ATTACHMENT A

THE PROPOSED DECISION

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BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Calculation of Final Compensation of: CHRISTINE LONDO, Respondent, and CITY OF WALNUT, Respondent.	Case No. 2014-0881 OAH No. 2014070904

PROPOSED DECISION

Humberto Flores, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on November 5, 2014, in Glendale, California.

Roy Coffey, Staff Counsel, represented the California Public Employees' Retirement System, State of California (CalPERS).

Stephen H. Silver, Attorney at Law, represented Christine Londo (respondent) Londo, who was present throughout the administrative hearing.

The City of Walnut was represented by Michael Montgomery, City Attorney for the City of Walnut.

Evidence was received and the record was left open to allow the parties to submit written briefs and argument. The CalPERS and respondent Londo submitted their closing briefs and arguments on December 5, 2014. Respondent Londo submitted her reply brief on December 12, 2014. The City of Walnut did not submit a closing brief. The closing brief submitted by CalPERS was marked Exhibit 16 for identification only. The closing and reply briefs submitted by respondent Londo were marked collectively as Exhibit E for identification only.

The Administrative Law Judge reviewed the parties' written briefs on December 14, 2014, and the matter was deemed submitted on that date.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 2-4-2015

ISSUE

Should the total compensation respondent Londo received during a 12 month period in 2005 and 2006, from her employment with the City of Walnut when working as the Interim City Manager and Finance Director/City Treasurer be treated as "final compensation" for the purpose of calculating her CalPERS' service retirement benefits?

FACTUAL FINDINGS

Background

1. Respondent Londo (Londo) became a member of CalPERS as a result of her employment with the City of West Covina. In 1988, Londo was hired by the City of Walnut. Her full-time position in the City of Walnut was that of Finance Director/City Treasurer. She held that position until she retired in September 19, 2013. CalPERS determined that respondent Londo's final compensation monthly pay rate to be $12,325.99.

2. In October 2005, the City Manager of the City of Walnut resigned his position. Thereafter, City Attorney Montgomery asked Londo if she would be interested in taking on the additional position and duties of Interim City Manager in addition to performing her duties as Finance Director. Respondent Londo accepted on the condition that she would receive a $5,000 increase in her monthly salary as additional compensation for the performing the duties of City Manager.

3. In an October 31, 2005 memorandum to the City Council, Mr. Montgomery wrote:

> SUBJECT : <u>INTERIM CITY MANAGER</u>
>
> At the October 26, 2005 City Council meeting, the City Council appointed Finance Director Christine Londo as the Interim City Manger [sic]. Ms. Londo is willing to retain her current Finance Director position, title, duties and salary and in addition, she will agree to be compensated in the additional sum of $5,000 a month, with the commensurate benefits for performing the additional duties of City Manager.
>
> **<u>RECOMMENDATION</u>**
>
> It is recommended that the City Council approved [sic] the Interim City manager compensation of $5,000 a month plus commensurate benefits effective October 27, 2005. (Exhibit 10, page 1, bold in original.)

4. On October 31, 2005, Londo wrote the following memorandum to the members of the Walnut Improvement Agency:

> The City Manager of the City of Walnut serves as the Executive Director of the Walnut Improvement Agency. This office [City Manager] was vacated on October 27, 2005, and it is necessary to appoint the Interim City Manager as the Interim Executive Director.
>
> It is recommended that the Agency appoint the Interim City Manager, Christine Londo, as the Interim Executive Director of the Walnut Improvement Agency. (Exhibit 10, page 2)

5. In the October 26, 2005 Walnut City Council meeting, the City Council appointed Londo as "Acting City Manager" (Exhibit 11). In the November 30, 2005 Walnut City Council meeting, the City Council voted to "approve the Interim City Manager compensation of $5,000 per month plus commensurate benefits effective October 27, 2005" (Exhibit C). Respondent Londo assumed the duties of Interim City Manager for the city of Walnut in November 2005, and continued in that position through November 2006. During that time, the City of Walnut reported a pay increase of $5,000.

6. Respondent Londo presented testimony that she assumed the position and duties of City Manager on a full-time basis. Respondent Londo asserts in her written brief that it was a permanent position. This assertion is not persuasive as it contradicts the documentary evidence set forth in Factual Findings 3, 4 and 5. The action of the City Council reported in the minutes of October 2005 City Council meeting refers to respondent Londo's position as "Acting City Manager." The reported minutes of the November 2005 City Council meeting refers to respondent Londo's position as "Interim City Manager." In their memoranda, both City Attorney Montgomery and respondent Londo refer to the subject position as "Interim City Manager." The documentary evidence shows that all of the parties involved (including respondent Londo) intended that respondent Londo's position of Interim City Manager would be a temporary. Indeed, respondent Londo testified that she would only serve as City Manager through sometime in 2006.

7. On January 13, 2010, pursuant to a request by respondent Londo, the Retirement Estimate Unit of CalPERS notified respondent Londo that Cal PERS had calculated a final compensation of $15,568.90 from 11/01/2005 to 10/31/2006. Respondent Londo received another estimate in 2013 reporting the same amounts as the 2010 estimate. She was also provided with an estimate of her monthly pension amount in the event she retired at age 62.75. Respondent Londo testified that this estimate was a major factor in her decision to retire. Respondent Londo retired on September 19, 2013.

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8. On November 26, 2013, Tomi Jimenez, Manager of the Compensation and Employer Review Customer Account Services Division of CalPERS, wrote a decision letter to respondent Londo informing Londo that CalPERS would not consider as part of her pay rate for establishing a final compensation, the additional $5,000 per month that respondent Londo earned for assuming the duties of Interim City Manager. In the letter, Ms. Jimenez writes:

> CalPERS made multiple attempts at retrieving a salary schedule and/or documents publicly approved by the governing body of the City identifying the pay rate for your position of Interim City Manager, but was not provided with the requested information. The City provided a recommendation from Michael B. Montgomery, City Attorney, to the City Council stating that you were willing to retain your current Finance Director position, title duties, and salary and agreed to be compensated the additional sum of $5,000 per month for performing the additional duties of City Manager. This document is not considered a publicly available pay schedule and cannot be used to verify your pay rate. Even if the recommendation was considered a publicly available pay schedule, the additional sum of $5,000 per month would be considered pay rate because it was not part of your normal rate of pay that was paid to similarly situated members in the same group or class employment, and you continued to work in your capacity as the Finance Director/City Treasurer while performing the additional duties of City Manager. Furthermore, the additional sum of $5,000 would not be considered temporary upgrade pay because you did not assume the upgraded position. Instead you performed some additional duties while remaining in your primary position of Finance Director/City Treasurer. (Exhibit 5)

9. Respondent Londo filed an appeal of the decision by CalPERS excluding the additional $5,000 per month she earned for assuming the duties of Interim City Manager. In her appeal, respondent Londo contended that California Code of Regulations, title 2, section 570.5, which was cited by CalPERS in its decision letter, was enacted after respondent Londo earned the disputed income.

10. Respondent Londo testified that she was working full-time as the City Manager and that most of her duties as Finance Director/City Treasurer were taken over by her Accounting Manager who took over the supervisory role in that department. However, respondent Londo maintained her position Finance Director/City Treasurer. Respondent Londo further testified that although she assumed the duties and responsibilities of the City Manager she did not increase her hours of work.

11. The highest monthly pay rate for the Finance Director/City Treasurer set forth in July 2006 Salary Schedule for the City of Walnut was $10,362. The City of Walnut did not establish a pay rate for the position of Interim City Manager. Respondents Londo and/or the City of Walnut did not present documentary evidence of the monthly salary or pay rate for the position of City Manager during the relevant time period.

LEGAL CONCLUSIONS

Relevant Statues and Regulations

1. The following provisions of the Government Code are relevant to this appeal:

Section 20630 provides:

> (a) As used in this part, "compensation" means the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work for any of the following:
>
> (1) Holidays
>
> (2) Sick Leave
>
> (3) Industrial Disability Leave . . .
>
> (4) Vacation
>
> (5) Compensatory Time Off
>
> (6) Leave of Absence
>
> (b) When compensation is reported to the Board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall be reported in accordance with Section 20636 and shall not exceed compensation earnable, as defined in Section 20636.

Section 20635 provides:

> When the compensation of a member is a factor in any computation to be made under this part, there shall be excluded from those computations any compensation based on overtime

put in by a member whose service retirement allowance is a fixed percentage of final compensation for each year of credited service. For the purposes of this part, overtime is the aggregate service performed by an employee as a member for all employers and in all categories of employment in excess of the hours of work considered normal for employees on a full-time basis, and for which monetary compensation is paid.

If a member concurrently renders service in two or more positions, one or more of which is full time, service in the part-time position shall constitute overtime. If two or more positions are permanent and full time, the position with the highest payrate or base pay shall be reported to this system. This provision shall apply only to service rendered on or after July 1, 1994.

Section 20636 states in pertinent part:

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

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

[¶ . . . ¶]

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

(2) Special compensation shall be limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate. If an individual is not part of a group or class, special compensation shall be limited to that which the board determines

is received by similarly situated members in the closest related group or class that is in addition to payrate, subject to the limitations of paragraph (2) of subdivision (e).

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

[¶ . . . ¶]

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

Government Code section 20049 states:

"Labor policy or agreement" means any written policy, agreement, memorandum of understanding, legislative action of the elected or appointed body governing the employer, or any other document used by the employer to specify the payrate, special compensation, and benefits of represented and unrepresented employees.

2. The following provisions of the California Code of Regulations, title 2, division 1, chapter 2, subchapter 1, are relevant to this appeal:

Section 570.5 – Requirement for a Publicly Available Pay Schedule

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 571 – Definition of Special Compensation

(a) The following list exclusively identifies and defines special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS if they are contained in a written labor policy or agreement:

[¶ . . . ¶]

(3) PREMIUM PAY

Temporary Upgrade Pay - Compensation to employees who are required by their employer or governing board or body to work in an upgraded position/classification of limited duration.

[¶ . . . ¶]

(b) The Board has determined that all items of special compensation listed in subsection (a) are:

(1) Contained in a written labor policy or agreement as defined at Government Code section 20049, provided that the document:

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

(B) Indicates the conditions for payment of the item of special compensation, including, but not limited to, eligibility for, and amount of, the special compensation;

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

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

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

(F) Does not reference another document in lieu of disclosing the item of special compensation;

(2) Available to all members in the group or class;

(3) Part of normally required duties;

(4) Performed during normal hours of employment;

(5) Paid periodically as earned;

(6) Historically consistent with prior payments for the job classification;

(7) Not paid exclusively in the final compensation period;

(8) Not final settlement pay; and

(9) Not creating an unfunded liability over and above PERS' actuarial assumptions.

(c) Only items listed in subsection (a) have been affirmatively determined to be special compensation. All items of special compensation reported to PERS will be subject to review for continued conformity with all of the standards listed in subsection (b).

(d) If an items (sic) of special compensation is not listed in subsection (a), or is out of compliance with any of the standards in subsection (b) as reported for an individual, then it shall not be used to calculate final compensation for that individual.

Respondent Longo's Compensation for Service as Interim City Manager

3. In this case, Respondent Londo was appointed Interim City Manager. This was not a permanent position. The evidence established that it was the intent of all of the parties involved that the position would be temporary (Exhibits 10 and 11). The parties also intended that respondent Londo would be compensated for the additional hours that she would work beyond her normal working hours as Finance Director/City Treasurer in order to meet the added responsibilities of Interim City Manager. In accordance with the parties' intent, respondent Londo received the pay rate she was entitled to as Finance Director/City Treasurer and received the additional compensation for acting as the Interim City Manager. The City of Walnut did not establish a pay rate pursuant to Government Code section 20636, subdivision (b)(1), based on a publicly available pay schedule for the position of Interim City Manager or the combination of Interim City manager/Finance Director. The monthly compensation respondent Londo received as Interim City Manager was not available to other City of Walnut employees who were similarly situated. Under the facts of this case, the additional $5,000 that respondent Londo received for serving as Interim City Manager should not be considered as part of her final compensation for the purpose of calculating her CalPERS service retirement benefits based on Government Code section 20636 (b)(1).

4 Respondent Londo asserted that she served as Interim City Manager in a permanent full-time capacity and that she spent most of her time performing the duties of Interim City Manager. Based on this assertion, respondent Londo contends that she was in fact working in two full-time positions, which was allowed under the City's Municipal Code, section 2-23.[1] Therefore, she qualifies under Government Code section 20635 to receive a pension amount based on the higher base rate pay of the City Manager position. Even if respondent's assertion that she served in two full-time positions is true, her contention that she should be credited with the City Manager's base rate pay is not persuasive. The City of Walnut and respondent Londo did not agree to a base rate pay for her service as Interim City Manager. The agreement was for respondent Longo to maintain her position and base rate pay as Finance Director/City Treasurer and to receive an additional $5,000 to serve as Interim City Manager. Irrespective of how respondent Longo chose to divide her time in performing the duties of both positions, her highest monthly pay rate during the relevant time period was $10,362, based on her position as Finance Director/City Treasurer. Pursuant to Government Code section 20635 her base rate pay for Finance Director/City Treasurer should have been reported to CalPERS as her highest pay rate. Therefore, respondent Londo did not establish that she is entitled to include the $5,000 additional compensation in her CalPERS retirement calculation based on Government Code section 20635.

Special Compensation

5. California Code of Regulations, title 2, section 571, subdivision (a)(3), provides that "Special Compensation" is reportable to CalPERS if it is contained in a written labor policy or agreement. Special Compensation includes Premium Pay/Temporary Upgrade Pay, which is defined as "Compensation to employees who are required by their employer or governing board or body to work in an upgraded position/classification of limited duration."

In this case respondent Londo entered into an agreement with the City of Walnut wherein she agreed to work in the upgraded position of Interim City Manager for an additional compensation of $5,000. The agreement complies with Government Code section 20049 in that it was subject to a vote by the City Council based a on a recommendation by the City Attorney that specified a compensation of $5,000. This agreement set forth in a memorandum by the City Attorney to the City Council along with a recommendation that was public record in that it was included as an agenda item in the November 2005 City Council minutes. The City Council acted on the recommendation and voted in a public City Council meeting to appoint respondent Londo as "Acting City Manager. This City Council's

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[1] Walnut City Code, section 2-23 states: "The city manager shall be the administrative head of the city government under the direction and control of the city council . . . In addition to his general powers, . . . it shall be his or her duty and he shall have the power: . . . (p) To serve in any appointed office or head of department within the city government to which he may be qualified when appointed thererto by the city council and to hold and perform the duties thereof at the pleasure of the city council."

action to appoint respondent Londo as Acting City Manager was also public record in that it was included in the minutes of the November 2005 City Council meeting (Exhibit C).

Once she was appointed, respondent Londo was required to work in the upgraded position of Interim City Manager. The action by the City Council has been maintained in the City of Walnut records since 2005, and available for public inspection. The total amount of compensation received by respondent Londo during the relevant time period was consistent with the salary that had been paid to the prior City Manager. Finally, there was no evidence presented that this special compensation would create an unfunded liability over and above CalPERS' actuarial assumptions. Therefore, respondent Londo has established that the monthly $5,000 that she was paid to perform the duties of the position of City Manager qualifies as "Special Compensation" under Government Code section 20636, subdivision (c), and as a Premium Pay/Temporary Upgrade Pay under California Code of Regulations, title 2, section 571, subdivision (a)(3).

6. Cause exists to overrule the decision of CalPERS to exclude from calculation of respondent Londo's retirement benefit allowance, all compensation Londo received as Interim City Manager.

Equitable Estoppel

7. Respondent Longo asserts that equitable estoppel should be applied in this case because respondent Longo relied on the written estimates she received from CalPERS delineating the her final compensation and pension amounts she was entitled to receive. Based on the Legal Conclusions 5 and 7, it is unnecessary to address this issue.

ORDER

The determination by CalPERS to exclude from the calculation of service retirement allowance the $5,000 monthly payments made to respondent Christine F. Londo in connection with her service as Interim City Manager for the City of Walnut from November 2005 through November 2006 is overruled. The appeal filed by respondent Christine F. Londo is granted.

DATED: January 14, 2015

HUMBERTO FLORES
Administrative Law Judge
Office of Administrative Hearings