

ATTACHMENT B
RESPONDENT'S ARGUMENT

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5 PIER' ANGELA SPACCIA



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8 **BOARD OF ADMINISTRATION**
9 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT TRUST**

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

13 **PIER' ANGELA SPACCIA,**)

14 Respondent,)

15 and)

16 **CITY OF BELL,**)

17 Respondent.)
18
19

CASE NO. 2011-0789
OAH NO. 2012020198

RESPONDENT'S ARGUMENT

Date: June 19, 2013
Time: 9:45 a.m.
Location: Robert F. Carlson Auditorium;
CalPERS Lincoln Plaza North;
400 Q Street, Sacramento, CA

20 INTRODUCTION

21 At the meeting of April 17, 2013, the Board of Administration of the California
22 Public Employees' Retirement System, on a consent calendar and apparently without
23 discussion, redefined 'publicly available' under Government Code section 20636 using
24 section 570.5 of the California Code of Regulations, which was not even in effect at the
25 time of Pier' Angela Spaccia's retirement.

26 Had the Board even read its own regulation, as well as Respondent Spaccia's
27 argument, it would have realized that its action was a legal nullity because it failed to
28 make a reasoned enforcement decision as required by its own regulation.

1 Equally bizarre, the Board proposes to overrule Judge Ahler's decision holding
2 employers are permitted to purchase additional retirement service credit. This tentative
3 decision was reached without any understanding of the reasons an employer would pay
4 for additional retirement service credit, and in complete disregard of the legislative
5 history of Government Code section 20909.

6 Interestingly, Angela Spaccia's additional service credit was not paid directly by
7 the City of Bell, but was paid by CalPERS itself from surplus funds it was holding.

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

10 Beginning in 2004, the City of Bell decided to purchase 5 years of Additional
11 Retirement Service Credit for 12 employees. The premiums to be paid by Bell were
12 calculated by CalPERS. CalPERS accepted City of Bell checks for payment for most of
13 the employees, but used its own surplus funds to pay for some employees including
14 Angela Spaccia.

15 CalPERS claims that it was illegal for the City of Bell to pay for the ARSC based
16 on Government Code Section 20909 which permits employees to purchase the credit on
17 their own. Apparently CalPERS also claims its own action in using surplus funds to
18 purchase Angela Spaccia's additional service credit was also illegal.

19 In the American legal tradition, if an act is not forbidden or labeled illegal, it is
20 allowed. Government Code section 20909 does not forbid an employer from purchasing
21 additional service credit. There are many reasons a city may wish to purchase ARSC
22 time for an employee. The city, in times of plenty, may wish to reward employees by
23 providing this added benefit. A city might choose to purchase ARSC time in lieu of a
24 supplemental pension plan. A city might wish to speed the retirement of a highly paid
25 senior employee in order to hire two younger employees at the same cost. It might pay a
26 city to buy the ARSC time to retire a senior employee to be replaced by a junior
27 employee at a reduced salary. A city may wish to settle a whistle blower case (such as
28 Sgt. Corcoran in the City of Bell) by purchasing ARSC time to compensate for time lost

1 while wrongfully fired.¹

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

5 The legislative counsel's analysis is Exhibit A. The Board will note that on page
6 2 where the consultant used the word "permitted" he should have used the word
7 "required." Of course the State Senate would be concerned about requiring local
8 appropriations, but would have no concern if a city chose to buy ARSC time for its own
9 reason. If the Senate wished to prohibit such purchases by a city, it would have been
10 easy for the Legislature to explicitly impose such a prohibition in the statute

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

16 Little needs to be added to Judge Ahler's decision. The pertinent part which
17 states:

18 "52. By its own terms, the statute requires only that "a member" file
19 the required notice and make the required contribution. Nothing in the
20 statute prohibits an employer from making the contribution on an
21 employee's behalf. No direct appellate authority was provided to support
22 CalPERS' assertion on that issue. Nor was any legislative history related
23 to the enactment of Government Code section 20909 offered to support
24 CalPERS' assertion.

25 *Factual Conclusions on Estoppel Related to Air Time*

26 53. Government Code section 20909 does not expressly prohibit a
27 public employer from purchasing air time on behalf of an employee. In
28 fact, it is not uncommon for a public employer to do so in the settlement of
litigation with a public employee, as was demonstrated in this matter.

¹ In fact the City of Bell is providing a check to Sgt. Corcoran so he can write a check to CalPERS. Because Ms. Spaccia is now retired she no longer is in a position to use the legal fiction that Sgt. Corcoran and the City of Bell are currently using.

1 Ms. Spaccia established that she advised CalPERS of the fact that the
2 City of Bell sought to purchase air time on behalf of certain employees,
3 including herself; that a responsible CalPERS employee told Ms. Spaccia
4 that such a purchase was permissible and would be honored by CalPERS;
5 that the CalPERS employee knew that her representations would be relied
6 on and, in fact, air time was directly purchased by the City of Bell for
7 certain employees; that Ms. Spaccia had at least five years of credited state
8 service when she elected by written notice filed with CalPERS to make a
9 contribution under Government Code section 20909; and that in
10 accordance with what she was told by a responsible CalPERS employee,
11 Ms. Spaccia arranged for the City of Bell to make the contribution on her
12 behalf. There was nothing sneaky or underhanded in the transaction.
13 Payment by the City of Bell on Ms. Spaccia's behalf was not expressly
14 prohibited by the statute. Ms. Spaccia, who is now retired, is no longer
15 eligible to fund the purchase of air time.

16 It would be unfair and unjust under the circumstances to disallow the
17 City of Bell's purchase on Ms. Spaccia's behalf of five years of air time
18 under all the circumstances."

19 The City of Bell now claims that the purchase of the "air" time was not approved
20 by the City Council. In fact on June 7, 2004, the City Council of the City of Bell on a
21 consent calendar similar to the CalPERS consent calendar, approved the use of the
22 City's CalPERS surplus fund to purchase five years of service credit in response to
23 Assembly Bill 719, effective January 1, 2004. A copy of the agenda item and its
24 approval minutes is attached as Exhibit B.²

25 CONCLUSION

26 The CalPERS' staff argument revising Government Code section 20909 is absurd
27 and without any rationale either in policy, legislative history, or past implementation by
28 CalPERS itself.

29 The retroactive redefinition of publicly available under Government Code section
30 20636 using the yet to be approved Regulation 570.5 borders on the irresponsible.
31 Rather than fully discussing a matter that has already been decided on a "consent
32 calendar," Ms. Spaccia is attaching her closing argument to Judge Ahler which she
33 believes shows the illogic of the retroactive re-definition of "publicly available." See
34 Exhibit C.

35 ² Neither CalPERS nor the City of Bell has complied with Government Code section 20160
36 as discussed in Exhibit D.

1 The Board should also note that Ms. Spaccia has made an examination of the
2 CalPERS website which shows that a majority of the audits since the implementation of
3 Regulation 570.5 have criticized the employers because they were not in compliance
4 with the new definition of publicly available.

5 As far as Ms. Spaccia can learn, none of the hundreds of employees affected by
6 the criticized non-compliance have suffered any consequence. Every employer has been
7 given an opportunity to correct its compliance with Regulation 570.5, and as far as Ms.
8 Spaccia can learn, no employee has ever suffered the retroactive forfeiture of his or her
9 pension as recommended by the Board in her case.

10 The Board should adopt Judge Ahler's interpretation of Government Code
11 section 20909 allowing cities to purchase additional retirement service credit, and
12 should reschedule consideration of its adoption of Judge Ahler's interpretation of
13 Government Code section 20636. The proposed reinterpretation of section 20636
14 specifically violates the custom and practice of CalPERS for years, and retroactively
15 imposes a duty on Ms. Spaccia of which she was unaware and without the ability to
16 perform.³

17 Also, Judge Ahler's calculation that Ms. Spaccia's highest pay was based on her
18 2003 contract with the City of Bell. This is incorrect because Ms. Spaccia's highest
19 salary under the CalPERS program was with the North County Transit District and the
20 County of Ventura which was approximately \$140,000 as contrasted with \$100,00 from
21 Bell's contract of 2003.

22 Respectfully submitted,

23
24 Date: June 6, 2013



25 HARLAND W. BRAUN
26 Attorney for Respondent
ANGELA SPACCIA

27 ³ The proposed decision urged by CalPERS' staff will deprive a dozen employees of their
28 ARSC time without a hearing. Attached as Exhibit D are two letters on behalf of Luis Ramirez and
Annette Peretz.

EXHIBIT A

SENATE PUBLIC EMPLOYMENT & RETIREMENT
Nell Soto, Chair
AB 719 (Negrete McLeod) as amended March 24, 2003

BILL NO: AB 719
Hearing date: June 23, 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) 966-1917

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:

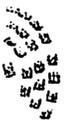
1) What Is "Air Time"?

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.



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

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EXHIBIT B

City of Bell

29

Memorandum

DATE: JUNE 7, 2004

TO: MAYOR AND MEMBERS OF COUNCIL

FROM: ROBERT A. RIZZO,
CHIEF ADMINISTRATIVE OFFICER

BY: ANGELA SPACCIA,
ASSISTANT TO THE CHIEF ADMINISTRATIVE OFFICER

**SUBJECT: BUDGET AMENDMENTS FOR FY 2003 - 04 AND FY
2004 - 05**

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Recommendation:

It is recommended that City Council adopt the attached listing of amendments to the FY 2003-04 and FY 2004-05 budget.

Background:

Each year, as part of the subsequent year's budget preparation cycle, staff evaluates the current year budget to evaluate changing conditions that may require an update in annual appropriations.

This year, refunding of the Redevelopment Agency Tax Allocation Bond, settlement of a pass-thru agreement with the L.A. Unified School District, and park improvements, and contract adjustments have prompted proposal of the attached listing of budget amendments.

FY 2004-05 budget changes are primarily due to grant and other state allocated adjustments.

Financial Analysis:

Sufficient resources are available in each of the funds with proposed amendments to provide for these additional appropriations.

**City of Bell and Related Authorities
Proposed Budget Amendments
FY 2003-04**

<u>Item</u>	<u>Description</u>	<u>Account Code</u>	<u>Balance As Originally Adopted</u>	<u>Proposed Amendment</u>	<u>Balance As Revised</u>
1)	<u>General Fund</u>				
	Vehicle License Fee Decrease Revenue				
	Motor Vehicle In Lieu Tax	01-428-05	(2,000,000)	235,522	(1,764,478)
			<u>(2,000,000)</u>	<u>235,522</u>	<u>(1,764,478)</u>
2)	<u>Personnel Services</u>				
	Expenditures				
	Administration	01-521-0200-0110	101,781	19,149	120,930
	Administration	01-521-0200-0199		32,000	32,000
	Administration Support	01-521-0225-0199		19,375	19,375
	Finance	01-521-0400-0199		42,625	42,625
	Legal - Police	01-521-0800-0720	15,000	533,000	548,000
			<u>116,781</u>	<u>646,149</u>	<u>762,930</u>
3)	<u>Park Improvements</u>				
	Expenditures				
	Construction	01-521-0925-0925	500,000	(500,000)	-
			<u>500,000</u>	<u>(500,000)</u>	<u>-</u>
4)	<u>Other</u>				
	Revenue				
	Transfer In Capital Projects	01-429-50		(29,000)	(29,000)
	Expenditures				
	Election Expenses	01-521-0300-0784		29,000	29,000
				<u>-</u>	<u>-</u>
5)	<u>Retirement Fund</u>				
	Expenditures				
	Benefit Pay Off	08-521-1001-0188	150,000	28,000	178,000
	Benefit Pay Off	08-521-1002-0188	33,309	105,000	138,309
	Deferred Compensation	08-521-1002-0189	41,000	28,000	69,000
			<u>183,309</u>	<u>133,000</u>	<u>316,309</u>
6)	<u>CRA-Capital Projects</u>				
	Revenue				
	Trf In-Debt Svc	20-421-30		(2,537,620)	(2,537,620)
	Expenditure				
	Florence/Walker NE	20-525-1800-0920		600,000	600,000
	Property Acquisition	20-525-1800-0922		1,571,391	1,571,391
				<u>(366,229)</u>	<u>(366,229)</u>
7)	<u>CRA-Tax Increment/Debt Service</u>				
	Revenue				
	Trs In/Out Debt svc	21-429-20	1,533,100	312,000	1,845,100
	Trs In/Out Debt svc	21-429-20		333,325	333,325
	Expenditure				
	ERAF	21-525-0100-0300		142,568	142,568
			<u>1,533,100</u>	<u>787,893</u>	<u>2,320,993</u>

<u>Item</u>	<u>Description</u>	<u>Account Code</u>	<u>Balance As Originally Adopted</u>	<u>Proposed Amendment</u>	<u>Balance As Revised</u>
8)	CRA-Low/Mod Special Revenue				
	Revenue				
	Trf In-Debt Svc	22-421-65	283,193	(3,223,193)	(2,940,000)
	Trf Out-Debt Svc	22-421-65	-	1,289,081	1,289,081
	Trf Out-Housing Authority	22-421-60	-	241,000	241,000
			<u>283,193</u>	<u>(1,693,112)</u>	<u>(1,409,919)</u>
9)	CRA-Debt Service				
	Revenue				
	Tsf In/Out Tax Increment	23-429-10	(1,533,100)	(312,000)	(1,845,100)
	Tsf In/Out Tax Increment	23-429-10	-	(333,325)	(333,325)
	Proceeds from new debt	23-429-30	-	(27,925,000)	(27,925,000)
	Transfer in Low/Mod	23-429-15	-	(1,289,081)	(1,289,081)
	Transfer to Low/Mod	23-429-15	(283,193)	3,223,193	2,940,000
	Transfer to Cap Proj	23-429-25	-	2,537,620	2,537,620
	Premium from bond issuance	23-429-40	-	(268,000)	(268,000)
	Expenditure				
	Loan Repayment	23-525-0100-0300	-	333,325	333,325
	Loan Repayment	23-525-0100-0300	-	1,289,081	1,289,081
	LAUSD pass-thru agreement	23-525-0100-0209	-	1,300,000	1,300,000
	Bond issuance cost	23-525-0100-0210	-	1,000,000	1,000,000
	Refunded Escrow	23-525-0100-0400	-	20,435,000	20,435,000
			<u>(283,193)</u>	<u>(9,187)</u>	<u>(1,825,480)</u>
10)	CDBG				
	Revenue				
	Housing Rehab	30-421-61	(251,835)	(61,000)	(312,835)
	Veteran's Park	30-421-72	(50,000)	(265,101)	(936,835)
	Veteran's Park		-	(202,088)	-
	Veteran's Park		-	(393,021)	-
	Veteran's Park		-	(26,625)	-
	Bell Sports Complex	30-421-87	(265,101)	265,101	-
	Community Center Improvement	30-421-88	(202,088)	202,088	-
	Lead-based Paint Abatement	30-421-88	(25,000)	(6,000)	(33,000)
	Skate Park	30-421-88	-	(30,000)	(30,000)
	Expenditures				
	Asbestos Abatement	30-525-0060-0235	-	66,000	66,000
	Lead-based Paint Abatement	30-525-0066-0235	5,000	3,000	8,000
	Lead-based Paint Abatement	30-525-0066-0235	25,000	-	25,000
	Bell Sports Complex	30-525-0067-0235	100,000	(100,000)	-
	Bell Sports Complex	30-525-0067-0925	165,101	(165,101)	-
	Veteran's Park	30-525-0072-0925	50,000	265,101	936,835
	Veteran's Park		-	202,088	-
	Veteran's Park		-	393,021	-
	Veteran's Park		-	26,625	-
	Community Center Improvement	30-525-0073-0235	202,088	(202,088)	-
	Skate Park	30-525-0088-0925	-	30,000	30,000
			<u>(246,835)</u>	<u>-</u>	<u>(246,835)</u>
11)	Miscellaneous Grants				
	Revenues				
	LA River Parkway Grant	32-424-45	-	(200,000)	(200,000)
	DOT/STPL Florence AC Overlay	32-424-50	-	(442,650)	(442,650)
	Transfer from Prop C	32-429-30	-	(57,350)	(57,350)
	Expenditures				
	Professional Services	32-525-7005-0235	-	25,000	25,000
	Capital Outlay	32-525-7005-0925	-	175,000	175,000
	Professional Services	32-525-7008-0235	-	57,350	57,350
	Capital Outlay	32-525-7008-0925	-	442,650	442,650
			<u>-</u>	<u>-</u>	<u>(500,000)</u>

<u>Item</u>	<u>Description</u>	<u>Account Code</u>	<u>Balance As Originally Adopted</u>	<u>Proposed Amendment</u>	<u>Balance As Revised</u>
12)	Capital Projects				
	Revenues				
	Proceeds of Debt - BAN	50-429-16		(8,000,000)	(8,000,000)
	Transfer Out General Fund	50-429-10		29,000	29,000
	Transfer Out Housing Authority	50-429-80		2,500,000	2,500,000
	Expenditures				
	Architectural/Planning-Civio Ctr	50-521-1003-0235		97,500	97,500
	Architectural/Planning-Sports Complex	50-521-1004-0235		60,000	60,000
	Design/Architectural-Deb's Park	50-521-1005-0235		225,000	225,000
	Construction-Deb's Park	50-521-1005-0925		1,425,000	1,425,000
	Construction-Vet's Pk	50-521-1008-0925		1,100,000	1,100,000
	Construction-Skate Pk	50-521-1007-0925		1,100,000	1,100,000
	Construction-Little Bear Park	50-521-1009-0925		1,650,000	1,650,000
				<u>188,500</u>	<u>188,500</u>
13)	Federal Forfeitures				
	Revenues				
	Federal - DOJ	71-421-25	-	(170,900)	(170,900)
				<u>(170,900)</u>	<u>(170,900)</u>
14)	Skate Park Enterprise				
	Revenues				
	Merchandise	80-440-40		(5,000)	(5,000)
	Expenditures				
	Advertisement	80-521-0200-0201		10,000	10,000
	Special Supplies	80-521-0300-0320		12,000	12,000
	Special Supplies	80-521-0400-0321		5,000	5,000
	Other Equipment	80-521-0200-0911		10,000	10,000
	Special Supplies	80-521-0200-0320		9,000	9,000
				<u>41,000</u>	<u>41,000</u>
15)	Liability Insurance				
	Revenues				
	Trf In-fr. Other Funds	88-429-05	(278,380)	(173,750)	(452,130)
	Expenditures				
	Paid in Lieu Vacation	88-521-2000-0199		42,750	42,750
	Insurance	88-521-2010-0205	40,000	131,000	171,000
	Insurance	88-521-2050-0205	40,000	66,000	106,000
			<u>(198,380)</u>	<u>66,000</u>	<u>(132,380)</u>
16)	Housing Authority				
	Revenues				
	Bell MHP Space Rent	90-421-05	(810,744)	50,000	(760,744)
	Florence Village Space Rent	90-422-05	(979,914)	80,000	(899,914)
	Housing Rent	90-426-20	(203,400)	203,400	-
	6317 Pine Rental Revenue	90-431-05	-	(60,000)	(60,000)
	6500 Flora Rental Revenue	90-432-05		(40,000)	(40,000)
	6624 Flora Rental Revenue	90-433-05		(90,000)	(90,000)
	Bell@Otis Rental Revenue	90-435-05		(20,000)	(20,000)
	6229 Flora Rental Revenue	90-436-05		(4,000)	(4,000)
	Expenditures				
	6317 Pine:				
	Management Fees	90-521-0505-0135		6,000	6,000
	Legal Fees	90-521-0505-0170		1,200	1,200
	Maintenance Supplies	90-521-0505-0210		3,400	3,400
	Maintenance & Repairs	90-521-0505-0215		35,000	35,000
	Utilities-Water	90-521-0505-0262		900	900
	Utilities-Trash	90-521-0505-0263		915	915
	Landscape	90-521-0505-0270		700	700
	6500 Flora:				
	Management Fees	90-521-0510-0135		4,000	4,000
	Legal Fees	90-521-0510-0170		600	600
	MHP Property Insurance	90-521-0510-0205	310	(310)	-

<u>Item</u>	<u>Description</u>	<u>Account Code</u>	<u>Balance As Originally Adopted</u>	<u>Proposed Amendment</u>	<u>Balance As Revised</u>
	Maintenance Supplies	90-521-0510-0210		1,500	1,500
	Maintenance & Repairs	90-521-0510-0215	7,200	15,800	23,000
	Management Fees	90-521-0510-0236	4,920	(4,920)	-
	Utilities-Water	90-521-0510-0262	3,600	(2,600)	1,000
	Utilities-Trash	90-521-0510-0263	2,400	(2,400)	-
	Landscape	90-521-0510-0270		600	600
	Special Departmental Supplies	90-521-0510-0320	3,000	(3,000)	-
	6624 Flora:				
	Management Fees	90-521-0515-0135		9,000	9,000
	Legal Fees	90-521-0515-0170		500	500
	MHP Property Insurance	90-521-0515-0205	630	(630)	-
	Maintenance Supplies	90-521-0515-0210		4,500	4,500
	Maintenance & Repairs	90-521-0515-0215	14,000	40,000	54,000
	Management Fees	90-521-0515-0236	9,300	(9,300)	-
	Landscape	90-521-0515-0270		1,000	1,000
	Special Departmental Supplies	90-521-0515-0320	3,000	(3,000)	-
	4350 Florence:				
	MHP Property Insurance	90-521-0520-0205	355	(355)	-
	Maintenance & Repairs	90-521-0520-0215	9,600	(9,600)	-
	Management Fees	90-521-0520-0236	6,120	(6,120)	-
	Utilities-Water	90-521-0520-0262	4,800	(4,800)	-
	Utilities-Trash	90-521-0520-0263	3,000	(3,000)	-
	Special Departmental Supplies	90-521-0520-0320	3,000	(3,000)	-
	Capital Outlay	90-521-0520-0911	4,000	(4,000)	-
	Bell@ Otis:				
	Management Fees	90-521-0525-0135		2,000	2,000
	Legal Fees	90-521-0525-0170		2,000	2,000
	MHP Property Insurance	90-521-0525-0205	25	(25)	-
	Maintenance Supplies	90-521-0525-0210		3,800	3,800
	Maintenance & Repairs	90-521-0525-0215		30,000	30,000
	Utilities-Water	90-521-0525-0262		2,000	2,000
	Special Departmental Supplies	90-521-0525-0320	600	(600)	-
	6229 Flora:				
	Management Fees	90-521-0530-0135		400	400
	Maintenance Supplies	90-521-0530-0210		1,800	1,800
	Maintenance & Repairs	90-521-0530-0215		15,000	15,000
			(1,914,188)	244,355	(1,669,843)

17)	Housing Authority-Capital Projects			
	Revenues			
	Transfer In Capital Projects	91-429-50		(2,500,000)
	Expenditures			
	Acquisition	91-525-0500-0925		523,529
	Acquisition	91-525-0500-0925		300,026
	Acquisition	91-525-0500-0925		301,284
	Acquisition	91-525-0500-0925		280,580
	Acquisition	91-525-0500-0925		266,175
	Acquisition	91-525-0500-0925		802,261
	Acquisition	91-525-0500-0925		850,000
	Acquisition	91-525-0500-0925		483,000
				1,306,855
				1,306,855

Note: In response to Assembly Bill 719, effective January 1, 2004, a portion of the City's CalPers Surplus Fund will be used to obtain five (5) years service credit for qualifying non-safety miscellaneous unrepresented executive and administrative management staff that are vested with CalPers no later than June 30, 2008. No budget adjustment is required.

<u>Item</u>	<u>Description</u>	<u>Account Code</u>	<u>Balance As Originally Adopted</u>	<u>Proposed Amendment</u>	<u>Balance As Revised</u>
15)	<u>Liability Insurance</u>				
	Revenues				
	Trf In-fr. Other Funds	88-429-05	(278,380)	(197,000)	(475,380)
	Expenditures				
	Insurance	88-521-2010-0205	45,000	131,000	176,000
	Insurance	88-521-2050-0205	45,000	66,000	111,000
			<u>(188,380)</u>	<u>-</u>	<u>(188,380)</u>

***Minutes of
Bell City Council
Bell Community Redevelopment Agency
Bell Public Finance Authority
Bell Surplus Property Authority
Bell Community Housing Authority
Meeting***

***June 7, 2004– 7:00 P.M.
City Council Chambers***

Meeting was called to order by Mr. Cole at 7:05 P.M. with Mr. Bello, Mr. Mirabal and Mrs. Jacobo present in their capacities as Councilmembers, Community Redevelopment Agency Members, Public Finance Authority Trustees, Surplus Property Authority Commissioners and Community Housing Authority Commissioners. Mr. Hernandez was excused.

Pledge of Allegiance led by Councilwoman Jacobo.

Presentations

City Council presented Bell High School Marching Band with a contribution to their fundraiser.

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Communications From The Public

Ron Garcia, Southern California Edison, addressed the City Council regarding Energy Conservation.

Julie Gonzalez, Bell Chamber of Commerce, extended an invitation to the City Council to the Salute to America.

Delia Duran, 6607 Sherman Way, expressed her concern to inappropriate activity near her residence.

Public Hearing

Mayor Cole opened the public hearing at 7:25 P.M. regarding consideration to adopt Resolution Nos. 2004-26 through 2004-2004-29 (inclusive) confirming a diagram and assessment and ordering the levying of assessment for fiscal year 2004-2005 within the Integrated Waste Management District, Landscape and Lighting District, Garbage And Refuse Collection District, and Sanitation And Sewerage Systems

Hearing no testimony for or against this item, Mayor Cole closed the public hearing at 7:26 P.M.

Councilman Bello moved approval of Resolution 2004-26

RESOLUTION NO. 2004-26

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BELL, CALIFORNIA, CONFIRMING A DIAGRAM AND ASSESSMENT AND ORDERING THE LEVYING OF ASSESSMENTS WITHIN THE CITY OF BELL

Minutes of
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**INTEGRATED WASTE MANAGEMENT DISTRICT FOR
THE 2004-2005 FISCAL YEAR**

Second by Mayor Pro Tem Mirabal. Vote proved unanimous.

Mayor Pro Tem Mirabal moved approval of Resolution No. 2004-27.

RESOLUTION NO. 2004-27

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY
OF BELL, CALIFORNIA, CONFIRMING A DIAGRAM
AND ASSESSMENT AND ORDERING THE LEVYING OF
ASSESSMENTS WITHIN THE CITY OF BELL
LANDSCAPE AND LIGHTING DISTRICT FOR THE
2004-2005 FISCAL YEAR**

Second by Councilman Bello. Vote proved unanimous.

Councilwoman Jacobo moved approval of Resolution No. 2004-28.

RESOLUTION NO. 2004-28

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY
OF BELL, CALIFORNIA, CONFIRMING A DIAGRAM
AND ASSESSMENT AND ORDERING THE LEVYING OF
ASSESSMENTS WITHIN THE CITY OF BELL
GARBAGE AND REFUSE COLLECTION DISTRICT FOR
THE 2004-2005 FISCAL YEAR**

Second by Councilman Bello. Vote proved unanimous.

Minutes of
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Councilman Bello moved approval of Resolution 2004-26.

RESOLUTION NO. 2004-29

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BELL, CALIFORNIA, CONFIRMING A DIAGRAM AND ASSESSMENT AND ORDERING THE LEVYING OF ASSESSMENTS WITHIN THE CITY OF BELL SANITATION AND SEWERAGE SYSTEMS DISTRICT FOR THE 2004-2005 FISCAL YEAR

Second by Mayor Pro Tem Mirabal. Vote proved unanimous.

Consent Calendar

Mayor Pro Tem Mirabal moved approval of the consent calendar as follows:

Approval of Regular City Council Meeting Minutes dated May 17, 2004.

Approval of 12-Month Time Extension for Agreement with Oldtimers Foundation to Continue Services for Operation of Senior Nutrition Program.

Approval of Budget Amendments for FY 200³~~4~~-04 and FY 2004-05.

Approval of Assignment of 2003 Juvenile Accountability Incentive Block Grant to L.A. District Attorney's Office.

Approval of Resolution No. 2004-20 approving and adopting the Annual Appropriations limit for the Fiscal Year 2004-05.

Minutes of
Bell City Council
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RESOLUTION NO. 2004-20

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BELL, CALIFORNIA, APPROVING AND ADOPTING THE ANNUAL APPROPRIATIONS LIMIT FOR THE FISCAL YEAR 2004-05.

Approval of Resolution No. 2004-21 Approving the Investment Policy for the Fiscal Years July 1, 2004 through June 30, 2005.

RESOLUTION NO. 2004-21

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BELL, CALIFORNIA, APPROVING THE INVESTMENT POLICY FOR THE FISCAL YEARS JULY 1, 2004 THROUGH JUNE 30, 2005

Approval of Resolution No. 2004-22 Identifying Staff Positions and Salary Ranges for Fiscal Years 2004-2005 and Rescinding Resolution Numbered 2003-30.

RESOLUTION NO. 2004-22

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BELL, CALIFORNIA, IDENTIFYING STAFF POSITIONS AND SALARY RANGES FOR FISCAL YEARS 2004-2005 AND RESCINDING RESOLUTION NUMBERED 2003-30

Approval of Temporary Use Permits-Seasonal Sale of Fireworks/Fireworks Stand.

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June 7, 2004

Second by Councilman Jacobo. Mayor Cole abstained on Item 5.02 (Approval of 12-Month Time Extension for Agreement with Oldtimers Foundation to Continue Services for Operation of Senior Nutrition Program.) Remaining vote proved unanimous.

Council Business

Councilman Bello moved approval of Warrants dated June 7, 2004 in the amount of \$ 1,786,840.19 (261 checks). Second by Councilwoman Jacobo. Vote proved unanimous.

Councilman Bello moved approval of Warrants dated June 7, 2004 in the total amount of \$28,737.50 (Warrant No. 29688). Second by Mayor Pro Tem Mirabal. Mayor Pro Tem Cole abstained, remaining vote proved unanimous.

Micheal Huls presented a staff report regarding consideration of Rate Adjustment for Commercial Bin-Service.

RESOLUTION NO. 2004-25

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BELL, CALIFORNIA, APPROVING COMMERCIAL REFUSE RATES EFFECTIVE JULY 1, 2004.

Councilman Bello moved approval of Resolution No. 2004-25. Second by Councilwoman Jacobo. Vote proved unanimous.

Micheal Huls presented a staff report regarding New AB 939 Diversion Programs and Authorize Staff to Work with Consolidated Disposal Service to Develop an Implementation Plan.

Councilman Bello moved approval of New AB 939 Diversion Programs and Authorize Staff to Work with Consolidated Disposal Service to Develop an Implementation Plan. Second by Mayor Pro Tem Mirabal. Vote proved unanimous.

Community Redevelopment Agency

Community Redevelopment Agency Meeting was called to order by Chair Cole at 8:05 P.M. with Vice Chair Mirabal and Agency Members Bello and Jacobo present. Agency Member Hernandez was excused.

Agency Member Bello moved approval Community Redevelopment Agency Meeting Minutes dated May 17, 2004. Second by Agency Member Jacobo. Hearing no additions or corrections, Minutes were approved as presented.

Agency Member Bello moved approval of Community Redevelopment Agency warrants dated June 7, 2004 in the amount of \$1,637,078.85 (9 checks).. Second by Agency Member Jacobo, vote proved unanimous.

Agency Member Bello moved approval of Contract to R.G. Construction Engineering, Inc. for Demolition of one commercial building at 4022 Gage Avenue (Former La Tapatia Tortilleria). Second by Agency Member Jacobo, vote proved unanimous.

No items were identified for the next Community Redevelopment Agency Meeting.

Community Redevelopment Agency Meeting adjourned at 8:08 P.M

Public Finance Authority

Public Finance Authority Meeting was called to order by President Cole at 8:08 P.M. with Vice President Mirabal and Trustees Bello and Jacobo present. Trustee Hernandez was excused.

Trustee Bello moved approval of Public Finance Authority Meeting Minutes dated May 3, 2004. Second by Vice President Mirabal. Hearing no additions or corrections, minutes were approved as presented.

No items were identified for the next Public Finance Authority Meeting.

Public Finance Authority Meeting adjourned at 8:10 P.M

Community Housing Authority

Community Housing Authority Meeting was called to order by Chair Cole at 8:10 P.M. with Vice Chair Mirabal and Commissioners Bello and Jacobo present. Commissioner Hernandez was excused.

Commissioner Bello moved approval of Community Housing Authority Minutes Meeting dated May 3, 2004. Second by Vice Chair Mirabal. Hearing no additions or corrections, minutes were approved as presented.

Minutes of
Bell City Council
Bell Community Redevelopment Agency
Bell Public Finance Authority
Bell Surplus Property Authority
Bell Community Housing Authority
Meeting
June 7, 2004

No items were identified for the next Community Housing Authority Meeting.

Community Housing Authority Meeting adjourned at 8:12 P.M

Surplus Property Authority

Surplus Property Authority Meeting was called to order by President Cole at 8:12P.M. with Vice President Mirabal and Commissioners Bello and Jacobo present. Commissioner Hernandez was excused.

Commissioner Jacobo moved approval of Surplus Property Authority Meeting Minutes dated May 3, 2004. Second by Commissioner Bello. Hearing no additions or corrections, minutes were approved as presented.

No items were identified for the next Surplus Property Authority Meeting.

Surplus Property Authority Meeting adjourned at 8:14 P.M

The City Council reconvened to identify items they wish to discuss at the next meeting. These items were not acted on at this meeting, only identified for the next meeting.

Identification of Items for Next City Council Meeting.

Councilman Bello asked staff to prepare a plaque for Principal Scott Braxton.

Minutes of
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Mayor Cole stated that a representative from the Los Angeles School District wants to address the City Council.

Adjournment

City Council Adjourned at 8:16 P.M. in Memory of Former President Ronald Reagan to an Adjourned Meeting Scheduled for June 28, 2004 at 5:00 P.M, Council Chambers

Theresa Diaz
City Clerk

APPROVED:

George Cole
Mayor

ATTEST:

Theresa Diaz
City Clerk

Minutes of
Bell City Council
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Bell Public Finance Authority
Bell Surplus Property Authority
Bell Community Housing Authority
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June 7, 2004

EXHIBIT C

1 **HARLAND W. BRAUN, ESQ.**
2 1880 Century Park East, Suite 710
3 Los Angeles, California 90067-1608
4 State Bar No. 41842
5 Telephone: (310) 277-4777
6 Facsimile: (310) 277-4045

7
8 Attorney for Respondent
9 **PIER' ANGELA SPACCIA**

10
11
12 **BOARD OF ADMINISTRATION**
13 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT TRUST**

14 In the Matter of the Calculation of
15 Final Compensation:

16 **PIER' ANGELA SPACCIA,**

17 Respondent,

18 and

19 **CITY OF BELL,**

20 Respondent.

21 **CASE NO. 2011-0789**
22 **OAH NO. 2012020198**

23 **RESPONDENT PIER' ANGELA**
24 **SPACCIA'S CLOSING ARGUMENT**

25
26 **INTRODUCTION**

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

31 Ms. Spaccia's highest twelve months compensation at the City of Bell was
32 \$320,123.43. Because Ms. Spaccia was forced into an early retirement, her pension
33 would be 50% subject to a possible 20% reduction to provide for her disabled son.

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

4 CalPERS made two claims:

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

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

14
15 Issues Not Involved in This Proceeding

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

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

28 Vested pension rights are so constitutionally protected that even a criminal

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

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

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

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

23

24 Ms. Spaccia's Employment Contract Was Publicly Available

25 At the time Ms. Spaccia retired from the City of Bell, her employment contract
26 was publicly available as that term was historically defined and understood at that time.
27 The scandal at the City of Bell precipitated the creation by CalPERS of Regulation
28 571.5 changing the requirement from 'publicly available' to 'publicly published.' A

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

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

15

16 CalPERS Failed to Prove Public Availability Requires Publication

17 Uniquely, CalPERS has a number of methods to prove that "publicly available"
18 at the time Ms. Spaccia retired meant published as that is now defined by Regulation
19 571.5. CalPERS has within its historic memory the entire history of the state pension
20 system, including the writing and modification of the statutory scheme and promulgation
21 of regulations, the auditing of its member municipalities, the determination of the
22 pensions for specific municipalities, and the publication of explanations of its
23 requirements distributed to its members.

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

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

7 There is not even any reference in the legislative digest to the publication of the
8 employment contracts. In fact Government Code Section 20023(b) simply states "pay
9 rate means the normal monthly rate of pay or base pay of the member paid in cash to
10 similarly situated members of the same group or class of employment for services
11 rendered on a full time basis during normal working hours." There is no reference to
12 publicly available schedules with respect to the group.

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

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

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

24 CalPERS explained to the Legislature that the existing law:

25 ". . . specifies that the pay rates of members not in the group or
26 class are required to coincide with publicly available pay schedules, and
27 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]

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

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

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

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

17 To be more specific, CalPERS audited the City of Bell in 2006 [Exhibit 31] and
18 2010 [Exhibit 32], and in neither audit did the CalPERS auditors note that the
19 employment contracts were not publicly available. CalPERS cannot claim that this was
20 an oversight by its trained auditors because the concept of compensation earnable under
21 Government Code Section 20636 is the basic foundation upon which all CalPERS
22 pensions are based.

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

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

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

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

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

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

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

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

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

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

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

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

1 Spaccia's employment contract.¹

2

3 Unconstitutional Forfeiture is Not a Remedy for Lack of Publication

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

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

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

18 CalPERS is responsible for publishing the specific nature of the requirements of
19 public availability which it did not do. CalPERS had many opportunities, particularly in
20 2006 to suggest clarifying legislation and did not. CalPERS also failed to notify Bell in
21 the 2006 audit and 2010 audit, and failed to notify any of Bell's employees of the
22 deficiency in making the employment contracts publicly available.

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

26

27 ¹ Although the Adams negotiations were confidential, once the contract was signed, it was
28 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.

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

7
8 Ms. Spaccia's Claimed Pension is Guaranteed
9 by the United States and California Constitutions

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

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

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

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

28

1 CalPERS Regulation 571.5 is a New Requirement
2 Which Redefines Public Availability

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

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

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

23
24 The Randy Adams Contract

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

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

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

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

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

23 In any event, as Clifton Albright describes, Resolution 2006-42 specifically
24 exercises the power of the City Council under Section 519 of the Charter to authorize
25 the CAO to enter into service and employment contracts. However, Section 604(a) of
26 the City Charter, applicable only to Randy Adams, requires that the appointment or
27 removal of department heads be done with the approval of the City Council [See Exhibit
28 19].

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

6
7 Government Code Section 20909 Does Not Prohibit the City of Bell
8 From Purchasing Additional Retirement Service Credit

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

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

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

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

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

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

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

11
12 CONCLUSION

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

17 The remaining question is what is the highest salary that Ms. Spaccia had at the
18 City of Bell. That figure is uncontested as \$320,123.43. Ms. Spaccia, based on the
19 evidence and argument at the hearing, asks the Court to find that the ARSC time was
20 properly purchased by the City of Bell, and that her highest salary at the City of Bell was
21 \$320,123.43 and should be used to calculate her CalPERS pension retroactive to her
22 date of retirement of October 10, 2010.

23 Respectfully submitted,

24
25 Date:

December 28, 2013

Harland W. Braun
HARLAND W. BRAUN
Attorney for Respondent
ANGELA SPACCIA

EXHIBIT D

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September 6, 2012

CalPERS
Customer Account Services Div.
Retirement Account Services Section
P.O. Box 942709
Sacramento, CA 94229-2709

Attn: Ms. Debra Gibson
Ms. Karen DeFrank
Ms. Nova Horton

Re: Your Correspondence of August 24, 2012

Dear CalPERS Representatives:

Ms. Peretz has provided me a copy of your letter dated August 24, 2012. This office has been retained to represent Ms. Peretz in this matter. Ms. Peretz disputes the preliminary determination, as set out in your letter and is by this correspondence opposing the preliminary determination. Ms. Peretz requests that, based on this letter a new determination be made which continues the Retirement Benefits, as currently being paid and that no adjustment be made to her account.

Preliminary Considerations. In your letter you indicate a review of the ARSC purchase, made in June 2005 was conducted. This review was done without any notice to my client and she has not been provided with any facts, details or information used in your review or to come to the conclusions set out in your letter. Nor has she been provided copies of documents that were reviewed, what statements or interviews were conducted or what information was considered. Further, there is no specificity as to who conducted this review or their legal authority to take such action. As such, demand is hereby made that the following information be provided to this office immediately.

All writings, including but not limited to documents, evidence, notes of interviews, correspondence and/or emails which were reviewed in making the preliminary determination. In seeking all "writings" that were reviewed, the definition, as set forth in the Evidence Code section 250 is being used. (A printout of the section is attached to this correspondence for your convenience.)

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Ms. Karen DeFrank
Ms. Nova Horton

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Any judicial determination that the payment was "unlawful" as set out in the first paragraph of your letter.

A copy of the sections in PERL, which you believe support your position that the payment was unlawful.

Any judicial determination which requires CalPERS to rescind the purchase, as set forth in your letter.

Any and all legal briefs or analysis used to make your determination the payment was unlawful or any legal position allowing CalPERS to be granted the authority to make a determination of lawfulness in the Government Code or PERL.

The name(s) of the person(s) who made the preliminary determination and their report(s).

The names of each supervising person who reviewed the original determination and any charges to the report(s).

All of the information described as, "presently available" to CalPERS at the time it made its preliminary determination.

Any and all information provided to supervisors or department heads in order to substantiate the position taken in forming the preliminary determination.

The basis for the current review and who initiated the review at the present time.

Your Preliminary Determination Basis.

I have reviewed your reference to Government Code section 20909(a) and agree that it allows for service credits to be purchased.

I also agree that Government Code section 20909(b) allows a member to elect to make an ARSC purchase. We both agree that Ms. Peretz did make this election and did purchase the five-year ARSC credit. We also agree that payment, as requested by CalPERS was fully made, received and credited to Ms. Peretz's account in June of 2005. At no time, until your letter of August 24, 2012, was any statement made to Ms. Peretz that receipt of funds by CalPERS and/or payment was in any manner improper or unlawful.

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As to your claim in the first full paragraph at page two that the reading of the statute is supported by legislative history, we dispute this claim and the underlying assumption upon which it is based. In fact, exactly the opposite is true.

In your final sentence of paragraph one at page two you make the statement that CalPERS has not located any documentation to show the city's payment was ever authorized by the city council. What documents did you review, what requests for documents were made and what evidence or fact does CalPERS have to believe that the payment must be authorized by the city council. Additionally, why was this never mentioned earlier, since CalPERS was fully aware the payment was coming from the city prior to the time the money was paid and was fully aware payment came from the city in June 2005.

In the second paragraph at page two the letter states the ARSC purchase failed to comply with PERL, but no citation or any specificity is contained in the letter. Please provide the specific section(s) of PERL to which you are claiming ARSC fails to comply. You state it appears to be unlawful. Who made this determination and on what basis was it made. Is there a judicial opinion which has made a finding it is unlawful. If this is just an opinion then I would request to know who tendered this opinion, the basis and facts upon which it is based, and the authority of the individual(s) to make such a determination.

The letter goes on to state "the city erred." Can you provide any support for this statement? Did you contact any of the city council members from 2005 to get their opinion on this matter? Do you have any justification to support your claim the city "erred" or is this merely an unsupported and unsupportable statement? I would ask that you supply all facts and evidence which you believe supports this statement.

As to the claim that CalPERS should not have accepted the city's payment, the fact is it did accept the payment; it knew where the funds were coming from prior to their being sent; CalPERS was aware at the time the funds were received and CalPERS has waited over seven years before making any mention to Ms. Peretz. Why was this not addressed in June 2005?

In your second section, Duty to Correct Mistakes, you have made an assumption that a mistake was made. Your letter states that CalPERS has only certain authority. Please provide me with specifics that allow you to do any of the acts you are currently taking, supported by citations to PERL, the California Constitution or the Government Code.

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We dispute that the purchase was unlawful. The payment was made, it was accepted, it was communicated to Ms. Peretz that she had purchased the service credits and she has relied on your representations and your statements as to her benefits and retirement payments. Unless you can provide a legal justification for your act then CalPERS will be in breach of its fiduciary duty and subject to damages for any and all improper and unwarranted and unjustified actions.

In reviewing the cases and codes I do not see any prohibition about who must or can pay the funds to purchase the service credit. The one statement you mention is not law and does not reflect what is set forth in the code. So, if this was considered and left out, it would validate the right of the city to make the payment and invalidate your argument as the language was not put into the code.

As to your final paragraph on page two, those issues have already been addressed and there is no dispute.

In your reference to the Longshore case, it is totally unapplicable to the current situation. The Longshore case deals with unpaid overtime compensation. The facts of that case have nothing to do with Ms. Peretz's situation. Ms. Peretz is not seeking unpaid overtime compensation.

As you should know, a public employees entitlement to a pension is among those rights clearly favored by the law. (See Hittle v. Santa Barbara Co. Employees Retirement Ass'n (1985) 3a C3d 374. Further, pension laws are to be liberally construed to protect pensioners and their dependents from economic insecurity. Pension rights are obligations protected by the contract clause of both the Federal and State Constitutions (U.S. Const. Article I, Section 10, Cl 1; Ca Constitution, Article I, Section 9.) (See Miller v. St. of California (1977) 18 C3d 808).

Ms. Peretz strongly denies that any error in accepting payment was made by CalPERS and as such there is nothing to correct. As a result no erroneous payment has been made and no collection of money, lawfully and correctly paid can be taken by CalPERS, without a judicial determination.

While CalPERS is the administrator of the pension funds to be paid upon retirement of its members, your actions appear to be in complete disregard of your fiduciary duties. There is no cost or adverse impact to CalPERS, the amount paid for the service credit was

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fully paid using an actuarial determination made by your agency and paid in a sum which you determined was the present value amount needed to cover the payments to be made in the future. This formula in effect allowed Ms. Peretz, using your services to obtain an annuity which could be determined by her using the various information you provided. Ms. Peretz entered into the agreement based on your representations, the law, as it existed, and the statements and promises of the city. To now turn around after seven years of silence and without any judicial determination of your position is a blatant abuse of your position and authority.

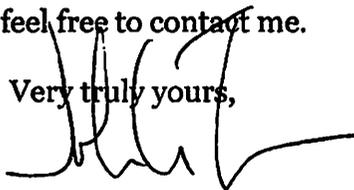
I am requesting that, because Ms. Peretz was not previously informed of your actions that she be allowed 30 days to file a response, from the date all of the information requested in this letter is supplied.

In the alternative, Ms. Peretz requests that if any adverse decision is made that Ms. Peretz be afforded her appeal rights to comply with all procedures necessary to resolve the matter without intervention of the courts, if at all possible. Ms. Peretz requests that all rights of appeal and rights to contest this preliminary determination be provided to her immediately. They may be emailed to my office at the email address set out above.

I would ask that I be contacted within five (5) days of the date of this letter to advise if you will allow Ms. Peretz to exercise her appellate and other rights to a review of your preliminary determination. If you fail to timely respond it will be deemed to be a complete denial of Ms. Peretz to appeal from or pursue her rights by CalPERS and we will be asking the court to intervene on her behalf. Further, the funds now held by CalPERS are to be maintained by you or for you to agree to be responsible for payment of the full pension if you should return the funds to the city and they fail to reimburse CalPERS. As a fiduciary of Ms. Peretz, it is mandatory that you look out for her best interest.

If you have any questions, please feel free to contact me.

Very truly yours,



John A. Tkach

JAT/eb

09/06/2012

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October 9, 2012

Via Facsimile & U.S. Mail

California Public Employees'
Retirement System
Customer Account Services Division
P.O. Box 942709
Sacramento, CA 94229-2709

Attn: Ms. DeFrank, Chief

Re: Luis Ramirez
Annette Peretz

Dear Ms. DeFrank:

This office represents Luis Ramirez and Annette Peretz with respect to the August 13, 2012, letter to Mr. Ramirez and the August 24, 2012, letter to Ms. Peretz. In the correspondence from Ms. Seabourn dated September 19, 2012, I was given until October 13 to file a response. Please consider this a supplemental response to my letter for Mr. Ramirez dated August 29, and my letter for Ms. Peretz dated September 6.

On October 3, I received from Mr. Yates, CalPERS' response to my request for information as set out in my August 29 correspondence. Because the letter from CalPERS to Mr. Ramirez and Ms. Peretz are the same, I will address the preliminary determination letter as to both of them herein. While I have not received the documents requested as to Ms. Peretz, I fully anticipate the same basic information is contained in her file.

Other than the letters sent to Mr. Ramirez and Ms. Peretz, the response to my inquiry contained no factual information which would support the preliminary determination. In fact, the information makes it perfectly clear that CalPERS was fully aware of the payment being made by the City of Bell prior to the time payment was made and CalPERS took affirmative action to receive the payment directly from the city. According to the records produced by CalPERS the cash election payment was completed and \$95,288.47 was credited to Mr. Ramirez and a paid-in-full letter to Mr. Ramirez was sent by CalPERS.

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From 2005, until the letter dated August 13, 2012, there was never any notice, statement or communication indicating any problem with the service credit.

At page two of your letter, the last sentence of the first paragraph states "Moreover, CalPERS has not located any documentation to show that the City's payment was ever authorized by the City Council." While it may be accurate that CalPERS has not located such a document, it does in fact exist and, as such, CalPERS' position is inaccurate. Payment of the service credit, per Assembly Bill 719 was approved by the City Council on June 7, 2004. Payment was then authorized by the City on June 8, 2005.

Upon applying for retirement, CalPERS calculated the amount to be paid to Mr. Ramirez and Ms. Peretz, conducted an audit of their account and determined and approved the retirement payment due. In addition, CalPERS has paid the amount calculated by your department on behalf of Mr. Ramirez and Ms. Peretz. To date, I have heard no explanation as to why CalPERS has waited over seven years and until after retirement of my clients and approval of the retirement amounts to now bring up this matter.

It is our position that your preliminary determination is incorrect and must be vacated for the reasons set forth below.

Based on your letter and the documents provided, it appears that your conclusions are based solely on the reasons set forth in your letter. If other information or considerations were used by CalPERS to come to its conclusion, we demand that such information be immediately provided to this office.

In your correspondence you set forth Government Code section 20909(a) which allows a member to elect to make contributions for up to five years of service credits. It is undisputedly that my clients are members within the definition and that each of them elected to make a contribution to CalPERS for five years of service credit. It is undisputed this election was made, and the funds were received and retained by CalPERS in 2005 and is presently in your possession. It also cannot be disputed that CalPERS prepared the calculation of the amount needed to be paid to fund the retirement account and the amount determined necessary to cover the costs was fully paid. As such, based on the actuarial analysis and determination of CalPERS, the amount needed to pay the retirement benefits were fully funded and paid. The result would be no cost to CalPERS as the amount was fully funded. CalPERS, by having retained and invested these funds would be unjustly enriched if its position is continued.

CalPERS 10/9/12

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It is also undisputed that my clients made and completed the election to purchase the service credits prior to the time they retired as set forth in Government Code section 21050 and 21052.

Nowhere in the Government Code does it prohibit the employer from making the payment on behalf of the employee. The legislative analysis to which you refer is not the law as passed. Had the legislators decided not to allow the employer to make the payment they could have and would have done so when they enacted the legislation. Instead, it is clear that the legislature was aware of this and based on a reading of the analysis it is evident the legislators wanted to make certain the cities were not required to make the payment. Their not being required to make the payment is far different than the cities being prohibited from making the payment. Nowhere in the code does it state the cities are prohibited from making the payment. It is evident the legislature wanted to not require the cities to be responsible if they chose not to make the service credit payment on behalf of its member. Nowhere in the code does it prohibit the cities from doing what they did.

Further, CalPERS was aware of the payment being made by the city, withdrew the funds from the city's account and never gave any indication that this was not allowed. Now seven years later, for the very first time you are seeking to reduce the benefits to my clients.

As a fiduciary it is CalPERS who is responsible for making certain the benefits worked for are paid properly and in a timely fashion. The action being contemplated by CalPERS is in direct conflict with its duties and obligations to my clients.

As was noted in your response to my requests numbers two and four, "CalPERS is not in possession of any written judicial determination that the payment for the purchase of five years of ARSC time by Luis Ramirez was "unlawful." Nor does CalPERS have any documents of "any judicial determination which requires CalPERS to rescind the purchase

In the preliminary determination letter, the case of Longshore v. Co. of Ventura is cited in fn. 4 at page 2. If CalPERS is relying on this case for guidance it is misplaced and does not assist the position CalPERS has preliminarily taken. In the case of Longshore the issue was whether deputy sheriffs should receive recognition of/and cash payments for overtime credits accumulated by them. The Court of Appeal concluded that the county's salary ordinances, in effect during the time period in question, created no vested rights to cash compensation for overtime service. This case has no application or applicability to the

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matter addressed in your letter. Neither of my clients are seeking cash compensation for overtime.

There has been no judicial determination which supports your conclusion and your conclusion appears to be based on a case that has no application to the issue being addressed and the misreading of a statute to add terms that are not part of what the legislature enacted.

I have been provided with no other information or documents which would provide any basis or rationale which would lead to the conclusion that the city is prohibited from taking the action. Further CalPERS has allowed my clients to rely on your actions for over seven years and a determination has been made as to the benefits that are payable and are being paid.

The Precedential Decision 98-02 cited in your letter at p. 2, fn. 3 does not lend support for your position because the facts are different. The facts show that Henderson elected to buy back four years of military service credit. Payments were to be made monthly and at the date of retirement he had paid only 62% of the amount due. CalPERS calculated his retirement allowance as if the full amount had been paid. In the case of Mr. Ramirez and Ms. Peretz the full amount requested by CalPERS, based on CalPERS calculation was fully paid. CalPERS was aware the payment was going to be made by the city prior to it being paid and never stated it was in any manner improper. As a result both Mr. Ramirez and Ms. Peretz have relied on the actions of CalPERS in making their decisions as to how to proceed.

In Section V. , Government Code 20160 is cited. It states that errors or omissions may be corrected if all of the following facts exist:

- (1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.
- (2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.

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In sub section (d) it states:

“(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).”

I have reviewed your correspondence directed to Mr. Ramirez and to Ms. Peretz, as well as all of the information provided by Mr. Yates. Nowhere in any of your documentation or your correspondence do you identify that any request, claim or demand was made to correct an error or omission, made by a party seeking corrections. Additionally, the request must be made within a reasonable time after discovery of the right which shall in no case exceed six months.

In my correspondence dated August 29 on behalf of Mr. Ramirez and my correspondence dated September 6, on behalf of Ms. Peretz, it was stated:

“This review was done without any notice to my client and she/he has not been provided with any facts, details or information used in your review or to come to the conclusion set out in your letter. Nor has he/she been provided copies of documents that were reviewed, what statements or interviews were conducted or what information was considered.”

Nowhere in the letters or in the documents provided is there any indication a request, claim or demand to correct the error or omission was made by the party seeking a correction. This is a condition precedent to CalPERS taking any action. The limitation period set out in the Government Code is clear. The request, claim or demand “in no case shall exceed six months after discovery of this right.” The city authorized payment in 2005 and notified CalPERS it was being paid from a city account. CalPERS acknowledged this letter and the application and withdrew the funds in 2005. It sent a letter to Mr. Ramirez and Ms. Peretz acknowledging the five years of service credits were purchased. Clearly the six-month limitation has passed years ago. Further, there is no evidence present by CalPERS that any such request, claim or demand was ever made. However, if CalPERS was provided such a request claim or demand this information has not been provided and demand is made that this information be produced to this office immediately.

According to the records provided by Mr. Yates CalPERS was fully aware prior to payment being made that the city intended to make the payment and after receipt of funds

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sent a paid-in-full letter. At the time Mr. Ramirez elected to retire the records show CalPERS conducted an audit and/or review prior to placing my clients on your rolls. On January 21, 2011, a letter was sent by CalPERS indicating the amount of the allowance to be paid and stating the warrant for payments would be made retroactive to December 31, 2010. Also, on January 21, 2011, a letter was sent by CalPERS to Bell notifying them of the placement on the retirement roll. Even if this date for review is used the six months have passed more than a year prior to your correspondence.

As such, the fact necessary to make a correction does not exist and CalPERS is prohibited by the Government Code from taking the action it is proposing.

Turning to sub part (2), this fact also does not exist and prevents CalPERS from taking the adverse action it is proposing. The error or omission must be shown to have been based on mistake, inadvertence, surprise or excusable neglect. Nowhere in your letter do you claim any of these were made by any party or claimant, nor are there any facts offered to support such a claim was ever made. It is up to CalPERS to demonstrate a mistake, inadvertence, surprise or excusable neglect occurred and there is nothing in your correspondence setting forth any such facts or evidence. As the Government Code requires that all of the facts must exist, and clearly none of them do exist, CalPERS may not take the action it is proposing. The lack of any clear statement establishing error is also fatal to CalPERS position.

In section (d), the code states that the party seeking the correction has the burden of presenting documentation or other evidence to the board establishing the right to correction. No such documentation or evidence has been produced to demonstrate any of the required evidence was presented to the board. In fact, there has been no identification of "the party" seeking the correction or when this claim was made.

It is further clear that estoppel is additionally applicable in this matter. In order to establish a claim for estoppel it must be shown that:

"(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury."

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Each of the elements can be demonstrated, based on the facts which exist. CalPERS was fully appraised of the fact that the city elected to make the payment. CalPERS was informed prior to the payment, it was provided the account number from which to draw the funds and it did withdraw the funds. There can be no question that CalPERS knew the city was going to pay the funds. Based on the documents provided at least two letters and the application all stated the city was going to make payment on behalf of the employee.

CalPERS knew that its conduct would be acted upon. Had CalPERS provided any notice to either the city or my clients then alternative actions could and would have been taken. My clients had the right to believe the acts of CalPERS were accurate, and CalPERS acted on them as correct.

At no time were either of my clients aware that any claim was or could be made as now proposed by CalPERS.

Both Mr. Ramirez and Ms. Peretz relied on CalPERS and the city's conduct, to their injury, if the proposed action is taken. Had they been timely notified of any problem alternative actions could have been taken.

The elements of estoppel are clearly established. As noted in the Longshore case, cited in your letter, it states:

"We have recognized and applied against public entities a doctrine of equitable estoppel. In City of Long Beach V. Mainsail (1970) 3 Cal.3d 462, 489 [91 Cal.Rptr. 23, 476 P.2d 423], we reaffirmed our holding in Driscoll v. City of Los Angeles (1967) 67 Cal.2d 297, 305 [61 Cal.Rptr. 661, 431, P.2d 245]."

Also as noted in the Henderson decision:

"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 estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel."

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Even in the cases where estoppel has been limited due to public policy considerations, no such facts exist in this case. The city elected to make payment and carried out the act it promised to the employee as part of the compensation package, intended and designed to ensure the employee would remain with the city until retirement, all of which occurred as a result of the actions taken by the city. The amount paid was calculated by CalPERS and discounted to present value. As such there are no unfunded liability and no detriment to CalPERS, since the allowance to be paid was fully funded.

As such, no public policy considerations would be applicable in this situation.

It should also be noted that in his findings ALJ Mr. Hjett noted that:

“The Board owes a fiduciary duty of trustee to a trust fund and its beneficiaries.”

As the Board is a fiduciary to my clients it must take all necessary steps to protect and guard their interests. Failure to act appropriately would be a breach of those duties.

As noted in the case of Betts v. Bd of Administration 21 C3d 859:

“A public employee’s pension constitutes an element of compensation, and a vested contractual right to pension benefits accrued upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity.”
Citing Kern v. City of Long Beach 2d C2d 848.

The statute of limitations also limits any action to three years. As these acts were taken over seven years ago, the statute of limitations has clearly passed.

The time to act has been exceeded under the statute of limitations and as such, the city and/or CalPERS may not take the action it is proposing.

Based on the facts, or lack thereof, it is respectfully requested that the tentative decision be vacated and that no adverse action be taken as to my clients.

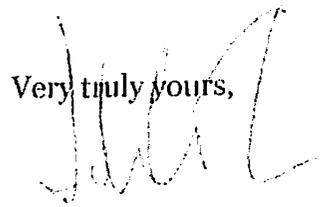
I would ask that you review your decision and vacate your preliminary determination.

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Should you make a final determination which is adverse to my clients I would ask that our appeal rights be provided and the matter be set for hearing before a ALJ.

If you have any questions or would care to discuss this matter further, please contact me.

Very truly yours,



John A. Tkach

JAT/cb

cc: Debra Gibson
Nova Horton