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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 OPPOSITION TO
)	MALKENHORST'S MOTIONS IN
and.)	LIMINE <u>NOS. 5 & 6</u>
)	
CITY OF VERNON,)	
)	Hearing: June 13, 2014, 9:00 a.m.
)	
Respondent.)	
)	
)	

MOTIONS IN LIMINE NOS. 5 & 6 SHOULD BE DENIED

While Malkenhorst was employed by the City of Vernon, he misappropriated public funds. Malkenhorst was caught, and in 2011, convicted of a felony. Malkenhorst now moves in limine to prevent CalPERS from attacking his credibility with the fact and circumstances of his felony conviction.

Witnesses who take the stand put their credibility at issue. (See *People v. Taylor* (1986) 180 Cal.App.3d 622, 631.) In assessing credibility, the trier of fact may consider a witness's character for honesty or veracity (or their opposites). (Ev.C. § 780(e).) Evidence Code section 788 provides that to attack a witness's credibility, "it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony...." (Evid. Code, § 788; see also, *Piscitelli v. Salesian Society* (2008) 166 Cal.App.4th 1, 6-7 ["Evidence that a witness has been convicted of a felony is admissible to attack the witness's credibility."])

Malkenhorst does not deny that under Section 788, his felony conviction may be used to impeach his credibility. Instead, he argues that evidence of his felony conviction should be excluded under Evidence Code section 352, which "allows the court to exclude evidence if its probative value is substantially outweighed by its prejudicial effect." (*Piscitelli, supra*, 166 Cal.App.4th at p. 7.) Under Section 352, "prejudicial" does not mean the evidence is damaging to a party's case. Instead, it means 'evoking an emotional response that has very little to do with the issue on which the evidence is offered.'" (*Id.* at p. 11.) "[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction." (*People v. Doolin* (2008) 45 Cal.4th 390, 439.)

Evidence of Malkenhorst's felony will not prejudice a jury because there will be no jury at the Hearing. Instead, the issues at the Hearing will be decided by an ALJ, whose experience and training will serve as a bulwark against inflamed emotions. The ALJ will also be able to determine the probative value of Malkenhorst's conviction for misappropriating money from

1 the City. The ALJ will listen to Malkenhorst's testimony and decide whether he is credible, or
2 whether he is shading the truth to similarly "misappropriate" a public pension to which he is
3 not entitled.

4
5 In sum, evidence of Malkenhorst's felony is relative, probative, and non-prejudicial.
6 The fact of the felony is admissible, as well as the circumstances of the crime, which are
7 described in a report prepared by the City of Vernon. Malkenhorst contends the report is
8 inadmissible hearsay, but that's not the case. The report is subject to the official record
9 exception to the hearsay rule. (See Evid. Code, § 1280.) In any event, hearsay evidence is
10 admissible "for the purpose of supplementing or explaining other evidence." (Gov. Code, §
11 11513(d).) Here, the City's report would be used to supplement and explain the fact of
12 Malkenhorst's felony conviction and his lack of credibility.

13 For the reasons set forth above, if Malkenhorst testifies at the Hearing, he must be
14 prepared to have his credibility attacked through the fact and circumstances of his felony
15 conviction. The Motions should be denied.

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17 DATED: June 9, 2014

STEPTOE & JOHNSON LLP

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20 By:  _____

Jason Levin

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22 Attorneys for Complainant CalPERS
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