ATTACHMENT E

THE PROPOSED DECISION

ATTACHMENT E

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues Against: JAMES TOWNS, and SPECIAL DISTRICT RISK MANAGEMENT AUTHORITY, Respondents.	Board Case No. 2014-0254 OAH No. 2014070494

PROPOSED DECISION

The hearing in this matter was before David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), at Los Angeles, California, on April 22, 23, 24, 27 and 28, and December 7, 8, 9, 10 and 11, 2015.

Complainant Renee Ostrander, then Acting Division Chief, Customer Account Services Division, California Public Employees' Retirement System (PERS), was represented by Edward Gregory and Sheri Cheung, Steptoe & Johnson LLP. Respondent James Towns was present for the hearing and was represented by James Jensen, Attorney at Law. Special District Risk Management Authority (SDMRA) did not appear in this matter, despite being served with notice of the hearing.

The record remained open for briefing, as noted in more detail below. The record was closed and this matter was under submission as of August 2, 2016.

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Briefing and the amended protective order

At and after conclusion of the hearing, the following documents were filed on the dates indicated and are marked for identification as indicated. (Complainant's exhibits, and some OAH orders, are numbered 1-115; respondent Town's exhibits begin at number 201.)

a. Interim protective orders were in place during the hearing. On December 15, 2015, a written protective order was served on the parties; exhibit 107. The protective order was amended later (see paragraph g, below).

b. Complainant's post-hearing brief, March 11, 2016. This brief contains references to a portion of exhibit 44 and portions of transcripts that were sealed. A redacted version of the brief is marked exhibit 108. An un-redacted version of the brief, and the sealed portions of exhibit 44 and transcripts, were lodged and are marked exhibit 108A, and are sealed.

c. Respondent Towns' request for official notice, etc., May 6, 2016; exhibit 248. Complainant's objection to official notice, May 16, 2016; exhibit 109. Respondent Towns' response re official notice, etc., May 16, 2016; exhibit 249. Order granting request for official notice, May 17, 2016; exhibit 110. In this Order, the subject of the request, i.e., a PERS Circular Letter, is noted as being marked and received as exhibit 247.

d. Respondent Towns' post-hearing brief, May 18, 2016; exhibit 250.

e. Complainant's reply brief, June 30, 2016. This brief contains references to sealed exhibits. A redacted version of the brief is marked exhibit 111. An un-redacted version of the brief was lodged, marked exhibit 111A, and is sealed.

f. Respondent Towns' request that the Court unseal exhibit 44, etc., July 29, 2016; exhibit 251. Complainant's opposition to this request, July 29, 2016; exhibit 112. Order denying requested modifications to protective order, August 2, 2016; exhibit 113.

g. Due to the filing of redacted briefs by complainant, as well as the lodging of un-redacted briefs, exhibits and transcripts, the Protective Order was further amended to seal these materials, i.e., exhibits 108A and 111A. The amended Protective Order is dated August 11, 2016, and marked exhibit 114. This amended Protective Order was modified for further clarity, dated August 12, 2016, and marked exhibit 115.

Effect of order limiting evidence; pre-hearing filings

Pre-hearing procedures and motions resulted in orders affecting the presentation of evidence. For example, respondent Towns' jurisdictional challenge was argued and ruled on during Prehearing Conference (PHC) March 9, 2015, on the record. Motions in limine

pending at that time were ruled on later. in Orders on Motions in Limine, etc., dated March 26, 2015, marked for identification as exhibit 104. The Orders on Motions in Limine granted motions to exclude evidence and limit argument proposed by respondent Towns. Respondent Towns submitted evidence and argument on certain subjects despite the exclusion orders. Such excluded evidence and argument are therefore not considered herein, except to the extent noted as necessary to determine the issues.

There were numerous pre-hearing filings by the parties that are not being marked as exhibits herein and will not be added to the hearing record. These filings are part of the administrative record maintained by OAH.

Burden and standard of proof

Respondent Towns contends that PERS bears the burden of proof because, in summary, his contract with SDRMA included a pension, which became a vested right upon retirement on December 31, 2009. PERS paid that pension from retirement until it unilaterally determined to reduce it effective May 1, 2014. Respondent Towns argues that PERS does not have the right or authority to reduce the pension. However, respondent Towns does not provide any authority under which this set of contentions results in placing the burden of proof on PERS.

Respondent Towns' contentions are not convincing. When a person seeks to establish eligibility for a benefit or service administered by the government, the burden of proof is on him or her to establish such eligibility. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161; *Greatorex v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57.) In state administrative hearings, unless indicated otherwise, the standard of proof is "persuasion by a preponderance of the evidence." (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) Respondent Towns bears the burden to establish, by a preponderance of the evidence, he is entitled to the benefits he seeks.

FACTUAL FINDINGS

1. The Statement of Issues was filed by complainant in her official capacity as Acting Division Chief, Customer Account Services Division, PERS.

2. Respondent James Towns (respondent Towns or Towns) was employed with Running Springs Water District beginning November 1, 1971. Running Springs Water District had contracted with PERS for retirement benefits for its eligible employees. Thus began Towns' membership in PERS. Respondent Towns' service for Running Springs Water District was not in dispute in this matter.

3. Respondent Towns began employment with SDRMA on November 15. 1994. where he was last employed in the position of Chief Executive Officer. SDRMA is a public entity which contracted with PERS for retirement benefits for its eligible employees. By virtue of his employment. respondent Towns is a local miscellaneous member of PERS.[1]

4. SDRMA was properly served with notice of the hearing yet did not appear at the hearing.[2] The default of SDRMA was noted on the record, and the matter proceeded in its absence. (See Government Code section 11520.[3]) The failure of SDRMA to file a notice of defense, and the resulting waiver of its right to a hearing, was noted in an Order dated September 29. 2014.

5. PERS is a defined benefit plan administered by the PERS Board of Administration (PERS Board). Benefits for its members are funded by member and employer contributions. and by interest and other earnings on those contributions. The amount of a member's contributions is determined by applying a fixed percentage to the member's compensation. A public agency's contribution is determined by applying its employer contribution rate to the payroll of the employing agency. Using certain actuarial assumptions specified by law. the PERS Board sets the employer contribution rate on an annual basis. These and other relevant provisions are found in the Public Employees' Retirement Law (the PERL). (Section 20000 et seq.)

6. The PERL refers to a member's pension on retirement as a service retirement allowance (retirement allowance). The amount of a member's retirement allowance is calculated by a formula applying a set percentage figure, based upon the member's age on the date of retirement, to the member's years of service. and the member's "final compensation." In this matter, respondent Towns' age on the date of retirement and years of service are not in issue. The formula applicable to respondent Towns by the contract between SDRMA and PERS and under section 20037. states that Towns' "final compensation" means "the highest average annual compensation earnable by a member during the three consecutive years of employment immediately preceding the effective date of his or her retirement." In computing

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[1] Although the ALJ was not referred to any evidence confirming respondent Towns' status as a local miscellaneous member of PERS relative to his time of employment with Running Springs Water District. both parties acted as if this had been established. as will the ALJ.

[2] Counsel for SDRMA was present during testimony of witnesses who are/were SDRMA employees or board members. However, this does not constitute an appearance to represent SDRMA in the hearing of this matter.

[3] All statutory references are to the Government Code unless otherwise noted.

a member's retirement allowance. PERS staff may review the salary reported by the employer for the member to ensure that only those items allowed under the PERL will be included in the member's "final compensation" for purposes of calculating the retirement allowance.[4]

7. On November 3, 2009, respondent Towns signed an application for service retirement, and he retired for service effective December 31, 2009, with 35.942 years of service credit based on his service for the Running Springs Water District and SDRMA, and service credit Towns purchased. PERS referred to Towns' final compensation as reported by SDRMA on his behalf: that is, $22,964.49 per month. In applying the formula, PERS calculated Towns' retirement allowance to be $17,985.82 per month. PERS has paid this amount to respondent Towns starting on the effective date of retirement, December 31, 2009.

8. In 2012 PERS conducted an audit review of SDRMA and determined that increases in Towns' salary should not have been considered as part of his final compensation. PERS determined that Towns received a salary increase in July 2005 of $12,444.50 per month, or 67.41 percent, which PERS contends did not meet the definition of "compensation earnable" under the PERL. In 2013, PERS recalculated Towns' final compensation by removing the salary increases, but adding cost of living adjustments that other SDRMA employees had received in the period 2005 to 2009, resulting in an amount of final compensation of $13,717 per month. Based on this new amount, in 2014 PERS reduced Towns' monthly retirement allowance to $10,881.

9. By letters dated April 19, 2013, respondent Towns and SDRMA were notified of PERS' preliminary determination and given the opportunity to reply. Replies were submitted, by SDRMA dated May 24, 2013, and by Towns dated June 26, 2013. PERS did not change the preliminary determination. By letter dated August 20, 2013, PERS issued its final determination and advised SDRMA and Towns of their right to appeal. By letter dated September 30, 2013, Towns filed a timely appeal, and requested an administrative hearing. All jurisdictional requirements have been met.

Summary of applicable law

10. The evidence and argument submitted relate in large part to the manner in which PERS conducted its audit and interwoven statutory provisions relating to the process whereby certain items can, and cannot, be included in the formula to determine Towns' retirement allowance. An attempt at a brief explanation follows.

11a. The PERL includes defined terms including "final compensation," "compensation," "compensation earnable" and "payrate." Care must be taken to follow the

[4] "Final compensation" and other relevant terms are defined in the PERL. Applicable provisions of the PERL are discussed in more detail in the Legal Conclusions below.

statutory framework to see how each of these concepts, including exceptions, may apply to Towns. "Final compensation," as used in a PERS' member's formula for retirement allowance, is based upon the member's "compensation," which is defined in section 20630. Compensation essentially includes regular pay for work during normal working hours as well as paid days off, such as for holidays, sick leave and vacation. Employees' compensation is reported to PERS, and shall not exceed compensation earnable.

11b. "Compensation earnable" is defined in section 20636 as "payrate" and "special compensation." PERS claims that the requirements of payrate, and exclusions from special compensation, support its reduction of Towns' final compensation and, therefore, of his retirement allowance.

11c. "Payrate" is defined in section 20636, subdivision (b)(1). It includes references to "similarly situated members of the same group or class of employment" and "publicly available pay schedules," both of which are relevant to PERS' position. As relevant here, section 20636, subdivision (b)(1) provides that payrate "means the normal rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered . . . pursuant to publicly available pay schedules. 'Payrate,' for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered . . . ." subject to the limitations of subdivision (e)(2), discussed below. So, under certain circumstances, payrate may include reference to the normal rate of pay of a group or class of other employees. "Group or class of employment" is defined in section 20636, subdivision (e)(1), as "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." As explained below, PERS contends Towns is not in a group or class, while Towns contends that he might be for some purposes.

11d. In other circumstances where no reference is made to a group or class of other employees, section 20636, subdivision (e)(2), provides that increases in compensation earnable (i.e., payrate and special compensation; see Factual Finding 11b) are limited at times. More specifically, during an employee's final compensation period (for Towns, three years) and the two years immediately preceding, increases in compensation earnable are limited "to the average increase in compensation earnable during the same period reported by the employer for all employees who are in the same membership classification," with an exception that does not apply here. The parties referred to the two year period as a "look back."

11e. "Special compensation" is also included in compensation earnable (see Factual Finding 11b), and is discussed in section 20636, subdivision (c). Under subdivision (c)(1), special compensation includes "payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions." Under subdivision (c)(2),

special compensation "shall be limited to that which is received by a member pursuant to a labor policy or agreement . . .. to similarly situated members of a group or class of employment that is in addition to payrate.[5] If an individual is not part of a group or class, special compensation shall be limited to that which . . . is received by similarly situated members in the closest related group or class that is in addition to payrate," again subject to the limitations of subdivision (e)(2) (see Factual Finding 11d).

11f. Under section 20636, subdivision (c)(7), special compensation does not include final settlement pay (subd. (A)).

11g. "Final settlement pay," under section 20636, subdivision (f), means pay or conversions of benefits "that are in excess of compensation earnable, that are granted . . . in connection with, or anticipation of, a separation from employment." The Board may enact regulations on the subject.

11h. The Board has enacted such a regulation: California Code of Regulations, title 2,[6] section 570. which adds that final settlement pay shall be excluded from the payroll that an employer reports to PERS, may take the form of severance pay, or may be paid lump sum or in periodic payments. "It may also take the form of a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS."

11i. Section 20636, subdivision (d) requires payrate and special compensation schedules to be public records available for public scrutiny. Regulation 570.5, subdivision (a) sets forth requirements of a pay schedule, including that it must identify the position title for every employee position, show the payrate for each identified position, and is posted at the employer's office or is "or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website." If these requirements are not met, under subdivision (b), the Board, "may determine an amount that will be considered to be payrate, taking into consideration all information it deems relevant," including certain listed documents.

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[5] While it appears that, grammatically, a word, phrase or concept is missing, it is not due to the ellipsis. The full language of the statutes appears in the Legal Conclusions below. Case law makes clear that, for purposes of analyzing special compensation and payrate, PERS may look to the pay provided to similarly situated employees. (See *Molina v. Board of Administration, California Public Employees' Retirement System* (2012) 211 Cal.App.4th 522.)

[6] All further references to regulations are to California Code of Regulations, title 2.

11j. Under Regulation 571, special compensation is further defined. Subdivision (b) provides that all items of special compensation must, among other things, be available to all members in the group or class, be paid periodically as earned, not be paid exclusively in the final compensation period; and not be final settlement pay. Special compensation must be reported to PERS and is subject to review. Under subdivision (d), special compensation not listed in subdivision (a), or out of compliance with any of the standards in subdivision (b), "shall not be used to calculate final compensation for that individual."

Towns' employment and pay at SDRMA

12. When Towns began employment with SDRMA as its Executive Director/Risk Manager, it was a relatively small operation offering risk management insurance coverage including property and liability. The SDRMA board of directors (board[7]) positions were part time and the board relied on outside consultants for advice and some services, and employees for other advice and services. As of 2002, Towns' position name was changed to Chief Executive Officer, but the written job description was essentially the same. Thereafter, SDRMA changed, including bringing marketing functions in-house, merging with another entity that offered workers' compensation insurance, and performing more reinsurance tasks. Because SDRMA could provide more services, it was able to court more potential clients, larger potential clients, and provide more services to existing clients.

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[7] To avoid confusion, recall that Factual Finding 5 indicates that the PERS Board of Administration is referred to herein as the PERS Board; the SDRMA board hereafter is referred to as the board.

13. Towns' performance was evaluated by the board every two years. In anticipation of his review in 2005, Towns and board president David Aranda exchanged communications, including Towns' email dated April 22, 2005 (exh. 43). Towns expressed satisfaction with his compensation package, calling it generous, and that it could remain the same. Towns' base salary at the time was $149,334. "Looking to the future and possibly retiring in 5+ years," Towns suggested changes that could be considered by the board. First, current merit pay raises/merit bonuses were considered a one-time bonus not included as reportable earnings by PERS; if the bonus was, instead, treated as a salary increase, it could add to Towns' retirement allowance. The board could revise its policy such that these items were considered as an adjustment to base salary, and any increase in cost to SDRMA could be offset by reducing the range of merit bonuses from the current 20 percent to 30 percent downward to the range of 15 percent to 24 percent. Towns asked if the board would consider an adjustment retroactive to his 2003-2005 evaluation period. Towns gave examples of how these adjustments might work, thereby converting a bonus to an increase in his salary.

14. Towns forwarded his email to SDRMA Chief Financial Officer Paul Frydendal, who referred the question to PERS. Frydendal had taken the SDRMA bonus plan (Incentive Award Program, or IAP) and drafted proposed amendments to comport with Towns' suggestions. PERS replied (Nikki Cooke email April 27, 2005; exh. 80) that the proposed IAP for regular employees would not result in pay increases reportable to PERS because it was for extraordinary job performance outside of normal duties. A separate IAP for the CEO (Towns) would also not be reportable compensation because it was only available to the CEO. Cooke's email referenced Regulation 570, subdivision (b), section 20636, and listed nine "standards" applicable before special compensation would be reportable to PERS, including that it was available to all members of the group or class, paid periodically as earned, historically consistent with prior payments for the job classification, not paid exclusively in the final compensation period, and was not final settlement pay.

15. May 2005 board documents, including agenda items and backup documents for agenda items, show that Frydendal and Aranda were working on proposed policy revisions consistent with some of Towns' earlier suggestions.[8] The board met in closed session at its May 4, 2005 meeting, discussed the subjects, and deferred the matter for later discussion. A committee was assigned to study and report.

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[8] Some of these board documents are contained in the sealed portions of exhibit 44 and discussed in sealed transcript testimony and briefs (see also exhs. 108A, 111A). The ALJ is sensitive to the protective order and will only refer to this material in the most general sense, as there is no practical manner in which this Proposed Decision can include more specific information and then have those portions considered confidential.

16. The subject resurfaced for the board's meeting December 7, 2005, where the committee reported its recommendations for a revised CEO job description, a new CEO contract, and a new IAP (exhs. 45, 46. 47). Each was approved. The new CEO contract (exh. 37), ultimately signed June 28, 2006, was retroactive to July 1, 2005 and attached to it is the revised CEO job description. The contract states that the CEO "shall have the primary responsibility for the execution of Board policy, whereas the Board shall retain the primary responsibility of formulating and adopting said policy." It includes sections relating to "other duties" and "performance objectives." Compensation is set at $250,000 annually, with cost of living adjustments in the same percentage as for other employees.

17. The prior CEO employment contract in evidence was signed in October 2001, effective June 28, 2001 (exh. 38). It includes the same language as in the 2005 agreement, as noted above, concerning the CEO's responsibilities, other duties and performance objectives. It includes a retroactive salary increase; compensation is set at $120,000 annually, with cost of living adjustments in the same percentage as for other employees. A cost of living adjustment specific to the CEO was included.

18. With respect to the revised job description, Towns contends that a new CEO position was created or that he was promoted. As such, a new base salary was created and can be a proper basis for inclusion in the calculation of Towns' retirement allowance. Among other things, Towns cites the differences between the new and old CEO job descriptions: a newly created Chief Operating Officer (COO) position to include many of the old CEO position's administrative duties; Towns' added responsibilities for guiding SDRMA into the future and growing SDRMA's client base including identifying and marketing to prospective new clients and expanding business and services to existing clients; a salary survey requested by the board regarding salaries for CEO's of similar organizations; and a lack of convincing evidence that the board was converting Towns' merit salary/bonus pay to "PERSable" compensation. The 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.

19. PERS contends that the board followed Towns' wishes from his April 2005 email and converted merit bonuses and salary increases to base salary. (See, also, Factual Finding 34 below, discussing this contention.)

20. Minutes from the board's October 5, 2005 meeting state that a new executive position of COO was approved "to assist the CEO in day-to-day operation." (Exh. 203.) A comparison of the old CEO job description from 1994 (exhs. 207, 40) to the new one attached to the 2005 contract (exhs. 208, 37) reveals some differences. There are clearly more delineated duties in the 2005 version, along with some overlap and repetition from the 1994 version.

21. Towns testified, and his brief asserts, that under the new job description the CEO was to take greater initiative in setting strategic direction and guiding the board in its oversight of SDRMA, particularly helping to propose strategic plans and direction. In fact, the 2005 job description includes: "Leads the development and implementation of effective business strategies" and provides "leadership and management to ensure that the mission and core values of the organization and members are put into practice." (Exhs. 208, 37.)

22. However, the prior job description includes that the executive director "must be well familiar with the special districts needs and issues in order to devise and recommend long-term strategies to the [board] addressing the means to optimize [SDRMA's] mission." (Exhs. 207, 40.) Further comparisons do not support the conclusion that a new position was created. Further, testimony from board members does not support the conclusion that the board intended to create a new position. Several described the 2005 job description as an update to include tasks being performed by Towns.

23. The language of Towns' prior contract as Executive Director and the 2005 contract as CEO are similar in their descriptions of Towns' duties. The intent of the parties is clear. The job descriptions are also substantially similar, albeit with more detail in the 2005 update. There is evidence from board members that no new position was being created in 2005. The job description of the new COO position is to assist the CEO, not to take duties away. Even though the COO performed many tasks previously performed only by Towns, this does not lead to the conclusion that Towns performed a new job. There is sufficient evidence to support the conclusion that no new position was created for Towns in 2005.

Whether Towns is part of a group or class

24. The determination of Towns' final compensation, for use in the PERS retirement formula, requires reference to his compensation and compensation earnable (see Factual Findings 6, 11a), which is made up of his payrate and special compensation (Factual Finding 11b). Payrate refers to, among other things, the normal rate of pay to similarly situated members of the same group or class of employment as listed on publicly available pay schedules. (Factual Finding 11c).

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25. Towns should be considered as not a member of a group or class. ("One employee cannot be considered as a group or class." Section 20636, subd. (e)(1).) For example, he was the sole employee with a contract requiring him to report to the board. As such, section 20636, subdivision (e)(2) limits his compensation earnable (comprised of his payrate and special compensation; see Factual Findings 11b, 11d) to the average increases, during the five year period preceding retirement, in compensation earnable reported by the employer for all employees in the same membership classification. A result of Towns' treatment as an individual is that, under section 20636, subdivision (e)(2), PERS was entitled to utilize the look back period of two years prior to Towns' final compensation period of three years, 2006-2009, to include review of his salary adjustment in 2005.

26. Tomi Jimenez, PERS' assistant division chief of the customer account services division since about January 2014, was the section manager of the compensation review unit when Towns' retirement allowance was review and modified. Jimenez reviewed the salary information reported to PERS for SDRMA's employees who were members of PERS. All of these members/employees, including Towns, were considered miscellaneous members of PERS. Towns' increase in compensation, reported by SDRMA to PERS for the period 2005-2009, was an increase of approximately 67 percent over his compensation prior to the retroactive adjustment. In the same period, the average increase for other employees was 9.9 percent, received in the form of cost of living adjustments (COLA). In a letter to Towns dated April 19, 2013 (exh. 5), Jimenez listed how Towns' rate of pay prior to the 2005 increase would be affected by the COLA's. Towns' increased 2005 rate of pay ($20,833.33 per month) was therefore decreased to $12,444.50 per month and, after the three COLA's were added, increased to $13,717.52 per month as his final compensation. Using the retirement formula, Towns' retirement allowance would be reduced to $10,399.55 per month (later corrected to $10.254.16). There had been an overpayment ($277,663.66, based on the incorrectly reduced amount of final compensation; the overpayment was later calculated as $405,512.16), which could be recouped by adjusting the retirement allowance.[9] Jimenez's findings and conclusions are sufficient to support factual findings.

27. Another alternative is that Towns should be included in the class of "Chief Officers," including the CEO, COO, CFO and Chief Risk Manager. If so, under section 20636, subdivision (b)(1), his payrate "means the normal rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered . . . pursuant to publicly available pay schedules." (See Factual Finding 11c.)

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[9] Jimenez testified to a series of letters from PERS to Towns containing recalculations, including erroneous recalculations that were later corrected. (See, e.g., exhibits 4, 4A, 5, 5A, 10, 10A, 11 and 11A.) She testified at one point that a particular recalculation of the overpayment was not done because an error had not been corrected in the amount of Towns' retirement allowance.

28. "Group or class of employment" is defined in section 20636, subdivision (e)(1), as "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." (See Factual Finding 11c.) Examining these criteria, 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.

29. If Towns was considered in the chief officers group, the differences in pay between Towns and the others would serve to limit and reduce Towns' payrate for use in determining his retirement allowance. Jimenez analyzed information that SDRMA reported to PERS for these chief officers, as well as SDRMA organizational charts, salary and wage schedules, the COO's offer letter and contracts, and other information. She determined, and the evidence established, that the other chief officers each earned about $100,000 in 2006; their salaries ranged from $90,000 to $129,000 during the three-year period of Towns' final compensation period (2006-2009); and the high salary of $129,000, or $10,750 per month, was several thousands' less than the final compensation amount PERS used to recalculate Towns' retirement allowance ($13,717.52 per month after the three COLA's were added in). Towns was paid substantially more than others in the group of "Chief Officers," so section 20636, subdivision (b)(1) would limit Towns' payrate to the amount paid to others. As a result, there is no benefit to Towns if he is considered as part of a "Chief Officers" group of "similarly situated members of the same group or class of employment for services rendered," as described in section 20636, subdivision (b)(1), because that section limits his payrate to the normal rate of pay of similarly situated employees.

30. Therefore, as a group of one, Towns' compensation earnable is limited to the average increases over his final five years in compensation earnable for all SDRMA employees who were miscellaneous members of PERS. Alternatively, if Towns is within a group or class, his compensation earnable, when compared to the highest salary of the group members, would limit his compensation earnable and reduce his retirement allowance. In either case, Towns' final compensation, as reported to PERS by SDRMA, is not supported by the facts and the law.

Publicly available pay schedule; special compensation; final settlement pay

31. The second element of payrate, beyond consideration of whether Towns is a group of one or within a group with others, is that the amounts paid to Towns must be contained in a publicly available pay schedule (see Factual Findings 11c, 11i). The evidence established that the amounts paid to Towns as an employee were not contained in a publicly available pay schedule.

32. Towns is correct that Regulations 570.5 and 571 became effective in 2011, after he retired. Regulation 570.5 lists numerous requirements of a pay schedule in relation to the statutory references to "publicly available pay schedules" (section 20636, subdivision (b)(1); see Factual Finding 11c) or payrate and compensation schedules as public records available for public scrutiny (section 20636, subdivision (d); see Factual Finding 11i). Even without the clarification supplied by Regulation 570.5, SDRMA did not have pay schedules or payrate and compensation schedules that were publicly available, as required by the statutes. The purpose of the statutes was to permit the public to have effective access to pay information such that the public could find the salaries for SDRMA employees listed by date, position and amount. SDRMA did not have documents that effectively and efficiently allowed the public to have access to such information. (SDRMA came into compliance after the period relating to Towns' retirement allowance.) Towns contends that the combination of board minutes, employment contracts, salary schedules and proposed wage schedules were available on request was sufficient. As noted by PERS, these documents did not contain the information necessary to determine, for all employees, what position at SDRMA was paid what salary for what period of time. Nor was the required information contained in one inclusive document.

33. The board approved a new IAP policy at its meeting on December 7, 2005, with one set of criteria and percentages for regular employees and added criteria and percentages for the CEO. The policy states that the CEO's IAP is not included in and does not adjust his base salary. SDRMA did not report IAP earned by Towns, if any, to PERS, and it would not be considered as special compensation to be included in the final compensation amount used in the formula to determine Towns' retirement allowance (see Factual Findings 6, 11a, 11b, 11d, 11e, 11h.) Even if there was IAP due to Towns, yet unpaid and unreported to PERS, this would be considered special compensation. Towns was not part of a group or class; under section 20636, subdivision (c)(2), his special compensation would be limited to the special compensation received by similarly situated members in the closest related group or class: the effect of which would be to negate the additional IAP to which Towns was entitled above that available to other SDRMA employees.

34. PERS contends that the manner of Towns' pay after his new contract in December 2005 supports the interpretation that the board followed the plan in his April 2005 email relating to containing costs of his raise by reducing his bonuses. It is not necessary to add findings on this contention other than to note that Towns was still entitled to bonuses and the facts did not establish that in 2005 the board did not intend to give him future bonuses. As noted above, the intent of the parties is taken from the language of Towns' employment contract and other evidence. Towns declined to seek a bonus from the board in 2007. For reasons not anticipated in 2005, Towns received no bonus in 2009.

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35. There was evidence to the effect that the increase in wages for Towns as of 2005 was, in part. in recognition by SDRMA of his past performance. This is consistent with the finding that his final compensation was susceptible to readjustment under the PERL, as it included improper elements of final settlement pay. (See Factual Findings 11f, 11g.) However, as noted above, Towns was still eligible for bonuses after his 2005 salary increase, even though the board did not award them. Towns was credible in his testimony to the effect that his biennial IAP reviews did not occur after 2005 for acceptable reasons, such as in 2007 when he indicated he was "fine" financially and, later, due to board action on a succession plan, ultimately including Towns separation from employment in 2009. There was insufficient evidence from which to conclude that IAP bonuses were not awarded to Towns because the board rolled those amounts into his 2005 salary increase. In this regard. that salary increase was not final settlement pay under section 20636, subdivision (f) (see Factual Findings 11f, 11g). As noted therein, final settlement pay would not be included in Towns' retirement allowance formula. Therefore, the evidence supports the conclusion that the increase in Towns' salary due in part to recognition of his past performance is improper final settlement pay, as it was not available to others and is not special compensation: however, there was insufficient evidence that Towns' salary increased in part because the board determined in 2005 he would not receive future bonuses. As noted above, under Regulation 570, improper final settlement pay includes not only a bonus or retroactive adjustment to payrate, but also conversion of special compensation to payrate or any other payroll reported to PERS.

Towns' claims of reliance, laches, and other defenses

36. Towns contends that he relied on the PERS estimate of his retirement allowance provided in 2009 and that, had he known that PERS miscalculated, he would have delayed his retirement date so as to avoid the "look back" period of two years prior to his final compensation period of three years (see Factual Finding 11d). A delay of six months in his retirement would have had the effect of not allowing PERS to look back to 2005.

37. This contention is rejected, for several reasons. First, the PERS estimate was provided under the specific instructions that it was an estimate only and unofficial. Second, PERS cannot provide a higher retirement allowance than the law allows. Third, by the time Towns received the estimate, the SDRMA board had already determined that he would be succeeded by Greg Hall. the COO, who had signed a contract as the new CEO effective January 1, 2010. Towns served at the will of the board and had limited input into the timing of his termination. which could occur anytime.

38. Among the defenses raised by Towns is that laches operates to restrict PERS' ability to revise the retirement allowance based on increased pay in 2005; Towns was not informed of the potential for recalculation of his retirement allowance, despite PERS' fiduciary duties to him, and he therefore could not properly plan his retirement. to his

prejudice; PERS has duties to correct errors so as to place Towns in the position as if the mistake did not occur; Towns purchased additional retirement service credit based on the amount of his higher compensation level and should get a partial refund if a lower compensation rate is used by PERS; PERS is bound by collateral estoppel, equitable estoppel and *res judicata* to continue to pay Towns the first calculated amount of his retirement allowance; PERS improperly calculated retirement benefits attributable to Towns' time at Running Springs; PERS and SDRMA have unclean hands; and PERs' actions were arbitrary, capricious and vindictive.

39. It was established that PERS reviewed SDRMA records and Towns' retirement was processed in 2009 despite the presence of a rise in reported salary that would normally have resulted in further scrutiny by PERS. However, PERS failure to catch the improper amount of Towns' final compensation in 2009 does not give Towns any rights to an improperly inflated retirement allowance as long as PERS acts within its statutory rights to review and adjust his retirement allowance. Many of Towns' defenses cannot be supported because of the law, noted below, that requires PERS to pay only what is due as a retirement allowance. The law allowing correction of mistakes, and placing the parties as they were before the mistake was made, has practical implications here that prevent its application in a way that would allow Towns to take a later retirement.

40. To the extent Towns' defenses rely upon actions allegedly taken, or failures to act, by SDRMA, those defenses were not adjudicated; not because SDRMA defaulted and did not participate in this mater, but because the Statement of Issues was framed by PERS to determine its obligations to Towns under the circumstances. The issues of SDRMA's possible liability on any theory posited by Towns were beyond the jurisdiction of OAH in this matter. And as noted below, SDRMA's contract with PERS subjects SDRMA employees to all provisions of the PERL, under section 20506. Similarly, Towns' recoupment for any possible overpayment he made for additional retirement service credit was not pleaded and beyond the jurisdiction of OAH; it was never raised by Towns during the proceeding.[10] Towns' estoppel defenses fail because he did not establish the facts that would support the defenses and the law is contrary. Again, PERS' statutory rights to review and adjust Towns' retirement allowance defeats any claim that Towns was entitled to rely on incorrect compensation amounts used in the retirement allowance formula. Towns' *res judicata* defense fails because there was no adjudication of issues on which the theory may be based. Towns' defenses are not supported by the facts and/or the law.

[10] Towns does refer to his purchase of additional retirement service credit in his Amended Appeal of denial of benefits (exh. 2), however it is in support of his estoppel and *res judicata* defenses.

LEGAL CONCLUSIONS AND DISCUSSION

1. Cause exists to deny respondent Towns' appeal, in that Towns did not establish his eligibility for a retirement allowance above that ultimately determined by PERS, based on Factual Findings 2-40 and Legal Conclusions 2-30, below.

Statutes and regulations

2. Various statutes, regulations and appellate court decisions apply to the determination of Towns' appeal. As relevant these are summarized below.

3. The PERL vests the management of the retirement system in the PERS Board. and gives the Board the authority to make rules binding on its members. (Sections 20120-20122.) Subject to other provisions of the PERL and pertinent regulations, "the board shall determine and may modify benefits for service and disability" for those it determines are entitled to receive benefits. (Sections 20123, 20125.)

4. SDRMA's contract with PERS subjects SDRMA and its employees to all provisions of the PERL. (Section 20506.)

5. The three year period used to determine Towns' retirement allowance is based on section 20037. which states in pertinent part: "For a . . . local member who is an employee of a contracting agency that is subject to this section, 'final compensation' means the highest average annual compensation earnable by a member during the three consecutive years of employment immediately preceding the effective date of his retirement . . . ."

6. By virtue of the contract between SDRMA and PERS, Towns' retirement allowance is calculated by a formula applying a percentage figure based on his age at retirement to his years of service and his final compensation, as described in section 20037 and as noted in Factual Finding 6.

7. "Compensation" is addressed in section 20630, which states:

"(a) As used in this part, "compensation" means the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work because of any of the following: [¶] (1) Holidays. [¶] (2) Sick leave. [¶] (3) Industrial disability leave . . . . [¶] (4) Vacation. [¶] (5) Compensatory time off. [¶] (6) Leave of absence.

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"(b) When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall be reported in accordance with Section 20636 and shall not exceed compensation earnable, as defined in Section 20636."

8. "Compensation earnable" includes references to payrate, special compensation and final compensation. Section 20636 states, in pertinent part:

"(a) 'Compensation earnable' by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5.

"(b)(1) 'Payrate' means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules. 'Payrate,' for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e). [¶] . . . [¶]

"(c)(1) Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.

"(2) Special compensation shall be limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate. If an individual is not part of a group or class, special compensation shall be limited to that which the board determines is received by similarly situated members in the closest related group or class that is in addition to payrate, subject to the limitations of paragraph (2) of subdivision (e). [¶] . . . [¶]

"(6) The board shall promulgate regulations that delineate more specifically and exclusively what constitutes 'special compensation' as used in this section. . . .

"(7) Special compensation does not include any of the following:

"(A) Final settlement pay.

"(B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise.

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"(C) Other payments the board has not affirmatively determined to be special compensation.

"(d) Notwithstanding any other provision of law, payrate and special compensation schedules, ordinances, or similar documents shall be public records available for public scrutiny.

"(e)(1) As used in this part, 'group or class of employment' 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.

"(2) Increases in compensation earnable granted to an employee who is not in a group or class shall be limited during the final compensation period applicable to the employees, as well as the two years immediately preceding the final compensation period, to the average increase in compensation earnable during the same period reported by the employer for all employees who are in the same membership classification, except as may otherwise be determined pursuant to regulations adopted by the board that establish reasonable standards for granting exceptions.

"(f) As used in this part, 'final settlement pay' means pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment. The board shall promulgate regulations that delineate more specifically what constitutes final settlement pay. . . ."

9. Regulation 570 addresses final settlement pay. Regulation 570 states:

"'Final settlement pay' means any pay or cash conversions of employee benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.

"For example, final settlement pay may consist of severance pay or so-called 'golden parachutes'. It may be based on accruals over a period of prior service. It is generally, but no always, paid during the period of final compensation. It may be paid in either lump-sum, or periodic payments.

"Final settlement pay may take the form of any item of special compensation not listed in Section 571. It may also take the form of a bonus, retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS."

10. The reference to a pay schedule to determine compensation earnable is addressed in Regulation 570.5, which states:

"(a) For purposes of determining the amount of 'compensation earnable' pursuant to Government Code Sections 20630, 20636, and 20636.1, payrate shall be limited to the amount listed on a pay schedule that meets all of the following requirements:

"(1) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;

"(2) Identifies the position title for every employee position;

"(3) Shows the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;

"(4) Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, bi-monthly, or annually;

"(5) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;

"(6) Indicates an effective date and date of any revisions;

"(7) Is retained by the employer and available for public inspection for not less than five years; and

"(8) Does not reference another document in lieu of disclosing the payrate.

"(b) Whenever an employer fails to meet the requirements of subdivision (a) above, the Board, in its sole discretion, may determine an amount that will be considered to be payrate, taking into consideration all information it deems relevant including, but not limited to, the following:

"(1) Documents approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer;

"(2) Last payrate listed on a pay schedule that conforms to the requirements of subdivision (a) with the same employer for the position at issue;

"(3) Last payrate for the member that is listed on a pay schedule that conforms with the requirements of subdivision (a) with the same employer for a different position;

"(4) Last payrate for the member in a position that was held by the member and that is listed on a pay schedule that conforms with the requirements of subdivision (a) of a former CalPERS employer."

11. Regulation 571 lists and defines special compensation, and provides in pertinent part:

"(b) The Board has determined that all items of special compensation listed in subsection (a) are:

"(1) Contained in a written labor policy or agreement as defined at Government Code section 20049, provided that the document:

"(A) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;

"(B) Indicates the conditions for payment of the item of special compensation, including, but not limited to, eligibility for, and amount of, the special compensation;

"(C) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;

"(D) Indicates an effective date and date of any revisions;

"(E) Is retained by the employer and available for public inspection for not less than five years; and

"(F) Does not reference another document in lieu of disclosing the item of special compensation;

"(2) Available to all members in the group or class;

"(3) Part of normally required duties;

"(4) Performed during normal hours of employment;

"(5) Paid periodically as earned;

"(6) Historically consistent with prior payments for the job classification;

"(7) Not paid exclusively in the final compensation period;

"(8) Not final settlement pay: and

"(9) Not creating an unfunded liability over and above PERS' actuarial assumptions.

"(c) Only items listed in subsection (a) have been affirmatively determined to be special compensation. All items of special compensation reported to PERS will be subject to review for continued conformity with all of the standards listed in subsection (b).

"(d) If an item of special compensation is not listed in subsection (a), or is out of compliance with any of the standards in subsection (b) as reported for an individual, then it shall not be used to calculate final compensation for that individual."

12. Sections 20160, 20163 and 20164 relate to PERS' duties to make corrections under the circumstances herein. Section 20160 provides, in pertinent part:

"(a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:

"(1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.

"(2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.

"(3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part.

"Failure by a member or beneficiary to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an 'error or omission' correctable under this section.

"(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

"(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

"(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).

"(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. . . ."

13. Section 20163, subdivision (a) provides, in pertinent part: "Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person or the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled."

14. Section 20164 provides, in pertinent part:

"(a) The obligations of this system to its members continue throughout their respective memberships, and the obligations of this system to and in respect to retired members continue throughout the lives of the respective retired members, and thereafter until all obligations to their respective beneficiaries under optional settlements have been discharged. The obligations of the state and contracting agencies to this system in respect to members employed by them, respectively, continue throughout the memberships of the respective members, and the obligations of the state and contracting agencies to this system in respect to retired members formerly employed by them, respectively, continue until all of the obligations of this system in respect to those retired members, respectively, have been discharged. The obligations of any member to this system continue throughout his or her membership, and thereafter until all of the obligations of this system to or in respect to him or her have been discharged.

"(b) For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years, and shall be applied as follows:

"(1) In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment.

"(2) In cases where this system owes money to a member or beneficiary, the period of limitations shall not apply. [¶] . . . [¶]

"(e) The board shall determine the applicability of the period of limitations in any case, and its determination with respect to the running of any period of limitation shall be conclusive and binding for purposes of correcting the error or omission."

Appellate opinions re compensation and publicly available pay schedules

15. Key aspects of the PERL applicable to Towns' circumstances have been the subject of interpretation and application in appellate decisions. Generally, in defining "compensation earnable" and "final compensation," the PERL contemplates equality in benefits between members of the "same group or class of employment and at the same rate of pay." (*City of Sacramento v. Public Employees' Retirement System* (1991) 229 Cal.App.3d 1470, 1492.) "[B]oth components of 'compensation earnable,' an employee's payrate and special compensation, are measured by the amounts provided by the employer to similarly situated employees. (See § 20636, subds. (b)(1), (2), (c), (e)(2).)" (*Prentice v. Board. of Administration. California Public Employees' Retirement System* (2007) 157 Cal.App.4th 983, 992 (*Prentice*).)

16. The PERL requires a "publicly available pay schedule for services rendered on a full time basis during normal working hours." (*Molina v. Board of Admin., California Public Employees' Retirement System* (2001) 200 Cal.App.4th 53, 66-67 (*Molina*).) Section 20636, subdivision (b)(1) was amended in 2006 to add the requirement for a "publicly available pay schedule." The Legislature intended that a public employee's 'payrate' be readily available to an interested person without unreasonable difficulty. (*Randy G. Adams*, PERS Prec. Dec. No. [unassigned], effective Jan. 16, 2013, Case No. 2011-0788 (*Adams*).) The PERS's Circular Letter dated August 19, 2011, regarding newly enacted Regulations 570.5 and 571, states that the regulations benefit the public, employers and members by "ensuring consistency in the reporting of compensation and enhancing disclosure and transparency of public employee compensation." The regulations were adopted to "clarify existing law and makes specific the requirements for publicly available pay schedule as that phrase is used in the definition of 'payrate'." (Exh. 247.) Indicia of a publicly available pay schedule include formal approval by the SDRMA board, in open session after notice to the public, of a salary or salary range for a given position, described in the detail required by section 20636, subdivision (b)(1), and Regulation 570.5, and the schedule's ready availability for review by any member of the public without the necessity of a public records request, subpoena, or other legal process. (*Adams, supra.*) A pay increase is not included in an employee's payrate unless it is published in a pay schedule. (*Molina, supra.* 200 Cal.App.4th at p. 66, citing *Prentice, supra).)*

17. The requirement of a publicly available pay schedule, set forth in section 20636, subdivision (b)(1), and the requirements for the pay schedule set forth in Regulation 570.5, apply to Towns' payrate. Though the amendment to the PERL at section 20636, subdivision (b)(1), occurred after Towns retired, it was "a matter of clarification," and applied retroactively. (*Prentice, supra*, 157 Cal.App.4th at p. 990, fn. 4; *Gallup v. Superior Court* (2015) 235 Cal.App.4th 682, 690; *People v. CHE, Inc.* (1983) 150 Cal.App.3d 123, 135 [statutory rule of construction applies equally to administrative regulations; a regulation amendment that clarifies a statutory scheme will apply retroactively].) By a parity of

reasoning. the adoption of Regulations 570 and 570.5 were matters of clarification. and apply retroactively.

18. Towns cites several sources for support of the contention that the statutory amendment and adoption of the regulation after his retirement provided additional requirements to payrate which cannot be applied retroactively. For the reasons noted above, this contention is not convincing.

19. Towns contends that the several documents available at SDRMA (e.g., Towns' contract, salary schedules and wage schedules) satisfy the requirement of a publicly available pay schedule. This is contradicted by the requirement in Regulation 570.5, subdivision (a)(8), that a pay schedule cannot "reference another document in lieu of disclosing the payrate."

20. To the extent that Towns' increased salary was, in part, recognition by SDRMA of his past performance (see Factual Finding 35), the portion of salary affected may be considered as special compensation, which is limited to special compensation received by similarly situated members of a group or class that is in addition to payrate. (Section 20636, subdivision (c).) No other SDRMA employee received salary at Towns' level, and his compensation for use in the formula to determine his retirement allowance should be substantially reduced. And the portion of Towns' salary recognizing past performance can be considered as final settlement pay, which is excluded from consideration in the formula to determine his retirement allowance. (Section 20636, subds. (c)(7) & (f), and Regulations 570, 571.) The statutes and regulations addressing special compensation and payrate operate such that a member's pension "will not necessarily reflect his total personal compensation." (*Molina, supra,* 200 Cal.App.4th at pp. 65-67.)

Authority of PERS to correct errors is not affected by laches

21. PERS' ability to correct the mistake of allowing Towns' retirement allowance to by calculated using an improper compensation amount is not affected by laches. PERS' calculation was erroneous. The PERL mandates that PERS "correct all actions taken as a result of errors or omissions of . . . this system." (Section 20160, subd. (b); see *Welch v. California State Teachers' Retirement Bd.* (2012) 203 Cal.App.4th 1, 27.) The PERL provides no time limit for PERS to perform its statutory obligation to correct its actions. Finding "a legislative purpose of 'correcting system errors or omissions wherever possible.'" the court in *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29 concluded that "[w]e should not supply a limitation period not contemplated by the Legislature." (*Id.*, at p. 50.) Towns has not cited any authority that the doctrine of laches may be used to prevent PERS from complying with obligations mandated by a statute that intentionally imposes no time limitation on corrective actions.

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Other defenses, including estoppel, laches and breach of fiduciary duty

22. Towns argues that PERS should be equitably estopped from disallowing the higher amount of salary because SDRMA made contributions to PERS for years based on the higher amounts of compensation and he relied to his detriment that he would receive higher pension benefits based on the higher amount of reported compensation.

23. The requisite elements for equitable estoppel are the same whether applied against a private party or the government: (1) the party to be estopped was apprised of the facts, (2) the party to be estopped intended to induce reliance by the other party, or acted so as to cause the other party reasonably to believe reliance was intended, (3) the party asserting estoppel was ignorant of the facts, and (4) the party asserting estoppel suffered injury in reliance on the conduct. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.)

24. Neither estoppel nor fiduciary theories will serve to compel PERS to treat compensation as pensionable when it does not qualify under section 20636. More specifically, if section 20636 precludes a portion of pay from being considered, PERS cannot be ordered to pay a pension based on the excluded portion, notwithstanding any failure to timely notify the member of excess contributions to PERS made on the member's behalf and any promises made by the employer. (*City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 543-544.) Nor will PERS' fiduciary duty to members justify forcing PERS to violate the mandates of the PERL by virtue of an order to pay greater benefits than the statutes allow. (*Chaidez v. Board of Administration* (2014) 223 Cal.App.4th 1425, 1431-1432.) Further, PERS made no promise to Towns, direct or implied, that the pay reported by SDRMA to PERS was the proper compensation as legally defined for use in the formula to determine his retirement allowance. PERS has no way to predict when a member will file for retirement benefits and its duty to review and determine the appropriate components to use in the formula arises only when retirement occurs. PERS did not therefore mislead Towns.

25. Towns' estoppel argument also is problematic because appellate courts have held that "estoppel is barred where the government agency to be estopped does not possess the authority to do what it appeared to be doing." (*Medina v. Board of Retirement, Los Angeles County Employees Retirement Assn.* (2003) 112 Cal.App.4th 864, 870.) As discussed above, the PERL does not support Towns' final compensation including the higher amount of salary. Finally, for estoppel to apply against a government agency that had no legal authority to do what it is requested to do, it must be shown that "the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*City of Long Beach v. Mansell, supra*, 3 Cal.3d 462, pp. 496-497.) In this case, respondent failed to establish that an injustice would result if his final compensation is based on compensation that SDRMA improperly included in its reporting to PERS and was not made publicly known by an available pay schedule.

26. An unreasonable delay in commencing an administrative proceeding may result in the application of laches if the delay caused prejudice to Towns. (*Gates v. Dept. of Motor Vehicles* (1979) 94 Cal.App.2d 921, 925; *Brown v. California State Personnel Board* (1985) 166 Cal.App.3d 1151.) Laches is established by an unreasonable delay in bringing an action resulting in prejudice to the other party in presenting a defense. (*Id.*) The party asserting laches bears the burden of establishing prejudice; prejudice is never presumed. (*Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 362.)

27. In this case, it was not established that any inordinate or unreasonable delay occurred, resulting in prejudice that would trigger laches. The delay relied on by Towns is in the amount of time elapsed from his 2005 salary increase to PERS' redetermination of his retirement allowance; not a delay in PERS commencing this legal proceeding. Further, as noted above, under *City of Pleasanton v. Board of Administration, supra,* 211 Cal.App.4th at pp. 543-544, PERS cannot be ordered to pay a pension based on compensation that does not comply with section 20636, notwithstanding any failure to point out that the employer was making excess contributions to PERS based on retirement promises made by the employer to the employee.

28. Towns does not state the factual basis for his argument of *res judicata*. There has been no hearing or proceeding resulting in legal conclusions or an order determining rights or liabilities upon which the theory of *res judicata* would apply.

29. Towns' theories based on fiduciary duty, unclean hands, failure to notify him of rights, and PERS' duty to place him back in a position unaffected by the erroneous calculation of his retirement allowance are also unavailing, for the reasons stated above.

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Outcome

30. PERS is within its rights and is obligated to adjust Towns' retirement allowance downward, based on its redetermination of Towns' final compensation. (See Factual Finding 26.)

ORDER

The appeal of respondent James Towns from PERS's reduction of his service retirement allowance is denied.

DATED: August 25, 2016

DocuSigned by:
David B. Rosenman
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DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings