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14 BEFORE THE BOARD OF ADMINISTRATION
15 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

16 In re the retirement benefits of
17 BRUCE V. MALKENHORST, SR. and
18 CITY OF VERNON,
19 Respondents.

CALPERS CASE NO.: 2012-0671
OAH CASE NO.: 2013080917
**CITY OF VERNON'S OPPOSITION TO
BRUCE MALKENHORST'S MOTION TO
"AMEND NOTICE OF DEFENSE"**

21 I. INTRODUCTION

22 Bruce Malkenhorst Sr.'s administrative appeal concerns the final determination of his
23 retirement allowance – under the Public Employees' Retirement Law (the "PERL") Government
24 Code §§ 2000 et seq. – from the California Public Employees' Retirement System (CalPERS).
25 With his Motion to Amend Notice of Defense ("Motion"), Malkenhorst attempts to obfuscate the
26 sole issue before this tribunal by requesting that it exceed its jurisdiction and adjudicate his
27 private breach of contract claims against the City of Vernon. These claims have nothing to do
28

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1 with CalPERS' final determination or application of the PERL. Because it is not supported by law
2 or equity and would only confuse the pertinent issue of this proceeding, the Motion should be
3 denied.

4 **II. MALKENHORST HAS NO STATUTORY BASIS FOR AMENDING HIS NOTICE**
5 **OF DEFENSE.**

6 Government Code section 11506, subdivision (a) states, in pertinent part, "[w]ithin 15
7 days after service of the accusation...the respondent may file with the agency a notice of
8 defense." Subdivision (b) of section 11506 allows a respondent to file one or more notices of
9 defense, "**within the time specified.**" (Emphasis added.) Further, while Government Code
10 section 11507 permits an agency to amend or supplement its accusations, it does not allow a
11 respondent to file an amended notice of defense.

12 In his Motion, Malkenhorst cites to sections 11506 and 11507 for authority to file his
13 amended notice. Neither of these statutes permits him to file an amended notice of defense more
14 than fifteen days after any filed accusation. Moreover, CalPERS never filed an "accusation" in
15 this matter; it only filed a Statement of Issues. Accordingly, Plaintiff lacked statutory authority to
16 file a notice of defense in the first place, let alone an amendment.

17 **III. PLAINTIFF MISTATES THE SUPERIOR COURT'S RULING.**

18 Malkenhorst misinterprets the ruling of the California Superior Court in his civil lawsuit
19 against the City of Vernon. The Superior Court sustained the City's demurrer to Malkenhorst's
20 complaint because he had "failed to exhaust his available administrative remedy for challenging
21 CalPERS adverse pension determination." The Court did not (and could not) order the OAH to
22 expand its jurisdiction and rule on Mr. Malkenhorst's breach of contract claim against the City.
23 Rather, the Court unambiguously ruled that Plaintiff had to effectuate his available administrative
24 appeal regarding CalPERS determination of his final retirement compensation amount **before** he
25 can bring a lawsuit against the City of Vernon for breach of contract:

26 As noted, the administrative process has not concluded. Whether plaintiff
27 [Malkenhorst] has a 'contract right or other common law, constitutional, or
28 statutory claim' against the City must await the conclusion of the administrative
process.

1 (See Exhibit "A," p. 3, Ruling on Demurrer, Malkenhorst's Motion to Amend Notice of Defense.)

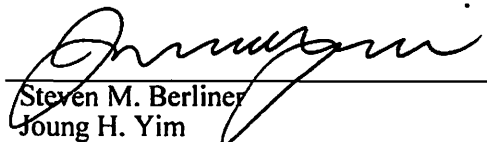
2 Indeed, there is no order that would preclude Malkenhorst from re-filing his breach of contract
3 claim against the City after the administrative process has been fully exhausted..

4 **IV. CONCLUSION**

5 For the reasons stated herein the OAH should deny Plaintiff's motion to amend his notice
6 of defense.

7 Dated: August 18, 2014

LIEBERT CASSIDY WHITMORE

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10 By: 
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: **6033 West Century Boulevard, 5th Floor, Los Angeles, California 90045.**

On August 18, 2014, I served the foregoing document(s) described as **CITY OF VERNON'S OPPOSITION TO BRUCE MALKENHORST'S MOTION TO "AMEND NOTICE OF DEFENSE"** in the manner checked below on all interested parties in this action addressed as follows:

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(BY U.S. MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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Executed on **August 18, 2014**, at Los Angeles, California.

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


Sharon Y. Fung

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