ATTACHMENT B

AUGUST 2, 2013 REQUEST FOR PUBLIC COMMENTS RE: DESIGNATION OF BOARD DECISION IN PIER'ANGELA SPACCIA MATTER AS PRECEDENTIAL

Attachment B

California Public Employees' Retirement System
Legal Office
P.O. Box 942707
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Memorandum

August 2, 2013
Ref. No. 2011-0789

To: All CalPERS Contracting Agencies

From: WESLEY E. KENNEDY
Senior Staff Attorney

CalPERS Legal Office
400 Q Street, Lincoln Plaza North Room 3340
P.O. Box 942707
Sacramento, CA 94229-2707

Subject: Request for Public Comments re: Precedential Designation of Board Decision in the Matter of Pier 'Angela Spaccia, Case No. 2011-0789; OAH No. 2102020198

On June 19, 2013, the Board of Administration of the California Public Employees' Retirement System ("Board"), following a public hearing before the Board, "In the Matter of the Application for Final Compensation of Pier 'Angela Spaccia, Respondent, and The City of Bell, Respondent", adopted a portion of and rejected a portion of a proposed decision by an Administrative Law Judge. The decision was to be effective immediately and was ordered to be precedential. The Board ordered that a Final Decision be prepared and presented for its consideration at its next meeting.

The Final Decision determined that specific portions of Respondent's compensation paid to her by the City of Bell could not be used in the calculation of her retirement benefit because it was not paid pursuant to a publicly available pay schedule. In addition, a purchase of additional retirement service credit (ARSC) by the employer with employer funds would be cancelled and an amount equal to the cost of the purchase would be credited back to the employer.

On July 16, 2013, the Board adopted the Final Decision. At the July 16, 2013, meeting, the Board also reconsidered the question of whether its decision in this matter should be designated as precedential and directed staff to take public comments about whether the decision should be made precedential. A copy of the Final Decision is attached.

This Request for Public Comments has been issued to solicit your written comments on the question of whether the Board's Final Decision in this matter should be made precedential. *(Please note: the Board is not requesting comments or arguments on the merits or correctness of its Final Decision, which is not up for reconsideration; any such comments or arguments will not be considered.)*

In deciding whether to designate a decision as precedential, the Board's policy is to consider the following questions:

- Does the decision contain a significant legal or policy determination of general application that is likely to recur?
- Does it include a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made, and how the law was applied?

If you are interested in commenting on whether the Board's decision should be precedential, please address the questions above, along with any other questions or considerations, and mail, fax or deliver your written comments to:

CalPERS Legal Office
Attn: Wesley Kennedy, Senior Staff Attorney
400 Q Street, Rm LPN 3340
Sacramento, CA 95811
Fax No. (916) 795-3659

Comments must be received in the CalPERS Legal Office no later than 5:00 p.m. PDT, September 2, 2013. Comments should not exceed six pages in length (single spaced). Late comments will not be considered.

The Board will consider all comments received at a future public meeting of the Board, on a date to be announced, and determine whether to make its decision in the Pier'Angela Spaccia matter precedential.

CalPERS staff will provide copies and a summary of the comments received to Board members. CalPERS staff will also provide its written recommendations to the Board. Oral comment or argument will not be received at the Board meeting.

Questions concerning this notice may be directed to Mr. Kennedy in the CalPERS Legal Office at (916) 795-0725.

Attachment

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Calculation of the Final Compensation of:	)	CASE NO. 2011-0789 OAH NO. 2012020198
PIER'ANGELA SPACCIA,	)	FINAL DECISION
Applicant/Respondent,	)	
and	)	
CITY OF BELL,	)	
Public Entity/Respondent.	)	

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System adopts Attachment A as the Final Decision of the Board concerning the Application of Pier'Angela Spaccia; RESOLVED FURTHER, that this Board decision shall be effective immediately upon the Board's adoption.

* * * * *

I hereby certify that on July 16, 2013, the Board of Administration, California Public Employees' Retirement System, made and adopted the foregoing Resolution, and I certify further that the attached copy of the Final Decision is a true copy of the Decision adopted by said Board of Administration in said matter.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
ANNE STAUSBOLL
CHIEF EXECUTIVE OFFICER

Dated: JUL 26 2013

BY

DONNA RAMEL LUM
Deputy Executive Officer
Customer Services and Support

ATTACHMENT A

FINAL 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

FINAL DECISION

The Board of Administration makes this Final Decision following its hearing of the case upon the record that was made when this matter was heard before James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, 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 record was closed 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 not entitled to receive five years of 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 paid pursuant to a publicly 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 credit ("air time") for her was improper and had to be rescinded.

8. By letter dated December 27, 2010, Ms. Spaccia timely appealed from CalPERS' 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 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

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[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.

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 explained 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)(l), as "the normal monthly rate of pay or base pay of the

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

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 "publicly 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 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 situated 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 Publicly 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. Bell 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]

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

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[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, 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

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 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' 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.

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;

Closing Brief. The mistaken reference is in the nature of a typographical error and is harmless.

(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' 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 hours, 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]

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[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 "publicly 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 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 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 the compensation a local agency could provide to an individual employee by way of individual agreements for retirement purposes. (*Prentice v. Board of Admin.,*

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.)

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 extend 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. 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

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[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.

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. Ms. Spaccia testified that at some time before May 15, 2004, she visited Sacramento to confer with CalPERS' staff. She testified that 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. Over objection by CalPERS, Ms. Spaccia testified that Ms. Veitenhaus told her that there would be no problem if the City of Bell directly purchased air time for certain employees. According to Ms. Spaccia, Ms. Veitenhaus did not warn her that a direct purchase by the employer might be improper or that only an employee could pay for air time. Ms. Spaccia said she relied on what she was told. Ms. Veitenhaus was not called to testify.

46. Ms. Spaccia also stated that, 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, 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 notified Ms. Spaccia of its determination that the City of Bell's direct purchase of five years of air time for her was improper in June 2012, after Ms. Spaccia retired. Her retirement prevented her from purchasing 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

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

> 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 that "a member" file the required notice and make the required contribution. The statute does not expressly prohibit an employer from making the contribution on an employee's behalf. No direct appellate authority was provided to support CalPERS' assertion on that issue. However, the legislative history related to the enactment of Government Code section 20909, offered at hearing to support CalPERS' assertion (CalPERS Exh. 26.) establishes that "this benefit is to be cost neutral to employers. The member pays the full present value cost of the additional service credit." (CalPERS Exh. 26, p. 2.) Further, the Senate Bill Analysis of SB 719, unequivocally states: "This bill...[s]pecifies that the cost of the 'air time' service credit will be fully paid by the member, with no employer contribution permitted." (CalPERS Exh. 26, page 4,)

Factual Conclusions on Estoppel Related to Air Time

53. Government Code section 20909 does not provide for the purchase of ARSC by a public employer for an employee. Based on the construction of section 20909 in relevant and consistent legislative history, the intent is evident that such purchases were not to be allowed.

Ms. Spaccia failed to establish several necessary elements of estoppel in her case. These elements were that she advised CalPERS of (1) the fact that the City of Bell sought to purchase air time on behalf of certain employees, including herself; (2) that a responsible CalPERS employee told Ms. Spaccia that such a purchase was permissible and would be honored by CalPERS; (3) that the CalPERS employee knew that her representations would be relied on and, that in fact, air time was directly purchased by the City of Bell for certain employees.

The evidence did establish 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, Ms. Spaccia arranged for the City of Bell to make the contribution on her behalf. However, Ms. Spaccia was unable to establish that the City of Bell had, in fact, followed the appropriate legal procedures to authorize such purchases.

54. Section 20160 requires that CalPERS correct all errors or omissions in benefit calculations. Under section 20160, the Board must correct a mistake. However,

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

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.)

Determination of Service Benefits

6. 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 exactingly 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

7. 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.

8. 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

9. A pay increase must be part of a publicly available pay schedule in order to qualify as "compensation earnable." Under the 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. CalPERS 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].)

10. 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.

11. 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

12. 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.)

13. 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.)

14. 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, 31, 40 and 41.)

15. 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

16. 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.

Equitable Estoppel

17. Equitable estoppel may be asserted against the government in rare circumstances. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 4990450 [a rare combination of government conduct and extensive reliance creating an extremely narrow precedent for application in future cases.].) The requisite elements for applying equitable estoppel against a private party are: (1) the party to be estopped must be apprised of the facts; (2) the party to be estopped must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting estoppel must be ignorant of the true state of facts; and (4) the party asserting estoppel must rely upon the conduct to his injury. 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.) However, "the power of a public officer cannot be expanded by application of this doctrine." (*Page v. City of Montibello* (1980) 112 Cal. App. 3d 658, 667.) The doctrine may not be applied when doing so "would have the effect of granting the state's agents the power to bind the state merely by representing that they have the power to do so." (*Ibid.*) (*Board*

Decision In the Matter of the Statement of Issues of Rita Takahashi, June 15, 2011, p.6, para. 6.)

18. 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.)

19. Ms. Spaccia did not prove 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. In addition, it would be improper to uphold estoppel in this instance, even if all other elements required for that doctrine were present, because to do so would contravene the clear intent of the applicable statute and result in the creation of a benefit not otherwise authorized by the legislature. (Factual Findings 52 and 53.)

20. Permitting Ms. Spaccia to retain the ARSC would result in a "status, right, and obligation" that but for the error or omission, would not have existed. An adjustment disallowing the ARSC purchase retroactive to the date of its initial purchase is appropriate as a correction under Section 20160, subd. (b).) (Factual Finding 54.)

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 properly disallowed the City of Bell's purchase of five years of air time for Ms. Spaccia, and that CalPERS should remove the service credit associated with that purchase from her account.

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 and exclude from the recalculation of Ms. Spaccia's service retirement allowance the five years of additional retirement service credit that was disallowed.

Dated: June 19, 2013