HARLAND W. BRAUN, ESQ.
1880 Century Park East, Suite 710
Los Angeles, California 90067-1608
State Bar No. 41842
Telephone: (310) 277-4777
Facsimile: (310) 277-4045

Attorney for Respondent
PIER'ANGELA SPACCIA

BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT TRUST

In the Matter of the Calculation of Final Compensation: **PIER'ANGELA SPACCIA,** Respondent, and **CITY OF BELL,** Respondent.	**CASE NO. 2011-0789** OAH NO. 2012020198 RESPONDENT PIER'ANGELA SPACCIA'S CLOSING ARGUMENT

INTRODUCTION

Pier'Angela Spaccia was an employee covered by the CalPERS pension plan under which she worked for various employers culminating in her work as Assistant Chief Administrative Officer of the City of Bell. Ms. Spaccia had 22.30 years of actual service and 5 years of additional retirement service credit, for a total of 27.30 years.

Ms. Spaccia's highest twelve months compensation at the City of Bell was $320,123.43. Because Ms. Spaccia was forced into an early retirement, her pension would be 50% subject to a possible 20% reduction to provide for her disabled son.

The Court ruled Ms. Spaccia had presented a prima facie case of the number of years in the CalPERS program, as well as the highest final salary. The burden then shifted to CalPERS to contest Ms. Spaccia's claim.

CalPERS made two claims:

1. Ms. Spaccia forfeited all her earnings for her seven years of service at the City of Bell because her employment contract was not "publicly available" as required by Government Code Section 20636. Under it's theory, CalPERS asserts that any employee who worked for a municipality which fails to post the employee's written employment contract on a wall or on the internet thereby forfeits his or her pension. The offending employer is thereafter rewarded with a massive refund from CalPERS.

2. CalPERS claims that Government Code Section 20909, which allows employees to purchase additional retirement service credit (ARSC) for up to 5 years, prohibits the purchase of the service credits by the employer.

Issues Not Involved in This Proceeding

The Court has candidly revealed its belief that Ms. Spaccia was paid an excessive salary for her service as the Assistant CAO of the City of Bell. The Court has expressed skepticism that the duties of Ms. Spaccia at the City of Bell merited the admittedly high salary she received. The Court has also expressed disapproval of the unfortunate e-mails sent by Ms. Spaccia while she served as a go between during the Randy Adams negotiations.

To be blunt, none of these conclusions are relevant to these proceedings. As CalPERS' itself admits, it does not regulate the rate of compensation for employees of its member municipalities. The rate of compensation is a legislative or executive decision for each member municipality as part of the political process. Moreover, neither CalPERS nor this Court has the authority to judge whether a particular employee satisfactorily fulfills his or her obligations to the member municipality.

Vested pension rights are so constitutionally protected that even a criminal

violation during the course of employment does not forfeit the CalPERS pension.

It is useful to simplify the CalPERS system to explore this principle of vested rights from a different perspective. The municipality determines the basic salary of an employee and reports the payment of the salary to CalPERS. CalPERS then calculates the premium which it requires so it can profitably invest the funds it receives to finance the employee's retirement at a future date. In this process the employee has no role whatsoever. The employer purchases the future pension from CalPERS based on CalPERS' own projection. The employee has a vested right in his or her pension to be calculated based on the number of years of service and the highest basic salary as defined by statute.

CalPERS is claiming Ms. Spaccia's salary over seven years is to be ignored because her employment contract was not posted on the city hall wall or on the internet, and the years of ARSC time did not qualify because they were purchased by the City of Bell. As far as counsel for Ms. Spaccia knows, CalPERS is not claiming that her salary was excessive, that Ms. Spaccia should suffer if CalPERS underestimated its future obligation, or that Ms. Spaccia should forfeit her pension because of some alleged misconduct at the City of Bell.

The Court may not personally approve of the final result of the application of the statutes, historical record, regulations, and the constitutions of California and the United States, but a faithful application of relevant legal principles require that Ms. Spaccia be granted a CalPERS pension based on 27.30 years service and her highest twelve months salary of $320,123.43.

Ms. Spaccia's Employment Contract Was Publicly Available

At the time Ms. Spaccia retired from the City of Bell, her employment contract was publicly available as that term was historically defined and understood at that time. The scandal at the City of Bell precipitated the creation by CalPERS of Regulation 571.5 changing the requirement from 'publicly available' to 'publicly published.' A

necessary issue to the claim argued by CalPERS is the question of who should suffer if the City of Bell failed to put Ms. Spaccia's employment contract on the wall of the city hall or on the internet as CalPERS claims is now required. As will be discussed, the answer is that it would be an unconstitutional forfeiture for an employee to lose his or her pension because the municipality failed to comply with a regulation not even in existence at the time of the employee's retirement.

CalPERS has the burden of proof as to whether Ms. Spaccia's employment contract was publicly available. Her employment contract was not posted on a wall in the city hall or on the internet as CalPERS now claims was necessary. It is not disputed that Ms. Spaccia's employment contract was available to any citizen or organization who requested to see it. City Attorney Ed Lee, a witness called by CalPERS, testified that Ms. Spaccia's employment contract was available to the public. The evidence is uncontradicted that when the Los Angeles Times requested Ms. Spaccia's employment contract, it was delivered to the Times within three days.

CalPERS Failed to Prove Public Availability Requires Publication

Uniquely, CalPERS has a number of methods to prove that "publicly available" at the time Ms. Spaccia retired meant published as that is now defined by Regulation 571.5. CalPERS has within its historic memory the entire history of the state pension system, including the writing and modification of the statutory scheme and promulgation of regulations, the auditing of its member municipalities, the determination of the pensions for specific municipalities, and the publication of explanations of its requirements distributed to its members.

The record is devoid of any evidence that CalPERS ever interpreted Government Code Section 20636 as consistent with Regulation 571.5 before 2011. Unbelievably, CalPERS is claiming that Regulation 571.5 is not new, but merely a codification of the existing rules that CalPERS has followed throughout its entire history. This is simply not true [See Attachment A].

Historically, Government Code 20636 was used only for the purpose of defining what compensation was the base salary for which a pension was to be provided. For example, in Senate Bill 53 of the 1993 legislative session, which enacted predecessor Government Code Section 20023, the legislative counsel's digest simply states the bill is for the purpose of determining required contributions and benefits [See Attachment B].

There is not even any reference in the legislative digest to the publication of the employment contracts. In fact Government Code Section 20023(b) simply states "pay rate 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." There is no reference to publicly available schedules with respect to the group.

Publicly available pay schedules were only used to determine the pay rate for an employee not a member of a group. The obvious reason for the requirement that there must be a written document available to the public was to prevent there being a single secret employment contract for one individual.

A full reading of Government Code Section 20023, the predecessor of 20636, demonstrates that the entire balance of Section 20023 only defines in detail the base salary for purposes of the pension. There was no further reference to public availability or publication.

Assembly Bill 2244 in 2006, sponsored by CalPERS, modified Government Code Section 20636 to include the words "pursuant to a publicly available pay schedule" to also apply to a group as well as to the individual member.

CalPERS explained to the Legislature that the existing law:

> ". . . specifies that the pay rates of members not in the group or class are required to coincide with publicly available pay schedules, and that the pay rate of a member in a group or class must be the same as the amount paid to similarly situated members of the same group or class of employment." [Attachment C]

CalPERS explains that the 2006 amendment "clarifies that the pay rate of

members in a group or class must be consistent with publicly available pay schedules."

The relevance and importance of the history of the 2006 amendments, a bill specifically sponsored by CalPERS, is that there was no attempt to further define "publicly available" even though this phrase was the specific focus of the bill because of the lack of such a requirement for employees in a group or class. Obviously it never occurred to anyone at CalPERS that "publicly available" had to be redefined to mean published, put on the internet, or pasted on the wall of the city hall. Publicly available at that time meant exactly what it says: the employment contract must be available to the public when the public requested it.

From 1993 through 2011, CalPERS has done literally hundreds of audits of various municipalities to determine whether they are in conformity with the rules and regulations of CalPERS, as well as the statutory requirements of CalPERS. Yet CalPERS has not introduced evidence of a single audit of any municipality in which the municipality was warned that it was out of compliance because its individual employment contracts were only available if a citizen requested them, as opposed to being on the internet or glued to a wall in the city hall.

To be more specific, CalPERS audited the City of Bell in 2006 [Exhibit 31] and 2010 [Exhibit 32], and in neither audit did the CalPERS auditors note that the employment contracts were not publicly available. CalPERS cannot claim that this was an oversight by its trained auditors because the concept of compensation earnable under Government Code Section 20636 is <u>the</u> basic foundation upon which all CalPERS pensions are based.

The reason neither audit mentions the lack of public availability is not because of negligence, but because it was never thought that there was a publication requirement until the citizens of Bell screamed that they had no idea what their city officials were earning. It was only <u>after</u> this public outcry that CalPERS passed Regulation 571.5 which transformed the requirement for availability on request to a publication requirement.

Attached to this brief is a copy of the CalPERS pamphlet dated July 2011 called "Vested Rights of CalPERS Members" [See Attachment D]. This pamphlet, publicly available on the internet, was written by the CalPERS legal office. Ms. Spaccia will refer to this pamphlet later in this brief, but for the time being the Court should notice that nowhere in this public explanation by CalPERS is there a warning to employees that, should their employer fail to put their employment contract on the internet or glue them to a wall in the city hall, their pensions will be forfeited.

Perhaps the CalPERS auditors from time immemorial have been negligent and failed to note that employment contracts were not "publicly available." However, even if there were never an audit that raised this question, or the current employee pamphlet fails to clearly define "public availability," surely there must be <u>some</u> memorandum or direction to the various members of CalPERS instructing them that public availability means something much more than available to the public upon request. Surely there must be some document from a CalPERS training course over the last 30 years defining public availability as publication.

The obvious answer is that CalPERS cannot sustain its burden of proof because CalPERS cannot prove something that is false. CalPERS never defined public availability as anything other than available upon request. CalPERS Regulation 571.5 is a transformational change in the interpretation of Government Code Section 20636. Regulation 571.5 adds another new and different purpose which is the dissemination to the public, without any request, the salary levels of various municipal officials. This is an excellent change with an excellent purpose, but this change and purpose did not exist when Ms. Spaccia retired.

Had it so desired, the California Legislature would have had no trouble defining "publicly available" as something more than available upon request. For example, in Government Code Section 6253.4 in the California Public Records Act, the legislature listed 38 departments of government which had to establish written guidelines for the accessibility of records and required specifically that "these guidelines shall be posted in

a conspicuous public place at the offices of these bodies, and a copy of the guidelines shall be available upon request free of charge to any person requesting the bodies' records."

In other words, the guidelines for accessibility must be posted, but in fact the records themselves must only be "available upon request." Again, available upon request is public availability, but clearly the legislature wanted more than that when it required the posting in a public place of the guidelines for public availability in Government Code Section 6253.4.

Again in the Public Records Act, Government Code Section 6253.8, the legislature had no difficulty in requiring state agencies to publish their orders on the internet. Section 6253.8 specifically requires the posting of certain orders on the entities' internet website, thus demonstrating that the legislature had a clear understanding of the difference between internet posting and posting on the wall, as opposed to available upon request.

Also, the Brown Act, which guarantees public access to most legislative meetings as well as the availability of supporting documents and materials, defines access as "available to the public upon request." *See* Section 54957.5(a).

Similarly, in the Brown Act the public may make a written request for documents approved at a closed session and may receive such documents after the conclusion of the meeting. *See* Government Code Section 54957.1(b).

Also, in the Brown Act the public may request in writing the agenda or all documents comprising the meeting packages be mailed for a cost not to exceed the actual cost of providing the service. *See* Government Code Section 54954.1. Thus, in each instance that the Brown Act provides for public accessibility, such availability is defined as receiving the document <u>after</u> a written request.

In addition to the fact that Ms. Spaccia's contract was publicly available as the term was defined at that time, unlike Rizzo and Adams, there was no attempt by Rizzo, Garcia, or Valdez to make fake contracts for the public to deceive anyone about Ms.

Spaccia's employment contract.[1]

Unconstitutional Forfeiture is Not a Remedy for Lack of Publication

Even assuming the City of Bell's failure to publish Ms. Spaccia's contract was erroneous, it does not follow that she should forfeit a pension based on her employment with Bell for over 7 years. The issue of whether Ms. Spaccia should forfeit her pension requires the Court to consider whether there was a material or immaterial breach, who was responsible, and who should be allowed to profit from this error.

Ms. Spaccia is an innocent employee with respect to the claimed failure to publish her employment contract. She had no authority over whether her contract was available after a public request, or was published by posting it on a wall in the city hall or on the internet.

The City of Bell is the party responsible for the failure to publish the Spaccia contract, and therefore should not benefit from its own failure to follow the future regulation. The City of Bell created the supposed violation, and now wishes to profit from its own failure and wants returned its contribution to CalPERS which provided for Ms. Spaccia's pension.

CalPERS is responsible for publishing the specific nature of the requirements of public availability which it did not do. CalPERS had many opportunities, particularly in 2006 to suggest clarifying legislation and did not. CalPERS also failed to notify Bell in the 2006 audit and 2010 audit, and failed to notify any of Bell's employees of the deficiency in making the employment contracts publicly available.

CalPERS, if properly functioning, should also have no financial stake in whether Ms. Spaccia obtains her pension. CalPERS determines Bell's contribution for Ms. Spaccia's future pension each year based on the reported salary, her projected life

---

[1] Although the Adams negotiations were confidential, once the contract was signed, it was given to City Clerk Valdez to be placed in Adams' personnel packet to be made publicly available. The later concealment by creating phoney contracts was done without Ms. Spaccia's knowledge. The term "pay period" was in the contract template used for years and written by City Attorney Ed Lee.

expectancy, the projected premature deaths of some employees, the return on investments, as well as the overall viability of the CalPERS investment fund. Whether CalPERS over- or underestimates the proper premium to be paid by the City of Bell is out of Ms. Spaccia's control. As an employee, Ms. Spaccia is promised by CalPERS and the City of Bell a particular pension based on her final salary times her years of service, and has a right to rely on both CalPERS and the City of Bell for her pension.

Ms. Spaccia's Claimed Pension is Guaranteed
by the United States and California Constitutions

The bottom line is that Ms. Spaccia had a vested constitutional right in her CalPERS pension as claimed. This right is described by the CalPERS pamphlet attached to this brief [See Attachment D].

To quote the CalPERS pamphlet on page 7: "The California Supreme Court long ago established that a promise of a pension made by a public employer to its employees is a promise the employer must keep. In other words, public employers in California are legally required to honor promises to current and former employees regardless of how much money they have set aside for that purpose."

The CalPERS legal pamphlet also explains that Ms. Spaccia's CalPERS pension is reinforced by both the United States and California Constitutions. According to CalPERS, "California has a strong public policy, enunciated through published legal decisions over the past century, establishing that public employee retirement benefits are contractual obligations entitled to the protection of the "contract clause" of the state constitution. That clause, found at Article 1, Section 9 of the California Constitution provides: "A . . . law impairing the obligation of contracts may not be passed."

CalPERS reinforces this point by arguing that Article 1, Section 10 of the United States Constitution similarly prohibits the state from impairing the obligation of contracts [page 8].

CalPERS Regulation 571.5 is a New Requirement
Which Redefines Public Availability

There can be no argument that Regulation 571.5 was merely a reiteration of the then existing public availability requirement. CalPERS itself proposed the regulation after the Bell expose` and political pressure for more transparency. The proposal for the regulation specifically says that it adds new requirements to the existing practice [See Attachment A].

The requirement that the employment contract must be posted physically on a wall in the city hall, or posted on the internet is new. There is absolutely no evidence that any such a requirement existed before Ms. Spaccia retired. The argument by CalPERS that this regulation was "nothing new" is preposterous.

CalPERS has always maintained that it has no discretion to deviate from the requirements of the law and regulations. Therefore, the fact that CalPERS awarded Robert Rizzo, the Chief Administrative Officer (CAO) a pension based on his 2002 contract with a salary equivalent of $185,000 puts a lie to this contention. This was the last Rizzo contract approved by the City Council, but under CalPERS's definition of publicly available, Robert Rizzo's contract for 2002 was not publicly available. Moreover, a half dozen Bell employees have retired based on their salaries during the period of 2002 through 2010, and yet there is no evidence that any one of these pensions has been challenged even though none of them were publicly available under the new CalPERS definition. The consistent conduct of CalPERS puts a lie to its argument contesting Ms. Spaccia's pension.

The Randy Adams Contract

The Court has issued an opinion with regard to the pension of Randy Adams. Suffice it to say that Randy Adams' claim for a pension was unique in the history of CalPERS in the sense that he wished to double his pension based on one year of employment at the City of Bell. Attachment E is Ms. Spaccia's analysis of the Randy

Adams decision and how it might apply to her case. Ms. Spaccia believes that the analysis is generally correct but deficient in the discussion of estoppel.

At the time the analysis was written, Ms. Spaccia believed that the doctrine of estoppel would apply to CalPERS for its failure to raise the issue of public availability of her employment contract. However, upon further analysis it is clear that the reason that CalPERS did not raise the issue of public availability was because the contracts were in fact publicly available as that term was defined in 2006 and 2010. Therefore, the doctrine of estoppel would be unnecessary.

In addition to spiking, the primary distinction between Ms. Spaccia and Randy Adams was that all of Ms. Spaccia's contracts, as described in the analysis as well as the declaration of Clifton Albright, were legally approved either by the City Council or Robert Rizzo. The 2005 budget, as well as the 2005 contracts, were in fact approved by the City Council. Her contracts were signed by the Mayor, the City Clerk, and the City Attorney, and the fact that there may have been some technical non-compliance with the Brown Act is quite irrelevant.

Legislation passed with technical violations of the Brown Act are not nullities and are only voidable. Interested persons or a district attorney may seek to have actions taken in violation of the Brown Act declared null and void by a court. Government Code Section 54960 is the specific provision, with strict time limits, for a district attorney or any interested party to go to court to have legislative acts declared null and void. Suffice it to say, if there were any technical violations at the 2005 City Council meeting, the actions taken by the City Council are still valid.

In any event, as Clifton Albright describes, Resolution 2006-42 specifically exercises the power of the City Council under Section 519 of the Charter to authorize the CAO to enter into service and employment contracts. However, Section 604(a) of the City Charter, applicable only to Randy Adams, requires that the appointment or removal of department heads be done with the approval of the City Council [See Exhibit 19].

Therefore, an important distinction between Randy Adams and Ms. Spaccia is that there was no requirement for the City Council to specifically approve the contracts for Ms. Spaccia once the authority to make the contract had been delegated by the City Council under Section 519, whereas Section 604(a) required City Council's approval of the Adams contract.

Government Code Section 20909 Does Not Prohibit the City of Bell From Purchasing Additional Retirement Service Credit

Beginning in 2004, the City of Bell purchased 5 years of Additional Retirement Service Credit for 12 employees. In each instance the premium to be paid by Bell was calculated by CalPERS. CalPERS accepted City of Bell checks for payment for all 12 employees.

Now CalPERS claims that it was illegal for the City of Bell to pay for the ARSC based on Government Code Section 20909 which allows employees to purchase the credit on their own.

In our legal tradition, if an act is not forbidden or labeled illegal, it is allowed. There are many reasons a city may wish to purchase ARSC time for an employee. The city, in times of plenty, may wish to reward employees by providing this added benefit. A city might choose to purchase ARSC time in lieu of a supplemental pension plan. A city might wish to speed the retirement of a highly paid senior employee in order to hire two younger employees at the same cost. It might pay a city to buy the ARSC time to retire a senior employee to be replaced by a junior employee at a reduced salary. A city may wish to settle a whistle blower case (such as Sgt. Corcoran in the City of Bell) by purchasing ARSC time to compensate for time lost while wrongfully fired.

CalPERS' only "authority" to deny Bell the power to buy ARSC time was one word mistakenly used in a 2003 analysis by a legislative consultant referred to in CalPERS' letter to Ms. Spaccia denying credit.

The legislative counsel's analysis is Attachment F. The Court will note that on

page 2 where the consultant used the word "permitted" he should have used the word "required." Of course the State Senate would be concerned about requiring local appropriations, but would have no concern if a city chose to buy ARSC time for its own reason. If the Senate wished to prohibit such purchases by a city, it would have been easy for the Legislature to explicitly impose such a prohibition in the statute

Even more telling is that the same analysis on page 3 discusses that employers will pay for such service credits for their own benefit. The analysis then states that the employee pays for the service credit when the employer does not benefit from the service credit purchased. Clearly therefore for the analysis to make any sense, the word on page 2 should have been "required."

CONCLUSION

There are only two questions to be answered at these proceedings. The first question is whether the City of Bell had the authority to purchase ARSC time for its employees. Based on the language of Government Code Section 20909 as well as the legislative analysis, there can be no question that municipalities have this authority.

The remaining question is what is the highest salary that Ms. Spaccia had at the City of Bell. That figure is uncontested as $320,123.43. Ms. Spaccia, based on the evidence and argument at the hearing, asks the Court to find that the ARSC time was properly purchased by the City of Bell, and that her highest salary at the City of Bell was $320,123.43 and should be used to calculate her CalPERS pension retroactive to her date of retirement of October 10, 2010.

Respectfully submitted,

Date: December 28, 2013

HARLAND W. BRAUN
Attorney for Respondent
ANGELA SPACCIA

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Los Angeles; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1880 Century Park East, Suite 710, Los Angeles, California.

On January 28, 2013, I served the within document entitled

RESPONDENT PIER'ANGELA SPACCIA'S
CLOSING ARGUMENT

on the interested parties in said action, by transmitting a true copy thereof as follows:

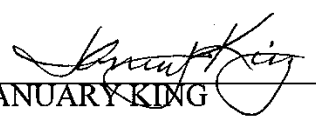
Office of Administrative Hearings
1350 Front Street, Suite 3005
San Diego, CA 92101
By E-mail: sanfilings@dgs.ca.gov
By Fax: (916) 376-6325

Wesley E. Kennedy, Esq.
California Public Employees' Retirement System
P.O. Box 942707
Sacramento, CA 94229-2707
By E-mail: wesley_kennedy@calpers.ca.gov

Stephen Onstot, Esq.
Aleshire & Wynder LLP
18881 Von Karman Ave., Suite 1700
Irvine, CA 92612
By E-mail: sonstot@awattorneys.com

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed this 28th day of January, 2013, at Los Angeles, California.



JANUARY KING

In the Matter of the Calculation of Final Compensation:
PIER'ANGELA SPACCIA, Respondent, and CITY OF BELL, Respondent
CalPERS Board of Administration Case No. 2011-0789, OAH No. 2012020198

RESPONDENT PIER'ANGELA SPACCIA'S
CLOSING ARGUMENT

ATTACHMENT A

ATTACHMENT A

ATTACHMENT A

Actuarial & Employer Services Branch
P.O. Box 942709
Sacramento, CA 94229-2709
TTY for the Speech and Hearing Impaired - (916) 795-3240
(888) CalPERS (225-7377) FAX (916) 795-3005

December 14, 2010

AGENDA ITEM 5b

TO: MEMBERS OF THE BENEFITS AND PROGRAM ADMINISTRATION COMMITTEE

I. SUBJECT: Proposed Regulations for Publicly Available Pay Schedule and Written Labor Policy or Agreement

II. PROGRAM: Actuarial & Employer Services Branch

III. RECOMMENDATION: Staff recommends that the Committee recommend that the Board approve for publication the proposed amendments to clarify and make specific the requirements for publicly available pay schedule and labor policy or agreement.

IV. ANALYSIS:

Only "compensation earnable" (defined under Government code sections 20636 and 20636.1 and corresponding regulations to include "payrate" and "special compensation") can be reported to CalPERS and considered in calculating retirement benefits. Generally the law requires that a member's payrate be shown on a publicly available pay schedule, that special compensation be limited to items included in a labor policy or agreement, and that all records establishing and documenting payrate and special compensation be available for public scrutiny. Employers have not uniformly adhered to these requirements.

Failure to adhere to these laws has sometimes resulted in audit findings, reversals of payroll, adjustments to retirement benefit calculations and increased workload for both CalPERS staff and employers. It is anticipated that these proposed changes to the regulations will provide CalPERS employers the details necessary to comply with the statutory provisions.

The proposed addition of section 570.5 and amendment to section 571, subdivision (b) will ensure consistency between CalPERS employers as well as enhance disclosure and transparency of public employee compensation by requiring that the payrate or item of special compensation be listed on a schedule or in a document that:

- Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meeting laws;
- Has been posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;
- Indicates the effective date and date of any revisions;
- Is retained by the employer and available for public inspection for not less than five years;
- Does not reference another document in lieu of disclosing the payrate or item of special compensation;
- For payrate, identifies the position title for every employee position, shows the payrate for each position, and identifies the time base;
- For special compensation, indicates the conditions for payment.

The adoption of these proposed regulations will benefit the public, CalPERS employers, members and staff by reducing the uncertainty around whether or not a member's payrate and/or special compensation was publicly available and properly approved by the employing agency. These regulations will also help CalPERS enforce compliance with the compensation statutes, maintain a consistent practice of verifying payrates and special compensation for compensation reported by CalPERS employers, and encourage transparency and proper reporting of public employees' pay for retirement purposes. If employers fail to conform to the pay schedule requirements, these regulations also provide a means for the Board to determine an amount, thereby ensuring that the payrates used to calculate compensation earnable remain fair, equitable, and properly authorized under the law.

The proposed new section 570.5 and the amended section 571, subdivision (b) are included as Attachment A for the Committee's approval. If Board approval to proceed with the proposed changes to the regulations is received, CalPERS staff will initiate the publication of the Notice of Proposed Regulatory Action in the California Regulatory Notice Register. A minimum 45 day written comment period will be followed by a public hearing, if requested, which would be scheduled for a future BPAC meeting. After Board adoption, the regulations will be transmitted to the Office of Administrative Law for review, approval and filing with the Secretary of State and publication in the California Code of Regulations. The proposed changes to the regulations will become effective 30 days after filing with the Secretary of State.

V. STRATEGIC PLAN:

Implementation of these regulations is not a specific product of the Strategic or Annual plans but is part of the regular and ongoing workload of the Actuarial & Employer Services Branch and other affected branches.

VI. RESULTS/COSTS:

CalPERS may achieve cost savings as a result of decreased litigation and administrative appeals related to these issues, as employers and members become more aware of the requirements for a publicly available pay schedule and/or labor policy or agreement.

LORI MCGARTLAND, Chief
Employer Services Division

ALAN MILLIGAN
Chief Actuary

Attachment

FINAL STATEMENT OF REASONS

Update of Initial Statement of Reasons

There have been no changes in the applicable laws or facts, or to the effect of the proposed regulations, from those described in the Initial Statement of Reasons.

Local Mandate Determination

The proposed regulation does not impose any mandate on local agencies or school districts.

Summary and Response to Comments Received During the Public Notice Period of February 14, 2011 through March 21, 2011

CalPERS received five written comments, which were questions clarifying the scope and requirements of the regulations. In addition to the written comments, CalPERS received two comments via phone. One was requesting a copy of the proposed regulations and the other was a question about requirements for compliance. None of the comments requested or required changes be made to the regulations as written. There was no request for public hearing on or before 15 days prior to the closing of the comment period.

1. Anna Gonzalez of North Los Angeles County Regional Center asked for clarification on what is considered as special compensation. CalPERS provided the definition of special compensation as a benefit(s) paid to employees in addition to regular payrate and earnings. CalPERS also provided the link to the list of approved special compensation items in the CalPERS Public Agency & School Procedures Manual. Gonzalez also asked about disclosure of the portions of health premiums covered by executive management and the employer. CalPERS stated that this information would not be required for disclosure on publicly available pay schedules. It also stated that the purpose and intent of these regulations are to clarify "compensation earnable", compensation for the purpose of calculating retirement benefits and that health premium costs and/or money provided to cover health premiums do not qualify as compensation earnable and cannot be used for retirement benefit calculations.

2. Herbert Pike of Association of Bay Area asked if the proposed regulation will expect them to issue a formal list of top management and their salaries and also asked about the frequency of updates on this information. CalPERS clarified that CCR 570.5 (a) provides a specific criterion in order for the payrate to be considered as compensation

earnable and reportable for use in calculating members' retirement benefits. CCR 570.5(a) (2) and (3) require the position title for every employee position and the payrate for the respective position identified, not the names of the individuals. In response to question on frequency of updates, CalPERS stated that in order for payrate to be considered as reportable for retirement calculation purposes, the information should be updated according to the procedure identified in CCR 570.5 and as appropriate. In plain terms, if there are changes in payrate which exceed the monetary parameters as identified on the pay schedule, an update is necessary as often as changes occur in order to be considered for use in calculating the member's benefit. CalPERS pointed out that the pay schedules would not necessarily need to be updated because an employee's payrate changes. However, if the employee's payrate exceeds the amount identified on the pay schedule, an update would be required in order to be considered in the calculation of members' benefits.

3. Bonnie Rasband of Marin County Office of Education asked how they can handle situations such as having a professional expert and/ or sub that doesn't have salary schedule and having a salary that varies according to experience. CalPERS was unable to provide a definitive answer on the situation. However, CalPERS provided scenarios such as:

    - If their governing body has approved an employee position at a particular rate of pay or within a pay range, then the position and the pay or pay range, as well as the manner in which it is paid, must be included on the publicly available pay schedule.

    - If the "professional expert and/or sub" is performing service for their agency in a capacity other than as a common law employee (i.e. as an independent contractor), then the pay need not be included on the pay schedule since it would not be reportable to CalPERS.

4. Richard Battles of Howell, Moore and Gough, LLP on behalf of Goleta Sanitary District (GSD) asked if General Manager's Employment Agreement with GSD qualifies as the schedule or document required under the proposed regulations. CalPERS confirmed that the General Manager's salary will be included on the publicly available pay schedule.

5. Mary Kimbell-Smith of Consumnes Community Services District via Noel Nicklay of California Special District Association was concerned about the load of work for taking all the special pays in each labor document , calculating what they would add at each step of a salary range for each position, and publishing them. CalPERS stated that this question applies to existing Regulation 571, subdivision (a) which contains the exclusive list of special compensation items for contracting agency and school employers. This part of the regulation is not being amended. CalPERS

explained that the proposed amendment to Regulation 571, subdivision (b) clarifies what information must be contained in a written labor policy or agreement, and how the employer is to maintain that information.

6. Julie Carter of City of Dublin requested via phone a copy of the newly proposed CCR 570.5 and proposed amendment to CCR 571. CalPERS provided her an electronic copy of the language for the proposed regulations via email.

7. Kate of Woodside Fire Protection District asked via phone how CalPERS will enforce agencies to comply with these new regulations within 30 days after they are effective. CalPERS requested the commenter to return call to discuss response but the call was never returned.

Alternatives Determination

CalPERS has determined that no reasonable alternative considered by the Board would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons that the proposed action.

In the Matter of the Calculation of Final Compensation:
PIER'ANGELA SPACCIA, Respondent, and CITY OF BELL, Respondent
CalPERS Board of Administration Case No. 2011-0789, OAH No. 2012020198

RESPONDENT PIER'ANGELA SPACCIA'S
CLOSING ARGUMENT

ATTACHMENT B

ATTACHMENT B

ATTACHMENT B

1993 Cal. Legis. Serv. Ch. 1297 (S.B. 53) (WEST)

CALIFORNIA 1993 LEGISLATIVE SERVICE
1993 Portion of 1993-94 Regular Session
COPR. (C) WEST 1993 No Claim to Orig. Govt. Works

Additions are indicated by <<+ Text +>>; deletions by
<<- Text ->>. Changes in tables are made but not highlighted.

CHAPTER 1297
S.B. No. 53
RETIREMENT—PUBLIC EMPLOYEES—ADMINISTRATION

AN ACT to amend Sections 20025.2, 20181, 20335, 20361, 20615, 20862.5, 20862.8, and 21151 of, to add Sections 20022.2, 20024.03, 20304, and 20615.5 to, to repeal Sections 20022.05, 20361.1, 20361.2, and 20361.3 of, and to repeal and add Sections 20022 and 20023 of, the Government Code, relating to public retirement.

[Approved by Governor October 11, 1993.]

[Filed with Secretary of State October 11, 1993.]

LEGISLATIVE COUNSEL'S DIGEST

SB 53, Russell. PERS: administration.

The Public Employees' Retirement Law defines the terms "compensation" and "compensation earnable" for purposes of determining required contributions and benefits.

This bill would recast and redefine the terms "compensation" and "compensation earnable" and various other terms and would define various other related terms. This bill would revise compensation reporting requirements.

This bill would require, when a member concurrently renders service in two or more permanent full-time positions, reporting to the system of the positions with the highest payrate or base pay.

This bill would provide that the final compensation for purposes of determining benefits accruing to future elected or appointed officers from future service in the office, shall be based on the highest average annual compensation earnable by the member during the period of state service for the employer in each elective or appointed office. This bill would provide that where that elective or appointed service is a consideration in the computation of any benefit, the member may have more than one final compensation.

This bill would increase the period of limitation on action by the board from 3 years to 10 years in the case of benefit payments made as a result of fraudulent reports for compensation.

This bill would require any employer that fails to enroll an eligible employee into membership to pay all arrears costs

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

for member contributions and related administrative costs of $500.

This bill would specify that assistant city attorneys are not excluded from membership in the system.

This bill would prospectively exclude from membership, elected or appointed officers of specified local public agencies who serve on public commissions, boards, councils, or similar administrative bodies, would prospectively remove city attorneys and assistant city attorneys from the definition of "elective officer," and would make related changes.

This bill would require certain employers that elect to pay all or a portion of the members' contributions to extend that benefit to all members in a group or class of employment. This bill would also authorize those electing employers, under specified conditions, to elect to stop paying those members' contributions during the applicable final compensation period for the member and provide, instead, a related increase in the members' payrate and require the employers to make related increased employer contributions.

This bill would require that the certification by employers of accumulated unused sick leave only report those days of unused sick leave that were accrued by the member during the normal course of his or her employment but shall not report any additional days of sick leave reported for the purpose of increasing the member's retirement benefit. Those reports would be subject to audit and retirement benefits could be adjusted when improper reporting is found.

This bill would also repeal the authorization of contracting agencies to employ retired members in limited duration positions requiring specialized skills, to fill a temporary vacancy, but would permit the employment of retired members in a position vacant because of a leave of absence, or of limited duration and requiring specified skills, or in an emergency.

This bill would make other related and technical changes.

This bill would become operative on July 1, 1994.

The people of the State of California do enact as follows:

<< Repealed: CA GOVT § 20022 >>

SECTION 1. Section 20022 of the Government Code is repealed.
SEC. 2. Section 20022 is added to the Government Code, to read:

<< CA GOVT § 20022 >>

20022. "Compensation" means the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work because of: holidays; sick leave; industrial disability leave, during which, benefits are payable pursuant to Sections 4800 and 4850 of the Labor Code or Article 4 (commencing with Section 19869) of Chapter 2.5 of Part 2.6 of Division 5 of Title 2 of the Government Code; vacation; compensatory time off; or leave of absence. 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 20023 and shall not exceed compensation earnable, as defined in Section 20023.

<< Repealed: CA GOVT § 20022.05 >>

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

SEC. 3. Section 20022.05 of the Government Code is repealed.
SEC. 4. Section 20022.2 is added to the Government Code, to read:

<< CA GOVT § 20022.2 >>

20022.2. "Labor policy or agreement" means any written policy, agreement, memorandum of understanding, legislative action of the elected or appointed body governing the employer, or any other document used by the employer to specify the payrate, special compensation, and benefits of represented and unrepresented employees.

<< Repealed: CA GOVT § 20023 >>

SEC. 5. Section 20023 of the Government Code is repealed.
SEC. 6. Section 20023 is added to the Government Code, to read:

<< CA GOVT § 20023 >>

20023. (a) "Compensation earnable" by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g).
(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.
(2) The computation for any leave without pay of a member shall be based on the compensation earnable by him or her at the beginning of the absence.
(3) The computation for time prior to entering state service shall be based on the compensation earnable by him or her in the position first held by him or her in state service.
(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.
(3) Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall identify the pay period in which the special compensation was earned.
(4) Special compensation may include the monetary value of normal contributions paid to the board by the employer, on behalf of the member and pursuant to Section 20615, provided that the employer's labor policy or agreement specifically provides for the inclusion of the normal contribution payment in compensation earnable.
(5) The monetary value of any service or noncash advantage furnished by the employer to the member, except as expressly and specifically provided in this part, shall not be special compensation unless regulations promulgated by the board specifically determine that value to be "special compensation."
(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 the Fair Labor Standards Act (29 U.S.C. Secs. 201-219, inclusive) 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.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

(d) Notwithstanding any other provision of law, payrate and special compensation schedules, ordinances, or similar documents shall be public records available for public scrutiny.
(e) As used in this part, "group or class of employment" means a number of employees considered together because they share job similarities, work location, collective bargaining unit, or other logical work related grouping. Under no circumstances shall one employee be considered a group or class. 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.
(g)(1) Notwithstanding subdivision (a), "compensation earnable" for state members means the average monthly compensation, as determined by the board, upon the basis of the average time put in by members in the same group or class of employment and at the same rate of pay, and is composed of the payrate and special compensation of the member. The computation for any absence of a member shall be based on the compensation earnable by him or her at the beginning of the absence and that for time prior to entering state service shall be based on the compensation earnable by him or her in the position first held by him or her in that state service.
(2) Notwithstanding subdivision (b), "payrate" for state members means the average monthly remuneration paid in cash out of funds paid by the employer to similarly situated members of the same group or class of employment, in payment for the member's services or for time during which the member is excused from work because of holidays, sick leave, vacation, compensating time off, or leave of absence. "Payrate" for state members shall include:
(A) Any amount deducted from a member's salary for any of the following:
(i) Participation in a deferred compensation plan established pursuant to Chapter 4 (commencing with Section 19993) of Part 2.6 of Division 5 of Title 2.
(ii) Payment for participation in a retirement plan that meets the requirements of Section 401(k) of the Internal Revenue Code.
(iii) Payment into a money purchase pension plan and trust that meets the requirements of Section 401(a) of the Internal Revenue Code.
(iv) Participation in a flexible benefits program.
(B) Any payment in cash by the member's employer to one other than an employee for the purpose of purchasing an annuity contract for a member under an annuity plan that meets the requirements of Section 403(b) of the Internal Revenue Code.
(C) Employer "pick up" of member contributions that meets the requirements of Section 414(h)(2) of the Internal Revenue Code.
(D) Any disability or workers' compensation payments to safety members in accordance with Section 4800 of the Labor Code.
(E) Temporary industrial disability payments pursuant to Article 4 (commencing with Section 19869) of Chapter 2.5 of Part 2.6 of Division 5.
(F) Any other payments the board may determine to be within "payrate."
(3) Notwithstanding subdivision (c), "special compensation" for state members shall mean all of the following:
(A) The monetary value, as determined by the board, of living quarters, board, lodging, fuel, laundry, and other advantages of any nature furnished a member by his or her employer in payment for the member's services.
(B) Any compensation for performing normally required duties, such as holiday pay, bonuses (for duties performed on regular work shift), educational incentive pay, maintenance and noncash payments, out-of-class pay, marksmanship pay, hazard pay, motorcycle pay, paramedic pay, emergency medical technician pay, POST certificate pay, and split shift differential.
(C) Compensation for uniforms, except as provided in Section 20022.1.
(D) Any other payments the board may determine to be within "special compensation."
(4) Neither "payrate" nor "special compensation" for state members shall include any of the following:

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

(A) The provision by the state employer of any medical or hospital service or care plan or insurance plan for its employees (other than the purchase of annuity contracts as described below in this subdivision), any contribution by the employer to meet the premium or charge for such a plan, or any payment into a private fund to provide health and welfare benefits for employees.
(B) Any payment by the state employer of the employee portion of taxes imposed by the Federal Insurance Contribution Act.
(C) Amounts not available for payment of salaries and that are applied by the employer for the purchase of annuity contracts including those that meet the requirements of Section 403(b) of the Internal Revenue Code.
(D) Any benefits paid pursuant to Article 5 (commencing with Section 19878) of Chapter 2.5 of Part 2.6.
(E) Employer payments that are to be credited as employee contributions for benefits provided by this system, or employer payments that are to be credited to employee accounts in deferred compensation plans; provided, that the amounts deducted from a member's wages for participation in a deferred compensation plan shall not be considered to be "employer payments."
(F) Payments for unused vacation, sick leave, or compensating time off, whether paid in lump sum or otherwise.
(G) Final settlement pay.
(H) Payments for overtime, including pay in lieu of vacation or holiday.
(I) Compensation for additional services outside regular duties, such as standby pay, callback pay, court duty, allowance for automobiles, and bonuses for duties performed after the member's regular work shift.
(J) Amounts not available for payment of salaries and which are applied by the employer for any of the following:
(i) The purchase of a retirement plan which meets the requirements of Section 401(k) of the Internal Revenue Code.
(ii) Payment into a money purchase pension plan and trust which meets the requirements of Section 401(a) of the Internal Revenue Code.
(K) Payments made by the employer to or on behalf of its employees who have elected to be covered by a flexible benefits program, where those payments reflect amounts that exceed the employee's salary.
(L) Any other payments the board may determine are not "payrate" or "special compensation."
(5) If the provisions of this subdivision, including the board's determinations pursuant to subparagraph (F) of paragraph (2) and subparagraph (D) of paragraph (3), are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5 or 3560, the memorandum of understanding shall be controlling without further legislative action, except that if the provisions of a memorandum of understanding require the expenditure of funds, those provisions shall not become effective unless approved by the Legislature in the annual Budget Act. No memorandum of understanding reached pursuant to Section 3517.5 or 3560 may exclude from the definition of either "payrate" or "special compensation" a member's base salary payments or payments for time during which the member is excused from work because of holidays, sick leave, vacation, compensating time off, or leave of absence. If any items of compensation earnable are included by memorandum of understanding as "payrate" or "special compensation" for retirement purposes for represented and higher education employees pursuant to this paragraph, the Department of Personnel Administration or the Trustees of the California State University shall obtain approval from the board for that inclusion.
(6)(A) Subparagraph (B) of paragraph (3) of this subdivision prescribes that compensation earnable includes any compensation for performing normally required duties, such as holiday pay, bonuses (for duties performed on regular work shift), educational incentive pay, maintenance and noncash payments, out-of-class pay, marksmanship pay, hazard pay, motorcycle pay, paramedic pay, emergency medical technician pay, POST certificate pay, and split shift differential; and includes compensation for uniforms, except as provided in Section 20022.1; and subparagraph (I) of paragraph (4) excludes from compensation earnable compensation for additional services outside regular duties, such as standby pay, callback pay, court duty, allowance for automobile, and bonuses for duties performed after regular work shift.
(B) Notwithstanding subparagraph (A) of this paragraph, the Department of Personnel Administration shall determine which payments and allowances that are paid by the state employer shall be considered compensation for retirement purposes for any employee who either is excluded from the definition of state employee in subdivision (c) of Section 3513, or is a nonelected officer or employee of the executive branch of government who is not a member of the civil service.
(C) Notwithstanding subparagraph (A) of this paragraph, the Trustees of the California State University shall determine which payments and allowances that are paid by the trustees shall be considered compensation for retirement

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

In the Matter of the Calculation of Final Compensation:
PIER'ANGELA SPACCIA, Respondent, and CITY OF BELL, Respondent
CalPERS Board of Administration Case No. 2011-0789, OAH No. 2012020198

RESPONDENT PIER'ANGELA SPACCIA'S
CLOSING ARGUMENT

ATTACHMENT C

ATTACHMENT C

ATTACHMENT C

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 651-1520 Fax: (916) 327-4478

AB 2244

CONSENT

Bill No: AB 2244
Author: Assembly Public Employees, Retirement and Social Security Committee
Amended: As introduced
Vote: 21

SENATE PUBLIC EMP. & RET. COMMITTEE: 5-0, 6/12/06
AYES: Soto, Ashburn, Alarcon, Dunn, Hollingsworth

ASSEMBLY FLOOR: 78-0, 5/11/06 - See last page for vote

SUBJECT: Public Employees' Retirement System: retirement benefits

SOURCE: California Public Employees Retirement System

DIGEST: This bill makes various clarifying and technical amendments to the laws administered by the California Public Employees' Retirement System.

ANALYSIS:

Existing Law

1. Allows local contracting agencies of California Public Employees' Retirement System (CalPERS) to reclassify certain local safety member positions as "local sheriff" positions.

2. Generally prohibits any contract or contract amendment from providing any retirement benefits for some, but not all, members of local miscellaneous, local police officer, local firefighter, county peace officer, or local safety officer classifications.

LEGISLATIVE INTENT SERVICE (800) 666-1917

CONTINUED

3. Specifies that the pay-rates of members not in a group or class are required to coincide with publicly available pay schedules, and that the pay-rate of a member in a group or class must be the same as the amount paid to similarly situated members of the same group or class of employment.

4. Permits past service to be converted to "local sheriff" service for positions reclassified as "local sheriff" positions. When the law was changed to allow specified Solano County employees to be reclassified as "local sheriffs," the bill neglects to amend the section regarding how past service for the reclassified positions should be treated.

5. Limits the eligibility to receive credit for prior service to persons employed by the contracting agency on the effective date of the contract granting the prior service credit.

6. Allows a member to reduce work time and receive a partial retirement allowance without a separation in employment under Partial Service Retirement Program (PSRP). PSRP participants are considered active employees and there is not separation in service. Consequently, the partial retirement allowance could be considered an impermissible in-service distribution unless the participant has reached normal retirement age. Currently, the minimum participation age for PSRP is lower than CalPERS' normal retirement age.

7. Creates State Alternate Retirement Program (SARP) for state employees first hired on or after August 11, 2004. Under SARP, new state miscellaneous and industrial members do not contribute to CalPERS for the first two years of employment. However, service earned while participating in SARP may be used for purposes of vesting for benefits. Although statute was amended to allow such vesting for service retirement, the section providing for disability retirement was inadvertently not amended.

8. Provides that a member may qualify for disability retirement by establishing that he or she "is incapacitated physically or mentally from the performance of his or her duties in the state service." Historically, CalPERS has interpreted duties "in the state service" to mean the actual duties the member was performing when he or she became disabled with his or her current employer. In September 2004, however, the California

LEGISLATIVE INTENT SERVICE (800) 666-1917

CONTINUED

Supreme Court, in the Nolan decision, interpreted this section more broadly thereby establishing a new standard that CalPERS must meet to qualify for disability retirement.

Specifically, the Supreme Court changed the criteria for determining disability retirement by interpreting "in the state service" to require a CalPERS member to show that he or she is not only substantially incapacitated from performing the usual duties of the position for his or her current employer, but also from performing the usual duties of the position for other CalPERS-covered employers.

Since the Nolan decision interpreted the words "in the state service" more broadly, the change proposed by this bill would serve to reaffirm CalPERS' historical practice that a member would be eligible for disability retirement provided he or she could show substantial incapacity to perform the usual duties required of his or her current employer.

9. Prohibits a retired annuitant from working for a state agency if during the prior 12-month period he or she received unemployment insurance payments arising out of prior employment with the same employer. Other sections of law that deal with the temporary employment of CalPERS members after retirement were not amended to be consistent with the above prohibition.

10. Added, in 2001, three retirement formulas to PERL for public agency miscellaneous members: 2.5 percent at 55, 2.7 percent at 55, and three percent at 60. These formulas supersede the two percent at 60 and two percent at 55 formulas for local miscellaneous members, but the two percent at 55 formula for school members was inadvertently not superseded.

This bill:

1. Adds references to the "local sheriff" classification in the appropriate sections of law to ensure that local safety members are treated in a consistent manner.

2. Adds the "local sheriff" classification to the classifications prohibited from providing any retirement benefits only to select members.

LEGISLATIVE INTENT SERVICE (800) 666-1917

CONTINUED

3. Clarifies that the pay-rate of members in a group or class must be consistent with publicly available pay schedules.

4. Adds a code section reference to existing law that will make the treatment of past service for the reclassified Solano County employees consistent with that of other employees reclassified as "local sheriff."

5. Clarifies that contract date also means contract amendment date.

6. Makes the minimum participation age for the Partial Service Retirement Program (PSRP) consistent with the CalPERS normal retirement age on a prospective basis.

7. Allows service earned while participating in the State Alternate Retirement Program (SARP) to be used for purposes of vesting for disability retirement benefits.

8. Clarifies that a member in state service may qualify for disability retirement if he or she is incapacitated physically or mentally for the performance of his or her duties. This change reestablishes the state of the law related to disability retirement as it was administered and applied by CalPERS for over 30 years prior to the Supreme Court's decision in Nolan v. City of Anaheim (2004) 33 Cal. 4th 335.

9. Makes clarifying changes to the provisions governing employment after retirement to ensure the consistent treatment of retired members working after retirement.

10. Clarifies that the two percent at 55 formula for school members supersedes the two percent at 60 formula.

11. Corrects a spelling error contained in the Judges' Retirement System II (JRS II) Law by changing the word "sure" to "such."

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 6/14/06)

California Public Employees Retirement System (source)
California Professional Firefighters

LEGISLATIVE INTENT SERVICE (800) 666-1917

CONTINUED

State Council of the International Association of Fire Fighters
Riverside Sheriffs' Association
Sacramento Metropolitan Fire District
California School Employees Association
San Bernardino Public Employees Association
Independent Employees of Merced County (IEMC)
Organization of SMUD Employees (OSE)
San Diego County Court Employees Association
San Luis Obispo County Employees Association (SLOCEA)
Santa Rosa City Employees Association (SRCEA)
American Federation of State County and Municipal Employees (AFSCME)

ASSEMBLY FLOOR:
AYES: Aghazarian, Arambula, Baca, Bass, Benoit, Berg, Bermudez, Blakeslee, Bogh, Calderon, Canciamilla, Chan, Chavez, Chu, Cogdill, Cohn, Coto, Daucher, De La Torre, DeVore, Dymally, Emmerson, Evans, Frommer, Garcia, Goldberg, Hancock, Harman, Haynes, Jerome Horton, Shirley Horton, Houston, Huff, Jones, Karnette, Keene, Klehs, La Malfa, La Suer, Laird, Leno, Leslie, Levine, Lieber, Lieu, Liu, Matthews, Maze, McCarthy, Montanez, Mountjoy, Mullin, Nakanishi, Nation, Nava, Negrete McLeod, Niello, Oropeza, Parra, Pavley, Plescia, Ridley-Thomas, Sharon Runner, Ruskin, Saldana, Salinas, Spitzer, Strickland, Torrico, Tran, Umberg, Vargas, Villines, Walters, Wolk, Wyland, Yee, Nunez
NO VOTE RECORDED: Koretz, Richman

JJA:do 6/14/2006 Senate Floor Analyses
SUPPORT/OPPOSITION: SEE ABOVE
**** END ****

LEGISLATIVE INTENT SERVICE (800) 666-1917

In the Matter of the Calculation of Final Compensation:
PIER'ANGELA SPACCIA, Respondent, and CITY OF BELL, Respondent
CalPERS Board of Administration Case No. 2011-0789, OAH No. 2012020198

RESPONDENT PIER'ANGELA SPACCIA'S
CLOSING ARGUMENT

ATTACHMENT D

ATTACHMENT D

ATTACHMENT D

Vested Rights of CalPERS Members

Protecting the pension promises made to public employees

July 2011

Attachment D

CalPERS

CalPERS Profile

The California Public Employees' Retirement System (CalPERS) is the nation's largest public pension fund with assets of approximately $240 billion.

Headquartered in Sacramento, CalPERS provides retirement and health benefit services to more than 1.6 million members and 3,033 school and public employers. The System also operates eight Regional Offices located in Fresno, Glendale, Orange, Sacramento, San Diego, San Bernardino, San Jose, and Walnut Creek. Led by a 13-member Board of Administration, consisting of member-elected, appointed, and ex officio members, CalPERS membership consists of approximately 1.1 million active and inactive members and more than 500,000 retirees, beneficiaries, and survivors from State, school and public agencies.

Established by legislation in 1931, the System became operational in 1932 for the purpose of providing a secure retirement to State employees who dedicate their careers to public service. In 1939, new legislation allowed public agency and classified school employees to join the System for retirement benefits. CalPERS began administering health benefits for State employees in 1962, and five years later, public agencies joined the Health Program on a contract basis.

A defined benefit retirement plan, CalPERS provides benefits based on a member's years of service, age, and highest compensation. In addition, benefits are provided for disability and death.

Today CalPERS offers additional programs, including a deferred compensation retirement savings plan, member education services, and an employer trust for post-retirement benefits. Learn more at our website at **www.calpers.ca.gov**.

Contents

I. Introduction 3

II. Overview: Member Benefits And Contributions 4

III. Overview: Employer Funding Obligations 7

IV. California Contract Clause as Applied to Public Employees' Retirement Benefit Rights 8

V. Federal Contract Clause as Applied to Public Employees' Rights in California 12

VI. CalPERS Members' Rights 13

VII. The Role of CalPERS in Protecting Members' Vested Rights 16

VIII. Conclusion 17

I. Introduction

Recent economic crises affecting the world's governments and markets have brought fiscal pressures on state and local budgets in California. Budgetary constraints have focused attention on the cost of providing public services, and no cost has received more attention than the compensation and benefits earned by our public employees. Commissions, political leaders and private citizens all have weighed in on the subject, each proposing wide-ranging "reforms" aimed at reducing the retirement benefits earned by public servants. Proposals have included, for example: moving to less advantageous benefit formulas, imposing caps on pensionable compensation, changing the definition of pensionable compensation to exclude items that are currently included, lengthening the "final compensation" period on which benefits are calculated, restricting employees' rights to purchase additional service credit, lengthening eligibility periods, increasing employee contributions and eliminating employer paid member contributions. Many of these proposals seek to apply these "reforms" to currently active employees as well as those who may be hired in the future.

Understandably, this attention on the compensation and benefits of members of the California Public Employees' Retirement System ("CalPERS") has raised concerns as to the level of assurance the law provides that promised pensions will be available upon retirement.

CalPERS has prepared this paper for two purposes:

- To articulate the current state of California law regarding the nature of its members' pension rights and the extent to which such rights have become "vested" and may not be impaired; and

- To explain the role of CalPERS in ensuring that its members' vested rights are honored.

This paper is not intended to respond to any particular proposed legislation or initiative. Rather, it is intended to present CalPERS' institutional views in the broader context of its primary governing laws: the California Public Employees' Retirement Law (Gov't Code §§ 20000, et seq.) (the "PERL") and the California and United States Constitutions. The merits and enforceability of any new proposal must be analyzed on its own unique terms and conditions.

Finally, although some of the general principles and authorities discussed in this paper may be relevant to plans CalPERS administers other than the Public Employee Retirement Fund defined benefit plan, this paper is not intended to address any issues related to the CalPERS' health benefits plans, defined contribution plans, the Legislators' Retirement System or the Judges' Retirement Systems (I and II).

II. Overview: Member Benefits And Contributions

California law clearly establishes that public employee retirement benefits are a form of deferred compensation and part of the employment contract. Rights to this deferred compensation are earned when the employee provides service to the public employer.

By statute and contract, public employers, not CalPERS, decide how much of an employee's compensation will be paid currently and how much will be deferred and paid in the future. Simply put, employers grant the benefits owed to CalPERS' members. CalPERS in turn serves as the trustee of the trust created to fund these benefits, through the prudent administration and investment of the retirement fund.

The rights of all CalPERS members are established by statute. In the case of local agencies, members' rights are also governed by the contract between the agency and CalPERS. When contracting with CalPERS, local agencies may choose from a menu of options. Benefits for CalPERS members are often the product of collective bargaining.

This section provides a general overview of the core benefits earned by CalPERS members. It is not intended to be a comprehensive description of all benefits and rights of all CalPERS members.

A. Service Retirement Allowance

Each CalPERS member earns service credit towards a lifetime retirement allowance after employment, calculated under a formula which accounts for the member's years of credited service, the member's "final compensation" and the member's age at retirement. Each benefit formula is commonly referred to as a specified percentage of a member's "final compensation" for each year of service, based on a particular age at retirement. For example, under a "2% at 55" benefit formula, a member receives 2% of his or her "final compensation" per year of credited service, if that member retires at age 55. If the member retires earlier or later than age 55, the member receives a lower or higher percentage of "final compensation," according to a statutory table. For example, under the "State 2% at 55" table, a member retiring at age 50 receives 1.1% of "final compensation" per year of credited service. A member retiring at age 63 or older receives 2.5% of "final compensation" per year of credited service.

As noted, each formula applies a multiplier to a member's "final compensation." For some members, "final compensation" means the highest one-year average pensionable "compensation earnable" that they earn during their careers. For other members, the highest annualized three-year average "compensation earnable" that they earn during their careers is used. In general terms, "compensation earnable" includes the member's "payrate" (essentially base salary) and certain items of "special compensation," which are established as pensionable by law or regulation. "Compensation earnable" generally does not include items such as overtime pay and amounts that are not available to employees in the same group or class of public employment.

B. Disability Retirement Allowance

If a member has an injury or illness that prevents the member from performing the customary duties of his or her regular position, the member may be eligible for a disability retirement. If a member's disability is the result of a job-related illness or injury, and the member is a school, local or State safety, State peace officer/firefighter, State industrial, or State patrol member, the member may be entitled to an industrial disability retirement. Local miscellaneous members also may be eligible if their employer contracts with CalPERS to provide for an industrial disability retirement.

A member who is granted a disability retirement receives the greater of the service retirement allowance (if eligible) or an allowance based on a specified formula applicable to that member. A member who is granted an industrial disability retirement allowance receives the greater of his or her service retirement allowance (if eligible) or a specified percentage of the member's "final compensation" (usually 50%, but 60% for some members), plus an annuity purchased with his or her accumulated additional contributions.

"California law clearly establishes that public employee retirement benefits are a form of deferred compensation and part of the employment contract."

C. Purchase of Service Credit

If they meet eligibility requirements, active members are entitled to purchase additional retirement service credit, which increases their retirement allowance. Additionally, where eligible, members can purchase service credit for prior public service, military service and certain other types of service. The member's cost to purchase additional service credit is set by statute and is based on actuarial assumptions and methodologies determined by the Board of Administration ("Board").

D. Death and Survivor Benefits

CalPERS provides benefits to the beneficiaries of active and retired members upon the member's death. Benefits and eligible recipients vary based on whether the member was still working at the time of death or was retired, and by the member's employer, occupation and the specific provisions in the contract between CalPERS and the employer. Additionally, a member may opt to have his or her retirement allowance reduced in order to increase the benefits that will become payable to the member's beneficiaries after the member's death.

E. Cost of Living Adjustments

A member's (or beneficiary's) initial allowance is subject to annual cost-of-living adjustments ("COLAs") that account for changes in the applicable cost of living index each year. Members and beneficiaries also may receive additional "Purchasing Power Protection" when annual COLAs have been substantially eroded by inflation over time.

F. Member Contribution Rates

Members generally contribute portions of their paychecks towards the cost of their future retirement benefits. These member contributions are established in various ways, including among other by statute, ordinance and memorandum of understanding, and they vary widely based on such things as the member's employer, occupation and bargaining unit, if any. In general, member contribution rates are established as a percentage of the member's monthly compensation. With respect to member contributions established by statute under the PERL: "The Legislature reserves the right to increase or otherwise adjust the rates of [member] contribution ... in amounts and in a manner it may from time to time find appropriate." Some member contribution rates also are expressly subject to collective bargaining.

Some employers may choose to pay a portion or all of the retirement contributions otherwise required of their employees. These payments typically are negotiated during collective bargaining and the law provides that the employer may "periodically increase, reduce, or eliminate" such payments.

G. Reciprocity

The "reciprocity" provisions of the PERL (and related provisions in the retirement laws governing other California public retirement system) provide for certain reciprocal retirement benefits for a person who works for two or more public employers during his or her career, with membership in two or more California public retirement systems.

The primary purpose of reciprocity is to "eliminate[] the adverse consequences a member might otherwise suffer when moving from one retirement system to another." Reciprocity provisions accomplish this in a number a ways, including, for example, allowing a member to use his or her highest compensation in any reciprocal system to determine the compensation used to calculate benefits from all such systems.

III. Overview: Employer Funding Obligations

The California Supreme Court long ago established that a promise of a pension made by a public employer to its employees is a promise the employer must keep. In other words, public employers in California are legally required to honor promises to current and former employees regardless of how much money they have set aside for that purpose.

In order to ensure that their promises are kept, the law requires California's public employers to pre-fund the benefits they owe by making contributions to CalPERS along with the contributions of their employees. By investing the combined contributions of members and employers, CalPERS is able to pay all of the benefits as they come due.

To successfully fund all promised benefits, the law requires the Board to maintain an actuarially sound retirement fund. As one court explained: "Actuarial soundness of [CalPERS] is necessarily implied in the total contractual commitment, because a contrary conclusion would lead to express impairment of employees' pension rights." Further, employees have a vested right to statutorily required employer contributions, even where those contributions are not linked to providing an "actuarially sound" retirement system.

> "...a promise of a pension made by a public employer... is a promise the employer must keep. In other words, public employers in California are legally required to honor promises to current and former employees..."

The California Constitution provides that the Board "shall [] have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries" and "consistent with the exclusive fiduciary responsibilities vested in it, shall have the sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the public pension or retirement system." The Board has authority to determine an actuarially sound rate of contributions that, together with investment earnings, will "assure the competency of the assets" of CalPERS such that all promised benefits are paid now and in the future. It is the Board's exclusive responsibility to determine the contributions that will be required of the participating employers and the participating employers then have a mandatory "ministerial" duty to pay the contributions that the Board determines are necessary. This obligation will be quickly enforced by the courts, by writ of mandate, if an employer fails to meet it.

As stated by the United States Supreme Court, a defined benefit plan "is one where the employee, upon retirement, is entitled to a fixed periodic payment. The asset pool [available to pay benefits] may be funded by employer or employee contributions, or a combination of both. But the employer typically bears the entire investment risk and ... must cover any underfunding as the result of a shortfall that may occur from the plan's investments."

IV. California Contract Clause as Applied to Public Employees' Retirement Benefit Rights

A "vested" benefit is one that has matured into an irrevocable contractual right, which cannot be taken away or otherwise impaired without the member's consent, except in extremely limited circumstances. A "non-vested" benefit, on the other hand, is one that has been promised conditionally. It is generally alterable or completely revocable by the appropriate authority (usually the Legislature or the employer) without the member's consent. A public employee's right to the retirement benefits earned during employment is generally a vested right.

California has a strong public policy, enunciated through published legal decisions over the past half century, establishing that public employee retirement benefits are contractual obligations entitled to the protection of the "Contract Clause" of the State Constitution. That clause, found at Article I, section 9 of the California Constitution provides: "A ... law impairing the obligation of contracts may not be passed." (Article I, section 10 of the United States Constitution similarly prohibits a state from impairing the obligation of contracts.) This means that an employee's vested pension rights may not be impaired except under extremely limited circumstances.

The fundamental doctrine protecting California public employee pension rights is succinctly stated: "A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity."

This doctrine has been applied and refined by dozens of California appellate cases since the 1940s. Several general rules have emerged through this jurisprudence:

RULE 1:
Employees Are Entitled To Benefits In Place During Their Employment

---

Public employees obtain a vested right to the provisions of the applicable retirement law that exist during the course of their public employment. Promised benefits may be increased during employment, but not decreased, absent the employees' consent.

These rules apply to all active CalPERS members, whether or not they have yet performed the requirements necessary to qualify for certain benefits that are part of the applicable retirement law. For example, even if a member has not yet satisfied the five year minimum service prerequisite to receiving most service and disability benefits, the member's right to qualify for those benefits upon completion of five years of service vests as soon as the member starts work.

The courts have established that this rule prevents not only a reduction in the benefits that have already been earned, but also a reduction in the benefits that a member is eligible to earn during future service. For example, a ballot proposition that purported to eliminate future benefit accruals for legislators was held unconstitutional because legislators were entitled to continue earning benefits under the law in place when they were first elected.

RULE 2:
Employees Are Entitled Only to Amounts Reasonably Expected from the Contract

Vested rights protection does not extend to unreasonable or unanticipated windfalls. In other words, the Contract Clause only protects the benefits that are reasonably expected from the contract, and does not protect "unforeseen advantages."

RULE 3:
Only Lawful Contracts with Mutual Consideration Are Protected by the Contract Clause

"The contract clause does not protect expectations that are based upon contracts that are invalid, unenforceable, or which arise without the giving of consideration. Nor does the contract clause protect expectations which are based upon legal theories other than contract, such as quasi-contract or estoppel."

For this reason, it is not an "impairment of contract" for CalPERS to correct an error by a member, the member's employer or CalPERS' staff that may have resulted in more favorable treatment to the member than the law allows. The PERL specifically authorizes CalPERS to correct such errors.

RULE 4:
Future Employees Have No Vested Rights to the Current Statutory Scheme

Employees to be hired in the future do not have vested rights to any particular retirement benefits because they have not yet entered into public employment. Thus, there is no constitutional impediment to unilaterally reducing (or even eliminating) retirement benefits for new hires of public employers, even if the public employers historically have provided such benefits to their employees as part of past employment contracts.

RULE 5:
Retired and Inactive Members Have Vested Rights to the Benefits Promised to Them When They Worked

Like active employees, retirees and inactive members have a vested right to the benefits that were in place when they were employed. However, retirees and inactive members generally do not have vested rights to beneficial changes created after their employment terminates. This is because a "member whose employment terminated before enactment of a statute offering additional benefits does not exchange services for the right to the benefits." An exception to the general rule that benefits granted after retirement are not vested arises when the retiree

or inactive member gives up another right acquired during employment in exchange for the right to receive post-employment improvements. In that case, the right to a post-employment improvement is generally a vested right.

RULE 6:
Active Employees' Vested Rights May Be Unilaterally Modified Only Under Extremely Limited Circumstances

---

Active public employees have a vested right to a substantial pension, but, under limited circumstances, the terms of their retirement rights may be modified before they retire. The California Supreme Court has explained: "[V]ested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. Nonetheless, such modifications must be reasonable, and to be sustained as such, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages. Further, it is advantage or disadvantage to the particular employees whose own contractual pension rights, already earned, are involved which are the criteria by which modifications to pension plans must be measured."

There are numerous California published decisions that discuss the circumstances under which modifications to the vested rights of active employees may be permitted. There are four primary steps for determining whether a modification is permissible:

(a) The first step in determining whether a modification is permissible is to determine if the unmodified right is in fact vested, meaning neither the employer nor the Legislature reserved the right to change the benefit. This is because the applicable retirement laws often contemplate changes. Indeed, the laws sometimes expressly reserve to the employer or the Legislature the right to modify or eliminate certain benefits. A member's vested right is only to the law as it is written at the time of employment, including all of its conditions.

(b) If a vested right exists, the next step is to determine whether that vested right has been changed in a way that is disadvantageous to the member.

(c) If it is determined that a vested right has been changed in a way that is disadvantageous to a member, the next step is to determine whether the change has a "material relation to the theory of a pension system and its successful operation." If it does not, then the modification is not permissible. Case law is clear that "changes made to effect economies and save the employer money do bear some material relation to the theory of a pension system and its successful operation," but, as discussed immediately below, this finding alone is not sufficient to justify a disadvantageous change to a member's vested rights.

(d) If the change bears a "material relation to the theory of a pension system and its successful operation," the final step is to determine whether the disadvantaged employees will receive a "comparable new advantage." When a court conducts this analysis, it looks specifically at what may be taken from and provided to the individually impacted employees. This member-by-member analysis, however, does not necessarily take into account each member's unique personal circumstances. Thus, a member does not get to pick and choose which advantages or disadvantages will apply to him, and then argue that his vested rights have been unconstitutionally impaired.

RULE 7:
The State's "Emergency" Powers Are Extremely Limited and Cannot Be Used to Reduce the Benefits that Have Been Promised

The courts have carved out one narrow exception to the constitutional prohibition against the impairment of contracts, although there is no case where a court has actually applied that exception in a way that has reduced the long term costs of public retirement benefits in California. Both the California and United States Supreme Courts have held that "a substantial impairment may be constitutional if it is "reasonable and necessary to serve an important public interest" during an emergency. The courts pay little heed, however, to the "legislative assessment of reasonable and necessary," because "the State's self-interest is at stake [and a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised." Thus, the courts apply a rigorous four-prong test when determining if this limited exception applies: (a) the legislative enactment must serve to protect "basic interests of society;" (b) there must be an "emergency justification for the enactment," (c) the enactment must be "appropriate for the emergency;" and (d) the enactment must be "designed as a temporary measure, during which time the vested contract rights are not lost but merely deferred for a brief period, interest running during the temporary deferment."

Thus, even if vested pension rights may be temporarily impaired in a true emergency situation, it is clear that the State's emergency powers do **not** enable it to solve its budgetary problems by eliminating or reducing the long term benefit promises it has made.

V. Federal Contract Clause as Applied to Public Employees' Rights in California

As stated above, it is clear that the "Contract Clause" of the California Constitution provides broad protections of the vested pension rights of California's public employees. Some current "reform" proposals suggest changing the State Constitution to reduce or eliminate public employee retirement benefits, in some instances even amending the Contract Clause itself. Presumably, proponents of these measures assume that by amending the State Constitution, they can avoid a constitutional challenge to their proposed impairment of vested retirement benefits. The assumption is misplaced, for two reasons:

First, if a proposed pension reform were to be enacted in the form of a constitutional amendment, it would still have to pass muster under the Contract Clause of the State Constitution. In other words, any new provision of the State Constitution would still be subject to the requirement that it not impair the obligation of contracts. Absent actually eliminating the entire Contract Clause, the fact that a pension reform measure may be adopted by way of a constitutional amendment would not assure its validity.

"Some current 'reform' proposals suggest changing the State Constitution to reduce or eliminate public employee retirement benefits...Presumably, proponents of these measures assume that by amending the State Constitution, they can avoid a constitutional challenge to their proposed impairment of vested retirement benefits. The assumption is misplaced..."

Second, even if a proposed amendment eliminated the State Constitution's Contract Clause in its entirety, *the Contract Clause in the United States Constitution would give rise to the same protection of vested pension rights* as the State Constitution. Most of the published California cases that have analyzed the constitutionality of modifying vested pension rights of public employees have not meaningfully distinguished between the Contract Clause in the California Constitution and the Contract Clause in the United States Constitution. In 1991, the California Supreme Court removed any doubt that the United States Constitution protects public employee pension rights in California to the same extent as the California Constitution, by explaining that prior case law had "never rejected the federal clause as a source of protection" and "in light of prior California decisions consistently extending federal contract clause protection to state public officers, it is simply 'too late' to retreat from the clear implication of those holdings."

Therefore, amending the California Constitution likely would not open the way to lawfully impairing vested pension rights. All of the rules discussed in Section IV above likely would still apply, no matter how the California Constitution may be amended, so long as the Contract Clause of the United States Constitution remains unchanged.

VI. CalPERS Members' Rights

Based on the legal analysis set forth above, CalPERS here articulates its understanding of the current state of vested rights law in California, as it applies to CalPERS members' benefits. Analyzing any particular member's vested rights, however, must be done on a case-by-case basis. Thus, nothing in this section is intended to express a view on any individual member's rights or any specific legislative or constitutional proposal. Further, the discussion in this section is not intended to be exhaustive, but rather to provide a general overview of our members' primary rights.

A. Vested Rights

In general, CalPERS members have vested rights to:

» Have their service retirement allowance determined based on the benefit formula that existed in the law when they provided service, if they satisfy all eligibility requirements.
» Have their retirement allowance based upon all service credit that they accrued by providing service or by purchasing service credit.
» Have their retirement allowance calculated using the definition of "final compensation" that existed in the law when they provided service.
» Have their "final compensation" determined according to the definition of "compensation earnable" that existed in the law when they provided service.
» Receive a disability allowance or an industrial disability allowance determined in accordance with the law that existed when they provided service, if the member satisfies all eligibility requirements.
» Purchase service credit under the terms that existed in the law when they provided service, if the member satisfies all eligibility requirements.
» Receive cost of living adjustments to their retirement allowance under the terms that existed in the law when they provided service. This includes "Purchasing Power Protection."
» Have their beneficiaries receive death and survivor benefits provided under the terms that existed in the law when the member provided service.
» Receive the benefits of reciprocity that existed in the law when they provided service, if they satisfy all eligibility requirements.
» Withdraw their contributions, plus accrued interest, upon separation from employment, when eligible for such a withdrawal.
» Have an actuarially sound retirement fund, which requires (a) that the CalPERS Board establish employer contribution rates sufficient to maintain the actuarial soundness of the system so that the competency of its assets is assured, and (b) that the employers timely pay those rates.

Because the above rights of CalPERS members are vested, they may only be modified if such modifications are "reasonable, and to be sustained as such, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages."

Finally, there remains a question as to whether vested rights may be consensually modified through collective bargaining without offending the Contracts Clause.

B. Non-Vested Rights

In general, CalPERS members do not have vested rights to:

» Benefit improvements that are granted to them after they have terminated employment (e.g., the "ad hoc" cost of living improvements granted to retirees based upon retirement date), unless such benefit improvements have been granted in exchange for a vested right that the retired members gave up voluntarily.

» Windfall benefits that arise out of circumstances that were never contemplated to be part of the employment contract.

» Payments in excess of those authorized by law, or arising from an error by the member, the member's employer or CalPERS.

» Perpetuation of the Board's discretionary actions affecting contributions and benefits. For example, the Board may change its actuarial assumptions and methodologies for calculating the cost for purchasing service credit, or for determining actuarial equivalency (for a variety of purposes). The Board has full authority to change actuarial assumptions and methodologies in the sound exercise of its discretion, and doing so does not impair any vested right, even if a change does not appear favorable to CalPERS members.

» Continuation of a benefit or contribution rate where the benefit or contribution rate is subject to change under the terms of the applicable statute, memorandum of understanding or employment contract.

» Continued employment with their employer or the continuation of the historical compensation practices of that employer, even if those practices impact the calculation of members' "compensation earnable" and "final compensation." For example, an employer may have historically paid certain premium amounts that qualify as pensionable "compensation earnable." While the member has a vested right to have such amounts included in "compensation earnable" when paid, the member does not have a vested right to continue to be paid those amounts.

Because the above rights are not "vested" under the Contract Clauses of the California and United States Constitutions, there is no constitutional impediment to the Legislature or a member's public employer (or the Board, in the case of its own discretionary acts) from unilaterally altering those rights. Unless and until such alterations are made, however, members of course have a right to receive all benefits provided to them under law. Further, other laws may limit the ability to make such alterations. For example, although specific employment practices may not be vested in perpetuity, the terms of a collective bargaining agreement must be honored during the period of that agreement's applicability.

VII. The Role of CalPERS in Protecting Members' Vested Rights

Under the State Constitution and the PERL, the Board (which is the 13-member governing body of CalPERS) has the exclusive and plenary authority and fiduciary duty to administer CalPERS in a manner that will assure prompt delivery of benefits and related services to the members and beneficiaries of the system. Board members are either elected by members of the system, appointed by State elected officials or sit ex officio.

One court explained the fiduciary duties of members of a public retirement board thusly: "[A] trustee's primary duty of loyalty is to the beneficiaries of the trust. The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary. The trustee must not be guided by the interest of any third person. This unwavering duty of complete loyalty to the beneficiary of the trust must be to the exclusion of the interest of all other parties. Under the rule against divided loyalties, a fiduciary cannot contend that although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one."

The California Constitution provides: "A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty." The California Supreme Court has explained: "[P]ension plans create a trust relationship between pensioner beneficiaries and the trustees of pension funds who administer retirement benefits and the trustees must exercise their **fiduciary trust** in good faith and must deal fairly with the pensioners-beneficiaries."

The Board will act consistently with these principles. With respect to legislative and constitutional proposals that may impact its members' vested rights, the Board will exercise its best judgment and act appropriately under all existing circumstances. In doing so, the Board will observe certain general guidelines, including:

» CalPERS will make reasonable efforts to keep its members and beneficiaries apprised of changes or potential changes to the law that may impact their rights and responsibilities.

» CalPERS will ensure that funds spent in any process relating to potential changes in funding or benefit structures are appropriate expenditures of trust funds under Article XVI, section 17 of the California Constitution and other applicable law.

» CalPERS' actions will be carried out in a manner that implements the law. In the event CalPERS questions whether changes in the PERL or other applicable law may cause an unconstitutional impairment of its members' vested rights, CalPERS will exercise its best judgment, based on all existing circumstances, as to whether to initiate or participate in judicial challenges to such changes.

VIII. Conclusion

CalPERS is dedicated to administering the system in a manner that will ensure that the promises made to CalPERS' members and beneficiaries will be kept. CalPERS acknowledges the budgetary challenges that the State and other public agencies throughout California are presently facing, and will play an appropriate role in the addressing these challenges. In this process, it will be vitally important for all interested parties to heed the legal rules protecting the vested rights of CalPERS' members, which have developed over the course of many decades. Without due consideration of these rules, well-intentioned proposals may not achieve the purposes for which they are designed; indeed, they may lead only to additional litigation and administrative costs, which can only increase the long term cost of delivering the benefits that have been promised to CalPERS members. It is the hope of CalPERS that this paper will provide guidance to all parties as they address these challenges.

California Public Employees' Retirement System
400 Q Street
P.O. Box 942701
Sacramento, CA 94229-2701
(916) 795-3991
(916) 795-3507 fax
TTY: (916) 795-3240

In the Matter of the Calculation of Final Compensation:
PIER'ANGELA SPACCIA, Respondent, and CITY OF BELL, Respondent
CalPERS Board of Administration Case No. 2011-0789, OAH No. 2012020198

RESPONDENT PIER'ANGELA SPACCIA'S
CLOSING ARGUMENT

ATTACHMENT E

ATTACHMENT E

ATTACHMENT E

HARLAND W. BRAUN, ESQ.
1880 Century Park East, Suite 710
Los Angeles, California 90067-1608
State Bar No. 41842
Telephone: (310) 277-4777
Facsimile: (310) 277-4045

Attorney for Respondent
PIER'ANGELA SPACCIA

BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT TRUST

In the Matter of the Calculation of Final Compensation: **PIER'ANGELA SPACCIA,** Respondent, and **CITY OF BELL,** Respondent.	**CASE NO. 2011-0789** OAH NO. 2012020198 RESPONDENT PIER'ANGELA SPACCIA'S RESPONSE TO CALPERS REQUEST FOR OFFICIAL NOTICE [GOVERNMENT CODE § 11515] OF THE DECISION IN THE MATTER OF RANDY ADAMS, CASE NO. 2011-0788 Hearing Date: December 27-28, 2012 Time: 9:00 a.m. Location: Orange ALJ: James Ahler

INTRODUCTION

CalPERS requested that the Court take judicial notice of the decision in the Matter of Randy G. Adams, case no. 2011-0788, OAH no. 2012030095, because CalPERS believes that the decision in the Randy Adams case has relevance to the issues in the matter of Pier'Angela Spaccia's calculation of final compensation.

CalPERS is correct that some of the reasoning in the Adams case is relevant to the calculation in Pier'Angela Spaccia's case. Ms. Spaccia believes that the difference between her status and Randy Adams' status could be usefully considered in her matter.

Employment

Pier'Angela Spaccia was employed by the City of Bell from 2003, and she retired on July 31, 2010. Pier'Angela Spaccia was an employee and not a department head. As Assistant to and the Assistant Chief Administrative Officer Ms. Spaccia was assigned special duties when particular problems or projects occurred.

Estoppel

As an employee of the City of Bell, Pier'Angela Spaccia relied on the City of Bell, its attorneys, as well as CalPERS to assure that the CalPERS pension on which she relied was legally compliant. At no time while Pier'Angela Spaccia was employed at the City of Bell did any personnel from the City of Bell or its employees raise any issue with respect to the validity of her pension. Nor did anyone at the City of Bell ever raise any issue as to whether her salary was to be used in the calculation of her CalPERS pension.

Randy Adams did not rely on CalPERS or the City of Bell. Adams' demand that his Bell salary be "persable" shows a sophistication about compensation calculations which preclude him from claiming Bell or CalPERS impliedly misrepresented the validity of his extraordinary demand that his lifetime pension be doubled for a years work at Bell.

In 2006, CalPERS visited the City of Bell and conducted a thorough review of the City of Bell's CalPERS pension compliance. Based on this audit, CalPERS issued a report which is Exhibit 7 of Pier'Angela Spaccia's exhibits at the previous hearing. In that report, CalPERS never questioned whether Pier'Angela Spaccia's or anyone else's pay was "compensation earnable" under the appropriate statutes and regulations. In the 2006 CalPERS report, CalPERS never raised any issue about whether the salaries of any of the employees or public officials at the City of Bell were "publicly available" under the applicable regulations and statutes.

Had Pier'Angela Spaccia been notified of any of these possible deficiencies by the City of Bell or CalPERS, she would have either taken action to demand compliance

to protect her pension, or left the employment of the City of Bell to work at a government agency that was in full compliance with the CalPERS regulations. At all times while she worked at the City of Bell she reasonably relied on the City of Bell and CalPERS for the assurance that her pension as represented to her was legally compliant and safe.

CalPERS Treatment of Other Bell Retirees

While Pier'Angela Spaccia worked at the City of Bell, she observed CalPERS treatment of a half dozen retirees, all of whom had single contracts based on the same template as hers. Ms. Spaccia observed Dennis Tavernelli, David Reed, Andreas Probst, Sergio Camacho, and Michael Chavez retire from the City of Bell with the identical CalPERS program. CalPERS treated their income from the City of Bell, which was in an identical form as Ms. Spaccia's, as compensation earnable. To the present date, Ms. Spaccia is unaware of CalPERS challenging any of these retirees claiming that the salary that they received at the City of Bell did not qualify as "compensation earnable."

Had CalPERS contested any one of these retirees, Ms. Spaccia would have taken action to protect her pension and assure herself that it qualified under the new interpretation by CalPERS.

Subsequent to Ms. Spaccia's retirement, CalPERS has allowed Annette Peretz and Luis Ramirez, also employees of the City of Bell who were employed under identical circumstances as Ms. Spaccia to retire without any objection that their salaries did not qualify as compensation earnable.

Robert Rizzo's Authority with Respect to
Pier'Angela Spaccia's Employment Agreements

An important distinction between Randy Adams and Pier'Angela Spaccia is who in the Bell city government can authorize employment agreements. Section 519 of the City Charter allows the City Council by resolution to authorize the Chief Administrative Officer [CAO] to bind the City for the acquisition of equipment, materials, supplies, labor, services or other items included within the budget approved by the City Council.

However, Section 604(a) limits authorization under Section 519 because it provides that "the Chief Administrative Officer shall first review such appointment or removal [of department heads] with the City Council and obtain its approval."

Rizzo interpreted Section 604 to mean that all he need do was discuss the hiring of Randy Adams with various City Council members, focusing on the word "review" and ignoring the fact that he was required to obtain from the City Council its approval. A reasonable reading of Section 604 is that the City Council as a whole had to approve the appointment of Randy Adams.

Unlike Randy Adams, the employment agreement of Pier'Angela Spaccia could be approved by Chief Administrative Officer Robert Rizzo without the approval of the City Council. The distinction between a regular employee and a department head is critical.

The Declaration of Clifton Albright explains that Resolution 2006-42 clarified the distinction between Section 519 and Section 604. Section 519 required a resolution of the City Council authorizing the Chief Administrative Officer, whereas Section 604 apparently did not. In an abundance of caution, Clifton Albright wrote Resolution 2006-42 to remove any doubt about Robert Rizzo's authority.

Pier'Angela Spaccia was informed that there was some ambiguity in the authority of Robert Rizzo, and was told that a resolution was to be passed clarifying Robert Rizzo's authority. Pier'Angela Spaccia reasonably relied on Resolution 2006-42, as well as the information given to her by Robert Rizzo.

Spiking

The Court's decision in the Adams case discusses the fact that Government Code Section 20636 was specifically designed to curb "spiking" which is the intentional inflation of final compensation causing unfunded pension liabilities for CalPERS.

Randy Adams' claimed pension, if allowed, would have been probably the most egregious example of spiking in the history of CalPERS pensions. When Randy Adams retired from the City of Glendale, he would have received a CalPERS pension of

$258,175.28, and still would have been one of the highest pensions of retired public employees in the State of California. In a scheme designed to spike his pension, Randy Adams demanded that the City of Bell, rather than employing him as a consultant, must employ him as an employee requiring 'persable' compensation. This would have resulted in Randy Adams' yearly pension jumping from $258,175.28 to $510,270.60 per year. Under this scheme, Randy Adams would have doubled his pension by working only one year at the City of Bell.

The only reasonable arrangement for Randy Adams to work at the City of Bell would have been to take his CalPERS quarter million dollar pension and then be employed by the City of Bell as a consultant rather than as an employee. This arrangement would have given Adams the same income while he worked at the City of Bell, saved the City of Bell a quarter of a million dollars a year, and not bankrupted the CalPERS system.

The issue of whether Pier'Angela Spaccia's salary constitutes compensation earnable under Government Code Section 20636 does not involve any issue of spiking. There is not even any claim that her salary was increased for spiking purposes. Therefore, the legislative rationale for Government Code Section 20636 does not apply to the case of Pier'Angela Spaccia.

Public Availability

CalPERS claims that Pier'Angela Spaccia's employment contract was not publicly available under Government Code Section 20636. The Court explained in the Randy Adams decision that Section 570.5, Title 2 of the California Code of Regulations became operative August 10, 2011. Pier'Angela Spaccia retired on July 31, 2010. Ms. Spaccia never had any information about the definition of publicly available pay schedules under Government Code Section 20636, and would not have even been able to predict that a year after she retired that a new regulation would be passed defining public availability.

The CalPERS audit of 2006 examined the Bell pay schedules, in which Ms.

Spaccia's position referred expressly to another document. The audit report raised no issue of public availability.

The fact is that the employment contract of Pier'Angela Spaccia was readily available to the public. Ms. Spaccia's employment contract was contained in her personnel file which was publicly available. Former City Attorney Ed Lee testified at the previous hearing that her employment contract was readily available.

The L.A. Times requested that the City Clerk produce Pier'Angela Spaccia's employment agreement on July 6, 2010, and her employment agreement was delivered to the L.A. Times by July 9, 2010. Ms. Spaccia's employment agreement was delivered physically to the L.A. Times faster than if it had been mailed the very day that the request had been received by the City of Bell.

The District Attorney of Los Angeles requested Pier'Angela Spaccia's personnel file and it was delivered almost instantly, unlike Randy Adams' employment contract which was delayed. A copy of that file which was received by the District Attorney in 2010 was made available to Pier'Angela Spaccia through criminal discovery in 2011. A copy of the full file which contains the employment agreement of Pier'Angela Spaccia will be produced at the hearing, showing without any doubt that Pier'Angela Spaccia's employment agreements were not missing from her personnel file.

Creation of Fake Contracts

The Court concluded in the Randy Adams decision that his contract was not readily available to the public. The Court also noted that Randy Adams participated in the creation of two fake contracts to be used to deceive the public about his salary. The decision did not focus specifically on this criminal conduct by Randy Adams in signing backdated contracts, but the fact that fake contracts were used to deceive the public means that his real contract was not readily available to the public.

The fake contracts by Randy Adams were created by Lourdes Garcia and Rebecca Valdez, both of whom received use immunity from the District Attorney in order to testify about their criminal conduct. Obviously Randy Adams also participated

in this conduct knowing full well that these documents would be used in response to a public records request.

There is absolutely no evidence that Pier'Angela Spaccia participated in the creation of the fake contracts for Randy Adams, or the five fake contracts created for Robert Rizzo. Implicit in the Adams decision is the logic that one cannot claim that one's employment contract is publicly available while at the same time creating fake contracts to deceive the public.

Ms. Spaccia's Participation in the Adams Negotiation

Pier'Angela Spaccia has received serious criticism and bad publicity regarding her participation in the Randy Adams negotiation. In the Adams decision, the Court correctly concludes that, although Pier'Angela Spaccia participated mechanically in the negotiations, she was not directly involved in the negotiations that resulted in Adams becoming employed at the City of Bell.

The reason the Court was able to accurately gauge Pier'Angela Spaccia's involvement in the negotiation was because Pier'Angela Spaccia made available to the Court the original demand by Randy Adams for his employment at the City of Bell. This demand and the response of Robert Rizzo set the parameters of the negotiations for which Pier'Angela Spaccia bore no responsibility. Unfortunately, this critical initial demand by Randy Adams was withheld from the Grand Jury which indicted Ms. Spaccia, and the preliminary hearing magistrate who unfairly criticized Ms. Spaccia's involvement in the Adams negotiations.

Pier'Angela Spaccia does disagree slightly with the Court's findings regarding the Randy Adams negotiations, however, this disagreement does not involve the calculation of her final compensation. From Ms. Spaccia's perspective, there was secrecy in the recruitment of Adams because Rizzo was attempting to bring in a well-respected outsider into the City of Bell as the chief of police in order to reform the police department and avoid what had become serious civil liabilities resulting from police misconduct. Rizzo knew that members of the police department would resist an

outsider and would attempt to go directly to the City Council to thwart his plans. From Ms. Spaccia's perspective, this initial secrecy was necessary and justified given Mr. Rizzo's perspective.

However, once the Adams contract was signed, the contract itself was turned over to the City Clerk Rebecca Valdez. Ms. Spaccia knows this for a fact because she physically handed the Randy Adams contract to City Clerk Rebecca Valdez. Thereafter, Ms. Spaccia has no knowledge of whether the contract was withheld from Adams' personnel file, held by Rizzo at his desk drawer, or where the contract was kept. The Court also noted that the documents involving Randy Adams were to be filed separately in various departments and interpreted this to be an attempt at secrecy.[1] From Ms. Spaccia's perspective, the employment contract itself should have been available in Adams' personnel packet which would have been readily available to the public. The consulting agreement for prior work would be in accounts payable, not in his personnel packet, because it was not evidence of his current salary. The vehicle indemnification was an insurance matter which should have been in the insurance file, and the issue of Adams' workers compensation eligibility from Ventura was really a matter between Mr. Adams and previous employers. Again however, none of this bears on Ms. Spaccia's calculation of her final compensation.

The most important fact about Pier'Angela Spaccia's participation in the Randy Adams negotiation is that it is irrelevant to the calculation of her final compensation. Even assuming that there was wrongdoing by Pier'Angela Spaccia, which she denies, her pension does not depend on her conduct with respect to the Randy Adams contract. The unfortunate e-mails, as well as the extraordinary pay of Randy Adams, has created a

---

[1] The Court commented that assigning the mundane task of physically creating the Randy Adams contract to Pier'Angela Spaccia was part of the attempt to keep it secret. But, historically, Rizzo assigned the physical preparation of the contracts using the City of Bell template to Pier'Angela Spaccia for internal control purposes. In other words, he did not want the same person producing the physical contracts that would be funding the salary. Separating the production of contracts from the fiscal department was an internal safeguard.

firestorm of publicity regarding the negotiation. However, there was no provision in her CalPERS pension that any wrongdoing by Pier'Angela Spaccia could deprive her of her pension.

The Randy Adams Decision is Unique

The Randy Adams decision involved an employment contract so unique its logic will not affect any other retired or current Bell employee. The decision in Ms. Spaccia's calculation will necessarily affect many other employees and retirees because a finding that her employment contract was disqualified as compensation earnable would apply logically to every Bell employee with an individual contract, whether current or retired. A finding that a municipality cannot purchase additional retirement service credits could affect at least a dozen Bell city employees, some of whom are already retired.

Such a decision would require CalPERS to then challenge the retirement of every employee in the State of California whose contract did not technically comply with Government Code § 20636, and whose additional retirement service credits were paid by the employer. These employees, like Ms. Spaccia, had no knowledge that the pensions on which they relied were open to challenge.

CONCLUSION

Pier'Angela Spaccia's case is rather straightforward once one understands the fact that the publicity surrounding the City of Bell is not relevant. Ms. Spaccia was a seven-year employee of the City of Bell who relied on the City of Bell and CalPERS for the assurance that her pension which she believed she was earning was lawful.

Pier'Angela Spaccia's pay in no way involved spiking, and there is no issue that her contract had to be approved by the City Council given the rationale, language, and purpose of Resolution 2006-42, and the City Charter.

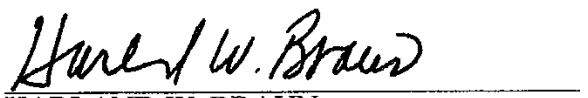
Pier'Angela Spaccia's employment contract was publicly available as testified to by City Attorney Ed Lee, as demonstrated by the production of her contract to the Los Angeles Times within three days, as well as the fact that it was inside the file obtained

by the District Attorney's Office in July 2010.

Moreover, with respect to the legal compliance of her CalPERS pension, she relied on the City of Bell and CalPERS itself.

Respectfully submitted,

Date: December 20, 2012



HARLAND W. BRAUN
Attorney for Respondent
ANGELA SPACCIA

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Los Angeles; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1880 Century Park East, Suite 710, Los Angeles, California.

On December 21, 2012, I served the within document entitled

RESPONDENT PIER'ANGELA SPACCIA'S RESPONSE TO CALPERS REQUEST FOR OFFICIAL NOTICE [GOVERNMENT CODE § 11515] OF THE DECISION IN THE MATTER OF RANDY ADAMS, CASE NO. 2011-0788

on the interested parties in said action, by transmitting a true copy thereof as follows:

Office of Administrative Hearings
1350 Front Street, Suite 3005
San Diego, CA 92101
By E-mail: sanfilings@dgs.ca.gov
By Fax: (916) 376-6325

Wesley E. Kennedy, Esq.
California Public Employees' Retirement System
P.O. Box 942707
Sacramento, CA 94229-2707
By E-mail:
By Fax: (916) 795-3659

Stephen Onstot, Esq.
Aleshire & Wynder LLP
18881 Von Karman Ave., Suite 1700
Irvine, CA 92612
By E-mail: sonstot@awattorneys.com

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed this 21st day of December, 2012, at Los Angeles, California.

JANUARY KING

In the Matter of the Calculation of Final Compensation:
PIER'ANGELA SPACCIA, Respondent, and CITY OF BELL, Respondent
CalPERS Board of Administration Case No. 2011-0789, OAH No. 2012020198

RESPONDENT PIER'ANGELA SPACCIA'S
CLOSING ARGUMENT

ATTACHMENT F

ATTACHMENT F

ATTACHMENT F

SENATE PUBLIC EMPLOYMENT & RETIREMENT BILL NO: AB 719
Nell Soto, Chair Hearing date: June 23, 2003
AB 719 (Negrete McLeod) as amended March 24, 2003 FISCAL: YES

PERS: MEMBER PURCHASE OF UP TO 5 YEARS OF "AIR TIME" (NON-QUALIFIED SERVICE)

HISTORY:

Sponsor: Service Employees International Union (SEIU)
California Professional Firefighters (CPF)

Prior legislation: AB 55 (Correa) 2003
Set today in this Committee
SB 2126 (Senate PE&R Committee)
Chapter 1076 of 1998

ASSEMBLY VOTES:

PER & SS	8-0	4/23/03
Appropriations	23-1	4/30/03
Assembly Floor	74-2	5/27/03

SUMMARY:

Would authorize a member of the California Public Employees Retirement System (PERS) the retirement system to purchase up to 5 years of service credit for additional retirement credit.

BACKGROUND AND ANALYSIS:

1) Existing federal law provides special rules relating to the portability of permissive service credit under government plans under the Taxpayer Relief Act of 1997. "Permissive service" was defined and limitations on "nonqualified service" were established. The limitations include requiring members to have 5 years of participation in the plan in order to purchase nonqualified service, and specify that only 5 years of nonqualified service can be purchased.

2) Existing PERS law:

a) does not authorize PERS members (state, school or local) to purchase additional service credit in the system that is not linked with any actual service performed, and

b) pursuant to Chapter 1076 of 1998, authorizes vested members of the State Teachers' Retirement System (STRS) to purchase up to 5 years of additional STRS service credit for "nonqualified service" in the retirement system.

LEGISLATIVE INTENT SERVICE (800) 666-1917

2) This bill:

a) allows active PERS members with at least 5 years of service to purchase up to 5 additional years of PERS retirement service (nonqualified service or "air time"),

b) specifies that "additional retirement credit" means time that does not qualify as county service, public service, military service, medical leave of absence, or any other time the system recognizes for service credit,

c) specifies that "air time" service credit for additional retirement credit may not be used to meet the minimum qualifications for service or disability retirement or for establishing eligibility for various specified benefits and any service credit based benefits, and

d) specifies that the cost of the "air time" service credit will be fully paid by the member, *with no employer contribution permitted*.

FISCAL EFFECT:

According to PERS, this benefit is cost neutral to employers, as the member pays the full present value cost of the additional service credit. The full present value cost is calculated to be equivalent to the cost of the increased benefit due to the additional service credit.

COMMENTS:

1) What Is "Air Time"?

Federal tax-qualification laws allow a member of a tax-qualified defined benefit program, such as PERS, to purchase up to 5 years of nonqualified time. Nonqualified time is sometimes referred to as "air time" because it does not correspond to any service actually performed.

The only federal requirements for purchasing "air time" are that the amount purchased cannot exceed 5 years, and a member purchasing nonqualified time must have earned at least 5 years of service credit before being eligible to purchase the nonqualified time. At this time there is no provision in PERS Law to allow a member to purchase nonqualified time.

2) PERS Service Credit - Who Pays For It?

The Committee is advised that there are several types of service credit that may be purchased by a member in PERS. These types of service credit include military service, service as a volunteer in Peace Corps or AmeriCorps, certain types of service prior to membership, and others.

LEGISLATIVE INTENT SERVICE (800) 666-1917

In general, there are two ways of paying for the additional PERS service credit:

a) one method of payment requires the member to pay the portion that would normally be attributable to the member's contributions and interest, *and the employer pays the balance* (this method most commonly applies when the employer directly benefits from the service being purchased, such as when a member worked for the employer before the agency came into PERS, or worked part-time or seasonally prior to full time PERS-covered employment), or

b) the other type of payment is known as the "full present value" payment, in which *the member pays for the full cost of the service credit purchase* (this cost method generally applies when an employer does not directly benefit from the member's service, such as with military or Peace Corps service).

3) Arguments in support

Supporters argue that the option to purchase nonqualified time allows members of PERS to increase their retirement benefits at no cost to employers. Many members take breaks in employment to raise children, advance their education, or work in the private sector for a time. Members who enter PERS-covered employment later in life, or who have breaks in service, will find that purchasing nonqualified time can contribute to providing a livable retirement income.

Supporters also contend that recent changes in federal tax laws allow people to roll over funds from personal tax-qualified savings accounts (such as 401(k), 403 (b), and 457) in order to purchase service credit in defined benefit plans. This practice makes the purchase of nonqualified time easier for those who have accumulated personal savings and want to invest these savings in order to increase their PERS retirement benefits.

4) AB 55 (Correa) 2003, a bill providing a similar "air time" optional benefits in the County Employees Retirement Act of 1937 ('37 Act), is to be heard today in this Committee.

5) **SUPPORT:**

California State University (CSU)
California State Employees' Association (CSEA)
Long Beach Police Officers Association
Santa Ana Police Officers Association
California Fraternal Order of Police
PERS Board of Administration

6) **OPPOSITION:**

None to date

#####

LEGISLATIVE INTENT SERVICE (800) 666-1917