ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DECLINE TO ADOPT THE PROPOSED DECISION

Respondent Christine Londo (Respondent Londo) was employed by Respondent City of Walnut (City) as the Finance Director/City Treasurer. The City contracted with CalPERS to provide retirement benefits to its employees. By virtue of her employment, Respondent Londo was a local miscellaneous member of CalPERS. In September 2013, Respondent Londo submitted an application for service retirement. CalPERS staff reviewed her file and determined that additional compensation paid to her ($5,000 per month) during the period of November 2005 through November 2006, for work she performed in addition to her work as the Finance Director/City Treasurer, could not be included in her final compensation for purposes of calculating her service retirement allowance. Respondent Londo appealed staff's determination and a hearing was held on November 5, 2014. Respondent Londo was represented by counsel before and during the appeal hearing.

The Administrative Law Judge (ALJ), in applying the relevant and controlling statutes to the facts, correctly rejected two of the three legal arguments advanced by Respondent to include the disputed additional compensation in Respondent Londo's final compensation. However, the ALJ incorrectly interpreted another statutory provision and concluded that the disputed additional compensation could and should be included in Respondent Londo's final compensation. For that reason, staff recommends that the Board decline to adopt the Proposed Decision and that it hear and decide the matter after a Full Board Hearing.

SUMMARY OF FACTS

Respondent Londo was employed by the City as its Finance Director/City Treasurer. That position was a full-time position and the City had established a payrate of $10,362 per month for the position. The payrate for the position of Finance Director/City Treasurer was contained in a publicly available Salary Schedule (July 2006) created and approved by the City.

In October 2005, the City Manager of the City resigned. The City Attorney approached Respondent Londo and asked her if she would be interested and willing to take on the additional position and duties of <u>Interim</u> City Manager, in addition to performing her duties of Finance Director/City Treasurer. Respondent Londo accepted the position of Interim City Manager with the understanding and agreement that (1) the City would pay her an additional $5,000 per month (over and above her regular salary as the Finance Director/City Treasurer); and (2) the position of Interim City Manager would be temporary, not permanent. The understanding and agreement between Respondent Londo and the City was documented. In an October 31, 2005, memorandum to the City Council, the City Attorney wrote, in relevant part:

> 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.

Respondent Londo assumed the duties of Interim City Manager (in addition to her regular duties of Finance Director/City Treasurer) in November 2005 and continued in the position through November 2006. The City paid Respondent Londo an additional $5,000 per month during that period for her work as the Interim City Manager.

The ALJ correctly found:

> [T]he documentary evidence shows that all of the parties involved (including respondent Londo) intended that respondent Londo's position of Interim City Manager would be temporary. Indeed, respondent Londo testified that she would only serve as City Manager through sometime in 2006. (Factual Findings No.6.)

The City did not create a permanent position of Interim City Manager. The City did not create a permanent position of Interim City Manager – Finance Director/City Treasurer. The City did not create and publish in a publicly available pay schedule a payrate for the position of Interim City Manager. The monthly compensation Respondent Londo received during the year she performed duties as both the Finance Director/City Treasurer and Interim City Manager was not available to other employees of the City who were similarly situated.

THE ALJ'S PROPOSED DECISION ERRONEOUSLY FINDS THAT THE DISPUTED $5000/MONTH PAY IS "TEMPORARY UPGRADE PAY" A FORM OF SPECIAL COMPENSATION

The California Public Employees' Retirement Law provides that certain items of "special compensation" can be included in an individual's final compensation, or compensation earnable, for purposes of calculating their service retirement allowance. Government Code section 20636 subdivision (a) provides that "compensation earnable" consists of either payrate or special compensation. Subdivision (c) reads, as follows:

> (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. [¶]

Section 571, subdivision (a)(3) provides the following definition of one item of allowable special compensation:

> 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.

The ALJ incorrectly found that the Interim City Manager position was an "upgraded position" and that Respondent Londo was entitled to include the $5,000 monthly compensation paid to her as an item of allowable special compensation. (See Legal Conclusions No. 5.) The ALJ's conclusion is flawed.

Staff, in its November 26, 2013, letter to Respondent Londo correctly advised her:

> [F]urthermore, the additional sum of $5,000 would not be considered temporary upgrade pay <u>because you did not assume the upgraded position.</u> Instead, you performed some additional duties while remaining in your primary position of Finance Director/City Treasurer. (Emphasis added.)

The City did <u>not</u> create an upgraded position of Interim City Manager or Interim City Manager and Finance Director/City Treasurer. Respondent Londo did <u>not</u> relinquish or vacate her permanent position of Finance Director/City Treasurer. The City did <u>not</u> create or establish a new payrate for the position of Interim City Manager or Interim City Manager and Finance Director/City Treasurer.

This issue has previously been considered by the Board. Reference is made to *In the Matter of the Appeal for Calculation of Benefits Pursuant to The Employer's Report of Final Compensation, Roy T. Ramirez, Respondent, and City of Indio, Respondent (2000)* California Public Employees' Retirement Board of Administration, Precedential

Decision No. 00-06. A comparison of the Factual Findings, Legal Conclusions, and Decision in *Ramirez* with the instant matter demonstrates that the Board's Precedential Decision is controlling with respect to Respondent Londo's appeal.

RAMIREZ	**LONDO**
• Ramirez was employed by the City as the Police Chief.	• Londo was employed by the City as the Finance Director/City Treasurer.
• The position was a full-time position.	• The position was a full-time position.
• Ramirez was paid a salary for the position of Chief of Police that was contained in a publicly available pay schedule.	• Londo was paid a salary for the position of Finance Director/City Treasurer that was contained in a publicly available pay schedule.
• The position of City Manager became vacant.	• The position of City Manager became vacant.
• Ramirez agreed to act as the Interim City Manager, on a temporary basis, in addition to performing his duties as Chief of Police.	• Londo agreed to act as the Interim City Manager, on a temporary basis in addition to performing her duties as Finance Director/City Treasurer.
• Ramirez negotiated additional compensation ($2,500 per month) for performing the duties of Interim Manager.	• Londo negotiated additional compensation ($5,000 per month) for performing the duties of Interim Manager.
• Ramirez increased his workload to more than 60 hours per week.	• Londo increased her workload.
• The City did not establish a permanent position of Chief of Police/City Manager.	• The City did not establish a permanent position of Director of Finance/City Manager.
• The City did not establish a payrate for the position of Chief of Police/City Manager.	• The City did not establish payrate for the position of Director of Finance/City Manager.
• When Ramirez accepted the additional responsibilities of Interim City Manager, he did not anticipate retiring when a permanent City Manager was appointed.	• When Londo accepted the additional responsibilities of Interim City Manager, she did not anticipate retiring when a permanent City Manager was appointed.

The Legal Conclusion in *Ramirez* (Paragraph 13) can and should be modified to be the controlling Legal Conclusion in the instant matter, as follows:

> Good cause exists to sustain the Chief Executive Officer's determination that the disputed payments made to [Respondent Londo] in connection with [her] service as the Interim City Manager, [City of Walnut], be excluded from the calculation of [her] service retirement benefit allowance.

THE ALJ CORRECTLY APPLIED THE PROVISIONS OF GOVERNMENT CODE SECTIONS 20635 AND 20636 IN FINDING THAT THESE STATUTES DID NOT SUPPORT RESPONDENT'S CASE

Government Code 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 the system. This provision shall apply to service rendered on or after July 1, 1994.

Government Code section 20635 cannot be used in support of Respondent Londo's claim that the Finance Director/City Treasurer and Interim City Manager positions were both full time and permanent AND that the Interim City Manager position was the position with the "highest payrate or base pay," and that, therefore, her final compensation should include the $5,000 per month she received in 2005-2006. First, the Interim City Manager position was not a permanent position. Second, the City did not create or establish a payrate or base pay for the position of Interim City Manager.

In Legal Conclusions No. 4, the ALJ correctly applied the terms of Government Code section 20635 to Respondent Londo's claims that she worked two full-time positions.

> [E]ven 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 [*sic*] 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 [*sic*] 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. (Emphasis added.)

Government Code section 20636 provides, in relevant part, as follows:

> (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 publically 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). [¶] . . . [¶]

Government Code section 20636 also cannot be used to support Respondent Londo's claim to include the additional $5,000 per month paid to her to be included in her final compensation. First, there was no group or class of similarly situated employees of the City who received or could have received the additional compensation paid to Respondent Londo. Second, there was no publicly available pay schedule that identified the additional compensation paid to Respondent Londo. Third, Respondent Londo continued to be paid her normal payrate for her position of Finance Director/City Manager, for work she performed "on a full-time basis during normal working hours." Again, the ALJ correctly applied the provisions of Government Code section 20636, subdivision (b)(1) to reject Respondent Londo's claims. In Legal Conclusions No. 3, the ALJ held:

> 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). (Emphasis added.)

The ALJ concluded that Respondent Londo's appeal should be denied, in part; but the ALJ also concluded that Respondent Londo's appeal should be granted. As explained and argued above, staff believes that the Proposed Decision is flawed and should be rejected by the Board. Most importantly, the Proposed Decision is diametrically contrary to a Precedential Decision of the Board, therefore should not be adopted without the detailed scrutiny exercised during a Full Board Hearing. Staff recommends that the Board reject the Proposed Decision and hear and determine the matter in a Full Board Hearing.

March 18, 2015

Rory J. Coffey

RORY J. COFFEY
Senior Staff Attorney