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**BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA**

In the Matter of the Calculation of Final	)	CASE NO. 2012-0671
Compensation of:	)	
	)	OAH NO. 2013080917
BRUCE MALKENHORST, SR.,	)	
	)	
Respondent,	)	CALPERS' RESPONSE TO
	)	MALKENHORST'S MOTION
and.	)	"TO FORCE CALPERS TO
	)	PROCEED BY ACCUSATION,
CITY OF VERNON,	)	BEAR BURDEN OF PROOF AND
	)	BURDEN OF PERSUASION"
	)	
Respondent.	)	
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**I. INTRODUCTION**

This administrative proceeding concerns the determination of Malkenhorst's retirement allowance under the Public Employees' Retirement Law ("the PERL," Government Code Section 20000 et seq.). The parties agree that Malkenhorst's retirement allowance depends on his "final compensation," but dispute whether CalPERS has determined Malkenhorst's "final compensation" in accordance with the PERL. Malkenhorst has also raised two procedural questions in connection with the dispute:

1) Must CalPERS file an accusation before the OAH may hear the dispute?

No. CalPERS properly initiated this proceeding by filing a Statement of Issues.

2) What is CalPERS' evidentiary burden of proof?

CalPERS has the burden to prove, by a preponderance of the evidence, that its determination of Malkenhorst's "final compensation" is proper under the PERL.

**II. BACKGROUND LAW AND FACTS**

CalPERS, a unit of the Government Operation Agency (Gov. Code § 20002), administers the retirement system for employees of the State of California and other contracting public agencies. (Gov. Code § 20120.) For all enrolled public employees, the CalPERS Board has final say on the amount of and adjustment to retirement benefits, and is the sole judge of the conditions under which benefits are provided. (Gov. Code §§ 20123-20125; see also § 20134.) The Board is required to administer CalPERS "in a manner to best provide benefits to the participants of the plan." (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1493.)

Under the PERL, CalPERS sets a retiree's benefit based on three factors: the retiree'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.

CalPERS determined Malkenhorst's final compensation after his retirement in 2005. In 2012, however, CalPERS determined that the final compensation it had been using for

1 Malkenhorst did not meet statutory requirements of the PERL. CalPERS then corrected its  
2 mistake as required by the PERL. (Govt. Code § 20160(b) ["[T]he board shall correct all  
3 actions taken as a result of errors or omissions of ... this system."]; see also, *Welch v.*  
4 *California State Teachers' Retirement Bd.* (2012) 203 Cal.App.4th 1, 27 [statutory history of  
5 Section 20160 indicates that "shall" means that CalPERS has a mandatory duty to act.]

6  
7 Malkenhorst appealed CalPERS' recalculation of his final compensation. In response,  
8 CalPERS initiated this administrative process by filing a Statement of Issues.

9 **III. THE STATEMENT OF ISSUES IS PROPER AND SUFFICIENT**

10 Malkenhorst contends the Statement of Issues was a nullity and that a formal accusation  
11 must be filed before an administrative hearing can occur. Not so. CalPERS regulations –  
12 specially, Section 555.2 – state the general rule that CalPERS initiates an administrative  
13 proceeding by filing a Statement of Issues. (2 CCR § 555.2 ["upon the filing of an appeal ...  
14 the Executive Officer shall execute a statement of issues."]) Another CalPERS regulation –  
15 Section 555.3 – provides the sole exception to the general rule: CalPERS must proceed by  
16 accusation for appeals involving disability retirements:

17 Any member whose retirement for disability has been requested by his  
18 employer shall be entitled to a hearing. The Executive Officer, upon  
19 determination that a member shall be retired for disability on such application,  
20 shall file an accusation and serve a copy thereof on the member and his  
21 employer.

22 (2 CCR § 555.3.)

23 Malkenhorst does not challenge the constitutionality or applicability of the CalPERS  
24 regulations. Therefore, because Malkenhorst's appeal does not involve a disability retirement,  
25 no accusation is required.

26  
27 Malkenhorst does not mention the CalPERS regulations that specifically apply to his  
28 appeal. Instead, he addresses a general APA regulation – Government Code section 11503 –  
that requires an accusation with respect to a hearing "to determine whether a right, authority,

1 license or privilege should be revoked, suspended, limited or conditioned....” (See Gov. Code  
2 § 11503.) Section 11503 is narrowly construed and typically applies only where an agency  
3 attempts to limit or revoke a professional license. (See *Owen v. Sands* (2009) 176 Cal.App.4th  
4 985, 995 [rejecting argument that state should have filed an accusation in connection with  
5 imposition of penalties against building contractor – penalties were not tantamount to a  
6 suspension or revocation of contractor’s license.]

7  
8 Section 11503 does not apply here for two reasons. First, it is a general regulation that  
9 is trumped by the more specific CalPERS regulation addressing accusations. (See *In re*  
10 *Alvarez* (2013) 222 Cal.App.4th 1064, 1085 [“a specific provision prevails over a general one  
11 relating to the same subject.”]) Second, Section 11503 doesn’t apply to the facts of  
12 Malkenhorst’s appeal. CalPERS has not restricted Malkenhorst’s “right” to receive a  
13 retirement allowance; it has only made a determination of the amount of the allowance  
14 permitted by the PERL. CalPERS’ statutory obligation to interpret and enforce the PERL is  
15 not similar to a restriction on a person’s right to seek professional employment.

16 Malkenhorst nonetheless contends that an accusation is required to provide “due  
17 process.” He asserts that the Statement of Issues fails to provide sufficient notice of the claims  
18 he is appealing and neglects to “identify ‘acts or omissions’ that CalPERS contends  
19 Malkenhorst has done....” (Motion at p. 5.) But contrary to Malkenhorst’s assertion, the  
20 Statement of Issues identifies all the PERL statutes relevant to the determination of his final  
21 compensation. The Statement of Issues does not identify Malkenhorst’s wrongful “acts or  
22 omissions” because they are not relevant to the final compensation calculation.

23  
24 **IV. CALPERS WILL PROVE COMPLIANCE WITH THE PERL**

25 CalPERS has the obligation to administer the retirement system in compliance with all  
26 applicable laws and regulations. This obligation extends to CalPERS’ determination of  
27 Malkenhorst’s final compensation. Thus, at the Hearing, CalPERS will prove, by a  
28 preponderance of the evidence, that it determined Malkenhorst’s final compensation in  
accordance with the PERL. CalPERS is prepared to “go first” at the Hearing to lay out its

1 evidence on the point. There is no truth to Malkenhorst's claim that "CalPERS attempts to  
2 shift the burden to Malkenhorst." (Motion at p. 4.)

3  
4 Malkenhorst also disputes the applicability of the "preponderance of the evidence"  
5 standard. This standard applies in every administrative action that "does not involve or affect a  
6 fundamental vested right." (*Ryan v. California Interscholastic Federation-San Diego Section*  
7 (2001) 94 Cal.App.4th 1048, 1077 ["it is for the administrative agency to weigh the  
8 preponderance of conflicting evidence."]; see also, Ev. Code § 115 ["Except as otherwise  
9 provided by law, the burden of proof requires proof by a preponderance of the evidence."])

10 A higher, "clear and convincing evidence" standard is used in administrative actions to  
11 restrict, suspend or revoke professional licenses. (*Owen v. Sands, supra*, 176 Cal.App.4th at p.  
12 989-990, 992 [in administrative hearing that could only result in civil penalties and could not  
13 have resulted in orders suspending, limiting, or revoking a professional license, "the  
14 preponderance of the evidence rather than the clear and convincing evidence standard of proof  
15 applied."]) "Because a professional license represents the licensee's fulfillment of extensive  
16 educational, training and testing requirements, the licensee has an extremely strong interest in  
17 retaining the license that he or she has expended so much effort in obtaining. It makes sense to  
18 require that a higher standard of proof be met in a proceeding to revoke or suspend such a  
19 license." (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive*  
20 *Repair* (2011) 201 Cal.App.4th 911, 916.)

21 Malkenhorst states, without explanation, that "a reduction in a vested pension is  
22 fundamentally the same as a limitation to a professional license." (Motion at p. 6.) In fact, the  
23 two are nothing alike. Unlike a professional license obtained through "extensive educational,  
24 training and testing requirements," the amount of Malkenhorst's initial retirement allowance  
25 was the result of a mistake – a mistake that CalPERS is required to fix pursuant to Government  
26 Code section 20160(b). Neither Malkenhorst nor any other retiree has a vested right to receive  
27 a benefit erroneously calculated under the PERL.  
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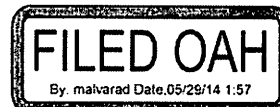
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2 DATED: May 21, 2014  
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STEPTOE & JOHNSON LLP

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5 By:  \_\_\_\_\_

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8 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 29, 2014, I served the following listed document(s), by method indicated below, on the parties in this action: **CALPERS' RESPONSE TO MALKENHORST'S MOTION "TO FORCE CALPERS TO PROCEED BY ACCUSATION, BEAR BURDEN OF PROOF AND BURDEN OF PERSUASION."**

**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.

**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](http://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.

**XX BY ELECTRONIC SERVICE**

**(to individual persons)**

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

**BY FACSIMILE**

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

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

☐ **FEDERAL** I declare under penalty of perjury under the laws of the United States that I am employed in the office of a member of the bar of this court at whose direction the service is made.

ELENA HERNANDEZ

Type or Print Name

Signature

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