

BEFORE THE
BOARD OF ADMINISTRATION OF THE
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Calculation of Final
Compensation of:

BRUCE MALKENHORST, SR.,

Respondent,

and

CITY OF VERNON,

Respondent.

Case No. 2012-0671

OAH No. 2013080917

ORDER RE PRE-TRIAL MOTIONS

On June 13, 2014, a Prehearing Conference and motion hearing was held before Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, at Los Angeles, California.

Jason Levin, Attorney at Law, represented complainant California Public Employees' Retirement System (CalPERS). John Jensen, Attorney at Law, represented respondent Bruce Malkenhorst, Sr. Joung Yim, Attorney at Law, represented respondent City of Vernon.

Respondent Malkenhorst and complainant filed pre-trial motions. This ruling is issued at this time in order to allow the parties to efficiently prepare for hearing.

RESPONDENT MALKENHORST'S PRE-TRIAL MOTIONS

1. Motion in Limine (#1) to Exclude All Evidence That Would Support a Reduction in Malkenhorst's Pension. **Ruling: Denied**, for reasons stated at hearing and set forth in the opposing papers. **But see** ruling on respondent Malkenhorst's motion to force CalPERS to proceed by Accusation, at paragraph 14, below.

2. Motion in Limine (#2) to Exclude All Irrelevant Testimony and Evidence That Does Not Relate to the Issues CalPERS is Proceeding On. **Ruling: Denied**, for reasons stated at hearing and set forth in the opposing papers.

3. Motion in Limine (#3) to Restrict the Testimony of CalPERS Witnesses Tomi Jimenez, Lolita Lueras, Margaret Junker, and Chris Wall. **Ruling: Denied**, for reasons stated at hearing and set forth in the opposing papers.

4. Motion in Limine (#4) to Restrict the Testimony of CalPERS Witness Joaquin Leon. **Ruling: Denied**, for reasons stated at hearing and set forth in the opposing papers.

5. Motion in Limine (#5) to Exclude Evidence of Prior Felony Conviction. **Ruling: Denied**, for reasons stated at hearing and set forth in the opposing papers.

6. Motion in Limine (#6) to Exclude CalPERS's Proposed Exhibit 66, 9/3/04 "Report on City Administrator's Misappropriation of Public Funds Through the Misuse of the City Petty Cash and the Credit Card Processes." **Ruling: Denied, without prejudice; respondent may renew the motion if and when CalPERS seeks to use the exhibit at hearing or move it into evidence.**

7. Motion in Limine (#7) re Discovery Violations and Barring Use of ADP Payroll Reports. **Ruling: Denied**, for reasons stated at hearing and set forth in the opposing papers.

8. Motion in Limine (#8) to Take Records Deposition of ADP, aka Automatic Data Processing, Inc. **Ruling: Granted.** If respondent City of Vernon does not produce pages apparently missing from ADP records provided by the City of Vernon to CalPERS by June 20, 2014, then respondent Malkenhorst may seek to depose ADP by means of a subpoena duces tecum; any such deposition is to take place by July 31, 2014.

9. Motion in Limine (#9) to Admit Court Pleadings and Records. **Ruling: Denied**, for reasons stated at hearing and set forth in the opposing papers.

10. Motion in Limine (#10) to Exclude All Evidence and Testimony that Violates the Parol Evidence Rule. **Ruling: Denied**, for reasons stated at hearing and set forth in the opposing papers.

11. Motion in Limine (#11) to Exclude All Evidence and Testimony Subject to Judicial Estoppel by Prior Filings in the 2005-2006 Administrative Process. **Ruling: Denied**, for reasons stated at hearing and set forth in the opposing papers.

12. Motion in Limine (#12) to Exclude All Testimony and Evidence that Lacks Foundation, Constitutes Hearsay, Is Irrelevant, or Contains Inappropriate Opinion or Conclusion. **Ruling: Denied**, for reasons stated at hearing and set forth in the opposing papers.

13. Motion re CalPERS's Alleged Right to Recoup Past "Pension Overpayments" from Respondent, and if so, the Time Period for Which Such "Overpayments" May Be Sought. **Ruling: Denied, without prejudice.** The parties may address this issue during the course of the hearing and in their closing briefs.

14. Motion to Force CalPERS to Proceed by Accusation and Bear the Burden of Proof. **Ruling: Denied, in part.** Complainant may proceed by way of the Statement of Issues, for the reasons stated at hearing and in the opposing papers. Complainant, however, has stipulated, and **it is hereby ordered**, that CalPERS has the burden of proof, by a preponderance of the evidence, and shall present its case first at hearing.

COMPLAINANT CALPERS'S MOTIONS IN LIMINE

1. Motion in Limine to Exclude From Evidence Pleadings in Other Litigation. **Ruling: Granted**, for reasons stated at hearing and set forth in the moving papers. (See ruling on respondent Malkenhorst's related motion, at paragraph 14, above.)

2. Motion in Limine to Exclude Malkenhorst's Proposed Expert Witnesses. **Ruling: Denied**, for reasons stated at hearing and set forth in the opposing papers. But respondent Malkenhorst's description of the subject matter of these witnesses' testimony, in the Joint Prehearing Conference Statement, is inadequate. Respondent Malkenhorst shall make a more thorough disclosure in compliance with the Prehearing Conference Order.

NON-PARTY'S MOTION FOR PROTECTIVE ORDER

Non-Party Gov. Gray Davis's Motion for a Protective Order re Subpoena Service by Respondent Bruce V. Malkenhorst, Sr. **Ruling: Granted**, for the reasons stated in the moving papers and declarations attached thereto. Further, to the extent respondent seeks testimony from Gov. Davis as to his understanding of the legal nature of CalPERS's determination of respondent's final compensation and whether it constituted an "adjudication," such testimony is not relevant to the issues presented for hearing. **Whether CalPERS's determination was an "adjudication" is a question of law and is not dependent on the beliefs of counsel for the parties involved in the process leading to that determination.** (With respect to testimony on this subject, the privilege attaching to attorney-client communications and the protections afforded to attorney work-product will apply in this matter and were addressed in the February 19, 2014, Order on Motions for Protective Order.)

IT IS SO ORDERED this 18th day of June 2014.



HOWARD W. COHEN
Administrative Law Judge
Office of Administrative Hearings