

1 FROLAN R. AGUILING
Chief Counsel, Bar No. 235874
2 SANDRA L. LUSICH
Deputy Chief Counsel, Bar No. 195995
3 CHRISTOPHER E. THOMAS
Assistant Chief Counsel, Bar No. 186075
4 DAVID M. VILLALBA
Principal Labor Relations Counsel, Bar No. 258974
5 California Department of Human Resources
State of California
6 1515 'S' Street, North Building, Suite 500
Sacramento, CA 95811-7258
7 Telephone: 916-909-3706
Facsimile: (916) 323-4723
8 david.villalba@calhr.ca.gov

9 Attorneys for Respondent

10
11 **STATE OF CALIFORNIA**
12 **ARBITRATION PROCEEDINGS**

13
14 CALIFORNIA ATTORNEYS,
ADMINISTRATIVE LAW JUDGES AND
15 HEARING OFFICERS IN STATE
EMPLOYMENT (CASE),

16 Grievant,

17 v.
18

19 CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM (CALPERS),

20 Respondent.
21
22

CalHR No: 22-02-0004

RESPONDENT'S CLOSING BRIEF

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION..... 4

STATEMENT OF FACTS..... 6

MOU PROVISIONS..... 11

ISSUES..... 12

ARGUMENT..... 12

I. THE GRIEVANCE MUST BE DENIED AS UNTIMELY...... 12

II. THE GRIEVANCE MUST FURTHER BE DENIED BECAUSE THE UNION NEVER MADE A DEFINITIVE REQUEST FOR TELEWORK, AS REQUIRED BY SECTION 6.4...... 14

A. The Union’s blanket request for all employees to have “maximum telework flexibility” is not a valid request under section 6.4 because it fails to give the employer sufficient information to make an informed decision. 14

B. The Union erroneously attacks management’s general telework policy, rather than showing management denied a specific employee request for telework...... 16

C. This issue of whether the Union presented a valid request under section 6.4 is not barred by the doctrine of res judicata...... 18

III. EVEN ASSUMING, ARGUENDO, THE UNION’S BLANKET REQUEST WAS VALID, THE GRIEVANCE FAILS BECAUSE MANAGEMENT’S DENIAL WAS BASED ON OPERATIONAL NEEDS. 19

A. Management has sole discretion to determine the operational needs justifying a denial of a request for telework. 19

B. Management’s denial of the Union’s request was based on legitimate operational needs...... 21

1. The need to strengthen the workplace culture. 21

2. The need to increase collaboration...... 23

3. The need to maintain productivity. 28

4. The need to train new employees and work efficiently with support staff. 29

5. The need to maintain uniform telework expectations. 31

C. These operational needs, whether taken individually or as a whole, are more than sufficient to justify management’s denial of the Union’s request for full-time telework...... 32

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

D. The Union’s arguments in opposition are without merit. 33

1. *The Union’s evidence on vacancy rates is inconclusive and ultimately irrelevant.* 33

2. *The Union’s argument that collaboration can occur via remote means ignores the practical reality that people tend to collaborate less when working remotely.*..... 34

3. *The Union erroneously argues that because attorneys may occasionally have different in-office days that the hybrid telework schedule is somehow not truly aimed at increasing collaboration.* 36

4. *The Union’s argument that CalPERS has the burden in this case is misguided and incorrect.*..... 37

IV. BECAUSE CALPERS’S TELEWORK POLICY APPLIES EQUALLY TO ALL “SIMILARLY SITUATED” CALPERS EMPLOYEES, THE UNION FAILED TO SHOW A VIOLATION OF SECTION 3.1. 38

V. GRANTING THE UNION’S REQUEST FOR A COMPLETE RESCISSION OF THE IN-OFFICE SCHEDULE WOULD VIOLATE FUNDAMENTAL MANAGEMENT RIGHTS AND EXCEED THE SCOPE OF THE ARBITRATOR’S AUTHORITY...... 39

CONCLUSION 41

1 **INTRODUCTION**

2 Grievant (CASE or Union) claims CalPERS violated sections 3.1 and 6.4 of the Bargaining
3 Unit 2 (BU 2) Memorandum of Understanding (MOU) by denying the Union’s request that
4 attorneys at CalPERS be given maximum flexibility to telework full-time, up to five days per
5 week. The Union’s grievance must be denied for several reasons.

6 First, the grievance is untimely. The evidence showed that CASE first requested maximum
7 telework flexibility for its members during a meet and confer with management on July 23, 2021.
8 This request was denied by management during that same meeting, and then denied again in a
9 subsequent meeting on January 20, 2022. Despite the repeated denial of the Union’s request,
10 CASE did not file its grievance until March 17, 2022, well-beyond the 30-day window for filing
11 grievances under the MOU. The grievance is, therefore, procedurally defective and must be
12 denied.

13 Second, the grievance must be denied because CASE never made a specific request for
14 telework on behalf of any particular employee. Instead, the Union made what was essentially a
15 bargaining proposal, in which it asked that all BU 2 employees at CalPERS be given the right to
16 telework as much or as little as they wanted. However, the plain language of section 6.4 clearly
17 requires the submission of an individual “employee request” for telework. The Union’s bargaining
18 proposal failed to give management any specific information about who wanted to telework, how
19 much, and why. Without this baseline of information, management could not possibly make an
20 informed decision about whether to approve or deny a request for telework. CASE’s request was
21 essentially for management to issue a “blank check,” approving *all* employee telework requests
22 forever into the future and rendering section 6.4 mere surplusage. However, section 6.4 does not
23 require management to guess or speculate about which employees may want to telework or to
24 approve in advance any and all telework requests. The Union’s grievance therefore fails to meet
25 the threshold requirement of section 6.4, which is the existence of a specific employee request for
26 telework. For that additional reason, the grievance must be denied.

27 Third, even assuming the Union’s bargaining proposal was a valid request under section
28 6.4, the grievance fails because management’s denial of the Union’s request was based on

1 operational needs. Under section 6.4, the employer has the right to deny an employee’s request for
2 telework, as long as the denial is based on “operational needs.” In this case, management
3 expressly denied the Union’s request for several legitimate operational needs, including: (1) the
4 need to maintain and improve CalPERS’s culture or shared sense of mission; (2) the need to
5 maintain and increase collaboration among employees; (3) the need to maintain productivity; (4)
6 the need to assimilate new team members, and (5) the need to maintain a uniform telework
7 schedule across the organization. The denial of the Union’s request was born out of management’s
8 first-hand experience with full-time telework during the COVID-19 pandemic. The evidence
9 showed that full-time remote work during this time had a decidedly negative impact in the areas
10 noted above. The evidence further showed that management’s concerns about the negative
11 operational impacts of full-time telework were supported by a deep and growing body of research.
12 This research documents, at length, the deleterious effects of full-time remote work in areas with
13 which CalPERS was concerned, namely, by showing how remote work negatively impacts a
14 shared sense of mission, workplace culture, collaboration, productivity, and training.

15 CASE’s argument that the return to office schedule hurt CalPERS’s ability to retain and
16 recruit qualified attorneys misses the mark because (1) the Union didn’t prove it, and (2) it is
17 irrelevant, even if it had been proven. At a fundamental level, CalPERS, as the employer, is
18 permitted to prioritize certain operational needs above others. While retention and recruitment are
19 an important concern, they are not the only concern, and they were not the primary concern for
20 CalPERS in this case. Section 6.4 does not require that a denial of telework meet *all* of an
21 organization’s operational needs—just one or more. Here, CalPERS cited five legitimate
22 operational needs for denying CASE’s request, which management is allowed to do, even if it
23 theoretically comes at the expense of other operational needs.

24 Ultimately, management at CalPERS believes that having employees in the office on a
25 regular basis is good for employees, produces a better work product, allows for greater and more
26 efficient collaboration, and helps with informal training and mentoring of new employees. These
27 are valid operational needs that are reasonably and rationally advanced by having employees in the
28 office. Accordingly, the grievance is without merit and should be denied.

1 **STATEMENT OF FACTS**

2 **CalPERS Background**

3 CalPERS is the state agency charged with administration of public employee retirement and
4 health benefits in California. (Gov. Code, § 20120, 20123.) CalPERS manages a portfolio of over
5 \$485 billion, and is the second largest purchaser of healthcare behind the federal government.
6 (Reporter’s Transcript (RT), Vol. 3, pp. 473-475.) CalPERS currently employs around 20
7 attorneys and approximately 20 support staff in its Legal Office. (Joint Exh. 9.) The attorneys at
8 CalPERS perform a wide range of functions including, but not limited to giving legal advice to
9 other divisions within CalPERS, including the CalPERS Board, writing legal opinions, advising on
10 issues involving the Public Employees Retirement Law (PERL), and performing the full range of
11 duties associated with litigation, including gathering evidence, preparing witnesses, attending
12 administrative hearings, and appearing in court. (RT, Vol. 1, pp. 24, 226-225; Vol 3, pp. 380-381.)
13

14 **Full-Time Telework During the COVID-19 Pandemic**

15 Prior to March 2020, the attorneys at CalPERS, with a few exceptions, primarily performed
16 their work in the office. (See RT, Vol. 1, pp. 25-26.) Beginning in March 2020, as a consequence
17 of the COVID-19 pandemic, the attorneys at CalPERS, along with thousands of other employees
18 throughout the state, were first required, and then permitted, to telework remotely on a full-time
19 basis. (*Id.* at pp. 26-27.) During this time, some support staff in the Legal Office were required to
20 continue to come into the office on a regular basis to perform various administrative tasks, such as
21 receiving the mail and scanning documents for the attorneys who were working remotely. (RT,
22 Vol. 3, pp. 386-387.)

23 During the pandemic, both the quantity and quality of communication and collaboration
24 within the Legal Office and within CalPERS, as a whole, significantly declined. (RT, Vol. 1, pp.
25 227-228; RT, Vol. 3, pp. 377, 484.) Legal management experienced a significant decline in
26 collaboration and communication among employees, poor morale among support staff, and a
27 general weakening of the bonds between employees and management. (RT, Vol. 1, pp. 224-225;
28 RT, Vol. 3, pp. 370-372, 387.) Informal training and mentoring of new and existing employees

1 also suffered during the pandemic. (RT, Vol. 1, pp. 234-235; RT, Vol. 3, p. 373.) Spontaneous
2 work meetings between employees, who happened to run into each other in the office, essentially
3 ceased, while other in-person meetings, which previously could be efficiently handled by dropping
4 into someone's office, significantly declined or stopped occurring as well. (RT, Vol. 3, pp. 371-
5 372; 378-380.)

6 During the pandemic, work expectations were also relaxed. (RT, Vol. 3, pp. 496-497.)
7 Management lowered expectations in terms of the level of productivity expected from employees,
8 in recognition of the fact that employees were dealing with difficult situations at home as a result
9 of the pandemic. (*Ibid.*) For the Legal Office, hearings were not happening as frequently, internal
10 deadlines were being suspended, and the types of requests for legal opinions the attorneys were
11 receiving were not as complex as they were pre-pandemic or are now currently. (RT, Vol. 1, pp.
12 43-44; Vol. 3, pp. 382-383.)

13 During the pandemic, the executive management team at CalPERS actively discussed and
14 made plans for an eventual transition of employees back into the office. (RT, Vol. 3, p. 474.) The
15 team frequently discussed the issue at their weekly meetings, taking input from all divisions within
16 CalPERS regarding their needs and the needs of their staff. (RT, Vol. 3, pp. 474-475.) As part of
17 this process, management not only considered the needs and experience of the executive team, but
18 actively solicited the input of rank-and-file employees through a series of lengthy public webchats,
19 which were personally conducted by Marcie Frost, the Chief Executive Officer (CEO) of
20 CalPERS. (See Union Exhs. 4-7.) Management also looked at industries that were doing similar
21 work to CalPERS to see what they were doing in terms of telework. (RT, Vol. 3, p. 475.)
22 Management also reviewed numerous studies and research articles on the effects of full-time
23 remote work on business operations. (RT, Vol. 1, pp. 246-248, 251-252.) These studies largely
24 confirmed what management was experiencing first-hand, namely, that full-time telework was
25 negatively impacting collaboration, workplace culture, communication, productivity, and training.
26 (Respondent's Exhs. 1-8; RT, Vol. 1, pp. 251-252 .)

27 ///

28 ///

1 **The Return to the Office**

2 As the pandemic drew to a close, near the end of 2021, management began making plans
3 for staff to start returning to the office on a regular basis. (Union Exh. 6, pp. 10-11.) Based on its
4 many months of observation and discussion, management decided that to best meet its
5 organizational needs, all employees within CalPERS, with appropriate exceptions, would come
6 back into the office for three days per week, and could telework the remaining two days. (RT, Vol.
7 3, p. 474.) While this was the general expectation, management was open and remains open to
8 considering individual requests for deviation from the general telework schedule. (RT, Vol. 3, pp.
9 432, 482-483.) Management’s plan was a phased approach, in which employees would start
10 coming back to the office for one to two days per week for the first two months and then transition
11 to three days per week by December 2021. (Union Exh. 6, pp. 10-11.) The return to office was
12 delayed for a time due to several outbreaks of COVID-19, but was eventually implemented in
13 March 2022. (RT, Vol. 1, pp. 59, 220-221.)

14 As part of its return to office, CalPERS drafted a telework policy, which formally
15 established the criteria for participation in the telework program, including procedures for
16 requesting changes to employees’ telework schedules. (RT, Vol. 3, p. 422; Joint Exh. 4.)
17

18 **Notice to CASE Concerning Telework Policy and Plans to Return to the Office**

19 On April 26, 2021, CalPERS formally notified CASE that it was going to be implementing
20 a new telework policy. (RT, Vol. 3, pp. 421-422; Respondent’s Exh. 9.) On July 23, 2021,
21 management met with CASE to bargain over the impacts of the proposed policy. (RT, Vol. 3, p.
22 423; Respondent’s Exh. 10.) During the meeting, Julie Morgan, the Labor Relations Manager for
23 CalPERS, informed CASE, consistent with earlier statements by management, that the attorneys
24 would be returning to the office three days per week and would be allowed to telework the
25 remaining two days. (RT, Vol. 3, p. 423; Respondent’s Exh. 10, p. 2.) Ms. Morgan told the
26 Union, “Again, we are planning to institute a hybrid telework model that allows team members to
27 be in an office-centric telework environment, working three days a week in the office, with the
28 ability to telework up to two days per week.” (Respondent’s Exh. 10, p. 2.) Monica Minor, who

1 was representing CASE, objected to the new requirement, stating that CASE wanted its members
2 to continue to have maximum flexibility to telework as much as they wanted. (RT, Vol. 3, p. 424;
3 Respondent’s Exh. 10, p. 3.) The request was noted, but management made no indication that it
4 would be changing the in-office expectation. (*Ibid.*)

5 Subsequently, the parties met and conferred again on January 20, 2022 to discuss some
6 minor updates to the telework policy, including an updated process for submitting employee
7 requests to change their telework agreements. (RT, Vol. 3, p. 426.) CASE again maintained that
8 it wanted the attorneys to be able to telework full-time. (*Id.* at pp. 427-428.) Management
9 responded that it would not be changing course and would continue with implementation of its
10 hybrid telework schedule. (*Ibid.*) In accordance with management’s previous statements, the
11 hybrid schedule was implemented and attorneys at CalPERS returned to the office three days per
12 week, beginning March 1, 2022. (RT, Vol. 1, pp. 220-221.)

13 On March 7, 2022, CASE sent a letter to CalPERS management reiterating its objections to
14 the new telework arrangement. (Joint Exh. 7.) CASE disputed management’s reasons for
15 implementing the new telework schedule and again asked that the attorneys be given the freedom
16 to telework as much or as little as they wanted. (*Ibid.*) On March 17, 2022, management
17 responded to CASE’s letter and reiterated the operational needs underlying management’s decision
18 to have employees physically present in the office. (Joint Exh. 8.) Management stated that in-
19 person attendance was necessary to ensure that the productivity of the Legal Division remained
20 consistent with expectations. (Joint Exh. 8.) In addition, management noted that in-person
21 attendance was necessary to obtain the operational benefits of “open communication, formal and
22 informal mentoring, team building, problem-solving, and information sharing,” all of which
23 CalPERS explained “occur more naturally when team members are on site and able to meet in-
24 person.” (Joint Exh. 8.)

25
26 **Procedural History**

27 On March 22, 2022, CASE filed a formal grievance against CalPERS. (Joint Exh. 1, pp. 2-
28 34.) The grievance alleged that CalPERS’s denial of CASE’s request for maximum telework

1 flexibility was not supported by operational needs, and thus violated sections 3.1 and 6.4 of the
2 MOU. (Joint Exh. 1, pp. 2-34.) CASE argued that the attorneys were able to get their work done
3 during the pandemic, while teleworking full-time, and there was no need to return to the office.
4 (*Ibid.*)

5 On April 21, 2022, CalPERS General Counsel, Matt Jacobs, responded to CASE’s
6 grievance, reiterating the reasons why the Union’s request for full-time telework was not
7 compatible with the operational needs of CalPERS. (Joint Exh. 1, pp. 40-47.) Mr. Jacobs noted
8 that full-time telework would not meet the organization’s operational needs as effectively as the
9 employer’s current hybrid model. (*Ibid.*) Specifically, Mr. Jacobs noted the following operational
10 needs for the denial of the Union’s request:

- 11 1. The need to maintain and improve CalPERS’s culture.
- 12 2. The need to maintain and increase collaboration.
- 13 3. The need to maintain productivity.
- 14 4. The need to assimilate new team members and work efficiently with support staff; and
- 15 5. The need to have the same requirements apply to all team members.

16 (*Ibid.*) On May 2, 2022, CASE appealed the grievance to CalHR. (Joint Exh. 1, p. 60.) On June
17 1, 2022, CalHR denied the Union’s appeal. (Joint Exh. 1, p. 72-77.) On June 2, 2022, CASE
18 appealed the matter to arbitration. (Joint Exh. 1, p. 78.)

19 CalHR initially disputed the arbitrability of the grievance, after which CASE filed a petition
20 to compel arbitration in superior court. (Union’s Exhibit 15.) On June 28, 2023, the court ruled
21 that the grievance was arbitrable, but made no findings regarding the merits of the grievance or the
22 application of section 6.4 to the facts of the case. (*Ibid.*)¹

23 ///

24 ///

25 ///

26 ¹ An order granting a petition to compel arbitration can only be appealed after a decision on
27 the merits of the arbitration is reached. (*Muao v. Grosvenor Properties* (2002) 99 Cal.App.4th
28 1085, 1088–1089; see also Cal. Code Civ. Proc., § 1294.2.) Thus, as CalHR’s appeal rights have
not yet been fully exhausted, the court’s decision is not yet final, and CalHR maintains its right to
appeal the arbitrability findings of the superior court once a decision on the merits in this case is
reached.

1 **MOU PROVISIONS**

2 **MOU § 3.1 State Rights**

3 A. All State rights and functions, except those which are expressly abridged by
4 this MOU, shall remain vested with the State.

5 B. To the extent consistent with law and this MOU, the rights of the State
6 include, but are not limited to, the exclusive right to determine the mission of
7 its constituent departments, commissions, and boards; set standards of service;
8 train, direct, schedule, assign, promote, and transfer its employees; initiate
9 disciplinary action; relieve its employees from duty because of lack of work,
10 lack of funds, or for other legitimate reasons; maintain the efficiency of State
11 operations; determine the methods, means and personnel by which State
12 operations are to be conducted; take all necessary actions to carry out its
13 mission in emergencies; and exercise complete control and discretion over its
14 organization and the technology of performing its work. The State has the right
15 to make reasonable rules and regulations pertaining to employees consistent
16 with this MOU provided that any such rule shall be uniformly applied to all
17 affected employees who are similarly situated.

12 **MOU § 6.4 Telework**

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

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

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

19 **MOU § 7.7 Formal Grievance - Step 1**

20 A. If an informal grievance is not resolved to the satisfaction of the grievant, a
21 formal grievance may be filed no later than:

22 1. Thirty (30) calendar days after the employee can reasonably be
23 expected to have known of the event occasioning the grievance;

24 2. Twenty-one (21) calendar days after receipt of the decision rendered
25 in the informal grievance procedure.

26 B. However, if the informal grievance procedure is not initiated within the
27 period specified in Item (1) above, the period in which to bring the grievance
28 shall not be extended by Item (2) above.

29 C. A formal grievance shall be initiated in writing on a form provided by the
30 State and shall be filed with a designated supervisor or manager identified by
31 each department head as the first level of appeal.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ISSUES

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

ARGUMENT

I. THE GRIEVANCE MUST BE DENIED AS UNTIMELY.

On July 23, 2021, the Union was first formally notified of management’s decision to start returning employees to the office in a meet and confer between CalPERS management and CASE. (RT, Vol. 3, p 423.) The Union was specifically informed that the attorneys at CalPERS would be required to come back into the office three days per week. (*Ibid*; Respondent’s Exh. 10, p. 2.) During that meeting, the Union requested that its attorneys be given maximum flexibility to telework full-time. (*Ibid.*) Notably, this is exactly the same request the Union is making in the present grievance. The Union’s request for full-time telework was not granted at that time and CalPERS continued forward with its plans to require employees to come back into the office. (*Ibid.*) Even though the Union was aware that CalPERS was moving forward with implementation of the hybrid schedule, despite its request, no grievance was filed by the Union.

On August 5, 2021, in a webchat with employees, CalPERS CEO Marcie Frost, again, confirmed that management was moving forward with the three day in-office requirement. (Union Exh. 6, pp. 10-11.) Again, neither the Union nor any of the affected employees filed a grievance.

On January 20, 2022, the parties met again to discuss various aspects of the telework policy. (RT, Vol. 3, pp. 427-428.) At that meeting, CASE reiterated its request for maximum telework flexibility for its members up to and including full-time telework. (*Id.* at p. 427.) Management again denied the Union’s request, stating that it was their intent to move forward with

1 an office-centric teleworking environment with staff “coming into the office three days a week,
2 with the opportunity to telework up to two days per week.” (*Id.* at pp. 427-428.) Despite this
3 unambiguous denial of the Union’s request, the Union made no immediate or timely challenge to
4 the denial. Not until March 22, 2022 did the Union file its grievance in this matter. (Joint Exh.
5 1.) Section 7.7 of the MOU requires that all grievances be initiated within 30 days of the events
6 occasioning the dispute. (Joint Exh. 2, p. 35.) Here, CASE knew or should have known that
7 CalPERS was rejecting its request for maximum telework flexibility in July 2021. The affected
8 employees were again informed of management’s plans in August 2022, and CASE was expressly
9 informed again of management’s denial of its request in January 2022. (RT, Vol. 3, pp. 427-428;
10 Union Exh. 6, pp. 10-11.) However, the Union failed to file the present grievance until March
11 2022—well-beyond the 30-day deadline for filing grievances under the MOU. (Joint Exh. 1, §
12 7.7.)

13 Nor is the grievance made timely merely because CalPERS had not yet implemented its
14 hybrid telework policy. Under the MOU, it is the rejection of the request for telework that triggers
15 the limitations period for purposes of section 6.4. That rejection was communicated several times,
16 at the very latest on January 20, 2022, which was more than 30 days before the Union filed their
17 grievance in this case. The fact that the Union kept reasserting its request, and that management
18 kept denying it, is immaterial. In determining the timeliness of labor charges filed against the
19 state, it is well-established that an employer’s continuing refusal to change its position does not
20 constitute a continuing violation or relate back to the initial rejection of the Union’s request.
21 (*UCLA Labor Relations Division* (1989) PERB Dec. No. 735-H; *County of Riverside* (2011) PERB
22 Dec. No. 2176-M.)² Rather, it is the initial rejection that matters for purposes of assessing the
23

24
25 ² The authorities cited herein are public precedential decisions issued by the Public
26 Employment Relations Board (PERB). PERB is the agency charged with investigating and
27 adjudicating allegations of unfair labor practices within the state. (Gov. Code, §§ 3541.3, 3513,
28 subd. (h).) It is generally recognized that arbitrators may give “significant weight” to administrative
29 decisions by government agencies where those agencies have expertise in evaluating and
30 adjudicating claims of unfair labor practices. (Elkouri & Elkouri, *How Arbitration Works* (5th ed.
1997), p. 563.) Accordingly, while not technically controlling in the context of arbitration, PERB’s
31 administrative decisions should be given persuasive value.

1 timeliness of the Union’s claim. (See, e.g., *Compton Community College District* (1991) PERB
2 Dec. No. 915-H; *California Faculty Association* (2007) PERB Dec. No. 1933-H [finding that the
3 continuing violation doctrine did not apply where respondent continually refused to implement a
4 revised grievance procedure]; *State of California (Department of Corrections)* (2003) PERB Dec.
5 No. 1559-S [rejecting continuing violation argument where State merely maintained its refusal to
6 answer the charging party’s information requests];.)

7 Here, CalPERS has consistently maintained its decision to move ahead with the hybrid
8 telework schedule, despite CASE’s request for maximum telework flexibility, since at least July
9 2021. Management’s subsequent statements reaffirming its plan to require employees to come
10 back into the office did not constitute a continuing violation. Accordingly, the grievance should be
11 denied as untimely.

12
13 **II. THE GRIEVANCE MUST FURTHER BE DENIED BECAUSE THE UNION**
14 **NEVER MADE A DEFINITIVE REQUEST FOR TELEWORK, AS REQUIRED BY**
SECTION 6.4.

15 **A. The Union’s blanket request for all employees to have “maximum telework**
16 **flexibility” is not a valid request under section 6.4 because it fails to give the**
employer sufficient information to make an informed decision.

17 As a threshold matter, the plain language of section 6.4 requires the submission of an
18 “employee request” for telework. Section 6.4 states:

19 *Employee requests* to telework shall not be denied except for
20 operational needs. [¶] When *teleworking requests* are denied, the
21 reason shall be put in writing, if requested *by the employee*. *Employees*
22 who believe *their request* to telework was denied in violation of this
subsection, may file a grievance that can be appealed to the fourth level
of the grievance procedure.

23 (Joint Exh. 2, p. 33, emphasis added.) Thus, before management’s obligation to respond to a
24 request arises, an “employee request” for telework must be made. Without the existence of a
25 specific request for telework by an employee or employees, management’s obligations to provide
26 an approval or denial of said request does not arise. This makes practical sense as management
27 cannot make an informed decision about whether to grant or deny a request in the absence of
28 specific details regarding the nature of the request and the employee making the request.

1 Here, the Union never formulated a specific request for telework on behalf of any
2 individual employee, but rather, made a blanket proposal that all BU 2 employees at CalPERS be
3 given “maximum telework flexibility.” (Joint Exh. 1, p. 61.) The Union’s request does not
4 identify any specific employee, nor does it specify the number of days requested, or the reasons
5 why any particular employee is requesting additional telework days.³ This kind of request contains
6 none of the specific information that management needs to make an informed decision about
7 whether to grant or deny the request.

8 The context of a particular telework request matters because the operational needs
9 justifying the approval or denial of those requests may be very different, depending on the
10 particular circumstances at issue. For example, if an employee with a history of showing up late
11 for meetings and missing deadlines makes a request to telework five days per week, management
12 might appropriately view that request differently than the same request from a stellar employee,
13 without any performance issues, who needs additional telework days to attend medical
14 appointments.

15 In fact, in appropriate circumstances, CalPERS management could very well grant a request
16 from one of the affected employees in this case for additional telework if it were properly
17 submitted and contained sufficient details for management to make an informed decision. (RT,
18 Vol. 3, p. 433.) The evidence showed that management was open to considering these individual
19 requests and had, in fact, granted such requests in the past. (RT, Vol. 3, pp. 482-483.) However,
20 the Union’s proposal for maximum telework flexibility is not a valid employee request under
21 section 6.4 because it does not allow management to make those types of individualized
22 determinations, but rather requires management to collectively approve or deny telework requests
23
24

25 ³ The evidence shows that each of the attorneys in the Legal Office has a telework
26 agreement on file which provides for the number of in-office days they have agreed to work.
27 (Respondent’s Exh. 12.) Notably, none of the attorneys has requested their telework schedule be
28 modified in any way. (RT, Vol. 3, p. 433.) Indeed, when Austa Wakily, one of the Union’s chief
witnesses, was asked how many days she wanted to telework, she was unable to provide a definitive
answer. (RT, Vol. 1, p. 87.) Another of the Union’s witnesses, David van der Griff, admitted that
he prefers to come into the office five days per week. (RT, Vol. 1, p. 103-104.)

1 for all employees at once, in advance, and without knowing all the facts. Nothing in section 6.4
2 requires management to make such an open-ended commitment.

3 Underscoring the illegitimacy of the Union’s request is the fact that neither CASE nor any
4 of the affected employees ever followed the proper procedures for requesting a telework
5 modification. (RT, Vol. 3, p. 434.) CalPERS’s telework policy expressly requires employees who
6 wish to change their telework schedules to submit their requests to their supervisor on a standard
7 Form 200. (Joint Exh. 4, p. 6; RT, Vol. 3, pp. 429-430.) The supervisor must then review the
8 request and either grant or deny the request consistent with operational needs. (See Joint Exh. 6.)
9 Both CASE and the affected employees were made aware of these procedures (RT, Vol. 3, pp.
10 433-434), and yet, the undisputed evidence shows these procedures were not followed in this case.
11 (*Ibid.*)

12 According to Ms. Morgan, the Labor Relations Specialist for CalPERS, following the
13 modification procedures is important because it is required by the statewide telework policy. (Joint
14 Exh. 5, p. 3; RT, Vol. 3, p. 432). In addition, following the procedures ensures that requests are
15 evaluated on a case-by-case basis by the appropriate party (in most cases, the employee’s direct
16 supervisor). (RT, Vol. 3, p. 432.) It also allows the supervisor and employee to engage in an
17 interactive process and discuss potential compromises. For example, if the employee requests five
18 days per week of telework, the supervisor can potentially discuss whether offering three or four
19 days per week of remote work would be sufficient to address the employee’s issue. The Union’s
20 blanket request deprives both the employee and the employer of these opportunities for discussion.
21 Lastly, following the procedure ensures a uniform process for everyone.

22 By failing to submit a specific employee request for telework, and by refusing to follow the
23 required procedures for submitting such requests, CASE has failed to meet the threshold
24 requirements of section 6.4. Accordingly, the grievance should be denied on these grounds.

25
26 **B. The Union erroneously attacks management’s general telework policy, rather
 than showing management denied a specific employee request for telework.**

27 The Union’s fundamental misunderstanding of the issue in dispute is evident from the fact
28 that the Union repeatedly attempts to argue that management’s expectation that employees be in

1 the office three days per week is not supported by operational needs. (See, e.g., RT, Vol. 1, pp.
2 141-142.) However, it is not the implementation of management’s policy, but rather the
3 submission and denial of an individual employee request for telework that is at issue under section
4 6.4. Section 6.4 states, “Employee requests to telework shall not be denied except for operational
5 needs.” (Joint Exh. 2, p. 33.) It says nothing about allowing CASE to broadly challenge
6 management’s overall telework policy or in-office requirement.

7 Under section 3.1, management has the right to establish all rules and policies pertaining to
8 the conduct of state operations, which necessarily includes the right to establish expectations and
9 rules around teleworking. In particular, section 3.1 expressly states that management has the
10 “exclusive right” to “determine the methods, means and personnel by which State operations are to
11 be conducted,” including the right to “schedule” and “assign” employees. (Joint Exh. 2, § 3.1, pp.
12 14-15.) That section also states that management has the right to “exercise complete control and
13 discretion over its organization and the technology of performing its work.” (*Ibid.*) Lastly, section
14 3.1 states that unless specifically abridged by the MOU, “[a]ll State rights and functions...shall
15 remain vested with the State.” (*Ibid.*) Because no provision of the MOU specifically abridges
16 management’s right to establish the rules surrounding telework, that right is necessarily retained by
17 the state pursuant to section 3.1.

18 Section 6.4 does not place any limits on the ability of management to establish an overall
19 telework policy or schedule. Rather, it simply states that *denials* of individual *employee requests*
20 for telework must be based on operational needs. Thus, the Union’s argument, that the general
21 telework policy or schedule is not supported by operational needs, is misguided, and must be
22 rejected. Under section 6.4, it is only the denial of an employee request for telework that is at
23
24
25
26
27
28

1 issue. As noted above, no such request has been presented in this case. Therefore, no violation of
2 section 6.4 has occurred.⁴

3
4 **C. This issue of whether the Union presented a valid request under section 6.4 is
not barred by the doctrine of res judicata.**

5 The Union erroneously argues the above defense is barred by the doctrine of res judicata.
6 (RT, Vol. 1, p. 9.) In particular, the Union contends that the superior court already disposed of this
7 argument in ruling on the Union’s petition to compel arbitration. (RT, Vol. 1, p. 9.) The doctrine
8 of res judicata or issue preclusion prevents a party from re-litigating a claim or issue that was
9 already resolved in a prior proceeding between the same parties on the same cause of action.
10 (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797.) The doctrine only applies if the
11 following elements are met: “(1) A claim or issue raised in the present action is identical to a claim
12 or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the
13 merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with
14 a party to the prior proceeding.” (*Ibid.*)

15 The Union’s argument fails because the issue before the superior court was not at all
16 identical to the issue in this case. The sole issue addressed by the court was whether the grievances
17 were subject to arbitration. Specifically, the state argued that CASE’s grievance was not arbitrable
18 under section 7.2 of the MOU. (Union Exh. 15, at p. 7.) Section 7.2 of the MOU limits the
19 arbitrability of complaints aimed at rules or policies not expressly contained in the MOU. Here,
20 CalPERS is not arguing that the Union’s grievance is not arbitrable under section 7.2. (Joint Exh.
21 2, p. 34.) Rather, CalPERS is arguing that the grievance must concern an individual employee
22 telework request in order to trigger management’s obligations under section 6.4. CalPERS is also
23 arguing that CASE and the affected employees must follow the required procedures for making a
24

25 _____
26 ⁴ The fact that management responded to CASE’s request for maximum telework flexibility
27 did not waive the argument that the Union failed to make a valid request under section 6.4.
28 Management arguably had a separate obligation to respond to the Union’s bargaining proposal for
greater telework flexibility in the context of the meet and confer, as part of management’s duty to
bargain with the Union in good faith. However, just because management responded to CASE’s
bargaining proposal this does not transform that proposal into a valid employee request under
section 6.4.

1 request to modify an employee’s telework schedule. The court never heard or considered either of
2 these issues. The court’s order was limited to the ruling that “the telework disputes pursuant to
3 Section 6.4 of the MOU are subject to arbitration.” (Union Exh. 15, p. 8.) In this matter, CalPERS
4 is not disputing the arbitrability of section 6.4. On the contrary, CalPERS is specifically asking the
5 arbitrator to interpret whether, based on the plain language of the contract, a specific request for
6 telework is required under section 6.4 in order to trigger management’s obligation to respond. This
7 was not the same issue presented to the court. Thus, the claim is not barred by the doctrine of res
8 judicata.⁵ The Union has failed to establish the existence of a denial of a valid employee request
9 for telework, and the grievance should be denied on these grounds.

10
11 **III. EVEN ASSUMING, ARGUENDO, THE UNION’S BLANKET REQUEST WAS**
12 **VALID, THE GRIEVANCE FAILS BECAUSE MANAGEMENT’S DENIAL WAS**
13 **BASED ON OPERATIONAL NEEDS.**

14 **A. Management has sole discretion to determine the operational needs justifying a**
15 **denial of a request for telework.**

16 Even assuming *arguendo* that CASE did make a valid request for telework, CASE failed to
17 show that management’s denial was not based on operational needs. Before addressing the
18 specific operational needs cited by management, it must be recognized that management has the
19 inherent right to determine what its own operational needs are in the first instance. (Joint Exh. 2, §
20 3.1.) Under section 3.1, management has the broad authority to determine the “means...by which
21 State operations are to be conducted.” (*Ibid.*) This means that management has the right to define
22 what its operational needs are and to make decisions about how best to meet those needs.

23 ⁵ Even assuming for the sake of argument the issues were somehow identical, the superior
24 court’s order does not have the finality necessary for res judicata to apply. It is settled law that “a
25 judgment is not final for purposes of collateral estoppel while open to direct attack, e.g., by appeal.”
26 (*Abelson v. National Union Fire Ins. Co.* (1994) 28 Cal.App.4th 776, 787; *National Union Fire Ins.*
27 *Co. v. Stites Prof. Law Corp.* (1991) 235 Cal.App.3d 1718, 1726; *Long Beach Unified Sch. Dist. v.*
28 *State of California* (1990) 225 Cal.App.3d 155, 169; *Sandoval v. Superior Court* (1983) 140
Cal.App.3d 932, 936–937.) Here, the decision of the superior court is still subject to appeal since
no immediate appeal lies from an order compelling arbitration, but rather review of the order is not
available until after an arbitration award has been issued. (*Phillips v. Sprint PCS* (2012) 209
Cal.App.4th 758, 766.) Because the court’s decision is still subject to appeal, it is not yet final.
Accordingly, neither res judicata nor collateral estoppel bars Respondent from making the above
argument.

1 In addition, it is important to recognize that an organization as large and complex as
2 CalPERS⁶ will inevitably have many different, competing operational needs at any given time,
3 which must be juggled and prioritized by management. (RT, Vol. 3, p. 477.) For example,
4 organizations generally have the need to serve clients, manage costs, supervise staff, train new
5 employees, establish an effective workplace culture, and address many other needs that are vital to
6 the success of the organization. For CalPERS, there are any number of operational needs that it is
7 trying to meet at any given time. (RT, Vol. 3, pp. 476-477.) One of the fundamental
8 responsibilities of management at any organization, including CalPERS, is to choose how best to
9 prioritize and meet these needs. (*Id.* at p. 477.)

10 Section 6.4 of the MOU does control which operational needs management must cite when
11 denying an employee’s request for telework. Nor does it allow the Union to choose which
12 operational needs are appropriate. As long as management has a legitimate operational need, and
13 there is some rational connection between that operational need and the denial of telework, then the
14 requirements of section 6.4 have been satisfied.

15 It is a fundamental principle in labor relations that in matters of managerial prerogative an
16 arbitrator may not substitute his or her judgment for that of management, unless the arbitrator finds
17 that the employer’s actions are unreasonable or arbitrary. (Elkouri & Elkouri, *How Arbitration*
18 *Works* (4th ed. 1991) p. 665.) The California Supreme Court has held that “fundamental
19 management decisions” are those that directly affect the “nature and extent of the services that can
20 be provided.” (*Building Material and Construction Teamsters Union v. Farrell* (1980) 41 Cal.3d
21 651, 663.) Both federal and California decisions recognize the right of employers to make
22 unconstrained decisions when fundamental management or policy choices are involved.
23 (*Fibreboard Corp. v. Labor Board* (1964) 379 U.S. 203, 223; *Berkeley Police Association v. City*
24 *of Berkeley* (1977) 76 Cal.App.3d 931-936.) Here, the selection and identification of particular
25

26 _____
27 ⁶ CalPERS administers one of the most complex pension systems in the industry, with a
28 combined portfolio of \$485 billion. (RT, Vol. 3, pp. 475-476.) It is also one of the largest
purchasers of health care in the United States, second only to the federal government. (*Id.* at p.
473.)

1 operational needs are a fundamental right of the employer—and the only question is whether
2 management’s reasons (i.e., operational needs) for denying CASE’s request for telework were
3 arbitrary or unreasonable. As discussed in greater detail below, the overwhelming evidence shows
4 that management’s reasons were neither arbitrary nor unreasonable, but were based on first-hand
5 experience as well as numerous published studies and articles regarding the negative impact of
6 full-time remote work.

7
8 **B. Management’s denial of the Union’s request was based on legitimate
operational needs.**

9 CalPERS denied CASE’s request for maximum telework flexibility for the following
10 operational needs:

- 11
- 12 1. The need to maintain and improve CalPERS’ culture;
 - 13 2. The need to maintain and increase collaboration;
 - 14 3. The need to maintain productivity;
 4. The need to assimilate new team members and work efficiently with support staff; and
 5. The need to have the same requirements apply to all team members.

15 (Joint Exh. 1, pp. 40-47; see also Joint Exh. 8, p. 2.)⁷ As discussed further below, these
16 operational needs are legitimate and reasonably and rationally related to management’s denial of
17 CASE’s request.

18
19 *1. The need to strengthen the workplace culture.*

20 One of the main reasons CalPERS denied CASE’s request for telework was the need to
21 strengthen the workplace culture. (Joint Exh. 1, p. 42.) CalPERS General Counsel, Matt Jacobs,
22 described this operational justification as the need to ensure that the Legal Office is working
23 together as a team toward a “common mission” or goal. (RT, Vol. 1, pp. 223-224.) Mr. Jacobs’
24 testimony as to what constitutes an effective workplace culture, as well as the operational needs
25 underlying a successful and effective legal office, are especially probative given his over 30 years
26

27 ⁷ Management summarized these operational needs in their March 17, 2022 letter to CASE
28 (Joint Exh. 8, p. 2) and provided a more detailed explanation of these operational needs in its letter
to CASE dated April 21, 2022. (Joint Exh. 1, pp. 40-47.)

1 of experience in managing a wide variety of legal offices and attorney staff, including his time as
2 the Chief Assistant U.S. Attorney in charge of day-to-day operations for both the Sacramento and
3 Fresno offices of the U.S. Attorney's Office. (RT, Vol. 1, pp. 218-219.)

4 Mr. Jacobs testified about his experience during the pandemic and how he personally saw
5 the bonds between his employees weakened as a result of full-time telework. (RT, Vol. 1, p. 224.)
6 He testified about the loss of connection and camaraderie in the office, explaining as follows:

7 [W]ith us all out of the office without the constant contact, running into
8 each other, talking to each other, going to lunch with each other,
9 kidding around with each other, asking about each other's families,
10 children, weekend activities, what have you, there was -- I sensed a
lessening of the connection. I sensed a lessening of camaraderie. I
sensed a lessening of the enthusiasm for the mission.

11 (*Id.* at p. 225.) Renee Salazar, CalPERS's Deputy General Counsel, likewise testified of the
12 weakening of the bonds between her and the attorneys she supervised during the pandemic, which
13 she described as being primarily due to the fully remote working environment. (RT, Vol. 3, pp.
14 370-373.)

15 The above observations are confirmed by published studies showing that employees who
16 exclusively work from home feel less connected to each other and to the mission of the
17 department. (Respondent's Exh. 1, 2.) As an article in the Harvard Business Review explains:

18 [A] benefit of spending time with colleagues in the office is that it
19 reinforces the sense that you share a common mission. The
20 phenomenon of goal contagion is a reflection that when you observe
21 the actions of other people, you often adopt their same goals. Being
22 around a group of people who are working toward a common mission
23 reinforces that goal in everyone in the workplace. When people feel
connected to the mission of the organization, it improves their overall
satisfaction with their work. Believing in what the organization wants
to accomplish reinforces that sense that a job is a vocation or calling
and not just a way to earn a paycheck.

24 (Respondent's Exh. 1, p. 4.) The same article talks about the disadvantages of being physically
25 separated from your co-workers.

26 The longer you're separated from [your colleagues], the more your
27 overall sense of mission tends to drift. In order to ensure that your
28 organization retains elements of its culture that you value, it's
important to engage frequently with your coworkers to stay aligned
about your core values.

1 (Respondent’s Exh. 1, p. 3.) A separate survey from Gallup confirms these results, finding that
2 employees who do not work in the same location as their manager are 10 percent less likely to say
3 someone cares about them at work, 10 percent less likely to say they are recognized for their
4 contributions, and 5 percent less likely to feel like their opinions count. (Respondent’s Exh. 2, p.
5 2.) Gallup data also found that “employees who work virtually are even more disconnected from
6 core cultural components,” and that “[r]emote employees are seven percentage points less likely to
7 see their connection to the mission of the company.” (*Id.* at p. 3.)

8 For any organization, it cannot reasonably be disputed that having employees feel
9 disconnected from the mission of the company is detrimental to overall operations. As noted in the
10 above studies, employees who lack a connection to their employer and to each other will be less
11 satisfied with their jobs and less engaged in their work. Based on these studies, as well as the
12 observations of experienced managers, like Mr. Jacobs and Ms. Salazar, who lived through the
13 pandemic and saw the effects of full-time telework on the Legal Office first-hand, management’s
14 concern about the erosion of the workplace culture and shared sense of mission at CalPERS
15 unquestionably represents a reasonable and rational basis for denying CASE’s request for full-time
16 telework for all CalPERS’ attorneys. This reason, alone, would be sufficient to satisfy the
17 requirements of section 6.4, yet management cited other equally compelling reasons as well.

18
19 *2. The need to increase collaboration.*

20 Relatedly, management also denied CASE’s request that all CalPERS’ attorneys be allowed
21 to telework full-time based on the need to increase collaboration among employees. (Joint Exh. 1,
22 pp. 43-45.) Again, Mr. Jacobs testified about his first-hand observations of the negative impact of
23 full-time telework on collaboration within the Legal Office. (RT, Vol. 1, pp. 226-232.) He
24 specifically noted how, when the office was fully remote, he saw less frequent collaboration among
25 the attorneys in the office and a significant decline in the quality of their communications. (RT,
26 Vol. 1, p. 227-228.) He testified, “There were fewer spontaneous, organic discussions.” (*Id.* at p.
27 227.) Mr. Jacobs also explained that when the office was fully remote there were fewer meetings,
28 and fewer people coming into his office to talk about work-related issues. (*Id.* at p. 228.)

1 Although the attorneys had the technical capacity to call or email each other, in practice, they
2 didn't do it nearly as much as they would when they were in the office. (*Ibid.*) Mr. Jacobs further
3 testified that the attorneys were less likely to ask questions while working remotely because they
4 were less willing to pick up a phone to contact a colleague, versus dropping into someone's office,
5 which they routinely did prior to the pandemic. (*Ibid.*) Prior to the pandemic, Mr. Jacobs testified
6 that attorneys would frequently stop by his office to discuss work-related issues—on average, one
7 or two times per day. (*Id.* at p. 230.) In contrast, during the pandemic when everyone was
8 teleworking full-time, the number of people reaching out to Mr. Jacobs dropped to zero. (*Id.* at p.
9 230.) Ms. Salazar testified to a similar experience in the office, noting that prior to the pandemic
10 attorneys would come talk to her and ask her questions; yet, during the pandemic when everyone
11 was teleworking full-time, those interactions dropped off considerably. (RT, Vol. 3, p. 372, 377.)

12 Again, Ms. Salazar and Mr. Jacobs' observations on this point are supported by published
13 studies and academic research. In a detailed study published in the journal, *Nature Human*
14 *Behavior*, data was collected from the emails, calendars, instant messages, video/audio calls and
15 workweek hours of over 60,000 Microsoft employees over the first six months of 2020 to estimate
16 the causal effects of firm-wide remote work on collaboration and communication. (Respondent's
17 Exh. 4.) That study found the following:

18 [F]irm-wide remote work reduced the number of existing connections
19 that churned from month-to-month...and decreased the number of
20 connections workers added month-to-month...Furthermore, the shift to
firm-wide remote work decreased the share of time that workers spent
collaborating with the connections they did add...

21 (Respondent's Exh. 4, p. 43.) The study further found that "firm-wide remote work caused the
22 collaboration network of workers to become more static and siloed, with fewer bridges between
23 disparate parts." (*Id.* at p. 47.) The authors noted that "connections to different parts of an
24 organization's informal communication network" are beneficial for individuals and facilitate
25 "knowledge transfer" within the organization. (*Id.* at p. 43.) However, access to this new
26 information is impeded in a remote working environment. (*Ibid.*) Research has shown, for
27 example, that "establishing a rapport, which is an important precursor to knowledge transfer, is
28 impeded by email use." (*Id.* at p. 44.)

1 Significantly, the Gallup article documents that other organizations have experimented with
2 virtual work environments and have found them unworkable for many of the same reasons cited by
3 CalPERS. (Respondent’s Exh. 2, p. 6.). The Gallup article recounts that “Organizations like IBM,
4 Yahoo, Aetna and others have experimented in the past with virtual cultures and later abandoned
5 them, concluding that the benefits to in-person collaboration were too valuable to forgo and the
6 risk to virtual working too great to take on.” (*Ibid.*)

7 The notion that collaboration is harmed by remote work is further confirmed in an article
8 by Dr. Art Markman, a Professor of Psychology at the University of Texas at Austin, which found
9 the following:

10 It’s harder for institutional knowledge to make its way around in a
11 remote environment. A lot of information sharing happens through
12 short, informal conversations between people over the course of a
13 normal workday. Working from home requires that every interaction
be scheduled or take place over text. That extra effort can make people
less likely to ask quick questions or share something they just learned
informally than if everyone was working together.

14 (Respondent’s Exh. 1, p. 3.) The article continues:

15 The physical workplace enables moments of serendipity that can move
16 projects along. You might bump into a colleague while thinking about
17 a problem and ask a question that leads to a new and surprising solution.
18 Maybe you grab a cup of coffee with a few coworkers and that leads to
19 a new product or service. Or you notice a colleague struggling with a
task and give them some tips that save a lot of time. We may not miss
those moments when they’re not happening, but they can have a
significant positive impact on our individual success, not just the
success of the company.

20 (Respondent’s Exh. 1, p. 3.) This latter point is particularly salient because these types of
21 “serendipitous” interactions cannot be replicated in a virtual environment. Because these
22 interactions are unplanned, by their very nature, they cannot occur in a remote environment. To
23 state the obvious, you cannot spontaneously run into a colleague on Zoom. In a fully remote work
24 environment, like the one envisioned by CASE, these serendipitous encounters, which contribute
25 to both the success of the employer and the employee, would be completely lost.

26 The loss of these collaborative encounters is particularly detrimental for the Legal Office
27 given the complex and consequential nature of the work that it does. (RT, Vol. 1, p. 226.)

28 CalPERS CEO, Marcie Frost, testified that CalPERS is one of the most complex pension systems

1 in the industry. (RT, Vol. 3, p. 476.) Further, witnesses for both the state and the union
2 unanimously agreed that the body of statutes that CalPERS attorneys regularly must interpret and
3 apply is uniquely complex. (RT, Vol. 1, pp. 39, 226; Vol. 3, pp. 375-376, 482.) The complexity of
4 the work is particularly significant here because, as one study notes, “richer communication
5 channels, such as in-person interaction, are best suited to communicating complex information and
6 ideas.” (Respondent’s Exh. 4, p. 44.) In-person communication is therefore vital to the complex
7 work that the attorneys at CalPERS perform.

8 In addition, while the attorneys in the Legal Office might be assigned individually to
9 certain litigation matters, attorneys still benefit from collaborating with each other and other
10 program experts about their cases. (RT, Vol. 1, pp. 260-261; RT, Vol. 3, pp. 380-381.) Ms. Frost
11 testified about how CalPERS is unique among the organizations she has worked with in how
12 heavily the organization relies on its attorneys. (RT, Vol. 3, p. 482.) She testified that her team
13 members from other divisions feel more confident when they have the attorneys in the room
14 helping them navigate the complexities of various issues. (*Ibid.*) Ms. Frost further acknowledged
15 that while teleworking may work in some situations, it is not an effective tool for collaboration and
16 problem solving. (*Id.* at pp. 484-485.) Ms. Frost testified that having the attorneys in the office is
17 an “important resource to the rest of the organization” and that their accessibility enhances the
18 team’s ability to solve complex problems. (*Id.* at pp. 485-486.)

19 Nor is Ms. Frost alone in her assessment of the benefit of in-person teams versus remote
20 teams. Research has shown, particularly with respect to tasks that require a high degree of
21 creativity, that fully remote teams are generally “less effective than in person teams.”
22 (Respondent’s Exh. 8, p. 11.) The evidence also showed that in person communications are often
23 more efficient at resolving complex issues. For example, Ms. Salazar testified about an anecdotal
24 experience in which she attempted to communicate an issue to one of her attorneys via email, but
25 the attorney misunderstood her comment. (RT, Vol. 3, pp. 378-380.) Ms. Salazar later happened
26 to see the attorney in the hallway, had a quick conversation, and was able to

27 ///

28 ///

1 resolve the issue much more efficiently and effectively in person than via email. (*Ibid.*) As Ms.
2 Salazar testified:

3 So in a very short conversation, we were able to do what would have
4 taken me – I would have had to set up a Zoom meeting with her, if it
5 was fully remote and, you know, spend time having to figure out when
6 we could meet and then schedule that meeting, [and then] have the
7 virtual [meeting]. So it's a lot more efficient.

8 (*Id.* at p. 380.) This is just one example of the type of efficiency that is gained by having
9 employees and supervisors in the office on a regular basis. Significantly, since returning to the
10 office, the state's witnesses unanimously agreed that collaboration and communication has
11 increased and that many employees are responding positively to the change. (RT, Vol. 1, p. 232;
12 Vol. 3, pp. 378-380, 485-486.)

13 Of course, in any organization there may be some who claim they see no benefit to coming
14 into the office or informally collaborating with their colleagues. Most of the Union's witnesses
15 would likely fall into this category. However, their experience is not representative of the entire
16 office. Ms. Frost testified that in addition to receiving complaints about the hybrid telework
17 schedule, she also receives "a lot of feedback from employees who are very happy with the
18 telework policy and the flexibility that they have. And they tell me directly that having access to
19 people, seeing people in the hallway, they are walking to the cafeteria, that interaction is really
20 important to them." (RT, Vol. 3, p. 494.) In short, while some employees may refuse to
21 collaborate with others while in the office, many other employees will take advantage of those
22 opportunities and benefit from them. Under the MOU, management has the right to encourage
23 (and even require) those important and beneficial interactions, even if not everyone chooses to
24 participate in them.

25 Accordingly, the evidence showed that management has a legitimate need to encourage
26 collaboration and efficient communication among its employees, and that the denial of CASE's
27 request for full-time telework for all attorneys was reasonably and rationally related to meeting that
28 need. Again, this operational need would be sufficient to satisfy the requirements of section 6.4,
standing alone; however, management's reasons for the denial did not stop here.

1 3. The need to maintain productivity.

2 Management also denied CASE’s request for full-time telework based on its need to
3 maintain a high level of productivity. (Joint Exh. 1, pp. 45-46.) While no specific measurements
4 were taken regarding the current levels of productivity within the Legal Office, management’s
5 concern about productivity was less about the *quantity*, and more about the *quality* of the work
6 produced. (RT, Vol. 1, pp. 232-233.) Management’s belief that in-person collaboration and
7 communication is necessary to maintain employee productivity (*ibid*; RT, Vol. 3, p. 377-378) is
8 overwhelmingly supported by the published research. One published article, by Edward Glaeser
9 and David Cutler, summarizes the research on this topic as follows:

10 Research suggests that a switch to permanent remote work would make
11 us all less productive.

12 People who shift to working from home can temporarily increase the
13 amount of work they get done in a given day. But over the medium to
14 long term, long-distance employment can’t deliver key benefits –
15 including learning and new friendships – that come from face-to-face
 contact. In-person work fosters innovation, the effects of which on
 productivity almost certainly exceed the gains from working harder at
 home for possibly unsustainable stretches.

16 (Respondent’s Exh. 6, pp.1-2.) Importantly, the research cited above explains that the productivity
17 of remote workers may not be affected in the short run, but will eventually decline over time, and
18 may, in fact, be “unsustainable.” Another study, conducted by Standard’s Institute for Economic
19 Policy Research, cites concrete statistics on the effect of fully remote work on productivity and
20 concludes, “Fully remote working appears to lower average productivity by around 10% to 20%.”

21 (Respondent’s Exh. 8, p. 10.) According to the study, factors contributing to this loss of
22 productivity include the challenges of “communicating remotely, barriers to mentoring, building
23 culture and issues with self-motivation.” (*Id.* at p. 1.)

24 While the Union asserts that management made several statements during the pandemic
25 that productivity was high, it was also shown during testimony that most of these statements were
26 not specifically directed toward the Legal Office. (RT, Vol. 3, pp. 500-502.) Rather, these
27 statements were limited to those portions of CalPERS for which performance metrics had been
28 established, which did not include the Legal Office. (*Ibid.*)

1 Furthermore, and importantly, the evidence showed that it was not “business as usual” at
2 CalPERS during the pandemic. (RT, Vol. 3, pp. 382-383.) The volume and complexity of the
3 legal work performed during the pandemic was significantly reduced, compared to the work
4 presently expected of the attorneys. (RT, Vol. 3, pp. 382-383.) For instance, during the pandemic,
5 hearings did not occur as often and the requests for legal opinions were not as complex. (*Ibid.*)
6 During this time, work expectations were generally lowered for CalPERS as a whole. (*Id.* at pp.
7 496-497.)⁸ In addition, the statements by management about employee productivity during the
8 pandemic were not intended to reflect a comprehensive analysis of precise productivity levels, but
9 rather to boost morale during a difficult time for employees. (*Id.* at pp. 385, 502.) To assume from
10 these statements that full-time telework would automatically meet the productivity needs of the
11 CalPERS Legal Office post-pandemic ignores the context of these statements and the evidence
12 showing a definitive connection between loss of productivity and remote work.

13
14 4. *The need to train new employees and work efficiently with support staff.*

15 In addition to the reasons noted above, management denied CASE’s request based on the
16 need to train new employees and strengthen relationships among support staff and the attorneys.
17 (Joint Exh. 1, p. 46.) Mr. Jacobs in his response to CASE described the harmful effect of fully
18 remote work on the support staff:

19 Having our attorneys present in the office also helps our support staff
20 do their jobs. During the pandemic, we observed a decrease in the
21 morale of the support staff who were required to come into the office
22 to handle a myriad of functions to assist attorneys in their duties so that
23 the attorneys could work remotely. In the short time the attorneys have
24 been back, support staff have been able to accomplish these tasks more
25 easily, which has not only increased their morale, it has also increased
26 their efficiency in performing their work (as well as the efficiency of
27 the attorneys they support).

28 (Joint Exh. 1, p. 46.) Ms. Salazar corroborated Mr. Jacobs’ observations, noting that morale
among support staff suffered while the attorneys were teleworking full-time. (RT, Vol. 3, pp. 385-

⁸ The suspension of the deadlines in the Legal Office’s Service Level Agreement (SLA’s) is one concrete example of how these expectations were lowered. (RT, Vol. 1, pp. 43-44.)

1 387.) Because support staff were having to come into the office and do work that the attorneys
2 would otherwise do if they were in the office, there was a general sense of unfairness. (*Id.* at p.
3 387.) Support staff talked about the benefit of having in-person interactions with attorneys, in
4 which they could more easily ask follow-up questions and get clearer direction about what the
5 attorneys wanted. (*Id.* at pp. 387-388.) The evidence showed that the situation with support staff
6 improved after the attorneys started coming back to the office on a regular basis. (*Id.* at p. 387.)

7 In addition, Mr. Jacobs testified that informal training and mentoring of new employees
8 suffered during the pandemic. (RT, Vol. 1, p. 234.) He testified, “So much of what they learn,
9 they learn from their colleagues and from observation of their colleagues, observation of their
10 peers at all levels of the office.” (*Ibid.*) Ms. Salazar likewise testified about training a new
11 attorney who started with CalPERS in December 2019, just three months before CalPERS went
12 fully remote, and how difficult it was to establish a relationship with this new attorney in a remote
13 environment. (RT, Vol. 3, pp. 373-374.)

14 Here again, management’s concerns about the drawbacks of remote work are supported by
15 the published research. The Stanford paper cites several different studies showing the effect of
16 full-time telework on training new employees:

17 Plenty of managers also raise concerns over employee mentoring and
18 learning in fully remote settings. Indeed, a Pew survey raises this
19 concern as one of the two largest challenges for remote work, with 36%
of respondents claiming teleworking reduced their opportunities to be mentored.

20 (Respondent’s Exh. 8, p. 11, emphasis added.) The Stanford paper quotes another study that
21 showed similar results:

22 [The] Emmanuel, Harrington and Pallais (2023) study [reviewed]
23 mentoring practices and team relations at a large software firm that had
24 some teams housed together in the same building and also split across
two buildings. Pre-pandemic, employees housed in the same building
25 as their teammates received 21% more comments on their code from
coworkers than those housed in a different building. These comments
26 are suggestions and ideas on how to improve their code and play an
important role [in] improving employee performance and learning. At
27 the start of the pandemic, all employees were sent home to work fully
remote. These building location differences rapidly disappeared, but all
28 team members now received almost 50% fewer comments than those
housed in the same building pre-pandemic.

1 (*Ibid.*) What these studies show is exactly what CalPERS management experienced—full-time
2 telework makes it more difficult to mentor and train new employees. Thus, the desire to increase
3 formal and informal training opportunities among attorneys constitutes yet another valid
4 operational need justifying the denial of CASE’s request for full-time telework.

5
6 5. *The need to maintain uniform telework expectations.*

7 Lastly, management denied CASE’s request based on the need to maintain uniform
8 telework expectations across the organization. (Joint Exh. 1, p. 47.) Both Mr. Jacobs and Ms.
9 Frost testified about the importance of creating a sense of fairness and equality within CalPERS as
10 an organization. (RT, Vol. 1, p. 235; Vol. 3, pp. 480-481.) When Mr. Jacobs requested an
11 additional day of telework for the Legal Office, he and Ms. Frost discussed the issue and ultimately
12 concluded that it would be unfair to grant an extra telework day to the attorneys and not do the
13 same for the other professional units. (RT, Vol. 3, pp. 480-481.) CASE’s request for full-time
14 telework would create an even greater disparity between the professional groups within CalPERS
15 and conflict with management’s goal of maintaining a sense of fairness and equality in the office.
16 As Mr. Jacobs explained:

17 Permitted one class of team members—attorneys—a different
18 arrangement risks harming the morale and camaraderie not just of
19 nonattorneys in the Legal Office, but also of many team members
outside the office. This would further harm the CalPERS culture,
which strongly values fairness across all team members.

20 (Joint Exh. 1, p. 47.) While CalPERS has made exceptions for certain groups to telework full-
21 time, those exceptions are limited to the call center and a small unit within the IT branch. (RT,
22 Vol. 1, pp. 237-238). These are small units that do not engage in or require the same degree of
23 collaboration and communication as the Legal Office requires. (*Ibid.*) The call center, for
24 example, is heavily script-based and does not require a significant degree of creativity or complex
25 problem-solving where collaboration might be beneficial. (RT, Vol. 1, pp. 238-239; RT, Vol. 3,
26 pp. 479.) The tiny unit within IT was also teleworking full-time prior to the pandemic and was
27
28

1 thus grandfathered in. (RT, Vol. 3, pp. 478-479.)⁹ Unlike these employees, the attorneys, and
2 other professional teams within CalPERS benefit greatly from the enhanced collaboration and
3 communication that only occurs when they are in the office together on a regular basis.
4

5 **C. These operational needs, whether taken individually or as a whole, are more**
6 **than sufficient to justify management’s denial of the Union’s request for full-**
7 **time telework.**

8 The evidence above clearly establishes that management’s decision to deny CASE’s
9 request for full-time telework was based on multiple, important, and legitimate operational needs.
10 Management’s belief that a return to full-time telework would impede its ability to meet those
11 needs is overwhelmingly supported by management’s first-hand experience with full-time telework
12 as well as numerous research, articles, and studies showing the deleterious effects of remote work
13 on things like collaboration, training, productivity, and more. Significantly, the Union failed to
14 present a single article or study stating that *full-time* telework produced better results in any of the
15 areas of concern cited by CalPERS.¹⁰

16 As noted above, section 6.4 does not require management’s denial of a request for telework
17 to meet each and every operational need of the organization. It merely requires that the denial be
18 based on one or more of those needs. Here, it cannot reasonably be disputed that increasing
19 collaboration, maintaining productivity, training new employees, and maintaining uniform
20 expectations are legitimate operational needs, and that they are reasonably and rationally related to
21 management’s denial of CASE’s request for full-time telework. For all of the above reasons, the
22 Union’s grievance is without merit and should be denied.
23

24 ⁹ Even if the unit in IT had not been teleworking full-time prior to the pandemic, the
25 justification for management treating them differently is primarily based on the nature of the job
26 duties, which are very different than the attorneys in the Legal Office. (See RT, Vol. 1, pp. 237-
238.)

27 ¹⁰ The Union cited a number of articles about the benefits of remote work on diversity and
28 inclusion, but none of those articles said that these benefits were exclusive to *full-time* telework.
(See Union Exhibits 9-11.) CalPERS agrees that there are some benefits of telework, which is why
it allows employees by default to telework two days per week.

1 **D. The Union’s arguments in opposition are without merit.**

2 1. *The Union’s evidence on vacancy rates is inconclusive and ultimately*
3 *irrelevant.*

4 The Union’s argument that CalPERS vacancy rates increased due to the hybrid telework
5 schedule is flawed for several reasons. First, the Union failed to show that the vacancy rate was
6 definitively tied to the hybrid schedule. Only two witnesses—Justin Delacruz and John Shipley—
7 provided direct testimony that they left CalPERS because of the hybrid schedule. (RT, Vol. 1, p.
8 96, 118.) The other testimony pertaining to the reasons other attorneys may have left CalPERS is
9 hearsay and unsupported by direct evidence. (See, e.g., RT, Vol. 1, pp. 68-69, 108.) Furthermore,
10 the evidence showed that at least some of the employees who left CalPERS retired, and did not
11 move to other agencies with full-time telework schedules. (RT, Vol. 1, p. 82.) Still other evidence
12 showed that at least some of the issues with vacancy rates at CalPERS were due to CalPERS not
13 making job offers to prospective employees quickly enough. (RT, Vol. 3, pp. 483-484.) Since
14 implementing “rapid recruitments” many of the divisions within CalPERS have seen vacancy rates
15 reduced to pre-pandemic levels, suggesting that vacancies at CalPERS cannot solely be attributed
16 to the hybrid telework schedule. (*Ibid.*) Notably, since moving to the hybrid telework schedule,
17 the Legal Office has also been able to hire five new attorneys, despite its hybrid schedule. (*Id.* at p.
18 388.)

19 In addition, the evidence showed that CalPERS is not alone in experiencing higher than
20 normal vacancy rates in the wake of the COVID-19 pandemic. (RT, Vol. 1, p. 240.) Virtually all
21 state agencies have experienced unusually high vacancy rates since the start of the pandemic.
22 (*Ibid.*) In fact, one of the exhibits referenced by the Union refers to a phenomenon called the
23 “Great Resignation,” in which employees across the country voluntarily chose to leave their jobs
24 “en masse” beginning in early 2021. Notably, according to the exhibit, this mass resignation
25 started well before CalPERS began returning employees to the office and is part of a broader
26 phenomenon, likely attributable to “higher wages,” “government support programs,” and increased
27 opportunities made available by remote and hybrid work schedules. (Union Exh. 2, p. 6.) Return
28 to office mandates were not listed as a contributing factor. (*Ibid.*) Thus, the Union’s claim that

1 vacancy rates at CalPERS are solely attributable to the hybrid schedule are simply not supported
2 by the evidence.

3 Second, whether the vacancy rate at CalPERS increased due to the hybrid schedule is
4 entirely irrelevant because management's reasons for denying CASE's request for telework had
5 nothing to do with vacancy rates. (See Joint Exh. 1, p. 40-47.) While vacancy rates are a valid
6 concern for most employers in general, they do not represent the sole or most important concern
7 for CalPERS regarding implementation of the hybrid schedule. (See RT, Vol. 3, p. 478.) Indeed,
8 Ms. Frost testified then when contemplating the return to office, she knew some employees might
9 leave the organization because of the hybrid schedule, but she decided to move forward with it
10 anyway. (*Ibid.*) As a result, Ms. Frost made the reasonable determination, in her capacity as CEO,
11 that creating a cohesive and collaborative working environment within the organization was more
12 valuable in the long-term than potentially losing a few employees in the short run. (*Ibid.*) Under
13 the MOU, Ms. Frost and other members of the management team have as the discretion to make
14 those fundamental determinations, and neither section 6.4 nor any other provision of the MOU
15 allows the Union or the arbitrator to second guess those managerial decisions.

16 Here, management had a reasonable basis for believing that denying CASE's request for
17 full-time telework would serve the various operational needs cited in support of their denial. This
18 is all section 6.4 requires. Thus, the Union's argument regarding vacancy rates is without merit.

19
20 2. *The Union's argument that collaboration can occur via remote means ignores
the practical reality that people tend to collaborate less when working remotely.*

21 The Union also makes the claim that collaboration, training, and communication can
22 theoretically occur just as easily and effectively via remote means as in person. This argument
23 ignores what CalPERS management witnessed first-hand during the pandemic, which was that
24 people were not using the remote tools available to them to collaborate with each other or to
25 communicate with their supervisors. (RT, Vol. 1, p. 228, Vol. 3, pp. 371-372.) Both Mr. Jacobs
26 and Ms. Salazar testified that the number of employees who spontaneously dropped in during the
27 workday significantly decreased when everyone started teleworking full-time. (*Ibid.*) According
28 to the witnesses, these employees did not replace these spontaneous in-person meetings by instead

1 sending more emails or making more telephone calls to their colleagues or supervisors. (*Ibid.*)
2 Rather, in most cases, informal communications like these decreased or simply stopped. (*Ibid.*)
3 Ms. Frost testified that in her experience, even though employees *can* pick up the phone or write an
4 email to their supervisor, the problem is they don't actually do this in practice. (RT, Vol. 3, p.
5 492.)

6 Furthermore, the Union's argument also runs contrary to the commentary and research on
7 this topic, which overwhelmingly recognizes that even though employees may have the means
8 available to them to communicate with their colleagues remotely, the fact is that they don't
9 communicate as often or to the same degree as they do in person. (See, e.g., Respondent's Exhs. 1,
10 4, 8.) Additionally, even if employees regularly used email or phone calls as a substitute for in-
11 person interactions, those methods of communication are generally recognized as inferior to in-
12 person communication, in part, because they do not convey non-verbal cues such as body language
13 and facial expressions, which are vital parts of the communicative process. (Respondent's Exh. 1,
14 p. 2; Respondent's Exh. 5, p. 3; see also RT, Vol. 1, pp. 262-263.)

15 Lastly, the Union's argument utterly fails to account for the unplanned, spontaneous
16 conversations that occur when people work with each other at the office. These regular,
17 impromptu conversations often lead to operational benefits and the transfer of knowledge that
18 would not otherwise occur via remote means. (See Respondent's Exh. 4, p. 1; Respondent's Exh.
19 5, p. 3.)¹¹ Consequently, someone working remotely full-time will completely miss out on these
20 important aspects of communication in the workplace. This is undoubtedly why study after study
21 shows that remote work does result in less collaboration, lower productivity, and less connection to
22 the overall mission of the employer, notwithstanding that employees could theoretically
23

24 ¹¹ As noted in the Yang study, "[T]here is a competitive advantage to successfully engaging
25 in the practice of 'knowledge transfer,' in which experiences from one set of people within an
26 organization are transferred to and used by another set of people within that same organization..."
27 (Respondent's Exh. 4, p. 1.) This is corroborated in the article by Dr. Helen Hughes, an Associate
28 Professor at Leeds University Business School, and a Chartered Occupational Psychologist, in
which she concludes that remote results in "fewer opportunities for impromptu discussion that
might lead to a development opportunity. Most conversations occurred through meetings and so
interactions were generally both planned and purposeful. There were fewer serendipitous
conversations ('water cooler moments')." (Respondent's Exh. 5, p. 3.)

1 communicate with each other via remote means. (Respondent’s Exhs. 1-8.) Thus, the Union’s
2 argument that management’s operational needs can be satisfied via remote means is inconsistent
3 with the research and is disconnected from the practical realities of the workplace.¹²
4

5 3. The Union erroneously argues that because attorneys may occasionally have
6 different in-office days that the hybrid telework schedule is somehow not truly
7 aimed at increasing collaboration.

8 The Union argues that because the attorneys have been granted the flexibility to choose
9 their own days in the office, the hybrid telework schedule is not truly aimed at achieving the
10 desired result of increasing collaboration. The Union reasons that because there is no guarantee
11 everyone will be in the office on the same day, the schedule is not actually designed to increase
12 collaboration.

13 This argument is flawed. CalPERS requires its attorneys, as a general rule, to come into the
14 office three days per week. This means there is considerable overlap in the attorneys’ in-office
15 schedules such that on any given day there are a number of attorneys in the office to allow for
16 collaboration and training to occur. The evidence showed that almost all of the attorneys are in the
17 office on Wednesdays and Thursdays, and more than half of the attorneys are in the office on each
18 of the other days of the week. (Respondent’s Exh. 12 [listing the days of the week each attorney is
19 in the office].) While this may not provide as many opportunities for collaboration as, for
20 example, requiring all attorneys to come into the office five days per week (which management
21 could have done), it still provides significant opportunities for both attorneys and support staff to
22 collaborate in person. Nothing in section 6.4 requires management to take an “all or nothing”
23 approach to meeting its operational needs. As Ms. Frost explained, in any managerial decision
24 there will always be tradeoffs. (RT, Vol. 3, p. 477.) In this case, management allowed the

25 _____
26 ¹² The evidence also showed that fully virtual meetings were less effective than in-person
27 meetings. Both Ms. Salazar and Mr. Jacobs testified that it was difficult to gauge people’s reactions
28 in a virtual meeting, they were less engaged, there were more interruptions and distractions, and
there was a complete loss of the informal conversations that typically occur before and after in-
person meetings, which generally strengthen relationships in the office and help employees operate
more effectively as a team. (RT, Vol. 1, pp. 229-230; RT, Vol. 3, p. 375.)

1 attorneys to telework two days per week and provided them the flexibility to choose which days
2 they come into the office. By so doing, management has appropriately opted to forego some
3 (though not all) opportunities for collaboration in order to give employees more flexibility in their
4 telework schedules. (See, RT, Vol. 3, p. 404.) Nothing in section 6.4 prohibits management from
5 making such a compromise.

6 Moreover, it was CASE’s members who requested this flexibility in the first place. (RT,
7 Vol. 1, p. 29.) According to Austa Wakily, one of the Union’s chief witnesses, the attorneys did
8 not initially have the flexibility to choose their own days in the office, but when the attorneys
9 voiced their concerns, management agreed to compromise. (*Ibid.*) Management should not be
10 penalized for attempting to meet employees halfway. CASE cannot argue in good faith that
11 management’s policy must be rescinded simply because management agreed to give the attorneys
12 the flexibility they themselves requested.

13
14 4. *The Union’s argument that CalPERS has the burden in this case is misguided*
15 *and incorrect.*

16 The Union erroneously argues that the burden is on management to provide specific
17 measurements showing that in-office time results in increased collaboration and productivity. (RT,
18 Vol. 1, pp. 12, 255.) In making this argument, the Union fundamentally misconstrues the burden
19 of proof in this case. The burden of proof in a labor dispute is typically on the grievant, not the
20 employer. (See, e.g., *Seminole County and IAFF* (2017) 2017 WL 6016144 (Hoffman) [“[I]n a
21 contract grievance...it is widely established that the union’s burden is to prove to the arbitrator by a
22 preponderance of the evidence that it established ‘just enough evidence to make it more likely than
23 not’ that what the union seeks to prove is true.”]; *Unite Here Local 11 and Hyatt Hotels*
24 *Corporation* (2022) 2022 WL 5316024 (Gonzales) [“As this is a contract interpretation case, the
25 Union has the burden of proof.”]; *United Food v. Rite Aid.* (2008) 2008 WL 6045801 (Block)
26 [“Since it is the Unions that allege the Collective Bargaining Agreement has been violated, they
27 have the burden of proof.”].) Thus, it is CASE’s burden to establish, by a preponderance of the
28 evidence, that management’s denial of telework was *not* supported by the stated operational needs.

1 Furthermore, the Union’s claim that management’s hybrid schedule must be revoked
2 simply because management has not kept detailed statistics on the effectiveness of in-person versus
3 remote work is absurd. Section 6.4 does not require scientific accuracy to support a denial of an
4 employee’s telework request. As long as management’s denial is reasonably related to legitimate
5 operational needs, no violation of section 6.4 occurs. As noted above, the evidence showed that
6 culture and collaboration, as well as training and productivity, did, in fact, suffer when employees
7 were teleworking full-time. (Part III.B., *ante.*) Management had two full years in which it
8 experienced exactly the type of telework arrangement requested by the Union. (*Ibid.*) During
9 those two years management saw first-hand how remote work weakened the bonds between
10 employees, reduced collaboration, made communication more difficult and less efficient, and
11 reduced morale among staff. (*Ibid.*)

12 Conversely, management saw what happened when employees came back into the office—
13 morale improved, management’s ability to mentor and assimilate new staff was enhanced, and
14 collaboration increased (especially through spontaneous communications, which can only occur
15 when employees are physically in the office). (*Ibid.*) Furthermore, the research backed
16 management’s first-hand experience, with study after study showing that fully remote work tends
17 to lead to poorer results in terms of productivity, communication, collaboration, and a host of other
18 operationally relevant factors. (*Ibid.*; Respondent’s Exh. 1-8.) This evidence was more than
19 sufficient to meet the minimal requirement under section 6.4 that a denial of telework be based on
20 operational needs. Accordingly, for all of the reasons discussed above, the Union has failed to
21 establish a violation of section 6.4, and the grievance should be denied.

22
23 **IV. BECAUSE CALPERS’S TELEWORK POLICY APPLIES EQUALLY TO ALL**
24 **“SIMILARLY SITUATED” CALPERS EMPLOYEES, THE UNION FAILED TO**
25 **SHOW A VIOLATION OF SECTION 3.1.**

26 CASE’s section 3.1 claim must also be dismissed. CASE alleges that CalPERS has
27 violated section 3.1 by failing to uniformly apply its policy to all “similarly situated” employees.
28 The claim must be rejected because the Union failed to show that the policy in question applied
differently to similarly situated employees. On the contrary, everyone in the Legal Office was

1 subject to the same general expectation that employees come into the office at least three days per
2 week. In addition, the evidence showed that management was more than fair in its approach to
3 granting exceptions to this general rule. (See, e.g., RT, Vol. 1, pp. 240, 244.) Both Ms. Frost and
4 Ms. Morgan testified that requests to telework more than two days per week would be considered
5 and granted on a case-by-case basis. (RT, Vol. 3, pp. 432, 482-483.)

6 While some divisions within CalPERS—namely, the call center and IT help desk—were
7 allowed to telework more often, those employees had substantially different duties, responsibilities,
8 and work expectations than the attorneys in the Legal Office. (RT, Vol. 1, pp. 238-239; RT, Vol.
9 3, pp. 479.) As noted above, those units are highly scripted and heavily monitored and do not
10 generally benefit from increased opportunities for collaboration to the same degree as the attorneys
11 and other professional units within CalPERS. (*Ibid.*) Accordingly, the attorneys are not in any
12 way “similarly situated” to the groups who are allowed to telework full-time.

13 In addition, CASE failed to show that the attorneys at CalPERS were similarly situated to
14 employees at any of the other departments mentioned during the hearing, including, for example,
15 the Department of Justice (DOJ). No evidence was presented to suggest that the duties and
16 responsibilities of the employees or the operational needs of those departments were at all similar
17 to those of CalPERS. Moreover, even if there were some similarities between the two groups,
18 section 3.1 only applies to employees who are “affected” by the particular rule or policy in
19 question. (Joint Exh. 2, § 3.1.) Here, CalPERS’s telework policy does not apply to DOJ
20 employees. CalPERS’s telework policy applies fairly and equally to all similarly situated
21 employees, *to whom the policy applies*, namely CalPERS employees. Accordingly, CASE’s
22 section 3.1 claim is without merit and should be denied.

23
24 **V. GRANTING THE UNION’S REQUEST FOR A COMPLETE RESCISSION OF**
25 **THE IN-OFFICE SCHEDULE WOULD VIOLATE FUNDAMENTAL**
26 **MANAGEMENT RIGHTS AND EXCEED THE SCOPE OF THE ARBITRATOR’S**
AUTHORITY.

27 With regard to the Union’s remedy, the Union asks the arbitrator to issue an award “[t]hat
28 CalPERS attorneys be allowed to telework as much as possible and only be required to go into the

1 office when necessary for such things, such as subpoena duties and scheduled client meetings.”
2 (Joint Exh. 1, p. 9.) This remedy would require a complete rescission of the employer’s general in-
3 office schedule and thus would exceed any reasonable articulation of the arbitrator’s authority.

4 Under section 3.1 of the MOU, management has the right to establish the general telework
5 schedule for its employees. (Part III.A., *ante.*) Section 3.1 states that management has the
6 “exclusive right” to “determine the methods, means and personnel by which State operations are to
7 be conducted.” (Joint Exh. 2, § 3.1, pp. 14-15.) This includes the right to determine how many
8 days, by default, employees are required to come into the office. Section 6.4 requires management
9 to consider deviations from that general schedule on a case-by-case basis and only deny such
10 requests if there is an operational need for doing so. Thus, the only proper remedy in this case,
11 assuming a violation even exists (which it does not), would be limited to a finding that the
12 employer’s response to the Union’s request was somehow inadequate, and potentially, if
13 appropriate, ordering the employer to cure the defects in its response.

14 The MOU does not authorize the arbitrator to make wholesale changes to the general
15 hybrid telework schedule adopted by CalPERS. By asking that employees be given maximum
16 flexibility to telework as much or as little as they want, the Union in this case is seeking to take
17 management completely out of the loop with regard to telework requests. Under the Union’s
18 proposed arrangement, management would have no right to approve or deny individual employee
19 requests for telework. Rather, employees would simply get to tell management when it is
20 necessary for them to come into the office. Granting such a remedy would effectively render
21 section 6.4 meaningless—if an employee no longer needs to make a request to telework, then
22 section 6.4 no longer serves any purpose. Such an interpretation would run counter to well-
23 established maxims of contract interpretation, which hold that interpretations rendering contractual
24 clauses “nugatory, inoperative or meaningless” should be strictly avoided. (*People v. Doolin*
25 (2009) 45 Cal.4th 390, 413.)

26 The Union will likely argue that it is not asking for employees to be able to come in
27 whenever they want, but only in those circumstances that the arbitrator deems operationally
28 necessary. This, too, would clearly be an improper remedy. As noted above, it is a fundamental

1 principle in labor relations that in matters of managerial prerogative an arbitrator may not
2 substitute his or her judgment for that of management. (Elkouri & Elkouri, *How Arbitration Works*
3 (4th ed. 1991) p. 665.) For the arbitrator to usurp management's role in determining how best to
4 meet its operational needs, would constitute a clear violation of management's rights under the
5 MOU as established by section 3.1. It would also place the arbitrator, who has little working
6 knowledge of CalPERS's operations, in the impossible position of having to step into the shoes of
7 management and decide for the organization as a whole, which operational needs are valid and
8 which are not. This kind of requested remedy is neither consistent with the MOU, nor long-held
9 constraints on arbitrable authority over fundamental management rights. For that reason, the
10 requested remedy by the Union is improper and should be rejected.

11
12 **CONCLUSION**

13 As discussed more above, the grievance filed by the Union is untimely under section 7.7,
14 and invalid under section 6.4. Moreover, management's denial of the Union's request was based
15 on multiple, legitimate operational needs that were reasonably and rationally related to its denial.
16 Accordingly, the grievance should be denied in its entirety.

17
18 Dated: March 18, 2024

Respectfully submitted,

19 FROLAN R. AGUILING
20 Chief Counsel

21 SANDRA L. LUSICH
22 Deputy Chief Counsel

23 By:


24 DAVID M. VILLALBA
25 Principal Labor Relations Counsel
26 Attorneys for Respondent
27
28