

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

Respondent James W. Towns (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision (PD) dated August 25, 2016. The Board considered and adopted the PD on November 16, 2016. For reasons discussed below, Staff argues the Petition should be denied.

Respondent was employed by Special District Risk Management Authority (SDRMA) as its Executive Director/Risk Manager and Chief Executive Officer from 1994 until he retired on December 31, 2009. By virtue of his employment, he was a local miscellaneous member of CalPERS.

In 2013, CalPERS determined Respondent's July 2005 salary increase of 67.41% should be excluded from his final compensation under the California Public Employees' Retirement Law (PERL). Respondent appealed.

The matter was heard by the Office of Administrative Hearings (OAH) in Los Angeles, with an ALJ presiding over a ten-day hearing on April 22-24 and 27-28, 2015 and December 7-11, 2015. Respondent was represented by attorney John M. Jensen. CalPERS and Respondent each submitted opening and closing briefs and together presented close to 250 exhibits and seven witnesses at the hearing. The ALJ's PD upheld CalPERS' determination and denied the appeal.

Respondent disagreed with the ALJ's findings and conclusion and submitted Respondent's Argument on November 4, 2016 to be considered as part of the November Board Agenda Item. Respondent's Argument was reviewed and considered by the Board before the November 16, 2016 meeting.

Respondent now submits a Petition for Reconsideration, echoing (in many places verbatim) the arguments previously considered by the Board and adding nothing new. The grounds stated in the Petition are nearly identical to the earlier-submitted Respondent's Argument as to why the Board should not adopt the PD. Respondent raises no new factual or legal basis that warrants reconsideration.

First, Respondent argues the ALJ ignored the testimony of former SDRMA Board member, Ken Sonksen, regarding the reasons for Respondent's 2005 salary increase. Respondent misconstrues the substance and impact of Mr. Sonksen's testimony—for example, asserting Sonksen was claiming to "hir[e] Towns into [a] new CEO position." In fact, when asked if the SDRMA Board created a new job or new position for Respondent in 2005, Mr. Sonksen answered unequivocally: "No. In our planning meetings, we never talked about a new job." The PD (at Factual Findings 15, 16, 18) summarized all the evidence Respondent presented on this point, but found, "[t]he evidence does not support the conclusion that a new CEO position was created or that Towns was promoted and, therefore the salary increase could be included in the formula for Towns' retirement allowance on that basis." The PD (at Factual Findings 22, 23) explicitly found, "testimony from board members does not support the conclusion

that a new position was created. Several described the 2005 job description as an update to include tasks being performed by Towns....There is evidence from Board members that no new position was being created in 2005." It is not the case that the ALJ ignored Mr. Sonksen's testimony. After considering Sonksen's and another SDRMA Board member's testimony, the ALJ simply disagreed with Respondent's characterization.

Second, Respondent claims the ALJ's legal and factual analysis is flawed as to whether Respondent was part of a "group or class." The PD found Respondent was not part of a group or class with others because he was the sole employee with a contract requiring him to report to the SDRMA Board. The PD specifically examined the criteria set out in Public Employees Retirement Law section 20636(e)(1) and found (at Factual Finding 28) "the facts do not support a finding that Towns was in a group or class of chief officers, as they did not share similarities in job duties, were not in a collective bargaining unit, and there were other, significant differences between Towns' work for the board and the others' work for SDRMA."

The cases cited by Respondent do not support his position. In *Prentice v. Bd. (CalPERS)* (2007) 157 Cal.App.4th 983, the court accepted CalPERS' and the employer's position that plaintiff was a member of a Management Confidential class which included 42 managers and assistant managers of other city departments. The court did not analyze whether these managers and assistant managers were properly included in the class under the criteria set out in section 20636(e)(1). The other case cited by Respondent, *Ventura County Deputy Sheriff's Assn. v. Bd. of Ret.* (1997) 16 Cal.4th 483, does not address the "group or class" issue at all.

Third, Respondent argues, even if he was not in a "group or class," CalPERS' recalculation of his final compensation was incorrect. He claims other SDRMA chief officers received a 43.3% salary increase during his final compensation period. This misconstrues the evidence, which showed the salaries of the Chief Operating Officer, Chief Financial Officer and Chief Risk Officer *ranged* from \$90,000 to \$129,000—not that all, or any one of them, got a salary increase of \$39,000 (43.3%).

CalPERS determined, and the ALJ agreed, a 9.9% increase was appropriate for Respondent, in line with the 9.9% average salary increase for other miscellaneous employees at SDRMA, received in the form of Cost-of-Living Adjustments (COLA). This is consistent with PERL section 20636(e)(2) (for a member not in a group or class, limiting compensation earnable to the average increase, during the 5-year period preceding retirement, reported by the employer for all employees in the same membership classification).

Finally, Respondent charges that CalPERS cannot recoup overpayments he received, while acknowledging this issue was not before the ALJ. Similarly, Respondent alleges a press release issued by CalPERS *after* the Board adopted the PD was defamatory. The press release was obviously not at issue in the appeal, not before the ALJ at hearing

and not before the Board at its November 16, 2016 meeting. Neither the prospect of recoupment nor the press release are valid grounds for reconsideration.

In his Petition for Reconsideration, Respondent does not challenge the ALJ's findings that Respondent's July 2005 67.4% salary increase was never reflected on a publicly available pay schedule as required by the PERL section 20636(b)(1) and regulations. The ALJ concluded that, regardless of whether Respondent is determined to be in a "group or class" with others, this serves as an independent basis to uphold CalPERS' determination and deny Respondent's appeal.

For all of the reasons stated above, Staff argues the Board should deny the Petition for Reconsideration. Because the PD applies the law to the salient facts of this case, the risks of denying the Petition are minimal. Respondent may file a writ petition in Superior Court seeking to overturn the decision of the Board.

December 21, 2016


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