ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Teresa Jacobo (Respondent Jacobo) was employed by Respondent City of Bell, (Respondent Bell) as a City Council Member commencing March 19, 2001. Respondent Jacobo filed for Service Retirement on March 8, 2011, with an effective date of February 28, 2011.

During her tenure on the City Council, Respondent Bell purchased, on behalf of Respondent Jacobo, five years of Additional Retirement Service Credit (ARSC). As a result, Respondent Jacobo retired with a total of 15.03 years of total service credit. Respondent Bell's contract with CalPERS provided for a one-year final compensation period.

Final compensation is the highest consecutive 12 months of compensation earnable and is used in the calculation of a member's pension benefit in CalPERS. Respondent Bell had reported Respondent Jacobo's final compensation to be $8,083.23 per month.

On May 31, 2011, following its review of the pertinent information, CalPERS staff notified Respondents Jacobo and Bell that CalPERS had determined that Respondent Jacobo's final compensation was $673.00 per month. In addition, CalPERS issued a supplemental determination that the purchase of the ARSC by Respondent Bell on behalf of Respondent Jacobo was unlawful and would be rescinded. Respondent Jacobo timely appealed CalPERS' determinations and a hearing was held on October 24, 2014. Respondent Jacobo was represented by legal counsel at the hearing, but did not appear or provide written testimony.

The evidence and testimony at the hearing established that during the period pertinent to this appeal, Respondent Bell had become a "Charter City." The Bell Charter, however, circumscribed the salary for its council members at the level permitted under statute to that of similar positions in general law cities of similar population. The statutorily prescribed base salary for a City Council Member in Bell was $300.00 per month. However, the same applicable law permits the governing body to increase the base salary by resolution in increments no greater than 5% per year on a cumulative basis. In this case, the evidence established that the Bell City Council had properly increased their base salary up to a maximum of $673 per month. However, the evidence also established that in subsequent resolutions, in April 2005 and November 2010, the Bell City Council erroneously reported two increases in Respondent Jacobo's salary to $1,332 per month by falsely asserting that no adjustment to the base payrate had occurred over the prior ten years. In fact, Respondent Jacobo's salary had been increased by resolution in 2003.

In addition to her base pay as a City Council Member, Respondent Bell also reported to CalPERS Respondent Jacobo's compensation for ostensible services, including those to various Respondent Bell-related authorities and commissions, including Bell Housing Authority, Surplus Property Commission, Bell Solid Waste and Recycling Authority, Bell City Planning Commission and the Bell City Community Development Authority. As a result, by July 2010, the cumulative and highest average compensation reported to

CalPERS by Respondent Bell for Respondent Jacobo was $8,083.25. The evidence at the hearing established that the compensation paid to Respondent Jacobo for her ostensible services on these various commissions and authorities greatly exceeded that permitted by applicable provisions of law, and to the extent it was alleged to have been compensation for services as a City Council Member, in fact reflected "overtime pay." Overtime pay is specifically excluded from inclusion in compensation earnable. (See Government Code section 20635.)

The evidence further supported a finding that the additional payments would not be allowable as "special compensation." Special compensation is an item of compensation which, if it qualifies under the applicable provision of the California Public Employees' Retirement Law (PERL), may be considered with a member's payrate in calculating compensation earnable. However, in order to qualify as special compensation, a material requirement in this case was that the item of compensation be available to all members of the same group or class of employment. The evidence in this case established that not all members of the Bell City Council received the additional compensation for ostensible services to the various boards and commissions.

After considering all of the documentary evidence and testimony, the Administrative Law Judge (ALJ) concluded that:

> The preponderance of the evidence in this case supports PERS' determination to use a "final compensation" amount of $673 per month to calculate Respondent's retirement allowance. Respondent failed to establish how her base salary as a City Council member could be greater than $673 per month, as dictated by Government Code section 36516, the Respondent Bell City Charter, and Ordinance No. 1139.
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> Respondent similarly failed to establish that the additional compensation associated with her services for the Municipal Agencies could be considered part of her "final compensation."
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> Pursuant to Government Code section 20899, Respondent's position as a City Council member was deemed to be a full-time position. ...Pursuant to Government Code section 20635, overtime is excluded from final compensation. In this case, Respondent's fulltime position was as a City Council member. Her service for the Municipal Agencies should be seen as additional part-time service.
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> No evidence was presented establishing that the additional compensation Respondent received from the Municipal Agencies was based on publicly available pay schedules.
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> It was not established that all City Council members were subject to the same amounts of compensation for serving on the same boards, commissions or authorities, or that all of the other City Council members

> were treated as though the additional compensation they received for such service was part of their salary as a City Council member. There is nothing in the record establishing that a City Council member received the same amount of compensation as Respondent simply by dint of serving as a City Council member. Compensation not available at the same rate to all similarly situated members of a class of employees cannot be considered for purposes of final compensation, either as pay rate or special compensation.

The ALJ also found lacking in merit Respondent Jacobo's argument that the proposed reduction in her benefits violated her vested pension rights. The ALJ specifically found that "[t]here is nothing in the record indicating that any portion of the PERL was changed to Respondent's detriment or that PERS' decision regarding her final compensation amount has caused such a result.

Finally, Respondent Jacobo argued that CalPERS must be precluded from adjusting her reported compensation based on principles of laches and estoppel. However, the ALJ found that CalPERS had not unreasonably delayed its actions and that Respondent Jacobo had not established the requisite elements for estoppel against a governmental agency.

The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

June 17, 2015

WESLEY E. KENNEDY
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