

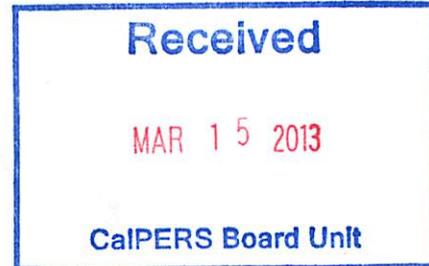
ATTACHMENT A
RESPONDENTS' PETITION FOR RECONSIDERATION

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DATE: March 15, 2013

TO: Cherec Swedensky, Assistant to the Board
Executive Office
California Public Employees' Retirement System
P.O. Box 942701
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FROM: John Michael Jensen
Law Offices of John Michael Jensen
11500 West Olympic Blvd Suite 550
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RE: In the Matter of Joseph Tanner and City of Vallejo, Respondents v. California Public Employees' System, Petitioner

CalPERS Case No. 9796
OAH Case No. 2011060337

Page 1 of 8

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March 15, 2013

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

Re: In the Matter of Joseph Tanner and City of Vallejo, Respondents
CalPERS CASE NO. 9796
OAH CASE NO. 2011-060337

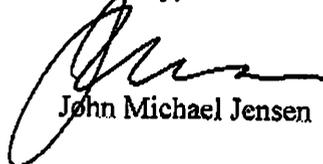
Dear Ms. Swedensky:

Pursuant to the February 25, 2013 from Peter H. Mixon, General Counsel for CalPERS, enclosing a copy of the Board of Administration's *Decision* in the above matter, I am hereby formally filing a Petition for Reconsideration of the Board's *Decision*.

Pursuant to the proof of service attached to the *Decision* indicating it was mailed to me on February 25, 2013 and Mr. Mixon's letter indicating that any Petition for Reconsideration must be received by the CalPERS Board Unit within 30 days of that mailing date, i.e., March 27, 2013, I am hereby timely submitting said Petition for Reconsideration.

Should you have any questions, please do not hesitate to contact me at your earliest convenience.

Sincerely,



John Michael Jensen

JMJ:gm
Enclosure
cc: Peter Mixon (by facsimile)
Joseph Tanner

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8 Attorneys for Respondent Joseph Tanner

9 BEFORE THE BOARD OF ADMINISTRATION
 10 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

<p>11 In Re the Matter of 12 JOSEPH TANNER and CITY OF 13 VALLEJO, 14 Respondents.</p>	<p>) CALPERS CASE NO.: 9796) OAH CASE NO.: 2011-060337)) RESPONDENT JOSEPH TANNER'S) PETITION FOR RECONSIDERATION) OF THE BOARD'S APPROVAL OF THE) PROPOSED DECISION)) Administrative Law Judge: Dian Vorters) Hearing Dates: September 26, 2011;) November 2-4, 2011; March) 26-29, 2012; May 22-24,) 2012) Location: Sacramento OAH)) CalPERS Board Hearing: February 21, 2103</p>
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22 Respondent Joseph Tanner hereby files this *Petition for Reconsideration* before the Board of
 23 Administration of the California Public Employees Retirement System ("Board") in the matter of the
 24 *Proposed Decision* of Joseph Tanner and City of Vallejo, OAH Case No. 2011-060337. The *Proposed*
 25 *Decision* was issued by Administrative Law Judge Dian Vorters on November 20, 2012, and adopted by
 26 the Board on February 21, 2013.

27 Tanner seeks reconsideration of the adopted *Decision*, based on the issues raised in his
 28 previously filed *Respondent's Argument* and the argument set forth below.

Received
 MAR 15 2013
 CalPERS Board Unit

JOHN W. TANNER, JR., Director
 1500 West Broadway Blvd., Suite 200
 Los Angeles, CA 90014
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 www.calpers.org

CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM
 BEFORE THE BOARD OF ADMINISTRATION

CALPERS CASE NO. 9730
 GAB CASE NO. 1011-0-0011
 RESOLUTION FOR THE BOARD OF ADMINISTRATION
 OF THE BOARD'S APPROVAL OF THE
 PROPOSED SETTLEMENT
 Administrative Law Judge: D. de Vries
 Hearing Date: September 26, 2011
 Location: Sacramento, CA
 2009-2011, 2011-2012
 2011
 CALPERS Board Hearing: January 21, 2013

JOSEPH TANNER and CITY OF
 VALLEJO

Responding

Respondent Joseph Tanner, former Director of the Board of
 Administration of the California Public Employees Retirement System ("CalPERS"), in his capacity as the
 Respondent Director of Joseph Tanner and City of Vallejo (JTCV), Case No. 2011-06037, hereby
 responds to the Board's Administrative Law Judge's Decision on November 20, 2012, and sets forth
 the Board on February 21, 2013.
 Tanner's sole recommendation of the adopted Decision is based on the issues raised in his
 previously filed the proposed settlement and the agreement set forth below.

1 Tanner's *Petition for Reconsideration* is timely filed as it is due on or before March 23, 2013,
2 pursuant to the February 25, 2013 letter from Peter Mixon, General Counsel for CalPERS, to counsel for
3 Tanner which enclosed the copy of the Board's *Decision*.

4 Tanner reserves his right to file for a Writ of Administrative Mandamus should this *Petition for*
5 *Reconsideration* be denied, or should the Board uphold its earlier decision to adopt the *Proposed*
6 *Decision*, including based on the entire administrative record and on all legal and factual matters raised
7 therein. Tanner requests that he be notified immediately of any action taken by the Board, including a
8 decision to deny this *Petition for Reconsideration*, so that he may preserve his rights accordingly.

9 **I. Introduction**

10 The adopted *Decision* makes fundamental errors of law. Many of those fundamental
11 errors are about contract law, including misconstruing the law regarding parties' ability to
12 amend contracts, and the ability to correct contracts.

13 The adopted *Decision* also makes fundamental errors about the Public Employees
14 Retirement Law. As highlighted in part in Tanner's *Respondent's Argument* dated February 4,
15 2013, the adopted *Decision* makes fundamental factual and legal errors concerning the
16 difference between retired annuitants, non-active Members, and active CalPERS Members.

17 Factually, the record shows that Tanner worked for Vallejo in two separate tenures.
18 First, he served as *interim* City Manager from January 8, 2007 through March 7, 2007 (when he
19 was not an active CalPERS Member and could earn no service credit or other pension benefits).
20 Second, Tanner later served a separate tenure as *permanent* City Manager from March 8, 2007
21 through the end of his employment (when he qualified for reinstatement into active CalPERS
22 membership and thus earned additional pension benefits attributable to that employment).

23 The February 21, 2013 *Staff's Argument* submitted to the Board recommending adoption
24 of the *Proposed Decision* wrongly states the factual and legal errors. However, *Staff's Argument*
25 goes further in wrongly arguing interpretations of the PERL that are contrary to the law and to
26 the logic of the PERL itself.

27 CalPERS' staff stretches the law incoherently and incompatibly to reach a desired
28 outcome (a drastic reduction of Tanner's pension allowance), rather than a reasoned, neutral

1 consideration of the matters presented and the application of the law to that.

2 **II. Tanner Had Separate Tenures as *Interim* City Manager and Later as *Permanent***
3 **City Manager**

4 The *Decision* subsumes Tanner's initial service as Vallejo's *interim* City Manager into
5 his later service as *permanent* City Manager, treating the entire period as service in a single,
6 unified position. This contradicts the facts.

7 It is undisputed that Tanner was a retired CalPERS Member at the time he began
8 working as Vallejo's interim City Manager. It is undisputed that Tanner was not reinstated into
9 active membership by CalPERS until March 8, 2007, the day he began working as Vallejo's
10 permanent City Manager.

11 **III. Before Reinstatement, Tanner Could Not Have Been an Active Member**

12 It is also undisputed that Tanner received no service credit for his first two months at
13 Vallejo. None of his earnings for those first two months were reported to CalPERS. No
14 contributions were made to CalPERS attributable to those earnings. Moreover, CalPERS has
15 never instructed Vallejo to report Tanner's first two months of earnings or make contributions
16 for that employment. For all practical purposes, Tanner's first two months of employment at
17 Vallejo occurred completely outside the context of CalPERS membership. For CalPERS
18 purposes, Tanner could as easily have been working at some private company down the block
19 or simply sitting at home drawing retirement benefits.

20 CalPERS' adoption of the *Decision* expands CalPERS' power far beyond that allowed in
21 the PERL. CalPERS presumes to have the authority to consider the compensation earned by a
22 non-Member outside of active CalPERS membership.

23 CalPERS assumes the authority to use events and compensation outside active CalPERS
24 membership to reduce the pension (by reducing the compensation earnable) of a Member during
25 his or her active service.

26 Tanner wishes the Board to reconsider its decision. Adoption of the *Decision* establishes
27 a dangerous precedent beyond the powers granted to the Board by the PERL: In this case
28 CalPERS is looking at a single individual (albeit one with two different CalPERS statuses at

1 different times), but the logic could just as easily be extended to justify the reduction of a
2 pension benefit to any Member by comparing him or her to any non-Member, or to the
3 compensation earned outside of active membership.

4 **IV. Incorrect Understanding of "Retired Annuitant" Status**

5 CalPERS makes additional incorrect interpretations of the PERL as well. The *Decision*
6 improperly argues that Tanner's interim City Manager status was a sham because an "interim"
7 employee normally works in a position until replaced by some *other* individual as a permanent
8 employee. (Factual Finding No. 9.) There is no restriction in the PERL preventing a CalPERS
9 retiree from working for the State or a CalPERS-contracting agency as a retired annuitant, then
10 subsequently taking a permanent position with the same or similar duties but this time with
11 CalPERS benefits.

12 The record is clear that Tanner was retired at the time he began working for Vallejo. He
13 was not reinstated into active membership by CalPERS until March 8, 2007. As a matter of law
14 Tanner was retired annuitant. It is irrelevant under law whether Tanner or Vallejo denominated
15 Tanner a "retired annuitant". He simply had the status of a retired annuitant before reinstatement
16 because he was working less than 960 hours for a contracting entity after retirement. Tanner
17 was a retired annuitant under law because he was actually retired and earning a pension at the
18 time he first went to work at Vallejo. For that initial time period before reinstatement, Tanner
19 was not eligible to earn any additional CalPERS benefits until he was reinstated into active
20 membership.

21 CalPERS' staff argued before the Board that "Tanner made no effort to tie his argument
22 to the language in Board Regulation 570 or PERL section 20636(e)(2), which do not make any
23 distinction between "retired annuitant" status and active member status." (*Staff's Argument*,
24 2/21/13, page 2.) CalPERS misrepresents Regulation 570 and the PERL. Both address the
25 calculation of "final compensation" of a Member and how that will impact the individual's
26 pension allowance. Neither have anything to do with non-Member status, i.e. the status of a
27 retired annuitant. Neither Regulation 570 nor PERL Section 30636 have any purpose other than
28 to evaluate and analyze the compensation earned by CalPERS Members and then determine

1 what portion of that compensation should be included in "final compensation".

2 **V. The Decision Rests Upon a Veiled, But Unproven, Allegation That Tanner and**
3 **Vallejo Conspired to Illegally Inflate and Hide His Compensation**

4 Contrary to the undisputed evidence and argument presented by live witnesses under
5 oath subject to cross examination in the administrative hearing, CalPERS' staff argues that
6 Tanner's arrangements with Vallejo were a deliberate attempt to hide Tanner's expected
7 compensation.

8 CalPERS did not introduce any evidence or elicit any testimony that established its
9 "conspiracy" accusations against Tanner and effectively against Vallejo as well. Instead, it
10 simply substituted its own *opinions* for the facts established at hearing.

11 The uncontradicted testimony of Mayor Anthony Intintoli, Councilmember Stephanie
12 Gomes, Vallejo employees Debora Boutte and Dennis Morris, and Tanner himself establish (i)
13 that Vallejo knew it was contracting for eventual PERSible compensation of \$300,000-plus, (ii)
14 that Tanner's PERSible compensation amount was always available to the public (and in fact
15 was widely known in Vallejo and elsewhere), and (iii) that the only reason Vallejo entered into
16 a *corrected* contract concerning Tanner's permanent City Manager tenure was to correct
17 mistakes of law and facts in the prior contract.

18 The record is clear. Tanner insisted he would not accept the position of permanent City
19 Manager unless he earned \$300,000-plus in PERSible compensation. It is equally clear that
20 Tanner was retired. He could not earn *any* PERSible compensation until he was allowed to
21 reinstate by CalPERS, and that Vallejo was desperate to hire someone of Tanner's caliber as
22 quickly as possible. Vallejo therefore contracted to hire Tanner as in *interim* (and non-
23 CalPERS) employee with the understanding that he would earn the \$300,000-plus in PERSible
24 income as soon as he was reinstated on March 8, 2007.

25 CalPERS' *Decision* treads on precarious unmeritorious reasoning. CalPERS makes
26 unsupported political assumptions contrary to law. It violates its duties under the PERL.

27 **VI. Conclusion**

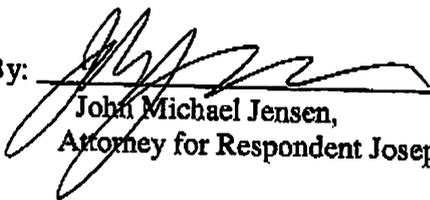
28 Tanner requests the Board reconsider and correct its mistakes in the *Proposed Decision*,

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and rule in Tanner's favor. *(Contrary to the reasoning of the Proposed Decision, the CalPERS Board can and must correct errors in its decisions. Those corrections will and must be given legal effect)*. The evidence supports the fact that Tanner earned what Vallejo openly contracted to pay him. It supports the fact that Tanner began at Vallejo while still in retirement. That period should not be used against him to reduce his pension. During that initial period, Tanner under CalPERS' rules was unable to earn a single penny in PERSible benefits. For that initial period, Tanner was beyond the reach of CalPERS law or regulations governing the employment and compensation of CalPERS Members. Tanner and Vallejo fully complied with all applicable PERL statutes or CalPERS regulations.

He is entitled to the full pension benefit he contracted for and earned. The CalPERS Board should set aside its prior adoption of the *Decision* and find in Tanner's favor.

Dated: March 15, 2013

By: 
John Michael Jensen,
Attorney for Respondent Joseph Tanner