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9 Attorneys for
10 California Public Employees'
11 Retirement System (CalPERS)

12 **BOARD OF ADMINISTRATION**
13 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**
14 **STATE OF CALIFORNIA**

15 In the Matter of the Calculation of Final
16 Compensation of:

17 BRUCE MALKENHORST, SR.,

18 Respondent,

19 and.

20 CITY OF VERNON,

21 Respondent.
22
23
24

) **CASE NO. 2012-0671**

) **OAH NO. 2013080917**

) **CALPERS' TRIAL BRIEF AND**
) **DESCRIPTION OF TECHNICAL**
) **TERMS**

) **Hearing Dates: August 25-27, 2014**
) **September 3-4, 2014**
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I. INTRODUCTION

This administrative proceeding concerns the determination of Malkenhorst's retirement allowance under the Public Employees' Retirement Law (Government Code section 20000, et seq.).¹ Under the PERL, CalPERS sets a retiree's benefit based on three factors: the retiree's credited years of service, final compensation, and age at retirement. (See, *Prentice v. Board of Administration* (2007) 57 Cal.App.4th 983, 989.) Of these three factors, only the amount of Malkenhorst's final compensation is in dispute.

"Final compensation" is a function of the employee's highest "compensation earnable." (*Prentice*, 57 Cal.App.4th at p. 989.) Compensation earnable consists of a member's "payrate" and "special compensation." "To summarize, a participant's specific pension benefit depends on 'final compensation,' which will not increase without a rise in 'payrate' or 'special compensation.'" (*Molina v. Board of Admin., California Public Employees' Retirement System* (2011) 200 Cal.App.4th 53, 66.)

Here, Malkenhorst's retirement allowance depends on his "payrate" and "special compensation" while employed by the City of Vernon. Both "payrate" and "special compensation" are in dispute.

II. PAYRATE

A. Definition of Payrate

"Payrate" is defined Government Code section 20636(b)(1). A copy of Section 20636 is attached as Exhibit 1.

For public employees like Malkenhorst, Section 20636(b)(1) defines payrate as: "**the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly**

¹ All further statutory references will be to the Government Code unless otherwise specified.

1 **available pay schedules, for services rendered on a full-time basis”** This definition
2 raises three factual issues that will be addressed at the Hearing:

3 1) What were the services Malkenhorst provided on a full-time basis?

4 2) What was Malkenhorst’s “rate of pay” for the services he provided on a full-time
5 basis?

6 3) Were the services, and the “rate of pay” for those services, declared in a publicly
7 available pay schedule?

8
9 **B. “Full-time” Employment; Overtime**

10 Each public employer may define what it means to be “full-time.” The evidence will
11 show that the City of Vernon defined “full-time” to mean 40-hour work weeks.

12 Pursuant to Section 20635, pay related to services in excess of “full-time” is deemed
13 overtime and does not count towards a member’s final compensation or retirement benefit.
14 Section 20635 provides in pertinent part: “When the compensation of a member is a factor in
15 any computation to be made under this part, there shall be excluded from those computations
16 any compensation based on overtime put in by a member whose service retirement allowance is
17 a fixed percentage of final compensation for each year of credited service....”

18 A copy of Section 20635 is attached as Exhibit 2.

19 **C. Publicly Available Pay Schedules**

20 A rate of pay is deemed “publicly available” if it meets the criteria listed in 2 CCR §
21 570.5. A copy of 2 CCR §570.5 is attached as Exhibit 3.

22 A rate of pay that has not been made “publicly available” does not count towards a
23 member’s final compensation or retirement benefit. (*Prentice*, 57 Cal.App.4th at pp. 994-996.)
24 If a rate of pay has not been made “publicly available,” “the Board, in its sole discretion, may
25 determine an amount that will be considered to be payrate, taking into consideration all
26 information it deems relevant....” 2 CCR §570.5(b).
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1 **D. What the Evidence will Show**

2 Malkenhorst held several positions with the City of Vernon, including City
3 Administrator/City Clerk, City Treasurer, Personnel Director, and CEO of the City Light &
4 Power Department. There is limited evidence as to the number of hours Malkenhorst spent in
5 all or any one of these positions. Moreover, the rate of pay for only one of these positions –
6 City Administrator/City Clerk – was specified in a publicly available pay schedule. As a result,
7 CalPERS could not calculate Malkenhorst's payrate by the usual means. CalPERS, therefore,
8 set Malkenhorst's payrate based on "all information it deems relevant," as required by 2 CCR
9 §570.5.
10

11
12 **III. SPECIAL COMPENSATION**

13 **A. Definition of Special Compensation**

14 "Special compensation" is defined by Section 20636(c). (See Exh. 1.) Special
15 compensation includes payment for "special skills, knowledge, [and] abilities," as long as such
16 payment does not exceed the amount paid "to similarly situated members of a group or class of
17 employment." "If an individual is not part of a group or class, special compensation shall be
18 limited to that which the board determines is received by similarly situated members in the
19 closest related group or class..." (*Prentice*, 57 Cal.App.4th at pp. 990, citing §20636(c).)
20 Longevity pay – additional compensation paid to employees who have been with an employer
21 for a certain minimum period – can be a legitimate item of special compensation.
22

23 **B. What the Evidence will Show**

24 Malkenhorst received longevity pay from the City of Vernon: a 25% bonus after 25
25 years of service. However, similarly situated employees of City of Vernon were only entitled to
26 a 20% bonus upon 25 years of service. Thus, as CalPERS will explain, Malkenhorst's final
27 compensation could not reflect more than the 20% figure.
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2 **IV. AUTHORITY FOR CORRECTING MALKENHORST'S**
3 **RETIREMENT ALLOWANCE**

4 Malkenhorst retired effective July 1, 2005. In 2006, CalPERS decided Malkenhorst's
5 "final compensation" as of the date of his retirement. In May 2012, following an audit of the
6 City of Vernon's records, CalPERS reevaluated and corrected Malkenhorst's "final
7 compensation" because it did not meet the requirements of the PERL.

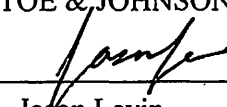
8 Government Code section 20160 outlines the criteria for correcting errors and
9 omissions. A copy of Section 20160 is attached as Exhibit 4. Section 20160(b) states, "the
10 board shall correct all actions taken as a result of errors or omissions of...this system." (Govt.
11 Code §20160(b)). CalPERS' corrections of its errors is mandatory. (*Welch v. California State*
12 *Teachers' Retirement Bd.* (2012) 203 Cal.App.4th 1, 27 [statutory history of Section 20160
13 indicates that "shall" means that CalPERS has a mandatory duty to act.]

14 Section 20160(e) states, "[c]orrections of errors or omissions pursuant to this section
15 shall be such that the status, rights, and obligations of all parties ... are adjusted to be the same
16 that they would have been if the act that would have been taken, but for the error or omission,
17 was taken at the proper time." Section 20160, "evidences a legislative purpose of 'correcting
18 system errors or omissions wherever possible'...." (*City of Oakland v. Public Employees'*
19 *Retirement System* (2002) 95 Cal.App.4th 29, 51 [describing the Legislature's "preference for
20 retroactive correction of errors."])

21 CalPERS' position is that it was compelled to correct its initial erroneous determination
22 of Malkenhorst's "final compensation" and to make that determination retroactive to the date of
23 Malkenhorst's retirement.

24
25 DATED: August 22, 2014

STEPTOE & JOHNSON LLP

26 By:  _____

27 Jason Levin

28 Attorneys for Complainant CalPERS

EXHIBIT 1

Westlaw.

West's Ann.Cal.Gov.Code § 20636

Page 1

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Effective: January 1, 2014

West's Annotated California Codes Currentness

Government Code (Refs & Annos)

Title 2. Government of the State of California

Division 5. Personnel (Refs & Annos)

Part 3. Public Employees' Retirement System (Refs & Annos)

Chapter 7. Compensation (Refs & Annos)

→→ § 20636. "Compensation earnable" defined; "payrate" defined; special compensation; "group or class of employment" defined; "final settlement pay" defined; provisions not applicable to new members

(a) "Compensation earnable" by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5.

(b)(1) "Payrate" means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules. "Payrate," for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e).

(2) "Payrate" shall include an amount deducted from a member's salary for any of the following:

(A) Participation in a deferred compensation plan.

(B) Payment for participation in a retirement plan that meets the requirements of Section 401(k) of Title 26 of the United States Code.

(C) Payment into a money purchase pension plan and trust that meets the requirements of Section 401(a) of Title 26 of the United States Code.

(D) Participation in a flexible benefits program.

(3) The computation for a leave without pay of a member shall be based on the compensation earnable by him or her at the beginning of the absence.

(4) The computation for time prior to entering state service shall be based on the compensation earnable by him or her in the position first held by him or her in state service.

(c)(1) Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.

(2) Special compensation shall be limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate. If an individual is not part of a group or class, special compensation shall be limited to that which the board determines is received by similarly situated members in the closest related group or class that is in addition to payrate, subject to the limitations of paragraph (2) of subdivision (e).

(3) Special compensation shall be for services rendered during normal working hours and, when reported to the board, the employer shall identify the pay period in which the special compensation was earned.

(4) Special compensation may include the full monetary value of normal contributions paid to the board by the employer, on behalf of the member and pursuant to Section 20691, if the employer's labor policy or agreement specifically provides for the inclusion of the normal contribution payment in compensation earnable.

(5) The monetary value of a service or noncash advantage furnished by the employer to the member, except as expressly and specifically provided in this part, is not special compensation unless regulations promulgated by the board specifically determine that value to be "special compensation."

(6) The board shall promulgate regulations that delineate more specifically and exclusively what constitutes "special compensation" as used in this section. A uniform allowance, the monetary value of employer-provided uniforms, holiday pay, and premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee under Section 201 and following of Title 29 of the United States Code shall be included as special compensation and appropriately defined in those regulations.

(7) Special compensation does not include any of the following:

(A) Final settlement pay.

(B) Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise.

(C) Other payments the board has not affirmatively determined to be special compensation.

(d) Notwithstanding any other provision of law, payrate and special compensation schedules, ordinances, or similar documents shall be public records available for public scrutiny.

(e)(1) As used in this part, "group or class of employment" means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related grouping. One employee may not be considered a group or class.

(2) Increases in compensation earnable granted to an employee who is not in a group or class shall be limited during the final compensation period applicable to the employees, as well as the two years immediately preceding the final compensation period, to the average increase in compensation earnable during the same period reported by the employer for all employees who are in the same membership classification, except as may otherwise be determined pursuant to regulations adopted by the board that establish reasonable standards for granting exceptions.

(f) As used in this part, "final settlement pay" means pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment. The board shall promulgate regulations that delineate more specifically what constitutes final settlement pay.

(g)(1) Notwithstanding subdivision (a), "compensation earnable" for state members means the average monthly compensation, as determined by the board, upon the basis of the average time put in by members in the same group or class of employment and at the same rate of pay, and is composed of the payrate and special compensation of the member. The computation for an absence of a member shall be based on the compensation earnable by him or her at the beginning of the absence and for time prior to entering state service shall be based on the compensation earnable by him or her in the position first held by him or her in that state service.

(2) Notwithstanding subdivision (b), "payrate" for state members means the average monthly remuneration paid in cash out of funds paid by the employer to similarly situated members of the same group or class of employment, in payment for the member's services or for time during which the member is excused from work because of holidays, sick leave, vacation, compensating time off, or leave of absence. "Payrate" for state members shall include:

(A) An amount deducted from a member's salary for any of the following:

(i) Participation in a deferred compensation plan established pursuant to Chapter 4 (commencing with Section 19993) of Part 2.6.

(ii) Payment for participation in a retirement plan that meets the requirements of Section 401(k) of Title 26 of the United States Code.

(iii) Payment into a money purchase pension plan and trust that meets the requirements of Section 401(a) of Title 26 of the United States Code.

(iv) Participation in a flexible benefits program.

(B) A payment in cash by the member's employer to one other than an employee for the purpose of purchasing an annuity contract for a member under an annuity plan that meets the requirements of Section 403(b) of Title 26 of the United States Code.

(C) Employer "pick up" of member contributions that meets the requirements of Section 414(h)(2) of Title 26 of the United States Code.

(D) Disability or workers' compensation payments to safety members in accordance with Section 4800 of the Labor Code.

(E) Temporary industrial disability payments pursuant to Article 4 (commencing with Section 19869) of Chapter 2.5 of Part 2.6.

(F) Other payments the board may determine to be within "payrate."

(3) Notwithstanding subdivision (c), "special compensation" for state members shall mean all of the following:

(A) The monetary value, as determined by the board, of living quarters, board, lodging, fuel, laundry, and other advantages of any nature furnished to a member by his or her employer in payment for the member's services.

(B) Compensation for performing normally required duties, such as holiday pay, bonuses (for duties performed on regular work shift), educational incentive pay, maintenance and noncash payments, out-of-class pay, marksmanship pay, hazard pay, motorcycle pay, paramedic pay, emergency medical technician pay, Peace Officer Standards and Training (POST) certificate pay, and split shift differential.

(C) Compensation for uniforms, except as provided in Section 20632.

(D) Other payments the board may determine to be within "special compensation."

(4) "Payrate" and "special compensation" for state members do not include any of the following:

(A) The provision by the state employer of a medical or hospital service or care plan or insurance plan for its employees (other than the purchase of annuity contracts as described below in this subdivision), a contribution

by the employer to meet the premium or charge for that plan, or a payment into a private fund to provide health and welfare benefits for employees.

(B) A payment by the state employer of the employee portion of taxes imposed by the Federal Insurance Contribution Act.

(C) Amounts not available for payment of salaries and that are applied by the employer for the purchase of annuity contracts including those that meet the requirements of Section 403(b) of Title 26 of the United States Code.

(D) Benefits paid pursuant to Article 5 (commencing with Section 19878) of Chapter 2.5 of Part 2.6.

(E) Employer payments that are to be credited as employee contributions for benefits provided by this system, or employer payments that are to be credited to employee accounts in deferred compensation plans. The amounts deducted from a member's wages for participation in a deferred compensation plan may not be considered to be "employer payments."

(F) Payments for unused vacation, annual leave, personal leave, sick leave, or compensating time off, whether paid in lump sum or otherwise.

(G) Final settlement pay.

(H) Payments for overtime, including pay in lieu of vacation or holiday.

(I) Compensation for additional services outside regular duties, such as standby pay, callback pay, court duty, allowance for automobiles, and bonuses for duties performed after the member's regular work shift.

(J) Amounts not available for payment of salaries and that are applied by the employer for any of the following:

(i) The purchase of a retirement plan that meets the requirements of Section 401(k) of Title 26 of the United States Code.

(ii) Payment into a money purchase pension plan and trust that meets the requirements of Section 401(a) of Title 26 of the United States Code.

(K) Payments made by the employer to or on behalf of its employees who have elected to be covered by a flexible benefits program, where those payments reflect amounts that exceed the employee's salary.

(L) Other payments the board may determine are not "payrate" or "special compensation."

(5) If the provisions of this subdivision, including the board's determinations pursuant to subparagraph (F) of paragraph (2) and subparagraph (D) of paragraph (3), are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5 or 3560, the memorandum of understanding shall be controlling without further legislative action, except that if the provisions of a memorandum of understanding require the expenditure of funds, those provisions may not become effective unless approved by the Legislature in the annual Budget Act. No memorandum of understanding reached pursuant to Section 3517.5 or 3560 may exclude from the definition of either "payrate" or "special compensation" a member's base salary payments or payments for time during which the member is excused from work because of holidays, sick leave, vacation, compensating time off, or leave of absence. If items of compensation earnable are included by memorandum of understanding as "payrate" or "special compensation" for retirement purposes for represented and higher education employees pursuant to this paragraph, the Department of Human Resources or the Trustees of the California State University shall obtain approval from the board for that inclusion.

(6)(A) Subparagraph (B) of paragraph (3) prescribes that compensation earnable includes compensation for performing normally required duties, such as holiday pay, bonuses (for duties performed on regular work shift), educational incentive pay, maintenance and noncash payments, out-of-class pay, marksmanship pay, hazard pay, motorcycle pay, paramedic pay, emergency medical technician pay, POST certificate pay, and split shift differential; and includes compensation for uniforms, except as provided in Section 20632; and subparagraph (I) of paragraph (4) excludes from compensation earnable compensation for additional services outside regular duties, such as standby pay, callback pay, court duty, allowance for automobile, and bonuses for duties performed after regular work shift.

(B) Notwithstanding subparagraph (A), the Department of Human Resources shall determine which payments and allowances that are paid by the state employer shall be considered compensation for retirement purposes for an employee who either is excluded from the definition of state employee in Section 3513, or is a nonelected officer or employee of the executive branch of government who is not a member of the civil service.

(C) Notwithstanding subparagraph (A), the Trustees of the California State University shall determine which payments and allowances that are paid by the trustees shall be considered compensation for retirement purposes for a managerial employee, as defined in Section 3562, or supervisory employee as defined in Section 3580.3.

(h) This section shall not apply to a new member, as defined in Section 7522.04.

CREDIT(S)

(Formerly § 20023, added by Stats.1993, c. 1297 (S.B.53), § 6, operative July 1, 1994, amended by Stats.1995, c. 829 (S.B.791), § 10; Stats.1995, c. 830, (S.B.159), § 1. Renumbered § 20636 and amended by Stats.1996, c. 906 (S.B.1859), § 3. Amended by Stats.1998, c. 678 (A.B.1166), § 11; Stats.1999, c. 971 (S.B.1279), § 6; Stats.2002, c. 1139 (A.B.3040), § 2; Stats.2006, c. 118 (A.B.2244), § 4; Stats.2007, c. 130 (A.B.299), § 123;

Gov.Reorg.Plan No. 1 of 2011, § 136, eff. Sept. 9, 2011, operative July 1, 2012; Stats.2012, c. 665 (S.B.1308), § 121; Stats.2013, c. 526 (S.B.220), § 3.)

Current with urgency legislation through Ch. 187 of 2014 Reg.Sess., Res. Ch. 1 of 2013-2014 2nd Ex.Sess., and all propositions on the 6/3/2014 ballot.

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EXHIBIT 2

Westlaw

West's Ann.Cal.Gov.Code § 20635

Page 1

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Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Government Code (Refs & Annos)

Title 2. Government of the State of California

Division 5. Personnel (Refs & Annos)

Part 3. Public Employees' Retirement System (Refs & Annos)

Chapter 7. Compensation (Refs & Annos)

→ → § 20635. Overtime

When the compensation of a member is a factor in any computation to be made under this part, there shall be excluded from those computations any compensation based on overtime put in by a member whose service retirement allowance is a fixed percentage of final compensation for each year of credited service. For the purposes of this part, overtime is the aggregate service performed by an employee as a member for all employers and in all categories of employment in excess of the hours of work considered normal for employees on a full-time basis, and for which monetary compensation is paid.

If a member concurrently renders service in two or more positions, one or more of which is full time, service in the part-time position shall constitute overtime. If two or more positions are permanent and full time, the position with the highest payrate or base pay shall be reported to this system. This provision shall apply only to service rendered on or after July 1, 1994.

CREDIT(S)

(Added by Stats.1995, c. 379 (S.B.541), § 2.)

Current with urgency legislation through Ch. 187 of 2014 Reg.Sess., Res. Ch. 1 of 2013-2014 2nd Ex.Sess., and all propositions on the 6/3/2014 ballot.

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EXHIBIT 3

Westlaw

2 CCR § 570.5

Page 1

Cal. Admin. Code tit. 2, § 570.5

C

Barclays Official California Code of Regulations Currentness

Title 2. Administration

Division 1. Administrative Personnel

Chapter 2. Board of Administration of Public Employees' Retirement System

Subchapter 1. Employees' Retirement System Regulations

Article 4. Contracts

→ → § 570.5. Requirement for a Publicly Available Pay Schedule.

(a) For purposes of determining the amount of "compensation earnable" pursuant to Government Code Sections 20630, 20636, and 20636.1, payrate shall be limited to the amount listed on a pay schedule that meets all of the following requirements:

- (1) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;
- (2) Identifies the position title for every employee position;
- (3) Shows the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;
- (4) Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, bi-monthly, or annually;
- (5) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;
- (6) Indicates an effective date and date of any revisions;
- (7) Is retained by the employer and available for public inspection for not less than five years; and
- (8) Does not reference another document in lieu of disclosing the payrate.

(b) Whenever an employer fails to meet the requirements of subdivision (a) above, the Board, in its sole discretion, may determine an amount that will be considered to be payrate, taking into consideration all information it deems relevant including, but not limited to, the following:

Cal. Admin. Code tit. 2, § 570.5

- (1) Documents approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer;
- (2) Last payrate listed on a pay schedule that conforms to the requirements of subdivision (a) with the same employer for the position at issue;
- (3) Last payrate for the member that is listed on a pay schedule that conforms with the requirements of subdivision (a) with the same employer for a different position;
- (4) Last payrate for the member in a position that was held by the member and that is listed on a pay schedule that conforms with the requirements of subdivision (a) of a former CalPERS employer.

Note: Authority cited: Sections 20120 and 20121, Government Code. Reference: Sections 20630, 20636 and 20636.1, Government Code.

HISTORY

1. New section filed 7-11-2011; operative 8-10-2011 (Register 2011, No. 28).

2 CCR § 570.5, 2 CA ADC § 570.5

This database is current through 8/1/14 Register 2014, No. 31

END OF DOCUMENT

EXHIBIT 4



C

Effective:[See Text Amendments]

West's Annotated California Codes Currentness

Government Code (Refs & Annos)

Title 2. Government of the State of California

Division 5. Personnel (Refs & Annos)

Part 3. Public Employees' Retirement System (Refs & Annos)

Chapter 2. Administration of System (Refs & Annos)

Article 4. Correction of Errors and Omissions (Refs & Annos)

→→ § 20160. Corrections of errors and omissions

(a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:

(1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.

(2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.

(3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part.

Failure by a member or beneficiary to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an "error or omission" correctable under this section.

(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and

(b).

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

CREDIT(S)

(Added by Stats.1995, c. 379 (S.B.541), § 2.)

Current with urgency legislation through Ch. 187 of 2014 Reg.Sess., Res. Ch. 1 of 2013-2014 2nd Ex.Sess., and all propositions on the 6/3/2014 ballot.

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PROOF OF SERVICE

F.R.C.P. 5 / C.C.P. 1013a(3)/ Rules of Court, Rule 2060

I am a resident of, or employed in the County of Los Angeles, State of California. 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 22, 2014, I served the following listed document(s), by method indicated below, on the parties in this action: **CALPERS' TRIAL BRIEF.**

SEE ATTACHED SERVICE LIST

XX BY U.S. MAIL

By placing the original / x 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 in Los Angeles, California following ordinary business practices. I am readily familiar with the firm's practice for collection and processing of document for mailing. Under that practice, the document is deposited with the United States Postal Service on the same day in the ordinary course of business. I am aware that upon motion of any party served, service is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after date of deposit for mailing contained in this affidavit.

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.

BY PERSONAL SERVICE

By personally delivering the document(s) listed above to the offices at the addressee(s) as shown on the attached service list.
 By placing the document(s) listed above in a sealed envelope(s) and instructing a registered process server to personally deliver the envelope(s) to the offices at the address(es) set forth on the attached service list. The signed proof of service by the registered process server is attached.

XX STATE

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

FEDERAL

I declare under penalty of perjury under the laws of the United States that I am employed in the office of a member of the bar of this court at whose direction the service is made.

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 pursuant to the Court's _____ Order mandating electronic service. See Cal. R. Ct. R. 2053, 2055, 2060. The transmission was reported as complete and without error.

XX BY ELECTRONIC SERVICE

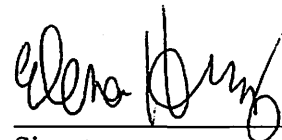
(to individual persons)
By electronically transmitting the document(s) listed above to the email address(es) of the person(s) set forth on the attached service list. The transmission was reported as complete and without error. See Rules of Court, rule 2060.

BY FACSIMILE

By transmitting the document(s) listed above from Steptoe & Johnson 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.

ELENA HERNANDEZ

Type or Print Name



Signature

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