

Attachment H (D)  
Joint Statement of Undisputed and Disputed Facts  
Page 1 of 40

1 John Michael Jensen, Esq., State Bar No. 176813  
2 Law Offices of John Michael Jensen  
3 11500 West Olympic Blvd Suite 550  
4 Los Angeles CA 90064  
5 (310) 312-1100  
6 (310) 312-1109 Facsimile  
7 johnjensen@johnmjensen.com

8 Attorneys for Respondent Bruce Malkenhorst

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

<p>In Re the Matter of</p> <p><b>BRUCE V. MALKENHORST, SR. and</b></p> <p><b>CITY OF VERNON,</b></p> <p style="padding-left: 100px;">Respondents.</p>	<p>) CALPERS CASE NO.: 2012-0671</p> <p>) OAH CASE NO.: 2013080917</p> <p>)</p> <p>) <b>JOINT STATEMENT OF UNDISPUTED</b></p> <p>) <b>AND DISPUTED FACTS CONCERNING</b></p> <p>) <b>BRUCE V. MALKENHORST, SR.'S</b></p> <p>) <b>CLAIMS OF COLLATERAL ESTOPPEL,</b></p> <p>) <b>RES JUDICATA, AND ISSUE AND</b></p> <p>) <b>CLAIM PRECLUSION</b></p> <p>)</p> <p>)</p> <p>) Hearing: February 14, 2014, at 9:00 am</p> <p>) Hearing Location: Los Angeles OAH</p>
---	--

Pursuant to the Status Conference Order filed on November 22, 2013 by Administrative Law Judge Janis Rovner of the Office of Administrative Hearings, the parties hereby file under protest their Joint Statement of Undisputed and Disputed Facts concerning Respondent Bruce Malkenhorst's claims of collateral estoppel, *res judicata*, and issue and claim preclusion under a full reservation of all rights of every kind or nature (as described in more detail herein).

Malkenhorst denies and contests CalPERS' and the OAH's authority and jurisdiction to hear any issue associated with these matters. For example, on October 11, 2013, Malkenhorst filed and served his Jurisdictional Challenge asserting that the California Public Employees'

Attachment H (D)  
Joint Statement of Undisputed and Disputed Facts  
Page 2 of 40

1 Retirement System and its Board of Administration (hereinafter collectively "CalPERS") and the  
2 OAH have no authority or jurisdiction to proceed with the administrative hearing on this matter  
3 including, *inter alia*, because CalPERS is barred from conducting an administrative hearing  
4 pursuant to collateral estoppel, *res judicata*, and issue and claim preclusion (hereinafter  
5 "collateral estoppel/*res judicata*") arising from a final resolution of an earlier administrative  
6 process in 2005-2006 about these matters. Malkenhorst also then concurrently filed and served a  
7 Memorandum of Points and Authorities concerning his collateral estoppel/*res judicata* claims.

8 As an additional independent ground of protest and opposition, Malkenhorst has  
9 requested files in discovery from third parties with a duty to provide the files to him. However,  
10 the City of Vernon has apparently requested that one of the parties holding the information  
11 withhold the documents concerning facts regarding the prior 2005-2006 administrative process  
12 which inform this Joint Statement of Undisputed and Disputed Facts. In particular, Malkenhorst  
13 subpoenaed client files, ESI, records, and documents from two law firms, Loeb & Loeb and  
14 Morgan, Lewis & Bockius, whose attorneys represented Malkenhorst or Malkenhorst's interest in  
15 his pension in a contested matter formally in CalPERS' administrative process. Loeb and Morgan  
16 Lewis have failed to provide those documents to Malkenhorst, including under claims that the  
17 documents are subject to the attorney client privilege or the attorney work product privilege.  
18 Loeb and Morgan Lewis have indicated that they will seek protective orders or their equivalent.  
19 The City of Vernon has requested Morgan Lewis to withhold providing the documents to  
20 Malkenhorst, thus likely or effectively preventing Malkenhorst from learning facts that are  
21 relevant regarding the 2005-2006 administrative process and thus the collateral estoppel/*res*  
22 *judicata* claims or defenses. Malkenhorst twice requested a continuance from the OAH on  
23 deadlines associated with the filing of the Joint Statement of Undisputed and Disputed Facts and  
24 his jurisdictional challenge, but no continuance was issued prior to the date set for Malkenhorst  
25 to provide his draft of the Joint Statement of Undisputed and Disputed Facts.

26 Filed timely under protest with a full reservation of all rights of any kind or nature,  
27 including that (i) he may change these "facts" and that (ii) he should not be held to these  
28 representations as they are likely incomplete, Malkenhorst has set forth some facts in order to

1 satisfy the timing of the Court's order that he provide a draft Statement of Undisputed and  
2 Disputed Facts concerning those claims on this date. These matters are to be considered by the  
3 Court as part of its February 14, 2014, hearing on Malkenhorst's jurisdictional challenge and  
4 related issues.

### 5 6 UNDISPUTED FACTS

#### 7 Malkenhorst's Employment History, Compensation at Vernon:

8 1. Malkenhorst was employed for approximately thirty (30) years by the City of  
9 Vernon ("City" or "Vernon"). The last approximately twenty-seven (27) of those years were  
10 spent employed as Vernon's City Administrator.

11 2. Vernon regularly paid Malkenhorst a salary in cash from City of Vernon funds.

12 3. Vernon publicly disclosed Malkenhorst's salary in the amount of \$35,302 per  
13 month for his full time-work in the position of City Administrator.

14 4. Vernon regularly contributed pension contributions to CalPERS, and regularly  
15 reported Malkenhorst's salary to CalPERS.

16 5. Malkenhorst terminated his employment at Vernon on June 30, 2005. Pursuant to  
17 a Service Retirement Election Application he submitted to CalPERS, he retired effective July 1,  
18 2005.

19 6. Pursuant to Vernon's contract with CalPERS, Malkenhorst's CalPERS pension is  
20 to be calculated based upon his highest one (1) year of "Compensation Earnable", which includes  
21 his allowable base salary and allowable longevity pay special compensation received from  
22 Vernon.

23 7. During the last year of Malkenhorst's employment at Vernon, the City reported a  
24 base salary of \$35,302 per month, plus 25% longevity pay of \$8,825.50, for a total  
25 "Compensation Earnable" of \$44,128 per month.

26 8. Based upon Malkenhorst's base salary and longevity pay special compensation  
27 reported to CalPERS, Malkenhorst's age at retirement, and the pension formula that Vernon  
28 contracted for, Malkenhorst would receive a monthly pension of approximately \$40,000.

1 **CalPERS' Review of Malkenhorst's Allowable Pension:**

2 9. On July 18, 2005, Alinda Heringer, an RPS II in CalPERS' Compensation Review  
3 Unit, sent a letter to Vernon indicating that CalPERS had completed a review of the  
4 compensation reported for Malkenhorst and that it was disallowing a portion of his reported  
5 compensation and reducing his pension allowance accordingly. A true and correct copy of the  
6 July 18, 2005 letter from Ms. Heringer is attached hereto as Exhibit 1.

7 10. Exhibit 1 was copied to "B Malkenhorst".

8 11. Exhibit 1 contained a statement advising Vernon that "you have the right to  
9 formally appeal this decision by filing a written appeal with CalPERS within 30 days of the  
10 mailing of this letter, in accordance with sections 555-555.4, Title 2, of the California  
11 Administrative Code, a copy of which is enclosed for your convenience. As stated in the  
12 regulations, an appeal should set forth the factual basis and legal authorities on which it is  
13 based." (Exhibit 3, page 3.)

14 12. *California Code of Regulations*, section 555, says:

15 The Executive Officer is hereby authorized to act: on any application for refund  
16 of contributions, crediting of service, correction of records, retirement for  
17 disability or service, and death benefits and allowances, and to fix and authorize  
18 the payment of any refund, allowance or benefit to which such application may be  
19 found to be entitled; to cause medical examination of retired persons; and to  
20 reinstate such persons from retirement upon his determination that disability does  
21 not exist. The Executive Officer may refer the question of an application's  
22 entitlement to any refund, allowance or benefit or of his reinstatement from  
23 retirement to a hearing officer for hearing.

24 The Executive Officer is hereby authorized and empowered to delegate to his  
25 subordinates authority to take any such action on his behalf.

26 13. *California Code of Regulations*, section 555.1, say:

27 Any application dissatisfied with the action of the Executive Officer on his  
28 application, other than his referral of the matter for hearing, may appeal such  
29 action to the Board by filing a written notice of such appeal at the offices of the  
30 Board within thirty days of the date of the mailing to him by the Executive  
31 Officer, at his most recent address of record, of notice of the action and right of  
32 appeal. An appeal shall contain a statement of the facts and the law forming the  
33 basis for appeal. Upon a satisfactory showing of good cause, the Executive  
34 Officer may grant additional time not to exceed 30 days, within which to file such  
35 appeal.

36 **"Notice of Appeal" Filed to Contest CalPERS' Determination in the 2005-2006**

37 **Administrative Process:**

1           14.     On August 11, 2005, in response to CalPERS' determination letter, Marla  
2 Aspinwall, an attorney with the law firm of Loeb & Loeb LLP (hereinafter "Loeb"), formally  
3 responded by a letter "Appeal" to Lori McGartland, Acting Division Chief of CalPERS'  
4 Actuarial and Employer Services Branch, entitled "NOTICE OF APPEAL – City of Vernon  
5 (Employer Code #209), Employee: B. Malkenhorst". A true and correct copy of the August 11,  
6 2005 letter from Ms. Aspinwall to Ms. McGartland is attached hereto as **Exhibit 2**.

7           15.     **Exhibit 2** indicates that Loeb "represents the City of Vernon ("the City") with  
8 respect to the appeal of [the] above-entitled matter which relates to the City's employee, Bruce  
9 Malkenhorst ("Mr. Malkenhorst"), and a request by CalPERS to reverse the increase [sic] payroll  
10 and special compensation entries related to Mr. Malkenhorst's retirement benefits." (**Exhibit 2**,  
11 page 1.)

12           16.     The matters in the Appeal referred to longevity bonuses, "job" duties, "job titles",  
13 single full-time job, base pay, and that Vernon's City Council determined the pay rate.

14           17.     Item No. 1 of **Exhibit 2** addresses CalPERS' contention that Malkenhorst was not  
15 entitled to the 25% longevity pay special compensation reported by Vernon. (**Exhibit 2**, page 2.)

16           18.     Item No. 2 of **Exhibit 2** says, "[t]he City Administrator's job description is  
17 included in the attached Vernon City Codes (attached for your convenience as 'Exhibit C') and,  
18 pursuant to those Codes, incorporates a number of different job titles and duties, all of which are  
19 included in the single full time job of City Administrator. The base pay reported to CalPERS for  
20 Mr. Malkenhorst is the base pay determined by the City Council for the performance of the  
21 duties contemplated in the Vernon City Codes for the position of City administrator." (**Exhibit 2**,  
22 page 3.)

23     **CalPERS' Acknowledgement of Appeal:**

24           19.     On September 23, 2005, CalPERS' Ms. Heringer sent a letter to Loeb's Ms.  
25 Aspinwall entitled "NOTICE OF APPEAL – City of Vernon – B. Malkenhorst", responding to  
26 **Exhibit 2**. A true and correct copy of the September 23, 2005 letter from Ms. Heringer to Ms.  
27 Aspinwall is attached hereto as **Exhibit 3**.

28           20.     CalPERS acknowledged that the matters in the Appeal referred to longevity

1 bonuses, "job" duties, "job titles", single full-time job, base pay, and that Vernon's City Council  
2 determined the pay rate.

3 21. **Exhibit 3** asks Ms. Aspinwall to answer several additional questions about Mr.  
4 Malkenhorst's compensation. It also asserts that Malkenhorst served in a number of positions at  
5 Vernon and states that "[a]ll of these other positions, with the exception of City Administrator,  
6 are considered overtime and not reportable to CalPERS for retirement purposes." (**Exhibit 3**,  
7 page 1.)

8 **Second "Notice of Appeal":**

9 22. On November 3, 2005, Loeb's Ms. Aspinwall sent a letter to CalPERS' Ms.  
10 Heringer responding to **Exhibit 3** entitled "NOTICE OF APPEAL – City of Vernon (Employer  
11 Code #209), Employee: B. Malkenhorst". A true and correct copy of the November 2, 2005 letter  
12 from Ms. Aspinwall to Ms. Heringer is attached hereto as **Exhibit 4**.

13 23. The matters in the Appeal continued to refer to longevity bonuses, "job" duties,  
14 "job titles", single full-time job, base pay, and that Vernon's City Council determined the pay  
15 rate.

16 24. **Exhibit 4** discusses the issue of Malkenhorst's duties and responsibilities at  
17 Vernon, including specifically CalPERS' assertion in **Exhibit 3** that Malkenhorst served in a  
18 number of separate positions which "are considered overtime and not reportable to CalPERS for  
19 retirement purposes". **Exhibit 4** responds to that assertion and states that Malkenhorst worked in  
20 a single position of City Administrator with multiple duties, that he received a single base salary  
21 for that work, and that "Mr. Malkenhorst's salary did not increase as a result of performing  
22 particular specified duties or decrease upon transfer or elimination of particular duties". (See  
23 **Exhibit 4**, pages 1-2.)

24 25. **Exhibit 4** also discusses the issue of the amount of Malkenhorst's compensation  
25 as City Administrator and states that his salary was based upon his experience and expertise.  
26 (**Exhibit 4**, pages 2-3.)

27 26. **Exhibit 4** also addresses CalPERS' concerns about Malkenhorst's longevity pay  
28 and the issue of "group or class of employment". (**Exhibit 4**, pages 3-4.)

1           27.     **Exhibit 4** also contends that Loeb had "contacted you [Heringer and/or CalPERS]  
2 a number of times and offered to answer any additional questions you may have" and that Loeb  
3 & Loeb "understood that this matter had already been submitted to your legal department for  
4 review." (**Exhibit 4**, pages 3-4.)

5     **Exchange of Additional Information and Argument, Discussion:**

6           28.     In addition to the formal letter communications attached hereto as **Exhibits 1**  
7 **through 4**, there were additional oral and/or written communications, exchanges of information  
8 or argument, or other discussions of the issues involved in the administrative proceeding  
9 involving Malkenhorst's pension allowance (hereinafter "communications, exchanges or other  
10 discussions") between the time **Exhibit 1** was sent and the time **Exhibit 4** was sent.

11           29.     Some of the communications, exchanges or other discussions referenced in No.  
12 22 occurred between (i) individuals employed by or authorized to act on behalf of CalPERS, and  
13 (ii) attorneys or non-attorney employees employed by or acting on behalf of Loeb.

14           30.     Some of the communications, exchanges or other discussions referenced in No.  
15 22 occurred between (i) individuals employed by or authorized to act on behalf of Vernon, and  
16 (ii) attorneys or non-attorney employees employed by or acting on behalf of Loeb.

17           31.     Some of the communications, exchanges or other discussions referenced in No.  
18 22 occurred between and among individuals employed by or authorized to act on behalf of  
19 CalPERS.

20           32.     The occurrence of some of the communications, exchanges or other discussions  
21 referenced in No. 22 were documented in writing by either (i) individuals employed by or  
22 authorized to act on behalf of CalPERS, (ii) individuals employed by or authorized to act on  
23 behalf of Vernon, and (ii) attorneys or non-attorney employees employed by or acting on behalf  
24 of Loeb. In some cases, the documentation also discussed or described the nature or content of  
25 the communications, exchanges or other discussions.

26           33.     CalPERS received legal and factual evidence and arguments about Malkenhorst's  
27 longevity bonuses, "job" duties, "job titles", single full-time job, base pay, and that Vernon's City  
28 Council determined the pay rate within a formal administrative process.

1           34.     CalPERS' legal department received legal and factual evidence and arguments  
2 about Malkenhorst's longevity bonuses, "job" duties, "job titles", single full-time job, base pay,  
3 and that Vernon's City Council determined the pay rate within a formal administrative process.

4           35.     CalPERS' executive level decision makers received legal and factual evidence and  
5 arguments about Malkenhorst's longevity bonuses, "job" duties, "job titles", single full-time job,  
6 base pay, and that Vernon's City Council determined the pay rate within a formal administrative  
7 process.

8           36.     CalPERS made a final determination based on the legal and factual evidence and  
9 argument about Malkenhorst's longevity bonuses, "job" duties, "job titles", single full-time job,  
10 base pay, and that Vernon's City Council determined the pay rate within a formal administrative  
11 process.

12 **CalPERS' Determination:**

13           37.     On August 17, 2006, CalPERS' Ms. Heringer sent a letter to Loeb's Ms.  
14 Aspinwall entitled "B. Malkenhorst and the City of Vernon Appeal". A true and correct copy of  
15 the August 17, 2006 letter from Ms. Heringer to Ms. Aspinwall is attached hereto as Exhibit 5.

16           38.     The first paragraph thanks Ms. Aspinwall for sending Exhibit 4 "concerning the  
17 appeal for Bruce Malkenhorst and the City of Vernon (the City)." (Exhibit 5, page 1.)

18           39.     The second paragraph of the letter states that "CalPERS has determined that  
19 setting differing levels of payrate or special compensation by date of hire may be allowed" and  
20 then goes on to discuss the issue of longevity pay. (Exhibit 5, page 1.)

21           40.     The letter is a final determination of all matters raised in the administrative  
22 appeal, including Malkenhorst's longevity bonuses, "job" duties, "job titles", single full-time job,  
23 base pay, and that Vernon's City Council determined the pay rate within a formal administrative  
24 process.

25           41.     The letter further advises that "The [CalPERS] Benefits Division has been  
26 notified to make the adjustment to Mr. Malkenhorst's allowance." (Exhibit 5, page 2.)

27           42.     Exhibit 5 does not assert any reservation of rights by CalPERS concerning  
28 Malkenhorst's pension calculation nor does it limit the resolution solely to the issue of longevity



1 pay.

2 **Further Exchange of Additional Information and Argument, Discussion:**

3 43. There were additional oral and/or written communications, exchanges of  
4 information or argument, or other discussions of the issues involved in the administrative  
5 proceeding involving Malkenhorst's pension allowance (hereinafter "communications, exchanges  
6 or other discussions") between the time Exhibit 4 was sent and the time Exhibit 5 was sent.

7 44. Some of the communications, exchanges or other discussions referenced in No.  
8 32 occurred between (i) individuals employed by or authorized to act on behalf of CalPERS, and  
9 (ii) attorneys or non-attorney employees employed by or acting on behalf of Loeb.

10 45. Some of the communications, exchanges or other discussions referenced in No.  
11 32 occurred between (i) individuals employed by or authorized to act on behalf of Vernon, and  
12 (ii) attorneys or non-attorney employees employed by or acting on behalf of Loeb.

13 46. Some of the communications, exchanges or other discussions referenced in No.  
14 32 occurred between and among individuals employed by or authorized to act on behalf of  
15 CalPERS.

16 47. The occurrence of some of the communications, exchanges or other discussions  
17 referenced in No. 32 were documented in writing by either (i) individuals employed by or  
18 authorized to act on behalf of CalPERS, (ii) individuals employed by or authorized to act on  
19 behalf of Vernon, and (ii) attorneys or non-attorney employees employed by or acting on behalf  
20 of Loeb. In some cases, the documentation also discussed or described the nature or content of  
21 the communications, exchanges or other discussions.

22 **Communications Occurring After Exhibit 5:**

23 48. On or about October 11, 2006, Carla Feldman, an attorney employed by Loeb,  
24 contacted CalPERS employee Johnnie McKenzie Jr. concerning recalculation of Malkenhorst's  
25 pension allowance.

26 49. On or about October 11, 2006, CalPERS' Ms. Heringer contacted Loeb's Ms.  
27 Feldman and informed Ms. Feldman that the issue of the calculation of an adjustment to  
28 Malkenhorst's pension allowance had been submitted to CalPERS' Benefit Services Division on

1 or about August 17, 2006.

2 **CalPERS' Payment of Retroactive Pension Benefits to Malkenhorst:**

3 50. On November 30, 2006, CalPERS' Retirement Processing department sent a letter  
4 to Malkenhorst advising that it would be adjusting his pension upward. A true and correct copy  
5 of that letter is attached hereto as Exhibit 6.

6 51. Exhibit 6 says, "When you began receiving your retirement allowance, we based  
7 our calculation on information available prior to your retirement date. Since then we have  
8 received additional information about your retirement. Your allowance has been adjusted on the  
9 basis of this information." (Exhibit 6, page 1.).

10 52. Exhibit 6 indicates that Malkenhorst's pension is based on total years of service  
11 times a final compensation amount of \$44,128 times an age factor of 2.418 percent. (Exhibit 6,  
12 page 2.) The figure of \$44,128 is calculated as his base salary of \$35,302 per month plus 25%  
13 longevity pay special compensation.

14 53. Exhibit 6 indicates that Malkenhorst's January 1, 2007 warrant will be his new  
15 Option 2W allowance of \$40,022.66 per month, plus a retroactive adjustment of \$136,083.13.  
16 (Exhibit 6, page 1.)

17 54. Malkenhorst subsequently received the retroactive adjustment set forth in Exhibit  
18 6 in a single lump-sum payment. This retroactive lump sum adjustment reflects amounts  
19 withheld from Malkenhorst's pension during the 2005-2006 administrative process.

20 55. Malkenhorst has been receiving a pension allowance calculated on a base salary  
21 of \$35,302 per month plus 25% longevity pay special compensation (a total "Final  
22 Compensation" figure of \$44,128) plus applicable cost of living adjustments, since January 2007.

23 **Issues Raised in CalPERS' 2005-2006 Administrative Process:**

24 56. The issue of whether Malkenhorst held the single position of City Administrator  
25 at the City of Vernon and performed multiple duties within that single position during the final  
26 27 years of his employment at Vernon was raised and resolved in CalPERS' 2005-2006  
27 administrative review of Malkenhorst's pension allowance.

28 57. The issue of whether Malkenhorst held numerous separate positions at the City of

1 Vernon, including but not limited to City Administrator, during the final 27 years of his  
2 employment at Vernon was raised and resolved in CalPERS' 2005-2006 administrative review of  
3 Malkenhorst's pension allowance.

4 58. The issue of whether Malkenhorst received a single base salary as compensation  
5 for his work at the City of Vernon during the final 27 years of his employment at Vernon was  
6 raised and resolved in CalPERS' 2005-2006 administrative review of Malkenhorst's pension  
7 allowance.

8 59. The issue of whether Malkenhorst received separate compensation for different  
9 positions he held at the City of Vernon, including but not limited to City Administrator, during  
10 the final 27 years of his employment at Vernon was raised and resolved in CalPERS' 2005-2006  
11 administrative review of Malkenhorst's pension allowance.

12 60. The issue of whether Malkenhorst was entitled to include longevity pay special  
13 compensation of 25% of his base salary as part of his "Compensation Earnable" used in  
14 calculating his pension was raised and resolved in CalPERS' 2005-2006 administrative review of  
15 Malkenhorst's pension allowance.

16 **Finality of CalPERS' August 17, 2006 Determination:**

17 61. CalPERS did not assert a reservation of rights at any point in 2005 or 2006 to  
18 conduct a second administrative review of Malkenhorst's pension allowance sometime after  
19 August 2006.

20 62. Malkenhorst never consented or agreed to a reservation of rights at any point in  
21 2005 or 2006 allowing CalPERS to conduct a second administrative review of Malkenhorst's  
22 pension allowance sometime after August 2006.

23 63. CalPERS has not provided Malkenhorst or his counsel with copies of any  
24 documents related to CalPERS' 2005-2006 administrative review of Malkenhorst's pension  
25 allowance in which CalPERS asserted a reservation of rights to conduct a second administrative  
26 review of Malkenhorst's pension allowance sometime after August 2006.

27 64. CalPERS did not assert a reservation of rights at any point in 2005 or 2006 to  
28 conduct a second administrative review of whether Malkenhorst held separate, multiple jobs or

Attachment H (D)  
Joint Statement of Undisputed and Disputed Facts  
Page 12 of 40

1 positions during the final 27 years of his employment at Vernon and how this could impact the  
2 calculation of Malkenhorst's pension allowance.

3 65. CalPERS did not assert a reservation of rights at any point in 2005 or 2006 to  
4 conduct a second administrative review of whether Malkenhorst received separate compensation  
5 for more than one job or position during the final 27 years of his employment at Vernon and how  
6 this could impact the calculation of Malkenhorst's pension allowance.

7 66. CalPERS did not assert a reservation of rights at any point in 2005 or 2006 to  
8 conduct a second administrative review of whether Malkenhorst was entitled to include 25%  
9 longevity pay special compensation in the calculation of his pension allowance.

10 **Vernon's Involvement in the Appeal of CalPERS Calculation of Malkenhorst's Pension**

11 **Allowance:**

12 67. Vernon hired Loeb to file a formal appeal of CalPERS' July 18, 2005 "final  
13 determination" to reduce Malkenhorst's pension allowance in support of Malkenhorst.

14 68. Vernon understood and agreed that Loeb would be filing an appeal of CalPERS'  
15 "July 18, 2005 "final determination" to reduce Malkenhorst's pension allowance on behalf of  
16 both Vernon and Malkenhorst.

17 69. Vernon understood that Malkenhorst was relying on Loeb's legal actions on his  
18 behalf concerning the appeal of CalPERS' July 18, 2005 "final determination" to reduce  
19 Malkenhorst's pension allowance.

20 70. Vernon was kept informed of Loeb's actions concerning the appeal of CalPERS'  
21 July 18, 2005 "final determination" to reduce Malkenhorst's pension allowance.

22 71. Vernon never objected to any of the actions taken by Loeb to help increase  
23 Malkenhorst's pension in connection with Loeb's formal appeal of CalPERS' July 18, 2005 "final  
24 determination" to reduce Malkenhorst's pension allowance.

25 72. Vernon acquiesced to the actions taken by Loeb to help increase Malkenhorst's  
26 pension in connection with Loeb's formal appeal of CalPERS' July 18, 2005 "final  
27 determination" to reduce Malkenhorst's pension allowance.

28 73. Vernon was informed by Loeb of CalPERS' August 17, 2006 "determination" to

Attachment H (D)  
Joint Statement of Undisputed and Disputed Facts  
Page 13 of 40

1 award Malkenhorst a pension allowance calculated based on the full base salary and 25%  
2 longevity pay special compensation that had been reported to CalPERS by Vernon.

3 74. Vernon was never objected to CalPERS' August 17, 2006 "determination" to  
4 award Malkenhorst a pension allowance calculated based on the full base salary and 25%  
5 longevity pay special compensation that had been reported to CalPERS by Vernon.

6 75. Vernon acquiesced to CalPERS' August 17, 2006 "determination" to award  
7 Malkenhorst a pension allowance calculated based on the full base salary and 25% longevity pay  
8 special compensation that had been reported to CalPERS by Vernon.

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Attachment H (D)  
Joint Statement of Undisputed and Disputed Facts  
Page 14 of 40

# **EXHIBIT 1**

Attachment H (D)

Joint Statement of Undisputed and Disputed Facts  
Page 15 of 40



Actuarial & Employer Services Division  
P O Box 942709  
Sacramento, CA 94229-2709  
Telecommunications Device for the Deaf - (916) 795-3240  
(888) CalPERS (225-7377) FAX (916) 795-3005

FILE CO

July 18, 2005

Employer Code #209

Martha Valenzuela, Personnel  
City of Vernon  
4305 Santa Fe Ave  
Vernon, CA 90058

Reply to Section 1157ah

Re B Malkenhorst

Dear Ms. Valenzuela

Our office has recently completed a review of the compensation reported for Bruce Malkenhorst by the City of Vernon (the City)

The City reported compensation for the period of July 2004 to July 2005 as follows

Payrate

\$44,128 July 2004 to June 2005

According to the City's 2003/2004 salary schedule, the maximum salary allowed for Mr Malkenhorst's position is \$36,302. According to the 2002-2003 salary resolution, the City Administrator was eligible for 25% longevity after 25 years of service. Longevity is a special compensation item that can be reported to CalPERS as long as it meets all the criteria of California Code of Regulations (CCR) 571

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

California Public Employees' Retirement System  
Lincoln Plaza - 480 P Street - Sacramento, CA 95814

Ma Valenzuela

-2-

July 18, 2005

**GC 20838 "Compensation Earnable"**

(a) "Compensation earnable" states in part, 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. "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 (emphasis added)

**C 20630 "Compensation"**

As used in this part, "compensation" means the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work because of holidays, sick leave, industrial disability leave, during which, benefits are payable pursuant to Sections 4800 and 4850 of the Labor Code or Article 4 (commencing with Section 19889) of Chapter 2.5 of Part 2.8, vacation, compensatory time off, or leave of absence

When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall be reported in accordance with Section 20838 and shall not exceed compensation earnable, as defined in Section 20838

The base payrate for Mr. Malkenhorst's position is \$35,302.00. According to the language in the salary resolution, the 25% longevity is only available to the City Administrator and no one else.

Government Code 20838 (7)(e) states in 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."

The increased payrates the City reported to CalPERS does not meet the CalPERS retirement law criteria and exceeds the City's salary schedule. Mr. Malkenhorst's retirement benefit will be calculated on the following payrate:

**Payrate**

\$35,302 from 7/1/04 to 7/1/05

We ask that the City reverse the increased payroll and special compensation entries for Mr. Malkenhorst and report the above correct payrate. Upon completion of these reversals, CalPERS will credit the agency with all contributions paid on these items. If



Ms Valenzuela

-3-

July 18, 2005

the member paid any contributions on these items, the City should, in turn, refund the member's contributions

However, you have the right to formally appeal this decision by filing a written appeal with CalPERS within 30 days of the mailing of this letter, in accordance with sections 555-555.4, Title 2, of the California Administrative Code, a copy of which is enclosed for your convenience. As stated in the regulations, an appeal should set forth the factual basis and legal authorities on which it is based. The appeal should be mailed to the following address:

Lon McGartland, Acting Division Chief  
Actuarial and Employer Services Branch  
P O Box 942709  
Sacramento, CA 94229-2709

Please do not hesitate to contact me at 1 (888) 225-7377 should you have any questions or concerns regarding this matter.

Yours truly,



Alinda Henniger, RPS II  
Compensation Review Unit

cc B Malkehoret

Attachment H (D)  
Joint Statement of Undisputed and Disputed Facts  
Page 18 of 40

# **EXHIBIT 2**

# LOEB & LOEB LLP

A LIMITED LIABILITY PARTNERSHIP  
INCLUDING PROFESSIONAL CORPORATIONS

10100 SANTA MONICA BOULEVARD,  
SUITE 2700  
LOS ANGELES, CALIFORNIA 90024

TELEPHONE: 310.282.2000  
FACSIMILE: 310.282.2200  
www.loeb.com

*DAVEN*

000 3106 12 3. 12

DDC - 1



Direct Dial: 310-282-2377  
Facsimile: 310-282-2200  
e-mail: [muspainwall@loeb.com](mailto:muspainwall@loeb.com)

August 11, 2005

Lori McGartland  
Acting Division Chief  
CalPERS  
Actuarial and Employer Services Branch  
P.O. Box 942709  
Sacramento, CA 94229-2709

Re: NOTICE OF APPEAL - City of Vernon (Employer Code #209),  
Employee: B. Malkenhorst

Dear Ms. McGartland

This office represents the City of Vernon ("the City") with respect to the appeal of above-entitled matter which relates to the City's employee, Bruce Malkenhorst ("Mr. Malkenhorst"), and a request by CalPERS to reverse the increase payroll and special compensation entries related to Mr. Malkenhorst's retirement benefits.

On or about July 18, 2005, the City received correspondence from Alinda Heringer of CalPERS' Compensation Review Unit claiming that, upon a review of the City's applicable Salary Resolutions, Mr. Malkenhorst was ineligible for a 25% longevity bonus, which the City awarded to Mr. Malkenhorst in recognition of his twenty-five (25) years of service and performance of his duties as City Administrator.<sup>1</sup> According to the letter, the City was incorrect to have increased Mr. Malkenhorst's payrate by 25% based on his eligibility under the City's Longevity Program (the "Longevity Program") as outlined and approved in Sections 9 and 25 of the City's salary Resolution No. 8473 effective July 1, 2004 ("the Resolution").<sup>2</sup>

The letter indicates that CalPERS believes that the City Administrator is in a class by himself under the program and therefore the program violates Government

<sup>1</sup> A copy of this correspondence is attached as "Exhibit A" to this Appeal.  
<sup>2</sup> A Copy of the Resolution is attached as "Exhibit B" to this Appeal.

LOS ANGELES  
NEW YORK  
CHICAGO  
NASHVILLE

Lori McGartland  
August 8, 2005  
JOSEPH LOEB LLP  
Page 2

Code Section 20636 (7)(e) which provides, in relevant part, that a "group or class of employment" means a number of employees considered together based on similarities in duties, authority or other logical work related grouping and that "one employee may not be considered a group or class." As outlined in greater detail below, our appeal is based on (i) the fact that, although the City Administrator's participation in the Longevity Program is discussed separately from other members of his class in Section 9 of the Resolution, the City Administrator is in the same benefit class under the Longevity Program as the City Counsel Members discussed in Section 25 of the Resolution and is not in a class by himself; and (ii) the base pay of the City Administrator is only for the single full time job of the City Administrator which includes numerous duties, as outlined in the Vernon City Codes ("Codes").

1. City Administrator and City Counsel Members in Same Class.

The Longevity Program approved by the City includes City employees and City Counsel Members in the same benefit class up to 20 years of service. The program provides both employees and counsel members with a 5% increase after 5 years of service, 10% increase after 10 years of service, 15% increase after 15 years of service, and 20% increase after 20 years of service. However, the program treats different classes of employees differently after 20 years of service. The Longevity Program provides a 25% increase after 25 years of service to the City Administrator and the City Counsel Members. The Program also provides a 25% increase after 30 years of service to Firemen and Department Heads. Thus, the City Administrator is in the same class and is eligible for the same Longevity benefit as the City Counsel Members. He is therefore, not the only member of his class.

The confusion has arisen due to the fact that the City's Longevity Program is discussed separately in the Resolution with respect to the City Counsel Members and the other employees of the city including the City Administrator. Thus, the resolution regarding the Longevity Program applicable to the City Administrator appears in Section 9(g) on page 12 of the Resolution and appears to apply only to the City Administrator. However, the same benefit is provided under the Longevity Program to the City Counsel Members under Section 25(b)(5) on page 42 of the resolutions. Taken together these two sections of the resolutions makes clear that the City Administrator is not the only member of this benefit class under the Longevity Program. It is our understanding that, at the time of preparing the July 18, 2005 correspondence, Ms. Heringer did not have the entire Salary Resolution and therefore was unable to examine page 42. Accordingly, a copy of the entire Salary Resolution at issue is attached hereto as "Exhibit B" for your convenience.

Lori McGartland  
~~LOEB & LOEB~~  
Page 3

2. Mr. Malkenhorst Base Pay is Solely for Performance of His Duties as City Administrator, as Contemplated in the Vernon City Codes.

The City Administrator's job description is included in the attached Vernon City Codes (attached hereto for your convenience as "Exhibit C") and, pursuant to those Codes, incorporates a number of different job titles and duties, all of which are included in the single full time job of City Administrator. The base pay reported to CalPERS for Mr. Malkenhorst is the base pay determined by the City Council for the performance of the duties contemplated in the Vernon City Codes for the position of City administrator.

We appreciate your consideration of the above evidence and further request that you grant this Appeal in light of the evidence. In the interim, should you have any questions, please do not hesitate to contact me. Thank you in advance for your assistance and cooperation.

Sincerely  
  
Mark Aspinwall  
for Loeb & Loeb LLP

cc: Alinda Heringer, CalPERS  
Eric Fresch, City of Vernon

jd:  
30432410002  
Lh\_CC027321.2

# **EXHIBIT 3**



Actuarial & Employer Services Division  
P.O. Box 942709  
Sacramento, CA 94229-2709  
Telecommunications Device for the Deaf - (916) 795-3240  
(888) CalPERS (225-7377) FAX (916) 795-1523

September 23, 2005

ER#209/AH  
Reply:115

Maria Aspinwall  
Attorney at Law  
Loeb & Loeb LLP  
10100 Santa Monica Blvd, Suite 2200  
Los Angeles, CA 90067

Re: NOTICE OF APPEAL- City of Vernon- B. Malkenhorst

Dear Ms. Aspinwall:

Thank you for the documentation you provided with your letter dated August 11, 2005, in response to CalPERS denial of longevity for Mr. Bruce Malkenhorst, an employee of the City of Vernon (the City).

We do not find that the documentation submitted complete and have the following questions for your response and requests for additional documentation. According to the City's resolution #8473 section 24(f) City Administrator/City Clerk, there are several benefits outlined in this section for Mr. Malkenhorst.

1. In section (f)(4), ICMA Retirement, is this amount of deferred compensation included in salary?
2. In section (f)(5), IRA Account, is this amount of \$2,000 or maximum part of salary?
3. In section (f)(12), Supplemental Executive Retirement Plan, is the \$60,000 annual payments and any other appropriate amounts part of salary?

Also, according to a letter sent to Gloria Orosco, at the City, dated June 2, 1995, as well as the job duties statement you provided, Mr. Malkenhorst served as City Administrator/City Clerk, City Treasurer, Director of Finance and Personnel, Purchasing Agent, Executive Director of Light and Power, and Executive Director of the Redevelopment Agency. All of these other positions, with exception of City Administrator, are considered overtime and not reportable to CalPERS for retirement purposes. According to the 2004/2005 salary schedule, Mr. Malkenhorst's salary is 222% or

Ms. Aspinwall

September 23, 2005

\$24,316 higher than the Director of Environmental Health, which appears to be the next highest position. Why is that? Has the City hired a replacement for Mr. Malkenhorst's position? If so, what is the salary the City is paying?

In your letter, you stated the longevity program approved by the City includes city employees and city council members in the same benefit class. Mr. Malkenhorst is not in the same class as the council members because Government Code 20322 of the CalPERS law states that Elected Officials are optional and excluded from membership and a separate group and cannot be inclusive of employee management benefits.

We would appreciate receiving your written response and any supporting documentation by November 3, 2005. If you have any questions, please contact me at (916) 795-2204.

Sincerely,



Allinda Herfnger, RPS II  
Compensation Review Unit  
Actuarial and Employer Services Branch

Attachment:



**EXHIBIT 4**

12/19/2013

10:40

3103121109

Attachment H (D)

Joint Statement of Undisputed and Disputed Facts

Page 26 of 40

Page 46

LOEB &amp; LOEB

Fax: 310-282-2200

Nov 3 2005 11:46

P.02

**LOEB & LOEB LLP**A LIMITED LIABILITY PARTNERSHIP  
INCLUDING PROFESSIONAL CORPORATIONS1000 SANTA MONICA BOULEVARD  
SUITE 2200  
LOS ANGELES, CA 90067-0144TELEPHONE: 310.515.1400  
FACSIMILE: 310.502.3220  
www.lloeb.comDirect Dial: 310-282-2377  
Direct Fax: 310-382-2200

November 3, 2005

**VIA EXPRESS MAIL & FAX**

Ms. Alinda Heringer  
RPS II  
Compensation Review Unit  
Astuarial and Employer Services Branch  
P.O. Box 942709  
Sacramento, CA 94229-3709

Re: **NOTICE OF APPEAL - City of Vernon (Employer Code #209)**  
**Employee: B. Malkenhorst**

Dear Ms. Heringer:

We are in receipt of your correspondence dated September 23, 2005 and have addressed the points contained in your correspondence below. I would like to note that, while your letter was dated September 23, 2005, we did not receive the letter until October 24, 2005. However, despite this fact, we desire to timely comply with your request for a November 3, 2005 response date.

The first point contained in your correspondence requests whether the following amounts are included in Mr. Malkenhorst's salary: (i) ICMA Retirement (Section (IX)(4)); (ii) IRA Account (Section (IX)(5)); and (iii) Supplemental Executive Retirement Plan. These amounts are not included in Mr. Malkenhorst's salary.

You next state that the duties of City Treasurer, Director of Finance and Personnel, Purchasing Agent, Executive Director of Light and Power and Executive Director of the Redevelopment Agency performed by Mr. Malkenhorst, with the exception of City Administrator, are considered overtime and are not reportable to CalPERS for retirement purposes. However, these were not positions for which Mr. Malkenhorst was separately compensated but were included in his responsibilities as the City Administrator and at no time did he receive overtime or additional compensation for performance of such duties. In fact, the City's Salary Resolutions specifically state that no additional compensation will be paid for performance of such

LOS ANGELES  
NEW YORK  
CHICAGO  
NASHVILLE

Feb.5 0045

LOEB & LOEB

Fax:310-282-2200

Nov 3 2005 11:46

P.03

**LOEB LOEB LLP**  
Ms. Alinda Horinger  
November 3, 2005  
Page 2

duties, as evidenced by the following statement contained in Resolution No. 6467, adopted on June 30, 1994, relevant portions of which are attached hereto as "Exhibit A", and which states the following:

**Section 21: LIGHT AND POWER DEPARTMENT:**

"The compensation for the following positions are included in the compensation established for the said position in the City Administrator/City Clerk Department, Schedule II, Exhibit B.

**(1) CHIEF EXECUTIVE OFFICER -** The City Administrator Clerk shall serve as the Chief Executive Officer in the Light and Power Department; . . ." (emphasis added).

Because the City of Vernon was a small city, Mr. Malkenhorst, as City Administrator was called upon to perform various duties and fill various roles over the years as the need arose. As is the case with smaller cities, such situations were commonplace throughout Mr. Malkenhorst's employment because the City of Vernon was a very small City when he commenced his leadership role. While the City of Vernon is not yet as large as some of the other surrounding cities, it has grown considerably throughout Mr. Malkenhorst's tenure much to his credit.

Over the years Mr. Malkenhorst's duties have changed as the needs of the City have changed. As further evidence of the fact that Mr. Malkenhorst did not receive any additional compensation for performing additional duties assigned to him over the years, Mr. Malkenhorst's salary did not increase as a result of performing particular specified duties or decrease upon transfer or elimination of particular duties. For example, Mr. Malkenhorst ceased being the Director of Finance and Director of Light and Power in early 2005, yet, as contemplated in the Salary Resolutions, his salary did not decrease.

With respect to your question concerning the amount of Mr. Malkenhorst's salary, Mr. Malkenhorst had significant experience with respect to city administration prior to being employed by the City. Moreover, Mr. Malkenhorst had been employed by the City for approximately 30 years. As such, he was paid a salary commensurate with his experience and expertise. It should be noted that any salary comparison to discrete positions, such as the Director of Environmental Health, does not make sense based upon Mr. Malkenhorst's wealth of experience, breadth of responsibility and length of employment with the City.

12/19/2013

10:40

3103121109

Attachment H (D)

Joint Statement of Undisputed and Disputed Facts

Page 28 of 40

Page 48

LOEB &amp; LOEB

Fax: 310-282-2200

Nov 3 2005 11:46

P.04

**LOEB & LOEB LLP**  
 Ms. Alinda Heringer  
 November 3, 2005  
 Page 3

The City has not hired a replacement for Mr. Malkenhorst, but is currently engaged in the process. As with Mr. Malkenhorst, any salary paid to the new City Administrator will be based upon the experience and abilities of the individual.

You further state in your correspondence that, pursuant to Government Code § 20322, ". . . Elected Officials are optional and excluded from membership and a separate group and cannot be inclusive of employee management benefits." However, based on our review of Government Code § 20322, nothing prevents Mr. Malkenhorst from being included in the same benefit class under the Longevity Program as the City Council Members, as outlined in Section 25 of Salary Resolution No. 8473 (Resolution).<sup>1</sup> Government Code § 20322 merely provides optional membership for Elected Officials in the Public Employees' Retirement System and does not make any distinction with respect to maintaining separate groups or classes based on elected or unelected status.

In fact, Government Code § 20636(7)(e)(1) states "group or class of employment" means a number of employees considered together because they share similarities in job duties, work locations, collective bargaining unit, or other logical work related grouping. One employee may not be considered a class or group." In the instant matter, Mr. Malkenhorst's logical work related grouping as City Administrator is with that of the other City Council Members as their positions relate to implementation and administration of the City and its policies. Additionally, the longevity program is the same for the City Administrator and the City Council Members. There is nothing in the Government Code definition of group or class that suggests that an elected official covered by the program may not be in the same group or class as similarly situated employees of the City, nor would such a distinction make sense. The group or class requirement is intended to prevent individual employees from being singled out for special treatment. If elected officials are included in the class with an employee, it can hardly be said that such employee has been singled out for special treatment in that regard.

We have made every effort since receipt of your last letter to be forthcoming with information about both Mr. Malkenhorst and the longevity program and to be responsive to both your written and oral questions. We have contacted you a number of times and offered to answer any additional questions you may have. We have

<sup>1</sup> Salary Resolution No. 8473, effective July 1, 2004, was attached as "Exhibit B" to our correspondence of October 11, 2005.

LOEB & LOEB

Fax: 310-282-2200

Nov 3 2005 11:47 P.05

**LOEB & LOEB LLP**  
Ms. Alinda Horinger  
November 3, 2005  
Page 4

requested that you meet with us to discuss your concerns and resolve any outstanding questions or concerns regarding Mr. Malenkhorst and the longevity program. We understood that this matter had already been submitted to your legal department for review. We were therefore surprised by the new questions and arguments raised in your recent letter which have not previously been discussed with us. Please feel free to call me to discuss this response or with any further questions or comments you may have. We look forward to a timely resolution of these issues.

Sincerely,

  
Michael Ruppivall  
for Loeb & Loeb LLP

zfb  
704341002  
LA000333

Attachment

cc: Eric Fresch, City of Vernon  
Lori McGardner

LOEB & LOEB

Fax:310-282-2200

Nov 3 2005 11:47

P.06

**EXHIBIT A**

LOEB & LOEB

Fax:310-282-2200

Nov 3 2005 11:47

P.07

**RESOLUTION NO. 6467**

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF VERNON FIXING THE COMPENSATION FOR CERTAIN EMPLOYEES OF SAID CITY AS OF JULY 1, 1993, AUTHORIZING CERTAIN EXPENSE ALLOWANCES AND AMENDING RESOLUTION NO. 5645 AND REPEALING ALL RESOLUTIONS IN CONFLICT THEREWITH

ADOPTED ON JUNE 30, 1994

AMENDMENTS TO RESOLUTION NO. 6467				
RESOLUTION NO.	ADOPTION DATE	PAGES AMENDED	SCHEDULE AND/OR SECTIONS AMENDED	DEPARTMENT AFFECTED

LOEB & LOEB

Fax:310-282-2200

Nov 3 2005 11:47

P.08

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  
26  
27  
28

**(d) Additional Hours Worked.**

All employees in the Water Department, except the Director of Community Services and those in supervisory positions, required to work hours in addition to their regular forty (40) hour work week will be compensated for such additional hours worked.

**(e) Dispatchers.**

The chief water and power dispatcher, Senior Water and Power Dispatcher and Water and Power Dispatchers I and II shall serve as Dispatchers in the Water Department and the compensation for said positions is included in the compensation established for the positions in the Light and Power Department, Schedule II, Exhibit "B".

**(f) Compensation of Certain Positions - Department of Community Services.**

The compensation for the Director of Water is included in the compensation established for the Director of Community Services in the Community Services Department.

**SECTION 21: LIGHT AND POWER DEPARTMENT:**

**(a) Compensation of Certain Positions - City Administrator/City Clerk Department.**

The compensation for the following positions are included in the compensation established for said position in the City Administrator/ City Clerk Department, Schedule II, Exhibit "B".

- (1) CHIEF EXECUTIVE OFFICER—the city



LOEB & LOEB

Fax:310-292-2200

Nov 3 2005 11:47

P.09

1 Administrator/city clerk shall serve as the Chief Executive  
2 officer in the Light and Power Department;

3 (2) ACCOUNTANT--the Accountant in the city  
4 Administrator/city Clerk Department shall also serve as the  
5 Accountant in the Light and Power Department;

6 (3) SENIOR ACCOUNT CLERK--the Senior Account Clerk  
7 in the City Administrator/city Clerk Department shall also serve  
8 as the Senior Account Clerk in the Light and Power Department;

9 (4) ACCOUNT CLERK--the Account Clerk in the City  
10 Administrator/City Clerk Department shall also serve as the  
11 Account Clerk in the Light and Power Department.

12 (b) Personal Vehicle Allowance.

13 In addition to said salaries as set forth in Schedule II,  
14 Exhibit "B", certain individuals serving in specified  
15 classifications shall receive, when using their own motor vehicle  
16 in the service of the City, an additional sum per month as  
17 provided for in Schedule III.

18 (c) Responsibility For Upkeep of Vehicle.

19 The city shall not be responsible for repairs or any  
20 additional costs for upkeep, fuel, lubrication, replacement in  
21 whole or in part, or other expenses in connection with any such  
22 vehicle beyond the respective amounts set forth in Schedule III.

23 (d) Additional Hours Worked.

24 All employees in the Light and Power Department, except  
25 the Director of Light and Power, Field Operations Manager,  
26 Electrical Engineering Manager, Resource Planning Manager, Power.

LOEB & LOEB

Fax:310-282-2200

Nov 3 2005 11:49 P.10

SCHEDULE II  
CITY ADMINISTRATOR/CITY CLERK DEPARTMENT SALARY SCALE

0.05

MONTHLY SALARY

POSITION	STEP	MONTHLY SALARY
CITY ADMINISTRATOR/CITY CLERK - 4000	STEP 1	\$24,189.00
	STEP 2	\$24,189.00
DIRECTOR OF ENVIRONMENTAL HEALTH - 4310	STEP 1	\$8,502.00
	2	\$8,059.00
	3	\$7,639.00
	4	\$7,241.00
	5	\$6,864.00
	6	\$6,506.00
	7	\$6,167.00
ASSISTANT TO THE CITY ADMINISTRATOR - 4001	STEP 1	\$7,888.00
	2	\$7,285.00
	3	\$6,905.00
	4	\$6,548.00
	5	\$6,204.00
	6	\$5,881.00
	7	\$5,574.00
CHIEF DEPUTY DIRECTOR ENVIRONMENTAL HEALTH-4320	STEP 1	\$6,888.00
	2	\$6,529.00
	3	\$6,188.00
	4	\$5,864.00
	5	\$5,560.00
	6	\$5,270.00
	7	\$4,986.00
ASSISTANT FINANCE DIRECTOR - - 4102	STEP 1	\$6,039.00
	2	\$5,293.00
	3	\$4,888.00
	4	\$4,654.00
	5	\$4,388.00
	6	\$4,080.00
	7	\$3,815.00
CUSTOMER SERVICE MANAGER - 4110	STEP 1	\$6,218.00
	2	\$5,884.00
	3	\$5,587.00
	4	\$5,298.00
	5	\$5,020.00
	6	\$4,758.00
	7	\$4,510.00
ENVIRONMENTAL SPECIALIST - 4340	STEP 1	\$5,320.00
	2	\$4,957.00
	3	\$4,699.00
	4	\$4,454.00
	5	\$4,223.00
	6	\$4,001.00
	7	\$3,783.00
8	\$3,595.00	

SCHEDULE II  
EXHIBIT "B" PAGE 18

Attachment H (D)  
Joint Statement of Undisputed and Disputed Facts  
Page 35 of 40

# **EXHIBIT 5**



Employer Services Division  
P.O. Box 942709  
Sacramento, CA 94229-2709  
Telecommunications Device for the Deaf - (916) 795-3240  
888 CalPERS (or 888-225-7377) FAX (916) 795-3005

FILE COPY

August 17, 2006

Employer Code #209

Reply to Section 115

Ms. Maria Aspinwall  
Attorney-at-Law  
Loeb & Loeb LLP  
10100 Santa Monica Blvd, suite 200  
Los Angeles, CA 90067

RE: B. Malkenhorst and the City of Vernon appeal

Dear Ms. Aspinwall:

Thank you for your letter dated November 3, 2005, concerning the appeal for Bruce Malkenhorst and the City of Vernon (the City).

CalPERS has determined that setting differing levels of payrate or special compensation by date of hire may be allowed. Persons hired on or after a date certain may reasonably be considered to be similarly situated members of the group or class (which make up a "logical work related grouping") within the definition of group or class in section 20836(e)(1) of the Public Employees' Retirement Law (PERL).

Please note that while it may be permissible to use date of hire in creating a group or class, in order for items of payrate or special compensation to be considered in the calculation of final compensation, all other requirements set forth in the PERL and regulations of the Board must still be met. As a result, each case must be decided separately, based on its facts. In addition, any ruling of the Board on compensation as payrate or special compensation is conditioned on the facts as presented. In the event of changes in the facts, the Board's ruling may also be different.

Based on the description of the longevity, it appears that the date of hire qualification would satisfy the statutory definition of group or class and the compensation would be allowed.

However, we are requesting the City amend their Memorandum of Understanding to combine the longevity provisions for the City Administrator with the longevity provisions for the Department Heads. The City is also asked to provide us with a date that we can expect this to happen.

California Public Employees' Retirement System

Feb.5 0058

M. Aspinwall

-2-

August 17, 2006

The Benefits Division have been notified to make the adjustment to Mr. Malkehora's allowance.

Should you have any further questions regarding this matter please do not hesitate to contact our Compensation Review Unit at (888) 225-7377.

Sincerely,



Alinda Heringer, RPS II  
Compensation Review Unit  
Employer Services Division

Attachment H (D)  
Joint Statement of Undisputed and Disputed Facts  
Page 38 of 40

# **EXHIBIT 6**

**FILE COPY**



**BENEFIT SERVICES DIVISION**  
P.O. Box 942716  
Sacramento, CA 94229-2716  
Toll Free: (888) CalPERS (225-7377)  
TDD - (916) 795-3240; FAX - (916) 795-3933

Reply To: Section 412  
Refer To: 570-44-0826:00

November 30, 2006

Bruce V Malkenhorst  
6651 Churchill Dr  
Huntington Beach Ca 92648

Dear Bruce V Malkenhorst:

When you began receiving your retirement allowance, we based our calculation on information available prior to your retirement date. Since then we have received additional information about your retirement. Your allowance has been adjusted on the basis of this information.

Reason(s) for the adjustment:

Change In Your Payrate  
Change In Your Final Compensation

This adjustment will result in an increase of \$8,004.89 to your current allowance and a retroactive adjustment from date of retirement through November 30, 2006 of \$136,083.13.

Your January 1, 2007 warrant will be as follows:

NEW OPTION 2W ALLOWANCE	\$ 40,022.66
RETROACTIVE ADJUSTMENT	\$ 136,083.13
GROSS ALLOWANCE (TOTAL)	\$ 76,105.79

Your February 1, 2007 and future warrants will be in the amount of \$40,022.66 less any authorized deductions.

Sincerely,

Retirement Processing



**BENEFIT SERVICES DIVISION**  
P.O. Box 942716  
Sacramento, CA 94229-2716  
Toll Free: (888) CalPERS (225-7377)  
TDD - (916) 795-3240; FAX - (916) 795-3933

**FILE COPY**

**Member Information**  
SSA#: 570-44-0826  
Retirement Date: 07/01/2005  
Age at Retirement: 70.00  
Beneficiary Date of Birth: 11/18/1938

November 30, 2006

Bruce V Malkenhorst  
6651 Churchill Dr  
Huntington Beach CA 92648

**ADJUSTED ACCOUNT DETAIL INFORMATION SHEET**

The following data was available at the time of your adjustment calculation. This information is being provided as a detail of the components used in calculating your adjusted retirement allowance. Any changes in the information reflected below could result in a change in your retirement allowance.

EMPLOYER NAME	TYPE OF SERVICE	YRS OF SERVICE	FORMULA / BENEFIT FACTOR	FINAL COMP
MANHATTAN BEACH	NORMAL SERVICE	2.784	2% @ 55 / 2.418	44,128.00
VERNON	NORMAL SERVICE	32.411	2% @ 55 / 2.418	44,128.00
VERNON	ARSC SERVICE	5.000	2% @ 55 / 2.418	44,128.00

Final compensation is your highest average monthly pay rate for the last consecutive 12 or 36 months of employment based on your employers' contract. The final compensation dollar amount shown is unmodified. If your service was coordinated with Social Security, we subtracted \$133.33 from the final comp amount shown above, before determining your benefit.

Please be aware that if you have Golden Handshake service it must be forfeited upon any subsequent reentry into this System.

Retirement Calculation and Adjustment Section  
Benefit Services Division