ATTACHMENT C

RESPONDENT'S ARGUMENTS
June 5, 2019

Huasha Liu

CalPERS Board of Administration
P.O. Box 942701
Sacramento, CA 94229-2701

Ref. No. 2018-0638

Subject: Arguments against the Proposed Decision In the Matter of My Appeal Regarding the Final Compensation Calculation by CalPERS

Honorable President and Board Members:

I respectfully request that you decline to adopt the Administrative Law Judge Ms. Erlinda G. Shrenger’s proposed decision and do not designate it as precedent, and grant my appeal regarding CalPERS’ recent policy change on Southern California Association of Governments’ (SCAG) lump sum merit payments for the following reasons:

1. Neither the Administrative Judge nor CalPERS has provided adequate justifications for CalPERS’ recent reversal regarding eligibility of SCAG’s lump sum merit pay as earnable compensation. This is significant because the reversal has a broad and negative impact on many current and future retirees at SCAG and other CalPERS member agencies that implement a similar lump sum merit pay program.

   a. The Administrative Judge’s Disposition (Proposed Decision on page 12) is primarily based on the same two miss-interpretations by CalPERS staff. These are:

      (1) My lump sum merit pay was not paid for “superior” performance (Proposed Decision-FACTUAL FINDINGS #29 on page 8); and
      (2) The lump sum merit pay is not available to all members in the group or class (Proposed Decision-FACTUAL FINDINGS #30 on page 8, and #31 on page 9).

   b. CalPERS’ assertion that my performance is not superior is arbitrary and unlawful. CalPERS has not defined and promulgated what constitutes a uniform “superior” performance. CalPERS staff’s current practice of case-by-case evaluation based on performance ratings and selective narratives in performance evaluation (FACTUAL FINDINGS #34 on pages 9-10) is likely to be taken out of context, and is subjective and arbitrary especially across different member agencies.
The Proposed Decision implies that CalPERS' determination to exclude the lump sum merit pay from my retirement pay was not arbitrary because it was based on an “individualized assessment” of whether the merit pay I received as part of my salary constituted special compensation. CalPERS did not provide any evidence that this "individualized assessment" was part of any protocol or standard benefits assessments applicable to me and all members affected by CalPERS' policy change. Unless and until CalPERS can show that this assessment is applicable to SCAG's lump sum merit pay program, and is standard operating procedure for all effected members, CalPERS' decision to revoke my vested, deferred retirement compensation continues to be arbitrary and unlawful.

There is an error in the Proposed Decision-FACTUAL FINDINGS #15 regarding SCAG's Performance Rating Criteria. Below is the correct SCAG's Performance Rating Criteria:

<table>
<thead>
<tr>
<th>Overall Performance Rating</th>
<th>Rating Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Role Model</td>
<td>4.25-5.0</td>
</tr>
<tr>
<td>Very Successful</td>
<td>3.45-4.24</td>
</tr>
<tr>
<td>Successful</td>
<td>2.55-3.44</td>
</tr>
<tr>
<td>Partially Achieved</td>
<td>Less than 2.55</td>
</tr>
</tbody>
</table>

My two applicable performance ratings were 3.60 and 3.75, respectively, resulting in an annual average rating score of 3.7. According to the authoritative Merriam-Webster Dictionary, “superior” is defined as “of higher rank, quality, or importance.” Given the “Very Successful” rating, my performance was clearly “of higher rank” and thus a “superior” performance.

It is important to note that a superior performance is not a perfect performance. Therefore, any performance evaluation for a superior performance is likely to have some critical narratives. The narratives often reflect different styles of the evaluators. Sometimes the narratives may sound harsh from an outsider's perspective. These “harsh” narratives could and should be perceived as constructive criticisms by the recipients. The ultimate rating scores and the associated merit pay are the true and accurate indicators of a superior performance.

It is so subjective and arbitrary that CalPERS staff selectively cited only the constructive criticism narratives from my evaluations while ignored the many narratives with high praise of my performance. As a matter of fact, the same supervisor who wrote the evaluations now has asked me to work for him in a different agency.
c. CalPERS’ assertion that SCAG’s lump sum merit pay is not available to all members in the group or class is factually incorrect. SCAG’s Merit Pay Policy and Program is available to all employees. More importantly, the merit pay including both salary increases and lump sum payments has been and will continue to be available to all SCAG employees. If and when a SCAG employee reaches the top of his/her pay range, the employee will be receiving the lump sum merit pay. Therefore, as an integral part of the Merit Pay Policy, the lump sum merit pay is available to each and every employee at SCAG.

2. SCAG’s lump sum merit pay is contract-based and non-discretionary.

Unlike employees in many other public agencies and private sector firms, employees at SCAG do not receive cost of living adjustments or any other salary increases. Merit Pay is the only form of compensation adjustment that SCAG employees receive.

a. SCAG’s Lump Sum Merit Pay is not a discretionary bonus

SCAG’s Merit Pay Program Lump Sum Payment is not a discretionary bonus. The lump sum payment is merely a form of disbursement of the same Merit Pay that applies to all employees throughout the agency. It is part of the agency-wide performance-based merit pay system.

Commencing in 2004/2005, SCAG’s Merit Pay Program is an agency-wide performance-based system with clear goals and objectives. SCAG’s Merit Pay Program including Lump Sum Payments were adopted by SCAG’s Governing Board of 85 elected officials, and subsequently approved by CalPERS in 2006.

SCAG’s Merit Pay Program has been made widely known since its commencement in 2004/2005 throughout the agency. Every employee in any class or group and all classes or groups have been aware of the merit pay program, including the clearly outlined performance standards and how the merit pay would be disbursed, either through a salary raise or a lump sum payment. Over a decade, SCAG’s employees receive updated performance standards each year in advance, and strive to perform their job duties well to earn their merit pay.

Each and all of the employees understand that the merit pay is part of their earnable compensation that contributes to their salary rate adjustment, in either base salary raise or lump sum payment. SCAG’s employees understand this and also rely on the merit pay being contributing in part to their future pension, including the lump sum payment.

b. SCAG’s Lump Sum Merit Pay is promised as a contract between SCAG and its employees

Each year, SCAG updates its standard Performance Agreement including the goals and objectives outlined in the standard Performance Agreement that
applies to everyone equally, and promises employees that they will receive their merit pay according to their performance. SCAG updates its salary contract with each of its employees upon completion of their performance evaluation, and disburses the respective merit pay to employees in either salary adjustment or lump sum payment. SCAG records this contract in its Personnel Action Form.

Over a decade, SCAG has made promise in advance every year to its employees regarding their merit pay, including both forms of salary raises and lump sum payments. SCAG updates the Performance Agreement annually, including the goals and objectives contained in the Performance Agreement. In accordance to the updated Performance Agreement, each of the employees will receive an annual performance evaluation from the respective supervisor. Based on the evaluation ranking determined by each level of respective supervisors, employees will receive the promised merit pay in either base salary raise or lump sum payment, depending on whether the employees are at the top of their salary ranges.

c. **SCAG’s Lump Sum Merit Pay is paid on a routine basis**

SCAG’s merit pay is disbursed to employees on a routine basis. Employees not at the top of their salary ranges receive their merit pay on a bi-weekly basis. Employees at the top of their salary ranges receive their merit pay on an annual basis. Such routine pay schedules have been in practice for over a decade.

Employees anticipate for their merit pay each year through either salary adjustment or lump sum pay. Based on the standard Performance Agreement and their evaluation rankings in previous year(s), employees have a rough idea about their anticipated merit pay for the incoming year, given the level of their job performance. They plan accordingly based on their living conditions, family situations, childcare, children’s educations, parent’s care, savings towards down payment for purchasing a home, vacation needs, etc.

3. **The limitations cited by CalPERS staff in C.C.R. Sections 571(a) and 571(b)(2) do not apply to SCAG’s lump sum merit pay policy.**

The intent of the C.C.R. Sections is to prevent abuse of such compensation to purposely increase retirement income. Given merit pay is part of SCAG’s agency-wide comprehensive performance evaluation system, SCAG’s decade-long merit pay policy including lump sum pay clearly is not, could not be, and will not be intended for such abuse.

4. **CalPERS’ reversal of the lump sum merit pay from earnable compensation is inequitable.**

SCAG’s performance-based merit pay policy does not discriminate between employees who are at the top of their respective salary ranges and those who are not. It is unfair and inequitable for CalPERS to exclude lump sum merit pay from employees’ earnable compensation just because those employees are at the top of their salary ranges.
It is inequitable for CalPERS to require that merit pay in the form of lump sum payment be available to all, yet, not to require that merit pay in the form of base salary increase be available to all. Further, it is inequitable for CalPERS to require superior performance from those who receive merit pay in lump sum payment, yet not those who receive merit pay in salary increase. This is so even assuming that CalPERS' interpretation of superior performance is non-arbitrary and lawfully sound, which it is not.

SCAG's merit pay in both forms of salary raise and lump sum payment are based on the same performance standards in the same Performance Agreement between SCAG and each employee. Employees receiving their merit pay in either form of the disbursement method must and shall be treated equally.

The employees who received their merit pay in lump sum payments anticipate the lump sum merit payments as part of their earnable compensation for calculating their retirement pension. These affected employees anticipate and rely on receiving their full pension that they have earned over the years. Separated from the rest, this group of employees is now adversely affected by CalPERS' action of taking away the subject portion of their pension.

5. CalPERS has not conducted any public process regarding its reversal, which has broad and adverse impact on financial condition and quality of life of many current and future retirees at SCAG and beyond.

a. To my knowledge, no one has ever been notified of any public hearing process by CalPERS to seek public input on such a critical policy reversal that has a broad and significant negative impact on financial reliance of many retirees.

b. The creation and existence of CalPERS is attributed to the monetary contributions from the members including both the employers and employees. It is an unwarranted policy and ill-based practice for CalPERS staff to single-handedly decide the fate of its vast set of contributing members subjectively and arbitrarily. I strongly believe that my appeal should be granted just for CalPERS' lack of public process alone.

6. SCAG's lump sum merit pay is lawfully deemed retirement compensable.

Based on the facts and arguments presented above, SCAG's lump sum merit pay is clearly lawfully eligible as part of the final compensation of the retirees. It is arbitrary and unlawful for CalPERS to revoke my vested, deferred, and hard-earned retirement compensation.
In conclusion,

a. The primary reasons which both the Administrative Judge’s Disposition and the CalPERS’ denial of my appeal rely on are invalid.

b. CalPERS’ recent policy change to reverse its previous approval of lump sum merit pay as earnable compensation is arbitrary, inequitable, inconsistent and noncompliance with the law; and lacks a public process.

c. SCAG’s Merit Pay Program including lump sum payments is consistent with the law, and meets all the requirements under the applicable California Code of Regulations.

d. CalPERS’ reversal of lump sum merit pay from compensation earnable has adversely affected financial reliance of me and many other retirees and employees in the same situation.

Therefore, on behalf of the affected and to be affected retirees and employees, I respectfully request that you grant my appeal, and order CalPERS staff to reimburse me and the other retirees for the pension payments we have not been paid because of this CalPERS staff error, and direct CalPERS staff to correct the policy so that all the affected retirees and employees receive this deserved compensation in their pension going forward.

I truly appreciate the time and effort you take on this critical matter. I, and many others, look forward to you making the right decision.