

ATTACHMENT A
RESPONDENT'S PETITION FOR RECONSIDERATION

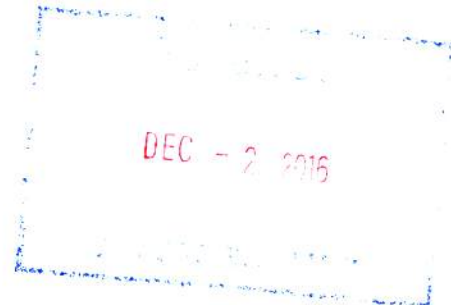
ATTACHMENT A

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DATE: December 2, 2016

TO: Cheree Swedensky, Assistant to the Board
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**Re: In the Matter of the Final Compensation Calculation of JAMES
TOWNS, Respondent, and SDRMA, Respondent**

Request for Reconsideration

Page 1 of 9

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December 2, 2016
BY FAX AND BY MAIL

Cheree Swedensky
Assistant to the Board
CalPERS Executive Office
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Sacramento, CA 94229-2701

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

Dear Ms. Swedensky:

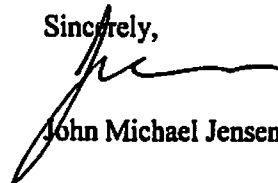
Attached please find James Towns' *Request for Reconsideration* for consideration by the Board of Administration at its December 21, 2016 meeting regarding its November 16, 2016 decision to adopt the *Proposed Decision* issued by ALJ David B. Rosenman.

This *Request for Reconsideration* is being filed by December 2, 2016, pursuant to the November 21, 2016 letter from General Counsel Matthew Jacobs.

Please forward this to the members of the CalPERS Board of Administration. Additionally, Mr. Towns requests that we receive a written reply from the President of the CalPERS Board of Administration to our *Request for Reconsideration*.

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

Sincerely,



John Michael Jensen

JMJ:gm
Enclosure

James Towns' Request for Reconsideration
CalPERS Case No. 2014-0254, OAH Case No. 2014070494

Respondent James Towns petitions for *Reconsideration* of the Board of Administration's November 16, 2016 adoption of Administrative Law Judge David Rosenman's *Proposed Decision* in the above-captioned administrative appeal. He asks that the Board reject the biased and prejudicial advice offered to the Board by CalPERS' staff and conduct its own hearing.

It appears to Mr. Towns that the Board did not objectively review his *Respondent's Argument* or the administrative record in the case prior to its decision. One sharp indication of this is that the Board failed and/or refused to address explicit contradictions in the *Proposed Decision's* findings and reasoning that Towns identified in his *Respondent's Argument*.

I. CalPERS Appears To Have Adopted the Proposed Decision Simply To Endorse A Position Favored by CalPERS' Staff, Violating CalPERS' Fiduciary Duties and Mr. Towns' Right To Due Process

In considering the *Proposed Decision*, CalPERS was required to ensure that a *Final Decision* was based on the correct law and consistent with the full and complete evidentiary record. Moreover, the Board was required to do so based on the *entire* record, not simply isolated evidence supporting CalPERS' findings while disregarding conflicting relevant evidence. (See *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 585, discussing *Bixby v. Pierno* (1971) 4 Cal.3d 130 [parties and Court are bound by the administrative record].)¹

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.)

Yet the Board's adoption of the *Proposed Decision* fails to even acknowledge, much less address, fundamental mutually self-contradictory positions taken in the *Proposed Decision* outlined below. CalPERS' failure to base its *Final Decision* on applicable law, and instead to adopt a legally flawed *Proposed Decision* without even addressing the flaws, constitutes arbitrary and capricious actions on CalPERS' part, including in violation of its fiduciary duties.

Perhaps the Board relied on the distorted and one-sided view of the evidence presented in CalPERS' *Staff's Argument* which (i) omitted crucial percipient and un-contradicted testimony and (ii) ignored foundational contradictions in the *Proposed Decision*.

The Board, however, cannot simply defer to CalPERS' staff, but must independently determine the matter, including as the Board owes fiduciary duties to ensure that the *Final Decision* accurately is based on the law and facts, and not simply rubber stamping staff's biased litigation position.

¹ 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*.

II. CalPERS' Press Release is Defamatory and Reveals CalPERS' Bias

The biased and distorted nature of the proceedings is also revealed by CalPERS' defamatory Press Release issued on November 16, 2016 which contains false and defamatory statements, including CalPERS' statements that Mr. Towns was attempting "pension spiking" and "pension abuse" and sought to illegally "convert his merit bonuses to base salary in an effort to boost his pension". For example, the Press Release states and implies that Mr. Towns had a motive or intent to spike his pension. The statements will not be repeated here as they are false.

We also note that the Press Release was issued immediately following the CalPERS November 16 Board meeting and before Mr. Towns' due process rights have been completed.

CalPERS' statements are knowingly false and contradicted by the ALJ's findings in the adopted *Final Decision*. CalPERS' allegations were explicitly considered and rejected by the ALJ, who ruled that there was insufficient evidence to prove (i.e., CalPERS had failed to demonstrate) that any conversion or attempted conversion occurred.

SDRMA agreed in its May 24, 2013 appeal letter, stating that "[i]t cannot be emphasized enough that at no point did SDRMA or Mr. Towns intend to or attempt to artificially inflate Mr. Towns' payrate for the purpose of increasing his retirement allowance. Rather, the compensation arrived at effective July 1, 2005, was approved by the Board after consideration of Mr. Towns' outstanding performance and the compensation paid to similarly situated chief executives of other similar agencies."

CalPERS' defamatory statements are not only false (and completely unsupported by the *Proposed Decision*) but have seriously harmed to Mr. Towns' professional and personal reputation.² The statements' un-privileged publication expose Mr. Towns to hatred, contempt, ridicule, or disgrace, cause him to be shunned or avoided, and have injured him in his occupation.

CalPERS' knowingly false statements injure Mr. Towns in respect to his office, profession, trade or business, by imputing to him general disqualification or by imputing something that has a natural tendency to lessen his profits, and otherwise by natural consequences cause him actual damage. CalPERS distributed the statements to impugn Mr. Towns, and the natural and probable effect of the publication in the mind of the reader would be to regard them as defamatory.

Mr. Towns is a private figure. Even if the calculation of his pension is a matter of public concern, the matter of the *Proposed Decision* was a private matter and indeed, the published statements were false. CalPERS knew or should have known the statements were false. CalPERS published the statements maliciously and in reckless disregard of whether the matter was false. The publication is defamatory *per se*, not privileged, and damage is presumed. CalPERS'

² CalPERS' failure to include references or links in the Press Release to Mr. Towns' *Respondent's Argument* and instead to only include CalPERS' side of the dispute illustrates what appears to be a deliberate effort to deny the public the right to examine the entire picture.

publication of the defamatory statements caused Towns to suffer special damages.

We request that CalPERS officially withdraw the November 16, 2016 Press Release and immediately issue a corrected one. If CalPERS fails to correct these statements and correct the impression that these statements were intended to make, Mr. Towns will pursue all legal remedies available to him.

III. CalPERS' Adoption of the *Proposed Decision* Implicitly Ratifies the ALJ's Complete Failure to Include the Only Percipient Testimony About the 2005 Salary Increase

As CalPERS' staff well knows but apparently did not advise the Board of, the *Proposed Decision* completely fails to mention the testimony of former SDRMA board member Ken Sonksen—the only surviving percipient witness.

Mr. Sonksen testified as the only surviving member of the SDRMA board subcommittee that evaluated the CEO restructuring in 2005 and established a new base salary for the new CEO position arising from the new duties of the CEO position. He testified that SDRMA's board established the new higher base salary as compensation for the fact that the CEO was now having to perform new and qualitatively different duties than before.

Mr. Sonksen testified as the only percipient witness that new base salary was the result of an 8-month process involving an examination of the CEO position's new responsibilities and duties in leading a radically changed SDRMA, the establishment of a new CEO job description, the hiring of a COO to take over many day-to-day duties of the CEO to free the CEO up to handle new responsibilities, and hiring Towns into the new CEO position, all after careful investigation to ascertain comparable salaries paid to chief executives in other similar agencies.

Mr. Sonksen explicitly testified that the new higher base salary for the new CEO position 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.

And Mr. Sonksen testified that the subcommittee did *not* come up with the higher salary by adding up prior merit bonus amounts as CalPERS alleged throughout the proceedings. The subcommittee did not even know what Towns had received. Mr. Sonksen further testified that the salary increase was recommended by the subcommittee and adopted by the Board and reported in open session and that Mr. Towns had no role whatsoever in setting the salary.

Mr. Sonksen's testimony was not challenged and was not limited in any way. Yet Mr. Sonksen's crucial, and only percipient, testimony is never even mentioned in the *Proposed Decision* and CalPERS' staff never flagged this for the CalPERS Board's consideration in its deliberations.

Further, *Proposed Decision* vaguely states in several places that the 2005 salary increase was "in part in recognition by SDRMA of [Towns'] past performance" (emphasis added), but never clearly states *what* portion and instead overrules the *entire* salary increase. CalPERS' adoption of the *Proposed Decision* maintains the confusion.

IV. The Proposed Decision Misunderstands and Misapplies the Law; By Adopting It, CalPERS Is Itself Answerable For Those Legal Errors

The *Proposed Decision* makes a number of serious legal errors in the application of the PERL. Failure to correct them (and CalPERS' staff's failure to even point them out to the Board) constitutes legal error by CalPERS itself. Several illustrative examples include the following:

A. Application of Wrong Criteria to Determine "Group or Class"

Perhaps most fundamental to the *Proposed Decision's* endorsement of 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.

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.

Misconstruing the law and facts, however, the ALJ 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 also untrue as demonstrated by admitted evidence). No justification was offered for departure from the statutory language or the ALJ's failure to apply the categories described in the PERL, and CalPERS' blanket adoption of the *Proposed Decision* mean that CalPERS itself has also departed from the statutory requirements.

B. Failure to Reconcile Mutually Contradictory Positions Re "Group or Class"

As pointed out in Mr. Towns' *Respondent's Argument*, the *Proposed Decision* completely fails to address the fact that SDRMA created a new Chief Operations Officer (COO) position in late 2005 to take over the day to day duties that had been performed by Chief Executive Officer (CEO) Towns, a fact acknowledged by the *Proposed Decision*. This leaves only two alternatives: either (i) Mr. Towns performed the same duties as before (meaning he was now *sharing* those duties with COO Greg Hall) and therefore they were in the same group or class "because they share similarities in job duties..." (*Gov't Code*, §20636(e)(1) or (ii) 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 PERL, the CEO and COO cannot have performed the same duties at the same Chief Executive level, yet not be in the same group or class. The implications of the ALJ's errors 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 Mr. Towns was now

performing a *different* job than before and therefore would be eligible for a corresponding new base salary. If it was a new job, then the higher CEO pay rate is PERSible, and no look-back period applies, and Mr. Towns received no salary increase greater than any other employee during his applicable three-year final compensation period.

C. Failure to Follow Case Law Re "Group or Class"

The *Proposed Decision* also fails to apply precedential case law governing the determination of "group or class" issues and instead substitutes *contrary* criteria that have been rejected by the courts.

For example, the *Proposed Decision* concludes without foundation that 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 directly contradicts the findings of *Prentice v. Bd. of Admin., California Pub. Employees' Ret. Sys.* (2007) 157 Cal.App.4th 983 which found 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.)

Managers and assistant managers by definition perform dissimilar duties and operate under dissimilar employment requirements, including that assistant managers 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 and Mr. Towns is in a "group or class" with other Chief Officers or Chief Executives, even if they reported to him and functioned under his direction.

The *Proposed Decision* also proffered a "fall back" position that even if Mr. 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.

As discussed in *Respondent's Argument*, the PERL says nothing about how the positions or salaries of members of a "group or class" must be identical, but instead that 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 be eligible for the same rate of pay, but not all members in the "group or class" are required to be paid the identical amount and even those holding the same position can be at different points on the salary scale based on seniority or performance.

Again, case law refutes the *Proposed Decision's* logic and by implication CalPERS' flawed adoption of the *Proposed Decision's* argument. In *Prentice*, Mr. Prentice was in the Management Confidential class of 42 managers and assistant managers where by definition the managers and assistant managers were eligible for different compensation. The court in *Ventura County Deputy Sheriffs' Assn. v. Bd of Ret.* (1997) 16 Cal.4th 483 also 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.)

D. Endorsement of CalPERS' Failure to Apply the PERL in Calculating Towns' Final Compensation

As Mr. Towns' *Respondent's Argument* pointed out, the *Proposed Decision* found that Towns is entitled to no increase in his final compensation beyond the 9.9% COLA increases received by the other SDRMA employees. This finding violates the mandate of the very section of the PERL CalPERS claims it is upholding in reducing Mr. Towns' final compensation.

After concluding (improperly and without foundation) that Mr. Towns was in a "group or class" of one, CalPERS contends that the new compensation he received in late 2005 violates the mandate of PERL section 20636(e)(2) 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." Yet CalPERS did no such thing, a fact proven at the hearing yet ignored by both the *Proposed Decision* and by CalPERS' adoption of it.

CalPERS' own witness at the hearing—Tomi Jimenez, at that point CalPERS' assistant division chief of the Customer Account Services Division—admitted in sworn testimony that this meant the average of the increases received by everyone who worked at SDRMA. Yet she acknowledged (a) 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; and (b) that CalPERS *did* know about the salary increases received by others in the chief officers' group but CalPERS never included them in its calculation 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%—and that they received the COLA increases on top of that. Greg Hall, Mr. Towns' replacement as CEO (with far less experience and hired on a probationary basis) started the day after Mr. Towns' retirement at a \$185,000 annual salary, \$20,000 more than the \$164,610 that CalPERS has allowed for Mr. Towns.

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

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

Although CalPERS' adoption of the *Proposed Decision* never addresses the issue of recoupment of any alleged "overpayments" to Mr. Towns, any attempt by CalPERS' staff to carry out such recoupment would be improper and the Board should instruct staff not to do so.

No issue of recoupment was raised in the *Statement of Issues*. 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.

Further, CalPERS has now 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."

VI. Conclusion

The *Proposed Decision* is fundamentally and irreparably flawed. The adoption of that *Proposed Decision* imputes the fatally flawed nature of the *Proposed Decision* to CalPERS itself.

Mr. Towns therefore requests that the CalPERS Board (a) grant his *Request for Reconsideration*, (b) hold its own full hearing on the matter, (c) correct the errors in the *Proposed Decision* and (d) issue a new *Decision* awarding Mr. Towns the pension CalPERS originally calculated.

Anything less would be tantamount to flaunting CalPERS' mandate to act within the law simply because it enables CalPERS to reach a politically expedient result.

Dated: December 2, 2016



John Michael Jensen, Attorney for Respondent