

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent James W. Towns (Respondent Towns) submitted an appeal to CalPERS' determination that increases in his salary should not have been considered as part of his final compensation. Respondent Towns' original final compensation as reported by his employer Respondent Special District Risk Management Authority (Respondent SDRMA) was \$22,964.49 per month. Applying the formula applicable to him, CalPERS originally calculated his pension to be \$17,985.82 per month. After an audit of Respondent SDRMA was completed in 2012, CalPERS reduced Respondent Towns' final compensation to \$13,717 per month, which produced a pension of \$10,881 per month. Respondent Towns appealed CalPERS' determination.

Hearings on this matter took place over 10 days in 2015. Several Pre-Hearing Conferences were held, which resulted in orders affecting the presentation of evidence. Extensive pre and post-hearing briefs were submitted and considered. Respondent Towns was represented by counsel at all times during the hearing process. Respondent SDRMA did not appear at hearing, and a default was noted on the record.

Respondent Towns began employment with Respondent SDRMA as Executive Director/Risk Manager beginning November 15, 1994. He was last employed as SDRMA's Chief Executive Officer. On November 3, 2009, Respondent Towns signed an Application for Service Retirement, effective December 31, 2009. He retired with 35.9 years of service. His final compensation reported by Respondent SDRMA was \$22,964.49 per month, which resulted in Towns' retirement allowance of \$17,985.82 per month. Beginning December 31, 2009, CalPERS paid Respondent Towns this retirement allowance.

In 2012, CalPERS conducted an audit of Respondent SDRMA, and determined that increases in Respondent Towns' salary should not have been considered part of his final compensation. CalPERS determined that Respondent Towns received salary increases beginning in July 2005 totaling \$12,444.50 per month, or 67.41%, which did not meet the definition of "compensation earnable" under the California Public Employees' Retirement Law (PERL). In the same period, the average salary increase for other SDRMA employees was 9.9%, received in the form of Cost-of-Living-Adjustments (COLAs).

In 2013, CalPERS recalculated Respondent Towns' final compensation by removing the salary increases, but adding COLAs that other SDRMA employees had received from 2005 through 2009, resulting in a final compensation of \$13,717 per month. In 2014, CalPERS reduced Respondent Towns' monthly retirement allowance to \$10,881 per month.

The Administrative Law Judge (ALJ) found that Respondent Towns' final compensation refers to his compensation earnable, which is made up of payrate plus special compensation. Public Employees' Retirement Law section 20636(b)(1) provides that payrate is the normal rate of pay to similarly situated members of the same group or

class of employment as listed on publicly available pay schedules. The ALJ found that Respondent Towns is not a member of a group or class, because he is the sole SDRMA employee with a contract requiring him to report directly to the board. As such, Public Employees' Retirement Law section 20636(e)(2) limits his compensation earnable to the average increases during the 5 year period preceding retirement in compensation earnable reported by the employer for all employees in the same membership classification. As a result of his contract provisions, CalPERS may use the "look back" provision of 2 years prior to Towns' final compensation period of 3 years (2006-2009) to include a review of salary adjustment back to 2005.

Public Employees' Retirement Law section 20636(b)(1) also requires a publicly available pay schedule for services rendered on a full time basis during normal working hours. A pay increase may not be included in an employee's payrate unless it is published in a pay schedule. The ALJ looked at whether the reported payrate was contained in a publicly available pay schedule. Respondent Towns argued that the combination of board minutes, employment contracts, salary schedules for other employees, and proposed wage schedules were available on request, so they qualified as publicly available pay schedules. The ALJ rejected Respondent Towns' argument, reasoning that California Code of Regulations section 570.5 provides that a pay schedule cannot "reference another document in lieu of disclosing the payrate."

Respondent Towns argued that he relied on the CalPERS estimate of his retirement allowance provided in 2009, and that, had he known that CalPERS miscalculated, he would have delayed his retirement date so as to avoid the "look back" period of 2 years prior to his final compensation period of 3 years. The ALJ rejected this argument for several reasons. First, the estimate was provided under specific instructions that it was an unofficial estimate only. Second, the ALJ found that CalPERS cannot provide a higher retirement allowance than the law allows.

After evaluation of voluminous exhibits, multiple witnesses and completing 10 days of hearing, the ALJ found that good cause exists to deny Respondent Towns' appeal, because he did not establish his eligibility for a retirement allowance above that determined by CalPERS.

The ALJ also rejected Respondent Towns' defenses based on estoppel, laches, breach of fiduciary duty, res judicata, unclean hands, failure to notify, and CalPERS' duty to place him back in a position unaffected by the erroneous calculation. The ALJ reiterated the fact that CalPERS cannot be ordered to pay a pension based on compensation that does not comply with Public Employees' Retirement Law section 20636 and California Code of Regulations sections 570.5 and 571.

The ALJ concluded that Respondent Towns' appeal should be denied. 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.

November 16, 2016.

  
ELIZABETH YELLAND  
Senior Staff Counsel