

ATTACHMENT D
STAFF'S ARGUMENT

**STAFF'S ARGUMENT IN SUPPORT OF POSTPONING THE DECISION
REGARDING DESIGNATION OF JULY 16, 2013 FINAL DECISION AS
PRECEDENTIAL**

After a Full Board Hearing on June 19, 2013, the Board adopted a final Decision dated July 16, 2013, *In the Matter of the Calculation of the Final Compensation of Pier'Angela Spaccia*, Respondent (*In Re: Pier'Angela Spaccia*). At the July 16, 2013 meeting, the Board directed the Legal Office to solicit written comments from the public regarding whether the July 16, 2013 final Decision should be designated precedential and upon receipt of these comments, to return to the Board for further consideration of a precedential designation.

In *In Re: Pier'Angela Spaccia*, the Board held 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. Ms. Spaccia is not entitled to receive five years of additional retirement service credit ("ARSC" or "air time") purchased on her behalf by the City of Bell.

The legal conclusion that the purchase of the five years of ARSC by the City of Bell for Ms. Spaccia violated the applicable statute governing "air time" purchases settled a question that has arisen in several cases in recent years, and that will figure in many compensation disputes in the future. Designating this final Decision as precedential, therefore, would curtail much future litigation over this issue. However, because Ms. Spaccia filed a Petition for Writ of Mandate on August 15, 2013, seeking to overturn the Board's final Decision in this matter, it is staff's recommendation that the Board refrain from deciding whether to make this Decision precedential until after all appeals are exhausted.

1. Statutory Authority.

Pursuant to section 11425.60 in the California Administrative Procedure Act (APA), the Board is authorized to designate all or part of a quasi-judicial administrative decision of the Board as precedential:

(a) A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency.

(b) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340). An agency's designation of a decision or part of a decision, or failure to designate a

decision or part of a decision, as a precedent decision is not subject to judicial review.

(c) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.

(d) This section applies to decisions issued on or after July 1, 1997. Nothing in this section precludes an agency from designating and indexing as a precedent decision a decision issued before July 1, 1997. (Emphasis added.)

2. Precedential Effect.

In general, the effect of making a Board decision precedential is to give it “precedential effect,” which in this context means:

- The decision may be officially cited in other administrative hearings, and also in court proceedings.
- The decision is considered “case-made” law, comparable to agency rule-making in its legal effect, and may be applied broadly to other cases and the parties involved in other cases. The decision-maker in another administrative matter may expressly rely on the precedential decision to decide the matter, that is, give the law or policy in the decision binding effect in a case involving the same issue as it affects other parties, unless the other case can be factually or legally distinguished.¹

¹ See: 13 CCR 1290 (Office of Administrative Hearings regulation); official *Calif. Law Revision Comments* regarding APA section 11425.60, where it is stated that the statute “... recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking”, and “... is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision.” Also see: *Pac. Legal Foundation v. Unemployment Insur. App. Board* (1991) 29 Cal.3d 101, 109; 21 *Jour. Nat. Ass’n Admin. Law Judges* 247 (2001), at pp. 265-267.

A precedential decision of the Board is not binding on the courts, which remain the final arbiters of the law; but a Board precedential decision, as the decision of the agency most knowledgeable and responsible for administering and making policy with respect to the California Public Employees' Retirement Law (PERL), is normally accorded great weight or given deference by the courts.²

Because it is important to maintain the confidence of the judiciary in CalPERS precedential decisions, it would be most prudent to await the final outcome of any appeals that are filed before designating this final Decision precedential. If the designation is adopted now, yet Ms. Spaccia ultimately prevails in her appeal, the Board would have to repeal the precedential designation and try to put legal precedent back to the *status quo ante*, which could be a difficult and complicated process.

3. Board Policy.

The Board's established policy regarding the designation of precedential decisions is based on subdivision (b) of section 11425.60 and calls for consideration of the following two 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?

From the staff's perspective, the answer to both these questions is "Yes."

A. "Significant Legal or Policy Determination of General Application That Is Likely to Recur"

The significant legal and policy determination presented in *In Re: Pier'Angela Spaccia* is the clear and concise explanation of Government Code section 20909 which governs the procedures for purchasing ARSC from CalPERS. It has been disputed whether this statute prohibits anyone other than the member from paying for the purchased "air time." The Board's final Decision makes clear that section 20909 requires that only the member may pay for the purchased "air time."

Currently, CalPERS is being required to litigate the issue concerning the source of the funds used to purchase "air time." By making the final Decision

² *City of Oakland v. Pub. Employees' Ret. System* (2002) 98 Cal.App.4th 29, 39; *Hudson v. Board of Administration of the Calif. Pub. Ret. Sys.* (1997) 59 Cal.App.4th 1310, 1324-1325.

precedential, most of these disputes would resolve at least of the administrative kind. Thus, a precedential decision analyzing section 20909 will provide members and employers guidance, and reduce the amount of future litigation.

B. “Clear and Complete Analysis Sufficient For an Understanding of Why the Finding of Facts Were Made and How the Law Was Applied”

The factual findings in *In Re: Pier'Angela Spaccia* are straightforward and easy to understand. The decision first summarizes the facts, and then follows a logical analysis and clarification of the applicable statute to explain the process for purchasing “air time.”

In arriving at the decision to reverse the purchase of five years of “air time” on Ms. Spaccia’s behalf, the Board found that permitting Ms. Spaccia to retain the ARSC would result in a “status, right and obligation” that, but for the error of allowing the purchase by the City of Bell, would not have existed. It further found that an adjustment disallowing the ARSC purchase retroactive to the date of its initial purchase is appropriate as a correction under section 20160 subd. (b).

The staff therefore believes that the findings and legal conclusions of *In Re: Pier'Angela Spaccia*, if the case is made precedential, will provide useful, specific rules both for staff and public entities.

C. Results of the Requests for Public Comments.

On August 2, 2013, a letter was mailed to over 1600 public agencies, 330 state entities, 63 school districts and the Respondent in the case asking for comments on whether to designate *In Re: Pier'Angela Spaccia* as a precedential decision. Staff received five written comments. Three were negative and two were positive.

The attorney for the City of Bell wrote in favor of making this Decision precedential. He stated that there are ten more pending appeals where the propriety of Bell’s purchase of “air time” for its employees is at issue, so a precedential decision would promote settlement and conserve resources.

The Orange County Department of Education wrote in favor of making the Decision precedential, finding that it met the two Board criteria for precedential designation.

The City Attorney for the City of Long Beach strongly objected to making the final Decision precedential, because it did not believe that the situation of an employer purchasing “air time” for its employees is likely to recur. The abuses discovered in the City of Bell were unique and unprecedented. The City also objected to the “retroactive application of Regulation 570.5 to Spaccia’s pension calculation,” because it asserted that retroactively applying a regulation is contrary to the established legal precedent.

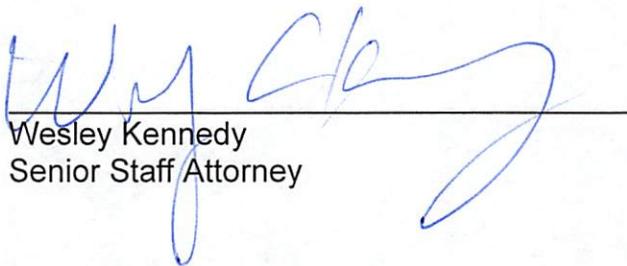
The Westlands Water District wrote objecting to precedential status, arguing that the Decision did not meet either one of the Board's criteria.

Finally, Calaveras County Water District objected to the precedential designation, stating its belief that each one of these cases should be considered on its own merits and that an employer should be able to purchase service credit on behalf of an employee for recruitment and/or retention purposes.

Conclusion

For the reasons stated above, staff argues that the Board refrain from deciding whether to make the final Decision *In Re: Pier'Angela Spaccia* precedential, until all appeals have been exhausted. At that time, staff will bring an agenda item back to the Board for a final determination.

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