



Board of Administration
California Public Employees' Retirement System

Consent

Agenda Item 6a1

April 17, 2013

ITEM NAME: Proposed Decision – In the Matter of the Calculation of the Final Compensation of PIER'ANGELA SPACCIA, Respondent, and CITY OF BELL, Respondent, Case No. 2011-0789

PROGRAM: Retirement Account Services

ITEM TYPE: Action Consent

PARTIES' POSITIONS

Staff argues that the Board of Administration should adopt in part and reject in part the Proposed Decision. Staff recommends that a Full Board Hearing be held concerning the ARSC issue.

Respondent Pier'Angela Spaccia argues that the Board of Administration should decline to adopt the Proposed Decision.

Respondent City of Bell argues that the Board of Administration should adopt in part and reject in part the Proposed Decision.

STRATEGIC PLAN

This item is not a specific product of either the Strategic or Annual Plans. The determination of administrative appeals is a power reserved to the Board of Administration.

PROCEDURAL SUMMARY

Respondent Pier'Angela Spaccia (Respondent Spaccia) submitted an application to CalPERS for a service retirement pending determination of her application for an industrial disability retirement. Respondent Spaccia requested that CalPERS use the highest compensation she received from the City of Bell (Respondent Bell) of \$28,582 per month as her "final compensation." CalPERS reviewed the compensation that Respondent Bell had paid to Respondent Spaccia and concluded that the reported payrate was not "compensation earnable" and should not be used to calculate Respondent Spaccia's service retirement because Respondent Spaccia was not paid pursuant to a "publicly available pay schedule." CalPERS then determined that her retirement allowance should be based on "compensation

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earnable" of \$7,607 per month that was paid to her by a previous public agency employer. In addition, CalPERS notified Respondent Spaccia that Respondent Bell's direct purchase of five years of additional retirement service credit ("ARSC" or "airtime") was improper and had to be rescinded. This had the effect of reducing Respondent Spaccia's total service credit by five years. Respondent Spaccia appealed these determinations and the matter was heard by the Office of Administrative Hearings on August 27, 28 and 29, 2012, as well as on December 27, 2012. A Proposed Decision was issued on February 26, 2013, finding that, for purposes of determining Respondent Spaccia's compensation earnable under the applicable statutes, Respondent Spaccia's 2003 contractual payrate from Respondent Bell of \$8,526 per month should be used. The Administrative Law Judge (ALJ) also found that CalPERS improperly disallowed the purchase of five years of ARSC, and restored those years of service credit to her account.

ALTERNATIVES

- A. For use if the Board decides to adopt the Proposed Decision as its own Decision:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own Decision the Proposed Decision dated February 26, 2013, concerning the application of Pier'Angela Spaccia; RESOLVED FURTHER that this Board Decision shall be effective 30 days following mailing of the Decision.

- B. For use if the Board decides not to adopt the Proposed Decision, and to decide the case upon the record:

(1) RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, after consideration of the Proposed Decision dated February 26, 2013, concerning the application of Pier'Angela Spaccia, hereby adopts in part and rejects in part the Proposed Decision and determines to decide the issue regarding the additional retirement service credit purchase itself, based upon the record produced before the Administrative Law Judge and such additional evidence and arguments that are presented by the parties and accepted by the Board; RESOLVED FURTHER that the Board's Decision shall be made after notice is given to all parties.

(2) RESOLVED that the Board of Administration of the California Public Employees' Retirement System, after consideration of the Proposed Decision dated February 26, 2013, concerning the application of Pier'Angela Spaccia, hereby rejects the Proposed Decision and determines to decide the matter itself, based upon the record produced before the Administrative Law Judge and such additional evidence and arguments that are presented by the parties and accepted by the Board; RESOLVED FURTHER that the Board's Decision shall be made after notice is given to all parties.

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- C. For use if the Board decides to remand the matter back to the Office of Administrative Hearings for the taking of further evidence:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, after consideration of the Proposed Decision dated February 26, 2013, concerning the application of Pier'Angela Spaccia, hereby rejects the Proposed Decision and refers the matter back to the Administrative Law Judge for the taking of additional evidence as specified by the Board at its meeting.

- D. Precedential Nature of Decision (two alternatives; either may be used):

1. For use if the Board wants further argument on the issue of whether to designate its Decision as precedential:

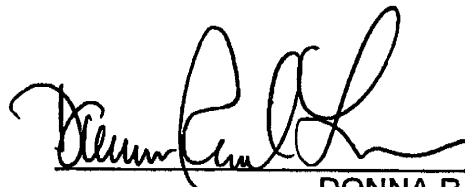
RESOLVED, that the Board of Administration of the California Public Employees' Retirement System requests the parties in the matter concerning the application of Pier'Angela Spaccia, as well as interested parties, to submit written argument regarding whether the Board's Decision in this matter should be designated as precedential, and that the Board will consider the issue whether to designate its Decision as precedential at a time to be determined.

2. For use if the Board decides to designate its Decision as precedential, without further argument from the parties.

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, hereby designates as precedential its Decision concerning the application of Pier'Angela Spaccia.

ATTACHMENTS

- Attachment A: Proposed Decision
Attachment B: Staff's Argument
Attachment C: Respondent(s) Argument(s)



DONNA RAMEL LUM
Deputy Executive Officer
Customer Services and Support

ATTACHMENT A
THE PROPOSED DECISION

**BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

**In the Matter of the Calculation of the Final
Compensation of:**

PIER'ANGELA SPACCIA,

Applicant/Respondent,

and

CITY OF BELL,

Public Entity/Respondent.

Agency Case No. 2011-0789

OAH No. 2012020198

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 27, 28 and 29, 2012, and on December 27, 2012, in Orange, California.

Wesley E. Kennedy, Senior Staff Counsel, represented Petitioner Marion Montez, Assistant Division Chief, Customer Account Services Division, California Public Employees' Retirement System, State of California.

Harland Braun, Attorney at Law, represented Applicant/Respondent Pier'Angela Spaccia, who was present throughout the administrative proceeding.

Stephen R. Onstot, Attorney at Law, represented Public Entity/Respondent City of Bell.

The matter was submitted on January 28, 2013.

SUMMARY

A preponderance of the evidence established that the earnings received by Pier'Angela Spaccia under her July 1, 2003, employment agreement with the City of

Bell should be used to calculate her service retirement allowance and that Ms. Spaccia is entitled to receive five years air time purchased on her behalf by the City of Bell.

FACTUAL FINDINGS

Stipulated Matters

1. The California Public Employees Retirement System (CalPERS) manages pension and health benefits for California public employees, retirees and their families. Retirement benefits are provided under defined benefit plans that are funded by member and employee contributions and by interest and earnings on those contributions.

2. A service retirement allowance is calculated by using a formula that includes the member's years of service, age at retirement, and final compensation. "Final compensation" is defined as the highest average consecutive 12 or 36 months of covered service. "Compensation earnable" is defined as "payrate" and "special compensation." In computing a member's service retirement allowance, CalPERS' staff may review the salary reported by an employer to ensure that only those items allowed under the Public Employee Retirement Law (PERL) are included in a member's "final compensation."

3. The City of Bell was and is a public agency that contracted with CalPERS for the provision of benefits to eligible employees under the PERL.

4. Pier'Angela Spaccia was employed by the City of Bell from July 1, 2003, until October 1, 2010, and by other participating public agencies before her employment with the City of Bell.

5. On October 1, 2010, Ms. Spaccia submitted an application to CalPERS for a service retirement pending determination of her application for an industrial disability retirement. Ms. Spaccia requested that CalPERS use the highest average compensation she received from the City of Bell as her "final compensation."

6. CalPERS reviewed the compensation the City of Bell reported it had paid to Ms. Spaccia and concluded that the reported payrate was not "compensation earnable" and should not be used to calculate Ms. Spaccia's retirement allowance because Ms. Spaccia was not the paid pursuant to a publically available pay schedule. CalPERS determined Ms. Spaccia's retirement allowance should be based on "compensation earnable" that was paid to her by other (non-City of Bell) public agencies.

7. By letter dated December 2, 2010, Ms. Spaccia was notified of CalPERS' determination and her right to appeal. CalPERS later notified Ms. Spaccia

that the City of Bell's direct purchase of five years of additional retirement service ("air time") for her was improper and had to be rescinded.

8. By letter dated December 27, 2010, Ms. Spaccia timely appealed from CalPERS's determinations and requested an administrative hearing.

9. Petitioner Marion Montez, Assistant Division Chief, Customer Account Services Division, California Public Employees' Retirement System, signed the Statement of Issues giving rise to this administrative proceeding.

Ms. Spaccia's Employment History Before July 2003

10. In January 1980, Ms. Spaccia began employment with the City of Ventura. She was employed there for approximately 11 years. She received several promotions, ultimately serving as Director of Management Services. Ms. Spaccia terminated her employment with the City of Ventura in 1990 to work for the Los Angeles County Transportation Commission (LACTC).

Ms. Spaccia began employment with the LACTC in 1990. During her employment, LACTC merged with the Southern California Rapid Transit District (SCRTD). Ms. Spaccia was employed by SCRTD through 1994 and became Director of Management Services.

Ms. Spaccia married in 1994 and moved to Idaho. While living in Idaho, she was employed as an Associate Director of the YWCA and then as Finance Director for Kootenai County. Ms. Spaccia and her son returned to California in 2000.

In 2000, Ms. Spaccia was employed briefly by the Old Globe Theater in San Diego, and was then employed by the North County Transit District.

In 2001, Ms. Spaccia returned to Ventura County where she was employed by the County of Ventura as an Assistant to the Chief Executive Officer. When a new administration was elected, Ms. Spaccia obtained employment with Moreland and Associates. It was through her employment with Moreland and Associates that Ms. Spaccia became associated with the City of Bell.

Ms. Spaccia's employment with some of the California public entities resulted in member and employer contributions to CalPERS and Ms. Spaccia's credited service with CalPERS for retirement purposes.

The City of Bell

11. The City of Bell is an incorporated suburb located several miles south of the City of Los Angeles. The City of Bell envelops about two and a half square miles within its city limits. Its population is about 35,000. In 2005, the City of Bell

became a charter city, which exempted the City of Bell from a state law that limits the pay of individuals who serve as city council members.

Ms. Spaccia's Employment with the City of Bell

12. In 2003, the City of Bell offered Ms. Spaccia full time employment to serve as the assistant to Chief Administrative Officer Robert Rizzo (CAO Rizzo) on a permanent basis. The City of Bell employed Ms. Spaccia from July 1, 2003, until October 1, 2010.

13. Ms. Spaccia was first employed under an Agreement for Employment dated July 1, 2003.

The original agreement for employment stated that the City of Bell was a general-law city, that the City of Bell desired to employ Ms. Spaccia as the assistant to the Chief Administrative Officer, and that the parties wanted to provide various procedures, benefits and requirements relating to Ms. Spaccia's employment. The agreement stated that Ms. Spaccia's duties were "as set forth in the City of Bell Municipal Code and other applicable laws and regulations, and [that she was] to perform such other proper duties as assigned by the Chief Administrative Office (CAO) of the City." Ms. Spaccia's basic salary was "\$3,935.00 per pay period"¹ and the salary could "be adjusted by the City Council, in its sole discretion, on or before each anniversary date of this Agreement."

14. An agenda for the City Council meeting occurring on June 30, 2003, was produced. Item IV – the Consent Calendar – stated that action would be taken on several items that were routine and non-controversial without discussion by the City Council. Resolution 2003-29, a resolution identifying an employee compensation plan, was noticed for that City Council meeting, as was Resolution 2003-31, a resolution designating certain full time city officers and employees as being unrepresented.

Ms. Spaccia's original agreement for employment was placed on the City Council's agenda and was made available to the public as part of the agenda packet for the June 30, 2003, City Council meeting. The City Council formally approved the agreement at that meeting.

15. During her employment with the City of Bell, Ms. Spaccia provided oversight and mentoring for Lourdes Garcia, (then) the City of Bell's Director of Administrative Services, organized the annual low rider car show, planned a

¹ The term "pay period" was not defined in the agreement, but common usage within the City of Bell established that a "pay period" was every two weeks. Using this agreement as a base, Ms. Spaccia was earning \$8,525.83 per month, or \$102,310 per year under the original employment agreement.

skateboard park, and performed other duties assigned by CAO Rizzo. Ms. Spaccia did not have a direct supervisor, reported directly to CAO Rizzo, and often worked from her home. Ms. Spaccia, an unrepresented miscellaneous city employee, had no formal job description, was not a department head, did not supervise others, and had no budgetary responsibilities. While she was always employed at a regular salary, determining Ms. Spaccia's actual work related group or class within the City of Bell presented classification problems. Ms. Spaccia appears to be properly classified with other City of Bell unrepresented management personnel.

Other Employment Documents

16. A number of documents relating to Ms. Spaccia's employment with the City of Bell were produced in addition to the Agreement for Employment dated July 1, 2003. These documents were never placed on a City Council agenda and were not made available to the public before any hearing. These documents are summarized as follows:

- A. Addendum Number One to Agreement for Employment dated July 1, 2004, increased Ms. Spaccia's basic salary by \$1,065 per pay period subject to the condition that the City experienced a positive cash position. The addendum was signed by George Cole, (then) Mayor. No specific duties were specified.
- B. Addendum Number Two to Agreement for Employment dated July 1, 2005, modified Ms. Spaccia's basic salary as follows: (a) \$7,115.40 per pay period effective July 1, 2005; (b) \$7,884.65 per pay period effective July 1, 2006; (c) \$8,846.16 per pay period effective July 1, 2007; (d) \$9,615.40 per pay period effective July 1, 2008. Each salary increase was contingent upon the City having a positive cash position. The addendum was signed by George Mirabal, (then) Mayor. No specific duties were specified.
- C. Addendum Number Three to Agreement for Employment dated July 1, 2006, modified Ms. Spaccia's agreement of employment by including an additional \$200 per pay period and included the funding of a Governmental Money Purchase Plan (401a). CAO Rizzo signed the addendum on behalf of the City of Bell. No specific duties were specified.
- D. Agreement for Employment dated June 30, 2008, stated that the City of Bell wished to employ Ms. Spaccia as Assistant Chief Administrative Officer "to have and exercise all of the powers, duties and responsibilities as Assistant Chief Administrative Officer as set forth in the City's Municipal Code and other applicable laws and regulations, and to perform such other proper duties as assigned

by the Chief Administrative Officer (CAO) of the City.” The agreement provided that Ms. Spaccia’s basic salary was set in the agreement dated July 1, 2005, and included “payment of employee’s portion of FICA and Medicare sums as set by the Social Security Administration,” together with a 20 percent salary increase, with a 12 percent annual increase thereafter, beginning July 1, 2009, and “Funding of the Governmental Money Purchase Plan will continue as per the existing Agreement.” CAO Rizzo signed the agreement on behalf of the City of Bell.

17. At all times relevant to this matter, Section 519 of the City of Bell’s Charter authorized the City Council to delegate contracting authority to the Chief Administrative Officer for “the acquisition of equipment, materials, supplies, labor, services or other items included within the budget approved by the City Council” by resolution or ordinance. Absent such a delegation, the City Council was required to approve such contracts.

18. In 2006, the City Council adopted Resolution 2006-42, which provided CAO Rizzo with authority to contract for “labor and services” included within a City Council-approved budget, but the resolution, by its own terms, did not apply to “any written contract for services rendered by any person in the employ of the City at a regular salary.”

The City of Bell Scandal

19. In July 2010, the *Los Angeles Times* reported that City of Bell officials received salaries that were among the highest in the nation. These and other reports led to widespread criticism and demands that certain City of Bell officials resign. In mid-September 2010, CAO Rizzo, Ms. Spaccia, and several other City of Bell officials were arrested on criminal charges filed by the Los Angeles County District Attorney’s Office.

The criminal charges against Ms. Spaccia are pending and have no relevance to this administrative proceeding.

Ms. Spaccia’s Application for CalPERS Retirement Benefits

20. Around February 2010, before the scandal broke, the City of Bell assigned Ms. Spaccia to the City of Maywood under a mutual-aid agreement to serve as the City of Maywood’s Interim City Manager. Ms. Spaccia served in that capacity for the next seven months.

21. On September 28, 2010, Ms. Spaccia signed a disability retirement application in which she sought a service retirement pending determination of that application. Ms. Spaccia represented that her retirement date was October 1, 2010,

that she was employed by the City of Bell as Assistant Chief Administrative Officer, and that her highest compensation occurred in the last 12 months she was employed by the City of Bell. Ms. Spaccia's compensation in the year preceding the filing of her application was \$320,123, which was \$26,677 per month.

CalPERS Response to the Application for Retirement

22. Ms. Spaccia's retirement application was subject to automatic review by CalPERS because Ms. Spaccia's reported payrate exceeded a \$14,500 per year limit and because "member works for the City of Bell." An unsigned detail report related to the application stated that "retirement benefits were placed on hold 'till legal investigation is complete.'" The detail report also stated, "Do not use payrate in any kind in calc."

23. Joy Fong, a CalPERS employee, calculated Ms. Spaccia's retirement allowance without using any payrate from the City of Bell. A worksheet dated December 14, 2010, stated that "full reciprocity" was provided for non-City of Bell public employment. (See Factual Finding 10.) The worksheet stated that Ms. Spaccia was credited with 27.056 years of public service and that her "total unmodified allowance" was \$4,141.96 per month. A supervisor reviewed and approved Ms. Fong's calculations.

Barbara Heard's Testimony

24. Barbara Heard has been employed by CalPERS for many years. She currently manages the CalPERS unit responsible for estimating retirement benefits. Ms. Heard attempted to explain how CalPERS calculated Ms. Spaccia's service retirement allowance. She testified that Ms. Spaccia's calculation "was complicated" and that Joy Fong was actually responsible for the calculation she testified about. The calculation did not include the use of any payrate from the City of Bell but, instead, used a "reciprocal salary" related to Ms. Spaccia's employment with non-City of Bell public entities that Ms. Spaccia had worked for that had contracted with CalPERS.

25. Ms. Heard had no idea why City of Bell payrates were not used. Ms. Heard testified that if the City of Bell reported payrate was used to calculate Ms. Spaccia's retirement allowance, the amount of Ms. Spaccia's service retirement allowance would be much higher.

Terrance Rodgers' Testimony

26. Terrance Rodgers is a Staff Services Manager with CalPERS' Compensation Review Unit. He was familiar with Ms. Spaccia's situation. He spent about 30 hours reviewing various materials before providing testimony in this matter. Mr. Rodgers did not make any of the determinations at issue. His role was limited to providing expert testimony.

27. Mr. Rodgers reviewed the payroll detail information submitted by the City of Bell that related to Ms. Spaccia's employment. He analyzed that information under Government Code section 20636 to determine if any payment by the City of Bell to Ms. Spaccia involved "compensation earnable," a combination of "payrate" and "special compensation."²

Mr. Rodgers observed that the term "payrate" was defined in Government Code section 20636, subdivision (b)(1), as "the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours" under "publicly available pay schedules." To constitute "payrate" for compensation earnable purposes, there must be others in the same group or class of employees (the PERL prohibits a class of one) and payment to the member must be made under a "publically available pay schedule." Mr. Rodgers testified that CalPERS typically assumes that a pay schedule was duly noticed and approved by the governing entity, but that assumption is not conclusive.

Following his document review, Mr. Rodgers concluded that Ms. Spaccia's employment agreements did not constitute a "pay schedule." Why? He believed that the written agreements relating to Ms. Spaccia's employment (Factual Findings 13 and 16) were not noticed, published or otherwise made available to the public, and that there was no evidence that Ms. Spaccia's contractual payrate was ever approved by the City Council other than as set forth in the original employment agreement. Based on the apparent failure to make Ms. Spaccia's employment agreements available to the public, Mr. Rodgers concluded that Ms. Spaccia's contractual payrate could not qualify as "compensation earnable."

Mr. Rodgers testified that CalPERS also attempted to determine whether other City of Bell employees fell within Ms. Spaccia's work related group or class. Ms. Spaccia was an unrepresented miscellaneous management employee. There was no duty statement or job description for her position. And, before 2008, the City of Bell had not employed anyone as Assistant Chief Administrative Officer. On this basis Mr. Rogers concluded that Ms. Spaccia was an unrepresented management employee.

Mr. Rodgers reviewed the payrates for other unrepresented management employees, including CAO Rizzo. He summarized their salaries in a spread sheet (Exhibit 33). Mr. Rodgers determined that there was a huge discrepancy between the pay increases CAO Rizzo and Ms. Spaccia's received in 2008 (about a 33 percent salary increase) compared to the pay increases received by most other members within the unrepresented managerial class (there were 2.5 percent increases, with one

² Ms. Spaccia stipulated that she did not receive "special compensation" from the City of Bell.

exception). Mr. Rodgers believed this was a significant finding that demonstrated a lack of stability and equal treatment within the class.

Mr. Rodgers testified that whenever an employee within a group or class receives a pay increase that far exceeds the pay increase of other members of the same group or class, that discrepancy calls into question the predictability and stability of the member's payrate; a heavily increased payrate cannot not be used to determine "compensation earnable." In addition, whenever a member's payrate increases at the discretion or the whim of just one person, such as CAO Rizzo, that, too, is a factor that should be considered in determining whether the member's increased payrate should constitute "compensation earnable." Special treatment of one employee within a group or class of employees similarly situation and secret employment agreements are not permitted in calculating a member's service retirement allowance according to Mr. Rodgers.

Based on the vast discrepancy between Mr. Rizzo and Ms. Spaccia's huge pay increases and the much smaller pay increases received by other unrepresented management group members, Mr. Rodgers concluded that Ms. Spaccia's salary with the City of Bell should not be considered compensation earnable. In reaching that determination, Mr. Rodgers did not consider that Ms. Spaccia was employed as the City of Maywood's Interim City Manager for seven months before her retirement. His failure to do so did not demonstrate any bias, lack of expertise, or result in a different outcome in this proceeding.

Mr. Rodgers believed that CAO Rizzo and Ms. Spaccia were the only City of Bell employees whose final salaries should not be used in calculating compensation earnable for CalPERS' retirement purposes. The fact that other City of Bell employees may have received a retirement allowance based upon what they were paid in their last years of service with the City of Bell did not establish that Ms. Spaccia was entitled to have her salaries considered as "compensation earnable."

28. Ms. Spaccia was given ample opportunity to obtain and present expert testimony to contradict or impeach the expert testimony provided by Mr. Rodgers. She failed to do so. Mr. Rodgers' testimony and analysis was not contradicted.

Ms. Spaccia's Arguments that her Salary Was Publically Available

29. Ms. Spaccia correctly observes that in calculating the amount of a service retirement allowance, CalPERS has no standing to determine whether a public employee's rate of compensation is appropriate or whether a public employee earned his or her pay. These valid observations miss the primary issue presented in this case – whether Ms. Spaccia received a normal monthly rate of pay that was paid to other similarly situated City of Bell employees under a publicly available pay schedule.

30. Ms. Spaccia makes several evidentiary and legal arguments to support her claim that she was paid under publicly available employment agreements.

Ms. Spaccia notes that the *Los Angeles Times* obtained a copy of her employment agreement three days after filing a public records request for its production, and that Ed Lee, an attorney who served as the City of Bell's City Attorney, testified that Ms. Spaccia's employment contract was available to the public.

31. The production of public employee's contract of employment only after a formal request for production has been made under the California Public Records Act (Government Code §§ 6250 through 6276.48) does not render that employment contract "publicly available" within the meaning of PERL.

The word "available" means "suitable or ready for use" and "readily obtainable," and the word "publicly" means "in a public or open manner or place" and "by public action or consent." The Legislature authorized the use of a public employee's payrate to calculate a public service retirement allowance only when the payrate is readily available to an interested person without unreasonable difficulty. A payrate buried in an employment agreement or budget that prevents the easy calculation of the payrate, or that is privately maintained, or that is not based on a published pay schedule, or that has not been approved in a public manner, or that becomes available only after the service of a formal public records request, subpoena or other legal process is not "publicly available." The statute at issue contemplates that public employee payrates be immediately accessible and available for public review from the employer during normal business hours.

The very fact that the *Los Angeles Times* was required to make the public records request to obtain the production of Ms. Spaccia's employment agreement constitutes evidence that Ms. Spaccia's employment agreement was not readily available.

32. Edward Lee was the City Attorney for the City of Bell for 15 years. His service ended in August 2010, shortly after the City of Bell scandal erupted. During his employment as City Attorney, Mr. Lee attended most City Council meetings. He received an agenda packet for the meetings he attended. Mr. Lee's signature appears on Addendum Number Two to Agreement (Factual Finding 16B), but the addendum was not in the agenda packet for the July 2005 City Council meeting. Mr. Lee testified that the City of Bell's five-year budget was not produced in his agenda packet, only the resolution relating to it. Ms. Spaccia did not establish through Mr. Lee's testimony or otherwise that Addendum Number One to Agreement (Factual Finding 16A) was ever a part of a City Council agenda packet or that it was otherwise made available to the public before it was approved by the City Council.³

³ The original employment agreement (Factual Finding 13) was made available to the public as part of the agenda packet for the City Council's June 30,

33. Mr. Lee opined that Ms. Spaccia's salary was a "public record" insofar as it was available through the City of Bell's Finance Department; however, Mr. Lee did not provide factual or analytical detail to support this opinion and his conclusory opinion is certainly not binding in this proceeding.

34. In written closing argument, Ms. Spaccia argues that the regulation on which CalPERS disputes her claim was not in effect before she retired and "Publicly available at that time meant exactly what it says: the employment contract must be available to the public when the public requests it."

Ms. Spaccia argues that that the governing statute does not compel the conclusion CalPERS seeks, that "Regulation 571.5"⁴ was enacted after the City of Bell scandal erupted, that the regulation was likely enacted in response to the City of Bell scandal, that before the regulation was enacted there was no requirement that an employment agreement be posted on a wall in the city hall or on the Internet to be deemed "publicly available," and that no evidence suggests that CalPERS ever interpreted "publicly available" in the manner it now asserts.

35. In 2006, CalPERS sponsored Assembly Bill 2244, which amended Government Code section 20636 to include the phrase "pursuant to a publicly available pay schedules." The amendment did not specifically define the phrase "publicly available" and no legislation has defined "publicly available" since then.

Ms. Spaccia asserts that before the regulation was enacted, "publicly available" simply meant "available to the public on request." Ms. Spaccia argues that she had a vested constitutional right in her CalPERS pension, that the 2011 regulation imposed requirements that did not exist before its enactment, and that application of the regulation in this matter would result in an unconstitutional forfeiture of her right to her pension.

To support her assertion about CalPERS's interpretation of the statute, Ms. Spaccia claims that CalPERS conducted two audits of the City of Bell before Ms. Spaccia retired and that CalPERS did not mention any problems with the public availability of employment agreements in those audits. Ms. Spaccia also argues that around a half dozen City of Bell employees have retired with service retirement allowances based upon their pay in their last year of employment with the City of Bell and that CalPERS has not questioned the validity of those allowances.

2003, meeting. The City Council formally approved the employment agreement. (Factual Finding 14.)

⁴ Respondent's Closing Argument erroneously refers to "Regulation 571.5" on pages 4, 6, 7 and 11. The regulation at issue is actually California Code of Regulations, title 2, section 570.5, which is referenced in Exhibit A in Respondent's Closing Brief. The mistaken reference is in the nature of a typographical error and is harmless.

36. California Code of Regulations, title 2, section 570.5 became operative August 10, 2011. It provides:

(a) For purposes of determining the amount of “compensation earnable” . . . payrate shall be limited to the amount listed on a pay schedule that meets all of the following requirements:

(1) Has been duly approved and adopted by the employer’s governing body in accordance with requirements of applicable public meetings laws;

(2) Identifies the position title for every employee position;

(3) Shows the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;

(4) Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, bi-monthly, or annually;

(5) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer’s internet website;

(6) Indicates an effective date and date of any revisions;

(7) Is retained by the employer and available for public inspection for not less than five years; and

(8) Does not reference another document in lieu of disclosing the payrate.

(b) Whenever an employer fails to meet the requirements of subdivision (a) above, the Board, in its sole discretion, may determine an amount

that will be considered to be payrate, taking into consideration all information it deems relevant including, but not limited to, the following:

(1) Documents approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer;

(2) Last payrate listed on a pay schedule that conforms to the requirements of subdivision (a) with the same employer for the position at issue;

(3) Last payrate for the member that is listed on a pay schedule that conforms with the requirements of subdivision (a) with the same employer for a different position;

(4) Last payrate for the member in a position that was held by the member and that is listed on a pay schedule that conforms with the requirements of subdivision (a) of a former CalPERS employer.

37. The Notice of Proposed Regulatory Action related to section 570.5 stated that the regulation "will ensure consistency between CalPERS employers as well as enhance disclosure and transparency of public employee compensation . . . This proposed regulatory action clarifies and makes specific requirements for publicly available pay schedule and labor policy or agreement . . ."

The informative digest portion of the notice stated in part:

Generally the law requires that a member's payrate be shown on a publicly available pay schedule, that special compensation be limited to items included in a labor policy or agreement, and that all records establishing and documenting payrate and special compensation be available for public scrutiny. Employers have not uniformly adhered to these requirements

CalPERS's Arguments

38. CalPERS claims that Regulation 570.5 applies in this proceeding even though it became operative *after* Ms. Spaccia filed her retirement application because the regulation simply “clarified” existing law. Applying this regulation, CalPERS asserts that Ms. Spaccia’s payrates with the City of Bell were not “publicly available” under Regulation 570.5 because they were not approved and adopted by the City of Bell in accordance with requirements of applicable public meetings laws (except for the original employment agreement) and because her payrates were not posted at her employer’s office, were not immediately accessible and available for public review from the employer during normal business hour, and/or were not posted on the employer’s Internet website.

CalPERS asserts that the same result on the “publicly available” issue must be reached without reference to Regulation 570.5 because the legislative history relating to pension legislation demonstrates an intent to prevent manipulation of compensation earnable “by requiring a member’s pension be both readily available for public inspection and review, and that it be established through a publicly noticed process.”⁵

The 2006 CalPERS audit stated that the City of Bell accurately reported members earnings “included in our sample, except for the instances noted in the report.” One problem observed in that report was the 47.33 percent increase in the CAO’s salary which was identified as at “risk” because the City paid the salary without the existence of “public salary information.” There was nothing sufficiently specific in the 2006 CalPERS audit to permit Ms. Spaccia to conclude that the audit covered her salary or that her salary had been determined to be publicly available.

The 2010 CalPERS audit occurred *before* Regulation 571.5 was enacted. In that audit, the auditors found a “widespread lack of information deemed necessary to determine the correctness of retirement benefits, reportable compensation, and enrollment in the retirement system” and “[p]ayrates reported to CalPERS failed to qualify as compensation earnable pursuant to multiple provisions of law.” Auditors

⁵ Senate Bill 53 was introduced in 1992 and was enacted in 1993. SB 53 was designed to curb “spiking,” the intentional inflation of a public employee’s final compensation, and to prevent unfunded pension fund liabilities. SB 53 defined “compensation earnable” in terms of normal payrate, rate of pay, or base pay so that payrates would be “stable and predictable among all members of a group or class” and “publically noticed by the governing body.” The legislation was intended to restrict an employer’s ability to spike pension benefits for preferred employees and to result in the equal treatment of public employees. (Senate File History Re: SB 53)

The reference to “publicly available pay schedules” set forth in Government Code section 20636, subdivision (b)(1), was added by the Legislature in 2006. Legislative history confirms that “the change was a matter of clarification.” (*Prentice v. Board of Admin., California Public Employees’ Retirement System* (2007) 157 Cal.App.4th 983, 990, fn. 4.)

found that the documents produced to substantiate compensation earnable were either unavailable or were received in a fashion that required a detailed analysis to yield basic relevant information. Auditors found that with respect to the employment contracts of Ms. Spaccia and CAO Rizzo, there was no evidence that the agreements were approved through a public process or even that Ms. Spaccia's agreement had been approved by City Council.

To further support its interpretation, CalPERS asked that official notice be taken of the Board of Administration's decision in *In Re Randy Adams*, OAH No. 2012030095, CalPERS Agency No. 20110778, which states:

Using a broad interpretation of "pay schedule" based upon the inclusion of a salary disclosed only in a budget has the vice of permitting an agency to provide additional compensation to a particular individual without making the compensation available to other similarly situated employees. And, a written employment agreement with an individual employee should not be used to establish that employee's "compensation earnable" because the employment agreement is not a labor policy or agreement within the meaning of an existing regulation and would not limit on the compensation a local agency could provide to an individual employee by way of individual agreements for retirement purposes. (*Prentice v. Board of Admin., California Public Employees' Retirement System* (2007) 157 Cal.App.4th 983, 994-995.)⁶

The City of Bell's Arguments

39. The City of Bell argues that Ms. Spaccia's employment signed by CAO Rizzo signed are void because under Resolution No. 2006-42, CAO Rizzo's authority to contract did not extent to "any written contract for services rendered by any person in the employ of the City as a regular salary." To the extent that the argument establishes that there was no public disclosure of the terms and conditions of the agreements before they were signed, that argument has relevance. The employment agreements were, in essence, private agreements between CAO Rizzo and Ms.

⁶ In a response to the request for official notice that was attached to Ms. Spaccia's closing argument, Ms. Spaccia argued that her situation was different from Chief Adams's situation because CAO Rizzo possessed authority to approve her employment contract without further approval from City Council because she was not a department head. This distinction is not supported under the relevant statutes and City resolutions.

Spaccia that were not formally approved by the City Council. Those agreements cannot be used to establish Ms. Spaccia's payrate under the PERL

The City of Bell argues that Addenda One and Addenda Two were not publicly available pay schedules because the employment agreements were not included in any agenda packet provided to the public and because notice of the consideration of those agreements was not provided in any agenda before the City Council approved the contracts. On that basis, the City of Bell argues that the employment agreements set forth in Addenda One and Addenda Two were never publicly available. The evidence supports this argument.

The City of Bell argues that the original agreement in 2003 was publicly available because it was included in the City Council agenda packet and it was on the City Council's agenda for consideration before it was formally adopted. The original agreement placed Ms. Spaccia in a group or class with other management personnel. On this basis, the City of Bell argues that Ms. Spaccia's \$8,526 monthly salary should be deemed to be her payrate for determining final compensation.

To support the argument that the original employment agreement should be used to calculate Ms. Spaccia's service retirement, the City of Bell argues that the City of Bell (and all other municipalities in California) are subject to the Brown Act (Government Code section 54950 *et seq.*), that the Brown Act promotes transparency in the conducting of city business, and that properly enacted legislative decisions of an elected body should be upheld when there is no violation of the Brown Act. The City of Bell observes that many municipalities do not have formal pay schedules for senior city management and these municipalities rely on properly noticed and duly approved employment contracts to establish payrates. The City of Bell argues that this procedure should be deemed to satisfy the publicly available schedule requirement in narrow instances where a senior management employee's employment contract was the only pay schedule within the jurisdiction and the final compensation to be determined was earned before Regulation 570.5 became operative.

Factual Conclusions on "Publicly Available"

40. Ms. Spaccia was employed under an agreement for employment dated July 1, 2003. Ms. Spaccia's original employment agreement was made available to the public as part of the agenda packet for the June 30, 2003, City Council meeting. The City Council formally approved the agreement at that meeting.

It is concluded that for purposes of determining Ms. Spaccia's compensation earnable under PERL, Ms. Spaccia's payrate of \$8,526 per month - as set forth in the July 1, 2003, employment agreement - should be used. The employment agreement was duly approved and adopted by the City of Bell in accordance with requirements of applicable public meetings laws; the agreement identified her position title; the agreement included her payrate; the agreement did require reference to any other

document to calculate her payrate; the agreement was available for public review before the City Council meeting; the City Council formally approved the agreement; and the City of Bell retained the agreement.

41. It is concluded that for purposes of determining Ms. Spaccia's compensation earnable under PERL, Ms. Spaccia's payrates contained in those documents identified in Factual Finding 16 (Addendum Number One to Agreement for Employment dated July 1, 2004; Addendum Number Two to Agreement for Employment dated July 1, 2005; Addendum Number Three to Agreement for Employment dated July 1, 2006; and Agreement for Employment dated June 30, 2008) may not be used. The employment agreements were not included in any agenda packet provided to the public before the City Council approved the contracts. Following the signing of those agreements, the agreements were not posted at the office of the employer, were not posted on the employer's Internet website, and were not immediately accessible and available for public review from the employer. A formal request for production was required to obtain a review of the employment agreements. The documents identified in Factual Finding 16 were not publicly available within the meaning of Government Code section 20636, subdivision (b)(1).

On and after the termination of the original employment agreement, Ms. Spaccia's payrate increases greatly exceeded the payrate increases received by other City of Bell unrepresented management employees other than CAO Rizzo. It is determined that Ms. Spaccia was a preferred employee whose compensation increases were not available to other similarly situated employees.

Applicant/Respondent's Constitutional and Equitable Arguments on the Publicly Available Issue

42. Ms. Spaccia contends that the United States and California's constitutions and longstanding principals of equity require that Ms. Spaccia's most recent pay from the City of Bell be used to calculate her service retirement allowance. She argues that her salary in the last seven years of her employment with the City of Bell cannot be ignored, that her employment agreements were available to members of the public in a reasonably prompt manner following formal request, that the City of Bell was responsible for any failure to publish her agreements, that she was unfairly singled out by CalPERS after the City of Bell scandal erupted because she held a position of authority, that CalPERS' interpretation of "publicly available" was unprecedented, and that CalPERS never specifically advised Ms. Spaccia or the City of Bell that her earnings were not suitable for the purpose of calculating a retirement allowance.

43. The requirements set forth in Government Code section 20636 are constitutional. CalPERS did not engage in discriminatory enforcement in reviewing Ms. Spaccia's situation or by applying Government Code section 20636. In this administrative proceeding, Ms. Spaccia and the City of Bell successfully challenged

some of CalPERS staff's determinations through the presentation of evidence and argument.

44. CalPERS is not estopped to apply the "publicly available" provision set forth in Government Code section 20636, subdivision (b)(1), in this matter. CalPERS never told Ms. Spaccia or the City of Bell that her earnings were paid pursuant to a publicly available pay schedule. To the contrary, the 2010 CalPERS audit determined that with respect to Ms. Spaccia and CAO Rizzo's employment contracts, there was no evidence that the agreements were approved through a public process or even that Ms. Spaccia's agreement had been approved by City Council.

The Purchase of Additional Retirement Service Credit (Air Time)

45. Before May 15, 2004, Ms. Spaccia visited Sacramento to confer with CalPERS' staff. She met with Nancy Veitenhaus, a member of CalPERS' Benefit Services Division, to discuss the possibility of the City of Bell purchasing additional retirement service credit for certain employees, including herself. Ms. Veitenhaus told Ms. Spaccia that there would be no problem if the City of Bell directly purchased air time for certain employees. Ms. Veitenhaus did not, according to Ms. Spaccia, warn her that a direct purchase might be improper or that only an employee could pay for air time. Ms. Spaccia reasonably relied on what she was told. CalPERS could have called Ms. Veitenhaus to testify, but did not do so. Ms. Spaccia's testimony on this issue was credible and uncontroverted.

46. Based on what she was told, Ms. Spaccia provided CalPERS with applications for the purchase of air time for 12 employees, 11 of whom were in executive or administrative management positions, with the remaining air time being purchased as part of a settlement related to a City of Bell employee's sexual harassment lawsuit.

47. On May 15, 2004, Ms. Spaccia signed a Request for Service Credit Cost Information Additional Retirement Service Credit (ARSC) that was filed with CalPERS. The request included her name and her employer's name, and stated that she had attached a copy of the estimate for the purchase. She checked a "No" box to indicate that she did not anticipate purchasing the ARSC with a rollover or plan-to-plan transfer of pre-tax funds. In that application, Ms. Spaccia indicated that her retirement formula was 2 percent at age 55, that she had 15.5 years of service, and that her monthly payrate was \$8,525.83.⁷

In response to her request, CalPERS advised Ms. Spaccia that the lump sum cost to purchase five additional years of service credit (air time) was \$71,085.39,

⁷ The monthly payrate Ms. Spaccia provided was consistent with her earnings under the Agreement for Employment dated July 1, 2003.

which would result in an estimated increase in her monthly pension in the amount of \$598.39 if Ms. Spaccia were to retire at age 50.

On August 31, 2004, Ms. Spaccia signed an Election to Purchase ARSC. Ms. Spaccia checked a box for "lump sum payment option" and indicated on the form in clear handwriting that "Payment from City of Bell Surplus Account." A check in the amount of \$71,085.39 was enclosed with the application.

48. CalPERS cashed the City of Bell's check for the purchase of Ms. Spaccia's air time as well as City of Bell checks written for the other 11 employees. CalPERS credited Ms. Spaccia and the other employees with five years of additional service credit.

49. CalPERS did not notify Ms. Spaccia of its claim that the City of Bell's direct purchase of five years of air time for her was improper until June 2012, approximately eight years later and after Ms. Spaccia retired, which made it impossible for her at that time to seek such air time on her own.

CalPERS' Claim

50. CalPERS asserts that Government Code section 20909 permits only "a member" to purchase air time and that the purchase of air time by anyone other than "a member" should be disallowed.

51. Government Code section 20909 provides in part:

(a) A member who has at least five years of credited state service, may elect, by written notice filed with the board, to make contributions pursuant to this section and receive not less than one year, nor more than five years, in one-year increments, of additional retirement service credit in the retirement system.

(b) A member may elect to receive this additional retirement service credit at any time prior to retirement by making the contributions as specified in Sections 21050 and 21052. A member may not elect additional retirement service credit under this section more than once

52. By its own terms, the statute requires only that "a member" file the required notice and make the required contribution. Nothing in the statute prohibits an employer from making the contribution on an employee's behalf. No direct appellate authority was provided to support CalPERS' assertion on that issue. Nor

was any legislative history related to the enactment of Government Code section 20909 offered to support CalPERS' assertion.

Factual Conclusions on Estoppel Related to Air Time

53. Government Code section 20909 does not expressly prohibit a public employer from purchasing air time on behalf of an employee. In 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.

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

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

LEGAL CONCLUSIONS

The Constitutional Mandate

1. Article XVI, section 17 of the California Constitution provides as follows:

The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purpose of providing benefits to participants . . . and defraying reasonable expense of administering the system.

Administration of the Retirement Fund

2. The CalPERS retirement fund was established as a trust, to be administered in accordance with the provisions of the Public Employees Retirement Law solely for the benefit of the participants. (Gov. Code, § 20170.) Management and control of the retirement system is vested in the Board of Administration. (Gov. Code, § 20123). The Board of Administration has the exclusive control of the administration and investment of the retirement fund. (Gov. Code, § 20171.)
Burden and Standard of Proof

3. Government Code section 20128 provides in part:

... [T]he board may require a member . . . to provide information it deems necessary to determine this system's liability with respect to, and an individual's entitlement to, benefits prescribed by this part.

4. Applicant has the initial burden to establish that she was entitled to a CalPERS service retirement and the amount of the retirement allowance. (Evid. Code, § 500; Evid. Code, § 550.) The standard of proof is a "preponderance of the evidence." (Evid. Code, § 115.)

5. Pension legislation must be liberally construed, resolving all ambiguities in favor of the applicant. However, liberal construction cannot be used as an evidentiary device. It does not relieve a party of meeting the burden of proof by a preponderance of the evidence. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

6. Once Ms. Spaccia introduced prima facie evidence sufficient to establish that she is entitled to a service retirement in some amount, the burden shifted to CalPERS and the City of Bell to refute the evidence she offered.

Determination of Service Benefits

7. A CalPERS member's retirement benefit is based upon the factors of retirement age, length of service, and final compensation. Compensation is not simply the cash remuneration received, but is exactly defined. The scope of compensation is critical to setting the amount of retirement contributions. Statutory definitions delineating the scope of compensation cannot be qualified by bargaining agreements. Nor can the Board of Administration characterize contributions as compensation or not compensation under the PERL, as those determinations are for the Legislature. (*Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App4th 578, 584-585.)

Compensation, Compensation Earnable, and Payrate

8. Government Code section 20630 provides in part:

(a) As used in this part, “compensation” means the remuneration paid out of funds controlled by the employer in payment for the member’s services performed during normal working hours or for time during which the member is excused from work . . .

(b) When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall be reported . . . and shall not exceed compensation earnable, as defined in Section 20636.

9. Government Code section 20636 provides in part:

(a) “Compensation earnable” by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5.

(b)(1) “Payrate” means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules. “Payrate,” for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours

Similarly Situated Members

10. A pay increase must be part of a publicly available pay schedule in order to qualify as “compensation earnable.” Under PERL, the limitations on salary increases for purposes of establishing “compensation earnable” are designed to require that retirement benefits are based on the salaries paid to similarly situated employees. PERS acts properly in looking at the published salary ranges rather than an exceptional arrangement between a city and a city employee even though that arrangement may be reflected in the city’s budget documents. (*Prentice v. Board of Admin., California Public Employees’ Retirement System* (2007) 157 Cal.App.4th 983, 993-994 [an increase of 10.49% in city general manager’s salary within three years of retirement that was not part of a publicly available pay schedule and was not part of payrate for similarly situated employees could not be considered in calculating manager’s retirement salary].)

11. An employee's pension will not necessarily reflect his total personal compensation because payrate for retirement purposes is measured by the amounts provided by the employer to similarly situated employees. (*Molina v. Board of Admin., California Public Employees' Retirement System* (2011) 200 Cal.App.4th 53, 65-66.)

12. Under Government Code section 20636, subdivision (b)(1), no employment agreement other than Ms. Spaccia's original employment agreement with the City of Bell can be used to calculate Ms. Spaccia's service retirement allowance because her earnings under those subsequent agreements cannot be measured by amounts provided to similarly situated employees.

Publicly Available

13. Under well-established rules of statutory construction, courts must ascertain the intent of the drafters to effectuate the purpose of the law. Because statutory language is generally the most reliable indicator of legislative intent, the words of a statute are first examined, giving them their usual and ordinary meaning and construing them in context. When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. Thus, if the language is unambiguous, the plain meaning governs and it is unnecessary to resort to extrinsic sources to determine legislative intent. (*Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1560-1561.)

14. The word "available" means "suitable or ready for use" and "readily obtainable." (*The Random House Dictionary of the English Language* (2nd Ed.), p. 142.) The word "publicly" modifies "available." "Publicly" means "in a public or open manner or place" and "in the name of the community" and "by public action or consent." (*The Random House Dictionary of the English Language* (2nd Ed.), p. 1563.)

15. The Legislature obviously intended that a public employee's "payrate" be readily available to an interested person without unreasonable difficulty. This concept does not apply in a situation where a public employee's payrate is buried in an agreement or budget that prevents its easy calculation, or is not based on a published pay schedule, or has not been approved by a governing body in accordance with requirements of applicable public meeting laws, or cannot be obtained except through a formal public records request, subpoena, or other legal process. (See the discussion in Factual Findings 30, 40 and 41.)

16. Under Government Code section 20636, subdivision (b)(1), no employment agreement other than the original employment agreement can be used for the purpose of calculating Ms. Spaccia's service retirement allowance because those subsequent agreements were not publicly available within the meaning of the statute.

Regulatory Authority

17. California Code of Regulations, section 570.5 became operative on August 10, 2011. That regulation is set forth at Factual Finding 36. Under that regulation, the payrate in Ms. Spaccia's original employment agreement with the City of Bell meets the exception expressed in section 570.5, subdivision (b). The other employment agreements do not qualify as being "publicly available" under the regulatory exception because they were not approved in accordance with requirements of public meeting laws and were not publicly available.

Estoppel

18. Equitable estoppel may be asserted against the government in some circumstances. The requisite elements for equitable estoppel against a private party are: (1) the party to be estopped was apprised of the facts; (2) the party to be estopped intended by conduct to induce reliance by the other party, or acted so as to cause the other party reasonably to believe reliance was intended; (3) the party asserting estoppel was ignorant of the facts; and (4) the party asserting estoppel suffered injury in reliance on the conduct. 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 are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel. (*Medina v. Board of Retirement, Los Angeles County Employees Retirement Assn.* (2003) 112 Cal.App.4th 864, 868-869.)

19. Ms. Spaccia did not prove the elements necessary to establish an estoppel against CalPERS on the issues related to the determination of her compensation earnable and payrate. (Factual Finding 44.)

20. Ms. Spaccia proved all of the elements necessary to establish an estoppel against CalPERS on the issue of the City of Bell's purchase of five years of air time on her behalf. It would be manifestly unjust to not permit her to retain such air time under the circumstances. (Factual Finding 53.)

Cause Exists to Conclude Ms. Spaccia's Payrate Was \$8,526 Per Month

21. Cause exists to conclude that CalPERS did not properly calculate Ms. Spaccia's compensation earnable under Government Code section 60636 in the amount of \$7,607 per month, and that the proper calculation of her compensation earnable under Government Code section 60636 is \$8,526 per month.

22. Cause exists to conclude that CalPERS improperly disallowed the City of Bell's purchase of five years of air time for Ms. Spaccia, and that Ms. Spaccia

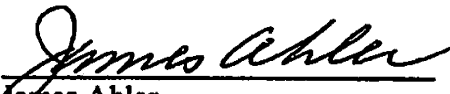
should receive the five years of additional retirement service credit that was improperly disallowed.

ORDERS

CalPERS shall recalculate Ms. Spaccia's compensation earnable based upon her earnings reflected in her agreement for employment with the City of Bell dated July 1, 2003.

CalPERS shall include in the recalculation of Ms. Spaccia's service retirement allowance the five years of additional retirement service credit that was previously disallowed.

Dated: February 26, 2013


James Ahler
Administrative Law Judge
Office of Administrative Hearings

ATTACHMENT B
STAFF'S ARGUMENT

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

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

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

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

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

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

Attachment B

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

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

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

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

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

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

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

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

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

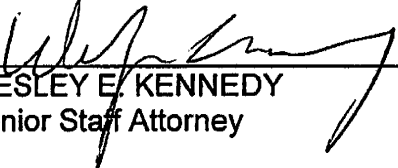
¹ (CalPERS Exh. 26 (Administrative Record Exhibit 41, regarding SB 719, Stats. 2003; admitted into evidence on August 29, 2012, at p. 41, LI. 18-19 of Administrative Hearing Transcript.)

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

Attachment B

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

April 17, 2013


WESLEY E. KENNEDY
Senior Staff Attorney

ATTACHMENT C
RESPONDENTS' ARGUMENTS



**ALESHIRE &
WYNDER LLP**
ATTORNEYS AT LAW

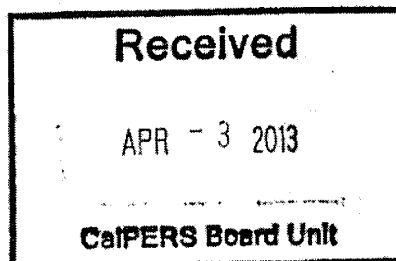
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March 28, 2013



VIA FACSIMILE (916) 795-3972 and US MAIL

Cheree Swendensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701

Re: In the Matter of the Final Calculation of the Final Compensation of Pier'Angela Spaccia/ Agency Case No. 2011-0789/ RESPONDENT CITY OF BELL'S ARGUMENT

Dear Ms. Swedensky:

Pursuant to Barbara Moseman's February 28, 2013 letter in the above-referenced matter, Respondent CITY OF BELL (hereafter "Bell" or "City") submits argument to the Board regarding Proposed Decision OAH 2012020198, which is scheduled to be considered by the CalPERS Board on April 17, 2013.

SUMMARY

The City does *not dispute* and, in fact supports, the conclusion in the Proposed Decision that Ms. Spaccia's compensation pursuant to her July 2003 employment contract with the City should be deemed her "final compensation" for purposes of determining her retirement benefits; however, the City *does dispute* the conclusion that Ms. Spaccia is entitled to the five years of "air time" purchased on her behalf by the City of Bell. The analysis in the Proposed Decision on the "air time" issue is legally incorrect because (1) the City did not approve the payment of "air time" to Ms. Spaccia, (2) the receipt of City-paid "air time" was not a condition of Ms. Spaccia's employment contract with the City, (3) the law does not allow an *employer* to pay for "air time" of an *employee*, (4) the City's purchase of "air time" for Ms. Spaccia violates the California Constitution in that it is an illegal gift of public funds, and (5) CalPERS is not estopped from denying Ms. Spaccia the benefits of the City-purchased "air time." Accordingly, the Board should *reverse* the Proposed Decision's conclusion as to "air time."

Further, after reversing the Proposed Decision as to "air time," the Board should adopt a Final Decision as *precedential* because there are currently ten (10) more pending appeals by current and former Bell elected officials and employees where CalPERS' denial of the unauthorized purchase of "air time" by the City is directly at issue.

Cheree Swendensky, Assistant to the Board
March 28, 2013
Page 2

ARGUMENT

A. The Purchase Of Ms. Spaccia's "Air Time" Was Neither Authorized By The City Nor A Benefit Under Ms. Spaccia's Employment Agreement

The Proposed Decision addresses the Additional Retirement Service Credit ("air time") issue at pages 18-20; however, nowhere in such discussion is there any *mention*, let alone consideration, of the fact that the City did not authorize the purchase of "air time" for Ms. Spaccia. Simply put, Ms. Spaccia, who was the City's Finance Director at the time, drafted a check made out to CalPERS for \$71,085.39 to be drawn from City funds and mailed it off to CalPERS to receive her five years of air time.

Spaccia has the burden of proof to show, by a preponderance of the evidence, that she is entitled to the City-purchased "air time." Evidence Code sections 500 and 550; *Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54, 57 As such, Spaccia must show that the Bell City Council approved the \$71,085.39 expenditure for Spaccia's "air time." She has not done so, and cannot do so. Nowhere in the record before this Board is there a City Council agenda where the purchase of Ms. Spaccia's "air time" by the City was to be considered by the City Council; nowhere in the record is there any minutes of City Council meetings showing that a \$71,085.39 "air time" expenditure had been approved; and, nowhere in Ms. Spaccia's 2003-04 or 2004-05 employment agreement is there any requirement for the City to purchase five years of "air time" for Ms. Spaccia. So not only does Ms. Spaccia fail to show her entitlement to the "air time" by a preponderance of the evidence, she did not even produce a scintilla of evidence in support of such claim. Accordingly, Ms. Spaccia is not entitled to keep the "air time" that the City "purchased" for her, and CalPERS is required by law to return the \$71,085.39 to the City. *People v. Robert Rizzo et al.* (2d Dist., March 20, 2013) B236246 ["...the recipient of funds under the void ordinance or contract may be liable to the City in restitution..."]¹

¹ In fact, What Ms. Spaccia did, may well have constituted a crime. Penal Code section 424 states (in relevant part):

424. (a) Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who either:

1. Without authority of law, appropriates the same, or any portion thereof, to his or her own use, or to the use of another...

Is punishable by imprisonment in the state prison for two, three, or four years, and is disqualified from holding any office in this state.

Courts interpreting section 424 have given it broad application. *Any* use of public funds not authorized by law constitutes a violation of section 424. *People v. Battin* (1978) 77 Cal.App.3d 635, 657. Actual possession of the public funds is also unnecessary, so long as the person has some degree of control over the disbursement of public funds. *People v. Groat* (1993) 19 Cal.App.4th 1228, 1232 The victim's remedy for violation of Section 424 is restitution. *Penal Code* section 1202.4

Of course it is not for this Board to determine whether Ms. Spaccia committed a crime. Penal Code section 424 is noted only to show that Ms. Spaccia's failure to produce evidence showing that the City authorized the purchase of her "air time" was *not* an oversight, but that

Cheree Swendensky, Assistant to the Board
March 28, 2013
Page 3

B. Employers Are Prohibited From Purchasing “Air Time” For Employees

The Proposed Decision, at pages 19-20, concludes that there is nothing prohibiting “an employer from making the [“air time”] contribution on the employee’s behalf...[n]or was any legislative history related to the enactment of Government Code 20909 [which authorizes the purchase of “air time”] offered to support CalPERS’ assertion.” In response, the City submits that the Proposed Decision is legally erroneous because the statute on its face states that “members” must make the contributions and substantial---in fact overwhelming---legislative history was indeed proffered by CalPERS in support of the position that employers cannot purchase “air time” on behalf of employees. *See* CalPERS’ Closing Argument, pages 14-15 and supporting Exhibits.

The general rule in statutory construction is to give statutes their “plain meaning” if it is clear. In this case, it is clear that “member” means a “member of CalPERS.” If the Legislature meant “member, or employer on behalf of the member” it would have said so.

The legislative history of Government Code section 20909 supports the “members only” interpretation. The Concurrence In Senate Amendments for AB 719 states that:

“According to CalPERS, this benefit is intended to be cost neutral to employers. The member pays the full present value cost of the additional service credit.”

As such, it appears that an employer may facilitate an employee’s purchase of “air time” (e.g. through a member’s payroll deductions or “cut the check”), but may not bear any of the financial burden, for otherwise the purchase of “air time” would not be cost neutral to employers.

Further, the Concurrence in Senate Amendments for AB 719 notes that there are “two ways for paying for the increase in retirement benefit that results from the crediting of the additional service credit” One is the method where the employer and employee pay for the credit. “This method most commonly applies when the employer directly benefitted from the service being performed.” The other type of payment is the “full present value” payment, where the member pays the full cost of the increase in benefit. “This cost method generally applies when an employer does not directly benefit from the member’s service...”

Here, CalPERS has determined that an “air time” purchase is to be via the “full present value” method. *See* Exhibit 26D. Presumably this is because “air time” purchases are to be cost neutral to the employer and because (as set forth in more detail below) “air time,” by

Ms. Spaccia had strong motivation to produce such evidence at her hearing *if she was able to do so*. She was not able to do so, not then, not now, and not in the future because no such evidence exists. As such, a remand to determine this issue would be not only be fruitless, but also unfair to the City, which would be required to further expend resources in defending against Ms. Spaccia’s proverbial “second bite at the apple.”

Cheree Swendensky, Assistant to the Board
March 28, 2013
Page 4

definition, “does not correspond to any service actually performed.” By rejecting the method by which the employer and employee pay for the credit in favor of the “full present value” method, CalPERS has impliedly determined that employers cannot purchase the “air time.”

In sum, the only way to interpret Government Code section 20909 consistent with its legislative history is to allow employers to facilitate a *member’s* purchase of “air time,” but not to purchase the “air time” for the member itself. Application of such interpretation to the instant matter makes clear that the City’s purchase of Ms. Spaccia’s “air time” must be disallowed because it is undisputed that such purchase was *not* cost-neutral to the City of Bell.

C. The “Air Time” Purchased By The City Was An Unconstitutional Gift Of Public Funds

Article XVI, section 6 of the California Constitution prohibits a city from making a gift of public funds. Pursuant to this provision, it is well-settled that when an employee’s compensation is fixed, and the services already performed, it is unlawful for a city to make a gift to such employee or raise his/her salary retroactively. *Robinson v. Dunn* (1888) 77 Cal. 473; *Lamb v. County Peace Officers Retirement Comm.* (1938) 20 Cal.App.2d 348.

As set forth above, Ms. Spaccia served the City via an employment agreement that contained no provision that she be compensated, in whole or in part, with “air time.” Thus, even assuming, *arguendo*, that the City somehow authorized the purchase of “air time” on Ms. Spaccia’s behalf, such purchase would still be illegal because Ms. Spaccia performed no additional services for the City warranting any additional compensation. A “gift” is something of value given without any expectation of receiving something in return. Here, Ms. Spaccia’s “air time” was purchased by the City without an expectation of receiving any additional work in return; hence, the “air time” was a gift, and because it was a gift purchased with public funds, it was unconstitutional.

Lastly, the very definition of “air time” is service credit that “does not correspond to any service actually performed.” (Ex. 26, AB 719 analysis, page 2) All a CalPERS member has to do to purchase “air time” is to pay its present value. *Id.* Accordingly, by definition, “air time” purchased by a city for its employee must be a gift.

In sum, the evidence and definition of “air time” make clear that the City’s purchase of “air time” for Ms. Spaccia was given without consideration; as such, it constituted a constitutionally-prohibited gift of public funds, and such funds must be returned to the City.

D. CalPERS Is Not Estopped From Denying Ms. Spaccia’s Application For “Air Time”

The Proposed Decision also concludes, at page 24, that CalPERS is estopped from denying Ms. Spaccia the benefits of the City-purchased “air time.” However, in drawing such conclusion, the Proposed Decision mis-applies the case of *Medina v. Board of Retirement, Los Angeles County Employees Retirement Assn.* (2003) 112 Cal.App.4th 864, 868-869.

Cheree Swendensky, Assistant to the Board
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Page 5

Medina imposes a five-part test that a plaintiff must prove in order to establish an estoppel against a public entity. Ms. Spaccia proffers no evidence in support of three of these parts; accordingly, her estoppel argument must fail.

First, *Medina* requires that “the party to be estopped [CalPERS] was apprised of the facts” surrounding the City’s purchase of the “air time.” In the case at bar, Ms. Spaccia presents no evidence that CalPERS believed that the City authorized the purchase of the “air time” or that the purchase would not be cost-neutral to the City. Indeed, once CalPERS discovered these missing facts, it quickly rescinded the award of “air time,” which led to the instant appeal.

Second, *Medina* requires that “the party asserting estoppel [Ms. Spaccia] was ignorant of the facts.” Here, Ms. Spaccia testified that she was fully aware of all of the relevant facts--- she knew that the City Council did not approve the purchase of “air time” because she was in charge of the Finance Department at the time and prepared the vague, non-descript footnote to the budget amendment that, in passing, mentions “air time,” knowing that just because an item is in the budget approved by the City Council does not mean it is an approved expenditure. Ms. Spaccia requested, approved, and issued the “air time” payment from the City to CalPERS on behalf of herself.

Third, under *Medina*, to estop a governmental entity “in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify an effect upon public interest or policy which would result from the raising of an estoppel.” (Simply put, this means that if the harm to Ms. Spaccia in not getting her “air time” outweighs CalPERS’ interest in not awarding it to her, then, assuming all other elements of estoppel are satisfied, the estoppel should stand.) Here, if Ms. Spaccia does not receive her “air time,” she loses nothing because she never purchased it in the first place and it was never provided to her as a benefit under her employment agreements. Conversely, CalPERS has at least two strong interests in not awarding Ms. Spaccia the City-purchased “air time.” First, CalPERS has an interest in upholding the legislative intent that a purchase of “air time” be cost-neutral to the employer. Second, CalPERS has an interest to avoid liability for restitution of City funds paid to CalPERS illegally.

As a result, because Ms. Spaccia must establish all five elements of estoppel in order to estop CalPERS here, and she cannot establish three such elements, her estoppel claim must be rejected.

E. After Reversing The Proposed Decision As To “Air Time,” The Board Should Adopt A Final Decision As Precedential

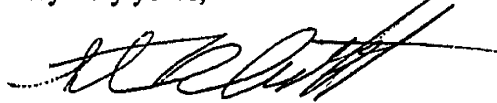
This Board has the option of designating any of its Final Decisions *precedential*, and usually does so if the decision is of major import or resolves an issue likely to arise again. Here, the issue of the legality of City-purchased “air time” is, and in fact has, arisen in at least 10 other cases that are currently on appeal before this Board---with the instant matter being the first one. Accordingly, the City requests that this Board provide guidance to the litigants and administrative law judges in these other cases (and any that are unknown to the City) by reversing the Proposed Decision as to “air time” and designating the Final Decision as precedential.

Cheree Swendensky, Assistant to the Board
March 28, 2013
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For all of the foregoing reasons, this Board should **affirm** the Proposed Decision as to Ms. Spaccia's final compensation, **reverse** the Proposed Decision as to "air time," and designate the Final Decision as **precedential**.

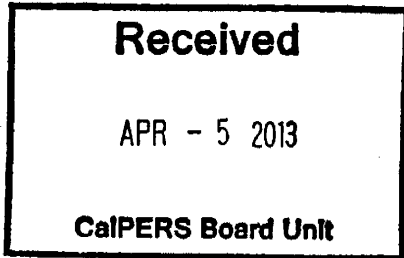
On behalf of the City of Bell, we thank you in advance for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "S. Onstot", with a long horizontal flourish extending to the right.

Stephen R. Onstot
Partner

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1880 Century Park East, Suite 710
2 Los Angeles, California 90067-1608
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4 Attorney for Respondent
PIER' ANGELA SPACCIA



6 BOARD OF ADMINISTRATION
7 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT TRUST

8 In the Matter of the Calculation of
9 Final Compensation:

CASE NO. 2011-0789
OAH NO. 2012020198

10 PIER' ANGELA SPACCIA,
11 Respondent,

RESPONDENT SPACCIA'S ARGUMENT
RE: DECISION OF ALJ JAMES AHLER

12 and

13 CITY OF BELL,

14 Respondent.

15
16 Judge Ahler Asks the Board to Violate its Constitutionally Imposed Fiduciary
Duty to Protect the Pension of Employees Covered by the CalPERS System.

17 This matter arises out of the 2010 scandal at the City of Bell where it was alleged by the
18 Los Angeles Times that officials got exorbitant salaries. During the investigation, the District
19 Attorney, who was then running for Attorney General at the time, had 8 people from the City of
20 Bell arrested at their homes at 7:00 a.m., as television cameras rolled. Thereafter the District
Attorney had a news conference where he labeled the City of Bell as corruption on steroids as
part of his campaign to become Attorney General.

21 All arrestees, including 6 City Council members, were charged with misappropriation of
22 government funds, conflict of interest, and miscellaneous charges. Angela Spaccia alone
among the 8 had no authority whatsoever to appropriate, or authorize the appropriation of
23 government funds. As for any conflict of interest, the supplemental retirement plan she set up,
which was the subject of these counts, did not even cover her at the time because she was an
24 outside consultant.

25 Angela Spaccia submitted a polygraph to both the District Attorney and Judge Ahler,
has testified over six times before various forums concerning her employment at the City of
26 Bell, and has not taken the Fifth Amendment to one question. Ms. Spaccia believes she has
been singled out for special treatment even though she is innocent of all the charges.

27 Angela Spaccia went to work for the City of Bell believing that she had legally
28 authorized employment contracts, and that her salary was covered by the CalPERS system
because she was given no notice by anyone, including CalPERS or the City of Bell, that her full
salary was not covered as part of her pension.

1 Angela Spaccia believes that an employee who in good faith works for a city covered by
2 CalPERS cannot be deprived of her pension because of alleged legal defects beyond her
control.

3 Judge Ahler held that an employee who in good faith works at a municipality covered
4 by the CalPERS system, and believes without question that they are enrolled in the CalPERS
5 system, can be deprived of her pension because the city for which she was employed did not
6 comply with some CalPERS regulations, or the city attorneys who approved her employment
7 contracts overlooked some legal defects.

8 Judge Ahler's decision is based on two faulty conclusions; (1) that Robert Rizzo did not
9 have authority to employ Angela Spaccia, and (2) that Angela Spaccia's employment agreement
10 was not publicly available as required by Government Code § 20636(b)(1).

11 As Ms. Spaccia will demonstrate, Judge Ahler is completely wrong with respect to both
12 of these conclusions. His conclusion not only ignores the history of the Resolution 2006-42, it
13 also fails to even recognize the moral outrage of a long-time government employee losing her
14 pension because the city who employed her did not properly comply with a technical
15 requirement of the City Charter.

16 There is a particular irony in the fact that the City of Bell's attorneys wrote Resolution
17 2006-42, and that the CalPERS system not only wrote the statutes to be applied, propounded all
18 the government regulations, audited the City for CalPERS compliance, and never raised any of
19 these issues. Now both the City of Bell and CalPERS are trying to deprive Angela Spaccia of
20 her pension based on conduct by CalPERS and the City of Bell. Yet, no one claims that Angela
21 Spaccia was in any way responsible for these alleged technical defects.

22 **Every Employee Covered by Calpers Should Be Told Their Pensions Are at Risk**

23 Were the CalPERS Board to adopt this philosophy implicit in the proposed decision, it
24 must announce to every employee in the State of California covered by the CalPERS retirement
25 system, that each of them is responsible for the failure of their municipalities to implement all
26 the technical requirements of the CalPERS system, as well as all legal requirements necessary
27 for their employment agreement. Employees who work for years in good faith could be
28 stripped of their pensions for technical errors over which they had no control.

29 **Judge Ahler Was Incorrect When He Found That City Council
30 Resolution 2006-42 Did Not Delegate Hiring Authority to CAO Rizzo.**

31 The lynchpin of Judge Ahler's decision is contained in paragraph 17 and 18, where he
32 concludes that Robert Rizzo did not have authority under Resolution 2006-42 to sign Angela
33 Spaccia's City of Bell employment agreements.

34 Judge Ahler cleverly leaves out of his opinion two important documents. First, he does
35 not include Resolution 2006-42 because to do so would put the lie to his conclusion. Any
36 reading of Resolution 2006-42 shows that the only reasonable interpretation to paragraph 3 is
37 that it prohibits the CAO from entering into contracts for services rendered by any person
38 already in the employ of the City of Bell at a regular salary. For the Board's convenience, I
39 have attached a copy of Resolution 2006-42. To read this Resolution otherwise renders it total
40 nonsense. Under Judge Ahler's absurd interpretation, the CAO can sign written contracts for
41 services with new employees, but cannot sign employment contracts for current employees
42 whether they are gardeners, janitors, or administrative staff.

43 As Angela Spaccia proved at the hearing, Resolution 2006-42 was written by City
44 Attorney Clifton Albright specifically to delegate the authority under Section 519 of the City of
45 Bell's Charter. Ms. Spaccia obtained a declaration from Albright which was accepted as

1 administrative hearsay by Judge Ahler. For the convenience of the Board, I have attached a
2 copy of this two-page declaration. As Albright states in his declaration, paragraph 3 prohibited,
3 without City Council approval, additional contractual services to be added to persons who were
4 already employed by the City of Bell.

5 It was not an inadvertent error to leave out the text of Resolution 2006-42, as well as the
6 declaration of the city attorney who wrote the resolution. It was a clear recognition that Ms.
7 Spaccia's employment contracts were authorized by a resolution delegating the authority to
8 CAO. This obvious truth undermines the totality of Ahler's opinion.

9 How can the City of Bell contest Ms. Spaccia's legitimate pension based on its claim of
10 its own mistake?

11 The moral answer to this question is that an employee should not be deprived of her
12 legitimate pension because of technical mistakes made by CalPERS and her employer. Nor
13 should either the City of Bell or CalPERS benefit from their own mistakes.

14 **Angela Spaccia's Employment Agreement Was "Publicly Available"**
15 **As That Term Was Understood During Her Period of Employment.**

16 According to Judge Ahler, if a citizen went to the City of Bell and asked to see Angela
17 Spaccia's employment agreement, and the City of Bell instantaneously copied her employment
18 agreement and gave it to the citizen, this would be insufficient to establish that her employment
19 agreement was "publicly available."

20 Judge Ahler constructs a totally fictitious historic meaning for the words 'publicly
21 available' and falsely states that the reference to 'publicly available pay schedule' was added to
22 Government Code §20636 in 2006. Actually, the words 'publicly available pay schedules'
23 were in the original legislation in 1993, and a second phrase of 'publicly available' was added
24 in 2006 to clarify that it applied to both individual employment agreements and to employees
25 who were members of a class.

26 To buttress Ahler's conclusion that actually 'publicly available' means published rather
27 than available upon request, Judge Ahler uses California Code of Regulations § 570.5 which
28 was not even operative when Angela Spaccia retired from the City of Bell.

29 Judge Ahler's decision even overlooks the entire history of CalPERS administration
30 from 1993 to 2010, and does not refer to a single instruction, memorandum, or audit that ever
31 interpreted 'publicly available' to mean published. Ms. Spaccia knew her employment
32 agreement was not pasted on the wall of the city hall or available online, but it never occurred
33 to her, or anyone else before this case, that public availability meant published. At the time of
34 Ms. Spaccia's retirement, 'publicly available' meant 'available upon request.' In fact the L.A.
35 Times obtained a copy of Ms. Spaccia's employment agreement within several days of its
36 request.

37 Surely an employee of the City of Bell who works in good faith for the City of Bell
38 should not be deprived of her legitimate pension because the City of Bell did not properly
39 'publish' her contract, and the CalPERS auditors never alerted her during the 2006 audit that
40 the compliance was deficient.

41 To buttress his conclusion that Ms. Spaccia's employment agreements were not publicly
42 available, Judge Ahler observed that they were not approved through a public process, or
43 approved by the City Council. This argument is based on Ahler's initial false conclusion that
44 Resolution 2006-42 did not delegate the authority to enter into an employment agreement. That
45 resolution, and in fact the City Charter itself, contemplated employment agreements that were
46 not run through the public process of a City Council approval, and could be signed by the CAO,

1 and were then publicly available upon request, thereby meeting CalPERS' requirement of
2 public availability.

3 **The Proposed Decision Fails to Discuss the**
4 **Appropriate Remedy for the Alleged Defects.**

5 Judge Ahler erroneously found that Resolution 2006-42 failed to give the CAO the
6 authority to sign an employment agreement with Angela Spaccia. The question should then
7 have been asked: What is the appropriate remedy for an oversight by the city attorney?

8 Judge Ahler interpreted the words 'publicly available,' which have existed in
9 Government Code § 20636 since at least 1993, to mean published on the internet or posted on
10 the wall of the city hall as Regulation 570.5 required as of August 10, 2011. Should an
11 employee who in good faith worked for the City of Bell be deprived of her pension because of
12 the retroactive application of this regulation?

13 Not only did Judge Ahler totally fail to consider the appropriate remedy for the technical
14 defects he erroneously found, he overlooked the fact that Regulation 570.5 specifically allows
15 for the protection of the innocent employee.

16 Regulation 570.5(b) states: "Whenever an employer fails to meet the requirements of
17 Subdivision (a) above, the Board, in its sole discretion, may determine an amount that will be
18 considered to be pay rate, taking into consideration all the information it deems relevant
19 including, but not limited to, the following . . ."

20 Although the subsection states the Board "in its sole discretion" has the power to award
21 a pension, this delegation in our legal system never amounts to the delegation of unchecked
22 power. This section must be interpreted to mean that the Board has rational reasons to excuse
23 an employee from suffering because of her employer's failure to meet the new requirements.
24 This is such a case.

25 There is no evidence that Ms. Spaccia was in any way responsible for or had notice of
26 any failure to make her employment agreement 'publicly available.' The very recent
27 implementation of Regulation 570.5 shows there had been at least massive ambiguity in the
28 implementation of the requirement by employers. Judge Ahler specifically quotes from the
29 explanation that CalPERS attached to proposed Regulation 570.5 which states that employers
30 have not uniformly adhered to the requirements.

31 The California Code of Regulations Section 570.5(b) specifically requires the Board to
32 make a determination of the amount of pay rate to be allowed where an employer fails to meet
33 the requirements that the employment agreement is publicly available. Judge Ahler made no
34 recommendation nor did he consider the various factors that the Board should use in making
35 that determination. In this respect, the proposed opinion is a complete failure.

36 **An Employee Does Not Have to Be a Member of a**
37 **Class or Group to Qualify for a CalPERS Pension.**

38 Judge Ahler attempts to disqualify Angela Spaccia because he claims that she was not a
39 member of a class or group of other employees, and criticizes her pay increases because they
40 were not in lockstep with other members of the "class." Government Code Section 20636
41 specifically provides for a pay rate for a member who is "not in a group or class," which has
42 been in the statute since 1993. In reality, Government Code Section 20636 attempts to define
43 what pay rate means to exclude additional amounts such as overtime, etc., which would not be
44 considered part of the basic pay rate for government employees.

1 What is bizarre about the CalPERS attempts to re-interpret Government Code Section
2 20636, and Regulation 570.5 is that it is CalPERS which drew up these sections, knows the
3 legislative history, and should be fully armed with legislative history, memorandums, prior
4 audits, and instructional materials which would support their position. There are no such
5 materials because no one before the Bell scandal ever attempted to interpret the CalPERS
6 requirements as they are being applied to Angela Spaccia.

4 **The Purchase of Additional Retirement Service Credit.**

5 Given the page limitation, Angela Spaccia relies on her paperwork submitted to Judge
6 Ahler with respect to the purchase of service credit. However, this disingenuous argument by
7 CalPERS shows the extent by which they are being forced politically to appease various
8 politicians to deprive Angela Spaccia of legitimate benefits. As even Judge Ahler says,
9 Government Code Section 20909 does not prohibit an employer from purchasing service credit,
10 and there are legitimate reasons why an employer would buy service credit, for example to
11 settle a lawsuit, or encourage older employees to retire.

9 Because CalPERS wrote the statute, it is ironic that its attempt to now negate the very
10 words of the statute and negate the rationale for employers purchasing service credit. Perhaps
11 CalPERS would be satisfied had the City of Bell paid the employees funds who would then
12 write out their check to CalPERS for air time.

12 **CONCLUSION**

13 The proposed decision by Judge Ahler is deficient in a number of respects and the
14 Board should refer it back to Judge Ahler or another administrative law judge to consider the
15 following issues:¹

- 15 1. Does the declaration of Clifton Albright and the language of Resolution 2006-42
16 delegate to the City of Bell CAO the authority to sign an employment contract
17 with Angela Spaccia and all other managers who currently have been awarded
18 full pensions?
- 19 2. Are the interpretations of "publicly available" in Regulation 570.5 retroactive
20 and therefore applicable to Angela Spaccia?
- 21 3. Assuming that Angela Spaccia is not responsible for either the delegation of
22 legal authority in the City of Bell or the compliance with the requirement of
23 "public availability," should she lose her pension based on factors over which
24 she had no control?

22 Respectfully submitted,

23 Date: April 5, 2013

24 Harland W. Braun
25 HARLAND W. BRAUN
26 Attorney for Respondent
27 PIER' ANGELA SPACCIA

28 ¹ Judge Ahler also used the wrong year to establish Spaccia's single highest year of
compensation. In 2001 Spaccia earned \$11,729.26 per month, and in 2004 Spaccia earned \$10,833.33
per month, which was publicly approved by the City Council. Both are higher than the 2003 figure
used by Ahler.

FROM: TO: 374*13102774045 12/14/2012 15:46:24 #2548 P.002/003

DECLARATION OF CLIFTON WADE ALBRIGHT

I, Clifton Wade Albright, declare as follows:

1. I am an attorney licensed to practice in the State of California, State Bar No. 100020, and a partner in the law firm of Albright, Yee & Schmit, 888 West 6th Street, 14th Floor, Los Angeles, California 90017. I was admitted to the State Bar of California on December 1, 1981, having graduated from Loyola Law School in Los Angeles, California.

2. During the year 2006, I was hired by the City of Bell, California, to give legal advice regarding municipal law, contracts, and any legal problems which might arise in the City. As part of my duties, I became familiar with the new Charter of the City of Bell which was adopted on January 3, 2006. I did not personally write the Charter or participate in the writing.

3. I have attached a copy of the Charter of the City of Bell to this declaration [See Exhibit A].

4. While acting as legal counsel to the City of Bell, I became aware that section 519 of the Charter may have been interpreted to require that every contract, contract for employment, contract for services, and essentially all contractual obligations be approved by the City Council.

5. I also noticed that the second paragraph of section 519 allowed the City Council to authorize the Chief Administrative Officer ["CAO"] to bind the City, with or without a written contract, for the acquisition of equipment, materials, supplies, labor, services, or other items included within the budget approved by the City Council. It concerned me that Robert Rizzo, the Chief Administrative Officer, assumed the power under paragraph two of section 519 without a formal ordinance or resolution passed by the City Council.

6. My law firm developed and wrote Resolution No. 2006-42, entitled "Resolution of the City Council of Bell Implementing Section 519 of the Bell City Charter Pertaining to

Page 1

LOCATION:

RX TIME 12/14 '12 17:14

FROM: TO: 374*13102774045 12/14/2012 15:46:37 #2548 P.003/003

Acquisition of Labor or Service Contracts." A copy of Resolution No. 2006-42 is attached as Exhibit B.

7. Paragraph number one of Resolution 2006-42 authorizes the CAO to bind the City of Bell, by a written contract for the acquisition of labor or services included within the budget approved by the Bell City Council.

8. Paragraph number two simply required that the CAO go through a bidding process for any public works exceeding \$25,000 and regulates contracts for public works.

9. Paragraph number three of Resolution 2006-42 simply states that the CAO may not enter into any written contract for services by any person already employed at the City of Bell at a regular salary.

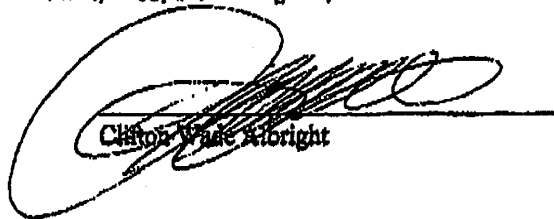
10. On July 31, 2006, it was explained to the City Council that the resolution delegated to the CAO the power to contract for services, labor, and all contractual obligations with several exceptions. As I stated, paragraph two of the resolution excludes public works contracts in excess of \$25,000 which had to be run through a bidding process, and paragraph three prohibited, without City Council approval, additional contractual services to be added to persons who are already employed by the City of Bell.

11. I specifically remember questions from City Councilman George Mirabal and City Councilwoman Teresa Jacobo. I also believe that the Resolution was written in plain English.

12. The City Council voted unanimously to approve the Resolution.

I declare under penalty of perjury the foregoing to be true and correct.

Dated this 14th day of December, 2012, at Los Angeles, California.



Clinton Wade Albright

Page 2

RESOLUTION NO. 2006-42

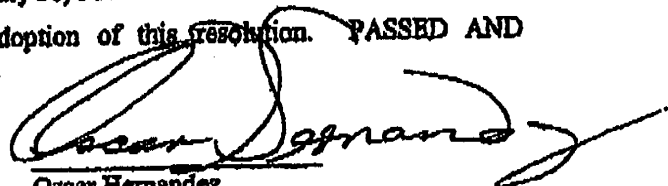
**RESOLUTION OF THE CITY COUNCIL OF BELL IMPLEMENTING
SECTION 519 OF THE BELL CITY CHARTER PERTAINING TO
ACQUISITION OF LABOR OR SERVICE CONTRACTS**

Whereas, the second paragraph of Section 519 of the City's Charter allows the Bell City Council to authorize by resolution the Chief Administrative Officer to bind the City, with or without a written contract, for the acquisition of equipment, materials, supplies, labor, services or other items included within the budget approved by the City Council;

Whereas, the City Council has determined that it is in the interest of efficient administration of the City to authorize the Chief Administrative Officer to bind the City with a written contract for the acquisition of labor or services;

Now, therefore, the City Council of the City of Bell does resolve as follows:

1. Pursuant to the second paragraph of Section 519 of the City's Charter, the Bell City Council hereby authorizes the Chief Administrative Officer to bind the City by written contract for the acquisition of labor or services included within the budget approved by the Bell City Council.
2. Any written contract entered into by the Chief Administrative Officer pursuant to this resolution shall comply with Section 1111 of the City's Charter if Section 1111 would otherwise be applicable in the absence of this resolution.
3. The authority granted by this resolution shall not apply to any written contract for services rendered by any person in the employ of the City at a regular salary.
4. Effective date of this resolution shall be July 31, 2006.
5. The City Clerk will certify to the adoption of this resolution. **PASSED AND APPROVED THIS 31st day of July 2006.**



Oscar Hernandez
Mayor