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15 **BOARD OF ADMINISTRATION**
16 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**
17 **STATE OF CALIFORNIA**

18 In the Matter of the Calculation of Final
19 Compensation of:

20 BRUCE MALKENHORST, SR.,

21 Respondent,

22 and.

23 CITY OF VERNON,

24 Respondent.

) **CASE NO. 2012-0671**
)
) **OAH NO. 2013080917**
)
) **CALPERS' OPPOSITION TO**
) **MALKENHORST'S MOTIONS**
) **CONCERNING ADP PAYROLL**
) **RECORDS AND DISCOVERY**
) **SANCTIONS**
)
)
)

1 saw from these payroll records and other documents that Malkenhorst had not been a full-time
2 City Administrator/City Clerk, as had been reported by the City, CalPERS was compelled by
3 law to reduce Malkenhorst's retirement allowance. In large part, this was because the City of
4 Vernon lacked publicly available pay schedules for the positions, like Light & Power
5 Administrator, in which Malkenhorst had been working.

6 It is no surprise Malkenhorst would like the ADP records excluded from the Hearing
7 because they offer such clear and strong evidence against him. But Malkenhorst's stated
8 grounds for having the ADP records excluded are legally baseless.

9
10 **II. SOME OF MALKENHORST'S PAYROLL RECORDS ARE MISSING**

11 In 2011 and 2012, CalPERS, conducted an audit of the City of Vernon, and as part of
12 that audit, CalPERS asked for and received the City's ADP records. ADP had done the City's
13 payroll, every two weeks, from approximately April 2004 through Malkenhorst's retirement in
14 July 2005.

15 Later, in connection with his administrative appeal, Malkenhorst asked CalPERS for
16 documents concerning his employment at the City of Vernon. CalPERS re-produced to
17 Malkenhorst all the ADP records concerning him that it had received from the City of Vernon.
18 CalPERS withheld nothing. (See Ex. 2, attached Declaration of Anne-Marie Trout.)

19 Malkenhorst now points out that the set of ADP payroll records he received from
20 CalPERS is incomplete. The state of the ADP records is as follows:

21 **2004 ADP Records:** 13 out of 19 payroll records for Malkenhorst have been produced.

22 **2005 ADP Records:** 15 out of 15 payroll records for Malkenhorst have been produced.

23 CalPERS does not know why six payroll records for Malkenhorst are missing, but
24 CalPERS does not have them, has never seen them, and does not know why they are missing.
25 (See Exh. 2, attached Declaration of Anne-Marie Trout.)

26 ///

27 ///

28 ///

1 **III. THE OAH SHOULD DENY MALKENHORST'S MOTION TO EXCLUDE THE**
2 **PAYROLL RECORDS FROM EVIDENCE**

3 Malkenhorst argues that CalPERS should not be able to rely upon *any* of the ADP
4 records because Malkenhorst has not received *all* of them – he says he is missing 6 payroll
5 entries for Malkenhorst. This leads Malkenhorst to jump to the conclusion that he has been the
6 victim of “intentional and selective omission or destruction of evidence.” This conclusion is
7 insulting and unnecessary. There is no evidence that anyone withheld or destroyed evidence –
8 Malkenhorst has what CalPERS has.

9 Malkenhorst goes on to argue that the missing payroll records are *needed* because
10 without them, the OAH will be presented with a “misleading” picture, thereby creating a
11 substantial danger of undue prejudice. But how exactly are the existing ADP records
12 misleading? All the ADP records located thus far demonstrate the same thing – Malkenhorst
13 worked in several City of Vernon departments. Malkenhorst has provided no reason to believe
14 that the missing payroll records would not provide more of the same.

15 Finally, Malkenhorst objects that the ADP records lack foundation and are hearsay. The
16 necessary foundation will be provided at the Hearing, and it will show that the ADP records are
17 City of Vernon business records, thereby satisfying a hearsay exception. Moreover, the OAH
18 may admit hearsay evidence “for the purpose of supplementing or explaining other evidence.”
19 (Gov. Code, § 11513(d).)

20 For the above reasons, Malkenhorst’s discovery and sanctions motions should be
21 denied.

22
23 DATED: August 12, 2014

STEPTOE & JOHNSON LLP

24
25 By: _____
26

Jason Levin

Attorneys for Complainant CalPERS
27
28

Exhibit 1

PERSONNEL	HOURS			EARNINGS			GROSS	STATUTORY DEDUCTIONS		VOLUNTARY DEDUCTIONS			NET PAY
	Reg	O/T	Hours 3&4	Reg	O/T	Earnings 3&4		Earnings 5	Federal	State/Local			
MALKENHORST, BRUCE V.			920.00 53			234,217.83	53			44,128.00	M- I	RAT1PR	
File: 000108								234,217.83	70,701.01	FIT	16,601.14	CA	
Dept: 001002											.93	M- S SURV	
Rate: 254.5846													Adjustment <input type="checkbox"/>
													Void
													PP 00000157
													146,915.68
Dept: 001002			1000.00 12			254,584.60	12				44,128.00	M- I	RAT1PR
Rate: 254.5846								254,584.60	77,829.38	FIT	18,495.25	CA	
											.93	M- S SURV	
													Adjustment <input type="checkbox"/>
													Void
													PP 00000156
													158,259.97
Dept: 001002		4.00				1,018.34							
Rate: 254.5846													
Dept: 001003		4.00				1,018.34							
Rate: 254.5846													
Dept: 001004		4.00				1,018.34							
Rate: 254.5846													
Dept: 001015		4.00				1,018.34							
Rate: 254.5846													
Dept: 001018		4.00				1,018.34							
Rate: 254.5846													
Dept: 001022		4.00				1,018.34							
Rate: 254.5846													
Dept: 005600		4.00				1,018.34							
Rate: 254.5846													
Dept: 009000		52.00				13,238.40							
Rate: 254.5846													
											1425.67	N- C CITY	
											20,366.78	N- H PERNS	
											44,128.00	N- I RAT1PR	
											392.26	N- R ERRPES	
											.93	N- S SURV	
											1425.67	N- T 7OFLN1	
											1833.01	N- V 9OFLN1	
											20,366.78	N- X	
						20,366.78			5,823.85	FIT	1,703.18	CA	
											9970.66	W CHECK	
											2869.09	X CHECK	
													Voucher# **
													260005 <input type="checkbox"/>
													Pay 3
													.00

REG

DEPT#	DEPARTMENT NAME
1001	CITY COUNCIL
1002	CITY ADMINISTRATION
1003	CITY CLERK
1004	FINANCE
1006	FINANCE ADMIN/INTERNAL INVESTIGATORY AUDITOR
1014	ELECTIONS
1015	TREASURER
1018	PERSONNEL
1021	EMPLOYEE RELATIONS
1022	REDEVELOPMENT
1023	INDUSTRIAL DEVELOPMENT
1024	CITY ATTORNEY
1025	INSURANCE
1027	COMMUNICATIONS
1029	LIBRARY
1031	POLICE
1032	PRISONER CARE
1033	FIRE
1036	CIVIL DEFENSE
1040	ADMINISTRATIVE, ENGINEERING & PLANNING
1041	BUILDING REGULATIONS
1042	STREET LIGHTING
1043	STREET OPERATIONS
1046	GARAGE
1047	WAREHOUSE
1048	MUNICIPAL HOUSING
1049	GENERAL GOVERNMENT BUILDING
1057	FIBER OPTICS
1060	HEALTH
1061	HEALTH-SOLID WASTE
1084	WATER
1890	AB1890 ENERGY MANAGEMENT
5095	PARCEL TAX
5600	GAS
6033	HAZARDOUS MATERIAL - FIRE
6043	HAZARDOUS WASTE - STREET
6060	HAZARDOUS WASTE - HEALTH
7100	CUSTOMER SERVICE
8000	FIELD OPERATIONS
8100	SYSTEM DISPATCH
8200	POWER PLANT OPERATIONS
8300	ELECTRICAL TRANSMISSION & DISTRIBUTION
8400	ELECTRICAL SUBSTATION
9000	L&P ADMINISTRATION
9019	INFORMATION TECHNOLOGY
9100	L&P ENGINEERING
9200	RESOURCES PLANNING

Exhibit 2

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) **CASE NO. 2012-0671**
)
) **OAH NO. 2013080917**
)
) **DECLARATION OF ANNE-MARIE**
) **TROUT**

DECLARATION OF ANNE-MARIE TROUT

1
2 1. I have personal knowledge of the matters in this declaration, and if called as a
3 witness, I would testify to their truth under penalty of perjury.

4 2. I am an Associate Governmental Program Analyst for the California Public
5 Employees' Retirement System (CalPERS). My duties include coordinating responses to Public
6 Records Act requests received by CalPERS, which entails working collaboratively with other
7 CalPERS branches and divisions to ensure timely processing and disclosure of requested
8 materials.

9 3. In 2011 and 2012, CalPERS conducted an audit of the City of Vernon. As part of
10 that audit, CalPERS asked for and received copies of the City's payroll records. The City
11 produced its payroll records in electronic format.

12 4. Subsequently, in connection with his administrative appeal, Malkenhorst asked
13 CalPERS for all documents concerning CalPERS' audit of the City of Vernon issued in April
14 2012, which refer or relate in any way to Bruce V. Malkenhorst, Sr. I was responsible for
15 gathering together documents to provide to Malkenhorst. I decided that the most efficient way to
16 respond was to re-produce to Malkenhorst the documents CalPERS had received from the City,
17 excluding only those records that did not concern Malkenhorst. I did not withhold from the
18 production any documents that bore Malkenhorst's name.

19 5. I understand that CalPERS' production of documents to Malkenhorst contained
20 many but not all of his ADP payroll records. If so, this must be because the missing payroll
21 records were not among the documents CalPERS received from the City of Vernon.

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

24 Executed August 12, 2014 at Sacramento, California.

25
26
27
28

Anne-Marie Trout

PROOF OF SERVICE
F.R.C.P. 5 / C.C.P. § 1013a(3)/ Cal. R. Ct. R. 2.260

I am a resident of, or employed in, the County of Los Angeles. 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 August 12, 2014, I served the following listed document(s), by method indicated below, on the parties in this action: **(NAME OF DOCUMENT)**

SEE ATTACHED SERVICE LIST

BY U.S. MAIL

By placing 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 LLP, 633 West Fifth Street, Suite 700, Los Angeles, California 90071, following ordinary business practices. I am readily familiar with Steptoe & Johnson LLP's practice for collection and processing of documents for mailing. Under that practice, the document is deposited with the United States Postal Service on the same day as it is collected and processed for mailing in the ordinary course of business.

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, from the email address _____@steptoe.com, at approximately _____. To my knowledge, the transmission was reported as complete and without error.

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, who received these documents at 633 W. Fifth Street, Suite 700, Los Angeles, California, 90071.

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 PERSONAL SERVICE

- By personally delivering and handing the document(s) listed above to the person(s) identified on the attached service list.
- By personally delivering the document(s) listed above to the office address(es) as shown on the attached service list and leaving said document(s) with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office(s).
- By personally delivering the document(s) listed above to the address(es) as shown on the attached service list and leaving said document(s) with someone of suitable age and discretion residing at said address(es).

BY FACSIMILE

By transmitting the document(s) listed above from Steptoe & Johnson LLP 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, or as a courtesy to the parties.

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

Executed on August 12, 2014 at Los Angeles, California.

Sandra Fleck
Type or Print Name

Signature

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CalPERS Legal Office