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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 Compensation of:) CASE NO. 2012-0671
19 BRUCE MALKENHORST, SR.,)
20 Respondent,) OAH NO. 2013080917
21 and.) CALPERS' MOTION IN LIMINE
22 CITY OF VERNON,) TO EXCLUDE MALKENHORST'S
23 Respondent.) PROPOSED EXPERT WITNESSES
24)
25) Prehearing Conference Date:
26) June 13, 2014
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I. INTRODUCTION

This administrative proceeding concerns the calculation of Malkenhorst’s retirement allowance under the Public Employees’ Retirement Law (“the PERL,” Government Code Section 20000 et seq.). At the Hearing, both sides plan to introduce *non-expert* testimony and documents relative to the factors identified in the PERL as affecting retirement allowances, including “final compensation.” This motion addresses whether Malkenhorst may also present *expert* testimony at the Hearing.

Malkenhorst recently filed a list of witnesses he intends to present at the Hearing. Malkenhorst listed three purported experts, but provided no summary of the experts’ opinions or explanation of how those opinions might pertain to the PERL. Malkenhorst was required to provide this information by APA regulation and OAH order.

It is too late for Malkenhorst to make up for his omission. If Malkenhorst were to provide a supplemental designation, there would be no time left for CalPERS to challenge it by further motion in limine or to identify counter witnesses and exhibits. Accordingly, Malkenhorst’s experts should be excluded from the Hearing.

II. LEGAL BACKGROUND

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

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

- “Final compensation” is a function of the employee’s highest “compensation carnable.” (*Prentice, supra*, 157 Cal.App.4th at p. 989.)

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- “Compensation earnable” consists of a member’s “payrate” and “special compensation.” (*Id.* at 989-90, citing Gov. Code § 20636(a).)
- An employee’s “payrate” is the monthly amount of cash compensation received by the employee “pursuant to publicly available pay schedules.” (*Id.* at p. 990, citing Gov. Code § 20636(b)(1).)
- “Special compensation” is, generally, a “payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions,” but is “limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate.” (*Id.* at p. 990, citing Gov. Code § 20636(c).)

In sum, the amount of a retiree’s pension depends on final compensation, which in turn depends on compensation earnable, which itself is a function of payrate and special compensation.

Both Malkenhorst’s payrate and special compensation are in dispute. What is not in dispute is the amount of Malkenhorst’s “compensation.” A member’s retirement allowance is not based on the lay concept of “compensation,” which might include overtime, bonuses, or other valuable consideration not recognized by the PERL. Thus, it is quite common for CalPERS members to receive “compensation” from their employers that legally does not count towards a retirement benefit. (See *Molina v. CalPERS* (2011) 200 Cal.App.4th 53, 67 [CalPERS member “fails to recognize the important difference between the amount he was paid by Oxnard ... and the much narrower category of ‘compensation earnable’ that can be taken into account for pension purposes, as established under PERL.”])

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III. FACTUAL BACKGROUND

On April 17, 2014, the OAH issued its Amended Status and Trial Setting Conference Order (the “Order”). The Order required the parties to file a Joint Statement containing their witness lists, including, “a brief synopsis of the witness’s expected testimony.”

On May 19, 2014, the parties filed their Joint Statement. The Joint Statement included Malkenhorst’s witness list,¹ which identified three witnesses as experts:

1. Bob Adams, “[t]o testify as an expert re city manager/city administrator duties, compensation for city managers/city administrators.”
2. Joseph Tanner, “[t]o testify as an expert re city manager/city administrator duties, compensation for city managers/city administrators.”
3. James Niehaus, “[t]o testify as an expert re CalPERS policies and practices.”

IV. MALKENHORST’S EXPERTS SHOULD BE EXCLUDED

Administrative law judges “by virtue of their case management authority, are given broad discretion to manage the litigation on their dockets,” and may impose preclusionary sanctions against parties that violate lawful orders. (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 531, 561.) Moreover, administrative law judges may “exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.” (Gov. Code § 11513, subd. (f).) Both rules support an order precluding Malkenhorst’s experts from providing testimony at the Hearing.

Malkenhorst was required to comply with the OAH Order, which specified that witness designations were to include, “a brief synopsis of the witness’s expected testimony.” Malkenhorst did not comply. The Order also reminded the parties that the Administrative Procedures Act governs this proceeding. Under the APA, when a party serves its witness list, it

¹ See Exhibit 1.

1 must concurrently provide, “[t]he name and address of each expert witness the party intends to
2 call at the Hearing *along with a brief statement of the opinion the expert is expected to give*
3” (1 CCR § 1026(d)(5) [emphasis added].) Again, Malkenhorst did not comply.
4

5 Malkenhorst cannot claim that he simply overlooked his obligation to provide notice of
6 his experts’ opinions. Counsel for the parties expressly discussed the obligation several weeks
7 before the final witness lists were due.²

8 It may be that Malkenhorst plans on requesting permission to file belated expert witness
9 information. If so, the request should be denied. Any information now provided would come
10 too late for CalPERS to counter with its own experts or additional exhibits, or to move in
11 limine to exclude whatever specific opinions may be provided. In fact, it seems almost certain
12 that the experts’ opinions would be irrelevant, cumulative, and a waste of time. (Gov. Code §
13 11513, subs. (c) and (f).)

14 Bob Adams and Joseph Tanner both purport to be experts on the duties of city
15 administrators, as well as the compensation city administrators receive for performing those
16 duties. This area of expertise is simply irrelevant. The duties and pay of city administrators
17 other than Malkenhorst would not assist the OAH in determining Malkenhorst’s retirement
18 allowance. There is no need for evidence from one expert on these issues, much less two. In
19 addition, the entire issue of administrator compensation is irrelevant. As explained in *Molina*,
20 the amount a public agency pays to a CalPERS member has no bearing on the member’s
21 retirement allowance. The key, instead, is “final compensation,” a statutorily defined term on
22 which Malkenhorst’s witnesses do not have personal knowledge, expertise, or opinions.
23

24 James Niehaus is also incapable of providing relevant evidence. Niehaus purports to be
25 an expert on CalPERS policies, but Niehaus never held an executive position at CalPERS and
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28 ² See attached declarations of Jason Levin and Lisa Petrovsky, counsel for CalPERS.

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lacks the qualifications to say what was or wasn't a "policy" at CalPERS, or present opinions as to the meaning of those policies.

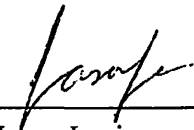
Malkenhorst failed to provide the opinions of his expert witnesses, as required. If he had done so, CalPERS would have been able to show that all the proffered expert opinions are inadmissible. Malkenhorst should not be provided a second chance to comply with the OAH Order when doing so will trigger further motion practice and threaten the long delayed Hearing.

V. CONCLUSION

For the reasons set forth above, the OAH should exclude from the Hearing any testimony from Bob Adams, Joseph Tanner, or James Niehaus.

DATED: May 29, 2014

STEPTOE & JOHNSON LLP

By: 
Jason Levin

Attorneys for Complainant CalPERS

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DECLARATION OF JASON LEVIN

1. I am an attorney licensed to practice before all the courts of the State of California and a partner of Steptoe & Johnson LLP, attorneys for CalPERS. I have personal knowledge of the facts set forth below, and would competently testify to those facts if called upon to do so.

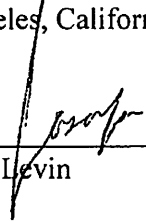
2. As ordered by the OAH, Malkenhorst and CalPERS exchanged their preliminary witness lists by April 23, 2014. Malkenhorst's list identified three expert witnesses, but did not describe their opinions.

3. The OAH ordered the parties to meet and confer on a final joint prehearing statement, which would include witness lists. The first of two meet and confer sessions took place on May 2, 2014. On that date, I participated in a telephone conference with John Jensen (counsel for Malkenhorst), Joung Yim (counsel for City of Vernon), and my colleague Lisa Petrovsky.

4. During the May 2, 2014 conference, I told Mr. Jensen that if he was going to designate expert witnesses, he also needed to describe the experts' opinions. Mr. Jensen responded to the effect that he would look into the issue.

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

Executed May 29, 2014 at Los Angeles, California.



Jason Levin

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DECLARATION OF LISA PETROVSKY

1. I am an attorney licensed to practice before all the courts of the State of California and an associate at Steptoe & Johnson LLP, attorneys for CalPERS. I have personal knowledge of the facts set forth below, and would competently testify to those facts if called upon to do so.

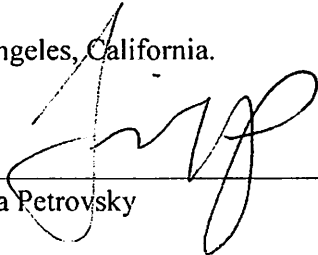
2. As ordered by the OAH, Malkenhorst and CalPERS exchanged their preliminary witness lists by April 23, 2014. Malkenhorst's list identified three expert witnesses, but did not describe their opinions.

3. The OAH ordered the parties to meet and confer on a final joint prehearing statement, which would include witness lists. The first of two meet and confer sessions took place on May 2, 2014. On that date, I participated in a telephone conference with John Jensen (counsel for Malkenhorst), Joung Yim (counsel for City of Vernon), and my colleague Jason Levin.

4. During the May 2, 2014 conference, I heard Mr. Levin tell Mr. Jensen that if he was going to designate expert witnesses, he also needed to describe the experts' opinions. Mr. Jensen responded to the effect that he would look into the issue.

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

Executed May 29, 2014 at Los Angeles, California.



Lisa Petrovsky

EXHIBIT “1”

Proposed Witness List
(Subject to revision)

| | | | | |
|----------------------------------------|--------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------|--|
| Carla Feldman (former Loeb attorney) | Percipient Witness | Authenticity of documents received by Loeb & Loeb and provided to others concerning CalPERS' 2005-2006 administrative process seeking to reduce the pension allowance of Malkenhorst, the issues raised in those proceedings, and the resolution of the dispute in Malkenhorst's favor in 2006. | | |
| Former Gov. Gray Davis (Loeb attorney) | Percipient Witness | Issues raised in the CalPERS' 2005-2006 administrative process seeking to reduce the pension allowance of Malkenhorst, and the resolution of the dispute in Malkenhorst's favor in 2006. | | |
| Alinda Heringer | Percipient | Authenticity of documents received by CalPERS and provided to others concerning CalPERS' 2005-2006 administrative process seeking to reduce the pension allowance of Malkenhorst, the issues raised in those proceedings and in prior CalPERS reviews or investigations, the resolution of the 2005-2006 dispute in Malkenhorst's favor in 2006; and the issues raised in the current administrative process. | | |
| Robert "Bob" Adams | Expert Witness | To testify as an expert re city manager/city administrator duties, compensation for city managers/city administrators. | X - Relevance; Vague; Lack of Qualification | |

Proposed Witness List
(Subject to revision)

| | | | | |
|---------------|----------------|------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------|--|
| Joseph Tanner | Expert Witness | To testify as an expert re city manager/city administrator duties, compensation for city managers/city administrators. | X - Relevance; Vague; Lack of Qualification | |
| James Niehaus | Expert Witness | To testify as an expert re CalPERS policies and practices | X - Relevance; Vague; Lack of Qualification | |



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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' MOTION IN LIMINE TO EXCLUDE MALKENHORST'S PROPOSED EXPERT WITNESSES.**

SEE ATTACHED SERVICE LIST

XX BY U.S. MAIL

By placing the original / x 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 delivery the envelope(s) to the offices at the address(es) set forth on the attached service list. The signed proof of service by the registered process server is attached.

XX STATE

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

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

SERVICE LIST



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