

ATTACHMENT B
STAFF'S ARGUMENT

**STAFF'S ARGUMENT TO ADOPT IN PART AND TO AMEND IN PART THE
PROPOSED DECISION**

Respondent Pier'Angela Spaccia (Respondent Spaccia) was employed by the Respondent City of Bell (Respondent City) as an Assistant to the Chief Administrative Officer, and later as the Assistant Chief Administrative Officer, starting on July 1, 2003. As such, Respondent Spaccia was a miscellaneous member of CalPERS. On September 28, 2010, Respondent Spaccia filed an application for service retirement pending industrial disability retirement. Respondent Spaccia requested that her CalPERS service retirement allowance be based on final compensation using her highest level of salary with Respondent City, \$28,582.44 per month, plus employer paid contributions to a deferred compensation plan.

A member's service retirement allowance must be based on his or her final "compensation earnable." Final compensation earnable is the highest average compensation paid over a 12 or 36 consecutive month period of employment with a CalPERS participating employer. Government Code section 20636 provides in part that "compensation earnable" is a combination of a member's "payrate" and allowable items of "special compensation." Payrate is, inter alia, "the normal rate of pay of the member paid in cash to similarly situated members of the same group or class of employment...pursuant to a publicly available pay schedule."

CalPERS' staff reviewed the circumstances of Respondent Spaccia's employment and determined that, because her salary was not set forth in a publicly available pay schedule, her final compensation earnable for Respondent City would be based on Respondent Spaccia's compensation of \$7,607.00 per month from another CalPERS participating public employer.

Respondent Spaccia also received five years of Additional Retirement Service Credit (ARSC) purchased directly by Respondent City with City funds. Government Code section 20909 provides that "a member...may elect...to make contributions" to acquire up to five years of ARSC. CalPERS' staff reviewed the circumstances of Respondent Spaccia's ARSC purchase and, in a separate and subsequent determination, informed Respondent Spaccia that it would disallow the ARSC purchase because it was made directly by the Respondent City with City funds.

Respondent Spaccia appealed these determinations and a hearing was held over four non-consecutive days before an Administrative Law Judge (ALJ). Respondent Spaccia and Respondent City were represented by legal counsel at all times preceding and during the hearing. Documentary and testimonial evidence was presented, including that of Respondent Spaccia, two current employees of Respondent City, the former City Attorney, and two CalPERS staff members.

During her employment with Respondent City, Respondent Spaccia's salary and other benefits were established by a series of "Employment Agreements" and addenda. Her salary was never set forth on a "publicly available pay schedule." However, her initial employment agreement, effective July 1, 2003, providing a base salary of \$8,525.83 per month, was set forth on an agenda and included as background documents presented and approved at a public meeting of the City Council. The ALJ found that Respondent Spaccia's salary was not set forth in a publicly available pay schedule, but that at least her first employment agreement had been included in the agenda and approved at a public hearing by the City Council. No other employment agreement was approved in this manner. Respondent Spaccia's argument that the increases reflected in her subsequent employment agreements were "publicly available" because they were either included in a multi-year City budget or produced in response to a request pursuant to the California Public Records Act, were determined not to be consistent with provisions of applicable statutory, regulatory and case law. Respondent Spaccia's argument that the City Charter authorized the Chief Administrative Officer to unilaterally execute her employment agreement was rejected by the ALJ.

While the ALJ also found that Respondent Spaccia's job functions and duties while employed by the Respondent City were never set forth on a duty statement or job description, he did find that Respondent Spaccia was correctly included in the unrepresented miscellaneous managerial group or class of City employees. With the exception of the Chief Administrative Officer, Robert Rizzo, the ALJ found that Respondent Spaccia had received increases in her salary that reflected a "huge discrepancy" between her and other members within her group and class of employment. The ALJ concluded that CalPERS properly considered this discrepancy between Respondent Spaccia's salary and that of other members of her group or class of employment (unrepresented miscellaneous managerial employee) in disallowing her claimed final compensation.

Except as to her first employment agreement, the ALJ found that none of Respondent Spaccia's subsequent increases were "pursuant to a publicly available pay schedule" as that term had been defined in law. The ALJ also endorsed the application of Title 2, California Code of Regulations, section 570.5, establishing and clarifying the term "publicly available pay schedule" for purposes of the Public Employees Retirement Law. Although this regulation was added after the initial determination, it was applied during the hearing review and hearing process. Subdivision (b) of that section provides that CalPERS may consider relevant factors, including but not limited to, documents approved by the employer's governing body in accordance with requirements of public meeting laws and maintained by the employer. Although not specifically citing subsection (b) of section 570.5, the ALJ found that Respondent Spaccia's first contract did establish a publicly available payrate and that CalPERS' determination that no salary from Respondent City could be used to establish Respondent Spaccia's compensation for the purpose of calculating her service retirement was in error. Accordingly, the ALJ set aside staff's determination to the extent it declined to consider any of Respondent Spaccia's compensation from Respondent City and held that the

base salary as reflected in her first employment agreement did establish a relevant payrate.

At the hearing, no dispute was raised regarding the fact that the funds used to purchase Respondent Spaccia's ARSC were paid directly from the employer rather than the member. The ALJ, however, found credible the testimony of Respondent Spaccia that she had spoken to and relied upon statements of a Retirement Specialist I, who in 2004 purportedly did not warn Respondent Spaccia that Respondent City could not directly purchase her ARSC. Relying on that representation, Respondent Spaccia arranged for Respondent City to purchase five years of ARSC for her benefit as well as a number of other selected employees of Respondent City.

The ALJ reviewed the text of Government Code section 20909 and found that the express terms of the statute did not prohibit an employer from making the contributions on behalf of the member, and that there was no controlling case law either way on the issue. However, the ALJ also erroneously found that no legislative history related to the enactment of Government Code section 20909, pertaining to the purchase of ARSC, was offered at hearing to support CalPERS' assertion. The ALJ was mistaken in this finding.

Contrary to the ALJ's finding, evidence was offered and admitted by Official Notice, setting forth significant legislative history bearing on the interpretation of Government Code section 20909.¹ This legislative history specifically and expressly stated the purchase of ARSC would be "cost neutral" to the employer. (Exh. 26, p. 2, ["...the benefit is intended to be cost neutral to employers. The member pays the full present value cost of the additional service credit."]; Exh. 26-A, p. 4 of 6, ["...benefit to be cost neutral to employers."]; Exh. 26-D., p. 1, ["...law intended to be fully member funded."] See also, Concurrence in Senate Amendment, SB 719, 8/18/03, at p. 2; ["The other type of payment is known as the 'full present value' payment. In this case, the member pays for the full cost of the increase in benefit that will result from the service credit purchase...."]. Furthermore, the Senate Analysis of SB 719, on page 2, unequivocally stated:

"This bill...[s]pecifies that the cost of the 'air time' service credit will be fully paid by the member, with no employer contribution permitted."

The ALJ clearly failed to acknowledge and recognize that such evidence was submitted and received by Official Notice of the ALJ into the record.² This was a material error on the part of the ALJ. This error reflects a misinterpretation of the pertinent statutory provision and resulted in the ALJ erroneously concluding that CalPERS would be estopped from rescinding the purchase.

¹ (CalPERS Exh. 26 (Administrative Record Exhibit 41, regarding SB 719, Stats. 2003; admitted into evidence on August 29, 2012, at p. 41, LI. 18-19 of Administrative Hearing Transcript.)

² Although the ALJ acknowledges others in Respondent City also had ARSC purchased by the employer. This benefit as well is one that was concededly not available to all members of Respondent Spaccia's group or class of employment, but only to a select few employees. (HT2, 18-19.)

The ALJ's Proposed Decision in determining that evidence existed which could support a finding that Respondent Spaccia's pay rate could be based on the first employment contract is consistent with the law and facts. Therefore, staff argues that the Board adopt the Proposed Decision pertaining to this issue. However, based on the law and evidence actually presented at the hearing, staff argues that the Board reject the ALJ's finding that CalPERS erred in rescinding the ARSC purchase and hold a Full Board Hearing on only this issue. The ALJ's errors need to be corrected by the Board not only to render a just and fair outcome in this case, but also in many other similar cases yet to be heard.

April 17, 2013


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