

# CITY of ALBUQUERQUE

## NINETEENTH COUNCIL

COUNCIL BILL NO. \_\_\_\_\_ ENACTMENT NO. \_\_\_\_\_

SPONSORED BY:

1 RESOLUTION

2 ..t

3 Directing The Administration To Investigate And Take All Necessary And Legal  
4 Action, Including The Filing Of A Declaratory Judgment Proceeding To  
5 Ascertain The Legality And Enforceability Of The Perlman Memorandum And  
6 Administrative Instruction No. 7-46 And To Develop Ordinance Amendments  
7 That Preclude Any Practice That Permits Unclassified Employees To Be  
8 Compensated For Work Not Performed On Behalf Of The City Of Albuquerque.

9 ..b

10 WHEREAS, on December 7, 2006 CAO Dr. Bruce J. Perlman issued an  
11 Interoffice Memorandum to the City's Chief Operating Officer ("Perlman  
12 Memorandum"). The Perlman Memorandum provided in relevant part that if  
13 the Chief Operating Officer (the "COO" or "Mr. Adams") returned to classified  
14 employment with the City: "your grade will be M-20 or the equivalent and your  
15 rate of pay will be maintained along with raises for the class until retirement";  
16 and

17 WHEREAS, rather than wait until the decision of the COO to return to  
18 classified service, Mr. Perlman made the determination of what was an  
19 "appropriate" salary three years before that decision; and

20 WHEREAS, the legal justification allegedly supporting the Perlman  
21 Memorandum was an Administrative Instruction also issued by Dr. Perlman  
22 two months earlier on October 1, 2006; and

23 WHEREAS, this Administrative Instruction (AI No. 7-46) provides, in part:

24 When an unclassified executive management employee is  
25 entitled to return to a classified position and elects to do

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1 so, their compensation shall be adjusted as appropriate;  
2 and

3 WHEREAS, the Perlman Memorandum further states that the rate of  
4 pay provided for the COO is determined to be “appropriate”, under the  
5 terms of the Administrative Instruction, if the COO returns to classified  
6 service with the City; and

7 WHEREAS, it is believed that Mr. Adams rate of pay currently  
8 approximates \$147,000; and

9 WHEREAS, on December 21, 2009, in an Interoffice Memorandum  
10 (“City Attorney Memorandum”) to David Campbell, City Attorney Robert  
11 White opined that the Perlman Memorandum “does form an enforceable  
12 employment contract with the City consistent with the authority granted  
13 to the CAO...”; and

14 WHEREAS, the City Attorney further opined that the MSO provisions  
15 that require a pay plan can be ignored by the CAO and that the CAO is  
16 empowered to enter into contracts to provide any salary to any  
17 employee; and

18 WHEREAS, the salary range for an M-20 classification starts at about  
19 \$34 per hour and goes to about \$56 per hour and should not exceed  
20 approximately \$104,000 annually; and

21 WHEREAS, the City Attorney Memorandum purports to be based on  
22 three provisions of the City’s Merit System Ordinance (“MSO”) as well  
23 as AI No. 7-45 quoted above; and

24 WHEREAS, it also appears that Mr. Adams was appointed CAO in  
25 violation of Section 3-1-6 of the MSO and without benefit of City Council  
26 consideration of the contract indicated at Section 3-1-6; and

27 WHEREAS, as reported in the press, the City Attorney has now  
28 concluded that contrary to the MSO, the previous administration  
29 inappropriately contracted, and, waived or caused to be waived various  
30 probationary and other requirements of the MSO regarding select City  
31 employees; and

32 WHEREAS, the City Council is specifically empowered under the City  
33 Charter to: “Preserve a merit system by ordinance.” Art. IV, § 10(e); and

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1 WHEREAS, the City Council has established a specific process to  
2 determine the salaries to be paid to classified employees; and

3 WHEREAS, the "anti-donation clause" at Article IX, Section 14 of the  
4 New Mexico Constitution, in part, prohibits the City from making "a gift,  
5 an allocation or appropriation of something of value, without  
6 consideration to a person, association or public or private corporation";  
7 and

8 WHEREAS, contracts that are not otherwise provided for in another  
9 portion of the City Code must comply with the Purchasing Ordinance. In  
10 part, that ordinance requires that professional services contracts for  
11 more than \$55,000 require City Council approval. § 5-5-19(A)(3)(c) ROA  
12 1994. The Perlman Memorandum was not approved by the City Council;  
13 and

14 WHEREAS, there are any number of arguments to dispute the claim that  
15 the Perlman Memorandum is an enforceable contract; and

16 WHEREAS, the administration should be directed to investigate, to  
17 the fullest extent of the law, the enforceability and legality of the  
18 Perlman Memorandum, Administrative Instruction No. 7-46, the previous  
19 Administration's violation of the MSO, the Purchasing Ordinance and  
20 possibly the State Constitution.

21 BE IT RESOLVED BY THE COUNCIL, THE GOVERNING BODY OF THE CITY OF  
22 ALBUQUERQUE,

23 Section 1. The Administration is directed to investigate and take all  
24 necessary and legal action, including the filing of a declaratory judgment  
25 proceeding, to ascertain the legality and enforceability of the Perlman  
26 Memorandum and Administrative Instruction No. 7-46.

27 Section 2. The Administration should give due regard to:

- 28 a. The authority of the CAO to issue AI No. 7-46;
- 29 b. Whether the Perlman Memorandum and the Administrative  
30 Instruction violate the MSO;
- 31 c. Whether the Perlman Memorandum and the Administrative  
32 Instruction violate the Purchasing Ordinance;

- 1 d. Whether the Perlman Memorandum and the Administrative
- 2 Instruction violate the State Constitution;
- 3 e. Whether the Perlman Memorandum and the Administrative
- 4 Instruction violate the Municipal Code or any other provision of state
- 5 law; and
- 6 f. Whether the CAO is empowered to negotiate employment contracts,
- 7 and, if so, the limits of such authority.

8 Section 3. The Administration is further directed to develop ordinance  
9 amendments that preclude any practice that permits unclassified  
10 employees to be compensated for work not performed on behalf of the  
11 City.

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