

**ATTACHMENT B**  
**RESPONDENT'S ARGUMENT**

Wendel, Rosen, Black & Dean LLP  
1111 Broadway, 24<sup>th</sup> Floor  
Oakland, California 94607-4036

1 R. Zachary Wasserman (Bar No. 54764)  
Anagha Dandekar Clifford (Bar No. 233806)  
2 **WENDEL, ROSEN, BLACK & DEAN LLP**  
1111 Broadway, 24<sup>th</sup> Floor  
3 Oakland, California 94607-4036  
Telephone: (510) 834-6600  
4 Fax: (510) 834-1928  
Email: zwasserman@wendel.com  
5 Email: adclifford@wendel.com

6 Attorneys for Respondents  
CHRISTINE MONSEN and  
7 ALAMEDA COUNTY TRANSPORTATION  
IMPROVEMENT AUTHORITY  
8

9 **BOARD OF ADMINISTRATION**

10 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

11  
12 In the Matter of the Calculation of Final  
Compensation of:

13 CHRISTINE MONSEN,

14 Respondent,

15 and

16 ALAMEDA COUNTY TRANSPORTATION  
IMPROVEMENT AUTHORITY,

17 Respondent.  
18  
19

Case No. 2012-0289  
OAH No. 2014010471

RESPONDENTS' CHRISTINE MONSEN  
AND ALAMEDA COUNTY  
TRANSPORTATION IMPROVEMENT  
AUTHORITY'S ARGUMENT IN SUPPORT  
OF RESPONDENTS IN THE MATTER OF  
THE CALCULATION OF FINAL  
COMPENSATION

Hearing: October 13, 2014  
Hearing Time: 2:45 p.m.  
Location: CalPERS

20 **INTRODUCTION**

21 Respondents Christine Monsen and Alameda County Transportation Improvement  
22 Authority (ACTIA or Agency) submits their argument on the evidentiary record before  
23 Administrative Law Judge (ALJ) Mary-Margaret Anderson on the issue of whether Ms. Monsen's  
24 final monthly compensation for pension purposes should be \$17,104.92.<sup>1</sup> We respectfully request  
25

26 <sup>1</sup> Respondent ACTIA notes that as a result of a 2010 merger between itself and Alameda County  
27 Transportation Authority, the consolidated agency exists today as Alameda County Transportation  
28 Commission (ACTC).

1 the Board grant Respondent's appeal based on demonstrated evidence that Ms. Monsen's salary  
2 of \$17,104.92 did not include deferred compensation paid by her employer, and was published and  
3 publicly available. Also, the increase in Ms. Monsen's salary was not made in anticipation of  
4 retirement; because she had an upward trajectory with the Agency and had no intention of retiring  
5 when she received the relevant raise in 2007.

#### 6 **PROCEDURAL HISTORY**

7 On October 28, 2011 almost one year after Ms. Monsen retired, Tomi Jimenez, Manager,  
8 Compensation & Employer review, Customer Account Service Division, notified ACTIA and  
9 Respondent of the decision that \$20,500 would be removed from Respondent's yearly payrate for  
10 purposes of calculating retirement benefit. (Attachment H, Exh. 4). Jimenez asserted that  
11 "[c]ompensation reported to CalPERS and information from the approved ACTIA salary schedule  
12 shows that in October of 2007, ACTIA increased the compensation for the Executive Director by  
13 adding deferred compensation in the amount of \$20,500 annually to [her] salary and reporting a  
14 monthly payrate of \$17,104.92" and argued that "deferred compensation does not meet the  
15 definition of reportable compensation under California Government Code (GC) § 20636" and "as  
16 defined in GC § 20630." Respondent timely appealed this determination. On June 30, 2014, after  
17 hearing the matter on March 5, 2014 and June 13, 2014, ALJ Anderson issued her Proposed  
18 Decision granting Ms. Monsen's Appeal. On September 17, 2014, the Board of Administration of  
19 the California Public Employees' Retirement System (CalPERS Board or Board), voted to decide  
20 the matter itself on the basis of the hearing record produced before the ALJ.

#### 21 **ARGUMENT**

22 CalPERS's staff has stated that its decision to deny the additional \$20,500 was made on  
23 the basis that this amount did not "meet the definition of reportable compensation." (Attachment  
24 H, Exh. 4). The evidence presented demonstrates that in 2007 Ms. Monsen's salary was increased  
25 by 3 percent plus \$20,500 and that Ms. Monsen retained the choice of whether or not to contribute  
26 that \$20,500 each year, or any lesser amount, to a deferred compensation plan. The evidence also  
27 shows that Ms. Monsen's salary of \$17,104.92 per month was published and publically available  
28 as required by PERL. Lastly, the evidence demonstrates that Ms. Monsen had no plans to retire in

1 2007 and there was no evidence raising any indication that the raise was given in contemplation of  
2 retirement. This evidence distinguishes the instant case from 12-01, *Craig F. Woods, Respondent*  
3 *and Tahoe Truckee Sanitation Agency* (“*Craig F. Woods*”), and demonstrates that the facts in this  
4 case do not conflict with the final settlement pay rules against raising pay in the final years of  
5 employment to inflate pension value. We request the Board review the complete record which  
6 supports the conclusion that the \$20,500 should be included in Ms. Monsen’s reportable  
7 compensation for retirement, approving the amount she has in fact been paid since her retirement  
8 in 2010.

9 **I. THE SALARY INCREASE WAS NOT DEFERRED COMPENSATION**

10 Ms. Monsen was hired by ACTIA in 1995 as Deputy Director; in 1998 she became  
11 Executive Director of the Agency. (Hearing Tr. 3/5/14; 3:32-7:32). Ms. Monsen retired at the  
12 close of 2010. During each year of employment as Executive Director, Ms. Monsen negotiated  
13 her compensation agreement with the ACTIA Board of Directors (“Board”) based on a  
14 combination of factors considered and discussed between Ms. Monsen and the Board. (Hearing  
15 Tr. 3/5/14; 23:12-13:13). Prior to October 2007, for several years, ACTIA made contributions to  
16 Ms. Monsen’s 457 Plan. After October 2007, ACTIA paid Ms. Monsen an additional \$20,500 as  
17 salary which was directly deposited into her bank account, and she chose to make the deduction in  
18 her salary to her 457 Plan as deferred compensation. (Attachment I, Exh. D; Hearing Tr. 3/5/14;  
19 14-20:37, 21:38-10:39). After October 2007, ACTIA made no contribution to her 457 Plan.

20 In July 2007, during the annual compensation negotiations, the Board, in closed session,  
21 considered a salary increase for Ms. Monsen. It was noted that she was in the lower half of the  
22 salary spectrum for similarly situated public officials, (Attachment I, Exh. B) and a majority of the  
23 Board felt she needed a substantial salary increase. The compensation subcommittee  
24 recommended approval of Ms. Monsen’s request which included a 6% adjustment increase and an  
25 amount equal to what the Agency had been paying for her maximum 457 contribution, or \$20,500  
26 at that time, as part of her salary. (Attachment I, Exh. B). Because Ms. Monsen recognized that a  
27 substantial increase in total cost to the Agency might have political ramifications, she suggested  
28 that instead of the Agency contributing to her 457 Plan that they increase her salary by that

1 amount so she could make the choice on what to do with the funds. (Hearing Tr. 3/5/14; 20:35).  
2 This also provided her with additional flexibility with her compensation to elect to keep the  
3 amount as taxed compensation, if needed. (Hearing Tr. 3/5/14; 14-20:37, 21:38-10:39). This  
4 question was in fact raised during the July 2007 closed session Board meeting. One Agency Board  
5 member asked what happens if Ms. Monsen chooses against deducting the amount towards her  
6 deferred compensation. The response provided and accepted was that this was Ms. Monsen's  
7 choice. As former Board Chair Mark Green testified, Ms. Monsen had the "flexibility to do  
8 whatever she wanted with that money. If she wanted to contribute she could, and if she didn't, she  
9 didn't." (Hearing Tr., 3/5/14, 25:21-2:22). The Board ultimately determined that a 3% increase  
10 plus an amount equal to the maximum allowable 457 contribution, or \$20,500 at that time, added  
11 to Ms. Monsen's salary was the appropriate pay increase and was commensurate with Ms.  
12 Monsen's performance vis-à-vis her peers.

13 As Government Code § 20636 (g)(4)(E) states, employer payments to a member's deferred  
14 compensation account are excluded from payrate, but Government Code § 20636 (b)(2)(A)  
15 distinguishes amounts that a member directs be diverted from salary for participation in a deferred  
16 compensation plan, as not "employer payments," but compensation that is included in a member's  
17 payrate. The evidence shows that in the negotiations for her salary in 2007, the Board concluded  
18 that Ms. Monsen's salary was on the low end of comparable positions and a 3 percent increase and  
19 \$20,500 (the maximum of which could be contributed to deferred compensation) would be an  
20 appropriate *salary* increase. The fact that Ms. Monsen had the choice to contribute from her salary  
21 any sum up to \$20,500 to her deferred compensation account, demonstrates that the \$20,500  
22 amount should be include in Ms. Monsen's payrate pursuant to Section 20636 (b)(2)(A).

23 There is a marked distinction between the facts of this case and those presented in the  
24 *Craig F. Woods* decision. In *Craig F. Woods*, the facts showed that the deferred compensation  
25 paid by the public agency to the member and reflected in an increase in the member's hourly rate  
26 during his last year of employment, should not be included in his final compensation. This  
27 determination was based on the distinction that the deferred compensation was not "deducted from  
28 an employee's salary" but rather paid "in addition to regular salary;" therefore reasoning that

1 “restructuring components of compensation does not alter the nature of the pay.” The instant case  
2 is demonstrably different.

3 Ms. Monsen’s salary was negotiated with the ACTIA Board. Components of the  
4 negotiated increase included an amount equal to what the Agency traditionally paid into Ms.  
5 Monsen’s 457 Plan and cost of living increases. Ultimately, the Board included a combination of  
6 both (3 percent cost of living increase and the \$20,500 that it would have paid into Ms. Monsen’s  
7 457 Plan) as her salary increase commensurate with her peers. Ms. Monsen’s salary was  
8 deposited into her own bank account and she thereafter *chose* to deduct the deferred compensation  
9 amount into her 457 Plan. The Salary Survey (Attachment I, Exh. J, pg. 142; Exh. K), shows Ms.  
10 Monsen’s published payrate as \$17,105 per month with no dollars attributed to deferred  
11 compensation. Attachment I, Exhibit D, the notification of remittance, shows the change from pay  
12 period ending 9/30/07, where Ms. Monsen is under “employer contributions” to deferred  
13 compensation, to pay period ending 10/31/07 where Ms. Monsen’s contributions are elected as  
14 “employee contributions.” The notification of remittance for pay period ending 10/31/07  
15 demonstrates the shift from employer to employee deferred compensation contribution for Ms.  
16 Monsen, based on her choice. It is stated on the contribution remittance that Ms. Monsen’s  
17 contribution, along with all other ACTIA employees, is an employee contribution. There are no  
18 employer contributions for that time period. Ms. Monsen had the choice to reduce or remove her  
19 contribution to the 457 Plan at any given time, unlike in *Craig F. Woods* where the additional  
20 \$920 monthly allowance was “for deposit in Employee’s retirement fund.” As a prudent planner  
21 Ms. Monsen diligently made the choice to contribute the maximum to her 457 Plan—she should  
22 not be penalized for that decision.

23 **II. THE 2007 SALARY INCREASE WAS NOT IN ANTICIPATION OF**  
24 **RETIREMENT**

25 Another distinguishing characteristic from *Craig F. Woods* is that Mr. Woods’ salary was  
26 drastically changed five months prior to retirement. After Mr. Woods had announced retirement,  
27 the public agency Board changed his contract to consolidate his base salary, car allowance and  
28 employer paid deferred compensation into one “hourly rate.” The ALJ determined that this

1 consolidation, solely for the purposes of inflating Mr. Woods' hourly rate during his final five  
2 months of service, was improper.

3 In the instant case, Ms. Monsen had no intention of retiring in 2007. (Hearing Tr. 3/5/14;  
4 4-10:39). Moreover, there had been no discussion of merging the two agencies (ACTIA and  
5 ACCMA) at that time. She believed her career trajectory was upward and this belief continued  
6 through the early stages of the merger. (Hearing Tr. 3/5/14; 3-9:22). Even in 2010, at the time of  
7 the merger, Ms. Monsen wrote a letter to the ACTIA Board asking them to let her stay on as  
8 Executive Director of the new merged agency. (Hearing Tr. 3/5/14; 14-20:37). Finally, when it  
9 was determined that the new agency would do a formal search Ms. Monsen noted that there were  
10 other qualified candidates and that some of those candidates would not apply if she threw her hat  
11 in the ring. Specifically, she understood that her Deputy was interested in submitting an  
12 application. (Hearing Tr. 3/5/14; 1-13:40). While difficult at the time, Ms. Monsen chose to take  
13 a step back and retire at the close of 2010. (See Hearing Transcript, 3/5/14, 3:22-12:24; 4:39-  
14 25:40).

15 The evidence supports that there was no intention of violating the final settlement pay rules  
16 and raising pension value deliberately in the final years of employment. While this issue was not  
17 alleged in the denial letter from CalPERS, (Attachment H, Exh. 4), there is no evidence to support  
18 any assertion that Ms. Monsen's retirement payrate was "spiked." Importantly, the payrate  
19 (including the deferred compensation amount) was accepted by CalPERS when Ms. Monsen chose  
20 to purchase additional retirement service credits in August 2010, when she was contemplating her  
21 retirement; and, that amount was used to calculate how much Ms. Monsen paid for the additional  
22 service credits. (See Attachment I, Exh. C.) It was also the payrate utilized for calculation by  
23 CalPERS for her first year of retirement.

24 **III. MS. MONSEN'S SALARY WAS PUBLISHED AND PUBLICALLY**  
25 **AVAILABLE**

26 At the first hearing, CalPERS raised an additional rational for its denial of Ms. Monsen's  
27 reported payrate as final compensation. CalPERS asserted that Ms. Monsen's payrate was not  
28 publically available or published. The evidence demonstrates that Ms. Monsen's salary was

1 available to the public, published through ACTIA Board packets (mailed out and available at  
2 Board meetings), and also available online. (Attachment I, Exh. K). It was the ACTIA website  
3 that contained Ms. Monsen's payrate. Mr. Georg Krammer, a witness at the hearing, testified that  
4 he prepared the salary survey, and also testified that he went on the ACTIA website and viewed  
5 his report prior to the June 2008 ACTIA Board meeting, along with the rest of the agenda for that  
6 day. (Hearing Transcript, 6/13/14, 14:33-14:35). In fact, the ACTIA website was not taken down  
7 (even after the merger) until September 2013. (Hearing Tr. 6/13/14, 19:28-16:29). It was  
8 therefore available during the times when CalPERS was investigating Ms. Monsen's case, first  
9 after 2010 and then in 2012 after our request for review; yet, there was no testimony that CalPERS  
10 actually reviewed (or made attempts to review) the website when investigating Ms. Monsen's  
11 case.

12 It was openly stated during the administrative hearing that the executive director's salary  
13 was negotiated. During these negotiations, several factors were taken into consideration,  
14 including the public's perception of Executive Director's salaries. However, once determined,  
15 Ms. Monsen's salary was anything but concealed. In fact, the published salary survey breaks  
16 down all aspect of Ms. Monsen's salary and compares it to her peers across the state.



**CONCLUSION**

We respectfully request the CalPERS Board agree with the decision of the Administrative Law Judge that the legal and fair conclusion is to include the 'disputed' \$1708.34 in Ms. Monsen's monthly reported final compensation for a total of \$17,104.92 as proper reportable compensation and request that CalPERS calculate her pension accordingly.

DATED: October 3, 2014

WENDEL, ROSEN, BLACK & DEAN LLP

By: 

R. Zachary Wasserman  
Anagha Dandekar Clifford  
Attorneys for Respondents CHRISTINE  
MONSEN and ALAMEDA COUNTY  
TRANSPORTATION IMPROVEMENT  
AUTHORITY

Wendel, Rosen, Black & Dean LLP  
1111 Broadway, 24<sup>th</sup> Floor  
Oakland, California 94607-4036