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14 **BOARD OF ADMINISTRATION**
15 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**
16 **STATE OF CALIFORNIA**

17 In the Matter of the Calculation of Final)
18 Compensation of:)

CASE NO. 2012-0671

19 BRUCE MALKENHORST, SR.,)

OAH NO. 2013080917

20 Respondent,)

**CALPERS' OPPOSITION TO
MALKENHORST'S: 1) "REQUEST
FOR CORRECTION" TO EXTEND
DISCOVERY; AND 2) VERIFIED
PETITION TO TAKE
DEPOSITIONS**

21 and.)

22 CITY OF VERNON,)

23 Respondent.)
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I. INTRODUCTION

There are three reasons the Court should deny Malkenhorst's motions for discovery: 1) his request for new discovery is untimely; 2) the depositions he seeks are not permitted; and 3) his proposed discovery is simply not material to his collateral estoppel defense. Malkenhorst's repeated cry of "due process violation" is hollow and should no longer serve to delay a merits hearing.

II. THERE HAS BEEN NO MISTAKE OR CLERICAL ERROR THAT NEEDS CORRECTING

On February 25, 2014, the Court conducted a status conference and ordered Malkenhorst to conclude discovery by March 25. Malkenhorst calls this discovery deadline a mistake or error that needs correcting. Not so. The March discovery deadline makes perfect sense.

Recall that the Hearing of this matter had been set to begin on March 5, 2014, but that Malkenhorst argued the Hearing should not proceed until it could be determined whether this entire administrative process was barred under the doctrine of collateral estoppel. At Malkenhorst's request, the Court set the collateral estoppel issue for hearing on February 14, but Malkenhorst later stated he could not be ready by that date because of uncompleted discovery against third-parties Loeb & Loeb and Morgan Lewis & Bockius (which had filed motions for protective order).

In response to Malkenhorst's request for a continuance, the Court took the collateral estoppel motion off calendar and used February 14 as the hearing on the third-party motions for protective order.¹ The motions for protective order were heard on February 14 and resolved by

¹ See Exhibit 1 (Malkenhorst letter brief dated January 17, 2014).

1 order dated February 19. That order required Loeb & Loeb to produce additional documents
2 by the end of February, and Loeb & Loeb complied.

3
4 By the end of February, then, Malkenhorst had received all the discovery he said he
5 needed to present his collateral estoppel motion. It therefore made sense for the Court to set
6 March 25 as the discovery deadline. There was no mistake.

7 What the Court and parties did not realize is that Malkenhorst had not been completely
8 forthcoming with his discovery plans. Malkenhorst said the Loeb & Loeb subpoena was the
9 discovery he needed. He never mentioned he had other discovery in mind. In particular,
10 Malkenhorst never stated that his collateral estoppel motion should be deferred until after he
11 obtained witness depositions.

12 Malkenhorst contends he has a statutory and due process right to pre-Hearing witness
13 depositions. That's just not so (as we explain below). And even were it true, Malkenhorst
14 waived his rights by failing to raise these new discovery demands in timely fashion.

15
16 **III. MALKENHORST IS NOT ENTITLED TO PRE-HEARING DEPOSITIONS**

17 Malkenhorst argues that he needs two depositions on the applicability of collateral
18 estoppel. The proposed deponents are Loeb & Loeb attorney Marla Aspinwall and CalPERS
19 staff member Alinda Heringer.

20 Malkenhorst contends these depositions are compelled by Government Code section
21 11511, but he is mistaken. Section 11511 does not allow pre-Hearing depositions as a matter
22 of right. Pre-Hearing depositions are permissive, and they can only be permitted where the
23 proponent shows "the materiality of the testimony" and that "the witness will be unable or
24 cannot be compelled to attend." (Gov. Code § 11511.) Malkenhorst is unable to make either
25 showing.

26
27 **A. Malkenhorst has not Showed that the Witnesses cannot Attend the Hearing**

28 Section 11511 states that witnesses may be subject to a pre-Hearing deposition only if
they are unable to "attend." Several decisions explain that "attend" refers to the ability of a

1 witness to attend the Hearing. (See, *People v. Municipal Court* (1978) 20 Cal.3d 523, 544
2 [Section 11511 provides, “for the taking of depositions when the witness was unable to or
3 could not be compelled to attend the hearing.”]; *Romero v. California State Labor*
4 *Commissioner* (1969) 276 Cal.App.2d 787, 790 [proponent must show “that the witness would
5 be unable or could not be compelled to attend the disciplinary hearing.”]) Pre-Hearing
6 depositions are thus a possibility only where a witness cannot be compelled by subpoena to
7 attend the Hearing. (*Shively v. Stewart* (1966) 65 Cal.2d 475, 478-79 [“section 11511 indicates
8 that the Legislature expressly contemplated the use of the subpoena power to secure the
9 attendance of witnesses and the production of evidence at hearings.”])

10
11 Here, Malkenhorst has failed to present any evidence that the witnesses cannot be
12 subpoenaed to the Hearing. The witnesses’ depositions, therefore, cannot be ordered.

13 **B. Malkenhorst has not Showed that the Witnesses would provide Material Testimony**

14 Section 11511 also prohibits pre-Hearing depositions unless the proponent can show
15 that the expected testimony is material. Not only would the requested testimony be immaterial,
16 it is not even relevant.

17 Malkenhorst contends he needs broad discovery to establish collateral estoppel. This
18 contention ignores the limited nature of collateral estoppel against an administrative agency. It
19 is true that collateral estoppel may apply to “prevent[] an administrative agency from
20 reconsidering, in the absence of new facts, its prior final decision made in a judicial or quasi-
21 judicial capacity in the context of an adversary hearing.” (*Hughes v. Board of Architectural*
22 *Examiners* (1998) 17 Cal.4th 763, 794.) But collateral estoppel against an agency is much
23 more limited than collateral estoppel against an individual. An agency will not be bound by a
24 prior final decision unless it was based on “a question of fact within its powers.” (*Aylward v.*
25 *State Board Chiropractic Examiners* (1948) 31 Cal.2d 833, 839.) Where the agency simply
26 made an “erroneous conclusion of law,” the agency cannot be barred from making a correction.
27 (*Id.*) This is especially true where, “it is clear that the legislature intended that the agency
28 should exercise a continuing jurisdiction with power to modify or alter its orders....” (*Olive*

1 *Proration Etc. Com. v. Agricultural Prorate Commission* (1941) 17 Cal.2d 204, 209.) In sum,
2 agencies “have only such limited authority as is conferred upon them by law,” and collateral
3 estoppel will not be applied to preserve agency determinations that “are beyond their statutory
4 jurisdiction.” (*City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 679.)

5
6 The Court need only look at the Statement of Issues to discern that the calculation of
7 Malkenhorst’s retirement allowance is *entirely* an issue of law. A retiree’s benefit formula
8 takes three factors into account: a member’s credited years of service, “final compensation,”
9 and age at retirement. (*Prentice v. Board of Administration* (2007) 57 Cal.App.4th 983, 989.)
10 “Final compensation” is a function of the employee’s highest “compensation earnable,” which
11 itself depends on a member’s “payrate” and “special compensation.” (*Id.* at 989-90, citing
12 Gov. Code § 20636(a).) All these terms are statutorily defined, and CalPERS calculates
13 retirement allowances based on its interpretation of the statutes. And if it ever determines that
14 an incorrect allowance has been calculated, CalPERS is obliged by law to make a correction.
15 (See Gov. Code sections 20160 and 20163(a) [requiring “[a]djustments to correct overpayment
16 of a retirement allowance....”])

17 Agencies can be collaterally estopped from reversing discretionary decisions and factual
18 findings. Never before, however, has an agency been collaterally estopped from carrying out
19 mandatory obligations imposed by statute. CalPERS cannot be estopped from adjusting
20 Malkenhorst’s retirement allowance if a different benefit is required by the PERL.

21 Malkenhorst argues that he needs to depose Alinda Heringer and Marla Aspinwall to
22 determine “their understanding of the facts” and “the final nature of CalPERS’ determination”
23 in 2005-2006 of Malkenhorst’s retirement allowance. These subjective inquiries are simply not
24 material to the application of collateral estoppel against CalPERS in connection with an
25 objective benefit calculation. This Court should reject further requests for discovery from
26 Malkenhorst and put these proceedings on track for an expedited resolution.
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IV. CONCLUSION

For the reasons set forth above, the Court should deny Malkenhorst's motions to reopen discovery and take pre-Hearing witness depositions.

DATED: March 17, 2013

STEPTOE & JOHNSON LLP

By: 
Edward Gregory
Jason Levin

Attorneys for Complainant CalPERS

EXHIBIT 1

Law Offices of John Michael Jensen
11500 West Olympic Blvd Suite 550, Los Angeles CA 90064-1524
johnjensen@johnmjensen.com tel. 310.312.1100

January 17, 2014
VIA EMAIL

Administrative Law Judge Janis Rovner
Office of Administrative Hearings
Los Angeles Regional Office
320 West Fourth Street, Suite 630
Los Angeles, CA 90013

Re: Motions for Protective Order Re Client Files of Attorneys Who Represented
Bruce Malkenhorst in CalPERS' 2005-2006 Administrative Process

Bruce V. Malkenhorst, Sr. v. California Public Employees' Retirement System
Nominally CalPERS Case No. 2012-0671, OAH Case No. 2013080917

Dear Judge Rovner:

I am following up to find out the scheduling of motions for protective order to be filed by the law firms of Loeb & Loeb LLP ("Loeb") and Morgan, Lewis & Bockius LLP ("Morgan Lewis").

My apologies if my letter crosses in the mail with further correspondence from the Court, but given the approach of various deadlines, I thought it best to write to you and copy all interested parties.

Both Loeb and Morgan Lewis have previously indicated they wished to schedule motions for protective orders to be heard by the OAH. The law firms' request to schedule motions for protective order likely arise from their unwillingness to provide documents responsive to my previous *subpoenas duces tecum*.

I subpoenaed documents that I believe are not privileged and are directly relevant to Mr. Malkenhorst's claims that the current administrative process should be barred by collateral estoppel and *res judicata*. The law firms have refused to provide the documents, even after significant additional correspondence.

You indicated in the telephone conference call last Friday that you would have an order or indication of how you wish to proceed provided to us on Tuesday, January 14.

On Tuesday afternoon, January 14, 2014, you telephoned my office about the protective order matters. You indicated that you were then going to call other attorneys representing the parties to discuss the same matters.

Administrative Law Judge Janis Rovner
Office of Administrative Hearings
January 17, 2014
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Based on the telephone call, I understand that you have decided the following:

1. You will be scheduling a hearing on the planned motions for protective order. Based on confirming availability of counsel for Loeb and Morgan Lewis, you indicated that you would like to hold this hearing on February 14, 2014, a date that had previously been reserved for a hearing on Mr. Malkenhorst's motion to dismiss.

2. Once you have been able to confirm availability of the moving parties, you will set a briefing schedule for the filing of the motions; for responsive pleadings by Mr. Malkenhorst, CalPERS and the City of Vernon; and for reply pleadings by the moving parties.

3. The hearing will be in person at the OAH offices in downtown Los Angeles. If we are able to hold the proceedings on the February 14, 2014 date, I presume the hearing will be at 9:00 am, the time originally set for Mr. Malkenhorst's motion to dismiss.

4. The hearing on Mr. Malkenhorst's motion to dismiss is being taken off-calendar for February 14, 2014.

5. The hearing on Mr. Malkenhorst's motion to dismiss will be set for a new date once the Court is ready to proceed on that matter. I presume the timing of that continued hearing on the motion to dismiss will be discussed with the parties, but in any event will be somewhat dependent on the outcome of the hearing on the motions for protective order and any orders issued as a result.

6. Pursuant to your November 22, 2013 Status Conference Order, the Court had also scheduled a pre-hearing conference to take place on February 14, 2014, with all parties to prepare and exchange witness lists and exhibit lists ten (10) days prior to that pre-hearing conference, and to file and serve pre-hearing conference statements no later than three (3) business days before the pre-hearing conference.

7. You indicated that the pre-hearing conference currently scheduled for February 14, 2014 will be taken off-calendar and rescheduled by the Court to a later date. The exchange of witness lists and exhibit lists, and the filing and service of pre-hearing conference statements, are also being continued, with no dates set at this time.

Please let me know at your earliest convenience if any of the statements set forth above do not accurately reflect the Court's thinking and intentions.

Please also let me know when the protective order motions will be heard (and/or confirm that it is Feb 14, 2014), as well as the applicable briefing dates.

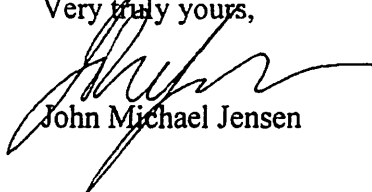
If you wish to hold another telephonic conference on any of these or related matters, I am available at your convenience. I will be out of the state this coming Monday, January 20, 2014,

Administrative Law Judge Janis Rovner
Office of Administrative Hearings
January 17, 2014
Page 3

but otherwise am generally available.

I will await further word from the Court on how you wish to proceed.

Very truly yours,



John Michael Jensen

JMJ:gm

cc: Renee Salazar, staff counsel for CalPERS
Ed Gregory and Jason Levin, counsel for CalPERS
Joung Yim, counsel for the City of Vernon
Daniel Friedman, for Loeb & Loeb
Brian Jazaeri, for Morgan, Lewis & Bockius
Carla Feldman, for Arent Fox
Bruce V. Malkenhorst, Sr.

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PROOF OF SERVICE
F.R.C.P. 5 / C.C.P. 1013a(3)/ Rules of Court, Rule 2060

I am a resident of, or employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to this action. My business address is: Steptoe & Johnson LLP, 633 West Fifth Street, Suite 700, Los Angeles, California 90071.

On **March 17, 2014**, I served the following listed document(s), by method indicated below, on the parties in this action: **CALPERS' OPPOSITION TO MALKENHORST'S: 1) "REQUEST FOR CORRECTION" TO EXTEND DISCOVERY; AND 2) VERIFIED PETITION TO TAKE DEPOSITIONS.**

SEE ATTACHED SERVICE LIST

XX BY U.S. MAIL

By placing the original / **XX** a true copy thereof enclosed in a sealed envelope(s), with postage fully prepaid, addressed as per the attached service list, for collection and mailing at Steptoe & Johnson in Los Angeles, California following ordinary business practices. I am readily familiar with the firm's practice for collection and processing of document for mailing. Under that practice, the document is deposited with the United States Postal Service on the same day in the ordinary course of business. I am aware that upon motion of any party served, service is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after date of deposit for mailing contained in this affidavit.

BY OVERNIGHT DELIVERY

By delivering the document(s) listed above in a sealed envelope(s) or package(s) designated by the express service carrier, with delivery fees paid or provided for, addressed as per the attached service list, to a facility regularly maintained by the express service carrier or to an authorized courier or driver authorized by the express service carrier to receive documents.

BY PERSONAL SERVICE

By personally delivering the document(s) listed above to the offices at the addressee(s) as shown on the attached service list.
 By placing the document(s) listed above in a sealed envelope(s) and instructing a registered process server to personally deliver the envelope(s) to the offices at the address(es) set forth on the attached service list. The signed proof of service by the registered process server is attached.

BY ELECTRONIC SERVICE

(via electronic filing service provider)

By electronically transmitting the document(s) listed above to LexisNexis File and Serve, an electronic filing service provider, at www.fileandserve.lexisnexis.com pursuant to the Court's _____ Order mandating electronic service. See Cal. R. Ct. R. 2053, 2055, 2060. The transmission was reported as complete and without error.

BY ELECTRONIC SERVICE

(to individual persons)

By electronically transmitting the document(s) listed above to the email address(es) of the person(s) set forth on the attached service list. The transmission was reported as complete and without error. See Rules of Court, rule 2060.

BY FACSIMILE

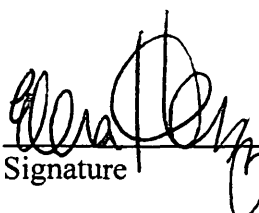
By transmitting the document(s) listed above from Steptoe & Johnson in Los Angeles, California to the facsimile machine telephone number(s) set forth on the attached service list. Service by facsimile transmission was made pursuant to agreement of the parties, confirmed in writing.

XX STATE I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
 FEDERAL I declare under penalty of perjury under the laws of the United States that I am employed in the office of a member of the bar of this court at whose direction the service is made.

Executed on March 17, 2014 at Los Angeles, California.

ELENA HERNANDEZ

Type or Print Name


Signature

SERVICE LIST

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