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8 **BOARD OF ADMINISTRATION**
9 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**
10 **ADMINISTRATIVE LAW JUDGE HUMBERTO FLORES**

11 In the Matter of the Calculation of Final) AGENCY CASE NO. 2014-0881
12 Compensation of) OAH NO. 2014070904
13 CHRISTINE F. LONDO,) **RESPONDENT CHRISTINE LONDO'S**
14 Respondent,) **POST HEARING BRIEF**
15 and) Hearing: November 5, 2014
16 CITY OF WALNUT,)
17 Respondent.)



18
19 **I. INTRODUCTION**

20 With all due respect, the testimony of the CalPERS representative (Karin Zimmerman)
21 and the documentary evidence offered by CalPERS clearly reveal an attempt by it to impose
22 upon Respondent Christine Londo what is commonly referred to as a "gotcha," with the end
23 result constituting a significant reduction in her anticipated and promised retirement allowance.
24 A review of the Statement of Issues presented by CalPERS (Exh. 1) does not disclose the exact
25 basis upon which it seeks to reduce her final compensation (the base upon which her pension is
26 calculated) and the resulting retirement allowance. It merely quotes from a series of provisions
27 of (a) the Public Employees Retirement Law (PERL) and (b) Regulations propounded by
28 CalPERS pursuant to authority granted by the PERL. Following those recitations, it simply

1 concludes that "CalPERS conducted a review of respondent Londo's compensation reported by
2 the City, and determined that the pay . . . [in question] does not meet the definition of
3 'compensation earnable' under the PERL, and should therefore be excluded in the calculation
4 of respondent Londo's final compensation." At no place in the Statement of Issues does
5 CalPERS explain the basis for that conclusion, *i.e.* why that "pay" is not "compensation
6 earnable."

7 At the hearing, Ms. Zimmerman first testified that the reason she determined that the
8 reported income of Ms. Londo during the period in question (November 2005 through
9 November 2006) would no longer be regarded as compensation earnable was that she believed
10 it constituted "overtime," which is excluded from that definition under Government Code
11 Section 20635. When it became apparent that her determination was not based upon a strong
12 foundation, she then backtracked to a claim that the compensation of Ms. Londo was not paid
13 to her "pursuant to publicly available pay schedules" as required by Government Code Section
14 20636(b)(1).

15 Initially, it is important to be mindful of the fact that virtually all of the testimony
16 offered by CalPERS with regard to this subject related to the contents of an enactment (PERS
17 Regulation 570.5) and a clarifying and explanatory Circular Letter that were prepared five and
18 nine years, respectively, after Ms. Londo commenced working as the City Manager. These
19 more precise explanations of how CalPERS interpreted Government Code Section 20636(b)(1)
20 appear to have been drafted because of a prevalent lack of understanding, a misunderstanding
21 and/or confusion on the part of contracting agencies like the City of Walnut as to what exactly
22 needed to be done to satisfy the requirements set forth in Section 20636(b)(1). Certainly,
23 neither the City of Walnut nor Ms. Londo should be held to comply with requirements enacted
24 after the event in question.

25 Moreover, we will demonstrate that the uncontroverted testimony established that the
26 actual payrate of Ms. Londo after she commenced performing the City Manager duties on or
27 about November 1, 2005 was publicly available. Both Ms. Londo and Mayor King testified
28 without contradiction that any member of the public could readily ascertain that Ms. Londo's

1 payrate was the base salary attendant to her position of Finance Director plus the additional
2 \$5,000 by which her salary was increased for assuming the additional duties of a full time City
3 Manager so as to cause her compensation to roughly equate to that of the departing City
4 Manager.

5 Furthermore, the uncontradicted evidence reveals that the pay in question satisfies the
6 definition of "Temporary Upgrade Pay" that appears in Section 571 of the California Code of
7 Regulations and states as follows:

8 "Temporary Upgrade Pay - Compensation to employees who are
9 required by their employer or governing board or body to work in
10 an upgraded position/classification of limited duration."

11 Finally, we will illustrate how the application of the doctrine of equitable estoppel
12 precludes CalPERS from challenging the final compensation amount it represented on two
13 occasions would apply to her when she retired.

14 **II. STATEMENT OF FACTS**

15 Christine Londo commenced employment with the City of Walnut as Finance Director
16 in 1988. Prior to that time, she served in several capacities while employed by the City of West
17 Covina, a local public agency that also contracts with CalPERS for retirement benefits for its
18 employees. In 1995, she was asked by the leadership of the City of Walnut to serve as the
19 "Acting City Manager" for approximately five months to assist it in securing a replacement for
20 the departing City Manager. She received additional compensation equal to fifteen percent
21 (15%) above her salary, which pay was reported to CalPERS as compensation earnable.¹ As
22 soon as the new City Manager came on board, she resumed her full time position as the City's
23 Finance Director.

24 In the summer of 2005, while she was still serving as the Finance Director, she learned
25 that the City Manager would soon be leaving. Around that time, she was approached by the
26 City Attorney, Michael Montgomery, who asked her if she would again serve as the City
27

28 ¹ CalPERS is not challenging the reporting of this pay which, in effect, only benefitted it (not Ms. Londo or the City) by providing for enhanced retirement contributions).

1 Manager on an acting basis until a replacement could be found. She responded that she was not
2 interested in repeating the "stopgap" situation that had occurred ten years earlier, but was
3 willing to assume the full duties of City Manager while retaining her position as Finance
4 Director. Mr. Montgomery responded that he would recommend that result to the members of
5 the City Council, which he in fact did on October 26, 2005. At that meeting, the City Council
6 approved the appointment of Ms. Londo as Acting City Manager. (Exh. 11, p. 7.)

7 Although the details of this new arrangement had not yet been worked out, Ms. Londo
8 immediately began assuming the full time duties and responsibilities of the City Manager as
9 well as retaining her position as the City's Finance Director. She related that she was able to
10 do so for the entire year she served as City Manager without expanding the amount of time she
11 spent at work. She explained that, by then, the Finance Department was running very smoothly
12 with capable assistants, and she only needed to be involved for matters which required attention
13 at the highest level. She unequivocally emphasized that she spent the majority of her time
14 performing the duties of City Manager during that entire time period. Mayor King confirmed
15 that, during the one year period of service as City Manager, she was serving in two full time
16 positions, City Manager and Finance Director.

17 Soon after she commenced serving as a full time City Manager, she worked out the
18 details of that arrangement with the City Attorney. They agreed that she would receive as
19 compensation an additional \$5,000 per month over and above her salary as Finance Director,
20 for a total of \$15,060 per month,² which would cause her compensation to be substantially the
21 same as that provided to her predecessor. Ms. Londo and Mr. Montgomery also agreed that she
22 would be serving as City Manager in a full time capacity for a one year period and that the
23 parties would decide after that time whether they wanted to continue this arrangement further.

24 The City Attorney placed on the agenda for the November 30, 2005 City Council
25 meeting his recommendation that the City Council approve the compensation that had been
26
27

28 ² Before she ceased performing those duties, her payrate was increased slightly through across the board increases to employees, thus producing a slightly higher final compensation amount of \$15,586.47 (see Exh. B, p. 2.).

1 agreed upon between Ms. Londo and him. (Exh. 10.) This communication was a public record
2 that was available to any interested person.

3 At its November 30, 2005 meeting, the City Council adopted that recommendation and
4 formally approved her employment as Interim City Manager with a salary that was an
5 additional \$5,000 per month over and above her salary as Finance Director, for a total of
6 \$15,060. (Exh. C, p. 6.) Both Ms. Londo and Mayor King testified that this document was a
7 public record that was available to any member of the public.

8 When Ms. Londo completed her promised one year of service as City Manager, the City
9 was anxious to continue the relationship. However, she declined and resumed her duties and
10 compensation as the Finance Director.

11 The City had never included the salary of the City Manager on its management salary
12 schedule at any time between 1988 and the early part of 2014. (See Exhs. 8, 9 and 12.) Ms.
13 Londo explained that neither she nor any other City official was under the impression that the
14 City Manager's salary had to be reported in any particular location or format in order to satisfy
15 the requirement of Section 20636(b)(1) that it be paid pursuant to a publicly available pay
16 schedule. At that time, CalPERS had not promulgated any enactment or other communication
17 informing contracting agencies that this vague statutory requirement had to be satisfied in a
18 particular manner or location. As previously stated, both Ms. Londo and the Mayor
19 emphatically testified that the salary she actually received was publicly available.³

20 The actual salary received by Ms. Londo while serving as City Manager was reported to
21 CalPERS. As a result, appropriate employer and employee retirement contributions were paid
22 on that particular salary.

23 In November 2006 when Ms. Londo decided to cease performing the duties of the City
24 Manager, she served for a brief period as the Finance Director and then assumed the position of
25 Assistant City Manager. In January 2010, she requested that CalPERS provide her with an
26

27
28 ³ Ms. Londo related that the first time the City included the City Manager's salary on the management salary
schedule was in July, 2014. She added that the motivating factor was the position PERS had taken with respect to
her after she retired.

1 estimate as to what it would regard as her "final compensation" base upon which her retirement
2 allowance would be computed if she were to retire. CalPERS responded that it would be using
3 the pensionable income she received and reported during her one year tenure as City Manager.
4 (Exh. A.) Ms. Londo decided she was not ready to retire at that time.

5 In January 2013, she again requested that CalPERS provide her with an estimate of what
6 would be her actual retirement allowance were she to retire in May of that year, depending
7 upon what Option she selected. CalPERS responded in writing (Exh. B.) that it would again be
8 using as her "final compensation" base the reported pensionable income she earned during her
9 tenure as City Manager between November 2005 and November 2006. It also set forth a
10 specific amount as to what her allowance would be for each of the available Options from
11 which she could select. Each of those calculations assumed the final compensation base that
12 represented her pensionable income between November 2005 and November 2006.

13 Ms. Londo elected to retire then because the allowance CalPERS represented she would
14 receive was deemed adequate by her in order to maintain her desired lifestyle. She temporarily
15 delayed her retirement, which slightly increased her retirement allowance, from May until
16 September to accommodate the City's need to hire a replacement, which it did prior to her
17 retirement. Ms. Londo recalled that the replacement came to work the Monday following her
18 last day of work, which was the previous Friday. She emphasized that her decision to retire in
19 2013 was predicated upon the representation of CalPERS in Exhibit B as to what her retirement
20 allowance would be.

21 Ms. Londo related that, had she known prior to her retirement that CalPERS would be
22 rescinding its representation as to what her final compensation base would be and, instead,
23 would employ a significantly lower one with a resulting reduced retirement allowance, she
24 would not have retired until her challenge to the action of CalPERS had finally been resolved.
25 She explained that retiring with the final compensation base now being asserted by CalPERS
26 would not enable her to maintain the standard of living she desired. She testified that, instead, if
27 her challenge proved unsuccessful she would have remained employed for three to four more
28 years, which would increase the percentage of final compensation that would determine her

1 pension, and thereby increase her resulting allowance. She added that she assumed she would
2 receive cost of living pay raises during that time so that her allowance would meet her
3 anticipated needs after using the reduced final compensation base now being asserted by
4 CalPERS.

5 Unfortunately, even though CalPERS was aware of Ms. Londo's situation and her
6 retirement date, it did not communicate to Ms. Londo that it was even questioning the use of
7 the final compensation base contained in the previous estimates it had provided to Ms. Londo
8 (Exhs. A and B) until after she had already retired and her replacement had been hired. She
9 first became aware of a possible problem five days after her retirement when she received a
10 telephone call from Ms. Zimmerman telling her that CalPERS was questioning the use of that
11 reported final compensation base. Ms. Zimmerman did not then confirm that CalPERS was
12 definitely going to insist on this new position but, instead, told her that she needed to talk to her
13 superiors and that she would get back to her in a short while.

14 Ms. Londo did not receive notification until more than two months later that CalPERS
15 was actually taking the position that she could no longer use as her final compensation base the
16 pensionable income reported while serving as City Manager that was represented to her as
17 being appropriate in the previous communications from CalPERS. (Exhs. A and B.) This
18 notification was provided in a letter from CalPERS dated November 26, 2013. (Exh. 4.)
19 Because the City had already hired a replacement, she was unable to take any action that would
20 enable her to receive the retirement allowance she anticipated to be necessary to enable her to
21 maintain her desired standard of living.

22 **III. ARGUMENT**

23 **A. THE COMPENSATION PROVIDED TO MS. LONDO WHILE SERVING AS**
24 **CITY MANAGER WAS NOT "OVERTIME."**

25 The only CalPERS witness began her testimony by explaining that the sole basis for her
26 initial conclusion that the compensation earned by Ms. Londo while serving as the City
27 Manager could not be regarded as pensionable income was that it constituted overtime which
28 must be excluded under Government Code Section 20635. Ms. Zimmerman stated that her

1 conclusion was based upon the fact that Ms. Londo retained her primary position and duties as
2 Finance Director and the assumption of the additional duties of City Manager was extra work
3 that in effect she regarded as overtime. She added that the sole basis for that determination
4 was her interpretation of a brief City Council Agenda item prepared by the City Attorney dated
5 November 30, 2005 (Exh. 10) which simply stated that she would "retain her current Finance
6 Director position, title, duties and salary . . . [while] performing the additional duties of City
7 Manager." She candidly acknowledged that she conducted no investigation to determine the
8 exact nature and extent of the duties Ms. Londo actually did perform during the one year period
9 she served as both City Manager and Finance Director. Consequently, Ms. Zimmerman had no
10 direct information or knowledge regarding the true nature and extent of the particular duties
11 performed and responsibilities assumed by Ms. Londo while serving as City Manager.

12 Quite the contrary, as Ms. Londo and Mayor King testified, Ms. Londo served as the
13 City Manager in a full time capacity. This uncontroverted testimony as to what actually
14 occurred falls directly within the second-to-last sentence of Government Code Section 20635,
15 which provides, in pertinent part, as follows:

16 " . . . If a member concurrently renders service in two or more
17 positions, one or more of which is full time, service in the part-
18 time position shall constitute overtime. **If two or more positions**
19 **are permanent and full time, the position with the highest**
20 **payrate or base pay shall be reported to this system"**

21 (Emphasis added.)

22 The highlighted portion of Section 20635 quoted above described exactly what occurred
23 with respect to Ms. Londo between November 2005 and November 2006. As we previously
24 demonstrated (*ante* p. ___), the uncontroverted testimony reveals that she did occupy two full
25 time positions that were permanent. Accordingly, the reporting by the City of the highest
26 payrate or base pay (that attendant to the City Manager position) clearly complied with
27 Government Code 20635.

28 ///

1 **B. MS. LONDO'S COMPENSATION WAS PUBLICLY AVAILABLE.**

2 After Ms. Zimmerman realized that she would have a difficult time substantiating her
3 decision that the compensation in question was overtime, she began articulating her belief that
4 the pay in question was not paid pursuant to a publicly available pay schedule as required by
5 Government Code Section 20636(b)(1). However, the uncontroverted testimony of both Ms.
6 Londo and Mayor King clearly illustrated that her entire reported compensation earnable while
7 serving as City Manager and Finance Director was readily available to the public. One
8 ingredient of her compensation, her existing salary as Finance Director, was readily
9 ascertainable by the public through the published management salary schedule. The increase to
10 her compensation of \$5,000 per month for performing the additional duties as City Manager
11 also was readily available to the public. Ms. Londo and Mayor King related that both the City
12 Attorney's Agenda item (Exh. 10) and the ensuing official action taken by the City Council
13 (Exh. C, p. 6) clearly communicated that portion of her total compensation to the public.
14 Therefore, **the totality of her salary**, while in two places, was paid pursuant to a publicly
15 available pay schedule, within the meaning of Government Code Section 20636(b)(1).

16 As we explained in the Introduction section of this Brief (*ante* p. 2), CalPERS strongly
17 relied upon a Regulation with respect to which official notice has been taken that was enacted
18 in 2011 and a Circular Letter that was finalized and communicated to contracting agencies a
19 week before the hearing. What is most significant about these documents is that they strongly
20 appear to support the position of the City and Ms. Londo that there was, and still is,
21 considerable confusion regarding the meaning of the language in Government Code Section
22 20636(b)(1) specifying that, for a member who is not in a group or class, like the City Manager,
23 his or her compensation earnable is the base pay "paid in cash and pursuant to publicly
24 available pay schedules"

25 That enactment does not specify what constitutes a "publicly available pay schedule".
26 It was clearly the belief of the representatives of the City, as evidenced by the testimony of
27 Mayor King and Ms. Londo, that this provision was satisfied as long as the actual pay could be
28 determined through public documentation. Evidently, CalPERS recognized this widespread

1 confusion and uncertainty and felt a need to provide contracting agencies with a clearer
2 understanding as to how this requirement is to be satisfied by enacting the Regulation and
3 following it up with the very recent Circular Letter.

4 The more precise description of what is required that is now contained in Regulation
5 570.5 cannot properly or logically be applied retroactively to a circumstance that existed six
6 years earlier where there was an intended and actual compliance with the vague requirement
7 that was operative at that time. See *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188,
8 1193-94. Therefore, the contents of this Regulation as well as the further clarifying Circular
9 Letter submitted in late October 2014 must be ignored, and the standard existing at the time of
10 the event in question must govern.

11 **C. THE ADDITIONAL COMPENSATION GRANTED MS. LONDO WHEN SHE**
12 **ASSUMED THE ROLE OF CITY MANAGER SATISFIES THE DEFINITION**
13 **OF "TEMPORARY UPGRADE PAY."**

14 For reasons that were difficult to understand, Ms. Zimmerman also discarded the notion
15 that, at a minimum, the increased salary of \$5,000 per month while serving as City Manager
16 cannot be regarded as Temporary Upgrade Pay within the meaning of Section 571(a)(3) of the
17 California Code of Regulations. The only explanation given for that position appears in the
18 November 26, 2013 letter from CalPERS that Ms. Zimmerman authored (Exh. 4 at p. 3) which
19 asserts that this result would not occur because "... [she] did not assume the upgraded position.
20 Instead ... [she] performed some additional duties while remaining in ... [her] primary
21 position of Finance Director/City Treasurer."

22 Again, this conclusory language is completely at odds with what actually occurred, as
23 evidenced by the uncontradictory testimony of Ms. Londo and Mayor King. As we previously
24 explained, Ms. Zimmerman conducted no independent investigation to determine (1) whether
25 in fact Ms. Londo did assume the upgraded position of City Manager and (2) the extent of the
26 duties performed during her tenure as City Manager.

27 Ms. Londo explained, without contradiction, that (1) while performing both the duties of
28 the City Manager and the Finance Director she did not increase the amount of time she worked

1 and (2) the vast majority of that time was spent performing the duties of the City Manager
2 because the Finance Department was able to run in a self-sufficient manner that only needed
3 her involvement for major high-level decisions. On cross-examination, Ms. Zimmerman was
4 presented with the following typical situation and then asked whether the pay in question would
5 satisfy the definition of Temporary Upgrade Pay: If an employee in the classification of Police
6 Officer and his employer agreed that for a temporary period of time, he or she would occupy
7 the higher paying position of Police Sergeant on a full time basis and perform the attendant
8 duties and assume the attendant responsibilities for additional compensation until a promotional
9 examination had been conducted and the position had been filled, would that additional
10 compensation constitute Temporary Upgrade Pay? Ms. Zimmerman answered in the
11 affirmative.

12 As Ms. Londo's uncontroverted testimony reveals, her situation is virtually identical to
13 the hypothetical question Ms. Zimmerman answered in the affirmative. Like the hypothetical
14 Police Officer, she agreed to assume the City Manager job on a full time basis and performed
15 the attendant duties and assumed the attendant responsibilities connected with that higher-
16 paying position. She did so for a limited time period until that position was filled one year
17 later.

18 Therefore, in addition to our primary contentions that (1) she occupied the position of
19 City Manager during that one year period on a full time basis and (2) the pay she received for
20 performing those services was publicly available, for the reasons expressed above, this extra
21 pay must be treated as compensation earnable and, as such, included in her final compensation
22 base because it constitutes Temporary Upgrade Pay within the meaning of Regulation
23 571(a)(3). (See Exh. 1, p. 7.)

24 **D. CALPERS MUST BE ESTOPPED FROM CHALLENGING THE FINAL**
25 **COMPENSATION AMOUNT IT REPRESENTED WOULD BE USED IN**
26 **CALCULATING MS. LONDO'S RETIREMENT ALLOWANCE.**

27 In the leading case of *Crumpler v. Board of Administration Employees Retirement*
28 *System* (1973) 32 Cal.App.3d 567, 581, the Court of Appeal articulated "[t]he elements which

1 must be present to invoke equitable estoppel” as being “(1) the party to be estopped must be
2 apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that
3 the party asserting the estoppel had a right to believe it was so intended; (3) the other party
4 must be ignorant of true state of facts; and (4) he must rely upon the conduct to his injury’
5 (citations omitted).” See also, *City of Oakland v. Oakland Police and Fire Retirement System*
6 (2014) 224 Cal.App.4th 310. The uncontroverted testimony clearly establishes the existence of
7 each of those elements.

8 Initially, CalPERS clearly knew and, in fact, represented that Ms. Londo’s retirement
9 allowance would be based upon a final compensation base that equated to her reported
10 pensionable income while she served as City Manager. In response to requests by Ms. Londo,
11 on two separate occasions (Exhs. A and B.) CalPERS communicated to her unequivocally that
12 it was using that reported income as her final compensation base upon which her pension
13 would be calculated. Secondly, in presenting that information to Ms. Londo, it must be
14 concluded that Ms. Londo had a right to believe that CalPERS intended her to act upon that
15 information. At the time Ms. Londo elected to retire and retired, she was completely ignorant
16 of the fact that CalPERS might later be altering its position as to what her appropriate final
17 compensation should be. Finally, she clearly relied to her detriment on the information
18 presented by CalPERS by retiring and thereby negating any opportunity to secure her desired
19 pension through acquiring additional years of service and/or increases in pay while using the
20 final compensation base now being asserted by CalPERS.

21 **IV. CONCLUSION**

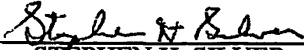
22 For all the reasons set forth above, we respectfully urge the Administrative Law Judge
23 to render a Decision determining that the compensation earned and reported by Ms. Londo
24 while she was serving as the City Manager be regarded as the “final compensation” base upon

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1 which her allowance is calculated and that the attempt by CalPERS to reduce both that base and
2 the resulting allowance be rejected.

3 Respectfully submitted,

4 SILVER HADDEN SILVER & LEVINE

5
6 Dated: 12/5/14 By 
7 STEPHEN H. SILVER
8 Attorneys for Respondent Christine F. Londo
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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 December 5, 2014, I served the foregoing document described as **RESPONDENT CHRISTINE F. LONDO'S POST-HEARING BRIEF** on the parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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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 than 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.

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

Executed on December 5, 2014, at Santa Monica, California.

LISA L. HILL



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15 Respondent,) **LONDO'S REPLY TO POST HEARING**
16 and) **BRIEF OF CALPERS**
17 CITY OF WALNUT,) Hearing: November 5, 2014
18 Respondent.)
19 _____)

20 **I. THE RAMIREZ PRECEDENTIAL DECISION SHOULD HAVE NO**
21 **APPLICATION TO THE PRESENT CASE.**

22 In its Post-Hearing Brief, CalPERS relies entirely on the December 20, 2000
23 "Precedential Decision" involving Mr. Ramirez and the City of Indio to support its position that
24 the compensation earned by Ms. Londo while serving as City Manager between November
25 2005 and November 2006 cannot be regarded as her final compensation.

26 Initially, as a decision of an administrative agency, its value as legal precedent is
27 minimal, at best. Most importantly, we have no information as to whether this decision later
28 was challenged through the initiation of judicial proceedings and, if so, what the outcome of

1 those proceedings may have been.

2 In Paragraph 12 of the section of the *Ramirez* Decision entitled "LEGAL
3 CONCLUSIONS" which appears on the third to last page, the Administrative Law Judge
4 purports to articulate the basis for the determination that the additional compensation received
5 by Mr. Ramirez for assuming the duties of City Manager while still serving as the Chief of
6 Police should not be included in the "final compensation" base upon which his pension was
7 calculated. The apparent grounds for that conclusion were (1) it was understood that Mr.
8 Ramirez's services only would be temporary; (2) the extra compensation was provided for
9 working additional hours beyond his normal working hours as Chief of Police; (3) this added
10 compensation was not pursuant to any labor policy or agreement but "was earned for the
11 valuable services Ramirez provided in excess of the hours he normally worked as Chief of
12 Police; and (4) "[a]n unfunded liability over and above PERS' actuarial assumptions would
13 exist if Ramirez were to receive a service retirement benefit based in part on the compensation
14 he earned as interim City Manager in his final year of employment with the City of Indio."
15 None of those factors are present in our case.

16 **A. MS. LONDO'S APPOINTMENT AS CITY MANAGER WAS PERMANENT,**
17 **NOT TEMPORARY.**

18 The uncontradicted testimony shows that, unlike Ms. Londo's temporary appointment in
19 1995 for the sole purpose of assisting in the selection of a new permanent City Manager, her
20 appointment as City Manager during the time period at issue was accomplished on a permanent
21 basis subject to reevaluation by both parties after a one year period. In other words, in contrast
22 to Mr. Ramirez, she was not elevated to the position of temporary City Manager simply to
23 assist in the recruitment of a new permanent City Manager. Mayor King testified that the City
24 wanted her to maintain that position for more than one year. However, it was Ms. Londo who
25 decided, after serving one full year in that position, that she wanted to terminate that
26 relationship and resume her position as Finance Director albeit at a lower level of pay.

27 Contrary to the assertion of CalPERS (at p. 3, line 23), the City allowed for a permanent
28 position of City Manager/Director of Finance. The City's Municipal Code, in Section 2-23(p),

1 expressly prescribed that the City Manager was empowered to serve as a Department Head.
2 (See Exh. O.)

3 Therefore, as we emphasized in our earlier Brief (at p. 8, lines 12-27), because Ms.
4 Londo occupied the position of City Manager in a permanent, full time capacity, her situation
5 falls directly within the following language contained in Government Code Section 20635:

6 " . . . If a member concurrently renders service in two or more
7 positions, one or more of which is full time, service in the part-
8 time position shall constitute overtime. **If two or more positions**
9 **are permanent and full time, the position with the highest**
10 **payrate or base pay shall be reported to this system"**

11 (Emphasis added.)

12 Accordingly, the reporting by the City to CalPERS of the highest payrate or base pay
13 (that attendant to the City Manager position) clearly complied with Government Code 20635.

14 **B. MS. LONDO'S ADDED COMPENSATION FOR SERVING AS CITY**
15 **MANAGER WAS NOT PROVIDED FOR WORKING EXTRA HOURS.**

16 Most significantly, in contrast to Mr. Ramirez, Ms. Londo did not perform services as a
17 City Manager during time that exceeded her regular hours of work as the City's Finance
18 Director. Quite the contrary, she clearly testified without contradiction that because she was
19 able to delegate many of her Finance Director duties and responsibilities, she performed both
20 jobs on a full time basis without any noticeable change in her hours of work. Interestingly, in
21 setting forth its comparison between Ramirez and Ms. Londo, the Trial Brief of CalPERS (at p.
22 3, line 22) noted that Ramirez increased both his workload and the amount of hours he worked
23 whereas it only asserted that Ms. Londo increased her workload, **not her hours of work.**

24 **C. MS. LONDO'S COMPENSATION AS CITY MANAGER WAS PURSUANT**
25 **TO A LABOR AGREEMENT.**

26 Unlike the determination of the Administrative Law Judge in *Ramirez* that the additional
27 compensation he received was not pursuant to a labor agreement, here the undisputed testimony
28 clearly reveals that there existed a labor agreement between the City (through its City Attorney)

1 and Ms. Londo to serve as City Manager for the prescribed additional compensation.

2 **D. THERE IS NO EVIDENCE OF ANY UNANTICIPATED UNDERFUNDING.**

3 In contrast to the *Ramirez* situation, here there was no "last minute spike" in Ms. Londo's
4 pension that produced a clear unfunded liability. CalPERS offered no evidence regarding any
5 possible unanticipated underfunding. Because the added compensation she received between
6 November 2005 and November 2006 occurred more than seven years prior to her retirement,
7 CalPERS had abundant opportunity to factor this increased compensation into its actuarial
8 determinations so as to cause any necessary additional funding to be provided well before Ms.
9 Londo retired.

10 **E. THE *RAMIREZ* DECISION DOES NOT PRECLUDE A DETERMINATION**
11 **THAT MS. LONDO'S COMPENSATION AS CITY MANAGER WAS**
12 **"TEMPORARY UPGRADE PAY."**

13 Finally, what also is significant is the fact that nowhere in the *Ramirez* Decision is there
14 any mention of the application of CalPERS Regulation 571(a)(3) which promulgates that
15 "Temporary Upgrade Pay" constitutes "special compensation." The Regulation defines
16 "Temporary Upgrade Pay" as "compensation to employees who are required by their employer
17 or governing board or body to work in an upgraded position/classification of limited duration."

18 A careful review of the *Ramirez* Opinion clearly reveals that his situation satisfies that
19 definition completely. Because the *Ramirez* Decision ignores that provision, it cannot operate
20 to preclude the application of that enactment to Ms. Londo's situation. As we noted in our
21 initial Post Hearing Brief (at pp.10-11), this promulgation requires the conclusion that, at a
22 minimum, Ms. Londo's extra income for serving as City Manager between November 2005
23 and November 2006 must be regarded as "special compensation" and, as such, properly
24 included in her "final compensation!"

25 **II. CALPERS MUST BE ESTOPPED FROM CHALLENGING THE FINAL**
26 **COMPENSATION AMOUNT IT REPRESENTED WOULD BE USED IN**
27 **CALCULATING MS.LONDO'S RETIREMENT ALLOWANCE.**

28 The authorities cited by CalPERS in support of its contention that there is no basis to

1 apply equitable estoppel actually support the position advocated by Ms. Londo. The portion of
2 the decision of the California Supreme Court in *City of Long Beach v. Mansell* (1970) 3 Cal.3d
3 462 which is quoted by CalPERS at p. 5, lines 12-16 of its Trial Brief describes our situation to
4 a tee. It relates that CalPERS may be bound by an application of that doctrine when all of the
5 specified elements are present and “. . . the injustice which would result from a failure to
6 uphold estoppel is of sufficient dimension to justify any effect upon public interest or policy
7 which would result from the raising of an estoppel.” As we noted in our Post-Trial Brief (at pp.
8 11-12), all of the elements of estoppel are present in this case. Moreover, the injustice that
9 would result from a failure to apply that doctrine is of a significant amount considering that Ms.
10 Londo’s fixed income produced by her pension would be substantially less than what she
11 counted on because of the representations of CalPERS when she made her decision to retire.
12 Moreover, CalPERS has not set forth any negative impact upon public interest or policy that
13 could result from employing that doctrine in this case.

14 Furthermore, the application of estoppel in this case will not nullify a strong rule of
15 policy or produce a result that is contrary to the law. Clearly, for all of the reasons we have
16 articulated, CalPERS has the discretion to determine that the added compensation in question
17 either constituted “temporary upgrade pay” within the meaning of its Regulations, or fell within
18 the statutory definition of “special compensation.” See *City of Oakland v. Oakland Police and*
19 *Fire Retirement System* (2014) 224 Cal.App.4th 310; *Crumpler v. Board of Administration*
20 (1973) 32 Cal.App.3d 567.

21 **III. CONCLUSION**

22 Apparently out of desperation, CalPERS devotes much of its Brief trying to establish that
23 the burden of proof rests with Ms. Londo. In doing so, CalPERS has twisted the events leading
24 up to this hearing to make it seem like it is Ms. Londo that is trying to achieve a particular
25 result.

26 Quite the contrary, Ms. Londo’s compensation in question was reported to CalPERS
27 along with attendant retirement contributions and accepted by it without question until after she
28 retired. It is CalPERS, not Ms. Londo, that initiated this dispute by seeking to accomplish a re-

1 characterization of compensation it accepted as pensionable income. This is not a case where
2 Ms. Londo is trying to establish her entitlement to retirement. Instead, it is a situation where
3 CalPERS is trying to reduce the pensionable income the City of Walnut reported with respect
4 to Ms. Londo.

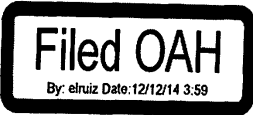
5 Moreover, even if the burden of proof did rest with Ms. Londo, for all of the reasons set
6 forth above as well as those contained in our Post-Trial Brief, it is clear that Ms. Londo has
7 more than established by a preponderance of the evidence her entitlement to have the full
8 compensation she received while serving as a permanent, full time City Manager included in
9 her final compensation.

10 Respectfully submitted,

11 SILVER HADDEN SILVER & LEVINE

12
13 Dated: December 12, 2014

14 By 
15 STEPHEN H. SILVER
16 Attorneys for Respondent Christine F. Londo
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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 December 12, 2014, I served the foregoing document described as **RESPONDENT CHRISTINE F. LONDO'S REPLY TO POST-HEARING BRIEF OF CALPERS** on the parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Hon. Humberto Flores
Administrative Law Judge
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(Per instructions of OAH, not to be sent via U.S. mail if emailed)

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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.

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

Executed on December 12, 2014, at Santa Monica, California.

LISA L. HILL