

1 MATTHEW G. JACOBS, GENERAL COUNSEL
2 RORY J. COFFEY, SENIOR STAFF ATTORNEY, SBN 87267
3 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
4 Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811
5 P. O. Box 942707, Sacramento, CA 94229-2707
6 Telephone: (916) 795-3675
7 Facsimile: (916) 795-3659

8 Attorneys for California Public
9 Employees' Retirement System

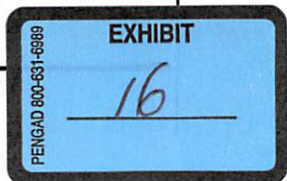
10 BOARD OF ADMINISTRATION
11 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

12	In the Matter of the Application for Final	)	CASE NO. 2014-0681
13	Compensation of:)	
14	CHRISTINE F. LONDO,	)	OAH NO. 2014070904
15		)	POST-HEARING BRIEF
16	Respondent,)	
17		)	Hearing Date: November 5, 2014
18	and	)	Hearing Time: 9:00 a.m.
19	CITY OF WALNUT,	)	Hearing Location: Glendale
20		)	Prehearing Conf.: None Scheduled
21	Respondent.	)	Settlement Conf.: None Scheduled
22)	
23)	
24)	
25)	

26 California Public Employees' Retirement System (CalPERS) submits the
27 following Post-Hearing Brief.

28
29 **RESPONDENT HAS THE BURDEN OF PROOF**

30 In this matter, CalPERS staff made a determination that a temporary pay
31 increase of \$5,000.00 per month, paid by Respondent City of Walnut (City), to
32 Respondent Christine Londo (Londo) from November 2005 through November 2006,
33 should not be included in Londo's final compensation, for purposes of calculating
34 Londo's service retirement allowance or benefit. Respondents appealed the CalPERS
35



1 determination. As stated at Paragraph XV of the Statement of Issues, "This appeal is
2 limited to the issue of whether the pay increase of \$5,000.00 per month from
3 November 2005 through November 2006 should be included in the calculation of
4 respondent Londo's final compensation."

5 In the absence of a statutory provision to the contrary, the moving party has the
6 burden of proof, and that burden is unaffected by the general rule that pension statutes
7 are to be liberally construed. (1 California Public Agency Practice, sec. 39.03[g].)

8 CalPERS, as a governmental agency, is entitled to the presumption that it has
9 properly performed its duty in making a determination regarding pension benefits.
10 Evidence Code sec. 664. The effect of such presumption places the burden of
11 rebutting the presumption upon Respondent. (*Roelfsema v. Department of Motor*
12 *Vehicles* (1995) 41 Cal. App. 4th 871.)

13 In *McCoy v. Board of Retirement* (1986) 183 Cal. App.3d 1044, 1051, the Court
14 of Appeal considered the issue of burden of proof in an administrative hearing
15 concerning retirement benefits, and found as follows: "As in ordinary civil actions, the
16 party asserting the affirmative at an administrative hearing has the burden of proof,
17 including both the initial burden of going forward and the burden of persuasion by a
18 preponderance of the evidence." In *Glover v. Board of Retirement* (1989) 214 Cal.
19 App. 3d 1327, the Court of Appeal held that the individual seeking disability retirement
20 benefits had the burden of proving by a preponderance of evidence that he was
21 entitled to such benefits. Similarly, Courts applying the County Employees' Retirement
22 Law (CERL) have held that the applicant [Respondent] has the burden of proof.
23 (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal. App. 3d 689,
24 691.)

25

II

**THE DECISION IS CONTROLLED BY THE CALPERS
PRECEDENTIAL DECISION IN RAMIREZ**

CalPERS requests that the court take judicial notice of the CalPERS Board Precedential Decision, *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*, Precedential Board Decision No. 00-06, a complete copy of which is attached as Exhibit 1.

The facts in the *Ramirez* matter were not in dispute. Likewise, in the instant matter the facts are not in dispute. A comparison of the Factual Findings, Legal Conclusions and Decision in *Ramirez* with the instant matter demonstrates that the Precedential Decision is controlling with respect to Londo's appeal.

RAMIREZ

- Ramirez was employed by the City as the Chief of Police.
- 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 salary schedule.
- 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.
- Ramirez negotiated additional compensation (\$2,500.00 per month) for performing the duties of Interim City Manager.
- Ramirez increased his workload to more than 60 hours per week.
- The City did not establish a permanent position of Chief of Police/City Manager.
- The City did not establish a payrate

LONDO

- * Londo was employed by the City as the Finance Director/City Treasurer.
- * The position was a full-time position.
- * Londo was paid a salary for the position of Finance Director/City Treasurer that was contained in a publicly available salary schedule.
- * The position of City Manager became vacant.
- * Londo agreed to act as the Interim City Manager, on a temporary basis in addition to performing her duties as Finance Director/City Treasurer.
- * Londo negotiated additional compensation (\$5,000.00 per month) for performing the duties of Interim City Manager.
- * Londo increased her workload.
- * The City did not establish a permanent position Director of Finance/City Manager.
- * The City did not establish a

1 for the position of Chief of Police/City
2 Manager.

payrate for the position of
Director of Finance/City
Manager.

- 3 • When Ramirez accepted the additional
4 responsibilities of Interim City Manager,
5 he did not anticipate retiring when a
6 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.

7 The Legal Conclusion in *Ramirez* (Paragraph 13) can and should be modified to
8 be the controlling Legal Conclusion in the instant matter.

9 "Good cause exists to sustain the Chief Executive Officer's
10 determination that the disputed payments made to [Respondent
11 Londo] in connection with [her] service as the interim City Manager,
12 [City of Walnut], be excluded from the calculation of [her] service
13 Retirement benefit allowance."

14 **III**

15 **THERE IS NO BASIS TO APPLY EQUITABLE ESTOPPEL**

16 Respondent contends that she relied on CalPERS estimates regarding the
17 calculation of her service retirement benefit. That reliance is the basis for
18 Respondent's assertion that CalPERS should be required to pay a pension benefit
19 based upon those estimates.

20 CalPERS is a creation of statutes, codified in the Government Code or Public
21 Employees' Retirement Law (PERL), which grant it certain powers. CalPERS has no
22 authority other than that granted by statutes. It has the authority to pay benefits to a
23 member only when the statutes authorize it and then only in the amount authorized.

24 (See *Hudson v. Posey* (1967) 255 Cal. App. 89.)

25 It is well settled that estoppel cannot be used to enlarge the powers of the
Public Employees' Retirement System. (*Page v. City of Montebello* (1981) 112 Cal.
App. 3d 658 at 667; *Board of Administration, State Employees' Retirement System v.*

1 *Ames* (1963) 215 Cal. App. 2d 215 at 230; and *Boren v. State Personnel Board* (1951)
2 37 Cal. App. 2d 634).

3 The California Supreme Court in the case of *City of Long Beach v. Mansell*
4 (1970) 3 Cal. 462 stated that the party seeking to assert equitable estoppel must
5 establish the following four elements:

- 6 (1) the party to be stopped must be apprised of the facts;
7 (2) he must intend that his conduct shall be acted upon, or must
8 so act that the party asserting the estoppel had a right to believe
9 it was so intended;
10 (3) the other party must be ignorant of the true state of facts; and
11 (4) he must rely upon conduct to his injury."

12 The California Supreme Court in *Mansell* noted that estoppel should be applied
13 to a governmental agency only in rare circumstances and discussed the li9mitations of
14 applying estoppel to governmental agencies as follows:

15 "The government may be bound by an equitable estoppel in the same
16 manner as a private party when the elements requisite to such an
17 estoppel against a private party are present and, in the considered
18 view of a court of equity, the injustice which would result from a
19 failure to uphold estoppel is of sufficient dimension to justify any
20 effect upon public interest or policy which would result from the
21 raising of an estoppel."

22 Estoppel will not be applied against a governmental agency if doing so
23 effectively nullifies a strong rule of policy adopted for the benefit of the public.

24 (*Lentz v. McMahon* (1989) 49 Cal. 3d 393; *County of San Diego v. Cal. Water* (1947)
25 30 Cal. 2d 817.)

CalPERS should not be estopped from paying Respondent a retirement
allowance that is base entirely and correctly upon an application of the applicable and
controlling statutes regarding compensation, compensation earnable, special
compensation and final settlement pay. CalPERS cannot be estopped from calculating,

1 or, if necessary, reducing Respondent's service retirement allowance from an incorrect
2 amount to a correct amount.

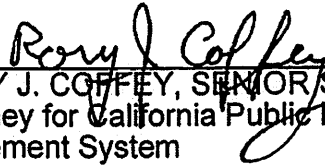
3 **CONCLUSION**

4 Respondent has not established, by a preponderance of evidence that the
5 CalPERS determination was in error. Respondent's appeal should be denied.

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8 Dated: December 5, 2014


RORY J. COFFEY, SENIOR STAFF ATTORNEY
Attorney for California Public Employees'
Retirement System

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PROOF OF SERVICE

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I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On December 5, 2014, I served the foregoing document described as:

POST-HEARING BRIEF – In the Matter of the Calculation of Final Compensation of CHRISTINE F. LONDO, Respondent, and CITY OF WALNUT, Respondent.; Case No. 2014-0681; OAH No. 2014070904.

on interested parties in this action by placing ___ the original XX a true copy thereof enclosed in sealed envelopes addressed and or e-filed as follows:

Stephen H. Silver, Esq.
Silver, Hadden, Silver, Wexler & Levine
P. O. Box 2161
Santa Monica, CA 90407-2161

Office of Administrative Hearings -
Los Angeles
320 West Fourth Street, Suite 630
Los Angeles, CA 90013

*Via Email at: shsilver@shslaborlaw.com

*Via e-file at laxfilings@dgs.ca.gov

Michael B. Montgomery
City of Walnut
P. O. Box 682
Walnut, CA 91788-0682

Christine F. Londo
126 E. Via Vaquero
San Dimas, CA 91773-3345

*Via Email at: clvette@msn.com

***Via Mail**

[X]

BY MAIL -- As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Sacramento, 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 the date of deposit for mailing an affidavit.

[X]

BY ELECTRONIC TRANSMISSION -- I caused such document(s) to be sent to the addressee(es) at the electronic notification address(es) above. I did not receive within a reasonable time of transmission, any electronic message, or other indication that the transmission was unsuccessful.

Executed on December 5, 2014, at Sacramento, California.

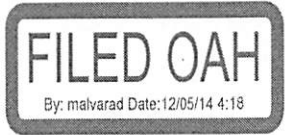
I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

CHRISTY L. BODILY

NAME

SIGNATURE

EXHIBIT “1”



Precedential Decision No. 00-06

BOARD OF ADMINISTRATION CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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.)

Case No.: 2640
 OAH No.: L-2000050022

Precedential Board Decision
 No. 00-06

Effective: December 20, 2000

PRECEDENTIAL DECISION

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own decision the Proposed Decision dated September 18, 2000, concerning the application of Roy T. Ramirez; hereby designates its decision as precedential; RESOLVED FURTHER that this Board decision shall be effective 30 days following mailing of the decision.

* * * * *

I hereby certify that on November 15, 2000, the Board of Administration, California Public Employees' Retirement System, made and adopted the foregoing Resolution, and I certify further that the attached copy of the administrative law judge's Proposed Decision is a true copy of the decision adopted by said Board of Administration in said matter.

BOARD OF ADMINISTRATION, CALIFORNIA
 PUBLIC EMPLOYEES' RETIREMENT SYSTEM
 JAMES E. BURTON, CHIEF EXECUTIVE OFFICER

Dated: November 20, 2000 BY _____
 BARBARA HEGDAL
 ASSISTANT EXECUTIVE OFFICER

**BEFORE THE BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

In the Matter of the Appeal of the	)	Case No.: 2640
Calculation Of Benefits Pursuant to	)	OAH No.: L-2000050022
Employer's Report of Final)	
Compensation Related to)	
)	
)	
ROY T. RAMIREZ,)	
)	
Respondent,)	
)	
And)	
)	
CITY OF INDIO,)	
)	
Respondent.)	

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 20, 2000, in San Bernardino, California.

Fernando De Leon, Staff Counsel, represented petitioner James Burton, Chief Executive Officer, Public Employees' Retirement System, State of California.

Kasey Christopher Clark, Attorney at Law, represented Roy T. Ramirez, who was present throughout the administrative proceeding, and the City of Indio.

The matter was submitted on August 21, 2000, following the filing of written briefs.

ISSUE

Should the compensation Roy T. Ramirez received during his last year of employment with the City of Indio when working as the interim City Manager should be treated as "final compensation" for the purpose of calculating his CalPERS' service retirement benefits.

FACTUAL FINDINGS

Ramirez' Membership in CalPERS

1. Roy T. Ramirez (hereafter Ramirez) was born on October 22, 1946.

Ramirez became a member of CalPERS as a result of his employment with the Coachella Valley Water District in the mid 1960s. He maintained that employment for about two and one-half years. Ramirez thereafter extended his CalPERS membership by virtue of approximately five years of employment with the City of Coachella in the late 1960s and early 1970s as a law enforcement officer.

In October 1973, Ramirez began working as a patrol officer with the City of Indio. He remained a patrol officer until 1976, when he was promoted to Sergeant. He was promoted to Lieutenant in 1989 and was promoted to Captain in 1993.

In 1993 Ramirez became the Chief of Police, City of Indio. He remained the Chief of Police until his retirement on October 29, 1998. Ramirez' employment with the City of Indio was credited to his CalPERS membership

2. Ramirez was a career law enforcement officer with the City of Indio who enjoyed the utmost respect of the Indio City Council. Ramirez was instrumental in maintaining and improving morale within the City of Indio Police Department, particularly with the rank and file.

Ramirez earned \$89,000 in salary in his last year of employment as the Chief of Police. He worked well over forty hours a week.

3. On April 15, 1998, Ramirez was at home preparing to attend a City Council meeting. He received a telephone call from Donna French (hereafter French), a Deputy City Clerk with the City of Indio. French invited Ramirez to attend a closed, executive City Council meeting that was taking place.

When Ramirez arrived at the meeting, he was told that the City Manager had just resigned and there was a need to fill the City Manager position on an interim basis. The City Council asked Ramirez to become the interim City Manager pending the appointment of a permanent City Manager. Ramirez agreed to act as the interim City Manager for four months provided that he be permitted to continue acting as the Chief of Police. The City Council agreed.

Almost as an afterthought, the City Council asked Ramirez how much he wanted to be paid as the interim City Manager. Ramirez had not given the matter any thought. One member of the City Council proposed that Ramirez be given an additional \$2,500 per month. Ramirez agreed. Neither Ramirez nor the City Council considered the impact such additional compensation might have on the retirement benefits Ramirez

would receive if he were to retire.

The agreement was not immediately reduced to writing.

4. Ramirez' appointment as the interim City Manager was announced that evening. Ramirez immediately began working as the interim City Manager and he continued working as the Chief of Police. After his appointment as interim City Manager, Ramirez increased his workload to more than sixty hours per week.

5. When Ramirez was appointed interim City Manager, many difficult financial and political issues faced the City of Indio. There was an approximate \$1,000,000 per year operating deficit, work on the 1998 municipal budget had not begun (yet had to be filed within sixty days), morale within the municipal staff was extremely low, there was a need to annex an auto mall into the City of Indio, there was significant litigation pending against the City of Indio with a great deal of exposure which needed to be resolved and there were numerous redevelopment issues.

Ramirez went right to work. He restructured many municipal departments and functions, he downsized the municipal staff, he balanced the budget, he supervised the new annexation project, he assisted in the development of a new municipal golf course, he attended numerous City Council meetings and staff meetings and he continued to meet his responsibilities as Chief of Police.

According to then Mayor Michael H. Wilson (hereafter Mayor Wilson), Ramirez "accomplished more in six and a half months to move this City forward than did the previous City Manger in four years."

6. The outgoing City Manager, Allyn S. Waggle (hereafter Waggle), had earned \$85,000, together with other benefits including an automobile allowance, insurance, paid vacation and sick leave.

The written employment agreement between the City of Indio and Waggle also provided that "in addition to the City's share, the City shall contribute seven percent (7%) of Waggle's contribution to the Public Employees Retirement System (PERS) for Waggle's behalf."

Waggle was a miscellaneous member of CalPERS, not a local safety member.

The Memorandum of Agreement

7. On August 6, 1998, Mayor Wilson signed a Memorandum of Agreement. The agreement concerned "the length of time of the agreement and the premium pay for serving in the upgraded position of Interim City Manager."

Item 1 memorialized the agreement concerning Ramirez' service as interim City

Manager from April 15, 1998, through August 12, 1998, and the agreement that Ramirez would receive an additional \$2,500 "special compensation" per month in consideration for serving as interim City Manager. Item 1 of the agreement stated the "special compensation constituted premium pay because Mr. Ramirez was requested to work in an upgraded position."

Item 2 extended the original agreement for an additional 60 days at the "premium pay of \$2,500 per month" and provided "the City Council also agreed to provide an additional \$5,000 of special compensation to recognize the continuing efforts of Mr. Ramirez in the upgraded position of Interim City Manager."

The memorandum of agreement between the City of Indio and Ramirez was signed after Ramirez filed his application for retirement benefits with CalPERS. The compensation Ramirez earned as interim City Manager was not intentionally designed to "spike" the amount of CalPERS retirement benefits Ramirez would receive if he retired although it certainly had that effect.

Ramirez' Decision to Retire

8. When Ramirez accepted the interim City Manager position, he had no intention to retire as Chief of Police after a permanent City Manager was appointed. In June 1998, when the City of Indio offered "golden handshakes" to its long-term municipal employees, including Ramirez, Ramirez first considered retiring. He discussed the matter with his family and with their counsel and blessing he decided to take advantage of what might be a one-time opportunity.

On June 22, 1998, Ramirez advised the City Council of his intention to retire as the Chief of Police and to resign as interim City Manager as soon as replacements were found and a transition was accomplished.

Ramirez' Application for CalPERS Retirement Benefits

9. On July 22, 1998, Ramirez signed an Application for Service Retirement which was filed with CalPERS shortly thereafter. In that application, Ramirez stated that he was employed by the City of Indio as the Chief of Police. He stated his last day of service would be October 29, 1998.

10. Item 17 of the retirement application requested Ramirez to select a "final compensation" period. In that regard, the application stated:

"FINAL COMPENSATION TO BE USED: "Final Compensation" is the highest average compensation earnable by you during a one year or three consecutive year period of employment, whichever your agency has contracted for, immediately preceding the effective date of your retirement,

or the date of your last separation from employment, if earlier, or during any other period specified by you in this application. Unless a different period is specified by you, your final compensation will be calculated based upon the one year or three year period immediately preceding your retirement or separation date.”

Not surprisingly, Ramirez selected the period October 29, 1997, to October 29, 1998, the year in which he enjoyed his greatest earnings.

CalPERS Response to Ramirez' Application for Retirement Benefits

11. CalPERS requested the City of Indio to provide information related to Ramirez' compensation in his last year of service. The City of Indio provided the requested information. It was established that the amount of compensation Ramirez received in his last year of employment with the City of Indio far exceeded the compensation he received previously. Obviously, this increase was by reason of the additional compensation Ramirez received for serving as the interim City Manager.

12. By letter dated October 20, 1998, Rebecca Bolin (hereafter Bolin), a Retirement Program Specialist II with CalPERS, wrote to Ramirez and to the City of Indio to determine if Ramirez' final year of compensation was reported in accordance with California's Public Employees' Retirement Law (hereafter PERL). Bolin wrote:

“I understand the significant increase in your special compensation was due to the fact that you were acting City Manager for that period of time. However, because I may still need additional documentation to determine if this item was reported in accordance with the PERL and the fact that your retirement is so near, CalPERS will temporarily calculate your retirement compensation using the compensation listed below. This is being done in order to delays in the processing of your retirement application.”

In its temporary calculation of Ramirez' service retirement benefits, CalPERS used Ramirez' reported payrate of \$6,7885.89 per month (his salary as Chief of Police) and his “special compensation” of \$299.52 per pay period (Ramirez' uniform allowance and longevity pay). CalPERS did *not* include in its temporary calculation of Ramirez' service retirement benefits any additional compensation he received as a result of serving as the interim City Manager.

13. Mayor Wilson wrote to Bolin to explain the circumstances surrounding Ramirez' additional compensation as the interim City Manager. He outlined the difficulties the City of Indio had experienced, Ramirez' appointment as interim City Manager by the City Council and Ramirez' dedicated and successful response to an enormous challenge. Mayor Wilson wrote:

“Clearly, we have the authority to pay the salary we felt was appropriate with the responsibility we assigned. It appears to us that you are questioning our authority and responsibility as it pertains to negotiating salaries with our

employees. We had an emergency that developed...and we took appropriate action to deal with it. At no time did we act on the salary issue to circumvent PERS rules or processes..."

14. By letter dated November 17, 1998, David F. Tatlock (hereafter Tatlock), Supervisor of CalPERS' Membership and Payroll Review, advised Ramirez that CalPERS "cannot accept this special compensation item" for serving as the interim City Manager for a variety of reasons. Tatlock advised that "the acting pay reported to CalPERS for you [as interim City Manager] cannot be included in your financial compensation calculation." Ramirez was advised that his service retirement benefits would be based on a payrate of \$6,785.89 per month and on special compensation of \$299.52 per pay period.

Tatlock advised Ramirez of the right to appeal CalPERS' decision.

15. By letter dated December 17, 1998, Brian P. Dolan (hereafter Dolan), Attorney at Law, requested an administrative hearing. Numerous factual and legal issues were raised.

CalPERS accepted the letter as an appeal.

16. On June 2, 2000, Ken W. Marzon, Chief, Actuarial and Employer Services Division, signed the Amended Statement of Issues on behalf of complainant James Burton, Chief Executive Officer of the Public Employees' Retirement System.

The Amended Statement of Issues and other required jurisdictional documents were served on Ramirez and his attorneys.

On July 20, 2000, the record was opened and jurisdictional documents were presented. An opening statement was given on Ramirez' behalf. CalPERS waived the giving of an opening statement. Various stipulations, sworn testimony and documentary evidence were received thereafter.

The parties' motion to leave the record open through the close of business on August 18, 2000, to permit the simultaneous filing of closing argument was granted.

Written closing arguments were received at the close of business on August 18, 2000. CalPERS' closing argument was marked as Exhibit 12 for identification. Ramirez' closing argument was marked as Exhibit 13 for identification.

On August 21, 2000, the record was closed and the matter was submitted.

Rebecca Bolin's Testimony

17. Relevant information was established through Rebecca Bolin's credible

testimony. CalPERS is a pre-funded, defined benefit retirement program. Retirement benefits are paid to CalPERS members according to a formula that includes the retiring member's length of service, a percentage figure based on the member's age on the date of retirement and the member's "final compensation."

Most state employees and all employees of local public agencies which contract with CalPERS are members of CalPERS. Local public agencies contracting with CalPERS are subject to the Public Employees' Retirement Law and all amendments thereto. State and local safety members are eligible for greater retirement benefits under the system than are miscellaneous CalPERS members.

The City of Indio contracted with CalPERS for a "one year final compensation" period. The City of Indio contracted with CalPERS to use a "2% at 50" formula for local safety members and a "2% at 55" formula for miscellaneous members.¹ Rates were charged on that basis.

18. According to Bolin, after CalPERS reviewed the information submitted by Ramirez and the City of Indio, it concluded that certain compensation Ramirez' received in his final year of employment with the City of Indio did not qualify as "final compensation" under pertinent statutes and regulations. CalPERS excluded the \$5,000 performance bonus and the \$2,500 per month paid to Ramirez for services rendered as interim City Manager.

The bonus was rejected because it was not awarded on the attainment of formal goals and objectives and similar bonuses were not available to other municipal employees in Ramirez' class, i.e. other managers employed by the City of Indio.

CalPERS rejected the \$2,500 per month payments that Ramirez received when acting as the interim City Manager because such compensation was negotiated and no person in the same class as Ramirez was eligible to receive similar payments. Under these circumstances, CalPERS was prohibited from concluding that Ramirez' unique monthly payments were includable as "final compensation,"² because applicable statutes and regulations do not permit a class consisting of one person.

Finally, serving as the interim City Manager was not a part of Ramirez' normally required job duties as the Chief of Police. Ramirez' compensation in his last year of employment was not historically consistent with the payments previously made to him. The payments made to Ramirez as interim City Manager appeared to be in the nature of "overtime" pay, a type of compensation which does not qualify as "final compensation" for purposes of determining service retirement benefits.

19. Bolin testified that a significant increase in special compensation at or near a member's retirement creates an "unfunded liability" which may increase not only the rates charged by CalPERS to the last employer, but also the rates CalPERS charges to any previous public employers who contract with CalPERS. Some actuarial problems would exist if the compensation Ramirez received as interim City Manager, a miscellaneous status, were included in his "final compensation" as a local safety member.

While Bolin was not an actuary, she had considerable training, knowledge and experience in the determination of retirement service benefits and the manner in which such benefits were funded. There was no testimony to the contrary.

The Disputed Payments to Ramirez Were Made In Good Faith

20. At issue in this matter is the additional compensation Ramirez received from the City of Indio when he provided services as its interim City Manager. These payments exceeded Ramirez' pay rate of \$6,785.89 per month and his additional special compensation of \$299.52 per pay period as Chief of Police. This additional compensation totals \$18,932 and is referred to as the "disputed payments."

21. Ramirez established that the disputed payments received from the City of Indio were made in good faith and for valuable services he rendered as the interim City Manager. Ramirez established that the disputed payments were not made in anticipation of his retirement.

LEGAL CONCLUSIONS

The Constitutional Mandate

1. Article XVI, section 17 of the California Constitution provides as follows:
"The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purpose of providing benefits to participants...and defraying reasonable expense of administering the system."

Administration of the Retirement Fund

2. The CalPERS retirement fund was established as a trust, to be administered in accordance with the provisions of the Public Employees Retirement Law solely for the benefit of the participants. Government Code section 20170. The management and control of the retirement system is vested in the CalPERS Board of Administration. Government Code section 20123. The CalPERS Board of Administration has the exclusive control of the administration and investment of the Retirement Fund. Government Code section 20171.

The Nature of the Fund and Determination of Service Benefits

3. As noted in *Hudson v. Board of Administration* (1997) 59 Cal.App.4th 1310, 1316, the Public Employees' Retirement Law (PERL) establishes a retirement system for

employees of the State of California and participating local public agencies. CalPERS determines employees' retirement benefits based on years of service, final compensation and age at retirement. The system is funded by employer and employee contributions calculated as a percentage of employee compensation. CalPERS determines employer contribution rates based on compensation figures and actuarial assumptions. CalPERS periodically adjusts employers' rates to compensate for any inaccuracy in those actuarial assumptions. Employee rates, in contrast, are fixed by statute.

4. In a similar vein *Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578, 584, noted that CalPERS is a defined benefit plan which sets an employee's retirement benefit upon the factors of retirement age, length of service and final compensation. Retirement allowances are therefore partially based upon an employee's compensation. An employee's compensation is not simply the cash remuneration received, but is exactly defined to include or exclude various employment benefits and items of pay. The scope of compensation is also critical to setting the amount of retirement contributions, because PERS is funded by employer and employee contributions calculated as a percentage of employee compensation.

"Statutory definitions delineating the scope of PERS compensation cannot be qualified by bargaining agreements." [Citation.] Nor can the PERS Board characterize contributions as compensation or not compensation under the PERL, those determinations are for the Legislature. [Citation.] *Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578, 585.

Determining "Final Compensation"

5. The analytical approach used to determine whether disputed payments should be included in a member's "final compensation" has been consistent.

Disputed payments are evaluated in light of relevant code provisions and the Legislative scheme. Where a particular statute is ambiguous, the intent of the act prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. Using this approach, a determination is made concerning the inclusion or exclusion of the disputed payments.³

Pertinent Statutory Authority

6. Government Code section 20630 provides in pertinent part:

"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*... 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." (Emphasis

added.)

7. Government Code section 20636 provides 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. "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 any 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... ..*

(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 et seq. of Title 29 of the United States Code shall be included as special compensation and appropriately defined in those regulations.*

(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) Any 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. Under no circumstances shall one employee be considered a group or class.

(2) Increases in compensation earnable granted to any 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 any 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..." (Emphasis added.)

8. Government Code section 20042 provides in pertinent part:

"On the election of a contracting agency... "final compensation" for a local member employed by that agency whose retirement is effective or whose death occurs after the date of the election and with respect to benefits based on service to the agency shall be computed under Section 20037 but with the substitution of the period of one year for three consecutive years..."

9. Government Code section 20635 provides in pertinent 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. This provision shall apply only to service rendered on or after July 1, 1994.” (Emphasis added.)

Pertinent Regulatory Authority

10. Title 2, California Code of Regulations, section 571 defined “special compensation” in pertinent part as follows:

“(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:

...

Bonus – Compensation to employees for superior performance such as ‘annual performance bonus’ and ‘merit pay’. If provided only during a member’s final compensation period, it shall be excluded from final compensation as ‘final settlement’ pay. A program or system must be in place to plan and identify performance goals and objectives.

...

Management Incentive Pay – Compensation granted to management employees in the form of...extra pay due to the unique nature of their job. Employees within the group cannot have the option to ...receive extra pay. This compensation must be reported periodically as earned and must be for duties performed during normal work hours. This compensation cannot be for overtime... ..

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

- (1) *Contained in a written labor policy or agreement;*
- (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."*

Respondents' Contentions

11. Ramirez and the City of Indio raised several contentions, most of which focused on the quality of Ramirez' performance as interim City Manager, the right of the Indio City Council to set Ramirez' pay, its right to reward his superior performance and the parties' good faith in setting Ramirez' compensation as interim City Manager.

Did Ramirez do a good job when he was acting as both Chief of Police and as interim City Manager in his final year of employment with the City of Indio?

No. He did a great job. He more than earned what he was paid. However, service retirement benefits are not based on a formula involving the value of the services provided by an employee.

Did the Indio City Council have the authority to set Ramirez' compensation as its interim City Manager and to award him premium pay for superior performance?

Of course. CalPERS does not dispute the Indio City Council's authority to determine how its employees should be compensated. But, CalPERS cannot calculate service retirement benefits based on compensation when compensation does not qualify as "final compensation" under applicable statutes and regulations.

Did Ramirez and the City Council act in good faith in setting the additional compensation Ramirez was to receive for the valuable services he rendered when he was acting as both Chief of Police and as interim City Manager?

Yes. There is no evidence that such compensation was designed to spike Ramirez' service retirement benefit. However, the issues of questionable intent and good faith are not involved in the statutory and regulatory determination of what constitutes "final compensation."

Was Ramirez' additional compensation for "overtime?"

Sort of. While it is true that Ramirez was not, by virtue of the nature of his employment, subject to federal laws concerning the payment of overtime, that matter does not fully resolve the question. It is clear that Ramirez' additional compensation was earned for taking on additional responsibilities of interim City Manager and for the time required of him to meet those responsibilities.

Ramirez' Compensation as Interim City Manager Should Not Be Included in Calculating Ramirez' Service Retirement Benefits

12. Ramirez was appointed as *interim* City Manager. The Indio City Council did not establish a permanent position of City Manager/Chief of Police. It did not set a payrate for the position of City Manager/Chief of Police.

It was understood that Ramirez' services as interim City Manager would be temporary. Ramirez was compensated for the additional hours he was required to work *beyond his normal working hours as Chief of Police* in order to meet the added but temporary responsibilities of the position.

Ramirez received the payrate, uniform allowance and longevity pay he was entitled to as Chief of Police when he received the additional compensation for acting as the interim City Manager. The monthly compensation Ramirez received as interim City Manager was not pursuant to any labor policy or agreement and it was not available to other City of Indio employees who were similarly situated. It was earned for the valuable services Ramirez provided in excess of the hours he normally worked as Chief of Police.⁴

The performance bonus Ramirez received as interim City Manager was not pursuant to any labor policy or agreement and it was not available to other similarly situated City of Indio employees. It was earned during his final compensation period and it was not awarded as a result of meeting formal goals and objections previously identified. It was earned for services Ramirez provided in excess of the hours he normally worked as Chief of Police.

The compensation Ramirez received as interim City Manager – both the monthly payments and the performance bonus – were for services provided in excess of the hours Ramirez served as Chief of Police. An unfunded liability over and above PERS' actuarial assumptions would exist if Ramirez were to receive a service retirement benefit based in part on the compensation he earned as interim City Manager in his final year of employment with the City of Indio.

Good Cause Exists to Sustain CalPERS' Decision to Exclude from the Calculation of Ramirez' Retirement Benefit Allowance All Compensation Ramirez Received as Interim City Manager

13. Good cause exists to sustain the Chief Executive Officer's determination that the disputed payments made to Roy T. Ramirez in connection with his service as the interim City Manager, City of Indio, be excluded from the calculation of his service retirement benefit allowance.

This conclusion is based on all Factual Findings and on all Legal Conclusions.

ORDER

The Chief Executive Officer's determination that the disputed payments made to Roy T. Ramirez in connection with his service as the interim City Manager, City of Indio, be excluded from the calculation of his service retirement benefit allowance is sustained.

Dated: September 18, 2000

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings

1 Under this formula, a local safety member's service retirement benefit is 2% of the local safety member's final compensation multiplied by the number of years of his or her CalPERS membership if the employee retires at age 50 years. If the employee is a miscellaneous member, he or she is entitled to 2% of his or her final compensation times the number of years of his or her CalPERS membership upon retirement at age 55 years.

2 It was established that Harold L. Schilling (hereafter Schilling) became the permanent City Manager after Ramirez' tenure as interim City Manager. Schilling was paid \$95,000 per year.

3 Using this approach, it was determined that a city resolution permitting an eligible city employee to convert employer-paid benefits (such as life and health insurance) to salary increases if the eligible employee retired within twelve months was "final settlement pay" and was properly excluded by CalPERS as "special compensation" in determining the employees' final compensation. See, *Hudson v. Board of Administration* (1997) 59 Cal.App.4th 1310.

Using this approach, it was determined that a retirement conversion option contained in a collective bargaining agreement between a municipality and a police officers' association which violated the PERL was unenforceable. The trial court determined, and the appellate court affirmed, that the retirement conversion option was an attempt to recharacterize excluded compensation into included compensation for retirement purposes at no substantial cost to the employer and the employees and would have allowed local government employers and their employees to engage in blatant pension abuse at the expense of CalPERS and its other members. See, *Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578.

Using this approach, it was determined in *Oden v. Board of Administration* (1994) 23 Cal.App.4th 194 that tax-deferred, employer-paid contributions made on behalf of CalPERS members did not constitute "compensation" within the meaning of the PERL although the contributions met the literal, common definition an employer "pick up" and employer contribution under Government Code section 20022. In reaching this decision it was noted that "Courts 'must consider the consequences that might flow from a particular construction and should construe the state so as to promote rather than defeat the statute's purpose and policy.'" *Ibid.*, at pp. 208-209.

Using this approach, it was determined that a federal act designating "overtime" for firefighters did not preclude the use of payment for the hours worked in excess of federal overtime in calculating service retirement benefits so long as the hours claimed were considered normal for the firefighters. Thus, it was held that the "premium does not constitute 'overtime,' that it is properly characterized as 'compensation' and that its characterization as such does not distort the compensation base or the legislative scheme." See, *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, cited portion at 1484.

Using this approach, it was determined that a retired state employee was not entitled to have his service retirement benefits adjusted to a higher amount by CalPERS even though he successfully established before the State Board of Control that he had performed the duties of higher classification during the last four years of his public employment and that he was entitled to more compensation from his employer than he was paid. The appellate court held that the State Board of Control had no authority over CalPERS and that the additional compensation granted to the retiree by the State Board of Control was not "compensation earnable" under the PERL. See, *Snow v. Board of Administration* (1987) 87 Cal.App.3d 484.

4 Government Code section 20635 provides in pertinent part:

"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."
