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Ref. No. 2012-0671

September 10, 2015

TO: ALL PARTIES AND THEIR ATTORNEY OF RECORD

SUBJECT: In the Matter of the Calculation of Final Compensation of BRUCE MALKENHORST, SR., Respondent, and CITY OF VERNON, Respondent.

Attached is a copy of the agenda item to be presented to the Board of Administration, California Public Employees' Retirement System at its meeting scheduled for September 17, 2015.



Board of Administration
California Public Employees' Retirement System

Agenda Item 8h

September 17, 2015

ITEM NAME: Proposed Decision – In the Matter of the Calculation of Final Compensation of BRUCE MALKENHORST, SR., Respondent, and CITY OF VERNON, Respondent.

PROGRAM: Employer Account Management Division

ITEM TYPE: Action

PARTIES' POSITIONS

Staff argues that the Board of Administration should decline to adopt the Proposed Decision.

Respondent Bruce Malkenhorst, Sr. (Respondent Malkenhorst) argues that the Board of Administration should decline to adopt the Proposed Decision.

STRATEGIC PLAN

This item is not a specific product of either the Strategic or Annual Plans. The determination of administrative appeals is a power reserved to the Board of Administration.

PROCEDURAL SUMMARY

Respondent Malkenhorst submitted an application for service retirement. CalPERS approved the application, and Respondent Malkenhorst retired from service effective July 1, 2005. In 2012, CalPERS determined that Respondent Malkenhorst's compensation had been over-reported by the City of Vernon due to the inclusion of payments that do not meet the definition of "compensation earnable." CalPERS then recalculated Respondent Malkenhorst's final compensation. Respondent Malkenhorst appealed this determination and the matter was heard by the Office of Administrative Hearings on August 25 through August 27, 2014 and September 3 and 4, 2014. A Proposed Decision was issued on July 14, 2015, both affirming in part and reversing in part CalPERS' determination.

ALTERNATIVES

- A. For use if the Board decides to adopt the Proposed Decision as its own Decision:

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RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own Decision the Proposed Decision dated July 14, 2015, concerning the appeal of Bruce Malkenhorst, Sr.; RESOLVED FURTHER that this Board Decision shall be effective 30 days following mailing of the Decision.

- B. For use if the Board decides not to adopt the Proposed Decision, and to decide the case upon the record:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, after consideration of the Proposed Decision dated July 14, 2015, concerning the appeal of Bruce Malkenhorst, Sr., hereby rejects the Proposed Decision and determines to decide the matter itself, based upon the record produced before the Administrative Law Judge and such additional evidence and arguments that are presented by the parties and accepted by the Board; RESOLVED FURTHER that the Board's Decision shall be made after notice is given to all parties.

- C. For use if the Board decides to remand the matter back to the Office of Administrative Hearings for the taking of further evidence:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, after consideration of the Proposed Decision dated July 14, 2015, concerning the appeal of Bruce Malkenhorst, Sr., hereby rejects the Proposed Decision and refers the matter back to the Administrative Law Judge for the taking of additional evidence as specified by the Board at its meeting.

- D. Precedential Nature of Decision (two alternatives; either may be used):

1. For use if the Board wants further argument on the issue of whether to designate its Decision as precedential:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System requests the parties in the matter concerning the appeal of Bruce Malkenhorst, Sr., as well as interested parties, to submit written argument regarding whether the Board's Decision in this matter should be designated as precedential, and that the Board will consider the issue whether to designate its Decision as precedential at a time to be determined.

2. For use if the Board decides to designate its Decision as precedential, without further argument from the parties.

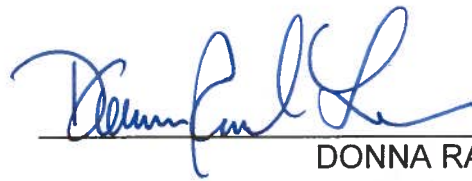
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RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, hereby designates as precedential its Decision concerning the appeal of Bruce Malkenhorst, Sr.

BUDGET AND FISCAL IMPACTS: Not applicable

ATTACHMENTS

Attachment A: Proposed Decision
Attachment B: Staff's Argument
Attachment C: Respondent(s) Argument(s)



DONNA RAMEL LUM
Deputy Executive Officer
Customer Services and Support

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION OF THE
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Calculation of Final
Compensation of:

BRUCE MALKENHORST, SR.,

Respondent,

and

CITY OF VERNON,

Respondent.

Case No. 2012-0671

OAH No. 2013080917

PROPOSED DECISION

Howard W. Cohen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on August 25 through August 27 and September 3 and 4, 2014, in Los Angeles.

Jason Levin, Attorney at Law, of Steptoe & Johnson, LLP, represented petitioner Karen DeFrank, Chief, Customer Account Services Division (CASD), California Public Employees' Retirement System (CalPERS).

Joung H. Yim, Attorney at Law, of Liebert Cassidy Whitmore, represented the respondent City of Vernon (Vernon).

John Michael Jensen, Attorney at Law, represented respondent Bruce Malkenhorst, Sr. (respondent Malkenhorst), who was at times present.

The parties filed various pre-trial motions. Those motions were ruled on before or during the course of the hearing, with the exception of motions filed by respondent Malkenhorst, in support of his notice of defense, by which he seeks to dismiss this action based on various legal theories. The dismissal motions will be addressed in this Proposed Decision.

Oral and documentary evidence was received. During the hearing, respondent Malkenhorst moved to seal a portion of the transcript comprising approximately five minutes

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RETIREMENT SYSTEM
FILED July 16, 2015
[Signature]

of testimony on August 27, 2014; there was no objection. Given the innocuous nature of the testimony offered during that time period, the motion is denied.

The record was held open to June 15, 2015, to allow the parties to file closing briefs. CalPERS's closing brief and reply brief were timely filed and marked for identification as exhibits 90 and 91, respectively. Vernon did not file a closing brief. Respondent Malkenhorst's closing brief was timely filed and marked for identification as exhibit YYYYYY. Respondent Malkenhorst concurrently filed a request that official notice be taken of certain documents; the documents were marked for identification as exhibits ZZZZZ through LLLLLL. CalPERS objected to official notice being taken of several of those exhibits. The objections are sustained as to exhibits AAAAAA, JJJJJ, KKKKKK, and LLLLLL, on grounds of relevance, foundation, and failure to demonstrate that the documents are the proper subject of official notice. Official notice is taken of exhibits ZZZZZ and BBBBBB through IIIII.

The record was closed and the matter was submitted on June 15, 2015.

SUMMARY

In 2012, seven years after respondent Malkenhorst retired from employment with Vernon, CalPERS recalculated respondent Malkenhorst's "final compensation," a term defined in the Public Employees' Retirement Law (PERL) (Gov. Code, § 20000 et seq.),¹ and decreased his retirement allowance. The issues in this case are whether CalPERS correctly found that respondent Malkenhorst's final compensation as previously calculated did not comply with the PERL, whether CalPERS has now correctly determined respondent Malkenhorst's final compensation, and whether CalPERS was barred by res judicata, collateral estoppel, or another legal or equitable theory, from recalculating respondent Malkenhorst's final compensation after having calculated a different figure in 2005. Because the evidence at hearing established that respondent Malkenhorst's final compensation had been incorrectly determined, and that CalPERS was not barred from recalculating his final compensation, respondent Malkenhorst's appeal from CalPERS's benefits is denied in part. It is granted in part, however, because CalPERS' current calculation of respondent Malkenhorst's final compensation is arbitrary and constitutes an abuse of discretion.

FACTUAL FINDINGS

Jurisdiction and Parties

1. CalPERS is a unit of the Government Operation Agency. (Gov. Code, § 20002.) Under the PERL, CalPERS administers the retirement system for employees of the

¹ All further statutory references are to the Government Code, except where otherwise stated.

State of California and other public entities. The CalPERS Board of Administration (Board) administers CalPERS' defined benefit retirement plan. Benefits for members are funded by member and employer contributions, and by interest and other earnings on those contributions.

2. Vernon is a public agency that contracts with CalPERS for retirement benefits for its eligible employees under Government Code section 20460 et seq. Vernon was incorporated as a general law city; it became a charter city in 1988.

3. Respondent Malkenhorst was hired by Vernon in April 1975 as Deputy City Clerk/Deputy Director of Finance. Over the years he was employed by Vernon, respondent Malkenhorst's job titles and duties changed. By 1978, respondent Malkenhorst had become City Administrator/City Clerk and City Treasurer. Subsequently, while remaining the City Administrator/City Clerk and City Treasurer, respondent Malkenhorst also accrued the titles and duties of Director of Finance and Personnel, Executive Director of Light and Power/Chief Executive Officer of Electrical Department, Executive Director of the Redevelopment Agency, Secretary of the Redevelopment Agency, CEO of the Gas Municipal Utility Department, Executive Director of the Industrial Development Authority, Secretary of the Industrial Development Authority, Treasurer of the Industrial Development Authority, and Executive Director of the Vernon Historic Preservation Society.² Respondent Malkenhorst retired in 2005. By virtue of his employment with Vernon, respondent Malkenhorst is a local miscellaneous member of CalPERS.

4. On June 6, 2005, respondent Malkenhorst signed an application for service retirement, requesting that his pension be calculated on the basis of his highest City Administrator payrate, including longevity pay. Using those amounts, CalPERS calculated respondent Malkenhorst's final compensation in the amount of \$44,128 per month, which was then used to calculate his retirement allowance in the amount of \$40,022.66 per month. Respondent Malkenhorst retired from service effective July 1, 2005, with just over forty years of service credit, and has been receiving his retirement allowance from that date.

5. In 2011, respondent Malkenhorst pled guilty and was convicted of felony misappropriation of public funds.³

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² Respondent Malkenhorst argued that he personally did not assume these titles and duties; rather, each of the titles and duties was assigned, by City Council resolution, to the City Administrator/City Clerk. The record indicates otherwise; in any event, respondent Malkenhorst being the only City Administrator/City Clerk during the relevant time period, the supposed distinction is illusory.

³ CalPERS did not argue and offered no authority for the proposition that respondent Malkenhorst's felony conviction renders him ineligible to receive a retirement allowance through CalPERS or in any way affects the amount he is entitled to receive under the PERL.

6. By letter dated October 22, 2012, CalPERS notified respondent Malkenhorst that his compensation had been over-reported by Vernon due to inclusion of payments that do not meet the definition of “compensation earnable” set forth in the PERL. CalPERS informed respondent Malkenhorst that it had recalculated his “final compensation,” that it would be reduced from \$44,128 to \$9,450 per month, and that a corresponding downward adjustment would be made to respondent Malkenhorst’s retirement allowance. CalPERS also advised respondent Malkenhorst and Vernon of their right to appeal the determination.

7. By letter dated December 21, 2012, respondent Malkenhorst filed a timely appeal and requested an administrative hearing.⁴

8. CalPERS filed a Statement of Issues on September 27, 2013. Respondent Malkenhorst timely filed a Notice of Defense.⁵ This hearing ensued.

⁴ Respondent Malkenhorst first filed a complaint and petition for writ of mandate against CalPERS in Los Angeles Superior Court, arguing that CalPERS was barred from proceeding because it had made a binding pension benefits determination in a “quasi-adjudication” in 2005. (See Factual Findings 35-39.) The court sustained a demurrer to the complaint, holding that respondent Malkenhorst must exhaust his administrative remedies against CalPERS. In March 2013, respondent Malkenhorst filed a notice of appeal from the superior court’s ruling; that appeal was still pending at the time of this hearing. On February 13, 2015, the Court of Appeal affirmed the trial court’s sustaining the demurrer against Malkenhorst’s complaint. On March 19, 2015, respondent Malkenhorst petitioned the California Supreme Court for review; no evidence was submitted regarding the outcome of that petition. Respondent Malkenhorst also filed petitions for a writ of supersedeas and request for stay in the Court of Appeal to stay this administrative hearing. The petitions were denied.

⁵ Respondent Malkenhorst also filed numerous pre-hearing motions, among them a motion to dismiss the case on the grounds that CalPERS must proceed by Accusation rather than by Statement of Issues, must present its evidence first, and must bear the burden of proof. At a motion hearing held on June 13, 2014, the parties stipulated that CalPERS would present its evidence first and that it would have the burden of proof in this case. The ALJ, therefore, denied respondent Malkenhorst’s motion in part, ordering that CalPERS present its case first and bear the burden of proof by a preponderance of the evidence, but that CalPERS could proceed by Statement of Issues and need not file an Accusation. (See Legal Conclusion 1.) In other pre-hearing papers, motions, and a demurrer, respondent Malkenhorst argued, among other things, that CalPERS’ pleading was fatally indefinite or uncertain. After argument was heard at the prehearing conference and at hearing, orders issued addressing those motions and a portion of the demurrer. The remainder of the demurrer and other motions, which collectively were treated as a motion to dismiss, are addressed below, at Legal Conclusions 2 through 10.

*Respondent Malkenhorst's Salary History at Vernon*⁶

9. Respondent Malkenhorst started his employment at Vernon as Deputy City Clerk/Deputy Director of Finance in April 1975, earning about \$39,000 per year. He became City Clerk/Director of Finance two years later; by that time, his annual salary had increased to \$59,000. In 1978, respondent Malkenhorst was City Administrator/City Clerk and City Treasurer and his annual salary increased to \$84,000. Over the next two and one-half years, his annual salary increased to \$115,000. In sum, respondent Malkenhorst's salary nearly tripled in his first six years working for Vernon.

10. In May 1981, respondent Malkenhorst assumed the additional title and duties of Chief Executive Officer of the Electrical Department. From 1981 to 1988, respondent Malkenhorst's annual salary again approximately tripled, to about \$375,000; his annual raises during that period were as low as six percent and as high as 23.49, 23.55, and 24.55 percent.⁷

11. In December 1988, respondent Malkenhorst assumed the additional titles and duties of Executive Director of the Redevelopment Agency and Secretary of the Redevelopment Agency. From 1988 to 1993, respondent Malkenhorst's annual salary increased nearly 70 percent, from about \$375,000 to about \$636,000; his annual raises during that period were as low as about two percent and as high as 16.14 and 16.33 percent.

12. In December 1993, respondent Malkenhorst assumed the additional titles and duties of Executive Director of the Industrial Development Authority, Secretary of the Industrial Development Authority, and Treasurer of the Industrial Development Authority. From 1993 to 2003, respondent Malkenhorst's annual salary increased by more than half, from about \$636,000 to about \$999,000, with annual increases ranging from three percent to 9.27 percent.

13. In December 2003, respondent Malkenhorst assumed his final additional title, Executive Director of the Vernon Historic Preservation Society. By the time he retired in 2005, his annual salary had increased to about \$1,056,000.

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⁶ This reconstruction of respondent Malkenhorst's salary history is based on Vernon's City Council resolutions. Respondent Malkenhorst did not offer any substantive refutation of this history.

⁷ Official notice was taken of the fact that, from July 1981 to November 1982, the Consumer Price Index increased approximately seven percent; during that time, respondent Malkenhorst's payrate increased by approximately 24 percent. CalPERS determined that respondent Malkenhorst's salary increased faster than any class of Vernon employees, including the class comprising department heads.

CalPERS's 2012 Audit of Vernon

14. CalPERS audits municipalities and other agencies for compliance with laws related to, among other things, compensation, health benefits vesting, and payroll reporting. In 2011, CalPERS began auditing Vernon. Early in the auditing process, CalPERS' Office of Audit Services (OAS) asked Tomi Jimenez, then Section Manager of a Compensation Review Unit (CRU), to help ascertain how many hours were associated with each position held by respondent Malkenhorst. CRUs ensure that retiring members' payrates are reported in compliance with the PERL. Jimenez began at CalPERS in 2002 and was a CRU section manager from 2010 until 2014. She is now Assistant Division Chief in the CASD at CalPERS.

15. Jimenez testified that, in addition to OAS asking her to assist the auditors, the CalPERS Board asked her, as a CRU section manager, to make a final retirement benefits determination regarding respondent Malkenhorst. Jimenez, therefore, obtained documentation from Vernon to enable her to calculate respondent Malkenhorst's final compensation, as that term is defined in the PERL.

16. CalPERS concluded in its review of respondent Malkenhorst's positions and payrate, and argued variously at the hearing, that:

a. In assuming his numerous duties and titles, respondent Malkenhorst must have been working overtime and that, under the PERL, payment for overtime cannot be used to calculate final compensation;

b. The documentation from Vernon does not show how many hours respondent Malkenhorst worked or was required to work in each position he held, that if the City Administrator/City Clerk position was a full time position the additional titles must have been part-time positions, and that, under the PERL, payment for part-time work cannot be used to calculate final compensation;

c. The salaries for the positions respondent Malkenhorst assumed were never listed in publicly available pay schedules, as required by the PERL and regulations;

d. Even if those salaries were not required to be listed because there was no salary ostensibly associated with the various titles, or even if City Council resolutions indicating no salary were adopted in open council session and posted throughout the City, the increases in salary respondent Malkenhorst received over the years must have been for his assumption for those titles and Vernon concealed that fact by delaying respondent Malkenhorst's salary raises so they would not conspicuously coincide with the assumption of new titles; and

e. The "special compensation" that respondent Malkenhorst received as longevity pay was impermissibly based on compensation for a class of one, consisting of only the City Administrator.

Overtime and Part-Time

17. With respect to the first two arguments, based on the evidence as a whole, respondent Malkenhorst was a full-time employee; he did not work overtime and he did not work part-time. There was no evidence that respondent Malkenhorst worked fewer than 40 or more than 45 hours per week. The additional positions assigned to respondent Malkenhorst as City Administrator/City Clerk did not require him to work overtime for PERL purposes, nor did they constitute part-time positions.

18. Various City Council resolutions provide that all employees “shall be considered forty hours per week personnel unless otherwise specified.” respondent Malkenhorst testified that he worked the standard Vernon workday, from 7:00 a.m. to 5:30 p.m., during Vernon’s four-day work week, for a total of forty hours per week, with occasional exceptions. For instance, he worked some weekends during the firefighters’ strike negotiations. He worked late twice per month, on those evenings when the City Council met. He occasionally had to attend a meeting on a Friday, when the city government offices were closed. He testified, though, that he accomplished all his work in 40 to 45 hours per week.

19. City department heads would report to respondent Malkenhorst as City Administrator/City Clerk. Respondent Malkenhorst also spent time on projects assigned to him by virtue of the various titles and responsibilities assigned to him by City Council resolution. Regardless of the additional duties that entailed, such as attending meetings regarding financing a new power plant, respondent Malkenhorst was still expected to perform his other duties at City Administrator/City Clerk, according to former City Councilperson Hilario Gonzalez.

20. There was a significant degree of flexibility in how respondent Malkenhorst would spend his work hours. Respondent Malkenhorst would delegate City Council-mandated tasks to various department heads, and supervise and review their work. One of the titles assigned to respondent Malkenhorst was City Treasurer, but he delegated to the Assistant Treasurer most of his duties, including preparing the city’s proposed annual budget; respondent Malkenhorst would review and revise the budget and then present it to the City Council Finance Committee. As City Administrator/City Clerk, respondent Malkenhorst was responsible for purchasing for the city; he would delegate purchasing duties, however, to the Assistant Purchasing Agent, and then approve or reject proposed purchases. The Assistant Finance Director prepared reports on financial conditions; respondent Malkenhorst reviewed them. Mail to the City Council came through the City Clerk’s office; respondent Malkenhorst delegated mail distribution functions to the Assistant City Clerk. Respondent Malkenhorst testified that he focused his personal efforts on whatever had to be done to administer the city, which varied over time. He was the Municipal Employee Relations Representative (MERR) for all the years he was City Administrator/City Clerk, but the bulk of the work he did as MERR was during a firefighters’ strike in 1978 and 1979. There were always non-routine matters associated with new titles assigned to him by the City Council that could take up most of his time, such as his work on the city’s generating plant and finalizing an electric power contract with

Southern California Edison. Respondent Malkenhorst testified that, though some weeks required a good deal of work as CEO of the Light and Power Department, other weeks required no work, and the result is that over the years the addition of the CEO title added only a nominal amount of work to his workload. He worked a significant amount as CEO of the Gas Municipal Utility Department from 1991 through 1993, but only a nominal amount after that, though he retained the title.

21. For its assertion that respondent Malkenhorst worked overtime or held several part-time positions, CalPERS in part relies on ADP payroll registers, which report respondent Malkenhorst's time in multiple departments. The evidence, however, reflects only that respondent Malkenhorst's salary was prospectively allocated over various departments for purposes of developing annual departmental budgets. The allocation did not track the number of hours respondent Malkenhorst expected to work on matters pertaining to each department receiving an allocation of some of his time. According to respondent Malkenhorst, the allocation was used for the purpose of offsetting income generated by income-generating departments.

Publicly Available Pay Schedules

22. For most of the positions assigned to respondent Malkenhorst, there was no publicly available pay schedule and there was no public accountability for payrates associated with newly-created positions. Vernon and respondent Malkenhorst obscured any connection between respondent Malkenhorst's pay increases and the positions and duties he was assigned, making it impossible for any member of the public to ascertain how much the city was paying for services associated with numerous important city functions.⁸ Indeed, at the hearing, respondent Malkenhorst vigorously denied any connection between any of his payrate increases and any of the titles and responsibilities he accrued over the years. All of this obfuscation and blurring of the line between job title and payrate subverted the transparency requirements of the PERL.

23. Illustrative of Vernon's practice when assigning to respondent Malkenhorst additional job titles and responsibilities are City Council resolution numbers 4803, adopted May 5, 1981, and 4817, adopted June 30, 1981.

24. With resolution number 4803, the City Council reorganized the electrical department administration, creating the position of Chief Executive Officer "to coordinate the development of policies involved in all phases of the electrical department . . ." (Ex. 14,

⁸ While the increases in respondent Malkenhorst's salary over the course of his years at Vernon and the amount of the salary he received in his last 15 years may be astonishing, they do not constitute the basis for CalPERS' claim that respondent Malkenhorst's "final compensation" included payments that do not comply with the PERL. Nor did CalPERS allege or submit evidence of any unfunded liabilities or other irregularities with respect to contributions into the CalPERS system by respondent Malkenhorst or Vernon based on the salary Vernon paid respondent Malkenhorst.

p. 1.) “The City Council of the City of Vernon hereby . . . appoints the City Administrator, Bruce V. Respondent Malkenhorst, to serve as the Chief Executive Officer of the Electrical Department in which said Mr. Respondent Malkenhorst shall serve in said capacity with no increase in compensation and shall have the duties and responsibilities described in Exhibit ‘A’ which is attached hereto and made a part hereof.” (*Id.* at pp. 1-2.) Those duties included coordinating the development of procedures, supervising and coordinating the duties of the operations manager, and serving as a director on the Board of Directors of Southern California Public Power Authority. Gloria Orosco, respondent Malkenhorst’s secretary from 1981 to 2004, testified that Vernon’s electricity needs were expanding and that the city needed respondent Malkenhorst to provide oversight and to meet with other cities, with Southern California Edison regarding litigation, and with other agencies. Resolution number 4817 established salary schedules for the Light and Power Department and the City Administrator/City Clerk Department. The pay schedule for the Light and Power Department recites that “[t]he City Administrator/City Clerk shall serve as the Chief Executive Officer in the Light and Power Department and the compensation for said position is included in the compensation established for the position of City Administrator/City Clerk Department.” (Ex. 16, at p. 20.) The pay schedule for the City Administrator/City Clerk Department identifies a salary scale with six steps for the position of City Administrator/City Clerk, ranging from \$4,110 per month to \$5,373 per month.

25. Respondent Malkenhorst testified that he received no salary increases for assuming the many titles assigned to him over the years since he became City Administrator/City Clerk in 1978. Respondent Malkenhorst’s salary increased by leaps and bounds throughout his 30 years at Vernon, sometimes close in time to, and sometimes at a significant remove in time from, his assumption of a new title. Respondent Malkenhorst attributes the raises he received to the results he produced for the City in the overall performance of his job, as determined by the Finance Committee and the City Council in his salary reviews. Respondent Malkenhorst disputes that his salary increases were directly related to hours worked or to any of the many titles and responsibilities he assumed. His testimony was corroborated by former City Councilperson Hilario Gonzalez.

26. But although respondent Malkenhorst received no increase in salary directly attributable to any given new title, his testimony and the testimony of former City Councilman Gonzalez make clear that respondent Malkenhorst was rewarded for successfully performing tasks associated with those new titles, such as when, as CEO of the Light and Power Department, he helped ensure a supply of cheap electricity to the businesses located in Vernon. Tomi Jimenez testified that, from 1979 to 2004, respondent Malkenhorst’s payrate increased nine-fold, while other employees’ payrates increased three- or four-fold, supporting a conclusion that respondent Malkenhorst was compensated for holding multiple positions.

27. Based on the evidence received at the hearing, salary resolutions and resolutions assigning new titles to respondent Malkenhorst were adopted in open session of the Vernon City Council. Gloria Orosco, who became Deputy City Clerk of Vernon in 1986, testified that she was in charge of posting in public places the agenda for the City Council

meetings, and for then making the Vernon City Council minutes and resolutions, which were not posted, publicly available. If members of the public wanted a copy of a resolution, they could contact the City Clerk's office; Orosco would determine whether Vernon had the document and would make arrangements to provide a copy.

Special Compensation (Longevity Pay)

28. The evidence is sufficient to establish that, for purposes of longevity pay, respondent Malkenhorst was placed in a class consisting of one person.

29. Vernon reported longevity pay for respondent Malkenhorst; longevity pay is a permitted item of special compensation, one of the components of final compensation. Respondent Malkenhorst, though, received a longevity payment only available to him, creating a group or class of one, which the PERL prohibits. Department heads received as longevity pay an additional 20 percent of their base salary per month after 20 years, and 25 percent after 30 years. Only the City Administrator was to receive 25 percent after 25 years. CalPERS determined to move respondent Malkenhorst into the next class, the class comprising department heads, and allow him their longevity pay, which after 25 years was 20 percent, not 25 percent.⁹

CalPERS' Current Determination of Respondent Malkenhorst's Final Compensation

30. Respondent Malkenhorst retired in 2005, and the payrate that Vernon reported for the position of City Administrator/City Clerk was used to generate a retirement benefit. But during the audit, Tomi Jimenez learned that respondent Malkenhorst had multiple job titles and duties, and she concluded that, without publicly available pay schedules for any of respondent Malkenhorst's positions other than City Administrator/City Clerk, which improperly served as a catch-all payrate category, CalPERS could not properly calculate respondent Malkenhorst's final compensation.

31. CalPERS argues that the only full-time position respondent Malkenhorst held at Vernon for which CalPERS can document a single, publicly available payrate is the position of City Clerk, which respondent Malkenhorst held before he was appointed City Administrator. When respondent Malkenhorst retired, Vernon separated his simultaneously-held job titles into multiple full-time positions. Because no City Administrator position was listed on the new pay schedule, CalPERS recalculated respondent Malkenhorst's final compensation using the payrate for the position of Acting City Clerk published by Vernon when respondent Malkenhorst retired. Jimenez decreased respondent Malkenhorst's allowable payrate and longevity pay, recalculated respondent Malkenhorst's final compensation, and sent the figures to the Benefits Department, which calculated respondent Malkenhorst's retirement benefit.

⁹ CalPERS took this position in 2005, retreated from it (see Factual Findings 35-39), and now reasserts it, finding its 2005 retraction to have been erroneous. CalPERS is required to correct past errors in determining retirement benefits. (See Legal Conclusion 21.)

32. CalPERS's stated method of calculating respondent Malkenhorst's final compensation is arbitrary and without sufficient legal authority. (Legal Conclusions 22-26.)

33. Respondent Malkenhorst's responsibilities as City Administrator/City Clerk and City Treasurer exceeded his responsibilities as City Clerk, even before other titles and duties were assigned to him. Evidence on the record established that the City Clerk's duties, during the relevant time period, included placing items on the agenda for City Council meetings, keeping minutes of City Council meetings, drafting ordinances, and, while serving concurrently as Finance Director, having responsibility for the city's finances. As City Administrator, on the other hand, respondent Malkenhorst's responsibilities and authority increased; department heads reported to respondent Malkenhorst on budget issues and on significant matters to be considered before being brought to the City Council. He continued to fulfill the functions of City Administrator even as he accrued the additional titles; though he delegated duties to assistants and department heads, he was still responsible to the City Council with respect to those duties. Although it may be difficult to identify a payrate for City Administrator, a difficulty created by Vernon's practices and respondent Malkenhorst's cooperation in obscuring what exactly he was being compensated for, there is a significant amount of data that CalPERS can and should review to ascertain an appropriate payrate for respondent Malkenhorst as City Administrator.

34. The determination of respondent Malkenhorst's final compensation in accordance with the PERL is within CalPERS's expertise. During the audit and payrate review process, CalPERS considered alternative measures for determining respondent Malkenhorst's final compensation, but decided against using them. Consistent with the conclusions set forth in this Proposed Decision, CalPERS might now determine that some elements of those measures can be appropriately applied. Pertinent payrate data might be derived from several sources. For example, it may be useful to CalPERS's calculations that within a year of adding City Administrator to his City Clerk title, respondent Malkenhorst's salary increased over 40 percent. No evidence was offered regarding the salary of respondent Malkenhorst's successor as City Administrator; the other titles having been stripped from that position, the payrate for the current City Administrator might provide data useful to CalPERS in recalculating an appropriate payrate for respondent Malkenhorst. Respondent Malkenhorst's enhanced responsibilities as City Administrator, and data bearing on his relative increase in payrate for assuming that position, mandate a dispassionate evaluation and recalculation, all in accordance with the principles set forth in the PERL.

CalPERS's 2005 Proposal to Reduce Respondent Malkenhorst's Retirement Allowance

35. Not long after respondent Malkenhorst retired, CalPERS informed respondent Malkenhorst by letter dated July 18, 2005, that his retirement allowance was to be adjusted downward because his payrate and longevity pay did not comply with the PERL. CalPERS notified respondent Malkenhorst of his right to appeal and request an administrative hearing.

36. Marla Aspinwall, an attorney with Loeb & Loeb, then representing respondent Malkenhorst, wrote to CalPERS a letter dated August 11, 2005, challenging the basis of

CalPERS's proposed adjustment and requesting an appeal. In the letter, Aspinwall contended that CalPERS's proposed adjustment was erroneous. With respect to respondent Malkenhorst's longevity pay, Aspinwall argued that respondent Malkenhorst should be considered in a class consisting of himself, as City Administrator, and the City Councilmembers, who received, by resolution, 25 percent longevity pay after 25 years of service.

37. Rather than proceeding with the administrative appeal process by filing a pleading and setting the matter for hearing, CalPERS wrote back to Aspinwall, by letter dated September 23, 2005, requesting additional information about respondent Malkenhorst's payrate and, with respect to the longevity pay calculation, the class to which respondent Malkenhorst belonged. CalPERS wrote that Government Code section 20322 makes City Councilpersons, as elected officials, a separate group to which the City Administrator could not belong.

38. There then followed further written and oral negotiations between CalPERS and Aspinwall. By letter dated November 3, 2005, Aspinwall wrote that "at no time did [Malkenhorst] receive overtime or additional compensation for performance of . . . duties" associated with the additional titles assigned to him. (Ex. AAA.) She wrote that Vernon "has not hired a replacement for Mr. Respondent Malkenhorst, but is currently engaged in the process. As with Mr. Respondent Malkenhorst, any salary paid to the new City Administrator will be based upon the experience and abilities of the individual." (*Ibid.*) With respect to longevity pay, Aspinwall wrote that the PERL did not mandate a separate class for elected officials, that Government Code section 20636, subdivision (e)(1), provides that a class may include employees who share similarities in job duties and who logically form a work-related grouping, and that Malkenhorst and the City Councilmembers were logically grouped together because "their positions relate to implementation and administration of the City and its policies." (*Ibid.*)

39. The negotiations concluded when CalPERS informed respondent Malkenhorst that it had reconsidered its position and retracted its proposed change to respondent Malkenhorst's retirement allowance. CalPERS never filed a pleading with OAH, and the matter never went to hearing.

LEGAL CONCLUSIONS

1. CalPERS initiated this action by filing a Statement of Issues. (Factual Finding 8.) Prior to the hearing, the parties stipulated, and the ALJ ordered, that CalPERS has the burden of proof in this proceeding.¹⁰ The standard of proof is a preponderance of the evidence, meaning that CalPERS is obliged to adduce evidence that has more convincing force than that opposed to it. (Evid. Code, § 115; *Glover Vernon. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

¹⁰ See Order Re Pretrial Motions, dated June 18, 2014.

Respondent Malkenhorst's Pre-Trial Motion to Dismiss

2. Prior to hearing, respondent Malkenhorst filed a motion to dismiss this action.¹¹

3. Respondent Malkenhorst requested that the motion to dismiss be the subject of a separate evidentiary hearing bifurcated from the remainder of the hearing on the merits. His request was denied by Order dated April 17, 2014, which provided as follows:

Respondent Malkenhorst's motion to dismiss will not be bifurcated from the remainder of the hearing; rather, it will be heard as part of, and with, the hearing on the merits of the pleading, and a ruling on the motion to dismiss will be included in the proposed decision issued pursuant to Government Code section 11517.

Respondent Malkenhorst moved for reconsideration of the bifurcation motion. The Presiding Administrative Law Judge denied the motion for reconsideration in an Order dated August 22, 2014, after letter briefs were filed and oral argument was heard at a telephonic status conference held on July 29, 2014. Respondent Malkenhorst again requested bifurcation at the hearing; the request was denied.

4. The motion to dismiss is based on legal grounds of collateral estoppel, res judicata, issue preclusion, claim preclusion, judicial estoppel, charter city autonomy, appellate court exclusive jurisdiction, CalPERS's limited agency jurisdiction, laches, and the statute of limitations.

5. The res judicata, collateral estoppel, issue preclusion, and claim preclusion grounds for the motion to dismiss derive from respondent Malkenhorst's argument that, in

¹¹ What is referred to here and in various OAH orders as respondent Malkenhorst's "motion to dismiss" actually comprises a plenitude of motions and objections, and a demurrer, that variously cross-reference and incorporate by reference some or all of the other motions and objections. Those include the following: (a) Object[ion]s to and Challenges [to] CalPERS' and OAH's Jurisdiction or Authority, Including Under Government Code 11506; (b) Points and Authorities on Laches, Statute of Limitations, Affirmative Defenses; (c) Assertion of Judicial Estoppel to Bar Evidence; (d) Memorandum of Points and Authorities Regarding Charter City Autonomy; (e) Points and Authorities on Parol Evidence Rule; (f) Memorandum of Points and Authorities Regarding Collateral Estoppel, Res Judicata, Issue Preclusion, and Claim Preclusion; (g) Request for Official and Judicial Notice; (h) two Notices of Defense raising affirmative defenses and new matter; (i) Demurrer, Including Under Government Code Sections 11506(a)(2)-(3); and (j) Motion to Strike Statement of Issues. Demurrers are not recognized in proceedings under Government Code section 11500 et. seq.; the arguments raised in respondent Malkenhorst's demurrer were treated as further grounds raised in support of respondent Malkenhorst's motion to dismiss.

2005, CalPERS finally adjudicated a calculation of respondent Malkenhorst's "final compensation" and is bound by that calculation. Respondent Malkenhorst's motion on these grounds is without merit and is denied. CalPERS's proposal to reduce respondent Malkenhorst's benefits in 2005 was resolved through informal negotiations. No initial pleading invoking the jurisdiction of OAH was ever filed. (Factual Findings 35-39.) The matter never went to hearing and was never adjudicated. (See *Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 483.)¹² "Only issues actually litigated in the initial action may be precluded from the second proceeding under the collateral estoppel doctrine. [Citation.]" (*People v. Sims* (1982) 32 Cal.3d 468, at p. 484 [the matter "was actually litigated at the DSS fair hearing"].) "For an administrative decision to have collateral estoppel effect, it and its prior proceedings must possess a judicial character. Indicia of proceedings undertaken in a judicial capacity include a hearing before an impartial decision maker; testimony given under oath or affirmation; a party's ability to subpoena, call, examine, and cross-examine witnesses, to introduce documentary evidence, and to make written and oral argument; the taking of a record in the proceeding; and a written statement of reasons for the decision. [Citation.]" (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943-944, quoted in *Y.K.A. Industries, Inc. v. Redevelopment Agency of the City of San Jose* (2009) 174 Cal.App.4th 339, 357.)

6. Respondent Malkenhorst argues that CalPERS and Vernon are judicially estopped to introduce evidence that contradicts prior statements made by them or on their behalf in 2005, when CalPERS notified Vernon and respondent Malkenhorst of a proposed reduction in respondent Malkenhorst's retirement benefits based on a recalculation of his payrate and his longevity pay. To the extent the motion to dismiss is based on judicial estoppel, it is denied. Judicial estoppel might apply if there had been a hearing at which CalPERS had adopted respondent Malkenhorst's position, and respondent Malkenhorst was now taking a different position. (See §§ 11440.10, subd. (a), 20123-20125, 20134 (requiring evidence that Board adopted the position of the party to be estopped); see also *Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 846.) Judicial estoppel applies to prevent a party from changing position to gain an advantage, after his or her interests have changed, "to the prejudice of the party who has acquiesced in the position formerly taken" (*People v. Torch Energy Services, Inc.* (2002) 102 Cal.App.4th 181, 189.) Here, there was no prior proceeding, and respondent Malkenhorst did not acquiesce in negotiations with CalPERS; rather, CalPERS acquiesced and accepted respondent Malkenhorst's position. Finally, Vernon did not attempt to introduce any evidence in this hearing.

7. Respondent Malkenhorst argues that CalPERS's re-calculation of his final compensation, both to determine future retirement benefits and to recoup alleged overpayments made to him, is barred by the statute of limitations and the doctrine of laches.

¹² The fact that the subject line of some CalPERS letters referred to "Notice of Appeal," which first appeared in the subject line of a Loeb & Loeb letter, is not determinative of the nature or legal effect of the correspondence.

a. Respondent Malkenhorst's statute of limitations argument lacks merit, and the motion to dismiss on this ground is denied. CalPERS maintains that its earlier calculations of respondent Malkenhorst's final compensation were erroneous. The PERL mandates that CalPERS "correct all actions taken as a result of errors or omissions of . . . this system." (Gov. Code, § 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 CalPERS 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.)

b. With respect to laches and future retirement benefits, respondent Malkenhorst has not cited to any authority that the doctrine of laches may be used to prevent CalPERS from complying with obligations mandated by a statute that intentionally imposes no time limitation on corrective actions. The motion to dismiss, to the extent it is based on an assertion of laches, is denied.

c. As for recoupment of alleged overpayments to respondent Malkenhorst, the statutory requirement that CalPERS correct all actions based on error appears to encompass the power to recoup overpayments. (See, e.g., §§ 20163, 20164.) CalPERS has alleged in the Statement of Issues that the only issues in this matter are whether it previously erroneously calculated, and has now correctly calculated, respondent Malkenhorst's final compensation. Respondent Malkenhorst argues that any attempt at recoupment is time-barred. CalPERS has not yet sought recoupment of past payments, nor has it elected how it will proceed if it is determined that it made overpayments in this case. No determination about recoupment, therefore, may be made in this matter. The motion to dismiss with respect to recoupment is premature, and is denied on that ground.

8. Respondent Malkenhorst argues that CalPERS's determination of his "final compensation" violates Vernon's autonomy as a charter city.

a. Regardless of whether respondent Malkenhorst has standing to bring this argument—and Vernon maintains that he does not—the argument is without merit, and the motion to dismiss on this ground is denied. Vernon exercised its autonomy to enter into a contract with CalPERS and to enroll its employees as members of the CalPERS system. By virtue of Vernon's contract with CalPERS, Vernon agreed that the PERL would govern its employees' retirement benefits. (§ 20506.)

b. Whatever compensation Vernon agreed to pay respondent Malkenhorst during the course of his employment, and however it chose, for its own purposes, to structure its government and the duties, salary, and job titles of its employees, Vernon agreed by virtue of its contract that CalPERS must determine respondent Malkenhorst's retirement benefits based on what the PERL defines as "final compensation." "Final compensation" is a function of "compensation earnable," which incorporates both "payrate" and "special compensation," all terms defined in the PERL. (§§ 20037, 20636, subd. (a).)

c. No evidence was submitted on the record that Vernon has adopted an ordinance that conflicts with the PERL, but in the event of such a conflict the PERL provisions regarding retirement benefits would prevail. (*City of Los Altos v. Board of Administration* (1978) 80 Cal.App.3d 1049, 1052 (*City of Los Altos*);¹³ compare *Batters v. City of Santa Monica* (1980) 101 Cal.App.3d 595, *Campbell v. City of Monrovia* (1978) 84 Cal.App.3d 341 [unlike retirement benefits provisions, sick leave provisions of the PERL specifically defer to local laws].) A determination by CalPERS that respondent Malkenhorst's employment encompassed multiple part-time positions, or constituted a single position with overtime, would not be, as respondent Malkenhorst argues, an infringement of Vernon's autonomy,¹⁴ so long as that determination is justified by evidence of the actual nature of respondent Malkenhorst's employment and the appropriate application of the PERL. The labels Vernon assigned to that employment for operational purposes do not carry weight in a dispute about retirement benefits except insofar as they reflect facts relevant to the application of the PERL.

9. Respondent Malkenhorst argues that the Fourth District Court of Appeal has exclusive jurisdiction to hear issues related to the offices respondent Malkenhorst held while employed by Vernon, by virtue of respondent Malkenhorst's pending appeal from the superior court's finding that he must exhaust administrative remedies before proceeding to civil court. (Factual Finding 7, fn. 4.) The argument is not persuasive; the Fourth District Court of Appeal has directed respondent Malkenhorst to exhaust his administrative remedies in this forum. The motion, to the extent it is based on this ground, is denied.

10. Respondent Malkenhorst argues that CalPERS and OAH lack jurisdiction over this matter because filing the Statement of Issues in this case is an act in excess of CalPERS's limited agency jurisdiction. The argument was not supported by persuasive authority or argument and, to the extent the motion to dismiss relies on this argument, it is denied.

Applicable Provisions of the PERL

11. The amount of a member's service retirement allowance is calculated by applying a 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 computing a member's retirement allowance, CalPERS staff may review the salary reported by the employer for the

¹³ Contrary to what is stated in respondent Malkenhorst's Reply in Support of Motion to Dismiss, the case of *Marsille v. City of Santa Ana* (1976) 64 Cal.App.3d 764, on which *City of Los Altos* relies in part, is still good law.

¹⁴ See *City of Los Altos, supra*, 80 Cal.App.3d at p. 1052, in which the court wrote that "PERS has contracts with several hundred public agencies and cannot be expected to accept different interpretations for different agencies. Uniformity of interpretation between PERS and all of its contracting agencies can be achieved by allowing the board of administration to establish the standards defining full-time and part-time status."

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.

12. The PERL vests the management of the retirement system in the CalPERS board, and gives the board the authority to make rules binding on its members. (§§ 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. (§§ 20123, 20125.)

13. The contract between CalPERS and respondent Vernon incorporates the definitions of words and terms set forth in the PERL. (§ 20000 et seq.) "Any contract . . . entered into shall subject the contracting agency and its employees to all provisions of this part and all amendments thereto applicable to members, [and] local miscellaneous members . . ." (§ 20506.)

14. The PERL defines "final compensation" for a local member who is an employee of a contracting agency as "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 . . ." (§ 20037.) Final compensation excludes overtime pay, which is pay for work hours "in excess of the hours of work considered normal for employees." (§§ 20630, subd. (a), 20635; see *City of Sacramento v. Public Employees' Retirement System* (1991) 229 Cal.App.3d 1470, 1486.) "If a member concurrently renders service in two or more positions, one or more of which is full time, service in the part-time position shall constitute overtime. (§ 20635.) "PERS is not preempted from defining 'overtime' in a manner which may be . . . different in purpose and effect, from the use of the term in the [Fair Labor Standards Act]." (*City of Sacramento, supra*, 229 Cal.App.3d at p. 1484.)

15. The calculation of "compensation earnable" is governed by section 20636, which provides:

(a) "Compensation earnable" by a member means the payrate and special compensation of the member

(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). [¶] . . . [¶]

(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. [¶] . . . [¶]

(§ 20636.) 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.)

16. The CalPERS Board of Administration has promulgated regulations to implement the PERL. The regulations relevant to this matter are found at Title 2 of the California Code of Regulations (CCR).¹⁵

17. One element of an employee’s “compensation earnable” is the employee’s payrate. “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;

¹⁵ All further references to CCR shall be to Title 2 thereof, unless otherwise stated.

- (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." (CCR section 570.5.)

18. 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.) The Legislature intended that a public employee's 'payrate' be readily available to an interested person without unreasonable difficulty." (*Randy G. Adams*, Prec. Dec. No. [unassigned], effective Jan. 16, 2013, Case No. 2011-0788 (*Adams*)). CalPERS's Notice of Proposed Regulatory

Action regarding CCR section 570.5, effective August 10, 2011, states that the section was intended to “ensure consistency between CalPERS employers as well as enhance disclosure and transparency of public employee compensation. . . . This proposed regulatory action clarifies and makes specific requirements for publicly available pay schedule and labor policy or agreement . . .” and was intended to “be declaratory of the existing law” (See Ex. 79.) “Generally the law requires that . . . all records establishing and documenting payrate and special compensation be available for public scrutiny. . . .” (*Id.*) Indicia of a publicly available pay schedule include formal approval by the City Council, in open session after notice to the public, of a salary or salary range for a given position, described in the detail required by Government Code section 20636, subdivision (b)(1), and CCR section 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 v. Bd. of Administration, California Public Employees’ Retirement System* (2011) 200 Cal.App.4th 53, 66 (citing *Prentice v. Bd. of Administration, California Public Employees’ Retirement System* (2007) 157 Cal.App.4th 983).)

19. Another component of “compensation earnable” is special compensation, which must be reported to CalPERS if contained in a written labor policy or agreement. Special compensation includes incentive pay, a category that includes longevity pay. “Longevity pay” is defined as “[a]dditional compensation to employees who have been with an employer, or in a specified job classification, for a certain minimum period of time exceeding five years.” (CCR, § 571, subd. (a)(1).) All special compensation items must be available to all members in the group or class. (CCR, § 571, subd. (b).)

20. “[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, subs. (b)(1), (2), (c), (e)(2).)” (*Prentice, supra*, at p. 992.)

21. CalPERS has the authority and the responsibility to correct errors in the calculation of benefits under section 20160, which provides:

(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 [¶] . . . [¶]

(b) Subject to subdivisions (c) and (d), the board *shall correct* all actions taken as a result of errors or omissions of . . . any contracting agency . . . 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. [¶] . . . [¶] (§ 20160, italics added.)

CalPERS' Calculation of Respondent Malkenhorst's Final Compensation

22. Whether the additional titles, additional attendant responsibilities, and additional payrates assigned to respondent Malkenhorst were identified on a publicly available pay schedule is central to the determination of this matter. CalPERS correctly determined that respondent Malkenhorst was not paid according to publicly available pay schedules.¹⁶

23. 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 CCR section 570.5, apply to respondent Malkenhorst's payrate. Though the amendment to the PERL at section 20636, subdivision (b)(1), and to the regulations at section 570.5, were added by amendment after respondent Malkenhorst retired, they were "a matter of clarification," and apply retroactively. (*Prentice v. Board of Admin., California Public Employees' Retirement System, 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].)

24. The City Council resolutions adding titles and duties to respondent Malkenhorst's position as City Administrator/City Clerk were adopted in publicly-noticed open sessions. Those resolutions did not, however, identify any pay respondent Malkenhorst was to receive for assuming those additional titles and duties; on the contrary, the resolutions specified that he was to receive no additional pay. The dramatic increases in respondent Malkenhorst's salary over the many years he served Vernon were reflected in schedules attached to City Council resolutions, and were identified only as pay for City Administrator/City Clerk. (Factual Findings 3, 9-27.) This is insufficient to satisfy the detailed requirements under section 20636 and CCR section 570.5, which are designed to ensure transparency for the benefit of the public. Payrate schedules, adopted in City Council resolutions, were not published or posted publicly, nor was it established that they were available to the public immediately upon request. (Factual Finding 27.) Accordingly, City Council resolutions assigning additional titles and duties to respondent Malkenhorst do not satisfy the PERL's pay schedule requirements and may not be used to calculate his payrate.

25. Even if, after submitting a request, members of the public could easily obtain a copy of the resolutions—a fact not established by this record—they would not be able to discern any connection between respondent Malkenhorst's payrate and any of the titles and duties assigned to him. Vernon successfully concealed from public view any connection between respondent Malkenhorst's payrate increases and the new job titles and

¹⁶ CalPERS incorrectly concluded that the time respondent Malkenhorst spent on his additional duties and titles should be treated as excluded overtime or as pay for separate part-time positions. Although respondent Malkenhorst was asked to take on additional duties, he devoted to the work associated with each title as much time as circumstances required, and he did not exceed normal working hours in performing his duties. (Factual Findings 17-21).

responsibilities assigned to him, making it impossible for any citizen of Vernon to ascertain what the payrate was for each of those positions. And respondent Malkenhorst, in testimony at hearing, denied there was any direct connection between his payrate increases and the additional titles and duties he assumed after becoming City Administrator.

26. Though CalPERS has discretion to determine payrate when there is no publicly available pay schedule, CalPERS must apply appropriate methods to ascertainable data in doing so. (CCR, § 570.5, subd. (b).) Selecting the salary for Acting City Clerk current at the time of respondent Malkenhorst's retirement, even though respondent Malkenhorst's duties and compensation as City Administrator, minus his additional titles and duties, exceeded those of the City Clerk position, is not appropriate under the PERL and is not a proper exercise of discretion.

ORDER

The appeal of respondent Bruce Malkenhorst, Sr., from CalPERS's reduction of his retirement benefits based on a recalculation of his final compensation is granted in part and denied in part.

CalPERS's determination that the payrate used to determine respondent Malkenhorst's final compensation does not comply with PERL requirements is affirmed.

CalPERS recalculation of respondent Malkenhorst's longevity pay is affirmed.

CalPERS recalculation of respondent Malkenhorst's final compensation based on the payrate for Acting City Clerk is reversed. CalPERS shall recalculate respondent Malkenhorst's final compensation using a payrate that appropriately credits respondent Malkenhorst for duties performed as City Administrator/City Clerk, without additional titles and responsibilities, consistent with the requirements of the PERL, including the requirement that the payrate component of respondent Malkenhorst's final compensation be reflected in publicly available pay schedules.

DATED: July 14, 2015



HOWARD W. COHEN
Administrative Law Judge
Office of Administrative Hearings

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DECLINE TO ADOPT THE PROPOSED DECISION

Overview

CalPERS staff argues that the Board should decline to adopt the Proposed Decision, in favor of its own decision, after conducting a full Board Hearing in accordance with its policies. Staff's argument is based on the following:

- I. The Proposed Decision erroneously limits the Board's discretion to determine payrate in the absence of publicly available pay schedules. (California Code of Regulations, title 2, section 570.5(b).)
- II. The Proposed Decision interferes with CalPERS' efforts to exclude overtime compensation from the payrate of management employees. (Government Code sections 20635, 20636(b)(1).)
- III. The Proposed Decision does not address an important statute of limitations issue. (Government Code sections 20164, subs. (b), (d) and (e).)

Legal and Factual Background

Bruce Malkenhorst was employed by the City of Vernon (City) from 1977 to June 30, 2005. For most of that period, Malkenhorst served as Vernon's City Administrator/City Clerk. At various points in time, however, Malkenhorst took on other City positions as well, including Treasurer, Municipal Employee Relations Representative, Chief Executive Officer of the Electrical Department (later named the Light and Power Department), Executive Director and Secretary of the Redevelopment Agency, CEO of the Gas Municipal Utility Department, Executive Director of the Industrial Development Authority, and Executive Director of the Vernon Historic Preservation Society.

Malkenhorst's City Administrator/City Clerk position was listed on a pay schedule with a specified monthly salary for a 40-hour position. Malkenhorst's other City positions were not listed on the City's pay schedules.

In 1994, Malkenhorst submitted a retirement application to CalPERS that required evaluation of his final compensation. In connection with its review, CalPERS observed that Malkenhorst held several City positions. CalPERS suspected Malkenhorst was working overtime to complete the work in these other positions and requested, twice, that the City track Malkenhorst's time in each position. Neither the City nor Malkenhorst complied.

Malkenhorst subsequently deferred his retirement until 2005. At that time, the City was reporting Malkenhorst's monthly pay as \$44,128: a monthly base payrate of \$35,302 (corresponding with the City's pay schedule for the City Administrator/City Clerk position) plus an additional 25% longevity pay.

Upon Malkenhorst's retirement, the City did not hire another City Administrator/City Clerk. The City, instead, created full-time Acting City Clerk and Acting City Treasurer positions, each of which was listed on a City pay schedule with a base monthly salary of \$7,875.

On July 18, 2005, CalPERS informed the City that Malkenhorst's longevity pay could not be considered an item of special compensation because he was the only City employee to whom the 25% longevity pay was available. The City appealed, and CalPERS ultimately relented. Administrative proceedings were never initiated.

Beginning in 2011, CalPERS audited the City. Noting that Malkenhorst held positions apart from City Administrator/City Clerk, CalPERS sought City records of the time Malkenhorst spent in these positions, as well as publicly available pay schedules for each. CalPERS ultimately determined these records did not exist.

Based upon the records it was able to obtain from the City, CalPERS concluded: 1) Malkenhorst's monthly base salary of \$35,302 could not be considered his payrate because it reflected pay for positions not listed on publicly available pay schedules, and reflected pay for working overtime hours; and 2) Malkenhorst's 25% longevity pay could not be considered special compensation because it was greater than the 20% longevity pay received by others in City management positions.

CalPERS staff then exercised its discretion to select an alternative payrate for Malkenhorst. It selected a payrate of \$7,875, corresponding with the Acting City Clerk position created at the time of Malkenhorst's retirement. CalPERS then added 20% longevity pay as an item of special compensation and determined Malkenhorst's final compensation to be \$9,450. Malkenhorst appealed this determination.

In his appeal, Malkenhorst denied that he was working in multiple City positions and that he was paid for working overtime hours. In addition, Malkenhorst challenged CalPERS' power to redetermine his final compensation following the 2011 audit. Three arguments were paramount. First, Malkenhorst argued that CalPERS' redetermination of his final compensation was barred by the doctrines of res judicata and collateral estoppel. Second, Malkenhorst argued that CalPERS' redetermination of his final compensation violated the City's autonomy as a charter city. Third, Malkenhorst argued that CalPERS' redetermination of his final compensation and any subsequent effort by CalPERS to recoup overpayment of his retirement benefit was or would be legally or equitably time-barred.

The Proposed Decision

After an administrative hearing, the ALJ issued his Proposed Decision in June 2015. The Proposed Decision affirms CalPERS' redetermination in two respects.

First, the Proposed Decision finds that Malkenhorst's monthly base salary of \$35,302 could not be considered his payrate because it reflected pay for multiple positions not

listed on publicly available pay schedules. The City had effectively used City Administrator/City Clerk "as a catch-all payrate category," which "concealed from public view" the connection between Malkenhorst taking on new job titles and receiving payrate increases.

Second, the Proposed Decision affirms CalPERS' decision to provide Malkenhorst only 20% longevity pay as an item of special compensation.

In sum, the ALJ agreed with CalPERS that Malkenhorst's final compensation was subject to redetermination. The ALJ rejected Malkenhorst's argument that the redetermination of his final compensation was barred by res judicata, collateral estoppel, city charter, statute of limitations, or any other legal or equitable doctrine.

In two other respects, the Proposed Decision disagrees with CalPERS' conclusions. First, the Proposed Decision finds that CalPERS failed to establish that Malkenhorst's monthly base salary of \$35,302 included pay for working overtime hours. The ALJ credited Malkenhorst's hearing testimony that he accomplished all his work, in all positions, in 40 to 45 hours per week. Second, the Proposed Decision rejects CalPERS' selection of \$7,875 as Malkenhorst's payrate. The ALJ ruled that the process by which CalPERS selected this payrate was arbitrary.

One issue was not resolved by the Proposed Decision: Malkenhorst's argument that CalPERS will be time-barred from recouping some or all of its past overpayment of benefits. The ALJ ruled that issue would not be ripe until such time that CalPERS seeks recoupment.

Why the Proposed Decision Should Be Rejected

- I. The Proposed Decision erroneously limits the Board's discretion to determine payrate in the absence of publicly available pay schedules. (California Code of Regulations, title 2, section 570.5(b).)

The PERL defines payrate to exclude any part of an employee's salary attributable to positions not described on a "publicly available pay schedule." (20636(b)(1).) By regulation, a pay schedule is proper only if it "[i]dentifies the position title for every employee position" and "[s]hows the payrate for each" (Cal. Code Regs., tit. 2, § 570.5(a)(2) and (a)(3), emphasis added.)

The Proposed Decision correctly found that the City lacked a publicly available pay schedule that would substantiate Malkenhorst's payrate. The City's pay schedules listed a base salary for the position of City Administrator/City Clerk, but no base salaries were listed for the various other positions held by Malkenhorst. Moreover, the City lacked time records by which CalPERS could determine the hours Malkenhorst worked in his various positions.

When a member's payrate does not meet the regulatory criteria, "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..." (Cal. Code Regs., tit. 2, §570.5(b).) Here, CalPERS properly exercised that discretion. Looking to City records, CalPERS noted that the City eliminated the single City Administrator/City Clerk position and created two full-time positions related to Malkenhorst's job duties: Acting City Clerk and Acting City Treasurer. Both full-time positions were listed on a City pay schedule with a base monthly salary of \$7,875, so CalPERS selected that amount for Malkenhorst's payrate.

Malkenhorst had not argued that some other figure was more appropriate for his payrate. Nor did Malkenhorst argue that CalPERS' selection of a \$7,875 payrate was arbitrary. Nonetheless, the ALJ so ruled.

The Proposed Decision finds that CalPERS acted arbitrarily because it failed to consider additional data that might provide a payrate for Malkenhorst that better corresponds with his City duties. The Proposed Decision does not, however, specify the relevant data that was overlooked or describe an objective process by which CalPERS might have better weighed that data. Thus, although it may be the ALJ's impression that a "better" payrate for Malkenhorst exists, the evidence does not establish that CalPERS acted arbitrarily. The Board should conduct a hearing to affirm CalPERS' discretion in cases such as this to weigh the relevant evidence as it sees fit.

II. The Proposed Decision interferes with CalPERS' efforts to exclude overtime compensation from the payrate of supervisory employees. (Government Code sections 20635, 20636(b)(1).)

Final Compensation excludes overtime pay, which is pay for work hours "in excess of the hours of work considered normal for employees." (Gov. Code § 20635.) Similarly, payrate is defined to include only what a member is paid for work during "normal working hours." (Section 20636(b)(1).) "Normal hours" for all full-time positions at the City (outside of the Fire Department) meant working 40-hour weeks.

The City Administrator/City Clerk position held by Malkenhorst was a 40-hour per week position. Therefore, when CalPERS learned in 1994 that Malkenhorst held several positions at the City in addition to City Administrator/City Clerk, CalPERS suspected Malkenhorst must be working overtime hours. To address the concern, CalPERS twice wrote the City asking Malkenhorst to track the time he spent in each of his positions.

As the City's chief administrative officer, it was Malkenhorst's statutory duty to provide the information CalPERS requested. (Gov. Code § 20221(b), making the "chief administrative officer of a contracting agency" responsible for furnishing CalPERS with "additional information concerning any member that the board may require in the administration of this system.") Malkenhorst ignored CalPERS' letters and did not track his hours.

Given the lack of contemporaneously kept time records, the ALJ concluded that CalPERS lacked the evidence to prove that Malkenhorst was in fact working overtime. The ALJ also credited Malkenhorst's hearing testimony that he needed only 40 to 45 hours per week to complete the duties of all his positions. Both rulings are erroneous.

CalPERS' evaluation of Malkenhorst's payrate has at every step been tethered to its analysis of City records. CalPERS' reliance on agency records is typical: CalPERS depends upon the payroll submissions it receives from its contracting agencies, and it may, if necessary, require the agency and/or its chief administrative officer to provide further documentation. (Gov. Code § 20221(b).) This records-based decision-making serves the goal of transparency because the records used by CalPERS for deciding payrate can be obtained and reviewed by the public. Oral statements, whether provided as part of or before litigation, are less reliable than contemporaneously prepared records, are less transparent, and are not in any event gathered or used by CalPERS for calculating final compensation.

Here, the City's own records provided strong circumstantial evidence that Malkenhorst was working overtime. CalPERS sought to supplement that evidence with Malkenhorst's contemporaneously kept time sheets, but Malkenhorst refused to cooperate with CalPERS' request despite his statutory obligation to do so. Malkenhorst should not be permitted to benefit from his own refusal to cooperate.

Malkenhorst argued that as an "exempt" City employee under the Fair Labor Standards Act (FLSA), he had no overtime to record or report. CalPERS, however, has not adopted the FLSA rules for overtime. Unlike FLSA overtime, overtime under the PERL applies equally to high-ranking managers and rank-and-file employees. All compensation for work beyond the City's standard 40-hour week is excluded from pension calculations, whether paid to those at the top or bottom of the organization chart.

CalPERS can readily identify and exclude overtime paid to the rank and file because it is segregated from regular pay in the payroll reports CalPERS receives. That same level of clarity is often missing from payroll reports for FLSA-exempt management employees, whose regular and overtime hours and pay may be lumped together. Thus, CalPERS' ability to compel timekeeping by managerial employees is the only objective tool available to enforce the PERL's overtime standards.

When agencies and their managerial employees fail to comply with CalPERS' directives to keep and provide overtime-related documents, the burden of producing documentary evidence of overtime cannot properly rest upon CalPERS. The Board should conduct a hearing to establish this point and affirm the Staff's determination that Malkenhorst worked and received pay for overtime hours.

III. The Proposed Decision does not address an important statute of limitations issue that was fully briefed by the parties. (Government Code sections 20164, subs. (b) and (e).)

The ALJ declined to address an important statute of limitations issue, even though it was briefed by the parties. That issue pertains to CalPERS' ability to recoup benefit overpayments made to Malkenhorst, and Malkenhorst's argument that such recoupment may, in whole or part, be time-barred. The Board should exercise its statutory authority to decide the issue.

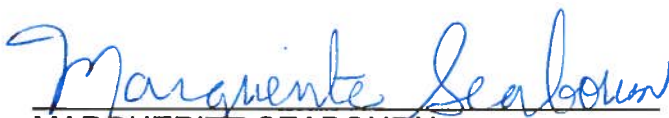
The PERL envisions two methods by which CalPERS may recoup overpayments to members. First, CalPERS may elect to file a civil lawsuit to recover overpayments, subject to a three-year or ten-year limitations period. (Gov. Code § 20164(b), (d).) Second, CalPERS may recover overpayments through the process of administrative adjustment, modifying a member's allowance "so that the retired person ... will receive the actuarial equivalent of the allowance to which the member is entitled." (Gov. Code § 20163(a).) CalPERS is directed to make adjustments so that "the status, rights, and obligations of all parties ... 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." (Gov. Code § 20160(e).)

Malkenhorst disagrees with the above analysis of the PERL and has argued, as a matter of law and equity, that CalPERS can no longer recoup overpayments. The dispute centers, in part, on the applicability, accrual and tolling rules for the limitation periods described in Sections 20164(b) and 20164(d). This dispute should be resolved by the Board in the first instance, which it is fully authorized to do under PERL section 20164(e) ("The board shall determinate 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.")

Proposed Board Action

Based on the serious flaws of the Proposed Decision, CalPERS staff urges the Board to reject the Proposed Decision and hold a full Board Hearing. Once the Board considers all the evidence and arguments in full context, the Board can then decide for itself whether the ALJ has analyzed the applicable law correctly. In short, the Board should grant a full Board Hearing so that the Board's final decision, whatever it may be, is supported by a correct and reasonable application of law.

September 17, 2015


MARGUERITE SEABOURN
Assistant Chief Counsel

ATTACHMENT C
RESPONDENT(S) ARGUMENT(S)

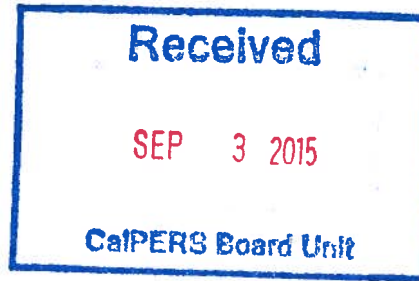
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August 31, 2015

BY FAX AND BY MAIL

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



Re: Bruce V. Malkenhorst, Sr. and City of Vernon, Respondents
CalPERS Case No. 2012-0671, OAH Case No. 2013080917

Dear Ms. Swedensky:

Bruce V. Malkenhorst, Sr. submits his Respondent's Argument for consideration by the Board of Administration at its September 17, 2015 meeting regarding the *Proposed Decision in In the Matter of the Calculation of Final Compensation of Bruce Malkenhorst, Sr* OAH Case No. 2013080917. The *Proposed Decision* makes various findings of fact and conclusions of law, granting Mr. Malkenhorst's appeal in part and denying it in part.

Significantly, the *Proposed Decision* finds that CalPERS' current method of calculating Bruce Malkenhorst's reduced final compensation is "arbitrary", "without sufficient legal authority", and "constitutes an abuse of discretion".

Specifically, Administrative Law Judge Howard Cohen found that although CalPERS has authority to recalculate Mr. Malkenhorst's pension allowance, its calculation of his final compensation was arbitrary and constitutes an abuse of discretion. The ALJ has directed CalPERS to recalculate his final compensation in a manner that appropriately credits Mr. Malkenhorst for duties performed as City Administrator/City Clerk, excluding only the compensation associated with performing "additional" titles and responsibilities, if any.

This six (6) page Respondent's Argument (with eight (8) exhibits attached) addresses the Proposal and matter in the ALJ's *Proposed Decision*, while reserving all rights of every kind to contest all issues. Mr. Malkenhorst does not concede any issue, factual or legal, associated with the *Proposed Decision* or his case, however his counsel herein makes a good faith attempt to address the concerns raised by ALJ Cohen and pending before the Board. This letter addresses the analysis the ALJ calls for: considering an "appropriate" final compensation amount. However, if these discussions are not fruitful, Mr. Malkenhorst reserves all rights of any kind, including to litigate and dispute every matter, and the efforts in this letter are not a concession, admission, or other representation that can be held against him. Mr. Malkenhorst does not concede the correctness of some of the ALJ's findings and conclusions, and he reserves all rights to challenge CalPERS' ultimate decision in this administrative proceeding and seek all relief of every kind, including attorney fees, should that prove necessary, including by Writ of Administrative Mandamus or other appropriate filing.

Amount of Final Compensation

The *Proposed Decision* does not make findings about the amount of “final compensation” that should be used in the pension calculation.

However, the *Proposed Decision* is clear that Malkenhorst is entitled to a pension based on the compensation for the work performed as the City Administrator.

Findings

As the *Proposed Decision* notes, Malkenhorst worked for most of his 30-year career as City Administrator/City Clerk (hereafter “City Administrator”) for the City of Vernon. The *Proposed Decision* finds that although the City Council tasked the City Administrator position with “additional” titles and duties over the course of his nearly 30 years (Factual Findings 9-13), Malkenhorst worked a single full-time schedule throughout his career, did not work overtime, and the “additional” duties assigned to him as City Administrator did not constitute part-time positions. (Factual Finding 17). As City Administrator, he performed duties greatly in excess of those of a city clerk. Vernon’s City Administrator position is highly complex and highly paid.

The *Proposed Decision* makes factual findings in Malkenhorst’s favor including that: (i) Malkenhorst was a full time employee who did not work overtime and did not work part-time. (ii) The duties did not require Malkenhorst to work overtime and they were not part-time positions. (iii) Many of the assigned non-routine tasks (or “titles”) took only a nominal amount of time or work. (iv) Malkenhorst did not work fewer than 40 hours nor more than 45 hours per week. (v) Vernon paid Malkenhorst a high salary for his work as City Administrator. (vi) The salary for City Administrator was reviewed, determined independently, and approved by Vernon’s Finance Committee and the City Council. (vii) The resolutions were adopted in open session, made publicly available, and posted in public places. (viii) Vernon paid contributions to CalPERS based on the salary paid, and (ix) Vernon fully funded its pension liability to CalPERS at that time.

The *Proposed Decision* found that although there were times when Mr. Malkenhorst's workload increased on a temporary basis, there was no evidence that he worked fewer than 40 hours or more than 45 hours per week. (Factual Findings 17-18.) Although at times pressing tasks consumed time, Mr. Malkenhorst typically spent only nominal amounts of time on those tasks over the years, despite retaining formal “titles” associated with those projects. (Factual Finding 20.) The *Proposed Decision* found that Mr. Malkenhorst was able to delegate many day-to-day duties to other city personnel while retaining overall responsibility. (Factual Finding 20.) The *Proposed Decision* also found that regardless of the nature and extent of the “additional” duties assigned to him by the City Council, Mr. Malkenhorst was still expected to perform all of the City Administrator/City Clerk duties. (Factual finding 19.) In short, evidence demonstrated that Mr. Malkenhorst's “full time” employment was as City Administrator/ City Clerk.

The *Proposed Decision* correctly points out that CalPERS stipulated before the hearing, and the ALJ ordered, that CalPERS bore the burden of proof. The *Proposed Decision* finds that CalPERS *did not* meet its burden of proof concerning several key elements of CalPERS' arguments at hearing, including: (1) alleged overtime (the *Proposed Decision* finds that Mr. Malkenhorst did not work overtime, but rather maintained a consistent work week of 40-45

hours, well within CalPERS' requirements), (2) alleged multiple positions (the *Proposed Decision* finds that any "additional" duties or titles performed or held by Mr. Malkenhorst did not constitute multiple positions), and (3) Mr. Malkenhorst's high salary does not in itself justify CalPERS' challenge to his final compensation and pension calculations (the *Proposed Decision* says that the pay increases cannot be found to constitute the basis for CalPERS' claims that Mr. Malkenhorst's final compensation included payments not in compliance with the PERL).

No Direct Pay Attributable for "Additional" Duties, Titles, Tasks

The *Proposed Decision* correctly finds that Malkenhorst held the position of Vernon's City Administrator /City Clerk from 1978 to 2005. Mr. Malkenhorst believes the ALJ incorrectly found that at least a portion of Mr. Malkenhorst's salary increases over the course of his career were attributable to being assigned new responsibilities and titles by the Vernon City Council. In fact, Vernon's actual resolutions that assigned the City Administrator position with various "additional" duties and responsibilities (and at times, with one or more "titles") make clear that Vernon's City Council required the City Administrator to perform those duties as a component part of the over-all responsibilities of the City Administrator position, for no additional compensation, and as part of the position's ultimate responsibility for the City's performance.

More importantly, the *Proposed Decision* finds that Malkenhorst received no increase in salary directly attributable to any new title, task, or duty given to the City Administrator position by Vernon's City Council. However, the *Proposed Decision* finds that at his annual review by the Vernon Finance Committee, Malkenhorst was rewarded for successfully performing the tasks that were required within his City Administrator position. As a result of Malkenhorst receiving significant raises in the City Administrator salary for performing the duties given to that position, the ALJ finds that Malkenhorst was compensated for performing those "additional" titles, duties, or responsibilities.

This result arises from various assumptions. One assumption is that the City Administrator position itself could not be "worth" the very high compensation. (i.e. the salary is so high, it must be multiple jobs...) However, CalPERS is not allowed to reduce a base salary simply because some people find it too high. *City of Pleasanton v. Bd. of Ad. of the Cal. Pub. Empl. Ret. Sys.*, (2012) 211 Cal.App.4th 522, 527. CalPERS is not allowed to divide a single position into multiple jobs simply because it thinks that the salary of the single position is too high.

More specifically, the *Proposed Decision* correctly notes that increases in Malkenhorst's salary over his last 15 years "do not constitute the basis for CalPERS' claim that respondent Malkenhorst's 'final compensation' included payments that do not comply with the PERL." In short, the *total amount* of Malkenhorst's salary is not grounds for a reduction. The amount of compensation should play no role in deciding *what portion* is attributable to work as City Administrator/City Clerk.

Nevertheless, even if one were to adopt the ALJ's findings about a portion of the salary increases being attributed to Mr. Malkenhorst's performance concerning the "additional" responsibilities or titles, the ALJ clearly found that vast majority of Malkenhorst's work was performing City Administrator/City Clerk duties. Any "additional compensation" associated with "other" duties or titles would constitute only a very small amount, if any, of the salary Mr. Malkenhorst earned. For example, the *Proposed Decision* notes that positions such as CEO of

the Light & Power Department or CEO of the Gas Municipal Utility Company took only a nominal amount of Mr. Malkenhorst's time after the projects were initiated.

More fundamentally, the ALJ also incorrectly assumed that multiple tasks or titles could not be assigned to be performed within a single position paid one salary. This assumption is contrary to law and established practice. *City of Long Beach v. Allen* (1956) 143 Cal. App. 2d 24, 30. Typically, the City as employer determines the duties, title(s), and salary of each position. For example, state law for general law cities establishes bare minimum duties that cities, especially charter cities, are encouraged to expand on. (Vernon resolutions show that the City Council assigned various tasks and titles to the position of City Administrator, not to Malkenhorst directly. Expert witness testified that it is common for city councils to assign multiple task or titles to a municipal executive to perform within one position.). This assumption wrongly gives CalPERS the power to determine which tasks, titles, or duties should be performed within a specific position, which is also contrary to existing law.

Publicly Available Pay Schedules, Requirement's Thereof in 2005

The ALJ felt CalPERS had met its burden that Vernon's publicly available pay schedules were not sufficiently "transparent" (Mr. Malkenhorst disagrees on and reserves all rights to contest all related to this). The ALJ apparently found that Vernon was not sufficiently "transparent" in its publicly available pay schedules because Vernon did not list the duties, titles, and responsibilities of the City Administrator position, as well as the compensation, even if zero compensation, associated with being tasked with those duties, titles, or responsibilities.

Factually, Vernon's publicly available pay schedules listed a single full time salary for the position of City Administrator/City Clerk that Malkenhorst held. It paid \$35,302 a month in 2005. *Ex 1 attached*. Vernon's pay schedules did not list the various titles, duties, or task assigned to the City Administrator position, or otherwise list the various titles, duties, or task separately. This is typical practice for California cities.

In 2006, Did Each Duty and Responsibility of a Position Have to be Listed and Detailed Separately on Publicly Available Pay Schedule?

Because Malkenhorst retired in 2005, the laws and regulation that govern his pension are those that were in effect in 2005. In 2005 before *Prentice*, there was no requirement to list the separate duties. *See* FN 4 in *Prentice v. Bd. of Admin., California Pub. Employees' Ret. Sys.*, (2007) 157 Cal. App. 4th 983, 990. Vernon properly listed the salary of the City Administrator/City Clerk on publicly available pay schedules and satisfied the publicly available pay schedule "requirement" as it existed in 2005. *See Ex 1 attached*.

While CalPERS has subsequently formulated new regulations about publicly available pay schedules that may require listing additional information, the law and regulation applicable to 2005 did not required the pay schedules to detail each task, duty, or title assumed by a position. The law in 2005 did not require that the pay schedules list, create or delineate a separate salary associated with each duty, task, or title performed within a job. In Vernon, the titles were "organizational signposts" and most of the tasks or duties associated with them required intermittent or minimal time and little ongoing work. The resolutions explicitly indicated that there was no pay associated with performing the positions other than for City Administrator.

Contrary to the documents, CalPERS determined that Malkenhorst had multiple job duties and titles, and that there was not publicly available pay schedule for any of Malkenhorst's positions other than City Administrator/City Clerk. Because of these assumptions, CalPERS rejected using the salary for City Administrator /City Clerk as payrate.

Since it rejected the City Administrator pay rate, CalPERS argued that it could instead use the much lower paid and much less complicated position of City Clerk, which Malkenhorst last held before 1978. In the hearing, although Malkenhorst had been City Administrator since 1978, CalPERS proposed that Malkenhorst was only entitled to a final compensation based on an "acting" City Clerk's salary of about \$90,000 (even though he never held the acting City Clerk position).

The ALJ sharply criticized CalPERS' staff's cavalier and arbitrary method of revising Mr. Malkenhorst's final compensation.

The *Proposed Decision* points out that Mr. Malkenhorst was City Administrator for most of his career and the City Administrator/City Clerk responsibilities greatly exceeded the responsibilities he held as City Clerk. The *Proposed Decision* compares City Clerk duties (like placing items on the City Council agenda, keeping minutes of Council meetings and drafting ordinances) with the City Administrator duties which included having all department heads report to him, budget issues and significant matters brought before the City Council. (Factual Finding 33). The ALJ notes that City Administrator was ultimately responsibility for all City departments and programs under overall City Council authority, a role much larger than City Clerk. City Administrator was clearly a much more demanding position, deserving a much higher salary. (Factual Finding 34.)

The *Proposed Decision* then goes on to note that while CalPERS purportedly considered alternatives for determining Mr. Malkenhorst's final compensation during the audit and payrate review process (See Ex 2 attached), CalPERS decided against using them without explanation and contrary to the law that pension statutes must be liberally construed in favor of beneficiaries. CalPERS instead took each opportunity to construe the law and facts against Mr. Malkenhorst, instead of in his favor. As a benchmark for comparison about what should be his final compensation, the ALJ also suggests that CalPERS look at the compensation of Mr. Malkenhorst's successor as City Administrator. While CalPERS did not seek to include that information in the administrative record, it presumably has all such information as part of Vernon's regular reporting of member earnings and contributions.

ALJ's Proposal

The *Proposed Decision* urges CalPERS to fairly identify a payrate for City Administrator that is consistent with the facts and law, if CalPERS refuses to use the actual salary as payrate for Mr. Malkenhorst.

In the effort to address in good faith the ALJ's proposal without conceding any issues and without waiving any rights, we assert here is a significant amount of data that CalPERS can review to ascertain an appropriate payrate such:

1) Actual Payrate. The documents are clear about the actual payrate for the City Administrator in 2005. See *Ex. 1 attached*.

2) Alternatives Considered in CalPERS Audit Process, such as the suggestion to look at the highest payrate of the new positions created after Malkenhorst's retirement. During CalPERS audit and review process, Terrance Rodgers, Compensation Review Unit ("CRU") *Staff Service Manager I* testified that he felt the City Council pay resolutions satisfy the pay schedule requirements and that a "payrate" for a comparable position in the Light & Power Department "may be more in alignment with the 'spirit' of SB 53 and the definition of payrate in GC 20636(b)(2)." (Attached as *Ex. 2* is his email, *Ex. "NNNNN"*.) Minimally this would qualify Malkenhorst for the \$24,000 monthly salary for Acting Director L&P position (attached as *Ex. 3*) *Exh.75-11*), a "position" CalPERS claims Mr. Malkenhorst held in his City Administrator position, (rather than the \$7,875 salary for Acting City Clerk) (*Exh. 75-22* attached as *Ex. 4*.)

2) Successor City Administrator's payrate. Sometime after Malkenhorst retired, Vernon hired a part time City Administrator at a salary of \$335,000 per year, plus longevity. In 2009, Vernon hired a different City Administrator and paid him a salary of \$384,000 a year, plus longevity. Attached as *Ex. 5* is Vernon's Resolution No. 9942, dated May 11, 2009, setting the salary for City Administrator at \$32,000 per month (\$384,000 per year). Attached as *Ex. 6* is Vernon's Resolution No. 10057, dated August 31, 2009, again setting the salary for City Administrator at \$32,000 per month. Attached as *Ex. 7* is Vernon's Resolution No. 2010-33, dated March 1, 2010, maintaining the salary for City Administrator at \$32,000 per month.

3) Payrate of Current City Administrator. Currently in 2015, Vernon pays its City Administrator a salary of \$293,436, plus longevity. See *Ex. 8* attached

Because he believes that he is entitled to a payrate based on the salary actually paid to him, Malkenhorst requests that the Board adopt the *Proposed Decision* with technical changes that restore the salary and payrate of \$35,302 plus longevity as previously accepted and determined by CalPERS in 2005, and paid until 2014. *Gov.C. § 11517(c)(2)(C)*.

Alternatively, the Board can reject the *Proposed Decision* and refer the case back to ALJ Howard W. Cohen to take additional evidence, including relevant to the amount of salary that Vernon paid others in the City Administrator position. *Gov.C. § 11517(c)(2)(D)*.

Lastly, the Board can reject the *Proposed Decision* and decide the case upon each Board member's independent examination of the extensive administrative record, including reading the transcript, and after taking additional evidence." *Gov.C. § 11517(c)(2)(E)*. In that case, Malkenhorst must be allowed to present evidence and oral argument to the Board. *Gov.C. § 11517(c)(2)(E)(ii)*.

CONCLUSION

In this Respondent's Argument, we urge the Board to address in good faith the proposal of ALJ Cohen in the *Proposed Decision* to seek a fair "final compensation" amount with respect to the law and facts determined in the administrative process.

Sincerely,


John Michael Jensen

Exhibits 1-8 attached to Respondent's Argument

Bruce V. Malkenhorst, Sr. and City of Vernon, Respondents
CalPERS Case No. 2012-0671, OAH Case No. 2013080917

Exhibit 1 Salary Schedule in 2005

Publicly Available Salary Schedule for City Administrator in 2005

Exhibit 2 Exhibit "NNNNN" CalPERS Staff email

Terrence Rodgers, Compensation Review Unit ("CRU") *Staff Service Manager I* email that he thought the City Council pay resolutions satisfy the pay schedule requirements and that a "payrate" for a comparable position in the Light & Power Department "may be more in alignment with the 'spirit' of SB 53 and the definition of payrate in GC 20636(b)(2)."

Exhibit 3 Exh. 75-11 , City of Vernon Pay Schedule

\$24,000 monthly salary for Acting Director L&P position , a "position"
CalPERS claims Mr. Malkenhorst held in his City Administrator position.

Exhibit 4 Exh. 75-22, City of Vernon Pay Schedule

\$7,875 salary for Acting City Clerk

Exhibit 5 City of Vernon *Resolution No. 9942*

City of Vernon *Resolution No. 9942*, dated May 11, 2009, setting the salary for City Administrator at \$32,000 per month (\$384,000 per year);

Exhibit 6 City of Vernon *Resolution No. 10057*

City of Vernon *Resolution No. 10057*, dated August 31, 2009, again setting the salary for City Administrator at \$32,000 per month

Exhibit 7 City of Vernon *Resolution No. 2010-33*

City of Vernon *Resolution No. 2010-33*, dated March 1, 2010, maintaining the salary for City Administrator at \$32,000 per month

Exhibit 8 City Of Vernon, Current Salary of City Administrator

Currently in 2015, Vernon pays its City Administrator a salary of \$293,436, plus longevity.

Exhibit 1

SCHEDULE II

0.03

CITY ADMINISTRATOR/CITY CLERK DEPARTMENT SALARY SCALE

		MONTHLY SALARY
CITY ADMINISTRATOR/CITY CLERK - 400X	STEP 1	35,302.00
DIRECTOR OF ENVIRONMENTAL HEALTH - 4310	STEP 1	10,986.00
	2	10,413.00
	3	9,870.00
	4	9,355.00
	5	8,867.00
	6	8,405.00
	7	7,967.00
CHIEF DEPUTY DIRECTOR ENVIRONMENTAL HEALTH - 4320	STEP 1	8,900.00
	2	8,436.00
	3	7,996.00
	4	7,579.00
	5	7,184.00
	6	6,809.00
	7	6,454.00
ASSISTANT TO THE CITY ADMINISTRATOR - 4100	STEP 1	8,580.00
	2	8,133.00
	3	7,709.00
	4	7,307.00
	5	6,926.00
	6	6,565.00
	7	6,223.00
SENIOR ENVIRONMENTAL SPECIALIST - 4440	STEP 1	7,996.00
	2	7,579.00
	3	7,184.00
	4	6,809.00
	5	6,454.00
	6	6,118.00
	7	5,799.00
SPECIAL ASST TO THE CITY ADMINISTRATOR - 4050	STEP 1	7,409.00
OFFICE MANAGER - 4120	STEP 1	6,655.00
RISK MANAGER/PERSONNEL ASSISTANT - 4260	STEP 1	6,308.00
BUDGET AUDITOR - 4330	2	5,979.00
	3	5,667.00
	4	5,372.00
	5	5,092.00
	6	4,827.00
	7	4,575.00
	8	4,336.00
LEGAL COUNSEL - 9700	STEP 1	25,000.00

SCHEDULE II
 EXHIBIT "B" PAGE 13

07/01/04

Exhibit 2

EX
NNNNN Page 744

From: Rodgers, Terrance
Sent: Tuesday, May 08, 2012 02:21 PM
To: Jimenez, Tom; Montez, Marlon; McGinity, Teresa; Lueras, Lolita; Ray, Angelina T.
Subject: FW: Malikenhorst, Sr. Compensation

Good Afternoon,

Per Tom's request, I wanted to provide explanation and another option to determine the "compensation earnable" for Mr. Malikenhorst, Sr. The explanations are as follows:

1. Accept payrate as reported, but reduce Longevity to 20% as provided to the group or class, for a total F/C amount of \$42362.40 (#1 in attached)
2. Use \$4797 payrate and 20% Longevity for a total F/C amount of \$5756.40. This was the last verified, full-time payrate and allowable special compensation (e.g. Plotkin with CSBA)- (#2 in attached)
3. Using the \$4797 payrate, allow the actuarially assumed cost-of-living increase (for all miscellaneous members) of 3% per year since 1978. This would provide a monthly payrate of \$10656 plus a 20% Longevity payment of \$2131.20 for a total monthly F/C of \$12787.20. Because we use the actuarially assumed COLA increase, this may help mitigate any unfunded liability issues and, based on experience, is a relatively reasonable monthly F/C for an equivalent position at a comparable city/organization (#3 in attached)
4. Another possible course of action that has been discussed is as follows:

Because the member took on multiple positions and due to the lack of specific information to establish a full-time payrate, another option is to limit the member to an amount on an approved publicly available pay schedule for which a full-time payrate has been established in the next most closely related group or class. This approach potentially provides more consistent application for all affected members, it may be more in alignment with the "spirit" of SB 53 and the definition of payrate in GC 20636(b)(2). Also, this approach is provided as a possible solution in situations where reported compensation does not conform to GC 20636(b)(2) in CCR 570.5(b). For example, when one of the positions listed for the member is the "CEO of the Electrical Department," determine the most closely related group or class on the pay schedule that conforms to the publicly available requirements and for which we can determine was a full-time payrate (e.g. the position is not cited in any resolution for which one person is serving in multiple positions such as Generation Operations Manager which is a subordinate position to CEO of the Electrical Department). By taking this approach, we can establish a full-time rate of pay for the most closely related, similarly situated group or class for services rendered on a full-time basis and pursuant to a publicly available pay schedule.

I hope this makes sense, but please let me know if I need to elaborate.
Regards,

Terrance Rodgers
Compensation Review
916/795.9523

Exhibit 3

SCHEDULE II

LIGHT & POWER DEPARTMENT SALARY SCALE

		MONTHLY SALARY
ACTING DIRECTOR L&P	STEP 1	24,000.00
GENERATION OPERATIONS MANAGER - 5197	STEP 1	9,924.00
ENGINEERING OPERATIONS MANAGER - 2550	STEP 1	9,924.00
ELECTRICAL ENGINEER - 5301	STEP 1	8,437.00
OPERATIONS ENGINEER - 5400	2	7,997.00
	3	7,580.00
	4	7,185.00
	5	6,810.00
	6	6,455.00
	7	6,118.00
	8	5,799.00
ASSOCIATE ENGINEER - 5302	STEP 1	7,185.00
	2	6,810.00
	3	6,455.00
	4	6,118.00
	5	5,799.00
	6	5,497.00
	7	5,210.00
	8	4,938.00
	9	4,681.00
ELECTRIC SERVICE PLANNER - 5204	STEP 1	6,414.00
ASSISTANT ENGINEER - 5312	2	6,080.00
ASSOCIATE ENERGY MGMT REP - 5317	3	5,763.00
	4	5,463.00
	5	5,178.00
	6	4,908.00
	7	4,652.00
	8	4,409.00

SCHEDULE II
EXHIBIT "B" PAGE 4

7/1/05

EX. 75 - 11

CalPERS143432

Exhibit 4

SCHEDULE II

CITY ADMINISTRATOR/CITY CLERK DEPARTMENT SALARY SCALE

		MONTHLY SALARY
ACTING CITY CLERK - 9851	STEP 1	7,875.00
DIRECTOR OF ENVIRONMENTAL HEALTH - 4310	STEP 1	10,986.00
	2	10,413.00
	3	9,870.00
	4	9,355.00
	5	8,867.00
	6	8,405.00
	7	7,967.00
CHIEF DEPUTY DIRECTOR ENVIRONMENTAL HEALTH - 4320	STEP 1	8,900.00
	2	8,436.00
	3	7,996.00
	4	7,579.00
	5	7,184.00
	6	6,809.00
	7	6,454.00
SENIOR ENVIRONMENTAL SPECIALIST - 4440	STEP 1	7,996.00
	2	7,579.00
	3	7,184.00
	4	6,809.00
	5	6,454.00
	6	6,118.00
	7	5,799.00
SPECIAL ASST TO THE CITY ADMIN - 4050	STEP 1	7,409.00
SR PERSONNEL ASST/ PURCHASING AGENT - 4120	STEP 1	7,875.00
ACTING CITY TREASURER - 4330	STEP 1	7,875.00
BULK POWER MANAGER - 5304	STEP 1	9,793.00
	2	9,282.00
	3	8,798.00
	4	8,339.00
	5	7,904.00
	6	7,492.00
	7	7,101.00
POWER RESOURCE COORDINATOR - 5102	STEP 1	8,572.00
	2	8,125.00
	3	7,701.00
	4	7,300.00
	5	6,919.00
	6	6,558.00
	7	6,216.00
	8	5,892.00
LEGAL COUNSEL - 9700	STEP 1	25,000.00

Exhibit 5

RESOLUTION NO. 9942

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF
VERNON AMENDING RESOLUTION NO. 9639 BY AMENDING
SCHEDULE NOS. III AND XXIV, OF SAID RESOLUTION
REGARDING THE COMPENSATION, COSTS AND BENEFITS OF
ITS EMPLOYEES (AMENDMENT NO. 8)

WHEREAS, on June 16, 2008, the City Council of the City of
Vernon adopted Resolution No. 9639 to be effective on July 6, 2008,
regarding the compensation, costs and benefits of its employees (the
"Salary Resolution"); and

WHEREAS, Schedule No. XXIV, Exhibit X, of the Salary
Resolution provides for positions and salary scales of positions
within the Utilities & Government Infrastructure Department; and

WHEREAS, on May 11, 2009, the City Council of the City of
Vernon introduced Ordinance No. 1156 for first reading concerning the
reorganization of City Departments by eliminating the Utilities &
Government Infrastructure Department, which Ordinance is scheduled for
adoption on June 1, 2009; and

WHEREAS, the City Council of the City of Vernon desires to
eliminate the salary scales of the Director of Utilities & Government
Infrastructure and Legal Counsel within the Utilities & Government
Infrastructure Department from the Salary Resolution; and

WHEREAS, Schedule No. III, Exhibit C, of the Salary
Resolution provides for positions and salary scales of positions within
the City Administration Department; and

WHEREAS, the City Council of the City of Vernon desires to
create a salary scale for the position of City Administrator and create
the position and salary scale of an Executive Secretary to the City
Administrator position within the City Administration Department; and

1 WHEREAS, the City Council of the City of Vernon wishes to
2 amend Schedule Nos. III (Exhibit C) and XXIV (Exhibit X) of the Salary
3 Resolution to implement the aforementioned changes.

4 NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE
5 CITY OF VERNON AS FOLLOWS:

6 SECTION 1: The City Council of the City of Vernon
7 hereby finds and determines that the recitals contained hereinabove
8 are true and correct.

9 SECTION 2: Effective May 15, 2009, Schedule No. XXIV
10 (Exhibit X) of the Salary Resolution is hereby amended as indicated on
11 Exhibit A, which is attached hereto and made a part hereof by this
12 reference to implement the elimination of the salary scales of the
13 Director of Utilities & Government Infrastructure and Legal Counsel in
14 the Utilities & Government Infrastructure Department.

15 SECTION 3: Effective May 15, 2009, Schedule No. III
16 (Exhibit C) of the Salary Resolution is hereby amended as indicated on
17 Exhibit B, which is attached hereto and made part hereof by this
18 reference, to implement the creation of a salary scale for the position
19 of City Administrator within the City Administration Department and the
20 creation of the position and the appropriate salary scale for the
21 position of Executive Secretary to the City Administrator in the City
22 Administration Department.

23 SECTION 4: The provisions of Resolution Nos. 9639, as
24 amended by Resolution Nos. 9664, 9672, 9678, 9728, 9815, 9888 and 9906,
25 not consistent with or in conflict with this resolution are hereby
26 repealed; in all other respects, Resolution Nos. 9369, 9664, 9672,
27 9678, 9728, 9815, 9888 and 9906, shall remain in full force and effect.

28 / / /

1 SECTION 5: The City Clerk of the City of Vernon shall
2 certify to the passage of this resolution, and thereupon and
3 thereafter the same shall be in full force and effect.

4 APPROVED AND ADOPTED this 11th day of May, 2009.

5
6 *Hilario Gonzales*

7 Name: Hilario Gonzales

8 Title: Mayor / ~~Mayor Pro-Tem~~


9 ATTEST:

10 *Manuela Giron*
11 MANUELA GIRON, City Clerk

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1 STATE OF CALIFORNIA)
2) ss
3 COUNTY OF LOS ANGELES)

4 I, MANUELA GIRON, City Clerk of the City of Vernon, do hereby
5 certify that the foregoing Resolution, being Resolution No. 9942, was
6 duly adopted by the City Council of the City of Vernon at a regular
7 meeting of the City Council duly held on Monday, May 11, 2009, and
8 thereafter was duly signed by the Mayor or Mayor Pro-Tem of the City of
9 Vernon.

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12 MANUELA GIRON, City Clerk

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EX "B"

CITY ADMINISTRATION
SALARY SCALE

		MONTHLY SALARY
CITY ADMINISTRATOR	STEP 1	32,000.00
EXECUTIVE SECRETARY TO THE CITY ADMINISTRATOR -	STEP 1	6,844.00
	2	6,487.00
	3	6,149.00
	4	5,828.00
	5	5,524.00
	6	5,236.00
	7	4,983.00
	8	4,704.00

SCHEDULE III
EXHIBIT "C"

cityadministration

Exhibit 6

RESOLUTION NO. 10,057

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF VERNON AMENDING PREVIOUSLY AMENDED RESOLUTION NO. 9639 REGARDING THE COMPENSATION, COSTS AND BENEFITS OF ITS EMPLOYEES ("SALARY RESOLUTION"), BY AMENDING SECTIONS 12.b and 13.a(10) AND SCHEDULE NOS. III, XV AND XXII OF THE SALARY RESOLUTION (AMENDMENT NO. 13)

WHEREAS, on June 16, 2008, the City Council of the City of Vernon adopted Resolution No. 9639 to be effective on July 6, 2008, regarding the compensation, costs and benefits of its employees, which has subsequently been amended by Resolution Nos. 9664, 9672, 9678, 9728, 9815, 9888, 9906, 9942, 10,001, 10,021, 10,029 and 10,053 (the "Salary Resolution"); and

WHEREAS, Schedule No. III, Exhibit C, of the Salary Resolution provides for positions and salary scales of positions within the City Administration Department; and

WHEREAS, the City Council of the City of Vernon desires to create the position of Budget Auditor in the City Administration Department with the appropriate salary scale; and

WHEREAS, Schedule No. XV, Exhibit O, of the Salary Resolution provides for positions and salary scales of positions within the Office of the Treasurer; and

WHEREAS, the City Council of the City of Vernon desires to leave the salary scale for the City Treasurer blank because when an employee serves in more than one position in more than one department some positions are indicated in schedules without a salary scale; and

WHEREAS, Sections 12.b and 13.a(10) of the Salary Resolution and Schedule XXII (Exhibit V) provide for uniform allowances for the Fire and Police Departments for the 2008-2009

1 fiscal year; and

2 WHEREAS, the City Council of the City of Vernon desires to
3 amend Sections 12.b and 13.a(10) and Schedule XXII (Exhibit V) to
4 provide for uniform allowances for the 2009-2010 fiscal year; and

5 WHEREAS, the City Council of the City of Vernon wishes to
6 amend Sections 12.b and 13.a(10) and Schedule Nos. III (Exhibit C), XV
7 (Exhibit O) and XXII (Exhibit V) of the Salary Resolution to implement
8 the aforementioned changes.

9 NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE
10 CITY OF VERNON AS FOLLOWS:

11 SECTION 1: The City Council of the City of Vernon
12 hereby finds and determines that the recitals contained hereinabove
13 are true and correct.

14 SECTION 2: Effective August 30, 2009, Schedule Nos. III
15 (Exhibit C) and XV (Exhibit O) of the Salary Resolution are hereby
16 amended in their entirety as indicated on Exhibit A, which is attached
17 hereto and made part hereof by this reference.

18 SECTION 3: Effective as of July 1, 2009, Sections 12.b and
19 13.a(10) of the Salary Resolution are hereby amended to read as
20 follows:

21 12.b. Uniform Allowance.

22 The City shall provide a uniform allowance as specified in
23 Schedule XXII, Exhibit V, for the 2009-2010 fiscal year of the City,
24 for the purchase of Uniforms and related equipment.

25 13.a(10) Uniform Allowance for Miscellaneous
26 Personnel in the Police Department.

27 Vernon shall provide a uniform allowance as
28 specified in Schedule XXII, Exhibit V, for the 2009-2010 fiscal year of

1 the City for the purchase of uniforms for dispatchers, Records
2 Personnel, Department Secretary and Administrative Aide positions in
3 the Police Department.

4 SECTION 4: Effective as of July 1, 2009, Schedule XXII
5 (Exhibit V) of the Salary Resolution is hereby amended in its entirety
6 as indicated on Exhibit B, which is attached hereto and made a part
7 hereof by this reference. Any payment provided for in Schedule XXII
8 that was to occur prior to September 1, 2009, and that has not yet been
9 paid, shall be paid on the next payroll check following the adoption of
10 this resolution, or as soon thereafter as is practicable.


11 SECTION 5: The provisions of Resolution Nos. 9639, as
12 amended by Resolution Nos. 9664, 9672, 9678, 9728, 9815, 9888, 9906,
13 9942, 10,001, 10,021, 10,029 and 10,053 not consistent with or in
14 conflict with this resolution are hereby repealed; in all other
15 respects, Resolution Nos. 9639, 9664, 9672, 9678, 9728, 9815, 9888,
16 9906, 9942, 10,001, 10,021, 10,029 and 10,053 shall remain in full
17 force and effect.

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SECTION 6: The City Clerk of the City of Vernon shall certify to the passage, approval and adoption of this resolution, and the City Clerk of the City of Vernon shall cause this resolution and her certification to be entered in the Book of Resolutions of the Council of this City.

APPROVED AND ADOPTED this 31st day of August, 2009.


Name: Hilario Gonzales
Title: Mayor / ~~Mayor Pro-Tem~~

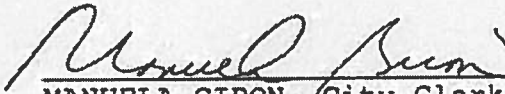
ATTEST:


MANUELA GIRON, City Clerk

1 STATE OF CALIFORNIA)
2) ss
3 COUNTY OF LOS ANGELES)

4 I, MANUELA GIRON, City Clerk of the City of Vernon, do hereby
5 certify that the foregoing Resolution, being Resolution No. 10,057, was
6 duly passed, approved and adopted by the City Council of the City of
7 Vernon at a regular meeting of the City Council duly held on Monday,
8 August 31, 2009, and thereafter was duly signed by the Mayor or Mayor
9 Pro-Tem of the City of Vernon.

10 Executed this 31st day of August, 2009, at Vernon, California.

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13 MANUELA GIRON, City Clerk

14 (SEAL)
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EX "A"

CITY ADMINISTRATION
SALARY SCALE

		MONTHLY SALARY
CITY ADMINISTRATOR	STEP 1	32,000.00
BUDGET AUDITOR -	STEP 1	11,708.00
EXECUTIVE SECRETARY TO THE CITY	STEP 1	6,844.00
ADMINISTRATOR -	2	6,487.00
	3	6,149.00
	4	5,828.00
	5	5,524.00
	6	5,236.00
	7	4,963.00
	8	4,704.00

SCHEDULE III
EXHIBIT "C"

cityadministration

Exhibit 7

RESOLUTION NO. 2010-33

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF VERNON AMENDING PREVIOUSLY AMENDED RESOLUTION NO. 9639 REGARDING THE COMPENSATION, COSTS AND BENEFITS OF ITS EMPLOYEES ("SALARY RESOLUTION"), BY AMENDING SECTION 4 AND SCHEDULE NOS. III, IV, XIII AND XIV OF THE SALARY RESOLUTION (AMENDMENT NO. 16)

WHEREAS, on June 16, 2008, the City Council of the City of Vernon adopted Resolution No. 9639 to be effective on July 6, 2008, regarding the compensation, costs and benefits of its employees, which has subsequently been amended by Resolution Nos. 9664; 9672; 9678; 9728; 9815; 9888; 9906; 9942; 10,001; 10,021; 10,029; 10,053; 10,057; 10,075 and 2010-06 (the "Salary Resolution"); and

WHEREAS, Section 4 of the Salary Resolution provides for contributions to be made to the California Public Employees' Retirement System (PERS); and

WHEREAS, the City Administrator has recommended that the City continue paying the employer's contribution to the PERS, but no longer pay the employees' contributions on behalf of City employees to the PERS; and

WHEREAS, Schedule No. III, Exhibit C, of the Salary Resolution provides for positions and salary scales of positions within the Office of City Administration; and

WHEREAS, by memo dated February 23, 2010, the Director of Personnel has recommended that the position and salary scale of Budget Auditor be eliminated in the Office of City Administration; and

WHEREAS, Schedule No. IV, Exhibit D, of the Salary Resolution provides for positions and salary scales of positions within the Office of City Clerk; and

WHEREAS, by memo dated February 24, 2010, the Director of Personnel has recommended that the salary scale for the position of City Clerk be eliminated; and

WHEREAS, the City Council of the City of Vernon desires to leave the salary scale for the City Clerk blank because when an employee serves in more than one position in more than one department some positions are indicated in schedules without a salary scale; and

WHEREAS, Schedule No. XIII, Exhibit M, of the Salary Resolution provides for positions and salary scales of positions within the Light & Power Department; and

WHEREAS, by memo dated February 23, 2010, the Director of Personnel has recommended the position and salary scale of Administrative Assistant to Engineering Manager be eliminated in the Light & Power Department; and

WHEREAS, Schedule No. XIV, Exhibit N, of the Salary Resolution provides for positions and salary scales of positions within the Office of the City Attorney/Public Prosecutor; and

WHEREAS, by memo dated February 23, 2010, the Director of Personnel has recommended the position and salary scale of Legal Services Administrative Secretary be eliminated in the Office of the City Attorney/Public Prosecutor; and

WHEREAS, the City Council of the City of Vernon wishes to amend Section 4; and Schedule Nos. III (Exhibit C), IV (Exhibit D), XIII (Exhibit M) and XIV (Exhibit N) of the Salary Resolution to implement the aforementioned changes.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF VERNON AS FOLLOWS:

SECTION 1: The City Council of the City of Vernon

hereby finds and determines that the recitals contained hereinabove are true and correct.

SECTION 2: The City Council of the City of Vernon hereby amends Section 4 of the Salary Resolution to read as follows:

"SECTION 4: PERS CONTRIBUTIONS

The City shall make the required employer's contribution to PERS. Employees shall make the required employees' contribution to PERS."

SECTION 3: Effective March 1, 2010, Schedule Nos. III (Exhibit C), IV (Exhibit D), XIII (Exhibit M) and XIV (Exhibit N) of the Salary Resolution are hereby amended in their entirety, copies of which are attached hereto as Exhibit A.

SECTION 4: The provisions of Resolution Nos. 9639, as amended by Resolution Nos. 9664; 9672; 9678; 9728; 9815; 9888; 9906; 9942; 10,001; 10,021; 10,029; 10,053; 10,057; 10,075 and 2010-06, not consistent with or in conflict with this Resolution are hereby repealed; in all other respects, Resolution Nos. 9664; 9672; 9678; 9728; 9815; 9888; 9906; 9942; 10,001; 10,021; 10,029; 10,053; 10,057; 10,075 and 2010-06, shall remain in full force and effect.

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SECTION 5: The City Clerk of the City of Vernon shall certify to the passage, approval and adoption of this Resolution, and the City Clerk of the City of Vernon shall cause this Resolution and the City Clerk's certification to be entered in the File of Resolutions of the Council of this City.

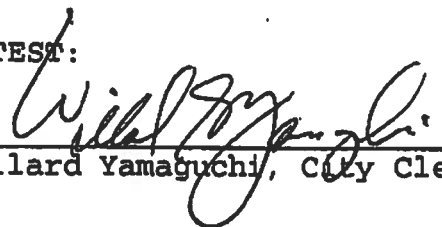
APPROVED AND ADOPTED this 1st day of March 2010..



Name: Hilario Gonzales

Title: Mayor / ~~Mayor Pro Tem~~

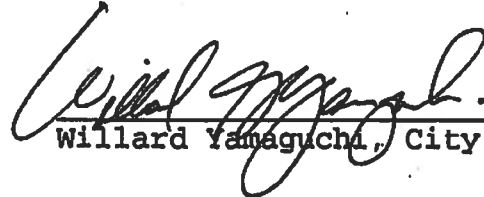
ATTEST:


Willard Yamaguchi, City Clerk

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, Willard Yamaguchi, City Clerk of the City of Vernon, do hereby certify that the foregoing Resolution, being Resolution No. 2010-33, was duly passed, approved and adopted by the City Council of the City of Vernon at a regular meeting of the City Council duly held on Monday, March 1, 2010, and thereafter was duly signed by the Mayor or Mayor Pro-Tem of the City of Vernon.

Executed this 1 day of March 2010, at Vernon, California.



Willard Yamaguchi, City Clerk

(SEAL)

EX "A"

CITY ADMINISTRATION
SALARY SCALE

	MONTHLY SALARY	
CITY ADMINISTRATOR	STEP 1	32,000.00
EXECUTIVE SECRETARY TO THE CITY ADMINISTRATOR -	STEP 1	6,844.00
	2	6,487.00
	3	6,149.00
	4	5,828.00
	5	5,524.00
	6	5,236.00
	7	4,963.00
	8	4,704.00

SCHEDULE III
EXHIBIT "C"

cityadministration

Exhibit 8



Effective June 28, 2015

City Council Monthly Compensation

The City Council receives the following compensation from the City of Vernon as authorized by California Law.

Name & Title	Monthly Council Compensation
W. Michael McCormick, Mayor	\$2,146
William Bill Davis, Mayor Pro-Tem	\$2,146
Luz Martinez	\$2,146
Yvette Woodruff-Perez	\$2,146
Melissa Ybarra	\$2,146

Executive Management

City Administrator

Mark C. Whitworth, the current City Administrator receives a yearly compensation of \$293,436.

Top Executive Management

Job Title	Monthly Compensation (a)
City Attorney	\$21,120
City Clerk	\$11,203
Police Chief	\$20,117
Director of Public Works, Water & Dev. Services	\$20,117
Director of Health & Environmental Control	\$17,378
Director of Human Resources	\$16,333.34
Director of Gas & Electric	\$22,180
Director of Finance	\$17,500
Fire Chief*	\$18,379

(*} Monthly compensation does not include premium pay

[To view the entire City of Vernon salary schedule please click here.](#)