

**ATTACHMENT C**  
**RESPONDENT(S) ARGUMENT(S)**

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November 4, 2016  
BY FAX AND BY MAIL

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



Re: James Towns, Respondent  
CalPERS Case No. 2014-0254, OAH Case No. 2014070494

Dear Ms. Swedensky:

Attached please find James Towns' *Respondent's Argument* for consideration by the Board of Administration at its November 16, 2016 meeting regarding the *Proposed Decision* issued by ALJ David B. Rosenman on August 25, 2016.

Please forward this to the members of the CalPERS Board of Administration.

Should you have any questions or need further information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to be "John Michael Jensen".

John Michael Jensen

JMJ:gm  
Enclosure

**James Towns' Respondent's Argument**  
**CalPERS Case No. 2014-0254, OAH Case No. 2014070494**

The *Proposed Decision* contains Legal Conclusions that are not correct and Factual Findings that are not supported by evidence in the record, reaches mutually contradictory conclusions, and is the result of an administrative process that violated Towns' due process rights.

Given the serious errors in the *Proposed Decision*, CalPERS cannot simply adopt it because it endorses a position that CalPERS' staff prefers, but must instead (a) correct the Legal Conclusions to be consistent with law, (b) correct the Factual Findings to those supported by evidence in the record, and (c) provide Towns fundamental due process by (i) rejecting the *Proposed Decision* and then either (ii) asking ALJ Rosenman to amend the *Proposed Decision* to correct the errors described herein or (iii) holding its own full Board hearing and then issue a *Decision* that is in accordance with the law and evidence presented in the administrative process.

**A. Proposed Decision Must Be In Accordance with Evidence Presented; CalPERS Is Required by Law to Reject a Proposed Decision Which Fails This Test**

While CalPERS is permitted to retain the OAH to conduct administrative proceedings and render *Proposed Decisions*, ultimately the Board, as final arbiter of the matter, must "guard the pass" and ensure that any *Decision* (including adoption of the *Proposed Decision* as CalPERS' own) is based on the correct law and consistent with the full and complete evidentiary record. Failure to do so would itself constitute error by CalPERS and subject CalPERS' actions to judicial review.

Moreover, the Board must do so based on the entire record, not simply isolated evidence supporting CalPERS' findings while disregarding conflicting relevant evidence in the record. (See *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4<sup>th</sup> 575, 585, discussing *Bixby v. Pierno* (1971) 4 Cal.3d 130 [parties and Court are bound by the administrative record].)<sup>1</sup> This requirement is all the more important given CalPERS' constitutional and statutory fiduciary duties to its membership. (*Cal. Const.*, art. XVI, §17(b); *Gov't Code*, §20151.)

Because of the page limitations, Towns cannot and is not attempting to identify all of the incorrect legal and factual findings in the *Proposed Decision*. Rather, he focuses on several crucial and interrelated errors which illustrate the inaccurate and biased approach of the *Proposed Decision*. In doing so, however, Towns reserves all rights, including his right to challenge other defects in the *Proposed Decision* (and/or CalPERS' endorsement of the flawed *Proposed Decision*) it in any future appeal or other litigation.

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<sup>1</sup> Although *California Youth Authority* dealt with decisions at the court level, the basic point also applies where the dispute is still at the administrative level: The agency is bound to review the entire matter, not simply rely on those parts of the record that support CalPERS' own preferred decision, including in the form of adopting an invalid *Proposed Decision*.

## **B. Wrong Understanding and Application of "Group or Class"**

Perhaps most fundamental to the ALJ's *Proposed Decision* upholding the drastic reduction in Towns' final compensation and pension calculation is an incorrect understanding of what constitutes a "group or class" of employees and how to determine this. To be blunt, the *Proposed Decision* abjectly fails to correctly state the legal requirements of a "group or class" determination, and then on goes on to apply that flawed legal standard to the facts of the case.

A correct application of the PERL's mandates on "group or class" to the factual evidence is no minor matter. Since Towns does, in fact, belong to a "group or class" with other SDRMA employees, then the two year "look back" period in *Government Code* section 20636(e)(2) does not apply.

Since Towns received no increases in compensation whatsoever during his final three years at SDRMA, other than the COLA increases every SDRMA employee received, his salary during his final three years never exceeded the salary increase of anyone else at the agency and must be used in calculating his final compensation.

**"Group or Class": Proposed Decision Ignores the Clear Language of the PERL.**  
PERL section 20636(e)(1) says that group or class "means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related grouping. One employee may not be considered a group or class."

Towns presented evidence that he as CEO was in a group or class with other Chief Officers or Chief Executives, including the COO who performed many of the exact same job duties as Towns in the same location. A neutral reading of the Section 20636(e)(1) criteria would have placed Towns in a group or class.

Misconstruing the law and facts, the ALJ, however, ignored and/or misapplied the specific criteria set forth in Section 20636(e)(1). Instead, the ALJ focused on criteria never mentioned in the PERL, including that Towns was (a) the only SDRMA employee who was hired on contract (which was not accurate and contrary to the record) and (b) the only one who reported to the SDRMA board (which is not a criteria for determining group or class in Section 20636(e)(1)). No justification was offered for departure from the statutory language or the ALJ's failure to apply the categories described in the PERL.

Further, the ALJ's conclusions about the other factors do not hold up. If anything, these factors *support* the idea that Towns was in the same "group or class" as other chief officers:

SDRMA created the Chief Operating Officer position in Fall 2005. Regarding an agreement, SDRMA hired Greg Hall into the COO position by way of what CalPERS' witness and SDRMA CFO Paul Frydendal described as a November 23, 2005 "letter offer" which officially offered Hall the position, set forth the essential terms of employment, and required Hall to sign indicating acceptance of the terms. Hall signed the contract. The only way the ALJ can conclude nobody else was hired on contract is by engaging in semantical gymnastics to distinguish something labeled "contract" from a legally equivalent document that does not have that formal title. This flaunts basic principles of contract law.

SDRMA board minutes and related documents admitted into evidence also show that Hall, Frydendal and other chief officers regularly made presentations to the SDRMA board about agency operations and advocated for certain actions. The ALJ, however, used language in Towns' employment contract and job description saying that he reported to the board to wrongly conclude, contrary to the evidence, that Towns was the *only* SDRMA employee who did so.

**No Requirement That Members of a Group or Class Perform Identical Jobs.** The *Proposed Decision* also concludes without foundation that different individuals cannot be part of the same "group or class" unless they perform the same tasks or operate under the same employment strictures as everyone else. This is without legal support or authority.

This also contradicts the findings of *Prentice v. Bd. of Admin., California Pub. Employees' Ret. Sys.* (2007) 157 Cal.App.4th 983, a case that CalPERS relies on. The *Prentice* court opined that "PERS argues, and the trial court found, Prentice was a member of the Management Confidential class of city employees that, as of November 2003, included 42 managers and assistant managers of other city departments." (*Prentice*, at 992.)

By definition, managers and assistant managers perform dissimilar duties and operate under dissimilar employment requirements, including the basic fact that assistant managers by definition report to and function under the direction of managers. Yet *Prentice* found them to be members of the same class. The same applies in this case. Towns is in a "group or class".

**Comparison of Duties of the CEO and COO.** The evidentiary record establishes (and even the *Proposed Decision* admits in part) that between May and December 2005, the SDRMA board carried out a multi-faceted restructuring of SDRMA, including restructuring the duties and responsibilities of the CEO and COO positions. As part of that restructuring, SDRMA's board created the position of Chief Operating Officer to perform many of the administrative and time-consuming day-to-day duties and responsibilities that the CEO position had formerly performed. This was confirmed by former SDRMA board members Ken Sonksen and David Aranda, SDRMA CFO Frydendal, SDRMA insurance broker Karl Sneider, and by Towns himself.

The *Proposed Decision*, however, takes a contrary position, finding that Towns (as CEO) continued to perform the same duties after hiring of the COO as he had before. Leaving aside that this finding is directly refuted by the evidentiary record and therefore has no foundational support, it also requires the *Proposed Decision* to take mutually self-contradictory positions: Either (a) Towns performed the same duties as before (meaning he was now *sharing* those duties with the COO) and therefore they were in the same group or class "because they share similarities in job duties..." (*Gov't Code*, §20636(e)(1) or (b) Towns *no longer* performed the duties because they were now done by the COO, in which case Towns had *de facto* taken on a different position than he held before.

Under the statute, it cannot be the case that the CEO and COO performed the same duties in the same location at the same Chief Executive level, yet are not in the same group or class.

The implications of the errors in the ALJ's logic are profound: If the CEO (Towns) and COO (Hall) were performing the same duties, they were in a "group or class" of at least two. Since they are in the same group or class, there is no authority to evaluate Towns' 2005 salary increase (more than three years prior to retirement) because it is outside the three-year applicable

period for determining final compensation.

If, on the other hand, they were performing *different* duties, then Towns was now performing a *different* job than before and therefore would be eligible for a corresponding new base salary. CalPERS' Jimenez acknowledged in sworn testimony that a change in duties could basically start a new job, but then admitted that she could not recall if she looked at Towns' duties to see if they changed in December 2005, never asked SDRMA if Towns' duties had changed, does not know if anyone else at CalPERS did, and admitted this was not considered or included in the criteria that she evaluated. If it was a new job, then the higher CEO pay rate is PERSible, and no look-back period applies.

**C. Unsupported Conclusion That All Members of a "Group or Class" Must Make the Same Salary**

As a "fall back" position, the *Proposed Decision* finds that even if Towns *were* part of a group or class of other chief officers, his compensation would be limited to the exact amount made by the other chief officers. There is no support in the PERL, case law, or common sense for this position.

First, a group or class can include people with different positions with different pay rates. The PERL does not hold that the positions and the salaries for members of a "group or class" must be **identical**. Instead, the payrate must be the "normal monthly rate of pay or base pay of the member [compared to] *similarly situated members* of the same group or class..." (*Gov't Code*, §20636(b)(1), emphasis added.)

In other words, employees doing the *same job* or holding the *same position* must make the same rate of pay, but not all members in the "group or class" are required to be paid the identical amount. Further, those holding the same position must be *eligible* for the same pay range, but two Secretary I's could make different salaries, for example, based on seniority and steps on the civil service pay scale, and still be in the same group.

Any contrary finding would either mean that every different job position would by definition have to be in a separate "group or class" (e.g. Secretary I, II, etc.) or even more absurd that any time a Secretary I got a merit increase on the salary scale because of seniority or superior performance, it would put them in a different "group or class" than their fellow Secretary I's. For agencies with small staffs and even many with large ones, it would effectively mean everyone would end up in a "group or class" of one. Adoption of such a mistaken interpretation would require CalPERS to make individualized evaluations and determinations for virtually every retiree in the system.

Second, the case law refutes this Legal Conclusion. In *Prentice*, Mr. Prentice was in the Management Confidential class of 42 managers and assistant managers. Clearly, the managers hold different positions than the assistant managers. Who would possibly take a position of manager in such a city if they were limited to the pay rate earned by their *assistant* managers? Further, *Ventura County Deputy Sheriffs' Assn. v. Bd of Ret.* (1997) 16 Cal.4<sup>th</sup> 483 found that "[w]ith the exception of overtime pay, items of 'compensation' paid in cash, *even if not earned by all employees in the same grade or class*, must be included in the 'compensation earnable' and 'final compensation' on which an employee's pension is based." (*Ibid*, at 487, emphasis added.)

The PERL allows that (i) a "group or class" can include employees in holding different titles or earning different salaries so long as they are "considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related grouping... (*Gov't Code*, §20636(e)(1); (ii) even "similarly situated" employees within a larger "group or class" can make different salaries, so long as they are *eligible* for the same basic compensation; and thus (iii) when the PERL limiting compensation increases to the average increase received by others, it is talking about *percentage* increases (not absolute dollars) to prevent one employee from benefiting in a manner denied to all other employees.

**D. CalPERS Must Apply the PERL in Calculating Towns' Final Compensation**

The *Proposed Decision* contains other legal errors, e.g. the finding that Towns is entitled to no increase in his final compensation beyond the 9.9% COLA increases received by the other SDRMA employees violates the mandate of the very section of the PERL it claims to uphold.

Section 20636(e)(2) says that compensation increases for employees not in a "group or class" must be limited to "the average increase in compensation earnable ... *for all employees* who are in the same membership classification." CalPERS' witness Jimenez testified that this meant the average of the increases received by everyone who worked at SDRMA. Yet Jimenez acknowledged that CalPERS never even *asked* about increases received by most of the SDRMA staff during its audit review, and thus knew nothing about salary increases, merit promotions to higher steps on the salary scale, or any other increases.

Further, Jimenez admitted that CalPERS *did* know about the salary increases received by others in the chief officers' group, but CalPERS and the ALJ omitted any evaluation of average salary increases. At the very least, Towns is entitled to have his pension increased for the average *percentage* increase of other chief executive employees over the same time period. The *Proposed Decision* itself cites the fact that the annual salaries of others in the chief officers' group went from \$90,000 to \$129,000 during Towns' three-year final compensation period—i.e., an increase of 43.3%—*as well as* the COLA increases.

But none of this was included in the calculation of "average" increases, or factored at all into the *Proposed Decision's* conclusion that Towns deserved *none* of his salary increase. CalPERS cannot cite Section 20636(e)(2) only to then ignore it.

Moreover, Greg Hall took over as CEO on January 1, 2010, the day after Towns retired. Even though he was hired as a probationary employee, and admittedly had far less experience than Towns, Hall began at an annual salary of \$185,000, more than \$20,000 more than the \$164,610 final compensation awarded to Towns. Hall's salary has grown since to \$236,000.

**E. CalPERS Cannot Adopt a Proposed Decision Which is Self-Contradictory**

There are too many Legal and Factual errors in the *Proposed Decision* to address in this brief Respondent's Argument, but some of the critical errors include where the ALJ fails to address or even include credible testimony of the only percipient witness, Ken Sonksen :

The *Proposed Decision* completely fails to mention the testimony of former SDRMA

board member Ken Sonksen—the only percipient witness and the only surviving member of the board subcommittee that evaluated the CEO restructuring in 2005 and established a new base salary— Sonksen testified that SDRMA's board established the new CEO's higher base salary as compensation for the position having to perform new duties and different qualitatively duties.

Sonksen said explicitly that the increase was based on the CEO's new and increased responsibilities, and that this increase occurred as a result of the board requiring the CEO to provide more long term guidance and leadership to the organization. Sonksen's testimony was not challenged and was not limited in any way. Yet Sonksen's crucial, and only percipient, testimony is never even mentioned in the *Proposed Decision*.

Additionally, the *Proposed Decision* also says in several places that the 2005 salary increase was "in part in recognition by SDRMA of [Towns'] past performance but never clearly states *what* portion. Yet, even crediting this incorrect reasoning, no increase was allowed for the part of the increase which was not for past performance." The vague and imprecise nature of the findings cannot be cured by disallowing the *entire* salary increase.

#### F. No Right to Seek Recoupment Raised, No Accusation , Violation of Due Process

Finally, Towns advises CalPERS that even if it should adopt the *Proposed Decision* (or reach a similar *Decision* on its own), No issue of recoupment was raised in the *Statement of Issues*. CalPERS has **no right to seek recoupment** of any alleged "overpayments" to Towns in the past. To have sought recoupment, CalPERS would have needed to file an *Accusation* and allow significantly more due process rights to Towns than CalPERS allowed. Without due process, and without proper pleading, CalPERS cannot subsequently seek to reduce the pension to recoup "overpaid" monies or otherwise recover funds. Recoupment would be a taking of Towns' personal property, and cannot be done in this matter without violating due process.

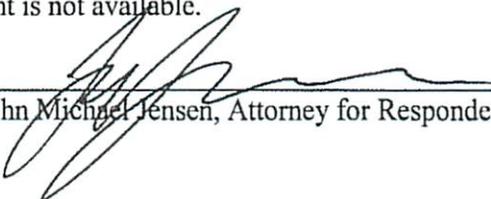
Moreover, CalPERS waived its opportunity to seek repayment or recoupment because it failed to raise it in the administrative proceedings. CalPERS' *Statement of Issues* on July 8, 2014, says that "[t]his appeal is limited to the issue of whether CalPERS has correctly determined that respondent Towns' July 2005 67.4% salary increase, in the amount of \$12,444.50 per month, should be excluded from the calculation of his final compensation."

CalPERS excluded recoupment from the subject matters to be decided at the administrative proceeding and never raised it in the hearing. It cannot now be sought.

#### G. Conclusion

The *Proposed Decision* is fundamentally and irreparably flawed. The CalPERS Board cannot adopt it. CalPERS is obligated to either request a revised *Proposed Decision* that does so, or to reject the *Proposed Decision* and conduct its own formal Board hearing into the matters included in the *Statement of Issues*. Recoupment is not available.

Dated: November 4, 2016

  
John Michael Jensen, Attorney for Respondent

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