

1 Edward Gregory (State Bar No. 128375)
2 Jason Levin (State Bar No. 161807)
3 Lisa Petrovsky (State Bar No. 239539)
4 STEPTOE & JOHNSON LLP
5 633 West Fifth Street, Suite 700
6 Los Angeles, California 90071
7 Telephone: (213) 439-9400
8 Facsimile: (213) 439-9599
9 *egregory@steptoe.com*
10 *jlevin@steptoe.com*
11 *lpetrovsky@steptoe.com*

12 Attorneys for
13 California Public Employees'
14 Retirement System (CalPERS)

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

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

20 BRUCE MALKENHORST, SR.,)

21 Respondent,)

22 and.)

23 CITY OF VERNON,)

24 Respondent.)
25)
26)
27)
28)

CASE NO. 2012-0671

OAH NO. 2013080917

**CALPERS OPPOSITION TO
MALKENHORST'S MOTION ON
STATUTE OF LIMITATIONS AND
LACHES**

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I. INTRODUCTION

This administrative proceeding concerns the determination of a retirement allowance under the Public Employees' Retirement Law ("the PERL," Government Code Section 20000 et seq.). CalPERS recently recalculated Malkenhorst's retirement allowance to correct an error, and CalPERS will prove that the recalculation is consistent with the PERL.

Malkenhorst contends that CalPERS is time-barred from correcting its error. He notes that from his retirement in June 2005 until May 2012, CalPERS agreed to provide him a retirement allowance based on a reported "final compensation" of over \$40,000. In 2012, CalPERS notified Malkenhorst that his reported "final compensation" did not meet the requirements of the PERL, and the correct amount was only \$9,450. This meant that Malkenhorst had for years been receiving monthly overpayments of over \$30,000.

Malkenhorst argues that because he has received overpayments of his retirement allowance for more than seven years, he is now permanently entitled to continue receiving overpayments into the future. This argument is completely untethered from the law. The PERL not only permits CalPERS to correct errors in final compensation, it requires such corrections to be made regardless of the passage of time. This is why Malkenhorst has been unable to identify even a single decision applying a "statute of limitations" or "laches" defense against CalPERS. His motion should be denied.

II. BACKGROUND LAW AND FACTS

CalPERS is a unit of the Government Operation Agency. (Gov. Code § 20002.) Under the PERL, CalPERS administers the retirement system for employees of the State of California and other public entities, including the City of Vernon ("City"). (Gov. Code § 20120.)

Malkenhorst is a former employee of the City, which contracts with CalPERS for pension benefits. When Malkenhorst retired from the City in June 2005, he requested pension benefits from CalPERS, and CalPERS attempted to determine Malkenhorst's retirement allowance. Under the PERL, that allowance is based on three factors: a member's credited

1 years of service, “final compensation,” and age at retirement. (See, *Prentice v. Board of*
2 *Administration* (2007) 157 Cal.App.4th 983, 989.)

3
4 Of the three factors on which a retirement allowance is based, only the amount of
5 Malkenhorst’s “final compensation” is in dispute. The dispute over “final compensation”
6 began soon after Malkenhorst retired in July 2005 and persisted until July 2006 when CalPERS
7 decided to provide Malkenhorst the “final compensation” he was demanding. That “final
8 compensation” was then used to calculate Malkenhorst’s retirement allowance, which was
9 provided retroactive to the date of his retirement.

10 In May 2012, following an audit of the City’s records, CalPERS reevaluated
11 Malkenhorst’s “final compensation.” It determined that the “final compensation” then being
12 used for Malkenhorst did not meet the requirements of the PERL and would have to be
13 corrected. CalPERS notified Malkenhorst of the reduction, and Malkenhorst appealed.

14
15 **III. CALPERS DOES NOT HAVE A TIME-LIMIT TO MAKE CORRECTIONS**

16 Malkenhorst uses inapt comparisons and analogies to argue that CalPERS must correct
17 errors within certain legal or equitable time limits. Remarkably, Malkenhorst does not even
18 mention the statutory basis for CalPERS’ corrective action: Section 20160 of the PERL.

19 Section 20160(b) states: “[T]he board shall correct all actions taken as a result of errors
20 or omissions of ... this system.” (Gov. Code § 20160(b).) The PERL does not say that
21 CalPERS “may” make corrections or that corrections must be made within a certain time
22 frame. Instead, Section 20160(b) says that CalPERS “shall” make corrections. (See *Welch v.*
23 *California State Teachers' Retirement Bd.* (2012) 203 Cal.App.4th 1, 27 [statutory history of
24 Section 20160 indicates that “shall” means that CalPERS has a mandatory duty to act.])
25 Section 20160(b) provides no time limit for CalPERS to comply with its statutory obligation to
26 make corrections.
27

28 Section 20160’s omission of a limitations period is noteworthy because, “the
Legislature knows how to draft time limits applicable to specific types of cases when it wants

1 to....” (*City of Oakland v. Public Employees’ Retirement System* (2002) 95 Cal.App.4th 29,
2 51.) *City of Oakland* interpreted Section 20160 in connection with CalPERS’ retroactive
3 reclassification of certain airport employees as firefighters, making them eligible for increased
4 retirement benefits. The city employer challenged the reclassification as untimely, but the
5 court disagreed, holding that CalPERS has the duty to correct mistakes, “throughout PERS
6 membership and through the lifetime of retired PERS members.” (*Id.* at p. 50.) Section 20160,
7 “evidences a legislative purpose of ‘correcting system errors or omissions wherever
8 possible’....” (*Id.*) “We should not supply a limitation period not contemplated by the
9 Legislature.” (*Id.*)

10
11 Malkenhorst does not address *City of Oakland’s* interpretation of Section 20160.
12 Instead, he discusses the limitation period for seeking administrative mandamus in the superior
13 court. (Motion at p. 22.) He argues that CalPERS rendered a “final compensation” decision in
14 2006, and then failed to file a writ petition within 30 days “to challenge it in court.” (Motion at
15 pp. 21-22.) This argument is illogical. This is not an administrative mandamus action, and
16 even hypothetically, it makes no sense to talk about CalPERS seeking a writ of mandate to
17 reverse its own decisions.

18 Malkenhorst also briefly discusses the doctrine of laches. He cites *City of Oakland* for
19 the proposition that, independent of any limitations period, the equitable doctrine of laches
20 “may bar an administrative proceeding....” (Motion at p. 23, citing *City of Oakland, supra*, 95
21 Cal.App.4th at p. 51.) According to *City of Oakland*, this generic rule originated with *Brown v.*
22 *State Personnel Bd.* (1985) 166 Cal.App.3d 1151, 1158–1159, where laches applied to an
23 employer’s belated effort to bring disciplinary charges against an employee. Most other courts,
24 however, have not followed *Brown*. (See *Fahmy v. Medical Bd. of California* (1995) 38
25 Cal.App.4th 810, 817, fn. 5 [“in the 10 years since *Brown* was decided, the section of the
26 opinion applying a statute of limitations to a laches defense in an administrative setting has
27 never been followed, except by the same court”].) No court has applied laches to prevent
28 CalPERS from taking corrective actions.

1 It is one thing to apply laches to an action like disciplining an employee. It is quite
2 another to superimpose laches over the PERL’s correction statute (§ 20160), which compels
3 CalPERS to accurately calculate a retirement allowance. There is no precedent for applying an
4 equitable doctrine like laches to prevent the State from complying with its legal, statutory
5 obligations.

6
7 *City of Oakland* is the one case where the defense of laches was raised against
8 CalPERS, and it was rejected by the court. In part, this was because the city had failed to prove
9 it had been prejudiced by CalPERS’ actions. (*City of Oakland, supra*, 95 Cal.App.4th at p. 52.)
10 Similarly, Malkenhorst has no evidence of prejudice. He says he “suffered prejudice resulting
11 from the delay because records have been destroyed, memories or recall lost, monies and
12 reliance expended...” (Motion at p. 23.) But this is empty rhetoric – Malkenhorst failed to
13 provide evidence describing the destroyed records, identifying the persons with lost memories,
14 or explaining how (and how much) money was expended because of CalPERS’ effort to correct
15 his final compensation.

16 The Court should be guided by the PERL and rule that Section 20160 not only permits
17 but requires CalPERS to correct Malkenhorst’s retirement allowance regardless of the passage
18 of time. Absent Legislative action imposing legal or equitable time restraints on corrections by
19 CalPERS, the OAH should defer to CalPERS decision how to, “best provide benefits to the
20 participants of the plan.” (*City of Sacramento v. Public Employees Retirement System* (1991)
21 229 Cal.App.3d 1470, 1493.)
22

23
24 **IV. THE PERL IMPOSES A LIMITATIONS PERIOD ONLY FOR CIVIL**
25 **COLLECTION LAWSUITS**

26 Malkenhorst argues that even if his retirement allowance must be corrected going
27 forward, CalPERS should be time-barred from recouping past overpayments. This argument is
28 technically premature (because CalPERS has not yet attempted to collect overpayments), but
we address it here for the sake of clarity and efficiency.

1 As previously stated, *City of Oakland* held that CalPERS did not have a time limit for
2 making corrections because “the Legislature knows how to draft time limits applicable to
3 specific types of cases when it wants to....” (*City of Oakland, supra*, 95 at p. 51.) In support
4 of this statement, *City of Oakland* pointed out that the PERL itself imposes time limits on
5 CalPERS, but only in the context of collecting overpayments.
6

7 The PERL provides CalPERS two options for recovering overpayments from members
8 like Malkenhorst. First, CalPERS may elect to file a civil lawsuit to recover overpayments,
9 subject to a three-year limitations period. (Gov. Code § 20164(b) [“For the purposes of
10 payments into or out of the retirement fund for adjustment of errors or omissions ... the period
11 of limitation of actions shall be three years...”].) The applicability of the limitations period is
12 up to CalPERS, and its decision is “conclusive and binding.” (Gov. Code § 20164(e).)

13 Second, CalPERS may recover overpayments through the process of administrative
14 adjustment, modifying a member’s allowance “so that the retired person ... will receive the
15 actuarial equivalent of the allowance to which the member is entitled.” (Gov. Code §
16 20163(a).) CalPERS is directed to make adjustments so that “the status, rights, and obligations
17 of all parties ... are adjusted to be the same that they would have been if the act that would
18 have been taken, but for the error or omission, was taken at the proper time.” (Gov. Code §
19 20160(e).) The provisions for administrative adjustment reveal the Legislature’s “preference
20 for retroactive correction of errors.” (*City of Oakland, supra*, 95 Cal.App.4th at p. 42, citing
21 Gov. Code § 20160(e).)

22 Unlike lawsuits for recovery of overpayments, administrative adjustments are not
23 subject to a “limitation of actions” because they are not true “actions.” (*City of Oakland,*
24 *supra*, 95 Cal.App.4th at pp. 50-51 [when a statute refers to a “limitation of actions,” the
25 referenced “actions” include civil lawsuits but not administrative proceedings.]) Nor can
26 administrative adjustments be barred by a claim of laches; equitable defenses cannot interfere
27 with the operation of a statutory scheme. (*San Bernardino Valley Audubon Society v. City of*
28 *Moreno Valley* (1996) 44 Cal.App.4th 593, 607-608, citing *Teachers Management & Inv.*

1 *Corp. v. City of Santa Cruz* (1976) 64 Cal.App.3d 438, 445 [“the doctrine of laches does not
2 apply to a case involving the interpretation of a statute....”])

3
4 Unlike the PERL, other statutory schemes lack clear guidance on the applicability of
5 limitations periods. This explains *Fountain Valley Regional Hospital & Medical Center v.*
6 *Bonta* (1999) 75 Cal.App.4th 316, a case cited by Malkenhorst. (Motion at pp. 21, 23.) In
7 *Fountain Valley*, the California Department of Health Services sought to administratively
8 recoup Medi-Cal overpayments to a hospital. The hospital contended the recoupment effort
9 was barred by laches, but the administrative law judge rejected the argument. On petition for
10 writ of mandate, the court of appeal noted that, “the Department itself recognizes there are
11 occasions when the doctrine of laches may be appropriately applied.” (*Id.* at p. 320, fn. 3.) It
12 thus directed the administrative law judge to reconsider laches in light of “a limitations period
13 ‘borrowed’ from an analogous statute of limitations....” (*Id.* at p. 319.)

14 DHS may recognize laches as a viable defense to recoupment of Medi-Cal
15 overpayments, but CalPERS denies that laches can prevent it from recouping pension
16 overpayments under the PERL. To permit CalPERS to maintain the viability of the system, the
17 PERL does not expressly or impliedly impose legal or equitable time constraints on
18 administrative actions. The PERL specifies a limitation period only for the filing of civil
19 lawsuits.

20
21 **V. CONCLUSION**

22 For the reasons set forth above, the OAH should deny Malkenhorst’s statute of
23 limitations and laches motion to dismiss, hear this matter on the merits, and decide the lawful
24 amount of Malkenhorst’s final compensation.

25 DATED: May 16, 2014

26 STEPTOE & JOHNSON LLP

27 By: 
Jason Levin

28 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 ON STATUTE OF LIMITATIONS AND LACHES.**

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.

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.

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 May 16, 2014 at Los Angeles, California.

ELENA HERNANDEZ
Type or Print Name

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(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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SERVICE LIST

John M. Jensen, Attorney at Law
Law Offices of John Michael Jensen
11500 W. Olympic Blvd., Suite 550
Los Angeles, CA 90064
Telephone: 310-312-1100
Facsimile (310) 312-1109
Attorneys for Respondent Bruce Malkenhorst

Young Yim, Attorney at Law
Liebert Cassidy Whitmore
6033 W. Century Blvd., #500
Los Angeles, CA 90045
Telephone: (310) 981-2000
Facsimile (310) 337-0837
Counsel for Real Party in Interest of City of Vernon

Renee Salazar, Senior Staff Attorney
CalPERS
P. O. Box 942707
Sacramento, CA 94229-2707
Telephone: 916-795-0725
Facsimile (916) 795-3659
Counsel for Defendants/Respondents CalPERS