

1 GINA M. RATTO, INTERIM GENERAL COUNSEL, SBN 131217  
2 RENEE SALAZAR, SENIOR STAFF ATTORNEY, SBN 214042  
3 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
4 Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811  
5 P.O. Box 942707, Sacramento, CA 94229-2707  
6 Telephone: (916) 795-3675  
7 Facsimile: (916) 795-3659

8 Attorneys for California Public  
9 Employees' Retirement System

10 BOARD OF ADMINISTRATION  
11 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

12 In the Matter of the Calculation of Final  
13 Compensation of

) AGENCY CASE NO. 2012-0671  
) OAH NO. 2013080917

14 BRUCE MALKENHORST, SR.,  
15 Respondent,

) STATEMENT OF ISSUES

16 and

) Hearing Date: March 5 & 6, 2014  
) Hearing Location: Orange, CA

17 CITY OF VERNON,

18 Respondent.

19 The California Public Employees' Retirement System (CalPERS), states:

20 I

21 CalPERS makes and files this Statement of Issues in its official capacity as such  
22 and not otherwise.

23 II

24 Respondent Bruce Malkenhorst, Sr. (respondent Malkenhorst) was employed by  
25 respondent City of Vernon, at times in numerous positions simultaneously, including  
Deputy City Administrator/Deputy City Clerk, City Administrator/City Clerk, City  
Treasurer, Director of Finance and Personnel, , Executive Director of Light and  
Power/Chief Executive Officer of Electrical Department, Executive Director of the

1 Redevelopment Agency, Secretary of the Redevelopment Agency, CEO of the Gas  
2 Municipal Utility Department, Executive Director of the Industrial Development  
3 Authority, Secretary of the Industrial Development Authority, Treasurer of the Industrial  
4 Development Authority and Executive Director of the Vernon Historic Preservation  
5 Society. By virtue of his employment, respondent Malkenhorst is a local miscellaneous  
6 member of CalPERS.

7 III

8 Respondent City of Vernon (respondent Vernon) is a public agency contracting  
9 with CalPERS for retirement benefits for its eligible employees pursuant to  
10 Government Code section 20460 et seq. The provisions of respondent Vernon's  
11 contract with CalPERS are contained in the Public Employees' Retirement Law (Cal.  
12 Government Code section 20000 et seq., the PERL).

13 Section 20500 provides in part:

14 The contract may include any provisions consistent with this part and  
15 necessary in the administration of this system as it affects the public agency  
and its employees....

16 Section 20506 provides in part:

17 Any contract . . . entered into shall subject the contracting agency  
18 and its employees to all provisions of this part and all amendments thereto  
applicable to members, local miscellaneous members . . .

19 Accordingly, the contract between CalPERS and respondent Vernon  
20 incorporates the definitions of words and terms as set forth in the PERL.

21 IV

22 CalPERS is a defined benefit retirement plan administered by the CalPERS  
23 Board of Administration. Benefits for its members are funded by member and  
24 employer contributions, and by interest and other earnings on those contributions. The  
25 amount of a member's contributions is determined by applying a fixed percentage to

1 the member's compensation. A public agency's contribution is determined by applying  
2 a rate to the payroll of the agency. Using certain actuarial assumptions specified by  
3  
4 law, the CalPERS Board of Administration sets the employer contribution rate on an  
5 annual basis.

6 V

7 The amount of a member's service retirement allowance is calculated by  
8 applying a percentage figure, based upon the member's age on the date of retirement,  
9 to the member's years of service and the member's "final compensation." In  
10 computing a member's retirement allowance, CalPERS staff may review the salary  
11 reported by the employer for the member to ensure that only those items allowed  
12 under the PERL will be included in the member's "final compensation" for purposes of  
13 calculating the retirement allowance.

14 VI

15 On or about June 6, 2005, respondent Malkenhorst signed an application for  
16 service retirement, requesting that his pension be calculated on the basis of his highest  
17 City Administrator pay rate, including longevity pay. Pursuant to those amounts,  
18 CalPERS calculated Respondent Malkenhorst's final compensation in the amount of  
19 \$44,128 per month, which was then used to calculate his retirement allowance in the  
20 amount of \$40,022.66 per month. Respondent Malkenhorst retired for service effective  
21 July 1, 2005, with approximately forty (40.195) years of service credit, and has been  
22 receiving his retirement allowance from that date.

23 VII

24 The following provisions of the Government Code are relevant to CalPERS  
25 authority to manage the retirement system, correct errors and calculate final

1 compensation:

2

Section 20120 provides:

3

The management and control of this system is vested in the board.

4

Section 20121 provides:

5

The board may make such rules as it deems proper.

6

Section 20122 provides:

7

Each member and each person retired is subject to this part and the rules adopted by the board.

8

9

Section 20123 provides:

10

Subject to this part and its rules, the board shall determine and may modify benefits for service and disability.

11

Section 20125 provides:

12

The board shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system.

13

14

Section 20037 provides in relevant part:

15

16

For a state member, or for a local member who is an employee of a contracting agency that is subject to this section, "final compensation" means the highest average annual compensation earnable by a member during the three consecutive years of employment immediately preceding the effective date of his or her retirement or the date of his or her last separation from state service if earlier or during any other period of three consecutive years during his or her membership in this system which he or she designates in his or her application for retirement, ...

17

18

19

20

Section 20042 provides in relevant part:

21

On the election of a contracting agency, ... "final compensation" for a local member employed by that agency whose retirement is effective or whose death occurs after the date of the election and with respect to benefits based on service to the agency shall be computed under Section 20037 but with the substitution of the period of one year for three consecutive years. ...

22

23

24

25

Section 20160, provides in relevant part:

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

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

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

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

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

...

Section 20164 provides in pertinent part:

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

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

(1) In cases where this system makes an erroneous payment to a member

1 or beneficiary, this system's right to collect shall expire three years from  
2 the date of payment. ...

3 Section 20630 provides:

4 **"Compensation"**

5 (a) As used in this part, "compensation" means the remuneration  
6 paid out of funds controlled by the employer in payment for the  
7 member's services performed during normal working hours or for time  
8 during which the member is excused from work because of any of the  
9 following:

10 (1) Holidays.

11 (2) Sick leave.

12 (3) Industrial disability leave, during which, benefits are payable  
13 pursuant to Sections 4800 and 4850 of the Labor Code, Article 4  
14 (commencing with Section 19869) of Chapter 2.5 of Part 2.6, or  
15 Section 44043 or 87042 of the Education Code.

16 (4) Vacation.

17 (5) Compensatory time off.

18 (6) Leave of absence.

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

24 Section 20635 provides:

25 **Overtime Compensation Excluded**

When the compensation of a member is a factor in any  
computation to be made under this part, there shall be excluded from  
those computations any compensation based on overtime put in by a  
member whose service retirement allowance is a fixed percentage of  
final compensation for each year of credited service. For the purposes  
of this part, overtime is the aggregate service performed by an  
employee as a member for all employers and in all categories of  
employment in excess of the hours of work considered normal for  
employees on a full-time basis, and for which monetary compensation  
is paid.

If a member concurrently renders service in two or more

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

positions, one or more of which is full time, service in the part-time position shall constitute overtime. If two or more positions are permanent and full time, the position with the highest payrate or base pay shall be reported to this system. This provision shall apply only to service rendered on or after July 1, 1994.

Section 20636 provides in pertinent part:

**"Compensation Earnable"**

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

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

(2) "Payrate" shall include an amount deducted from a member's salary for any of the following:

(A) Participation in a deferred compensation plan.

(B) Payment for participation in a retirement plan that meets the requirements of Section 401(k) of Title 26 of the United States Code.

...

(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).

(3) Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall identify the pay period in which the special compensation was earned.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

(4) Special compensation may include the full monetary value of normal contributions paid to the board by the employer, on behalf of the member and pursuant to Section 20691, if the employer's labor policy or agreement specifically provides for the inclusion of the normal contribution payment in compensation earnable.

(5) The monetary value of a service or noncash advantage furnished by the employer to the member, except as expressly and specifically provided in this part, is not special compensation unless regulations promulgated by the board specifically determine that value to be "special compensation."

(6) The board shall promulgate regulations that delineate more specifically and exclusively what constitutes "special compensation" as used in this section. A uniform allowance, the monetary value of employer-provided uniforms, holiday pay, and premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee under Section 201 et seq. of Title 29 of the United States Code shall be included as special compensation and appropriately defined in those regulations.

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

(A) Final settlement pay.

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

(C) Any other payments the board has not affirmatively determined to be special compensation.

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

(e) (1) As used in this part, "group or class of employment" means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related grouping. One employee may not be considered a group or class.

(2) Increases in compensation earnable granted to an employee who is not in a group or class shall be limited during the final compensation period applicable to the employees, as well as the two years immediately preceding the final compensation period, to the average increase in compensation earnable during the same period reported by the employer for all employees who are in the same



1 membership classification, except as may otherwise be determined  
2 pursuant to regulations adopted by the board that establish reasonable  
standards for granting exceptions.

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

6 VIII

7 The following regulations, promulgated by the Board of Administration  
8 through California Code of Regulations, Title 2, Division 1, Chapter 2, Subchapter  
9 1, Article 4, are relevant to this appeal:

10 Section 570 provides in part:

11 **Final Settlement Pay**

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

15 ...

16 Section 570.5 provides:

17 **Requirement for a Publicly Available Pay Schedule**

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

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

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

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

25 (4) Indicates the time base, including, but not limited to, whether

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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.

Section 571 provides in part:

**Definition of Special Compensation**

(a) The following list exclusively identifies and defines special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS if they are contained in a written labor policy or agreement:

(1) INCENTIVE PAY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**Bonus** - Compensation to employees for superior performance such as "annual performance bonus" and "merit pay". If provided only during a member's final compensation period, it shall be excluded from final compensation as "final settlement" pay. A program or system must be in place to plan and identify performance goals and objectives.

[¶]...[¶]

**Longevity Pay** - Additional 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.

**Management Incentive Pay** - Compensation granted to management employees in the form of additional time off or extra pay due to the unique nature of their job. Employees within the group cannot have the option to take time off or receive extra pay. This compensation must be reported periodically as earned and must be for duties performed during normal work hours. This compensation cannot be for overtime, nor in lieu of other benefits excluded under the statutes, nor for special compensation not otherwise listed in this Section 571.

[¶]...[¶]

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

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

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

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

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

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

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

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

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

- (3) Part of normally required duties;
- (4) Performed during normal hours of employment;
- (5) Paid periodically as earned;
- (6) Historically consistent with prior payments for the job classification;
- (7) Not paid exclusively in the final compensation period;
- (8) Not final settlement pay; and
- (9) Not creating an unfunded liability over and above PERS' actuarial assumptions.

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

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

**IX**

By letter dated October 22, 2012, CalPERS notified respondent Malkenhorst that on further review, CalPERS had determined that his compensation had been over reported by the City of Vernon due to inclusion of payments that do not comply with the PERL and do not meet the definition of "compensation earnable." Accordingly, his final compensation would be reduced from \$44,128 to \$9450 per month, and a corresponding downward adjustment would be made to respondent Malkenhorst's retirement allowance. CalPERS also advised respondents of their right to appeal this determination.

**X**


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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

XI

This appeal is limited to the issue of whether CalPERS has correctly determined respondent Malkenhorst's retirement allowance pursuant to the applicable provisions of the Government Code and Regulations.

BOARD OF ADMINISTRATION, CALIFORNIA  
PUBLIC EMPLOYEES' RETIREMENT SYSTEM

Dated: SEP 26 2013 BY  for  
KAREN DeFRANK, Chief  
Customer Account Services Division