. The reason CalPERS attorneys are not meeting SLA
3 deadlines currently is due to low staffing. (RT 43-47.) Also, because SLA was suspended, there
4 was no reason or incentive to use the exemption list. (RT 133-134.) CalPERS General Counsel
5 Matt Jacobs agreed. (RT 296.)

6 Thus, the sole quantifiable metric initially offered by CalPERS regarding a decline in
7 productivity was affirmatively disavowed by Mr. Jacobs and was proven to be a non-issue.
8 Instead, CalPERS pivoted to a rather novel definition of productivity. Specifically, Mr. Jacobs
9 claimed that uniform policies lead to a better product, and a better product means better
10 productivity. (RT 232-233.) Despite this rather tautological definition, he admitted he had no
11 metrics showing there was a decrease in productivity in the legal office. (RT 287.) He had no
12 quantitative evidence of any decrease in productivity. (RT 324.) Instead, he claimed that his
13 research led him to believe that there was something called qualitative productivity. (RT 350.)
14 However, he immediately admitted that CalPERS did not do any of the scientific work mentioned
15 in the articles he researched to establish a qualitative difference in productivity. (RT 351.)⁹

16 Not only did CalPERS fail to offer any evidence of a decline in productivity, but CalPERS
17 CEO Marcie Frost also repeatedly claimed that productivity increased during full-time remote
18 work. In her town hall web chats, she claimed that productivity was up, and all the numbers were
19 positive. (U4, p. 1; U4, p. 7; U5, p. 23.) She tried to minimize these statements by claiming she
20 was only talking about part of the organization even though she did not say anything to limit it in
21 any way. (RT 499-504.) She also acknowledged previously saying that she knew full-time
22 telework worked for half of the organization, and believed it worked for the other half. (RT 506-
23 507.) Despite being asked about how the productivity for attorneys dropped during the pandemic,
24 she was unable to identify any metric, or even any example, other than to state that productivity is
25 different during a health pandemic. (RT 508-511.) Thus, from the very mouth of the CEO of
26 CalPERS, it is clear that productivity was not affected by remote work.

27 _____

28 ⁹ He did repeatedly reference an employee survey that was never entered into evidence.

1 The only evidence that could possibly be characterized as a decline in “qualitative
2 productivity” was offered by Deputy General Counsel Renee Salazar. She claimed that the quality
3 of legal writing had in some instances deteriorated, but she gave no specific examples and later
4 clarified that it just meant she had to edit some documents; it was not enough to give any attorneys
5 a counseling memo. (RT 408.) She never even offered any examples of this alleged deterioration,
6 nor did she describe the frequency with which it occurred. Her testimony, including the lack of
7 detail, when compared to the testimony of Mr. Jacobs and Ms. Frost, is not credible and in any
8 event amounts to, at best, a de minimis change in productivity, as she defines that term. This de
9 minimis change, if believed, could not possibly be so great as to establish that the operations of the
10 organization could not be met.

11 In sum, CalPERS not only failed to prove that full-time telework reduced productivity, the
12 evidence actually proved the converse, i.e. that full-time telework led to high productivity.
13 Moreover, CalPERS failed to show that any change in productivity – whether quantitative,
14 qualitative, or something else – impacted the ability of CalPERS to operate. In other words, they
15 failed to show that it was an operational need to warrant denying telework to attorneys.

16 **4. The Operational Need to Assimilate New Team Members is Belied By** 17 **CALPERS’ Own In-Office Policy**

18 CalPERS’ next asserted operational need relates to onboarding new employees. (J1, p.
19 46.) Specifically, CalPERS claims that being in the office makes team members easier to reach,
20 introduces new team members to CalPERS’ culture, and boosts team member engagement.
21 Putting aside the fact that this purported justification is built – at least in part – upon the “culture”
22 justification, which was already debunked, this justification fails as an operational need for several
23 reasons.

24 First, and most obviously, the policy requires team members to be in the office three days
25 per week, but allows each employee to choose their own three days. Thus, some people’s
26 schedules will only overlap by at most one day. (RT 393.) If CalPERS truly believed that
27 onboarding required exposure to other employees every day, then CalPERS would require all
28 employees to be in the office five days per week. The fact that it requires only three in-office days

1 – and allows great inconsistency in which days are chosen by the employees – undercuts the
2 notion that new employees need to have constant in-person interaction with their colleagues.
3 Indeed, Deputy General Counsel Salazar acknowledged that even with the in-office mandate, there
4 is still a lot of communication by telephone or virtual platforms simply because not everyone is in
5 the office on the same days. (RT 393-394.)

6 Second, there was evidence that training could be done remotely, in-person, or in a hybrid
7 fashion, with no change in effectiveness. (RT 72-73; RT 155; RT 176.) Even Mr. Delacruz, who
8 was hired during the pandemic and required to come into the office five days per week, did most
9 of his training virtually. (RT 194.)

10 While it is true that Mr. Jacobs claimed that training and mentoring suffered during full-
11 time telework, he again offered no evidence, metrics, or anything to support his assertion. (RT
12 233-234.) However, he admitted that the mentoring and information exchange could be done over
13 the phone or via Zoom. (RT 288.) Moreover, John Shipley an attorney at CalPERS from 2015 to
14 2023, regularly mentored younger and new to CalPERS attorneys, and his ability to do so was not
15 affected by remote work, because even before COVID, he would often communicate via phone or
16 email rather than in person. (RT 113, 120-121.) Thus, multiple attorneys testified that they both
17 received and provided training or mentoring in person and virtually, with no material difference in
18 quality. This evidence undermines Mr. Jacobs’ bare assertion that in-person training is so
19 significantly better that it amounts to an operational need. Telling in this regard is the fact that
20 CalPERS failed to offer one iota of evidence indicating that there were any training deficiencies
21 during the two years of fully remote work. While Mr. Jacobs may prefer in-person training, a
22 preference is not a need. This purported justification must be rejected.

23 **5. The Operational Need to Have the Same Requirements Apply to All Team**
24 **Members Does Not Withstand Scrutiny**

25 The final purported justification for denying full-time telework is at once both utterly
26 believable and completely incoherent. There is little doubt that CEO Marcie Frost made an
27 executive determination to apply the three day in-office requirement across the board, out of some
28 sense of fairness. Matt Jacobs asked the CEO to provide an extra day of telework to the attorneys,

1 because he was losing attorneys as a result of the three-day—in-office mandate. (RT 239.) He
2 also recognized that the morale of the attorneys was suffering. (RT 240-241.) CEO Frost denied
3 the request based on “fairness,” i.e. the idea that if an exception was made for attorneys, other
4 units might make similar requests. (RT 241.)

5 But notwithstanding the fact that Ms. Frost sincerely wants her attorneys to be in the office
6 three days per week along with every other employee, her sincere desire is insufficient to
7 constitute an operational need. To begin with, it is clear that there is no operational need for
8 “absolute” fairness, i.e. equal treatment for all employees, because some employees at CalPERS
9 are in fact allowed to telework full-time. (RT 237-239.) Not only were call center employees
10 allowed to telework full-time after the pandemic, but a group of IT workers who were only
11 granted full-time telework prior to the pandemic due to a mistake. And while support staff
12 apparently grumbled about attorneys being able to work fully remote during the height of the
13 pandemic, CalPERS’ own policy states that when evaluating “CalPERS must consider the nature
14 of the work being performed and the business need” and look at the specifics of each job
15 classification. (J4, p. 3; RT 434-435.) Thus, CalPERS’ own policy contemplates there may be
16 some job classifications that are more suited to telework than others, which of course may lead to
17 grumbling. But regardless of the grumbling, the point is that the very policy enacted by CalPERS
18 relating to telework expressly contemplated that not all employees would be treated the same.
19 And yet treating everyone the same appears to have been the paramount consideration for
20 CalPERS management.

21 Nor can Mr. Jacobs’ testimony about the value of fairness be given much weight, as it was
22 he who acknowledged that he thought operational needs could be met by the attorneys if they were
23 given an extra day of telework. The supposed operational need for fairness and equal treatment is
24 irreconcilable with a determination that attorneys could meet operational needs with more
25 telework than other employees. In short, CalPERS cannot have it both ways. Either everyone –
26 truly everyone – must be treated the same, or it needs to develop a policy that does not expressly
27 contemplate that people will be treated differently. Either operational needs require attorneys to
28 be in the office three days per week, as was stated in the April 21, 2022 grievance denial, or

1 operational needs can be met with attorneys in the office only two days per week, as Mr. Jacobs
2 determined after he began hemorrhaging attorneys. CalPERS' inconsistent statements,
3 contradictory testimony, and incoherent articulations of policy make it clear that there is no
4 operational need served by requiring attorneys to be in the office three days per week.

5 **C. THE ABSENCE OF ANY OPERATIONAL NEED DEMONSTRATES THAT**
6 **THE DENIAL OF FULL-TIME TELEWORK WAS A VIOLATION OF THE**
7 **MOU**

8 CalPERS has had two full years to come up with operational needs to justify its denial of
9 full-time telework for the attorneys, which, ironically, is almost exactly the same amount of time
10 that attorneys did in fact work fully remote during the COVID-19 pandemic. Despite those many
11 months, CalPERS has failed to offer any operational need that withstands scrutiny. CEO Frost
12 was asked to name one operational need that suffered during the pandemic, and she failed to
13 articulate a single operational need that was not met while attorneys were working fully remotely.
14 (RT 495-498.) In light of the evidence in the record, a finding that CalPERS violated section 6.4
15 of the MOU is compelled.

16 **V. CALPERS ALSO VIOLATED SECTION 3.1.B OF THE MOU BY FAILING TO**
17 **UNIFORMLY APPLY ITS TELEWORK POLICY TO ALL SIMILARLY**
18 **SITUATED EMPLOYEES**

19 Although CalPERS has advanced consistency and uniformity as an operational need (see
20 *supra*), its argument demonstrates a separate and independent violation of the MOU. Section
21 3.1.B provides in pertinent part as follows:

22 The State has the right to make reasonable rules and regulations pertaining to
23 employees consistent with this MOU provided that any such rule shall be
24 uniformly applied to all affected employees who are similarly situated.

25 The key to determine whether disparate treatment is a violation under this section lies in
26 determining which employees are similarly situated to each other. In this case, that task is easy.
27 CalPERS CEO Marcie Frost made clear that the in-office mandate was applicable to the entire
28 organization. (RT 474.) She acknowledged CalPERS did not do an analysis of each job
classification to determine its suitability for telework and was not aware of anyone at CalPERS
who did. (RT 489.) Deputy General Counsel Renee Salazar echoed Ms. Frost's sentiments when
she characterized the three-day-in-office mandate as "equality issue for the larger organization."

1 (RT 392.)

2 Thus, from CalPERS' perspective, for telework purposes, all employees are the same. All
3 employees are similarly situated in that they all are required to be in the office three days per
4 week, regardless of job duties. However, by CalPERS' own admission, some employees are
5 nevertheless allowed full-time telework, based at least in part on their job duties or other
6 considerations. (RT 237-239.) But if all employees are similarly situated, how can it be that some
7 employees are exempted from the across-the-board mandate? Obviously, they cannot be
8 exempted without violating section 3.1.B.

9 Accordingly, by insisting so strenuously and so consistently that all employees in the entire
10 organization must be treated fairly and equally, but exempting some employees from the mandate,
11 CalPERS has simultaneously established that all employees are similarly situated while also
12 establishing a violation of section 3.1.B. CalPERS may argue that the IT workers and the call
13 center employees have duties that are particularly suited for telework. That may be true, but it
14 merely begs the question: if CalPERS engaged in the type of job-specific analysis of those
15 employees – the kind of analysis the CalPERS Telework Policy expressly requires – then why did
16 it not engage in the same analysis for the attorneys? There is no answer other than to acknowledge
17 a violation of section 3.1.B.

18 **VI. THE EXTENDED AND CONTINUING NATURE OF THE VIOLATIONS OF THE**
19 **MOU REQUIRE EXTRAORDINARY REMEDIES**

20 COVID undeniably changed all our lives in countless ways. Millions of people began to
21 use remote platforms like Zoom or Teams, and began to use new services like Door Dash and
22 other delivery platforms for food, groceries and other essentials. Many people moved their homes,
23 changed schools for their children, sold cars that were no longer needed for commuting, and made
24 countless other major life changes.¹⁰ Before the pandemic, many people did not believe it was
25 possible to work fully remotely. The years of COVID lockdowns, combined with new

26 ¹⁰ During the two years of working fully remotely, some attorneys at CalPERS actually moved
27 their residence as a result of the ability to work from anywhere and were understandably upset
28 when the return to office mandate was announced. (RT 33; 69-70.)

1 technology, exploded that myth. What was once unthinkable suddenly became very possible.
2 One of the truths that emerged from two years of COVID-19 was that the work of the attorneys at
3 CalPERS was very conducive to full-time or nearly full-time telework. But rather than learning
4 that lesson and taking some good out of the disaster that was the COVID pandemic, CalPERS has
5 arbitrarily insisted that attorneys come into the office three days per week in violation of sections
6 6.4 and 3.1.B of the MOU. This mandate caused a whole new round of disruption in the lives of
7 attorneys who were just settling in to a new normal. Since these violations have been ongoing for
8 two years, any remedy must be comprehensive enough to remediate the damage that has already
9 been done and to ensure the rights guaranteed in the MOU are protected moving forward.

10 First, CalPERS must immediately inform attorneys, that notwithstanding the general
11 department-wide mandate, they are permitted to telework up to five days per week, with the
12 express caveat that they are required to come into the office whenever it is necessary to complete
13 their job duties. This exception would include things like attending in-person court or
14 administrative hearings, attending CalPERS Board meetings, defending in-person depositions, and
15 working with colleagues in person on projects for which virtual meetings are too cumbersome or
16 counterproductive, like organizing trial exhibits with one’s legal secretary.

17 Second, all attorneys should be paid \$600 in compensation for being denied eligibility for
18 the \$50 per month stipend for the period of two years, since the in-office mandate only qualified
19 attorneys for the \$25 dollar per month stipend.

20 Third, CalPERS shall entertain claims from attorneys for costs incurred in connection with
21 complying with the in-office mandate for two years, including costs associated with commuting,
22 parking, moving expenses, etc. These costs shall be itemized and submitted on a standard expense
23 claim form, with receipts attached, and processed by CalPERS as it would process any other claim
24 for expense reimbursement.

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DATED: March 18, 2024

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