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3 11500 West Olympic Blvd Suite 550
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8 Attorneys for Respondent
9 Bruce V. Malkenhorst, Sr.

10
11 **BEFORE THE BOARD OF ADMINISTRATION**
12 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

13 In Re the Matter of) **CALPERS CASE NO.: 2012-0671**
14) **OAH CASE NO.: 2013080917**
15 **BRUCE V. MALKENHORST, SR., and**)
16 **CITY OF VERNON,**) **BRUCE V. MALKENHORST, SR.'S**
17) **)) REQUEST FOR OFFICIAL AND**
18 **Respondents.**) **JUDICIAL NOTICE IN SUPPORT OF HIS**
19) **MOTION TO DISMISS ON**
20) **COLLATERAL ESTOPPEL/RES**
21) **JUDICATA AND OTHER GROUNDS**
22)
23) **EXHIBITS 1 THROUGH 3**
24)
25) **Hearing Date and Time: To Be Determined**

26 Notice is hereby given to the California Public Employees' Retirement System and its
27 Board of Administration (collectively "CalPERS), to Respondent City of Vernon, and to the
28 Office of Administrative hearings:

Respondent Bruce V. Malkenhorst, Sr., submits this *Request for Official and Judicial Notice* under *Evidence Code* sections 450, 451, 452, and 459 *et seq.* in support of his *Motion to Dismiss* filed in the administrative proceedings herein, including on grounds of collateral estoppel/*res judicata*.

Malkenhorst makes this request for Official and Judicial notice of the official acts,

1 official records, and documents of CalPERS. This request for Official and Judicial Notice in
2 support of Malkenhorst's *Motion to Dismiss* seeks Official and Judicial Notice of (1) a March 6,
3 2014 letter from CalPERS to counsel for Respondent, advising that CalPERS will be
4 dramatically reducing Plaintiff's pension allowance commencing with his April 2014 warrant; (2)
5 a March 12, 2014 letter from counsel for Respondent to CalPERS, demanding that CalPERS
6 withdraw its March 6, 2014 letter, offer assurances of no reduction in the pension allowance, and
7 cease and desist violations of Respondent's constitutional due process rights; and (3) a March 19,
8 2014 letter from CalPERS to counsel for Respondent refusing to delay CalPERS' planned April
9 1, 2014 reduction in Respondent's pension allowance.

10 These documents are relevant to Malkenhorst's *Motion to Dismiss* in that they
11 demonstrate CalPERS' intention to reduce Malkenhorst's pension in less than two weeks, in
12 violation of his collateral estoppel/*res judicata* and due process claims.

13 True and complete copies of the documents for which Respondent seeks Official and
14 Judicial Notice are attached as **Exhibits 1, 2 and 3**. They are also authenticated in the
15 Declaration of John Michael Jensen. This *Request for Official and Judicial Notice* is based on
16 this filing and the other filings in this matter.

17
18
19 Dated: March 20, 2014

By: _____


John Michael Jensen,
Attorney for Respondent
Bruce V. Malkenhorst, Sr.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Respondent Bruce V. Malkenhorst, Sr. requests *Official and Judicial Notice* of (1) a
4 March 6, 2014 letter from CalPERS to counsel for Respondent, advising that CalPERS will be
5 dramatically reducing Plaintiff's pension allowance commencing with his April 2014 warrant; (2)
6 a March 12, 2014 letter from counsel for Respondent to CalPERS, demanding that CalPERS
7 withdraw its March 6, 2014 letter, offer assurances of no reduction in the pension allowance, and
8 cease and desist violations of Respondent's constitutional due process rights; and (3) a March 19,
9 2014 letter from CalPERS to counsel for Respondent refusing to delay CalPERS' planned April
10 1, 2014 reduction in Respondent's pension allowance.

11 The documents are official acts and official records of CalPERS.

12 Official and Judicial Notice of the document is appropriate to show that Respondent's
13 *Motion to Dismiss* on collateral estoppel/*res judicata* and other grounds is timely because
14 CalPERS will be dramatically reducing Respondent's pension allowance in less than two weeks,
15 in violation of CalPERS' promises not to do so until the completing of a depravation hearing on
16 the matter.

17 **II. DOCUMENTS**

18 **Exhibit 1** is an official record and official act of CalPERS. It is a March 6, 2014 letter
19 from Tomi Jimenez, Manager of the CalPERS Compensation and Employer Review section of
20 the Customer Account Services Division to John Michael Jensen, counsel for Respondent.

21 **Exhibit 2** is an official record and official act of CalPERS. It is a March 12, 2014 letter
22 from John Michael Jensen, counsel for Respondent, to Tomi Jimenez of CalPERS.

23 **Exhibit 3** is an official record and official act of CalPERS. It is a March 19, 2014 letter
24 from Tomi Jimenez of CalPERS to John Michael Jensen, counsel for Respondent.

25 **LAW AND ARGUMENT**

26 Respondent seeks for the OAH to recognize and accept for use by the Court of the
27 existence of various matters of law or fact. (*Evidence Code*, §§450, *et seq*; *People v. Rowland*
28 (1992) 4 Cal.4th 238, 268.)

1 Respondent seeks official and judicial notice of:

2 (1) CalPERS' Official Acts: Exhibits 1, 2 and 3 are the "official acts" of legislative,
3 executive and judicial departments of the federal or any state government. (*Evidence Code*,
4 §452(c); *Arce v. Kaiser Found. Health Plan, Inc.* (2010) 181 Cal.App.4th 471.) The court may
5 take notice of official acts of any state, county or federal legislative, executive or judicial
6 department. (*Evidence Code*, §452(c); see *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1750
7 [court can take judicial notice of records and files of state administrative agencies]; *C.R. v. Tenet*
8 *Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1102 [licenses issued by state agency].)

9 (2) CalPERS' Letters. Exhibits 1 and 3 are official acts and officials record. Judicial
10 Notice is appropriate since the letters were official acts of the state's executive department. (*In re*
11 *Social Services Payment Cases* (2008) 166 Cal.App.4th 1249; *Evidence Code*, §452(c).) Trial
12 court acted within its discretion in taking judicial notice of "All County Letters" issued by state
13 Department of Social Services (DSS), even though the letters were not rendered in accordance
14 with the Administrative Procedure Act, since the letters were official acts of the state's executive
15 department. (*In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, review denied.)

16 (3) CalPERS' Official Records and Reports. Exhibits 1, 2 and 3 are official records.
17 Judicial notice may be taken of *official reports and publications* by government agencies. (*Arce*
18 *v. Kaiser Found. Health Plan, Inc.*, *supra*, at 484.) Under *Evidence Code*, §452(c), the trial court
19 may take **judicial notice** of the records and files of a state **administrative** board. (*Fowler v.*
20 *Howell, supra*, at 1750.) To the degree that the filings in defendants' request for judicial notice
21 are the "official acts" of the agency, they are noticeable. (*Stevens v. Superior Court* (1999) 75
22 Cal.App.4th 594, 607-608.)

23 (4) CalPERS' Administrative Records, Notices of Determination. Court of Appeal
24 would take judicial notice of a staff report, hearing transcript, draft minutes, and notice of
25 determination from the California Coastal Commission regarding application for coastal
26 development permit for the park, in objector's appeal from trial court judgment denying writ of
27 mandate challenging city's certification of environmental impact report (EIR) for park. (*Banning*
28 *Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 2012.)

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Respectfully submitted,

DATED: March 20, 2014

BY: _____



John Michael Jensen
Attorneys for Plaintiff
Bruce V. Malkenhorst, Sr.

DECLARATION OF JOHN MICHAEL JENSEN

I, JOHN MICHAEL JENSEN, declare as follows:

1. The statements herein are based upon my personal knowledge and if called to testify under oath in court I could and would so testify.

2. I am over 18 years old.

3. I am the attorney for Respondent herein and have been since the inception of this lawsuit.

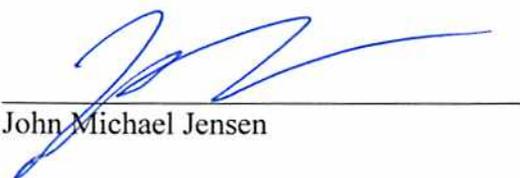
4. On March 6, 2014, I received the document attached hereto as Exhibit 1 by emailed scan from Tomi Jimenez, Manager Manager of the CalPERS Compensation and Employer Review section of the Customer Account Services Division to myself in my capacity as counsel for Respondent.

5. On March 12, 2014, I sent the document attached hereto as Exhibit 2 by emailed scan to Tomi Jimenez, Manager Manager of the CalPERS Compensation and Employer Review section of the Customer Account Services Division from myself in my capacity as counsel for Respondent.

6. On March 19, 2014, I received the document attached hereto as Exhibit 3 by emailed scan from Tomi Jimenez, Manager Manager of the CalPERS Compensation and Employer Review section of the Customer Account Services Division to myself in my capacity as counsel for Respondent.

Under penalty of perjury, I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true.

DATED: March 20, 2014



John Michael Jensen

EXHIBIT 1



California Public Employees' Retirement System
Customer Account Services Division
Retirement Account Services Section
P.O. Box 942709
Sacramento, CA 94229-2709
TTY: (877) 249-7442
888 CalPERS (or 888-225-7377) phone • (916) 795-4166 fax
www.calpers.ca.gov

March 6, 2014

John Jensen
Law Offices of John Michael Jensen
11500 West Olympic Blvd, Suite 550
Los Angeles, CA 90064-1524

Dear Mr. Jensen:

CalPERS is required by law to correct overpayments. Because of the rate at which the potential overpayment to Mr. Malkenhorst has grown and will continue to grow, and based on the findings in our October 22, 2012, final determination letter, CalPERS will adjust Mr. Malkenhorst's retirement allowance downward effective with the April 1, 2014, warrant.

As you know, CalPERS determined that the payrate reported by the City of Vernon on behalf of Mr. Malkenhorst did not meet the definition of compensation earnable.¹

The adjusted final compensation amount has been calculated using the most recent pay amount meeting the definition of "payrate"² in the amount of \$7,875. In addition to base payrate, longevity pay of 20 percent of that base pay was added, for a final compensation amount. Accordingly, Mr. Malkenhorst's monthly retirement allowance, including any eligible Cost of Living Adjustments, will be reduced from \$45,974.02 to \$9,845.33 minus any authorized deductions, effective with the April 1, 2014 warrant. The adjustment is based upon a final compensation amount reduced from \$44,128 to \$9,450 per month.

¹ Because this letter does not repeat all of the issues and facts of our previous letter it should be read in addition to the October 22, 2012 Determination Letter.

² See Government Code Section 20636.

EXHIBIT 2

Law Offices of John Michael Jensen

11500 West Olympic Blvd Suite 550, Los Angeles CA 90064-1524
johnjensen@johnmjensen.com tel. 310.312.1100

March 12, 2014
BY EMAIL AND U.S. MAIL

Tomi Jimenez
California Public Employees' Retirement System
PO Box 942709
Sacramento CA 942709

Re: Demand to Withdraw CalPERS letter dated March 6, 2014, Offer Assurance Of No Reductions, Take No Further Arbitrary or Capricious Actions, Provide Due Process, CEASE and DESIST From Intentional Violation of the United States Constitution, the California Constitution, and CalPERS' Own Policies

Dear Ms. Jimenez:

CalPERS has continued to act toward Mr. Malkenhorst as though CalPERS is not bound by law, precedent, or the guarantees afforded by the United States and California Constitutions. CalPERS administratively and unilaterally seeks to reduce Mr. Malkenhorst's vested property right in his pension *without a hearing* and in violation of due process. CalPERS seeks to immediately cut the pension even when CalPERS acknowledges that the property right is vested and that the legal issues are legitimately contested, pending, and vigorously litigated in several forums.

CalPERS must respect the legal process. The United States and California Constitutions, statute, and case law require CalPERS to provide due process, follow the law, honor collateral estoppel, and not arbitrarily and capriciously reduce Mr. Malkenhorst's vested property right in his pension, without notice or hearing.

Providing a fair and neutral legal process, with respect for law, is the only appropriate way to proceed.

As one example, CalPERS ignores that in 2005 and 2006, CalPERS considered and made a legal and binding final determination that Mr. Malkenhorst is entitled to the higher pension benefit. The highest level of CalPERS executive officers and government officials, present and former, considered Mr. Malkenhorst's pension and determined that it was appropriate to pay at the higher rate.

Specifically, the same law and facts that CalPERS raises now were previously considered and decided in 2005 and 2006. The attorneys of Loeb & Loeb filed formal "Notice of Appeal" on behalf of both Vernon and Malkenhorst providing law and facts to CalPERS' quasi-judicial administrative process to support that Mr. Malkenhorst held one job, was paid with a single salary for that position, was compensated pursuant to publicly available pay schedules, and was

Tomi Jimenez
California Public Employees' Retirement System
March 12, 2014
Page 2

otherwise entitled to the higher pension benefit. CalPERS accepted and considered these issues. Mr. Malkenhorst had already retired at that time, and facts regarding his employment were already established.

After a year of litigation in 2005-2006, including communications with the highest levels of CalPERS' administration, CalPERS made a final binding determination that Mr. Malkenhorst was entitled to the higher pension. CalPERS has continued to pay Mr. Malkenhorst the higher pension for the last seven years.

As the facts and law establishing his pension were already litigated by CalPERS and counsel in the 2005-2006 quasi-judicial administrative process after CalPERS provided formal appeal rights, collateral estoppel and *res judicata* bar CalPERS from litigating them again.

In addition, more recently, CalPERS has specifically filed documents in official proceedings promising on the record that CalPERS would not reduce the pension prior to a final and formal resolution of the legal issues. (See attached.) Mr. Malkenhorst has detrimentally relied on CalPERS' representations, and CalPERS is estopped to deny them. CalPERS would also be judicially estopped from denying them.

In any event, it is clear that Mr. Malkenhorst has established a constitutionally protected property interest. He has a legitimate claim to the full pension.

By its March 6, 2014 letter, CalPERS seeks to drastically reduce Mr. Malkenhorst's private vested property interest by official action without notice, without a hearing, or without the right to present all of his evidence, defenses, and theories. The risk of erroneous deprivation is great, including because CalPERS has already determined that he is entitled to the higher benefits.

The sole government interest that CalPERS claims is "the rate at which the potential overpayment to Mr. Malkenhorst has grown and will continue to grow". In other words, CalPERS assumes that it will "win" and assumes that it has overpaid Mr. Malkenhorst *as a grounds for denying him due process*.

As a matter of constitutional law, CalPERS violates due process when it reduces the vested property right beforehand simply because it thinks that it can later win. The harm to Mr. Malkenhorst is obvious in that it will reduce the funds available to him, including reducing the funds to support the cost of litigation to defend against CalPERS' continuing violation of Mr. Malkenhorst's constitutional rights.

Even if CalPERS can somehow defeat collateral estoppel and *res judicata* and commence a second hearing, CalPERS is required to provide due process *before* a vested property right is reduced. The few exceptions to a prior hearing are limited to where a meaningful pre-deprivation process is not possible. CalPERS recognizes that there is currently an administrative process

Tomi Jimenez
California Public Employees' Retirement System
March 12, 2014
Page 3

which CalPERS commenced over Mr. Malkenhorst's objections, and two cases on appeal. The appeals challenge CalPERS' powers to proceed contrary to (i) collateral estoppel and (ii) powers reserved to charter cities under the California Constitution.

In attachments to its March 6, 2014 letter, CalPERS argues that the payrate reported by the City of Vernon did not meet definition of compensation earnable. But as mentioned, the "findings" in the October 22, 2012 final determination letter are hotly contested and vigorously disputed. The "payrate" was one of the issues determined in Mr. Malkenhorst's favor in 2005-2006. CalPERS has provided no new or different facts that supply grounds to reduce the pension.

The timing of CalPERS' letter is particularly troubling. The timing sheds light on CalPERS' motivation. Recently, Mr. Malkenhorst filed a Complaint to challenge the constitutionality of the *retroactive* portions of *Government Code* section 53244, authored by State Senator Kevin De Leon, that purported to retrospectively and after the fact seize causes of action for retirement benefits against local municipalities based on a felony status.

Apparently, on March 5 or 6, a *Los Angeles Time* reporter contacted Sen. De Leon about the challenge and informed him that CalPERS has been paying Mr. Malkenhorst the higher pension. "Livid beyond belief" at either the challenge to the legislation that he sponsored or the continued payment to Mr. Malkenhorst, Sen. De Leon faxed a letter to CalPERS closely thereafter urging CalPERS to immediately reduce Mr. Malkenhorst pension benefit to zero.

The LA Times article written by Jeff Gottlieb published on March 6, 2014, wrote that Robert Glazier, CalPERS' deputy executive officer, "said CalPERS had been following its usual policies with Malkenhorst, which meant it would not reduce his pension until all his appeals had been exhausted."

CalPERS also said that it made a decision to cut Mr. Malkenhorst's pension based upon California Appellate Court recent opinion in *City of Oakland v. Oakland Police and Fire Retirement System*, Opinion filed February 28, 2014 and not yet published.

CalPERS' argument that the "new case" of *City of Oakland* is authority to reduce the pension is without merit. Firstly, the *City of Oakland* case was decided on February 28, 2014 and is not even final until 30 days after publication. Secondly, the issues in *City of Oakland* are unrelated to the PERL. Any discussion regarding the PERL is dicta.

Thirdly, substantively, *City of Oakland* does not provide legal support for CalPERS decision to unilaterally reduce a member's vested pension benefits. Indeed, the *City of Oakland* opinion establishes that benefits were not reduced prior to a full administrative hearing and other safeguards in the judicial process ensuring compliance with Constitutional due process requirements. Even in *City of Oakland*, any overpayments were only established by a hearing on the merits that satisfied due process. *City of Oakland* is not authority to violate due process, negate existing property rights, and declare an overpayment as a way of reducing a pension

Tomi Jimenez
California Public Employees' Retirement System
March 12, 2014
Page 4

without due process.

In fact, *City of Oakland* supports Mr. Malkenhorst's position by finding that *res judicata* and collateral estoppel apply to prevent re-litigation of final determinations of pension benefits.

It is evident that CalPERS has caved into Senator de Leon's political pressures and, thereby, concocted a pretext to unjustly and inaccurately rely upon the *City of Oakland* opinion to support their desire and/or agreement to immediately reduce Mr. Malkenhorst's pension.

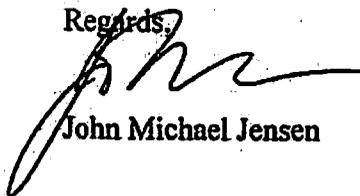
CalPERS reacted by sending the March 6, 2014 letter to Mr. Malkenhorst announcing that it was reducing the pension on April 1, 2014. CalPERS' March 6, 2014 letter arbitrarily and capriciously attempts to reduce Mr. Malkenhorst's pension and violates his property and constitutional rights, including to due process.

We hope to avoid the need to file additional litigation to protect Mr. Malkenhorst's rights, including to protect his continuing pension in the correct amount, his right to have CalPERS recognize his vested property rights, and his right to fully present his case and defenses (including collateral estoppel) in a manner that comports with due process.

We request that CalPERS withdraw its intention to reduce the benefit by March 19, 2014. We demand that CalPERS make assurance to Mr. Malkenhorst that the higher benefit will continue, especially as the other issues in litigation are as yet unresolved. CalPERS' failure to withdraw the letter and make such assurances will cause Mr. Malkenhorst to consider filing appropriate legal action, and make a request for attorney fees.

Please contact me directly at (310) 312-1100 if you have any questions.

Regards,



John Michael Jensen

JMJ:gm

cc: Bruce V. Malkenhorst, Sr.

Bruce Malkenhorst, Sr.
May 28, 2012
Page 7

EX 1

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 the adjustment of errors or omissions, whether pursuant to section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years, and shall be applied as follows:

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

Section 20160 requires CalPERS to correct errors made by an employer or by the system. Once an error is discovered, CalPERS is required to take action to correct it and is permitted to pay only those benefits authorized under the PERL. Should CalPERS ultimately determine that the additional information provided does not alter our preliminary findings; CalPERS will be required to correct the amount of your retirement allowance for the reasons described above. Moreover, should a final decision be reached that a reduction in your retirement allowance is required, CalPERS may be required to collect the overpayments made in error.

Section 20164 (b) states that where the system has made an erroneous payment to a member, the right to collect expires three years from the date of payment except where the payment is a result of fraudulent reports for compensation made. This further serves to confirm that if applicable, CalPERS will seek to collect back all overpayments authorized by statute.

Conclusion

We will await any information you wish to submit on or before June 25, 2012, and will consider it promptly upon receipt. If, after our review of the information, argument and documentation you provide, CalPERS' preliminary determination remains unchanged, CalPERS must make a reduction to your retirement benefit because the pay amounts reported by the City failed to meet the definition of compensation earnable and should not have been used to calculate your final compensation and retirement benefit. This correction would be based upon a final compensation amount adjusted from \$44,128 to \$9,450 per month. The corrected final compensation amount is calculated using the most recent pay amount that meets the definition of "payrate" in the amount of \$7,875 along with the longevity payment of 20 percent of that base pay which approximates \$1,575.60. Accordingly, your monthly retirement allowance would be reduced to \$9,654.09 minus any authorized deductions. CalPERS will continue to pay the current amount of your allowance between now and the time of this hearing. However, should a decision be reached to reduce your allowance in the administrative process, CalPERS will seek to recover all overpayments made to you allowable under the law.

This letter highlights some of the major concerns identified by CalPERS in its determination. However, the issues identified in this letter are not exhaustive, nor are

John Jensen
October 22, 2012
Page 8

EX 2

Section 20164(b) states that where the system has made an erroneous payment to a member, the right to collect expires three years from the date of payment except where the payment is a result of fraudulent reports for compensation made.

This letter further serves to confirm that CalPERS will seek to collect back all overpayments authorized by statute.

Conclusion

CalPERS must make a downward adjustment to Mr. Malkenhorst's retirement benefit because the pay amounts reported by the City failed to meet the definition of "compensation earnable" and should not have been used to calculate his final compensation and retirement benefit. This correction is based upon a final compensation amount adjusted from \$44,128 to \$9,450 per month. The corrected final compensation amount is calculated using the most recent pay amount meeting the definition of "payrate" in the amount of \$7,875 in addition to the longevity payment of 20 percent of that base pay which is approximately \$1,575.60. Accordingly, Mr. Malkenhorst's monthly retirement allowance will be reduced to \$9,654.09 minus any authorized deductions.

Should Mr. Malkenhorst, Sr. exercise the right to appeal, CalPERS will continue to pay the current amount of Mr. Malkenhorst's allowance between now and the time of hearing. Should a decision be reached to reduce Mr. Malkenhorst, Sr.'s retirement allowance in the administrative process, CalPERS will seek to recover all overpayments made to Mr. Malkenhorst, Sr. as provided under the PERL.

This letter highlights some of the major concerns identified by CalPERS in its determination. However, the issues identified in this letter are not exhaustive, nor are they intended to reflect all of the legal, technical and administrative issues that CalPERS considered in reaching the determination. In addition, this letter does not repeat all of the issues and facts identified in the Public Agency Review. Thus, it should be read in conjunction with these documents. CalPERS reserves the right to raise additional issues relating to the determinations listed above. If additional issues are raised, you will be notified and granted additional appeal rights as to any new findings.

You have the right to appeal the decision referred to in this letter if you desire to do so, by filing a written appeal with CalPERS, in Sacramento, within thirty days of the date of the mailing of this letter, in accordance with Government Code section 20134 and sections 555-555.4, Title 2, California Code of Regulations.

An appeal, if filed, should set forth the factual basis and legal authorities for such appeal. A copy of the applicable statute and Code of Regulations sections are included for your reference. If you file an appeal, the Legal Office will contact you and handle all requests for information.

EX 3A

**IN THE COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE**

BRUCE V. MALKENHORST, SR.,)	Court of Appeal
)	Case No. G047959
Appellant,)	
)	
vs.)	
)	EXEMPT FROM FILING
CALIFORNIA PUBLIC EMPLOYEES')	FEES (Gov. Code, § 6103)
RETIREMENT SYSTEM, BOARD)	
OF ADMINISTRATION OF)	
CALIFORNIA PUBLIC EMPLOYEES')	
RETIREMENT SYSTEM, et al.,)	
)	
Respondents.)	
)	
CITY OF VERNON,)	
)	
Real Party in Interest.)	
)	

RESPONDENT'S BRIEF

On Appeal from the Superior Court, County of Orange
Case No. 30-2012-00588466
The Honorable Jamoa A. Moberly

Gina M. Ratto, Interim General Counsel
Wesley E. Kennedy, Senior Staff Attorney (State Bar No. 99369)
California Public Employees' Retirement System
Lincoln Plaza North, 400 Q Street, Sacramento, CA 95814
P. O. Box 942707, Sacramento, CA 94229-2707
Telephone: (916) 795-3675
Facsimile: (916) 795-3659

Attorneys for Respondent,
California Public Employees' Retirement System, Board of Administration
of California Public Employees' Retirement System

EX 3B

at p. 555.)

By letters dated July 24, 2012 and July 25, 2012, responded to CalPERS preliminary determination by providing "additional information, documentation, and argument for CalPERS' consideration before it makes a final determination on this matter. Section 20128."³ In his response, Appellant contended, inter alia, that CalPERS was seeking "to 'reopen' the administrative process and change decisions made in [Appellant's] favor." (CT, at p. 542.) CalPERS issued a final determination in which its findings conformed with the preliminary determination (CT, at pp. 723-731) and informed Appellant of his right to request an administrative review of the determination pursuant to Government Code section 20134 and Title 2, California Code of Regulations (CCR) sections 555-555.4. The final determination also informed Appellant that "CalPERS would continue to pay the current amount of [his] allowance pending the hearing." (CT, at p. 730.) On December 21, 2012, Appellant submitted a timely appeal of the final determination. (Respondent's Request for Judicial Notice - Exhibit A.)

D. CalPERS Administrative Appeal Process

Section 20134 provides, in pertinent part, that "[t]he board may, in its discretion, hold a hearing for the purpose of determining any question presented to it involving any right, benefit, or obligation of a person under this part." In addition, the Board promulgated regulations expressly providing an administrative review process for any member or beneficiary "dissatisfied with the action of the Executive Officer." (Tit. 2, Cal. Code of

³ "Notwithstanding any other provision of law, the Board may require a member or beneficiary to provide information it deems necessary to determine this system's liability with respect to, and an individual's entitlement to, benefits prescribed in this part."

EXHIBIT 3



California Public Employees' Retirement System
Customer Account Services Division
Retirement Account Services Section
P.O. Box 942709
Sacramento, CA 94229-2709
TTY: (877) 249-7442
888 CalPERS (or 888-225-7377) phone • (916) 795-4166 fax
www.calpers.ca.gov

March 19, 2014

John Jensen
Law Offices of John Michael Jensen
11500 West Olympic Blvd, Suite 550
Los Angeles, CA 90064-1524

Re: CalPERS' decision to adjust Mr. Malkenhorst's monthly allowance
downward effective April 1, 2014.

Dear Mr. Jensen:

On March 6, 2014, CalPERS wrote to let you know about its decision to implement the downward adjustment of Mr. Malkenhorst's monthly retirement allowance. That was in advance of the April 1, 2014 implementation date. On March 12, 2014, you wrote back, asking that CalPERS change its decision, continue paying Mr. Malkenhorst a monthly, pre-deduction allowance of \$45,974.02, and not implement the reduction to \$9,845.33, the full amount CalPERS has determined the law allows.

CalPERS has reviewed the information in your March 12, 2014 letter, as well as the documents accompanying your letter. However, the information and documents have not altered CalPERS determination to implement the downward adjustment on April 1, 2014.

Here and throughout this matter, Mr. Malkenhorst has been and continues to be afforded due process. He was first notified of the reasons for this downward adjustment more than 21 months ago. CalPERS' May 25, 2012 and October 22, 2012 letters detailing those reasons are enclosed.

Mr. Malkenhorst timely appealed the adjustment and the appeal is proceeding before the Los Angeles Office of Administrative Hearings as case number 2013080917, with you representing Mr. Malkenhorst. Next week, the OAH plans to schedule dates for a full administrative hearing on the downward adjustment.

You have already raised the arguments laid out in your March 12, 2014 letter against the adjustment—Mr. Malkenhorst's version of 2005-2006 events, res judicata, collateral estoppel, charter city powers, and payrate—in the OAH proceeding and the OAH will hear and rule on them.

John Jensen
March 19, 2014
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Of course, you also have OAH appeal rights on this decision to implement the adjustment, as provided in the Public Employees' Retirement Law and CalPERS regulations and detailed in CalPERS October 2012 letter.

In that letter, CalPERS pointed out it might raise additional issues relating to the adjustment and provided you appeal rights. To expedite this matter, CalPERS will ask the OAH to address the implementation of the reduction in its ruling, so as to recommend that the Board either approve or reverse the reduction (or revise it as appropriate).

You suggest implementing the adjustment somehow violates vested constitutional rights. Mr. Malkenhorst has no right to an amount greater than the law allows.

We disagree with your points concerning the Los Angeles Times article, and your points regarding the appellate brief in one of Mr. Malkenhorst's court actions challenging the adjustment. The news media cannot be relied upon as a source of CalPERS policy. There is no policy to delay implementing adjustments to the correct allowance amount. The appellate brief's factual summary mentioned CalPERS continued to pay the higher amount, which was entirely accurate. None of CalPERS arguments, nor the trial court's ruling under review, was based on that point.

As you know, Jason Levin is the attorney representing CalPERS in the OAH proceeding concerning the adjustment of Mr. Malkenhorst's allowance. Mr. Levin will request that the OAH address the implementation of the downward adjustment in its proposed decision.

If you have any questions regarding this matter, please contact Mr. Levin.

Sincerely,



**TOMI JIMENEZ, Manager
Compensation and Employer Review
Customer Account Services Division**

Enclosures

**cc: Karen DeFrank
Joaquin Leon, City of Vernon**

