ATTACHMENT A

THE PROPOSED DECISION

Attachment A

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Calculation of Final Compensation Involving: REVELINA TALAVERA, Appellant/Respondent, and CITY OF CHULA VISTA, Respondent.	Case No. 2014-0702 OAH No. 2014100450

PROPOSED DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on August 25, 2015.

Wesley E. Kennedy, Senior Staff Counsel, represented Petitioner, Renee Ostrander, Acting Chief, Customer Account Services Division, California Public Employees' Retirement System (CalPERS), State of California.

Revelina Talavera, Respondent, represented herself at the hearing.

No appearance was made by or on behalf of the City of Chula Vista.

The matter was initially submitted on August 25, 2015. After the matter was submitted, an attorney representing Ms. Talavera, Erin Mindoro, submitted a post hearing "Supplemental Brief." In this brief, Ms. Talavera asked that arguments made by Petitioner be stricken because she was "surprised" by them. Ms. Talavera also asked that unspecified documents be disregarded because Petitioner sent them to her the day before the hearing. The record was reopened until September 4, 2015, in order to give Petitioner the opportunity to submit a response. On September 4, 2015, Petitioner submitted a response. Ms. Talavera's Supplemental Post Hearing Brief was marked as "Exhibit B"; Petitioner's

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED September 29, 2015
Kathie Koschnetz

Response to Respondent's Supplemental Brief was marked as "Exhibit 21." On September 4, 2015, the matter was submitted.

ISSUE

Should the eight percent pay enhancement paid to Ms. Talavera by the City of Chula Vista between July 15, 2011, through June 27, 2013, and from July 27, 2013, through September 5, 2013, be considered as special compensation temporary upgrade pay and included in calculating Ms. Talavera's final compensation for purposes of calculating Ms. Talavera's service retirement allowance?

FACTUAL FINDINGS

Jurisdictional Matters

1. Ms. Talavera was employed by the City of Chula Vista as the Fiscal Operations Manager/Comptroller. Ms. Talavera became eligible to receive CalPERS retirement benefits as a result of her employment with the City of Chula Vista in accordance with the Public Employees Retirement Law.

On August 9, 2013, Ms. Talavera signed an application for a CalPERS service retirement. Effective September 6, 2013, Ms. Talavera retired with 19.906 years of public service at the time of her retirement.

2. A disagreement exists concerning the amount of Ms. Talavera's "final compensation" for purposes of calculating her CalPERS service retirement allowance. Ms. Talavera believes that the eight percent pay enhancement compensation she received for her services as Purchasing Agent qualified as special compensation or Temporary Upgrade Pay that should be added to any base pay for purposes of calculating her service retirement allowance.

Petitioner rejected Ms. Talavera's contention. After gathering information and documentation from Ms. Talavera and the City of Chula Vista, Petitioner concluded in a letter dated November 5, 2013, that Ms. Talavera's compensation for service as Purchasing Agent was not base pay and that it did not constitute "Temporary Upgrade Pay."[1] Petitioner

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[1] Petitioner also found that the payments she received for her work as Purchasing Agent did not meet the definition of "Special Assignment Pay" pursuant to California Code of Regulations, title 2, section 571, subsection (a)(4). California Code of Regulations, title 2, section 571, subdivision (a)(4), identifies positions that qualify for "Special Assignment Pay." None of the positions identified in this section apply to Ms. Talavera's work as Purchasing Agent, and Ms. Talavera did not argue at the hearing that any of the identified

further found that Ms. Talavera's work as Purchasing Agent constituted overtime pursuant to Government Code section 20635, and overtime compensation is excluded in the computation of final income for retirement income purposes.

3. On November 5, 2013, Petitioner provided Ms. Talavera and the City with notice of the right to appeal its decision. On November 27, 2013, Ms. Talavera timely appealed. The City did not appeal.

On August 21, 2014, Petitioner signed the Statement of Issues. The matter was then set for an administrative hearing.

On August 25, 2015, the administrative record was opened and jurisdictional documents were presented; sworn testimony was taken; documentary evidence was received; closing arguments were given; the record was closed. After the hearing, Ms. Talavera's attorney submitted a "Supplemental Hearing Brief." The record was reopened in order to give Petitioner the opportunity to submit a response. On September 4, 2015, Petitioner submitted a response, and the matter was submitted.

Contracting Public Agencies and the CalPERS Retirement Program

4. The City of Chula Vista, a public entity, contracted with CalPERS to provide retirement benefits to its eligible employees. The contract between the City and CalPERS was and is subject to the Public Employee Retirement Law, which provides a defined benefit plan to employees of contracting agencies.

The CalPERS retirement plan is funded by member and employer contributions. The amount of an employee's contribution is determined by applying a fixed percentage of the employee's compensation. A public agency's contribution is determined by applying a fixed rate to the agency's payroll. Using certain actuarial assumptions specified by law, CalPERS's Board of Administration sets employer contribution rates on an annual basis.

A member's service retirement allowance is calculated by applying a formula that involves the member's age at retirement, the member's years of service with CalPERS, and the member's "final compensation," which is defined as "the remuneration paid out of funds controlled by the employer in payment of the member's services performed during normal working hours or for the time during which the member is excused. . . ." (Govt. Code, § 20630.) By statute, "final compensation" is the employee's "payrate" and any "special compensation." (Govt. Code, § 20636.)

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positions may apply. Thus, it is not necessary to address whether the payments she received for her work as Purchasing Agent constituted "Special Assignment Pay."

Ms. Talavera's Background and Public Employment

5. Ms. Talavera worked as Fiscal Operations Manager/Comptroller for the City of Chula Vista from November 23, 1998, to September 6, 2013. Prior to working for the City, Ms. Talvera worked for San Diego County for about five years. The City classified the Fiscal Operations Manager/Comptroller position as a Senior Management Group position.[2] The duties of a Fiscal Manager involved planning, directing, and overseeing activities with the City's Finance Department's Fiscal Operations Division; the supervision of all day to day functions and operations related to general ledger accounting, fixed assets, payroll, accounts payable, grant accounting, special assessments, and auditing; the direction of auditing/compliance procedures; managing and coordinating the preparation of the City's Comprehensive Annual Finance Report; coordinating assigned activities with other divisions and outside agencies; and providing highly responsible and complex administrative support. The monthly salary range was $7,727.54 to $9,392.86.

The July 2011 and July 2013 Requests to Change Pay Order and Memo

6. In July 2011, Finance Director Maria Kachadoorian assigned Ms. Talavera to assume the duties of Purchasing Agent for the City because the position was unfilled. Ms. Talavera performed the duties of Purchasing Agent, in addition to her duties as Fiscal Operations Manager/Comptroller, from July 2011 to September 2013, when she retired.

Like the Fiscal Operations Manager/Comptroller position, the Purchasing Agent position was classified as a Senior Management Group position with a monthly salary range $7,727.54 to $9,392.86. These duties included, as defined in the Municipal Code, negotiating, purchasing, and obtaining supplies, equipment, and contractual services used by the City; and procuring for the City the needed quality in supplies, equipment, and contractual services at the least expense to the City, among other responsibilities.

To compensate her for her work as Purchasing Agent, Ms. Talavera received an eight percent "Out of Class" increase for the period July 15, 2011, through June 30, 2013. The City Council did not approve this increase. The City, however, reported the additional compensation Ms. Talavera received to CalPERS as "Temporary Upgrade Pay" for purposes of calculating Ms. Talavera's final retirement compensation.

Ms. Kachadoorian facilitated the eight percent increase Ms. Talavera received by means of a "Payroll Change Order Request" she signed dated July 15, 2011. The City's Human Resources Director also signed the request. To justify this increase Ms. Kachadoorian attached a memo captioned "Attachment to Payroll Change Order Request."

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[2] The City classified positions within the City as follows: Executive Management Group; Senior Management Group; Unclassified and Confidential Middle Management Professional Group; and Confidential Group.

It reads as follows:

> The fiscal year 2009-2010 budget reflected the elimination of the Purchasing Agent position resulting in budget savings of approximately $140,000 per year annually. The position has been vacant since 2006, during which time the duties of the Purchasing Agent have been bounced between the Finance Director and Assistant Director of Finance.
>
> Due to the significant task of balancing the budget, labor negotiations, and continued cuts in the Finance Department it has become increasingly difficult to continue with these duties at the current levels.. In the addition, the Assistant Director of Finance has taken on the lead role as the "LEAN CHAMPION" for the department. Due to these factors, as the Finance Director, I am assigning the purchasing agent duties to Evelyn Ong, Comptroller, which will expand her duties and scope of work as discussed in the City of Chula Vista Municipal Code section 2.56.020.
>
> There will be no General Fund impact related to this Out of Class Pay request as the department has a vacancy which will be filled at a lower level generating savings. [3]

On July 25, 2013, Philip Davis, Assistant Director of Finance, signed a second Payroll Change Order Request for the eight percent enhanced pay. The City's Human Resources Director also signed this request. The request included as "justification" for the eight percent increase the following: "Acting Purchasing Agent" for the period July 12, 2013, through September 3, 2013.

7. No evidence was presented that the eight percent increase Ms. Talavera received was contained "in a written labor policy or agreement", approved by the City's "governing body", and made "available to all members in the group or class", to qualify as "special compensation" for purposes of calculating Ms. Talavera's final retirement income under California Code of Regulations, title 2, section 571, subdivision (b).

Ms. Talavera's Testimony

8. Ms. Talavera testified that Ms. Kachadoorian first discussed with her performing the duties of Purchasing Agent in July 2013. She was not clear regarding the exact circumstances of this conversation, but she recalled that Ms. Kachadoorian completed

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[3] Ms. Kachadoorian's assertion that the Purchasing Agent Position was eliminated was incorrect. The position was not eliminated; the City did not fill it.

the request to change order to add eight percent to her income. Before she submitted the memo, Ms. Kachadoorian showed Ms. Talavera the memo she wrote, and Ms. Talavera interlineated her legal name "Revelina Talavera" for the name "Evelyn Ong" that Ms. Kachadoorian typed in the memo. Ms. Talavera acknowledged that the City Council did not approve this increase, but she believed there was an internal document that gave Ms. Kachadoorian the authority to approve this increase. Ms. Talavera, however, did not have personal knowledge of this document. From July 2011 to September 2013, Ms. Talavera performed the duties of purchasing agent in addition to performing her work as Fiscal Operations Manager/Comptroller during this same time. Ms. Talavera stated that she did not need to work additional hours to perform the duties of both positions.

9. In July 2011, when the eight percent pay enhancement was initiated, Ms. Talavera said she was not contemplating retirement. She said she wanted to retire when she turned 58 years old, but she retired before then to take care of her two elderly parents. On July 1, 2011, July 12, 2011, and July 27, 2011, Ms. Talavera called CalPERS to receive retirement counseling and to discuss her retirement benefit calculation. In her conversation with a CalPERS representative on July 27, 2011, she asked the representative about Employer Paid Member Contributions (EPMC) and was advised that "EPMC will only be calculated on payrate for [the City]. It will not be added onto the final pay rate of another Pers agency unless that agency has EPMC." Before these series of contacts in July 2011, Ms. Talavera last contacted CalPERS on September 4, 2008, to inquire about service credits, according to CalPERS' customer contact notes. Ms. Talavera explained that she contacted CalPERS in July 2011 to inquire about her benefits in general and not in anticipation of retirement. Ms. Talavera's testimony was credible.

Petitioner's Evidence

10. Taras Katchmar, a CalPERS retirement program specialist, testified. He reviewed various documents and materials that related to the job duties of purchasing agent and Ms. Talavera's final compensation.

Based on his review of these materials and applicable laws, Mr. Katchmar concluded that CalPERS' decision to exclude the eight percent increase Ms. Talavera received for her work as purchasing agent was correct. He explained that the mere fact that the duties of purchasing agent were performed by the fiscal manager and executive manager did not make the purchasing agent position an "upgraded position" for final compensation calculation purposes under California Code of Regulations (CCR), title 2, section 571. Ms. Talavera did not change her job classification with the City, he commented.

Mr. Katchmar also noted that the compensation Ms. Talavera received for performing the duties of a purchasing agent did not meet the definition of "special compensation" under CCR section 571. The City did not afford members of Ms. Talavera's job class with the City similar pay; the compensation applied to Ms. Talavera only and not to other City employees; it was not in a labor agreement or policy approved by the City Council; and it was not historically consistent with her pay. In addition, Mr. Katchmar believed that the

compensation constituted final settlement pay in anticipation of retirement because it was paid within the last two years of Ms. Talavera's employment with the City and was paid to Ms. Talvera when she contemplated retirement.

Further, Mr. Katchmar also believed that Ms. Talavera's compensation constituted overtime pay and overtime pay cannot be included in the final calculation of benefits. Mr. Katchmar stated that for compensation to be considered as overtime pay it was not necessary that the employee actually work more hours, but that the employee is *required* to work additional hours. If a member is working two positions, the position with the highest income is considered in the calculation of final retirement compensation.

Mr. Katchmar added that the eight percent increase was properly excluded because it would constitute an unfunded liability above CalPERS' actuarial assumptions if it were included in Ms. Talavera's final retirement compensation.

Respondent's Post Hearing Motion to Strike and Disregard Evidence

11. In a "Supplemental Hearing Brief" submitted after the hearing, Ms. Talavera asked that "any arguments outside the interpretation of whether Ms. Talavera's compensation as Purchasing Agent should be considered in her retirement calculation" should be stricken because she claimed that Petitioner never questioned whether Respondent performed Purchasing Agent tasks. Ms. Talavera also asked that evidence "dumped" on her before the hearing should be disregarded.

Ms. Talavera's motion to strike is denied. In essence, Ms. Talavera argued that she was not given adequate notice of the issues Petitioner raised at the hearing. This is incorrect. The Statement of Issues that was served upon Ms. Talavera provided her with adequate notice of the legal and factual issues Petitioner raised at the hearing.

With regards to Ms. Talavera's motion to disregard evidence because Petitioner provided materials to her shortly before the hearing, this motion is also denied.[4] Ms. Talavera argued here that Petitioner provided Respondent on August 24th, the day before the hearing, with unspecified documents Petitioner purportedly wished to present at the hearing the next day. But, it is not clear what documents Ms. Talavera references or whether Petitioner offered any of these documents at the hearing as evidence. Ms. Talavera, also, at the hearing had the opportunity to object to the admission of these documents. Thus, no determination can be made concerning the materials Ms. Talavera wants disregarded.

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[4] It is noted that under Government Code sections 11507.5 through 11507.7, the mere fact that discovery was submitted beyond the applicable time frames does not automatically mean that the evidence must be excluded; assuming a violation of these sections, an administrative law judge in his or her discretion may impose remedies other than exclusion.

LEGAL CONCLUSIONS

The Public Employees' Retirement Law

1. One of the benefits offered to many public employees in California is membership in CalPERS. Members of CalPERS, once vested, participate in a defined benefit retirement plan, which supplies a monthly retirement allowance under a formula comprising factors such as final compensation, service credit (i.e., the credited years of employment), and a per-service-year multiplier. The retirement allowance consists of an annuity (which is funded by member contributions deducted from the member's paycheck and interest thereon) and a pension (which is funded by employer contributions and which must be sufficient, when added to the annuity, to satisfy the amount specified in the benefit formula). (*In re Marriage of Sonne* (2010) 185 Cal.App.4th 1564, 1568.)

The determination of what benefits and items of pay constitute compensation is crucial to the computation of an employee's ultimate pension benefits. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478.)

Burden and Standard of Proof

2. Government Code section 20128 provides in part:

> . . . [T]he board may require a member . . . to provide information it deems necessary to determine this system's liability with respect to, and an individual's entitlement to, benefits prescribed by this part.

3. Ms. Talavera has the initial burden to establish that she was entitled to a CalPERS service retirement and the amount of the retirement allowance. (Evid. Code, § 500; Evid. Code, § 550.) The standard of proof is a "preponderance of the evidence." (Evid. Code, § 115.)

Relevant Statutory Authority

4. "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 specified reasons (Govt. Code, § 20630, subd (a).) When compensation is reported, the employer must identify the pay period in which the compensation was earned regardless of when reported or paid and compensation cannot exceed "compensation earnable" as defined. (Govt. Code, § 20630, subd. (b).)

5. Government Code section 20635 provides in part:

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. . . .

6. Government Code section 20636 provides in 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 . . .

(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 . . .

(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 . . .

(7) Special compensation does not include any of the following:

(A) Final settlement pay.

(B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise.

(C) Other payments the board has not affirmatively determined to be special compensation.

[¶]. . . [¶]

(e)(1) As used in this part, "group or class of employment" means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related grouping. One employee may not be considered a group or class.

(2) Increases in compensation earnable granted to an employee who is not in a group or class shall be limited during the final compensation period applicable to the employees, as well as the two years immediately preceding the final compensation period, to the average increase in compensation earnable during the same period reported by the employer for all employees who are in the same membership classification, except as may otherwise be determined pursuant to regulations adopted by the board that establish reasonable standards for granting exceptions.

(f) As used in this part, "final settlement pay" means pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment. The board shall promulgate regulations that delineate more specifically what constitutes final settlement pay. . . .

Relevant Regulatory Authority

7. California Code of Regulations, title 2, section 570 provides in part:

"Final settlement pay" means any pay or cash conversions of employee benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.

For example, final settlement pay may consist of severance pay or so-called 'golden parachutes.' It may be based on accruals over a period of prior service. It is generally, but not always, paid during the period of final compensation. It may be paid in either lump-sum, or periodic payments.

Final settlement pay may take the form of any item of special compensation not listed in Section 571. It may also take the form of a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS.

8. California Code of Regulations, title 2, section 571 provides in part:

(a) The following list exclusively identifies and defines special compensation items for members employed by contracting agency . . . 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 item 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.

Relevant Decisional Authority

9. The Legislature and the Board of Administration of the Public Employees Retirement System adopted limitations on the salary which may be considered in calculating a public employee's retirement allowance. Among other matters, these limitations exclude from consideration payments which were not available to similarly situated public employees. (*Prentice v. Board of Admin., California Public Employees' Retirement System* (2007) 157 Cal.App.4th 983, 986.)

Calculation of "compensation earnable" is not based on individual efforts. Rather, both components of "compensation earnable," an employee's payrate and special compensation, are measured by the amounts provided by the employer to similarly situated employees. (*Prentice*, at pp. 991-992.)

Cause Exists to Affirm CalPERS' Determination

10. Ms. Talavera did not establish by a preponderance of the evidence that the eight percent enhancement compensation paid by the City of Chula Vista to her for her work as Purchasing Agent should be included in the final calculation of her retirement compensation.

Ms. Talavera worked as Fiscal Operations Manager/Comptroller and, in addition to this work, performed the duties of Purchasing Agent between July 2011 and September 2013, when she retired. Both positions were full time positions, and both positions were in the same bargaining class. She took on the duties of Purchasing Agent to assist the Finance Manager and Assistant Finance Manager and did so not in anticipation of retirement.

However, the eight percent enhancement compensation Ms. Talavera received does not qualify as special compensation for purposes of calculating her final retirement compensation under California Code of Regulations, title 2, section 571, subdivision (b). The eight percent enhancement was not in a labor agreement or policy approved by the City Council; the eight percent enhancement was not available to other City workers within her classification; and it was not historically consistent with her pay.

In addition, the eight percent enhancement compensation she received did not qualify as "Temporary Upgrade Pay" under California Code of Regulations, title 2, section 571,

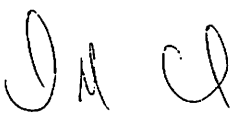
subdivision (a), because Ms. Talavera's position as Fiscal Manager was in the same employee classification as Purchasing Agent and, as a result, her work as Purchasing Agent cannot not qualify as a Temporary Upgrade.

Also, the eight percent enhancement compensation Ms. Talavera received qualified as "overtime compensation," and under Government Code section 20635 overtime compensation cannot be included in the final compensation of retirement benefits. Although Ms. Talavera was able to perform the work of Purchasing Agent and Fiscal Operations Manager/Comptroller within normal work hours, for Ms. Talavera to perform the extensive duties of both positions she was required to work overtime.

ORDER

The eight percent monthly increase reported by the City of Chula Vista as Temporary Upgrade Pay shall not be included in Ms. Talavera's final compensation for purposes of calculating Ms. Talavera's service retirement allowance.

Dated: September 25, 2015



ABRAHAM M. LEVY
Administrative Law Judge
Office of Administrative Hearings