

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent George G. Mirabal (Respondent Mirabal) was employed as the City Clerk by the City of Bell between April 21, 1992 and November 2, 1998. Effective April 1, 2003, he was elected to the City Council for the City of Bell (Bell) and remained in that position until his retirement effective March 5, 2011. During his tenure on the City Council, Bell purchased, on behalf of Respondent Mirabal, five years of Additional Retirement Service Credit (ARSC). As a result, Respondent Mirabal retired with a total of 19.950 years of total service credit. Bell's contract with CalPERS provided for a one-year final compensation period.

Final compensation is the highest consecutive 12-months of compensation earnable and is used in the calculation of a member's pension benefit in CalPERS. Bell had reported Respondent Mirabal's final compensation to be \$ 8,083.25 per month.

On May 31, 2011, following its review of the pertinent information, CalPERS staff notified Respondent Mirabal and Bell that CalPERS had determined that Respondent Mirabal's final compensation was \$673.00 per month. In addition, CalPERS issued a supplemental determination that the purchase of the ARSC by Bell on behalf of Respondent Mirabal was unlawful and would be rescinded. Respondent Mirabal timely appealed CalPERS' determinations and a hearing was held on January 8, 2015. Prior to the hearing, Respondent Mirabal withdrew his appeal of CalPERS' rescission of his five years of ARSC. Respondent Mirabal was represented by legal counsel at the hearing, but did not appear or provide written testimony.

The evidence and testimony at the hearing established that during the period pertinent to this appeal, Bell had become a "charter city." The Bell Charter, however, circumscribed the salary for its council members at the level permitted under statute to that of similar positions in general law cities of similar population. The statutorily prescribed base salary for a City Council member in Bell was \$300.00 per month. However, the same applicable law permits the governing body to increase the base salary by resolution in increments no greater than 5% per year on a cumulative basis. In this case, the evidence established that the Bell City Council had properly increased their base salary up to a maximum of \$673 per month. However, the evidence also established that in subsequent resolutions in April 2005 and November 2010, the Bell City Council erroneously reported two increases in Respondent Mirabal's salary to \$1,332 per month by falsely asserting that no adjustment to the base pay rate had occurred over the prior ten years. In fact, Respondent Mirabal's salary had been increased by resolution in 2003.

In addition to his base pay as a City Council member, Bell also reported to CalPERS Respondent Mirabal's compensation for ostensible services, including those to various Bell-related authorities and commissions, including Bell Housing Authority, Surplus Property Commission, Bell Solid Waste and Recycling Authority, Bell City Planning Commission and the Bell City Community Development Authority. As a result, by July 2010, the cumulative and highest average compensation reported to CalPERS by Bell

for Respondent Mirabal was \$8,083.25. The evidence at the hearing established that the compensation paid to Respondent Mirabal for his ostensible services on these various commissions and authorities greatly exceed that permitted by applicable provisions of law, and to the extent it was alleged to have been compensation for services as a council member, in fact reflected "overtime pay." Overtime pay is specifically excluded from inclusion in compensation earnable. (See Government Code section 20635.)

The evidence further supported a finding that the additional payments would not be allowable as "special compensation." Special compensation is an item of compensation which, if it qualifies under the applicable provision of the California Public Employees' Retirement Law (PERL), may be considered with a member's payrate in calculating compensation earnable. However, in order to qualify as special compensation, a material requirement in this case was that the item of compensation be available to all members of the same group or class of employment. The evidence in this case established that not all members of the Bell City Council received the additional compensation for ostensible services to the various boards and commissions.

After considering all of the documentary evidence and testimony, the Administrative Law Judge (ALJ) concluded:

It was not established that Respondent's additional compensation for serving on the other boards, commissions and authorities was based on publicly available pay schedules. In fact, the evidence indicated the opposite. . . since neither Respondent's higher base salary or his compensation for serving on the other boards, commissions and authorities were proven to be part of publicly available pay schedules, that compensation cannot be considered part of his payrate. Nor was it established that the additional compensation was special compensation.

[¶] ..[¶]

Under these circumstances, it was not established that Respondent's final compensation could be greater than \$673 per month. The evidence presented by PERS and the City supported PERS' determination of what to include in Respondent's final compensation. Based on the aforementioned case law, a rebuttable presumption was created supporting PERS' determination.

Finally, Respondent Mirabal argued that CalPERS must be precluded from adjusting his reported compensation based on principles of estoppel and laches. However, the ALJ found that CalPERS had not unreasonably delayed its actions and that Respondent Mirabal had not established the requisite elements for estoppel against a governmental agency.

The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

May 20, 2015

for Marguerite Seaborn
WESLEY E. KENNEDY
Senior Staff Attorney