

1 Steven M. Berliner, Bar No. 142835
sberliner@lcwlegal.com
2 Joung H. Yim, Bar No. 216136
jyim@lcwlegal.com
3 Alex Polishuk, Bar No. 265349
apolishuk@lcwlegal.com
4 LIEBERT CASSIDY WHITMORE
5 A Professional Law Corporation
6 6033 West Century Boulevard, 5th Floor
7 Los Angeles, California 90045
Telephone: 310.981.2000
Facsimile: 310.337.0837

8 Zaynah N. Moussa, Bar No. 265343
Deputy City Attorney
9 zmoussa@ci.vernon.ca.us
City of Vernon
10 4305 Santa Fe Avenue
Vernon, CA 90058
11 Telephone: 323.583.8811
12 Facsimile: 323.826.1438

13 Attorneys for Respondent
CITY OF VERNON

14 BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
15 OF THE STATE OF CALIFORNIA
16 THE COMMISSION ON PROFESSIONAL COMPETENCE

17 In the Matter of the Calculation of Final
18 Compensation of BRUCE
19 MALKENHORST, SR. and
CITY OF VERNON,

20 Respondents.

CalPERS Case No. 2012-0671
OAH Case No.: 2013080917

**CITY OF VERNON'S OPPOSITION TO
BRUCE V. MALKENHORST, SR.'S MOTION
TO DISMISS RE JUDICIAL ESTOPPEL AND
CHARTER CITY AUTONOMY;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF JOUNG
H. YIM**

Date: June 13, 2014
Time: 9:00 a.m.
Location: OAH – Los Angeles
320 West Fourth Street
6th Floor, Suite 630
Los Angeles, California 90013

Liebert Cassidy Whitmore
A Professional Law Corporation
6033 West Century Boulevard, 5th Floor
Los Angeles, California 90045

1 **I. JUDICIAL ESTOPPEL DOES NOT APPLY**

2 The City of Vernon opposes Respondent Bruce V. Malkenhorst Sr.'s assertion that
3 judicial estoppel applies to prevent the City from introducing any argument, evidence and
4 testimony that contradicts prior statements made in an administrative or judicial process.¹ Judicial
5 estoppel does not apply here to the City.

6 Judicial estoppel is only applicable in the rare instances where the position of a party in a
7 judicial or quasi-judicial administrative proceeding is "completely inconsistent" with an argument
8 previously presented by the party and "adopted" by a judicial or administrative tribunal. Mr.
9 Malkenhorst asserts that because the City previously "supported" him during his administrative
10 appeal to the California Public Employees' Retirement System's ("CalPERS") preliminary
11 determination in 2005 – concerning the City's Longevity Plan – the City is now judicially
12 estopped in this matter. This assertion is without merit because (1) the City's position in the 2005
13 appeal is not "totally inconsistent" with its position now; and (2) CalPERS never "adopted" or
14 "accepted as true" the City's position in its final determination of the 2005 appeal.

15 In 2005, CalPERS issued a preliminary determination that the City's payroll and special
16 compensation entries for Mr. Malkenhorst were inflated because the 25% longevity factor for his
17 salary was only available for his position and nobody else. (Exhibit "1," Correspondence from
18 CalPERS dated July 18, 2005.) Mr. Malkenhorst appealed. In a request for clarification, the City
19 indicated that its Longevity Program included all City employees and City Council members.
20 (Exhibit "2," Correspondence from City of Vernon dated August 11, 2005.) The City also
21 explained that the City Administrator's job description incorporated a number of different job
22 titles and duties. (Exhibit "3," Correspondence from City of Vernon dated November 3, 2005.)
23 CalPERS ultimately issued a decision in favor of Mr. Malkenhorst and reversed its preliminary
24 determination with regards to the City's longevity provisions only. (Exhibit "4," Correspondence
25 from CalPERS dated August 17, 2006.) The decision made no finding about the correctness of

26 _____
27 ¹ Mr. Malkenhorst's judicial estoppel argument is also irrelevant because the City does not intend
28 to offer any evidence or call witnesses at the hearing. The City has only reserved its right to call
witnesses or introduce exhibits for purposes of impeachment or rebuttal.

1 Mr. Malkenhorst's salary being based on other job descriptions and titles incorporated into his
2 position. (*See Id.*)

3 In 2012, CalPERS issued a preliminary determination wherein it found that pay associated
4 with additional duties and positions to Mr. Malkenhorst's former position did not constitute
5 compensation earnable and should not have been used in the calculation of Mr. Malkenhorst's
6 retirement benefits. (Exhibit "5," Correspondence from CalPERS dated May 25, 2012.) In his
7 instant appeal to that CalPERS decision, Mr. Malkenhorst argues that judicial estoppel prevents
8 the City from siding with CalPERS' determination.

9 The elements for the doctrine of judicial estoppel are as follows: (1) the same party has
10 taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative
11 proceedings; (3) the party's first position was adopted or accepted as true; (4) the two positions
12 are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or
13 mistake. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.) Mr. Malkenhorst
14 cannot satisfy the third and fourth elements for judicial estoppel.

15 The third *Jackson* factor requires that the party to be estopped was successful in asserting
16 its first position. (*Jackson, supra*, at 183.) This requires that the party not only prevail in an
17 earlier action but a showing that the preceding **tribunal** "adopted the position or accepted it as
18 true." (*Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831.) (Emphasis added). For example,
19 in *Swahn* the defendants made inconsistent factual allegations first in an arbitration proceeding
20 and then during a successive judicial action. In spite of the inconsistency, the Court held that
21 judicial estoppel was improper because the arbitration decision only reflected a favorable
22 outcome without adopting the "inconsistent" position. (*Id.* at 846.)

23 Similar to *Swahn*, while CalPERS' 2005 decision was favorable to Mr. Malkenhorst, it did
24 not adopt the position that Mr. Malkenhorst's entire salary as City Administrator, which included
25 a number of different job titles and duties, was compensation earnable pursuant to the California
26 Public Employees' Retirement Law ("PERL").

27 CalPERS also never adopted or accepted as true the City's first position because there was
28 no final determination on the merits of Mr. Malkenhorst's final compensation. A decision is on

Liebert Cassidy Whitmore
A Professional Law Corporation
6033 West Century Boulevard, 5th Floor
Los Angeles, California 90045

1 the merits if it "followed a 'full hearing' in which 'the substance of the claim [was] tried and
2 determined.'" (*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 483). Further, any
3 merits decision would have been subject to review by the CalPERS Board. (Gov. Code §
4 11440.10(a).) The Board has final say on the amount of pension benefits, adjustments to benefits,
5 and is the sole judge of the conditions under which benefits are provided. (Gov. Code §§ 20123-
6 20125, 20134.) It is undisputed, that the CalPERS Board never acted to "adopt" or "accept as
7 true" any City position whatsoever, and thus, judicial estoppel cannot be claimed against the City.

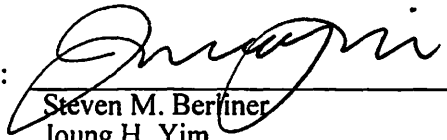
8 Additionally, the City's previous position is not "completely inconsistent" with its stance
9 now. In 2005, the City indicated Mr. Malkenhorst was entitled to longevity pay because he was
10 in the same benefit class as City Council members. The City also claimed that the City
11 Administrator's job description incorporated a number of different job titles and duties. CalPERS
12 has now determined that pay associated with such additional duties and positions did not
13 constitute compensation earnable and should not have been used in the calculation of Mr.
14 Malkenhorst's retirement benefits. The City has deferred to CalPERS' determination on the
15 application of the PERL: a position not "completely inconsistent" with the City's prior position.

16 **II. CITY OPPOSES MALKENHORST'S CHARTER CITY AUTONOMY CLAIMS**

17 Mr. Malkenhorst has no authority to speak on behalf of the City of Vernon in connection
18 with its "home rule" powers or on any other issue.

19 Dated: May 16, 2014

LIEBERT CASSIDY WHITMORE

20
21
22 By: 
23 Steven M. Berliner
24 Jung H. Yim
25 Alex Polishuk
26 Attorneys for Respondent
27 CITY OF VERNON
28

Liebert Cassidy Whitmore
A Professional Law Corporation
6033 West Century Boulevard, 5th Floor
Los Angeles, California 90045

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DECLARATION OF JOUNG H. YIM

I, Joung H. Yim, declare:

1. I am an attorney licensed to practice law in the State of California. I am an attorney with the law firm of Liebert Cassidy Whitmore, counsel of record for the City of Vernon ("City") in this matter. If called upon to testify, I could and would competently testify to the following facts from my own personal knowledge.

2. Attached hereto as Exhibit 1 is a true and correct copy of a July 18, 2005 letter from CalPERS to the City of Vernon concerning CalPERS' decision to reduce Mr. Malkenhorst's pension allowance.

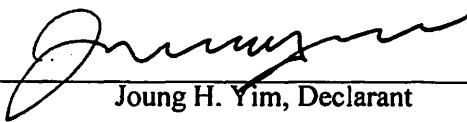
3. Attached hereto as Exhibit 2 is a true and correct copy of an August 11, 2005 "Notice of Appeal" from Marla Aspinwall of Loeb & Loeb to CalPERS.

4. Attached hereto as Exhibit 3 is a true and correct copy of a November 3, 2005 letter from Ms. Aspinwall to CalPERS.

5. Attached hereto as Exhibit 4 is a true and correct copy of an August 17, 2006 letter from CalPERS to Ms. Aspinwall.

6. Attached hereto as Exhibit 5 is a true and correct copy of a May 25, 2012 "preliminary determination" letter from CalPERS to Mr. Malkenhorst.

Executed this 16th day of May, 2014, at Los Angeles, California.



Joung H. Yim, Declarant

EXHIBIT 1



Actuarial & Employer Services Division
P O Box 942709
Sacramento, CA 94229-2709
Telecommunications Device for the Deaf - (916) 795-3240
(888) CalPERS (226-7377) FAX (916) 795-3005

FILE COPY

July 18, 2005

Employer Code #209

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

Reply to Section 1157ah

Re B Malkenhorst

Dear Ms. Valenzuela

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

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

Payrate

\$44,128 July 2004 to June 2005

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

571 (b) The Board has determined that all items of special compensation listed in subsection (a) are

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

California Public Employees' Retirement System
Lincoln Plaza - 400 P Street - Sacramento, CA 95814

Ms Valenzuela

-2-

July 18, 2005

GC 20838 "Compensation Earnable"

(a) "Compensation earnable" states in part, by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.6

(b) (1) "Payrate" means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours. "Payrate," for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours (emphasis added)

C 20630 "Compensation"

As used in this part, "compensation" means the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work because of holidays, sick leave, industrial disability leave, during which, benefits are payable pursuant to Sections 4800 and 4850 of the Labor Code or Article 4 (commencing with Section 19889) of Chapter 2.6 of Part 2.6, vacation, compensatory time off, or leave of absence

When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall be reported in accordance with Section 20838 and shall not exceed compensation earnable, as defined in Section 20638

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

Government Code 20638 (7)(e) states in part "group or class of employment" means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work related grouping. One employee may not be considered a group or class."

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

Payrate

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

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

Ms Valenzuela

-3-

July 18, 2005

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

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

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

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

Yours truly,



Alnda Hennger, RPS II
Compensation Review Unit

cc B Malkenhorst

EXHIBIT 2

LOEB & LOEB LLP

A LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

19100 SANTA MONICA BOULEVARD,
SUITE 2100
LOS ANGELES, CALIFORNIA 90024

TELEPHONE: 310.382.2200
FACSIMILE: 310.382.2200
www.loeb.com

DAIGN

003 AUG 12 11 5:12

DOC - 1



Direct Dial: 310-282-2377
Facsimile: 310-282-2200
e-mail: masplnwall@loeb.com

August 11, 2005

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

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

Dear Ms. McGartland

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

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

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

- ¹ A copy of this correspondence is attached as "Exhibit A" to this Appeal.
- ² A Copy of the Resolution is attached as "Exhibit B" to this Appeal.

LOS ANGELES
NEW YORK
CHICAGO
NASHVILLE

Lori McGartland
August 8, 2005
JOSEPH & LOEB LLP
Page 2

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

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

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

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

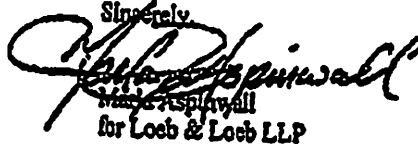
Lori McGartland
AUG 28 2015
Page 3

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

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

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

Sincerely,


Maura Aspinwall
for Loeb & Loeb LLP

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

js
2015011002
LA_C0311212

EXHIBIT 3

LOEB & LOEB

Fax: 310-282-2200

Nov 3 2005 11:46 P.02

LOEB & LOEB LLP

A LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATION(S)

1818 SANTA MONICA BOULEVARD
SUITE 2200
LOS ANGELES, CA 90047-6101

TELEPHONE: 310.561.1000
FACSIMILE: 310.561.1200
www.loeb.com



Direct Dial: 310-282-2177
Direct Fax: 310-282-2109

November 1, 2005

VIA EXPRESS MAIL & FAX

Ms. Alinda Heringer
RPS II
Compensation Review Unit
Actuarial and Employer Services Branch
P.O. Box 942709
Sacramento, CA 94229-2709

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

Dear Ms. Heringer:

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

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

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

LOS ANGELES
NEW YORK
CHICAGO
HARTFORD

Feb.5 0046

LOEB & LOEB

Fax:310-282-2200

Nov 3 2005 11:45 P.03

LOEB & LOEB LLP
Ms. Alinda Herlinger
November 3, 2005
Page 2

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

Section 21: LIGHT AND POWER DEPARTMENT:

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

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

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

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

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

LOEB & LOEB

Fax:310-282-2200

Nov 3 2005 11:46 P.04

LOEB & LOEB LLP
Ms. Alinda Haringer
November 3, 2005
Page 3

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

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

In fact, Government Code § 20636(7)(e)(1) states "group or class of employment" means a number of employees considered together because they share similarities in job duties, work locations, collective bargaining unit, or other logical work related grouping. One employee may not be considered a class or group.² In the instant matter, Mr. Malkenhorst's logical work related grouping as City Administrator is with that of the other City Council Members as their positions relate to implementation and administration of the City and its policies. Additionally, the longevity program is the same for the City Administrator and the City Council Members. There is nothing in the Government Code definition of group or class that suggests that an elected official covered by the program may not be in the same group or class as similarly situated employees of the City, nor would such a distinction make sense. The group or class requirement is intended to prevent individual employees from being singled out for special treatment. If elected officials are included in the class with an employee, it can hardly be said that such employee has been singled out for special treatment in that regard.

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

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

LOEB & LOEB

Fax: 310-262-2200

Nov 3 2005 11:47 P.05

LOEB & LOEB
Ms. Alissa Horinger
November 3, 2005
Page 4

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

Sincerely,


Andrew Poppo
for Loeb & Loeb LLP

243
200410002
LA1005113

Attachment

cc: Eric Fresch, City of Vernon
Lori McGardland

LOEB & LOEB

Fax:310-282-2200

Nov 3 2005 11:47 P.06

EXHIBIT A

LOEB & LOEB

Fax:310-282-2200

Nov 3 2005 11:47 P.07

RESOLUTION NO. 6467

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

ADOPTED ON JUNE 30, 1994

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

LOEB & LOEB

Fax: 310-282-2200

Nov 3 2005 11:47 P.08

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(d) Additional Hours Worked.

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

(e) Dispatchers.

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

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

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

SECTION 21: LIGHT AND POWER DEPARTMENT:

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

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

- (1) CHIEF EXECUTIVE OFFICER--the city

Feb 5 0053

1 Administrator/city clerk shall serve as the chief executive
 2 officer in the light and power department;
 3 (2) ACCOUNTANT--the accountant in the city
 4 administrator/city clerk department shall also serve as the
 5 accountant in the light and power department;
 6 (3) SENIOR ACCOUNT CLERK--the senior account clerk
 7 in the city administrator/city clerk department shall also serve
 8 as the senior account clerk in the light and power department;
 9 (4) ACCOUNT CLERK--the account clerk in the city
 10 administrator/city clerk department shall also serve as the
 11 account clerk in the light and power department.
 12 (b) Personal Vehicle Allowance.
 13 In addition to said salaries as set forth in Schedule II,
 14 eligible HR, certain individuals serving in specified
 15 classifications shall receive, when using their own motor vehicle
 16 in the service of the city, an additional sum per month as
 17 provided for in schedule III.
 18 (c) Responsibility For Upkeep of Vehicle.
 19 The city shall not be responsible for repairs or any
 20 additional costs for upkeep, fuel, lubrication, replacement in
 21 whole or in part, or other expenses in connection with any such
 22 vehicle beyond the respective amounts set forth in schedule III.
 23 (d) Additional Hours Worked.
 24 All employees in the light and power department, except
 25 the director of light and power, field operations manager,
 26 electrical engineering manager, resource planning manager, power
 27

LEB & LEB Fax: 510-282-2200 Nov 3 2005 11:47 P.09

LOEB & LOEB

Fax:310-282-2200

Nov 3 2005 11:48 P.10

0.05

SCHEDULE II
CITY ADMINISTRATOR/CITY CLERK DEPARTMENT SALARY SCALE

		MONTHLY SALARY
CITY ADMINISTRATOR/CITY CLERK - 4000	STEP 1	\$24,189.00
DIRECTOR OF ENVIRONMENTAL HEALTH - 4310	STEP 1	\$8,502.00
	2	\$8,059.00
	3	\$7,539.00
	4	\$7,841.00
	5	\$8,884.00
	6	\$6,506.00
	7	\$8,167.00
ASSISTANT TO THE CITY ADMINISTRATOR - 4001	STEP 1	\$7,888.00
	2	\$7,285.00
	3	\$6,905.00
	4	\$6,545.00
	5	\$6,204.00
	6	\$5,881.00
	7	\$5,574.00
CHIEF DEPUTY DIRECTOR ENVIRONMENTAL HEALTH-4320	STEP 1	\$6,886.00
	2	\$6,529.00
	3	\$6,189.00
	4	\$5,866.00
	5	\$5,560.00
	6	\$5,270.00
	7	\$4,985.00
ASSISTANT FINANCE DIRECTOR - - 4103	STEP 1	\$6,639.00
	2	\$6,299.00
	3	\$5,985.00
	4	\$5,654.00
	5	\$5,359.00
	6	\$5,080.00
	7	\$4,815.00
CUSTOMER SERVICE MANAGER - 4110	STEP 1	\$6,216.00
	2	\$5,884.00
	3	\$5,587.00
	4	\$5,286.00
	5	\$5,020.00
	6	\$4,759.00
	7	\$4,510.00
ENVIRONMENTAL SPECIALIST - 4340	STEP 1	\$5,230.00
	2	\$4,957.00
	3	\$4,699.00
	4	\$4,454.00
	5	\$4,223.00
	6	\$4,003.00
	7	\$3,793.00
	8	\$3,595.00

SCHEDULE II
 EXHIBIT "B" PAGE 16

EXHIBIT 4



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

LE COPY

August 17, 2006

Employer Code #209

Reply to Section 115

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

RE: B. Malkenhorst and the City of Vernon appeal

Dear Ms. Aspinwall:

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

CalPERS has determined that setting differing levels of payrate or special compensation by date of hire may be allowed. Persons hired on or after a date certain may reasonably be considered to be similarly situated members of the group or class (which make up a "logical work related grouping") within the definition of group or class in section 20636(e)(1) of the Public Employees' Retirement Law (PERL).

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

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

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

California Public Employees' Retirement System

Feb.5 0058

M. Aspinwall

-2-

August 17, 2008

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

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

Sincerely,



Alinda Heringer, RPS II
Compensation Review Unit
Employer Services Division

EXHIBIT 5



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

May 25, 2012

Bruce V. Malkenhorst, Sr.
6651 Churchill Drive
Huntington Beach, CA 92648

Dear Mr. Malkenhorst, Sr.

This letter is to inform you that the California Public Employees' Retirement System (CalPERS) is currently examining the amount of your retirement allowance. Based upon information provided by the City of Vernon (City) in its payroll reports and additional information provided in the current audit process, CalPERS has preliminarily concluded that your retirement allowance will require a downward adjustment.

By way of background, CalPERS undertook a Public Agency review of the City and the final report was released April 2012. CalPERS audit staff reviewed payroll and other relevant records and compensation reported to CalPERS for individuals included in a test sample over service periods of July 1, 2002, through June 30, 2010. CalPERS has also completed a review of the compensation reported by the City on your behalf, and determined that some of the compensation reported to CalPERS does not comply with the California Public Employees' Retirement Law (PERL) and does not appear to meet the definition of compensation earnable.

This letter also serves to inform you that CalPERS is continuing to examine the amount of your retirement allowance and plans to delay a final decision relative to adjusting your retirement allowance so as to allow you the opportunity to present additional information, documentation, or argument that you would like CalPERS to consider prior to finalizing its decision. Thereafter, CalPERS will issue a formal written determination on these issues.

Preliminary Determination

CalPERS originally calculated your final compensation at the time of your retirement effective July 1, 2005 in the amount of \$44,128 per month based upon compensation amounts reported by the City. This final compensation amount was then used to calculate your original retirement allowance \$40,022.93 per month. As a result of the Public Agency review conducted by CalPERS Office of Audit Services (OAS), an investigation of all relevant information provided by the City and payroll records was undertaken. CalPERS investigated your final compensation amount and has preliminarily concluded that it appears to have been erroneously calculated at the time

Bruce Malkenhorst, Sr.
May 25, 2012
Page 2

of your retirement because it included reported pay amounts that are not authorized by the PERL.

Under the PERL, the amount of compensation earnable that an employer reports to CalPERS is used to determine member contributions, final compensation and to calculate retirement benefit allowances. Compensation earnable consists of "payrate" and "special compensation". If CalPERS determines that compensation is or has been reported in error, and that amount does not constitute compensation earnable as defined in the PERL, then CalPERS has a duty to correct the error.

Payrate

All payrates or base pay reported must comply with Government Code Section 20636(b)(1)¹ which provides in relevant part as follows:

"the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules. 'Payrate,' for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e)." (Emphasis added)

Additionally, Section 20636(d) provides, "[N]otwithstanding any other provision of law, payrate and special compensation schedules, ordinances, or similar documents shall be public records available for public scrutiny."

As detailed below, not all of the pay scales appear to have included amounts solely attributable to one position². However, the City failed to provide copies of publicly available pay schedules for each of these positions with the percentages of time spent in each position.

A "payrate" must also be listed in a publicly available pay schedule which meets all criteria listed in California Code of Regulations (CCR) Section 570.5. The publicly available pay schedules provided by the City in support of your pay amounts fail to comply with CCR Section 570.5 subdivision (a)(3)(4)(6) because:

- They fail to show the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;

¹ All further references are the California Government Code unless otherwise specified.

² The City at different times has reported that you served in a number of capacities simultaneously. For example in 1995, the Chief Deputy City Clerk stated you were serving as the "City Administrator/City Clerk, City Treasurer, Director of Finance and Personnel, Purchasing Agent, Executive Director of Light & Power, and Executive Director of the Redevelopment Agency.

Bruce Malkenhorst, Sr.
May 25, 2012
Page 3

- They fail to indicate the time base, including but not limited to, whether the time base is hourly, daily, bi-weekly, monthly bi-monthly, or annually; and
- They fail to indicate an effective date and date of any revisions.

CCR Section 570.5 (b) states:

"Whenever an employer fails to meet the requirements of subdivision (a) above, the Board, in its sole discretion, may determine an amount that will be considered to be payrate, taking into consideration all information it deems relevant including but not limited to, the following:

- (1) Documents approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer;
- (2) Last payrate listed on a pay schedule that conforms to the requirements of subdivision (a) with the same employer for the position at issue;
- (3) Last payrate for the member that is listed on a pay schedule that conforms to the requirements of subdivision (a) with the same employer for a different position;
- (4) Last payrate for the member in a position that was held by the member and that is listed on a pay schedule that conforms to the requirements of subdivision (a) of a former CalPERS employer.

Additionally, in order to constitute payrate, pay must be for services rendered on a full-time basis during normal working hours and cannot be for additional duties or services related to other positions.³ Pay related to services performed that constitute "overtime", as that term is defined under the PERL are not reportable for retirement purposes. Section 20635 provides in pertinent part,

"When the compensation of a member is a factor in any computation to be made under this part, there shall be excluded from those computations any compensation based on overtime put in by a member whose service retirement allowance is a fixed percentage of final compensation for each year of credited service.

...

If a member concurrently renders service in two or more positions, one or more of which is full-time, service in the part-time position shall constitute overtime. If two or more positions are permanent and full-time, the position with the highest payrate or base pay shall be reported to this system."

³ Section 20636(b) and (c)(7)(B) also provides that special compensation does not include payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise. See also *In re the Matter of the Appeal of the Calculation of Benefits Pursuant to Employer's Report of Final Compensation Related to Roy T. Ramirez, and City of Indio*, (2000) CalPERS Precedential Board Decision No. 00-06, and *Prentice v. Board of Administration* (2007) 157 Cal.App. 4th 983.

Bruce Malkenhorst, Sr.
May 25, 2012
Page 4

The most recent amount of pay represented as payrate reported by the City for you is approximated \$35,302 per month. Based on the documentation available to date, it does not appear that this reported amount meets the definitional requirements of "payrate" under the PERL.

CalPERS cannot identify a salary that meets the payrate definition, and that was paid solely for the normal duties performed in the position of City Administrator. Information provided by the City suggests that the payrate for City Administrator was increased over the years as additional duties and positions⁴ were added to your responsibilities. The pay associated with such additional duties and positions does not constitute compensation earnable and should not have been used in the calculation of your retirement benefits.

As a result, CalPERS has preliminarily concluded that the amounts reported to CalPERS by the City for your services do not appear to have been paid "pursuant to publicly available pay schedules" under the meaning of that phrase in the statutory and regulatory definitions for payrate. In addition, the amounts failed to meet other definitional requirements of payrate in so far as they were not for the normal duties of one full-time position and were amounts reported for duties or services performed for other simultaneous positions that would constitute "overtime" under the PERL.

CalPERS reviewed your compensation history to identify pay that would meet the definition of compensation earnable and that can be used for the purposes of determining your corrected final compensation and retirement benefit amount. The most recent payrate reported by the City that appears to meet the definition of "payrate," appears on a publicly available pay schedule for a single position, and which does not constitute pay for duties in addition to normal duties, or overtime, would be the pay reported for the position Acting City Clerk in the amount of \$7875 per month as provided in Resolution 8780, signed June 29, 2005, effective July 1, 2005.

Since it appears that you were first appointed to the position of City Clerk July 1, 1977 and thereafter held that position throughout your tenure at the City, and there is a publicly available pay schedule available for duties related to this single position, the amount can be used for compensation earnable purposes in the process of determining your final compensation and retirement benefit amount. If it is determined that you were an elective officer as defined by the PERL then an election of benefits may have been required pursuant to Section 20322.

⁴ For example, the City at different times has reported that you served in a number of capacities simultaneously. In 1995, the Chief Deputy City Clerk stated you were serving as the "City Administrator/City Clerk, City Treasurer, Director of Finance and Personnel, Purchasing Agent, Executive Director of Light & Power, and Executive Director of the Redevelopment Agency."

Bruce Malkenhorst, Sr.
May 25, 2012
Page 5

Special Compensation

Additionally, in order to be included as a basis for retirement benefits, compensation reported to CalPERS must meet the definition of special compensation as defined in Section 20636, and specifically, in Section 20636(c)(2).

"Special compensation shall be 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 similarly situated members of a group or class of employment that is in addition to payrate. If an individual is not part of a group or class, special compensation shall be limited to that which the board determines is received by similarly situated members in the closest related group or class that is in addition to payrate, subject to the limitations of paragraph (2) of subdivision (e)." (Emphasis added)

Section 20636(e) provides in relevant part:

"group or class of employment" means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related grouping. One employee may not be considered a group or class.

Any compensation paid in addition to base pay must meet the definition of "special compensation" and must be an item of pay that has been expressly approved by the CalPERS Board. The approved list of special compensation items can be found in the CCR Section 571(a). Although, Longevity pay is listed as an approved item of special compensation, all items listed in CCR Section 571(a) must also meet all criteria listed in CCR Section 571(b).

The City reported longevity pay for you as the City Administrator at the level of 25 percent of your base pay upon reaching your 25 years of service. However, all other similarly situated city management positions received only 20 percent of base pay for 25 years of service. Since the longevity benefit paid on your behalf was higher than that of the other members of your group, it does not meet requirements of Section 20636 as noted above, nor does it meet all criteria listed in CCR 571(b)(2) which requires the amount be available to all members in the group or class.

The City reported a payrate that consisted of a base pay of \$35,302 plus 25 percent longevity payment of \$8,825.50 for a total of \$44,128.00 from July 10, 2004 through your last day on payroll June 30, 2005. The correct amount of longevity pay that should have been reported would have been 20 percent of your base pay, where such base pay, met the definition of "payrate." Your original retirement benefit was based upon the longevity pay at 25 percent of an amount that failed to meet the definition of payrate and "special compensation." Since the amount included pay amounts that fail to meet the definition of "compensation earnable," your retirement benefit amount was erroneously calculated and will need to be corrected.

Bruce Malkenhorst, Sr.
May 25, 2012
Page 6

Authority for Correction of Retirement Allowance for Amounts Erroneously Reported that Do Not Appear to Meet the Definition of Compensation Earnable

CalPERS was established by statute, the PERL, which grants it certain authority. The California Constitution also grants the CalPERS Board of Administration, as the board of a public retirement system, certain powers. CalPERS has no authority other than those granted by the PERL and the Constitution and has the authority to pay benefits to a member only when authorized and only in amounts authorized.⁵ CalPERS has no authority to use a final compensation amount that is calculated with amounts of pay that do not meet the definition of compensation earnable.

PERL section 20120 states that the management and control of this system is vested in the board. Section 20125 further provides that the board shall determine who are employees and is the sole judge of the conditions under which a person may be admitted to and continue to receive benefits under this system. The PERL includes provisions that address errors made by an employer and/or CalPERS and mandates corrections in certain instances.

Section 20160 outlines the criteria for correcting errors and omissions and requires the board to correct all actions taken as a result of errors or omissions of any contracting agency or this system. Corrections of errors or omissions made pursuant to section 20160 subsection (a)(3)(e) and subsection (b) shall be such that the status, rights, and obligations of all parties are adjusted to be the same that would have been, if the act that would have been taken, but for the error or omission, was taken at the proper time.

Section 20163(e) provides in pertinent part:

“. . . Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the retirement allowance so that the retired person or the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled.”

Section 20164 provides in pertinent part:

“(a) The obligations of this system to its members continue throughout their respective memberships, and the obligations of this system to and in respect to retired members continue throughout the lives of the respective retired members, and thereafter until all obligations to their respective beneficiaries under optional settlements have been discharged. The obligations of the state and contracting agencies to this system in respect to members employed by them, respectively, continue until all of the obligations to this system in respect to those retired members,

⁵ See CalPERS Precedential Decision *In re the Matter of the Appeal of Decreased Level of Retirement Allowance of Harvey H. Henderson* (1998) CalPERS Precedential Board Decision No. 98-02 and California Constitution, Art. XVI, section 17.

Bruce Malkenhorst, Sr.
May 25, 2012
Page 7

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

Bruce Malkenhorst, Sr.
May 25, 2012
Page 8

they intended to reflect all of the legal, technical and administrative issues that we considered in reaching our determination. In addition, this letter does not repeat all of the issues and facts identified in 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.

If you have any argument, information or documentation that would contradict the information outlined above, or that you would like CalPERS to consider relative to the issues described above prior to CalPERS issuing a formal determination in this matter, please provide it to CalPERS **no later than June 25, 2012.**

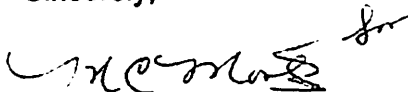
Any argument, information and/or documents you wish to submit to CalPERS should be directed to:

Karen DeFrank, Chief
Customer Account Services Division
P.O. Box 942709
Sacramento, CA 94229-2709

CalPERS will review any information provided and then proceed with a formal determination in this matter. CalPERS' formal determination will be communicated to you and the City by way of letter.

If you have any questions regarding this information, please call me directly at (916) 795-0340.

Sincerely,



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

cc: Karen DeFrank
Joaquin Leon, City of Vernon

Liebert Cassidy Whitmore
A Professional Law Corporation
6033 West Century Boulevard, 5th Floor
Los Angeles, California 90045

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: **6033 West Century Boulevard, 5th Floor, Los Angeles, California 90045.**

On May 16, 2014, I served the foregoing document(s) described as **CITY OF VERNON'S OPPOSITION TO BRUCE V. MALKENHORST, SR.'S MOTION TO DISMISS RE JUDICIAL ESTOPPEL AND CHARTER CITY AUTONOMY; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JOUNG H. YIM** in the manner checked below on all interested parties in this action addressed as follows:

John Michael Jensen
Law Offices of John Michael Jensen
11500 W. Olympic Blvd., Suite 550
Los Angeles, California 90064
Telephone: (310) 312-1100
Facsimile: (310) 312-1109
Email: johnjensen@johnmjensen.com

Attorneys for Respondent Bruce Malkenhorst, Sr.

Edward Gregory
Jason Levin
Lisa Petrovsky
STEPTOE & JOHNSON LLP
633 West Fifth Street, Suite 700
Los Angeles, California 90071
Telephone: (213) 439-9400
Facsimile: (213) 439-9599
Email: egregory@steptoe.com
Email: jlevin@steptoe.com
Email: lpetrovsky@steptoe.com

Attorneys for California Public Employees' Retirement System (CalPERS)

Renee Salazar
CalPERS
P.O. Box 942707
Sacramento, CA 94229-2707
Telephone: (916) 795-0725
Facsimile: (916) 795-3659

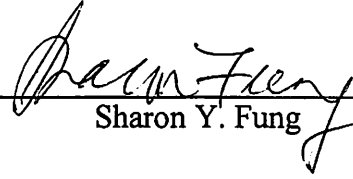
Attorneys for Defendants/Respondents CalPERS

- (BY U.S. MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

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


Sharon Y. Fung

Liebert Cassidy Whitmore
A Professional Law Corporation
6033 West Century Boulevard, 5th Floor
Los Angeles, California 90045

