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9 BEFORE THE BOARD OF ADMINISTRATION

10 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

11 In Re the Matter of ) CALPERS CASE NO.:  
12 BRUCE V. MALKENHORST, SR and ) OAH CASE NO.: 2013080917  
13 CITY OF VERNON, ) **RESPONDENT MALKENHORST'S**  
14 Respondents. ) **REPLY IN SUPPORT OF MOTION TO**  
15 ) **DISMISS**  
16 )  
17 ) Prehearing Date: June 13, 2014, 9:00am  
18 ) Location: Los Angeles OAH

19 This *Reply* to the three opposition briefs filed by CalPERS is submitted in support of  
20 Malkenhorst's previous-filed *Objections and Challenges to CalPERS' and OAH's Jurisdiction or*  
21 *Authority* and the following related pleadings, all filed on October 11, 2013 and collectively  
22 deemed a *Motion to Dismiss* by the OAH:

- 23 1. *Demurrer;*
- 24 2. *Motion to Strike Statement of Issues;*
- 25 3. *Points and Authorities re Collateral Estoppel/Res Judicata;*
- 26 4. *Points and Authorities re Charter City Autonomy;* and
- 27 5. *Points and Authorities re Statute of Limitations and Laches.*

1 **I. INTRODUCTION**

2 CalPERS' opposition misstates the issues in Malkenhorst's *Motion to Dismiss*.

3 In attacking the basis of Malkenhorst's charter city arguments, CalPERS ignores that  
4 charter cities have the fundamental right to determine the compensation of municipal employees,  
5 including the normal monthly salary. CalPERS ignores that the PERL inherently defers to the  
6 employer to determine the normal monthly rate of pay or base pay of the member, including in  
7 the definition of "compensation earnable" in Section 20636. Under the "home rule" reservations  
8 and under the PERL, the employer determines the amount of normal monthly rate of pay in its  
9 negotiations with its employee. The intent and language of the PERL does not preempt the  
10 charter city employer's rights to determine the normal monthly pay rate, which also applies for  
11 pension purposes. The "pension administration" contract between Vernon and CalPERS does not  
12 independently transfer or delegate Vernon's reserved powers to determine the monthly base pay  
13 to CalPERS for pension purposes.

14 CalPERS also ignores that charter cities are empowered to determine the structure of  
15 local government and the job duties of its municipal employees. Vernon appointed Malkenhorst  
16 to a *single full-time position* (City Administrator) with multiple duties and responsibilities,  
17 pursuant to Vernon's *Charter* and numerous duly enacted ordinances and resolutions. Vernon  
18 paid Malkenhorst a single base salary as City Administrator and explicitly said he would receive  
19 no separate salary for any of his other duties. Vernon documented these decisions in publicly  
20 available and publicly enacted pay schedules, resolutions, and ordinances.

21 Without authority, CalPERS seeks to find that Malkenhorst worked "multiple positions"  
22 or "overtime". CalPERS fails to cite authority that would empower CalPERS to change the office  
23 structure or job duties of a municipal employee, contrary to decision of a charter city.

24 This hearing is barred by collateral estoppel/*res judicata*. CalPERS raised the identical  
25 issues in 2005, received facts and law in a quasi-judicial process from attorneys timely appealing  
26 on Malkenhorst's and Vernon's behalf, and then CalPERS made a final determination in  
27 Malkenhorst's favor ending the quasi-judicial process in August 2006. CalPERS cites old law  
28 that agencies are not barred by collateral estoppel if they were mistaken in law. But recent law

1 overrides *Aykward*. In addition, CalPERS has no statutory or other authority to reopen a decided  
2 matter. Current case law has decided that a retirement system's continuing jurisdiction is not  
3 sufficient authority to reopen a decided matter contrary to collateral estoppel or res judicata.

4 CalPERS also fails to accept that the three year statute of limitations in *Government Code*  
5 section 20164 applies to bar the commencement of this matter.

6 **II. CHARTER CITY AUTONOMY**

7 **A. Charter City Issues**

8 Under California Constitution, art XI, §§3(a) and 5(a)-(b), the City of Vernon has the  
9 "home rule" right to (1) determine the base pay compensation of municipal employees and (ii)  
10 determine the office structure of municipal government. A pension is a "manner" of  
11 compensation, a deferred form of compensation, protected by Vernon's home rule rights.

12 As a charter city with constitutional "home rule" rights, Vernon can independently  
13 determine its own governance structure (e.g. the nature and duties of its single City  
14 Administrator position) and the amount of compensation that it pays. Vernon paid its municipal  
15 employees a monthly salary in cash (the single base salary paid to Malkenhorst) which it  
16 intended to also apply for pension purposes. The Vernon City Council adopted pay resolutions  
17 periodically over time designating the compensation for the City Administrator position. The  
18 Vernon City Council adopted pay resolutions and ordinances periodically over time confirming  
19 or amending the job duties and responsibilities of the City Administrator. Vernon designated the  
20 City Administrator position as a single exempt managerial position in the Vernon city  
21 administration with numerous duties and responsibilities. Malkenhorst received a single base  
22 salary for full-time work as City Administrator, with no additional payment. Malkenhorst's base  
23 salary and longevity pay compensation were reported to CalPERS as the compensation paid for  
24 performing duties of the single full-time exempt position. Vernon did not transfer, delegate, or  
25 contract away its charter rights to CalPERS on any issues relating to pay, office structure, job  
26 duties, or related issues when it contracted with CalPERS to administer the pension benefits of  
27 its employees. The PERL does not preempt the charter city autonomy.

28 In attacking the basis of Malkenhorst's charter city arguments, CalPERS fails to

1 understand that the “compensation earnable” statute is a limitation on CalPERS’ powers to act,  
2 not an authorization to establish the amount of the pension. The amount of the pension flows  
3 from the compensation and employment decisions of the employer and the employee, not from  
4 the pension administrator. The employer is allowed to structure the job and pay such that the  
5 employer can establish the amount of the pension, and then fund that pension.

6 Essentially, CalPERS argues that “compensation earnable” allows CalPERS to determine  
7 the amount of the base pay to be used in the pension calculation, and thus interpose itself to  
8 retroactively reduce or determine the amount of the pension (as earned over the previous  
9 employment). CalPERS argues that it has the authority to ignore that Vernon designated certain  
10 job duties to the City Administrator, deemed it an exempt position, and instead designate  
11 different positions and determine that overtime would be paid.

12 But the statutory language in Section 20636 regarding “compensation earnable” is a  
13 definition, not a grant of rights to CalPERS. CalPERS has no power and no right to change  
14 Vernon's historic decisions and divide an exempt position into multiple parts for the purpose of  
15 reducing the base rate of a pension. In general, there is no indication that the Legislature intended  
16 to divorce the amount of the pension from the employer’s decision on how much to pay an  
17 employee on a normal monthly basis. If an agency presumptively satisfies the terms in the  
18 definition, then CalPERS has no right to challenge it, much less change it.

19 Aggressively seeking to expand its powers, CalPERS argues that what an agency pays or  
20 does is immaterial to CalPERS' independent determinations, and that “compensation earnable”  
21 provides CalPERS with the right to independently review and change the monthly salary, office  
22 decision, and other decisions as CalPERS sees fit, without reference to any outside evidence.  
23 Thus confused, CalPERS argues that (1) CalPERS is not bound by the term of a statute definition  
24 and (2) the employer can never satisfy the definitional terms on its own.

25 For purposes of this case, CalPERS argues that the charter city's rights to determine the  
26 compensation and office structure of the City Administrator position are irrelevant to the pension  
27 determination because CalPERS has interposed itself to determine that the monthly  
28 compensation amount is unrelated to “pay rate” in Section 20636. CalPERS fails to cite authority

1 that CalPERS is empowered to determine the amount of:

2 "Payrate" means the normal monthly rate of pay or base pay of the member paid  
3 in cash to similarly situated members of the same group or class of employment  
4 for services rendered on a full-time basis during normal working hours, pursuant  
to publicly available pay schedules." Gov. Code, § 20636.

5 The charter city employer (i) determines the normal monthly rate of pay; (ii) clearly pays  
6 the member in cash; and (iii) provides the publicly available pay schedule. As a charter city,  
7 Vernon's practices satisfied all of the requirements of the definition of "compensation earnable".  
8 The normal monthly salary rate is one of the core "municipal" issues protected by the charter city  
9 autonomy over "home rule" determinations. Vernon also satisfied the definition of "special  
10 compensation" when it appropriately awarded Malkenhorst the longevity pay. Vernon awarded  
11 Malkenhorst with the 25% longevity pay pursuant to the publicly approved ordinances and  
12 resolutions, and complied with all applicable requirements to have longevity pay included in the  
13 "compensation earnable" and "final compensation". Both the amount of the monthly pay rate and  
14 the amount of the special compensation are within Vernon's home rule autonomy, and CalPERS  
15 has no right or power to fail to accept them.

16 CalPERS' opposition omits any mention that it challenges Vernon's decisions on job  
17 duties and responsibilities. Pursuant to its charter, Vernon duly enacted many ordinance and  
18 resolutions that established the duties, responsibilities, and compensation of the City  
19 administrator. But in this hearing, CalPERS is asserting that Malkenhorst worked "multiple  
20 positions" or "overtime" contrary to the documentary evidence that Vernon appointed  
21 Malkenhorst to a *single full-time position* (City Administrator) with multiple duties and  
22 responsibilities. CalPERS has no authority to revise Vernon's decision on the office structure or  
23 job duties of a municipal employee, especially in contradiction to decision of a charter city.

24 **B. No Statutory Preemption**

25 The Public Employees' Retirement Law ("PERL") does not preempt charter city  
26 autonomy on matters of compensation and the structure of the sub-government. CalPERS argues  
27 that the PERL would preempt local municipal law, but fails to mention that the preemption only  
28 occurs if there is a direct conflict between contradictory municipal ordinance and a state-wide

1 law over the same subject matter. But for example, the PERL does not contain any statutes  
2 empowering CalPERS to determine the structure of local offices, job duties, or the amount of  
3 pay of a local official.

4 **C. No Preemption By Contract**

5 Vernon's charter and ordinances and other applicable law in existence were incorporated  
6 into the Vernon-CalPERS contract. Vernon's ordinances and the *City Code* allow Vernon to  
7 retain the right to designate the compensation to be received for that position, including the base  
8 rate of the pension (which it funded based on the base rate). Under the contract, Vernon's  
9 responsibility and obligation was to pay appropriate contributions as a percentage of the  
10 designated salaries in order to fund pensions in an amount corresponding to the salary.

11 The CalPERS-Vernon pension administration contract cannot delegate or preempt by  
12 agreement the reserved constitutional charter rights without Vernon also adopting the PERL or  
13 other restrictions in its ordinances or charter. The *Marsille* case is no longer good law, and was  
14 not even accepted by the court that made the decision originally. *Batters v. City of Santa Monica*  
15 (1980) 101 Cal.App.3d 595 and *Campbell v. City of Monrovia* (1978) 84 Cal.App.3d 341 rule  
16 that local entities establish the amount and nature of the underlying entitlement that also  
17 establishes the amount and nature of the consequential or resultant pension benefit. Although  
18 *Batters* and *Campbell* address the local agency's determination on the amount of sick leave, the  
19 legal principle that the local agency establishes the base pay or amount of the entitlement applies  
20 generally to other benefits and in particular compensation of a single job.

21 *Campbell* cites to the general proposition that the PERL applies to contracting agencies  
22 when there is a conflicting ordinance. But CalPERS does not have law or authority to challenge  
23 the structure of local government or the right of an agency to establish the base pay or pay rate of  
24 the pension. As CalPERS is without authority to determine or challenge Vernon's decisions  
25 under law, essentially CalPERS is inappropriately trying to act without legal basis and as such  
26 establishing a conflict with Vernon's charter authority.

27 **III. COLLATERAL ESTOPPEL AND RES JUDICATA**

28 **A. Collateral estoppel and Res Judicata**

1           **Res judicata and collateral estoppel apply to decisions of an administrative agency acting**  
2 **in a judicial capacity in resolving disputed issues of fact properly before it that the parties have**  
3 **had an adequate opportunity to litigate. (*United States v. Utah Const. & Mining Co.* (1966) 384**  
4 **US 394, 422, 86 S.Ct. 1545, 1560; *Astoria Fed. Sav. & Loan Ass'n v. Solimino* (1991) 501 US**  
5 **104, 107, 111 S.Ct. 2166, 2169.) CalPERS argues the opportunity to litigate standard applies**  
6 **only to individuals, not agencies. But California law holds that a government agency is barred by**  
7 **collateral estoppel if it had "an adequate opportunity to fully litigate their claims" in the first**  
8 **proceeding. That the agency failed to present evidence or otherwise participate at the hearing**  
9 **does not prove the contrary. The failure of a litigant to introduce relevant available evidence on**  
10 **an issue does not necessarily defeat a plea of collateral estoppel. (*Teitelbaum Furs, Inc. v.***  
11 ***Dominion Ins. Co., Ltd.* (1962) 58 Cal.2d 601, 607.) Even a judgment of default in a civil**  
12 **proceeding is "res judicata as to all issues aptly pleaded in the complaint and defendant is**  
13 **estopped from denying in a subsequent action any allegations contained in the former**  
14 **complaint." (*Fitzgerald v. Herzer* (1947) 78 Cal.App.2d 127, 132; *People v. Sims* (1982) 32**  
15 **Cal.3d 468, 481.)**

16           **CalPERS cites old cases like *Aylward* that found that collateral estoppel and res judicata**  
17 **did not apply where an agency acts without jurisdiction or an agency exceeded its subject matter**  
18 **jurisdiction, but in this case CalPERS acted within its subject matter jurisdiction in 2005-6.**

19           **Under law, this controversy meets all five threshold requirements to establish collateral**  
20 **estoppel against CalPERS: CalPERS asserts the same issues in 2012-2014 as it asserted in 2005-**  
21 **2006: CalPERS started a quasi-judicial process when it issued the appeal rights letter in 2005.**  
22 **Malkenhorst fully exercised his opportunity to litigate when an attorney filed the first and second**  
23 **"Notice of Appeal" on his behalf raising facts and law. CalPERS' staff had authority to make**  
24 **"final" decisions on the appeal without formal approval by the Board, under *Government Code***  
25 **section 20099 and the regulations. CalPERS staff's authority or apparent authority to finally**  
26 **determine claims supports collateral estoppel and *res judicata*. By its payment of past due**  
27 **monies and its determination letters, CalPERS' staff finally determined all of the issues raised in**  
28 **the 2005-2006 process in Malkenhorst's favor. Collateral estoppel and *res judicata* apply to bar**

1 re-litigation of all of the factual and legal issues that were raised or could have been raised in  
2 prior process. Malkenhrost can offensively assert collateral estoppel against an agency. (*Murray*  
3 *v. Alaska Airlines, Inc.* (2010) 50 Cal.4<sup>th</sup> 860.)

4 The issues were finally determined by CalPERS and its staff as they have the right and  
5 power to initiate quasi-judicial administrative processes and to make final pension  
6 determinations. (§§20099, 20123.) CalPERS had the power under statute to decide these issues,  
7 and decide whether to hold a hearing under the APA or not. (§§20123, 20134; *CCR*, §§555,  
8 555.4.)<sup>1</sup> The *only* reason the process ended early is because CalPERS formally and finally  
9 resolved the issues in Appellant's favor.

10 *Sims* explained that "[a]n issue is actually litigated '[w]hen [it] is *properly*  
11 *raised*, by the pleadings or otherwise, and is submitted for determination,  
12 and is *determined* .... A determination may be based on a *failure of ...*  
13 *proof ...*' (Rest.2d, Judgments (1982) § 27, com. d, p. 255, italics added.)  
14 (*Sims, supra*, 32 Cal.3d at p. 484, 186 Cal.Rptr. 77, 651 P.2d 321.)

15 **B. No Specific Statutory Authority to Reopen the case**

16 Generally, an administrative agency has no inherent authority to reconsider a final  
17 administrative decision. (*Heap v. City of Los Angeles* (1936) 6 Cal.2d 405, 407; *Olive Proration*  
18 *etc. Com. v. Agri. etc. Com.* (1941) 17 Cal.2d 204, 209; *Gutierrez v. Board of Retirement of Los*  
19 *Angeles County Employees Retirement Ass'n* (1998) 62 Cal.App.4th 745, 749, fn. 3.) The PERL  
20 does not contain a statute that would allow CalPERS to reopen the case, such as *Vehicle Code*  
21 section 13353.2(e) or *Unemployment Insurance Code* section 1960.

22 CalPERS relies on *Government Code* section 20160(b) Subject to subdivisions (c) and  
23 (d), the Board shall correct all actions taken as a result of errors or omissions of the university,  
24 any contracting agency, any state agency or department, or this system. (Gov. Code, § 20160.)

25 But Section 20160 is not authority to reopen a case. The county employees' retirement  
26 system has statutes almost identical to Sections 20160-20164 in *Government Code* section  
27 31541. "(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result

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28 <sup>1</sup> The APA would lead to a formal OAH hearing, the right to require testimony under  
oath, to cross examine witnesses, to introduce evidence and argument, to be heard before an  
ALJ, the issuance of an ALJ's *Proposed Decision*, preparation of an administrative record, and  
ultimately the right to appeal to the courts.



1 of errors or omissions of the county or district, or this system." (*Government Code*, §31541.)

2 Reviewing the statutory scheme to determine whether the retirement system had statutory  
3 authority to reopen a case contrary to collateral estoppel and res judicata, the *Gutierrez* court  
4 found that "Unless authorized by statute, an administrative agency acting in an adjudicatory  
5 capacity (as LACERA does when it decides whether to grant disability retirement benefits) may  
6 not in any event reconsider or reopen a decision. (*Heap v. City of Los Angeles, supra*, at 407;  
7 *Olive Proration etc. Com, supra*, at 209; *Gutierrez, supra*, at 749.<sup>2</sup>

8 **C. Public Interest exception**

9 CalPERS asserts that the public interest exception should exempt CalPERS from  
10 collateral estoppel and res judicata. But "[t]he public interest exception is an extremely narrow  
11 one; we emphasize that it is the exception, not the rule, and is only to be applied in exceptional  
12 circumstances. *Housing Authority v. Workers' Comp. Appeals Bd.* (1998) 60 Cal.App.4th 1076,  
13 1086.)

14 **IV. STATUTE OF LIMITATIONS**

15 **A. 3 year Statutory Time Limit Under 20160 as Incorporated by 20164**

16 CalPERS argues that under Section 20160 there is no time bar for correcting errors or  
17 omission, but ignores that 20160 (c) incorporate the 3 year time limitation of Section 20164, not  
18 only for actions, but also for adjustments pursuant to Section 20160, 20163, or 20532, or  
19 otherwise. Gov. Code, § 20164.

20 Gov. Code, § 20164(b) For the purposes of payments into or out of the retirement  
21 fund for adjustment of errors or omissions, whether pursuant to Section 20160,  
22

23  
24 <sup>2</sup> For example of two statutes that provide an agency the right to reopen cases See: (1)  
25 The Workers' Compensation Appeals Board shall have continuing jurisdiction over its  
26 determinations made under Section 21166 and may at any time within five years of the date of  
27 injury, upon notice and after an opportunity to be heard is given to the parties in interest, rescind,  
28 alter, or amend the determination, good cause appearing therefor. Gov. Code, § 2117 and (2)  
This power includes the right to review, grant or regrant, diminish, increase, or terminate, within  
the limits prescribed by this division, any compensation awarded, upon the grounds that the  
disability of the person in whose favor the award was made has either recurred, increased,  
diminished, or terminated.-Lab. Code, § 5803.

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20163, or 20532, or otherwise, the period of limitation of actions shall be three years.

Section 20160 does not omit a time period, but expressly refers to and incorporates the limitations in Section 20164.

Although CalPERS seeks to rely on the *City of Oakland* dicta that 20164 "actions" refers only to civil actions, the Court in that case expressly did not rule on that issue. In *City of Oakland*, the ALJ's decision, which was adopted by the Board, did not require anyone to pay any money; it merely reclassified the employees. (*City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 49.)

This case is fundamentally different as it seeks a repayment of moneys from Malkenhorst, whether brought in an administrative proceeding or a civil action

Since this proceeding is fundamentally a new case seeking to establish that CalPERS has made an erroneous payment to a member, it is barred under the general statute of limitation in 20160 and 20164, as well as the 3 year statute of limitations applicable to mistake.

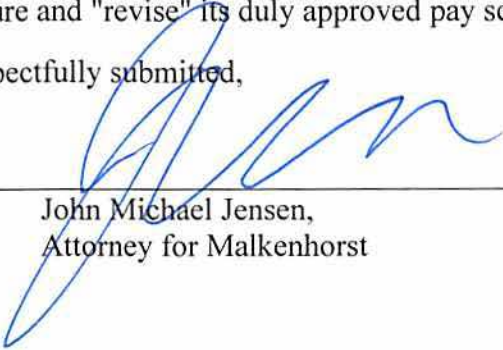
The PERL statutory scheme is clear that a 3 year statute of limitations bars the commencement of an administrative proceeding where the purpose of the action is to recover overpayments.

**V. CONCLUSION**

Nothing in the PERL grants CalPERS authority to act as ultimate arbiter of city employment decisions. Nothing gives CalPERS the power to reject Vernon's decisions, then "reorganize" Vernon's government structure and "revise" its duly approved pay schedules.

Respectfully submitted,

Dated: May 30, 2014

By:   
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John Michael Jensen,  
Attorney for Malkenhorst

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Law Offices of John Michael Jensen, 11500 W. Olympic Blvd., Suite 550, Los Angeles, CA 90064-1524.

On May 30, 2014, I served the following document(s) by the method indicated below:

Respondent Malkenhorst's Reply in Support of Motion to Dismiss

By placing the document(s) listed above in a sealed envelope(s) and consigning it First class mail through the U.S. Postal Service to the address (es) set forth below.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 30, 2014, at Los Angeles, California.

  
Griselda Montes De Oca