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

18 In the Matter of the Calculation of Final) **CASE NO. 2012-0671**
19 Compensation of:)
20 BRUCE MALKENHORST, SR.,) **OAH NO. 2013080917**
21 Respondent,)
22 and,) **CALPERS OPPOSITION TO**
23 CITY OF VERNON,) **MALKENHORST'S MOTION**
24 Respondent.) **REGARDING COLLATERAL**
25) **ESTOPPEL, RES JUDICATA, ISSUE**
26) **PRECLUSION, AND CLAIM**
27) **PRECLUSION**
28)

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I. INTRODUCTION

Administrative agencies can be subject to collateral estoppel only under a narrow set of circumstances. That set of circumstances does not exist here. There has never been a final, merits determination on the amount of Malkenhorst’s final compensation, and in any event, collateral estoppel cannot prevent CalPERS from carrying out its statutory obligations. The Court should deny Malkenhorst’s motion to dismiss.

Malkenhorst is a former employee of the City of Vernon (“City”), which contracts with CalPERS for pension benefits. When Malkenhorst retired from the City in 2005, he requested pension benefits from CalPERS, and CalPERS attempted to determine the level of benefits to which he was entitled. One of the main factors was Malkenhorst’s “final compensation” – a term defined by the Public Employees’ Retirement Law (“PERL,” Gov. Code § 20000 et seq.)

Some final compensation determinations are straightforward, but not Malkenhorst’s. His final compensation was complicated by his receipt of “longevity pay” from the City – a 25 percent bonus for his 25+ years of City employment. CalPERS initially took the position that Malkenhorst’s longevity pay would not count towards his final compensation, and the City appealed. Rather than filing a Statement of Issues to initiate an adversarial administrative process, CalPERS had discussions with the City regarding the longevity pay. CalPERS eventually agreed in 2006 to provide Malkenhorst a retirement allowance based on final compensation that included his longevity pay.

In 2012, following an audit of the City, CalPERS reevaluated Malkenhorst’s final compensation and identified two problems. First, Malkenhorst’s payrate – a critical aspect of final compensation – could not be substantiated as required by the PERL. Second, CalPERS determined that the PERL did not allow Malkenhorst’s longevity pay to be considered as part of his final compensation. Substantively, Malkenhorst disagrees with CalPERS on both issues. Procedurally, Malkenhorst argues that even if CalPERS is legally correct, it is collaterally estopped from reducing his final compensation and retirement allowance because of the events in 2005 and 2006.

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Malkenhorst incorrectly views the 2006 resolution as a final judgment. It was not a final judgment – there was no judicial or quasi-judicial adjudication of disputed legal issues. More troubling is Malkenhorst’s contention that CalPERS is somehow bound by its 2006 decisions, even if those decisions are contrary to the PERL. It cannot be that CalPERS must pay Malkenhorst a pension forbidden by law, or that CalPERS can be compelled to breach its fiduciary duty to the fund. The Office of Administrative Hearings (“OAH”) should rule collateral estoppel does not apply, hold that CalPERS is obliged to manage the retirement system consistent with the PERL, and find the PERL expressly requires correction of past errors.

II. BACKGROUND LAW AND FACTS

A. The Statutory Formula for Malkenhorst’s Pension

CalPERS is a defined benefit plan. Under the PERL, a retiree’s benefit formula takes three factors into account: a member’s credited years of service, final compensation, and age at retirement. (See, *Prentice v. Board of Administration* (2007) 57 Cal.App.4th 983, 989.) Of these three factors, only the amount of Malkenhorst’s final compensation is in dispute.

In *Prentice*, the Court described the derivation of final compensation:

- “Final compensation” is a function of the employee’s highest “compensation earnable.” (*Prentice, supra*, 157 Cal.App.4th at p. 989.)
- “Compensation earnable” consists of a member’s “payrate” and “special compensation.” (*Id.* at 989-90, citing Gov. Code § 20636(a).)
- An employee’s “payrate” is the monthly amount of cash compensation received by the employee “pursuant to publicly available pay schedules.” (*Id.* at p. 990, citing Gov. Code § 20636(b)(1).)
- “Special compensation” is, generally, a “payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions,” but is “limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to

1 similarly situated members of a group or class of employment that is in addition
2 to payrate.” (*Id.* at p. 990, citing Gov. Code § 20636(c).)

3
4 In sum, the amount of a retiree’s pension depends on “final compensation,” and “final
5 compensation” is a function of “payrate” and “special compensation.” Both Malkenhorst’s
6 payrate and special compensation (longevity pay) are at issue in these proceedings.

7 **B. Chronology of Events Relating to Malkenhorst’s Reported Final Compensation**

8 The parties previously submitted a “Joint Statement of Undisputed and Disputed Facts,”
9 which identifies several documents pertaining to the parties’ interactions in 2005-2006. The
10 documents describe the following events:

11 On June 6, 2005, Malkenhorst signed an application for service retirement from the City
12 and requested pension benefits. The City reported Malkenhorst’s monthly payrate as \$44,128:
13 a salary of \$35,302 plus an additional 25 percent as longevity pay.

14 On July 18, 2005, CalPERS concluded Malkenhorst’s payrate was his base \$35,302
15 compensation. But CalPERS informed the City that Malkenhorst’s longevity pay could not be
16 considered an item of special compensation because he was the only City employee to whom
17 the 25 percent bonus was available.

18 On August 11, 2005, the City appealed CalPERS’ determination that Malkenhorst’s
19 longevity pay could not be considered special compensation. CalPERS refrained from filing a
20 Statement of Issues while it and the City continued discussions on the point.

21 A year later, on August 17, 2006, the City received a letter from Alinda Heringer at
22 CalPERS. Heringer wrote that CalPERS would accept the City’s explanation for why
23 Malkenhorst’s longevity pay was a legitimate item of special compensation. “The Benefits
24 Division have [sic] been notified to make the adjustment to Mr. Malkenhorst’s allowance.”
25 Mr. Malkenhorst was then paid a monthly retirement allowance in excess of \$40,000, reflecting
26 a final compensation of \$44,128 (the amount originally reported by the City).
27

28 In May 2012, CalPERS reexamined the issue of Malkenhorst’s final compensation and
 reached two conclusions: 1) although the City had paid Malkenhorst a monthly salary of

1 \$35,302, that amount was not his lawful “payrate” because it reflected several different jobs for
2 which publicly available pay schedules were unavailable; and 2) Malkenhorst’s longevity pay
3 could not be considered “special compensation” because it was at a higher level than that
4 received by others in city management positions.
5

6 This proceeding is Malkenhorst’s appeal of CalPERS 2012 determination. On this
7 motion, Malkenhorst argues that the 2012 determination is barred as a matter of law because
8 the amount of his final compensation, even if erroneous, was permanently fixed by CalPERS in
9 2006.

10 **III. MALKENHORST CANNOT ESTABLISH THE ELEMENTS**
11 **OF COLLATERAL ESTOPPEL**

12 **A. Elements of Collateral Estoppel Against an Agency**

13 In his motion, Malkenhorst contends that CalPERS is collaterally estopped¹ from
14 altering his final compensation. Collateral estoppel may generally be applied to “prevent[] an
15 administrative agency from reconsidering, in the absence of new facts, its prior final decision
16 made in a judicial or quasi-judicial capacity in the context of an adversary hearing.” (*Hughes*
17 *v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 794.) The basic elements of
18 collateral estoppel are: “(1) the issue is identical to that decided in the former proceeding, (2)
19 the issue was actually litigated in the former proceeding, (3) the issue was necessarily decided
20 in the former proceeding, (4) the decision in the former proceeding is final and on the merits,
21

22 ¹ Apart from collateral estoppel (“issue preclusion”), Malkenhorst also refers to res judicata
23 (“claim preclusion”). Collateral estoppel is a “distinct aspect of res judicata” and is the specific
24 doctrine applicable to final agency action. (See, *Murray v. Alaska Airlines* (2010) 50 Cal.4th
25 860, 866-67; *Raley v. California Tahoe Regional Planning Agency* (1977) 68 C.A.3d 965, 977,
26 footnote 7.) Collateral estoppel is to be distinguished from equitable estoppel, which is
27 unavailable against CalPERS. (See *In the Matter of Henderson*, Precedential Board Decision
28 No. 98-02, effective November 18, 1998 [holding that an equitable rule barring CalPERS from
correcting benefit overpayments would have “a disruptive effect on the administration of the
retirement system.”])

1 and (5) preclusion is sought against a person who was a party or in privity with a party to the
2 former proceeding.” (*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 481.)

3
4 Beyond these basic elements, **additional** requirements must be met before collateral
5 estoppel will be applied against governmental entities. Malkenhorst does not mention these
6 additional requirements in his motion.

7 First, collateral estoppel will not bind a governmental agency unless its initial
8 determination was based on “a question of fact within its powers.” (*Aylward v. State Board*
9 *Chiropractic Examiners* (1948) 31 Cal.2d 833, 839.) Where the agency simply made an
10 “erroneous conclusion of law,” the agency cannot be barred from making a correction. (*Id.*)
11 Agencies “have only such limited authority as is conferred upon them by law,” and collateral
12 estoppel will not be applied to preserve agency determinations that “are beyond their statutory
13 jurisdiction.” (*City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 679.)

14 Second, collateral estoppel does not apply where, “it is clear that the legislature
15 intended that the agency should exercise a continuing jurisdiction with power to modify or alter
16 its orders....” (*Olive Proration Etc. Com. v. Agricultural Prorate Commission* (1941) 17
17 Cal.2d 204, 209.)

18 Third, collateral estoppel is inappropriate where the issue addressed by the agency
19 “concerns a matter of public interest.” (*Modesto City Schools v. Education Audits Appeal*
20 *Panel* (2004) 123 Cal.App.4th 1365, 1379.)

21 Malkenhorst cannot prove either the basic or additional agency-related conditions for
22 collateral estoppel.

23 **B. Malkenhorst Cannot Satisfy the Elements of Collateral Estoppel Against an**
24 **Agency**

25 **1. There was no Actual Litigation of Malkenhorst’s Retirement Benefit**

26 CalPERS cannot be estopped from correcting Malkenhorst’s final compensation unless,
27 as a first step, Malkenhorst shows the issue was already “actually litigated” with CalPERS.
28 “For purposes of collateral estoppel, an issue was actually litigated in a prior proceeding if it

1 was properly raised, submitted for determination, and determined in that proceeding.”
2 (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511.) Litigation becomes “actual” (and
3 not just possible) when “parties each presented evidence and witnesses in support of their
4 positions.” (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; see also, *Castillo v. City of*
5 *Los Angeles* (2001) 92 Cal.App.4th 477, 482 [litigation is “actual” when a full hearing is set
6 during which the parties can raise issues and present evidence.]) Indicia of actual litigation
7 include, “a hearing before an impartial decision maker; testimony given under oath or
8 affirmation; a party’s ability to subpoena, call, examine, and cross-examine witnesses, to
9 introduce documentary evidence, and to make oral and written argument; the taking of a record
10 of the proceeding; and a written statement of reasons for the decision.” (*Murray v. Alaska*
11 *Airlines* (2010) 50 Cal.4th 860, 867-68.)

12
13 The events of 2005 and 2006 do not show actual litigation of Malkenhorst’s final
14 compensation. There was no hearing, no evidence, no motions, and no argument to a judge. In
15 fact, CalPERS avoided actual litigation by refraining from filing a Statement of Issues. (Tit. 2,
16 Cal. Code Regs. §§ 555.2, 555.4.)

17 **2. There was no Final Determination on the Merits of Malkenhorst’s Final**
18 **Compensation**

19 Had CalPERS filed a Statement of Issues in 2006 with respect to Malkenhorst’s final
20 compensation, the parties would have engaged in actual litigation governed by the
21 Administrative Procedures Act. (Tit. 2, Cal. Code Regs. § 555.4.) Only after the issues were
22 decided by a hearing officer would there be a decision on the merits. (*Castillo, supra*, 92
23 Cal.App.4th at p. 483 [A decision is on the merits if it “followed a ‘full hearing’ in which ‘the
24 substance of the claim [was] tried and determined.’”]; accord, *Basurto v. Imperial Irrigation*
25 *District* (2012) 211 Cal.App.4th 866, 892.) And any merits decision would have been subject
26 to review by the CalPERS Board. (Gov. Code § 11440.10(a).) Only after the Board acts (or
27 declines to act) can any decision be deemed “final.” (See Gov. Code § 11517(c)(1) [“If a
28 contested case is originally heard by an administrative law judge alone, he or she shall prepare

1 within 30 days after the case is submitted to him or her a proposed decision in a form **that may**
2 **be adopted by the agency as the final decision** in the case.” (Emphasis added.)) The Board
3 has final say on the amount of pension benefits, adjustments to benefits, and is the sole judge of
4 the conditions under which benefits are provided. (Motion at p. 18, citing Gov. Code §§
5 20123-20125; see also § 20134.)
6

7 The amount of Malkenhorst’s final compensation has never been the subject of a
8 judicial decision of any kind. There has not been an administrative hearing, a decision on the
9 merits, or final Board review of a merits decision.

10 Malkenhorst nonetheless theorizes that CalPERS determination became “final” in 2006
11 when it submitted to his pension demands and refrained from filing a Statement of Issues. (See
12 Motion at pp. 24-26.) But the only case he cites in support of that theory – *Murray* – is
13 factually and legally inapposite. (*Murray, supra*, 50 Cal.4th 860.)

14 In *Murray*, the plaintiff filed an administrative whistleblower complaint with the United
15 States Secretary of Labor, who decided the matter against the plaintiff. (*Id.* at p. 865.) The
16 plaintiff was advised that he could object to the decision, but he did not do so. (*Id.* at p. 866.)
17 Instead, the plaintiff filed a civil lawsuit, which the trial court dismissed on the ground that it
18 was barred by the collateral estoppel effect arising from the plaintiff’s failure to appeal the
19 Secretary’s administrative decision. (*Id.*) The Court of Appeal then addressed the following
20 question: “Should issue-preclusive effect be given to a federal agency’s investigative findings,
21 when the subsequent administrative process provides the complainant the option of a formal
22 adjudicatory hearing to determine the contested issues de novo, as well as subsequent judicial
23 review of that determination, but the complainant elects not to invoke his right to that
24 additional process, and the agency’s findings and decision thereby become a final,
25 nonappealable order by operation of law?” (*Id.* at p. 864.) The Court answered the question,
26 “yes.” A complainant who fails to exercise his rights to a formal hearing and judicial review in
27 an administrative process can be precluded from relitigating the administrative agency’s
28 determinations. (*Id.* at p. 878.)

1 *Murray* addresses the circumstances for applying collateral estoppel **in favor of** an
2 agency. This is much different than the issue here – whether Malkenhorst may apply collateral
3 estoppel **against** an agency. The difference is meaningful. Collateral estoppel in favor of an
4 agency can, as a matter of policy, be triggered by a complainant’s failure to exhaust
5 administrative remedies (*id.* at p. 867-68), whereas no similar policy or doctrine favors
6 collateral estoppel against an agency.
7

8 *Murray* is simply irrelevant to Malkenhorst’s argument. He has failed to cite any
9 authority for the proposition that if an agency refrains from submitting an issue to
10 administrative litigation, it can be barred from deciding (or re-deciding) that issue at a later
11 time.

12 **3. CalPERS is Expressly Required by Law to Correct Malkenhorst’s Pension**
13 **Benefit**

14 Even if CalPERS had initiated administrative litigation in 2006 to decide Malkenhorst’s
15 final compensation, and even if that administrative litigation had resulted in a final decision on
16 the merits in Malkenhorst’s favor, that result would not prevent CalPERS from making
17 corrections required by law. CalPERS not only can but must make final compensation
18 determinations that are consistent with the PERL, and if a past determination was mistaken, the
19 PERL mandates it be corrected. (Govt. Code § 20160.)

20 As previously stated, collateral estoppel will not bind an agency to an “erroneous
21 conclusion of law.” (*Aylward, supra*, 31 Cal.2d at p. 839; *City and County of San Francisco v.*
22 *Ang, supra*, 97 Cal.App.3d at p. 679.) This is especially true where, “it is clear that the
23 legislature intended that the agency should exercise a continuing jurisdiction with power to
24 modify or alter its orders....” (*Olive Proration, supra*, 17 Cal.2d at p. 209.) Moreover, even
25 absent express statutory authority to make corrections, collateral estoppel is subject to a public
26 interest exception: “when the issue is a question of law rather than of fact, the prior
27 determination is not conclusive either if injustice would result or if the public interest requires
28 that relitigation not be foreclosed.” (*Consumers Lobby Against Monopolies v. Public Utilities*

1 *Com.* (1979) 25 Cal.3d 891, 902.) “[T]he courts will not apply [collateral estoppel] to
2 foreclose the relitigation of an issue of law covering a public agency’s ongoing obligation to
3 administer a statute enacted for the public benefit and affecting members of the public not
4 before the court.” (*California Optometric Assn. v. Lackner* (1976) 60 Cal.App.3d 500, 505.)

5
6 Here, CalPERS is obliged to decide the correct amount of Malkenhorst’s final
7 compensation. CalPERS must “determine and . . . modify benefits for service and disability”
8 in accordance with the PERL. (Govt. Code, § 20123.) And CalPERS “is the sole judge of the
9 conditions under which persons may be admitted to and continue to receive benefits under this
10 system” according to the PERL. (Govt. Code, § 20125.)

11 If at any time CalPERS determines that it is overpaying a retiree’s monthly allowance
12 by more than five dollars (unless less than \$250 is at stake), CalPERS **must** take corrective
13 action and recalculate the benefit. (Govt. Code, § 20160, subd. (b) [“[T]he board shall correct
14 all actions taken as a result of errors or omissions of... this system.”]; Govt. Code, § 20161,
15 subd. (c) [excluding small-money cases from CalPERS recalculation obligation]; see also,
16 *Welch v. California State Teachers' Retirement Bd.* (2012) 203 Cal.App.4th 1, 27 [statutory
17 history of Section 20160 indicates that “shall” means that CalPERS has a mandatory duty to
18 act.] There is no time limit for CalPERS to make corrections; CalPERS has the duty to correct
19 mistakes, “throughout PERS membership and through the lifetime of retired PERS members.”
20 (*City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 50-51)

21 The PERL reflects the legislature’s intent that CalPERS “exercise a continuing
22 jurisdiction with power to modify or alter its orders....” (*Olive Proration, supra*, 17 Cal.2d at
23 p. 209.) Applying collateral estoppel here would improperly interfere with CalPERS’ “ongoing
24 obligation to administer a statute enacted for the public benefit and affecting members of the
25 public not before the court.” (*California Optometric Assn., supra*, 60 Cal.App.3d at p. 505.)
26 There is no authority for applying collateral estoppel when doing so would force an agency to
27 violate a statute.
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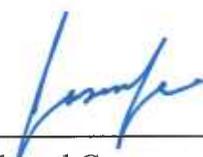
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IV. CONCLUSION

For the reasons set forth above, the OAH should deny Malkenhorst's motion to dismiss for collateral estoppel, hear this matter on the merits, and decide the lawful amount of Malkenhorst's final compensation.

DATED: May 16, 2014

STEPTOE & JOHNSON LLP

By:  _____
Edward Gregory
Jason Levin

Attorneys for Complainant CalPERS

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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 May 16, 2014, I served the following listed document(s), by method indicated below, on the parties in this action: **CALPERS OPPOSITION TO MALKENHORST’S MOTION REGARDING COLLATERAL ESTOPPEL, RES JUDICATA, ISSUE PRECLUSION, AND CLAIM PRECLUSION.**

SEE ATTACHED SERVICE LIST

XX BY U.S. MAIL

By placing the original / 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.

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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 delivery 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.

XX STATE

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 16, 2014 at Los Angeles, California.

ELENA HERNANDEZ

Type or Print Name

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.

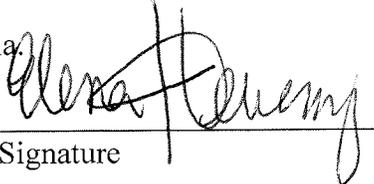
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