



Board of Administration
California Public Employees' Retirement System

Agenda Item 8h

March 18, 2015

ITEM NAME: Proposed Decision – In the Matter of the Calculation of Final Compensation of CHRISTINE F. LONDO, Respondent, and CITY OF WALNUT, Respondent.

PROGRAM: Customer Account Services Division

ITEM TYPE: Action

PARTIES' POSITIONS

Staff argues that the Board of Administration reject the Proposed Decision and hold a Full Board Hearing.

Respondent Christine F. Londo (Respondent Londo) and Respondent City of Walnut (City) argue that the Board of Administration should adopt the Proposed Decision.

STRATEGIC PLAN

This item is not a specific product of either the Strategic or Annual Plans. The determination of administrative appeals is a power reserved to the Board of Administration.

PROCEDURAL SUMMARY

Respondent Londo submitted an application for service retirement. CalPERS determined that a temporary increase of \$5,000.00 per month, paid by the City to Respondent Londo from November 2005 through November 2006, should not be included in the calculation of Respondent Londo's final compensation. Respondent Londo and the City appealed this decision and the matter was heard by the Office of Administrative Hearings on November 5, 2014. A Proposed Decision was issued on January 14, 2015, granting Respondent Londo and the City's appeals.

ALTERNATIVES

- A. For use if the Board decides to adopt the Proposed Decision as its own Decision:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own Decision the

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Proposed Decision dated January 14, 2015, concerning the appeals of Christine F. Londo and City of Walnut; RESOLVED FURTHER that this Board Decision shall be effective 30 days following mailing of the Decision.

- B. For use if the Board decides not to adopt the Proposed Decision, and to decide the case upon the record:**

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, after consideration of the Proposed Decision dated January 14, 2015, concerning the appeals of Christine F. Londo and City of Walnut, hereby rejects the Proposed Decision and determines to decide the matter itself, based upon the record produced before the Administrative Law Judge and such additional evidence and arguments that are presented by the parties and accepted by the Board; RESOLVED FURTHER that the Board's Decision shall be made after notice is given to all parties.

- C. For use if the Board decides to remand the matter back to the Office of Administrative Hearings for the taking of further evidence:**

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, after consideration of the Proposed Decision dated January 14, 2015, concerning the appeals of Christine F. Londo and City of Walnut, hereby rejects the Proposed Decision and refers the matter back to the Administrative Law Judge for the taking of additional evidence as specified by the Board at its meeting.

- D. Precedential Nature of Decision (two alternatives; either may be used):**

- 1. For use if the Board wants further argument on the issue of whether to designate its Decision as precedential:**

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System requests the parties in the matter concerning the appeals of Christine F. Londo and City of Walnut, as well as interested parties, to submit written argument regarding whether the Board's Decision in this matter should be designated as precedential, and that the Board will consider the issue whether to designate its Decision as precedential at a time to be determined.

- 2. For use if the Board decides to designate its Decision as precedential, without further argument from the parties.**


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RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, hereby designates as precedential its Decision concerning the appeals of Christine F. Londo and City of Walnut.

BUDGET AND FISCAL IMPACTS: Not applicable

ATTACHMENTS

Attachment A: Proposed Decision
Attachment B: Staff's Argument
Attachment C: Respondent(s) Argument(s)



DONNA RAMEL LUM
Deputy Executive Officer
Customer Services and Support

ATTACHMENT A
THE PROPOSED DECISION

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).

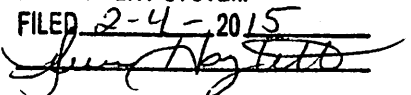
Stephen H. Silver, Attorney at Law, represented Christine Londo (respondent) Londo, who was present throughout the administrative hearing.

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 : INTERIM CITY MANAGER

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.

RECOMMENDATION

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 Statutes 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 Londo 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 Londo 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 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

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 thereto 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

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 Interim 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 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. (Emphasis added.)

The City did not create an upgraded position of Interim City Manager or Interim City Manager and Finance Director/City Treasurer. Respondent Londo did not relinquish or vacate her permanent position of Finance Director/City Treasurer. The City did not 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.

<u>RAMIREZ</u>	<u>LONDO</u>
● 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.

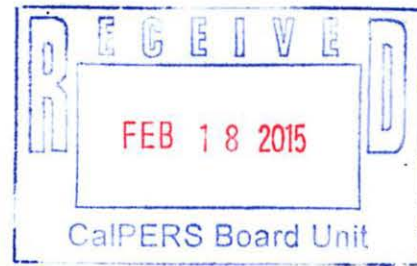
March 18, 2015



RORY J. COFFEY
Senior Staff Attorney

ATTACHMENT C
RESPONDENT ARGUMENT

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10
11 **BOARD OF ADMINISTRATION**
12 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**
13 **ADMINISTRATIVE LAW JUDGE HUMBERTO FLORES**

14 In the Matter of the Calculation of Final) AGENCY CASE NO. 2014-0681
15 Compensation of) OAH NO. 2014070904
16 CHRISTINE F. LONDO,)
17 Respondent,) **RESPONDENT CHRISTINE F.**
18 and) **LONDO'S ARGUMENT**
19) Hearing: November 5, 2014
20)
21)
22)
23)
24)
25)
26)
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_____)

20 Respondent, Christine Londo, strongly urges the Board of Administration of CalPERS
21 to adopt the Proposed Decision of the Administrative Law Judge (ALJ) in the above-captioned
22 matter. After considering all the evidence and written arguments submitted by the parties, the
23 ALJ correctly concluded that the increased compensation of \$5,000 earned by Ms. Londo
24 between November 2005 and November 2006 while serving as the City of Walnut's Interim
25 City Manager constituted special compensation in the form of "Temporary Upgrade Pay"
26 which is defined in Section 571(a)(3) of the CalPERS Regulations as follows:

27 "Compensation to employees who are required by their employer or governing
28 board or body to work in an upgraded position/classification of limited

1 duration.”

2 The ALJ correctly found that Ms. Londo, the City’s Finance Director, was in fact
3 required by the governing body of the City of Walnut, its City Council, to work in the upgraded
4 classification of City Manager for that limited one year period in return for additional
5 compensation of \$5,000. The ALJ’s determination is completely consistent with the testimony
6 of the CalPERS representative who appeared at the hearing. She was presented with the
7 following typical situation and then asked whether the pay in question would satisfy the
8 definition of Temporary Upgrade Pay: If an employee in the classification of Police Officer
9 and his or her employer agreed that for a temporary period of time he or she would occupy the
10 higher paying position of Police Sergeant on a full time basis and perform the attendant duties
11 and assume the attendant responsibilities for additional compensation until a promotional
12 examination had been conducted and the position had been filled, would that additional
13 compensation constitute Temporary Upgrade Pay? The CalPERS representative answered in
14 the affirmative.

15 As the ALJ concluded, the uncontroverted testimony of Ms. Londo established that her
16 situation was virtually identical to that hypothetical question. Like the hypothetical Police
17 Officer, she agreed to assume the City Manager job on a full time basis and she performed the
18 attendant duties and assumed the attendant responsibilities connected with that higher-paying
19 position. She did so for a limited time period until that position was filled one year later.

20 Of further significance is the fact that, as the ALJ emphasized, “there was no evidence
21 presented that this special compensation would create an unfunded liability over and above
22 CalPERS’ actuarial assumptions” in light of the fact that it was earned and reported to CalPERS
23 as pensionable income almost seven years prior to the time Ms. Londo had retired.

24 Finally, in its Post-Hearing Brief, CalPERS relied upon almost completely on a
25 “Precedential Decision” involving a retired City Manager from the City of Indio. However, as
26 we emphasized in our Reply Brief, nowhere in that Decision is there even any mention of the

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application or nonapplication of "Temporary Upgrade Pay." As a result, it cannot operate to preclude the application of that provision to Ms. Londo's situation.

Respectfully submitted,
SILVER HADDEN SILVER & LEVINE

Dated: February 18, 2015

By *Stephen H. Silver*
STEPHEN H. SILVER
Attorneys for Respondent Christine F. Londo

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1428 Second Street, P.O. Box 2161, Santa Monica, California 90407-2161.

On February 18, 2015, I served the foregoing document described as **RESPONDENT CHRISTINE F. LONDO'S ARGUMENT** on the parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Via Mail

Hon. Humberto Flores
Administrative Law Judge
Office of Administrative Hearings
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Telephone No. (213) 576-7200
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[By Mail] I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it would be deposited with the U.S. Postal Service with postage thereon fully prepaid at Santa Monica, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[By Electronic Mail] I transmitted the document(s) to the addressee(s) via electronic mail at the address listed above.

[By Facsimile Transmission] I caused the above-referenced document to be transmitted to the named person(s) via facsimile transmission to the fax number(s) set forth above from a fax machine at (310) 395-5801.

Executed on February 18, 2015, at Santa Monica, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

LISA L. HILL

