

ATTACHMENT A
STAFF'S ARGUMENT

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

I THE BOARD'S REQUEST FOR A FULL HEARING

The Board of Administration (Board) requested a Full Board Hearing in this matter at its April 17, 2013, meeting. The Proposed Decision issued by the Administrative Law Judge (ALJ) on February 26, 2013, found that Pier'Angela Spaccia (Respondent Spaccia's) first contract with City of Bell (Respondent City) at \$8,526.00 per month is the appropriate amount of compensation earnable (i.e. final compensation) for the purpose of calculating her service retirement. At its April 17, 2013, meeting, the Board adopted this finding of the ALJ. However, the Board rejected the second finding of the ALJ, which was that CalPERS was estopped from cancelling Respondent Spaccia's Additional Retirement Service Credit (ARSC) purchase. (A copy of the Proposed Decision is contained in Attachment D to this Agenda Item.) In rejecting the finding of the ALJ with regard to Respondent Spaccia's purchase of ARSC with employer funds, the Board ordered that this issue alone be the subject of a Full Board Hearing.

II SUMMARY OF THE CASE

Beginning on July 1, 2003, Respondent Spaccia was employed by the Respondent City as an Assistant to the Chief Administrative Officer, and later as the Assistant Chief Administrative Officer. She was a miscellaneous member of CalPERS. On September 28, 2010, Respondent Spaccia filed an application for service retirement pending industrial disability retirement. Respondent Spaccia requested that her CalPERS service retirement allowance be based on a final compensation of \$28,582.44 per month, plus employer paid contributions to a deferred compensation plan.

CalPERS staff reviewed the circumstances of Respondent Spaccia's employment and determined that the salary claimed by her was not set forth in a "publicly available pay schedule", as required by law. Therefore, none of her remuneration from Respondent City could be used in determining her final compensation. CalPERS staff also reviewed the circumstances of Respondent Spaccia's purchase of five years of ARSC, and in a separate determination letter informed Respondent Spaccia that it would disallow the ARSC purchase because it was made directly by the Respondent City with City funds. Respondent Spaccia appealed both these determinations.

Following four non-consecutive days of hearing, the ALJ issued a Proposed Decision in which he found that Respondent Spaccia's first contract with Respondent City at \$8,526.00 per month was "publicly available" and should be used by CalPERS in determining her final compensation for the purpose of calculating her service retirement. In his Proposed Decision, the ALJ also found that CalPERS was estopped from cancelling Spaccia's ARSC purchase. In making this second ruling, the ALJ relied upon his own finding that the statute permitting the purchase of ARSC in the California Public Employees' Retirement Law (PERL) did not expressly prohibit an employer from making such a purchase on behalf of an employee and therefore it was permitted. In

addition, because Respondent Spaccia was not specifically informed by CalPERS staff that such a purchase would be proscribed, the ALJ decided that it would not be fair to rescind this purchase, as Respondent had retired and thus was no longer eligible to purchase ARSC with her own funds.

On April 17, 2013, the Proposed Decision came before the Board for its consideration and action. The Board approved the ALJ's finding that CalPERS should use the payrate of \$8,526.00 per month in calculating Respondent's pension. However, the Board rejected the ALJ's second ruling that upheld the purchase of ARSC with City funds, and set that issue alone for consideration at a Full Board Hearing.

III ISSUE PRESENTED

Did CalPERS properly disallow and rescind the purchase of Additional Retirement Service Credit by the City of Bell for the benefit of Respondent Spaccia?

IV STATEMENT OF FACTS

On September 28, 2010, Respondent Spaccia filed an application for service retirement pending industrial disability retirement with CalPERS. In the course of reviewing her application for retirement and making the necessary determinations of final compensation and years of service credit, which are two of the key components of the retirement formula, staff reviewed Respondent's purchase of Additional Retirement Service Credit (ARSC).

Respondent Spaccia had received five years of ARSC purchased directly by Respondent City with City funds. Government Code section 20909 provides that "a member...may elect...to make contributions" to acquire up to five years of ARSC. CalPERS staff reviewed the circumstances of Respondent Spaccia's ARSC purchase and informed Respondent Spaccia that it would disallow the ARSC purchase because it was made directly by the Respondent City with City funds, and not with her own money. Respondent Spaccia appealed this determination and a hearing was held before an ALJ. Respondent Spaccia and Respondent City were represented by legal counsel at all times during the hearing. Documentary and testimonial evidence was presented, including that of Respondent Spaccia, two current employees of Respondent City, the former City Attorney, and two CalPERS staff members.

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

The ALJ reviewed the text of Government Code section 20909 and found that the express terms of the statute did not prohibit an employer from directly purchasing the ARSC on behalf of the member, and that there was no controlling case law either way on the issue. In support of this finding, the ALJ stated that no legislative history related to the enactment of Government Code section 20909, pertaining to the purchase of ARSC, was offered at hearing to support CalPERS' position. As will be demonstrated, this was erroneous. Numerous pieces of evidence introduced by CalPERS demonstrate the legislative intent to prohibit employer payment of ARSC costs. After misinterpreting section 20909, the ALJ concluded that because Respondent Spaccia was now retired and no longer eligible to purchase ARSC, it would be unjust to not permit her to retain those years of service credit. A reduction of Respondent Spaccia's service credit by five years would result in a reduction of her current retirement allowance of \$585. Therefore, the ALJ found that CalPERS was equitably estopped from rescinding the purchase.

V ARGUMENT

The staff argues that the Board reject the ALJ's finding that CalPERS erred in rescinding the ARSC purchase for the following reasons:

A. The Plain Language Of Section 20909 And Its Clear Legislative Intent Support CalPERS Denial Of Respondent's ARSC Purchase By Her Employer

It is undisputed that the funds used to purchase Respondent Spaccia's ARSC were paid directly from the employer rather than the member. However, Government Code section 20909 provides that "*a member...may elect...to make contributions*" to acquire up to five years of ARSC. (Emphasis added.) Thus, the plain language of the statute requires the member to purchase ARSC.

Contrary to the ALJ's finding, CalPERS had introduced several exhibits containing legislative history of section 20909 which clearly articulated that the intent of the bill was only to allow the individual member to purchase ARSC – not his or her employer. CalPERS introduced documents containing legislative history bearing on the interpretation of Government Code section 20909, in which it was specifically and expressly stated that ["...the benefit is intended to be cost neutral to employers. The member pays the full present value cost of the additional service credit."] (CalPERS Exh. 26, p. 2; CalPERS Exh. 26-A, p. 4 of 6, ["...benefit to be cost neutral to employers."] and that "...law intended to be fully member funded." (CalPERS Exh. 26-D., p. 1; See also, Concurrence in Senate Amendment, SB 719, 8/18/03, at p. 2; ["The other type of payment is known as the 'full present value' payment. In this case, the member pays for the full cost of the increase in benefit that will result from the service credit purchase...."].¹ Furthermore, the Senate Analysis of SB 719, on page 2, unequivocally states:

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

This bill...[s]pecifies that the cost of the 'air time' service credit will be fully paid by the member, with no employer contribution permitted.²

Respondent seeks to read into the clear language of the statute, language that would permit an employer to purchase ARSC. However, only in rare instances may a court add words to a statute, and only when it is required to do so to carry out the plain and clear legislative intent. This is not such an instance.

B. Respondent Has Not Established That CalPERS Is Estopped From Disallowing Her Employer Purchased ARSC

1. The ARSC Purchase

Respondent was permitted to testify at the hearing, over objection as unsupported hearsay, to an exchange with a Retirement Specialist I, in 2004. Respondent testified that the CalPERS employee did not affirmatively instruct her that her employer could not purchase an employee's ARSC. Based on this alleged omission, using her position in the upper management of the City, Respondent arranged for the City to purchase five years of ARSC for her benefit, as well as for the benefit of a number of other specially selected employees of Respondent City.

The form Respondent used for her "Election to Purchase ARSC", dated August 2004, indicated payment would be in a lump sum with after-tax money, and included a handwritten note by Respondent stating: "Payment from City of Bell Surplus Account." Based on the absence of any notation at the bottom of the form, it is apparent that a check for the purchase was not, at least initially, received at the same time as this form. It is also not clear whether the handwritten notation refers to a bank account maintained by the City, or possibly a contribution account for the City in CalPERS. What is clear from the testimony is that the actual payment for the ARSC purchase did not occur and was not even allegedly authorized until after May 2005.

2. Criteria for Estoppel

Generally, the criteria for establishing equitable estoppel against a public agency and a private entity are the same. In this case, Respondent has the burden to establish each of the following: (1) that [CalPERS] was fully apprised that it was the employer, not the member, that would be the party actually purchasing the ARSC; (2) that [CalPERS] acted in a manner intended to induce the member, or any reasonable person, to believe that it was appropriate for an employer to purchase ARSC rather than the member; (3) that the member was not aware that only a member could make such a purchase; and (4) that the member had relied on and been injured by CalPERS' representations.

² The ALJ acknowledges that others in Respondent City also had ARSC purchased by the employer. (Proposed Decision, Attachment D at p. 18) This benefit as well is one that was concededly not available to all members of Respondent Spaccia's group or class of employment, but only to a select few employees. (OAH Hearing Transcript, 08/28/12, Attachment F at p. 18-19)

However, when asserted against a public entity, such as CalPERS, even where all other elements of estoppel are established, estoppel may be applied against a public entity only where the situation meets a fifth test:

“The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.” (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 497.) However, “the power of a public officer cannot be expanded by application of this doctrine.” (*Page v. City of Montibello* (1980) 112 Cal. App. 3d 658, 667.) The doctrine may not be applied when doing so “would have the effect of granting the state’s agents the power to bind the state merely by representing that they have the power to do so.” (*Ibid.*) (*Board Decision In the Matter of the Statement of Issues of Rita Takahashi*, June 15, 2011, p.6, para. 6.)

Unless there is a finding that the injury to the party asserting the doctrine is of “such sufficient dimension as to justify any effect upon the public interest or policy” which would result from its application, estoppel against a public agency must be rejected.

3. The Evidence Does Not Support an Estoppel

Respondent Spaccia’s testimony that she was informed by CalPERS staff that the City could purchase ARSC using its funds, rather than merely serving as a conduit of the members’ funds, is not credible, or, at best, is unclear and uncorroborated. CalPERS was not made aware of the actual circumstances surrounding the purchase of the ARSC. Even if a staff person had told Respondent Spaccia that the payment for the ARSC could be made by the employer, (and this was uncorroborated hearsay) it was Respondent Spaccia that assumed that the purchase would be made with employer, rather than the members’ funds. Even if other staff who received payment were aware that the check used to make the purchase was issued by the City, CalPERS could not have been aware that the City was making the purchase for Respondent Spaccia rather than simply serving as the conduit for monies otherwise being paid by Respondent Spaccia. Only Respondent Spaccia knew the full details of the transaction and the only apparent authority for the use of the monies in the first instance.

4. The Exception to Estoppel Does Not Apply

Finally, to allow the purchase of ARSC would be contrary to the application of that doctrine and provide for a result in providing a benefit in conflict with the plain meaning of the PERL and clear legislative intent. Estoppel “cannot rewrite a statutory limitation on a benefit or privilege.” (*Smith v. Governing Bd. of Elk Grove Unified School Dist.* (2004) 120 Cal.App.4th 563, 569;

Case law applying the doctrine of estoppel supports this conclusion. In *Crumpler v. Bd. of Admin.* (1973) 32 Cal.App.3d 567 (*Crumpler*), the issue was whether the Board could reclassify animal control officers employed by a local agency as miscellaneous rather than local safety members of the system. *Id.* at pp. 570-71. Acknowledging the Board's authority to make such determinations, the court addressed the question of whether the Board should be estopped from making such a reclassification. First, finding that all prerequisites for applying estoppel were indisputably present, the court concluded that it was not presented with a case where the Board was without *the power to effect that which estoppel against it would accomplish.* (*Id.* at pp. 584.) There, the court found, the Board "possessed the authority to do what it appeared to be doing, [it] was not depriving the public of the protection of any statute ..., [and therefore had] ... no reason to bar an estoppel." (*Id.*) The court also noted that applying estoppel where "justice and right require" is subject to a further requirement that it not otherwise be "harmful to some specific public policy or public interest or where it would enlarge the power of a governmental agency or expand the authority of a public official. *Id.* at pp. 580-581. The court further concluded that the "petitioners have no vested right in an erroneous classification. Indeed, as we have noted, the [PERL] expressly provides for correction of errors such as occurred in the instant case." (*Id.* at p. 586; See similarly, *Medina v. Board of Retirement* (2003) 112 Cal. App.4th 864, 870-71.) It was only after finding all prerequisites for applying estoppel were indisputably present and that the Board was not without *the power to effect that which estoppel against it would accomplish.* (*Id.*, at pp. 582-584.) and *was not depriving the public of the protection of any statute ..., did it permit estoppel.* (*Id.*) A party may not, by estoppel, obtain relief that otherwise would be "harmful to some specific public policy or public interest or where it would enlarge the power of a governmental agency or expand the authority of a public official. (*Id.* at pp. 580-581;^{3[1]} See also, *Medina v. Board of Retirement, supra*, 112 Cal.App.4th at p. 870; see also *Fleice v. Chualar Union Elementary School Dist.* (1988) 206 Cal.App.3d 886, 893 ["principles of estoppel are not invoked to contravene statutes and constitutional provisions that define an agency's powers"].)^{4[2]}

Cited in *Crumpler*, the California Supreme Court decision in *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, addressed a "rare combination of government conduct and extensive reliance "and created" an extremely narrow precedent for application in future cases." (*id.*, at pp. 499-501). However, the facts in *Mansell*, related to thousands of homeowners, through the conduct of government entities over several decades, were led to believe that land on which they resided belonged to them, not the government. "Without hesitation" the court found that the culpability of the governmental activities, representations and conduct was so reprehensible that to not find estoppel would result in fraud and justify "any effect upon public interest or policy which would result" from it being raised. *Mansell* at pp. 496-497; See also, *Page v. City of Montebello* (1980) 112 Cal.App.3d 658, 666.

^{3[1]} "Petitioners have no vested right in an erroneous classification. Indeed, as we have noted, the act expressly provides for correction of errors such as occurred in the instant case." (*Id.* at p. 586.)

^{4[2]} "PERS's fiduciary duty to its members does not make it an insurer of every retirement promise contracting agencies makes to their employees. PERS has a duty to follow the law. As stated in *City of Oakland*, the policy reflected in the constitutional provision is to "ensure the rights of members and retirees to their full, earned benefits." (*City of Oakland, supra*, 95 Cal.App.4th at p. 46.)

Unlike *Mansell*, this case presents but a single individual who seeks to invoke estoppel to inflate her pension by compelling the Board to disregard an affirmative limitation of the PERL and in direct conflict with legislative intent. Unlike both *Crumpler* and *Mansell*, the Board is faced with a situation where it “utterly lacke[s] the power to effect that which an estoppel against it would accomplish.” (*Crumpler*, supra, at pp. 582-584.) Permitting estoppel in this case would conflict with the very specific and express legislative intention behind section 200909 and the PERL.

Similarly, in *Lee v. Board of Administration* (1982) 130 Cal.App.2d 122, 134, a designated beneficiary of a deceased state employee, claimed that CalPERS should be estopped from denying her death benefits and group term life insurance benefits because it distributed literature to its members, indicating that they had the ability to designate anyone as a beneficiary. In rejecting the plaintiff’s claim, the court concluded that because the literature CalPERS distributed made clear that if the information CalPERS provided was wrong, “any decision [relating to benefits] will have to be based on the Law [PERL] and not this booklet,” CalPERS could not be estopped from following the law and providing the benefits to the member’s surviving spouse. *Id.* at 135 (internal quotation marks omitted). The court further found:

[E]stoppel cannot be applied against a public agency in every instance where it’s erroneous or incomplete representations results [sic] in damages to a claimant. This is particularly true where the subject matter involved is as detailed and complex, as is the retirement scheme set up for state employees. In light of the myriad of ‘optional settlement’ . . . , distribution and types of benefits . . . , and other provisions regarding retirement . . . , the information presented in the PERS literature could not be anything more than a rudimentary overview of the system and how it operates.

Summarizing the decisional law, the California Supreme Court in *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, concluded “**N]o court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations.**” Here Spaccia requests that this court estop CalPERS from enforcing express provisions of the PERL and policy and confer on her benefits, notwithstanding the conflict with the statute creating and defining the benefit. However, estoppel cannot be allowed to compel a governmental agency to perform a function that it does not possess the authority to do and to prevent it from undertaking a duty it is required to perform.

Allowing conduct of the City to estop CalPERS would, in effect, permit the City to usurp PERS’ statutory authority to determine compensation for retirement purposes, and promote further the creation of large unfunded liabilities to both the current employer and prior CalPERS employers. (CalPERS Exh. 36, Declaration of Kung –Pai Hwang.) Further, “where an employee has worked for more than one employer which participates in PERS, any underfunding could increase the contribution rate not only of the most recent employer, but also of any previous employer.” (*ibid.*, at p. 749.) Such is precisely the circumstances and effect in this case. (See, CalPERS Exh. 36.)

Furthermore, because CalPERS is not in privity with the City such that it is bound by the

City's actions, "to find an estoppel by privity in this context could have the pernicious effect of inducing subordinate governmental entities to disregard the rule of law." (*Hudson v. Board of Administration, supra*, 59 Cal.App.4th at P. 1332; *See also, City of Pleasanton v. Board of Administration, supra*, 211 Cal.App.4th at p. 543, fn. 11.) Spaccia suffers no loss by receiving a correct and proper pension benefit. (§ 20160, subd. (b); *Crumpler, supra*, 32 Cal.App.3d at p. 586).

5. Section 20160 Supports the Board's Rejection of Estoppel

Section 20160 requires that CalPERS correct all errors or omissions in benefits calculations. Under section 20160, the Board must correct a mistake. However, the "status, rights, and obligations" must be "adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time." § 20160(b); *Pleasanton v. Board of Administration*, (2012) 211 Cal.App.4th 522, 544) The doctrine of estoppel cannot prevent this correction. (*Crumpler v. Bd. of Admin.*(1973) 32 Cal.App.3d 567, 585. *See also, Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 870-71.)

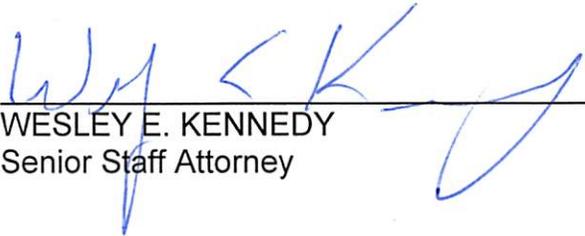
Spaccia may also try to argue that section 20160 provides the Board with administrative authority to undertake correction of mistakes retroactively, even where the right, status or obligation has no factual or legal antecedent. Any such argument is unsupported by authority. Further, even if CalPERS erred in initially allowing the ARSC purchase, the error could not, under section 20160, be retroactively corrected because it would require the Board to disregard an affirmative provision of the PERL, i.e. §20160(e)(3). Such conclusion is also inapposite to the Board's precedential decision cited in *City of Oakland, supra*, at p. 46 and in the Board's Precedential decision in *In re Henderson* (Nov. 18, 1998) PERS Prec. Dec. No. 98-02, which had concluded that it "although retiree detrimentally relied on CalPERS mistake in benefits amount, to find an estoppel here would be to allow CalPERS to unilaterally alter the statutory retirement benefit formula without benefit of enabling statutory authorization."].) Similarly, in *Crumpler* and *Medina*, retroactive corrections or reclassifications were made for benefits that had already been paid out, thereby directly impacting the members, but estoppel still was not available. Petitioners certainly cannot invoke estoppel or section 20160 to prevent a statutorily required calculation of Spaccia's benefits where made long before any benefits were paid.

Such an outcome would sanction other such purchases where individuals capable of manipulating their employer's funds could undertake similar transactions and be rewarded with a "spiked" pension, so long as they retired before the scheme was fully disclosed. It is only speculation that Respondent Spaccia would have used her own funds to make this ARSC purchase. Such speculation is insufficient to support a claim of estoppel against CalPERS.

**VI
CONCLUSION**

Based on both the plain meaning and clear language of Government Code section 20909, as illuminated by legislative history, and applying the doctrine of equitable estoppel in accordance with the law, staff argues that the Board should find that CalPERS properly disallowed and rescinded the purchase of Additional Retirement Service Credit by the City of Bell for the benefit of Respondent Spaccia.

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