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

15 In the Matter of the Calculation of Final) **CASE NO. 2012-0671**
16 Compensation of:)
17 BRUCE MALKENHORST, SR.,) **OAH NO. 2013080917**
18)
Respondent,) **CALPERS' POST-HEARING BRIEF**
19)
and.)
20) **Hearing Dates: August 25-27, 2014**
21 CITY OF VERNON,) **September 3-4, 2014**
22) **February 19, 2015**
23 Respondent.)
24)

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I. INTRODUCTION

Final Compensation is made up of payrate and special compensation. Is CalPERS' determination of Malkenhorst's Final Compensation proper under the Public Employees' Retirement Law (the PERL, Government Code¹ sections 20000, *et seq.*)? The answer is "yes." Records and testimony from the City of Vernon (the City) show CalPERS determined the components of Malkenhorst's Final Compensation—his payrate and special compensation—consistent with the PERL. That determination should be affirmed.

Payrate excludes overtime pay and pay for positions not listed on publicly available pay schedules. Payrate was the principle focus of the hearing, with Malkenhorst insisting his payrate should match the salary he received from the City. But the entirety of that salary cannot be used as payrate because it included two kinds of pay the PERL says do not count for pension purposes: *overtime pay* and *pay for working in positions not listed on publicly available pay schedules*. The portions of Malkenhorst's salary attributable to overtime and additional positions must be excluded from his payrate. (*See* sections 20635, 20636.)

Malkenhorst's payrate cannot be as much as his salary because his salary included overtime pay. Malkenhorst says that as an "exempt" City employee under the Fair Labor Standards Act, it was not possible for him to earn overtime pay. But unlike FLSA overtime, overtime in the PERL sense can be paid to high-ranking managers as well as to lower-level employees. All compensation for work beyond the City's standard 40-hour week

¹ All statutory references are to the Government Code unless stated otherwise.

1 is excluded from pension calculations, whether paid to those at the top or bottom of the
2 organization chart. (See section 20635 [“overtime is the [compensated] aggregate service
3 performed by an employee as a member for all employers and in all categories of
4 employment in excess of the hours of work considered normal for employees on a full-time
5 basis”].)

7 CalPERS can readily identify and exclude overtime paid to lower-level employees
8 who are not exempt from the FLSA because it is segregated from regular pay in the payroll
9 reports CalPERS receives. That same level of clarity is often missing from payroll reports for
10 higher-level, FLSA-exempt employees, whose regular and overtime pay is frequently lumped
11 together. This case is typical in that the City neither tracked nor reported overtime paid to
12 exempt employees. This despite CalPERS’ warnings, dating as far back as 1995, that
13 Malkenhorst was working overtime in multiple positions that must be tracked and reported.

16 Malkenhorst now seeks to take advantage of having ignored those warnings, insisting
17 he was never paid for working overtime. But his own secretary observed him on the job
18 before, during, and after the 40-hour schedule she kept. And the City’s records show
19 Malkenhorst was paid for his overtime in the form of yearly (or twice yearly) merit raises
20 connected with his taking on new City positions.

22 **Malkenhorst’s total salary cannot be payrate because his salary included pay for**
23 **working in positions not listed on publicly available pay schedules.** Compensation cannot
24 count as payrate unless listed on publicly available pay schedules. (See section 20636 (b)(1).)
25 Here, Malkenhorst earned compensation not only for working as City Administrator/City
26 Clerk, but for a host of other positions as well. None of the other positions was listed on a
27 publicly available pay schedule.
28

1 Malkenhorst asserts none of the other positions needed to be listed because they were
2 no more than duties assigned to the City Administrator/City Clerk. But the City's documents
3 tell a different story. They reveal that within the City's structure, many of these positions
4 existed in departments separate from the City Administration and City Clerk departments.
5 Moreover, Malkenhorst's salary was apportioned among each of these departments based on
6 his own estimate of the time he planned to devote in each. In the last two years of
7 Malkenhorst's employment, no more than 25 percent of his total pay was budgeted to the
8 City Administrator and City Clerk departments. The other 75 percent of Malkenhorst's
9 compensation was budgeted to his other positions, like Treasurer, Chief Executive Officer of
10 the Light and Power Department, and Executive Director of the Redevelopment Agency.
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14 The City itself realized that Malkenhorst was working in multiple, unlisted positions.
15 Upon Malkenhorst's retirement, the City listed three of his positions on publicly available
16 pay schedules (albeit on an "acting" basis): City Clerk, Treasurer, and Director, Light and
17 Power.
18

19 CalPERS properly exercised its discretion to determine Malkenhorst's lawful
20 payrate based on City records. Malkenhorst's salary reflected excluded compensation for
21 overtime and for positions not listed on publicly available pay schedules. Accordingly,
22 CalPERS had discretion to determine a reasonable payrate for him, consistent with the PERL
23 and with City records.
24

25 CalPERS set the other Final Compensation component—special
26 compensation—to match what was available to Malkenhorst's peers. The City paid
27 Malkenhorst special compensation in the form of a longevity bonus. The PERL permits
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1 longevity pay as special compensation, but only to the extent the same bonus structure is
2 available to similarly-situated City employees. (*See* section 20636(c).)

3 Here, Malkenhorst received a 25 percent longevity bonus from the City, while other
4 department heads with the same longevity would have received only 20 percent. CalPERS
5 therefore determined that no more than a 20 percent bonus could be considered special
6 compensation and included in Malkenhorst's Final Compensation.
7

8 **In sum.** CalPERS has determined Malkenhorst's payrate and special compensation
9 based on City records and in accordance with the PERL. The resulting Final Compensation
10 determination should be affirmed.
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12 **II. OVERVIEW OF RELEVANT LAW**

13 **A. Final Compensation Under the PERL**

14 A service retiree's benefit under the PERL is based on three factors: the retiree's
15 credited years of service, Final Compensation, and age at retirement. (*See, Prentice v. Board*
16 *of Administration* (2007) 57 Cal.App.4th 983, 989.) Malkenhorst's years of service and age
17 at retirement are not at issue, only his Final Compensation. Final Compensation is a function
18 of Malkenhorst's highest "compensation earnable" (*Prentice*, 57 Cal.App.4th at p. 989), and
19 compensation earnable consists of a member's "payrate" and "special compensation."
20 (*Molina v. Board of Admin., California Public Employees' Retirement System* (2011) 200
21 Cal.App.4th 53, 66.)
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23

24 Malkenhorst's payrate, a term narrowly defined by the PERL, was the focus of the
25 Hearing. Payrate is "the monthly rate of pay or base pay of the member, paid in cash and
26 pursuant to publicly available pay schedules, for services rendered on a full-time basis during
27 normal working hours...." (Section 20636(b)(1).)
28

1 The PERL’s definition of payrate highlights two reasons a worker’s Final
2 Compensation might be less than what he calls his salary. First, payrate will not include pay
3 for overtime hours. Second, payrate will not include pay for positions not described on
4 publicly available pay schedules. Both Malkenhorst’s overtime pay and unlisted positions
5 were factors in CalPERS’ determination of Malkenhorst’s Final Compensation.
6

7 **B. Overtime Pay is Excluded from Final Compensation**

8 Payrate cannot include pay beyond what is earned for regular, “full-time” service.
9
10 (Section 20636(b)(1).) Payment for overtime hours – hours “in excess of the hours of work
11 considered normal for employees on a full-time basis” – are not included in payrate. (Section
12 20635 [“When the compensation of a member is a factor in any computation to be made
13 under this part, there shall be excluded from those computations any compensation based on
14 overtime”]; see also *Molina v. Board of Admin., California Public Employees’*
15 *Retirement System* (2011) 200 Cal.App.4th 53, 66.)
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17 Each agency that contracts with CalPERS decides the number of weekly hours that
18 will comprise “full-time service; the number must be between 36 and 60 hours per week. (Tr.
19 dated Aug. 25, 2014 at 206:19 – 207:2.) The City of Vernon has always defined “full-time”
20 to mean 40-hour work weeks. (See, e.g., Exs. 65-25, 63-24 [“All employees of the City of
21 Vernon shall be considered forty (40) hours per week personnel unless otherwise specified
22 by the City Council”])
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25 The PERL’s restriction on overtime pay raises two factual issues. The first issue is
26 whether Malkenhorst worked overtime hours. The second issue is whether the City paid
27 Malkenhorst for working overtime. Based on information provided by the City, CalPERS
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1 reasonably determined that Malkenhorst was working more than 40 hours per week and was
2 being compensated for the extra work.

3
4 Malkenhorst has suggested that CalPERS cannot consider his excess hours to be
5 overtime because he is an “exempt” employee. The referenced “exemption” pertains to the
6 FLSA (29 U.S.C. §§ 201–219), which “require[s] that an employer pay overtime wages to
7 employees unless those employees are classified as exempt employees under the applicable
8 law.” (*Rhea v. General Atomics* (2014) 227 Cal.App.4th 1560, 1566-67.) Because
9 Malkenhorst was exempt, the City of Vernon did not need to pay him for working overtime.
10 But that does not mean that Malkenhorst didn’t in fact receive compensation for working
11 more than 40-hour weeks. Nothing in the FLSA or any other law prohibits employers from
12 compensating exempt employees for working long weeks. Indeed, it would be surprising if
13 exempt employees were not so compensated.
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16 Malkenhorst argues that even if the City did pay him for working extra hours, this
17 extra pay cannot be considered “overtime” under the PERL because the FLSA defines
18 “overtime” only for non-exempt workers. This argument suggests a conflict between the
19 FLSA and the PERL that doesn’t in fact exist. The FLSA speaks to employee pay; the PERL
20 speaks to the portion of that pay that can count towards a retirement benefit. Thus, “PERS is
21 free to define ‘overtime’ in a manner distinct from federal law.” (*City of Sacramento v.*
22 *Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1485-86.) And CalPERS
23 has so acted. CalPERS has construed Section 20635 to limit the PERSability of all overtime
24 pay for all employees, regardless of the FLSA. (Tr. dated Aug. 27, 2014 at 98:4-21.) Nothing
25 in the PERL suggests CalPERS should do otherwise, and there is no public policy that would
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1 favor managerial exempt employees obtaining overtime pension benefits unavailable to the
2 rank-and-file, non-exempt worker.

3
4 The identical approach to overtime has been adopted by the California State
5 Teachers' Retirement System, a CalPERS analog. (See *O'Connor v. State Teachers'*
6 *Retirement System* (1996) 43 Cal.App.4th 1610.) The plaintiffs in *O'Connor* were teachers,
7 a profession exempt from FLSA overtime rules. (See, *Sullivan v. Oracle Corp.* (2011) 51
8 Cal.4th 1191, 1195 [citing Cal.Code Regs., tit. 8, § 11040, subd. (1)(A)(3)(a); 29 C.F.R. §
9 541.303].) The teachers held two concurrent full-time teaching positions, received pay for
10 each, and upon retirement, wanted their final compensation to reflect their aggregate salary.
11 The Court of Appeal said no: “[The State Teachers’ Retirement Law] provide[s] an
12 employee credit up to a single, fulltime position, and all remaining pay is considered non-
13 creditable overtime.” (*O'Connor*, 43 Cal.App.4th at p. 1623.) “Overtime, for purposes of
14 the State Teachers’ Retirement Law, is not defined as that which the *employer* considers
15 overtime: it is the province of the Retirement Board to determine what pay is creditable to
16 retirement.” (*Id.* at p. 1624.)
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20 *Matter of Ramirez*, a CalPERS Precedential Decision, is an example of CalPERS’
21 effort to enforce the overtime rules against exempt employees.² Ramirez was Chief of
22 Police with the City of Indio who “worked well over forty hours a week.” (*Id.* at p. 2.) At
23 the request of the city council, Ramirez then took on extra work, acting as the interim city
24 manager. The new position paid Ramirez an additional \$2,500 per month, but increased his
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28 ² A copy of *Ramirez*, Decision 00-06, is attached as Attachment A.

1 workload to “more than sixty hours per week.” (*Id.* at p. 3.) When Ramirez retired,
2 CalPERS did not include the additional \$2,500 per month as part of his Final Compensation
3 – CalPERS claimed “[t]he payments made to Ramirez as interim City Manager appeared to
4 be in the nature of ‘overtime’ pay, a type of compensation which does not qualify as ‘final
5 compensation’ for purposes of determining service retirement benefits.” (*Id.* at p. 8.)
6 Ramirez disagreed, pointing out his superior performance as city manager, the parties’
7 good faith in setting his compensation, and the city council’s authority to determine how its
8 employees should be compensated. (*Id.* at p. 14.) The Court concluded that Ramirez’s
9 additional compensation could be considered overtime. “While it is true that Ramirez was
10 not, by virtue of the nature of his employment, subject to federal laws concerning the
11 payment of overtime, that matter does not fully resolve the question. It is clear that
12 Ramirez’ additional compensation was earned for taking on additional responsibilities of
13 interim City Manager and for the time required of him to meet those responsibilities.” (*Id.*
14 at p. 15.) Accordingly, Ramirez’s additional compensation was properly excluded from his
15 Final Compensation. (*Id.* at pp. 15-16; see also, *Prentice v. Board of Administration, supra*,
16 157 Cal.App.4th at p. 992 [“the Legislature has specifically considered instances where an
17 employee is asked to take on additional duties and found that such additional duties are to
18 be treated as excluded overtime.”])

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24 CalPERS’ actions here are consistent with *Matter of Ramirez*. And as in *Ramirez*, the
25 evidence here shows that Malkenhorst was being paid for working overtime in additional
26 positions.
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1 **C. Pay for Unlisted Positions is Excluded from Final Compensation**

2 The PERL's definition of payrate excludes from Final Compensation any part of a
3 worker's salary that has not been adequately disclosed in a "publicly available pay schedule."
4 (20636(b)(1); see also *Prentice*, 57 Cal.App.4th at pp. 994-996.) CalPERS subsequently
5 issued regulations that "clarify[y] and make specific requirements for publicly available pay
6 schedule[s]...." (Ex. 79.)

7
8 CalPERS' clarifying regulations apply to Malkenhorst. (See *People ex rel.*
9 *Deukmejian v. CHE, Inc.* (1983) 150 Cal.App.3d 123, 134-35 [a clarifying regulatory
10 amendment to a statutory scheme applies retroactively.]) The regulations specify that a salary
11 is adequately disclosed only if the pay schedule both "[i]dentifies the position title for every
12 employee position" and "[s]hows the payrate for each identified position...." (Cal. Code
13 Regs., tit. 2, § 570.5(a)(2) and (a)(3).) If a rate of pay does not meet these criteria, "the
14 Board, in its sole discretion, may determine an amount that will be considered to be payrate,
15 taking into consideration all information it deems relevant...." (Cal. Code Regs., tit. 2,
16 §570.5(b).)

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19 The City's pay schedules are now in evidence, and they provide salary information for
20 just one position held by Malkenhorst: City Administrator/City Clerk. But City
21 Administrator/City Clerk was not Malkenhorst's only position. As explained below,
22 Malkenhorst held several positions distinct from City Administrator/City Clerk for which no
23 pay schedules existed.
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III. EVIDENTIARY FACTS

A. Malkenhorst's Positions with the City of Vernon

Malkenhorst was employed by the City of Vernon from 1977 to June 30, 2005. For almost that entire period, Malkenhorst served as the City's administrator and clerk. Malkenhorst worked as City Clerk (Ex. 7-2) in his first year, presumably carrying out the duties of that position as required by state law. (Ex. 10-2, specifying that the City Clerk shall have the "duties provided for in the government code of the State of California.") At the same time, Malkenhorst filled the positions of Director of Finance (Ex. 7-2) and City Treasurer (Ex. 8-2).

The City Administrator position was added in 1978 (Ex. 9-2), after which Malkenhorst became known as the City Administrator/City Clerk. (Exs. 11-4, 11-5.) The position of City Administrator carried with it specific enumerated duties described by City resolution and later incorporated into the City Code. (Ex. 9-7 to 9-12; Ex. 10-4 to 10-8.) The duty statement also contained a catchall provision: the City Administrator was obliged to "perform such other duties and exercise such other powers as are necessarily incident to the powers set forth in this Section or as may be assigned or delegated to him, from time to time, by action of the Council." (Exs. 9-12, 10-8.)

As the years went on, Malkenhorst took on other positions at the City. The city code was amended to reflect Malkenhorst's "appointment" as Municipal Employee Relations Representative (MERR), which required Malkenhorst to carry out obligations specified by city resolution. (Ex. 10-2.) In May 1981, Malkenhorst became the Chief Executive Officer of the Electrical Department (later named the Light and Power Department). (Ex. 14; 16.) The City said it was creating this new "position" to address the Light and Power Department's

1 “increased work load in administration and operation.” (Ex. 14, first recital.) In 1988,
2 Malkenhorst was appointed Executive Director and Secretary of the Redevelopment Agency,
3 with specific duties described by resolution. (Ex. 31-2.) In 1991, Malkenhorst began service
4 as CEO in the Gas Municipal Utility Department. (Ex. 37-30.) In 1993, Malkenhorst was
5 appointed Executive Director, Secretary and Treasurer of the Industrial Development
6 Authority. (Ex. 32-2.) And in 2003, Malkenhorst was appointed Executive Director of the
7 Vernon Historic Preservation Society. (Ex. 64.)
8

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10 **B. Malkenhorst’s Salary; Budgeting**

11 From the time Malkenhorst became City Administrator/City Clerk, the salary for that
12 position was listed on a publically available pay schedule. (See, e.g., Ex. 11-12.) City
13 Administrator/City Clerk was a full-time, 40-hour position. (Ex. 12-2).
14

15 With one exception, Malkenhorst’s other positions with the City were not listed
16 separately on pay schedules. The exception was City Treasurer. In 1979, the City Treasurer
17 position was listed on a pay schedule at a \$50/month salary. (Ex. 11-13.) That salary was
18 reduced a few months later to \$25/month (Ex. 12-23), and then eliminated in 1980 (Ex. 13-
19 24), never to return to the pay schedules until the day after Malkenhorst retired. (Ex. 75-22
20 [listing \$7,875 monthly salary for Acting City Treasurer].)
21

22 The City may not have listed salaries for Malkenhorst’s other positions, but that does
23 not mean Malkenhorst went uncompensated for taking on the extra work. For example, when
24 Malkenhorst became the CEO of the L&P Department in May 1981, he did not receive an
25 immediate salary increase; he had to wait for the next budget resolution two months later in
26 July 1981. Malkenhorst then received the first of several merit raises, totaling a 24% increase
27 in salary between July 1981 and November 1982. (Ex. 85, noting monthly salary increase
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1 from \$5,373 to \$6,703.) The rise in the Consumer Price Index over this same period was just
2 7%.³

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4 The City also made it clear that Malkenhorst's sizable salary increase reflected his
5 new Light and Power duties: "The City Administrator/City Clerk shall serve as the Chief
6 Executive Officer in the Light and Power Department and the compensation for said position
7 is included in the compensation established for the position of City/Administrator/City
8 Clerk...." (Ex. 16-20, emphasis added; Ex. 65-35.) The same process was used in connection
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10 with Malkenhorst's appointment as CEO in the Gas Municipal Utility Department – his
11 salary for that position was included within the salary schedule listing for City
12 Administrator/City Clerk. (Ex. 37-30.) The City also found other ways to reward
13 Malkenhorst for taking on additional duties. The City provided Malkenhorst additional merit
14 raises over the years (Ex. 85), when according to Councilman Gonzales, the City's normal
15 practice was to provide department heads only cost of living adjustments each July. (Tr.
16 dated Sep. 4, 2014 at 130:22-24.)
17

18
19 Malkenhorst was not surprised by his receipt of additional compensation for taking on
20 additional City work. It was his expectation that he would be rewarded. (Tr. dated Feb. 19,
21 2015 at 140:21-25.)
22

23 The connection between Malkenhorst's salary and his new positions was also
24 reflected in the City's budget process. Each position worked by Malkenhorst was associated
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26
27 ³ The Court previously agreed to take judicial notice of the Consumer Price Index for the
28 period of Malkenhorst's employment. The relevant CPI data is in Attachment B. It shows
that from July 1981 to November 1982, CPI increased from 91.6 to 98.0, a difference of 7%.

1 with a department (Ex. 81), and when each new budget was prepared, Malkenhorst would
2 approve the apportionment of his salary, by percentage, across these departments. (Tr. dated
3 Sep. 4, 2014 at 138:8-14; Tr. dated Sep. 3, 2014 at 55:20–56:16; 119:14 – 121:15; 159:18 –
4 160:12; 162:9-14; 182:12-20.) The salary apportionment, according to Councilman
5 Gonzales, reflected Malkenhorst’s estimate of the *time* he was likely to spend in his various
6 positions over the coming year. (Tr. dated Sep. 4, 2014 at 136:9 – 138:14.) This practice –
7 apportioning salaries across departments based on estimated time commitments – continued
8 even after Malkenhorst retired. (Tr. dated Aug. 25, 2014 at 117:10-16.)

11 The City’s 2003 and 2004 budgets were the last in which Malkenhorst participated,
12 and Malkenhorst’s apportionment of his salary in those years is reflected in the City’s 2003
13 and 2004 payroll records. (Exs. 67, 68; Tr. dated Sep. 3, 2014 at 161:19 – 162:22.) For the
14 2003 budget year, the apportionment was as follows: 20% to City Administration [Dept.
15 1002], 5% to City Clerk [Dept. 1003], 15% to Finance [Dept. 1004], 5% to Treasurer [Dept.
16 1015], 5% to Personnel [Dept. 1018], 20% to Redevelopment [Dept. 1022], 10% to Gas
17 [Dept. 5600], and 20% to L&P Administration [Dept. 9000]. (Exs. 67 and 81.) Thus,
18 Malkenhorst prepared the 2003 budget expecting he would spend at least 50% of his time
19 working in his Redevelopment, Gas, and L&P positions. Only 25% of Malkenhorst’s time
20 was apportioned to City Administration and City Clerk.

21 For the 2004-2005 budget year, the last year of Malkenhorst’s employment, the
22 percentage of Malkenhorst’s time budgeted to City Administration and City Clerk dropped to
23 only 10%, mostly due to Malkenhorst’s obligation to oversee the construction of a new
24 power plant for the L&P Department (salary allocation increasing from 20% to 65%). (Exs.
25 68-3 and 81; Tr. dated Sep. 3, 2014 at 134:14 – 135:18; 169:11-17.) Malkenhorst’s time

1 commitment to this L&P project was such that when he retired, the City had to create a new,
2 **full-time** Acting Director of L&P, which position was promptly placed on a publically
3 available pay schedule. (Ex. 75-11.)
4

5 **C. Malkenhorst's Work Hours**

6 Prior to becoming CEO of the L&P department, Malkenhorst was already working
7 more than 40-hour weeks, and his workload increased further with the new assignment. (Tr.
8 dated Sep. 3, 2014 at 111:5-20, 112:15-23, 114:7-11.) Malkenhorst's secretary, Gloria
9 Orosco, worked 40-hour weeks, but noted that Malkenhorst was usually in the office before
10 her and stayed in the office as long as (if not longer than) she did. (Tr. dated Sep. 3, 2014 at
11 25:24 – 26:26.) Councilman Hilario Gonzales considered Malkenhorst "on call or full-time
12 duty almost 24 hours a day." (Tr. dated Sep. 4, 2014 at 117:15 – 118:19). It was Gonzales's
13 expectation that Malkenhorst would work as many hours as needed to get good results. (Tr.
14 dated Sep. 4, 2014 at 135:13-19.)
15
16

17 **D. CalPERS Notifies the City that Malkenhorst may be Working Overtime in**
18 **Multiple Positions**

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20 In 1994, Malkenhorst submitted a retirement application to CalPERS (Ex. 44), which
21 required CalPERS to evaluate Malkenhorst's Final Compensation. CalPERS wrote the City
22 asking for documentation to support Malkenhorst's recent salary increases (Exs. 44 and 45),
23 in part because an audit had shown the City was reporting non-PERSable income as
24 compensation. (Ex. 45.) CalPERS' request was handled by Malkenhorst's secretary, Gloria
25 Orosco, who provided documents and information to CalPERS indicating that Malkenhorst
26 was serving the City as City Administrator/City Clerk, City Treasurer, Director of Finance
27 and Personnel, Purchasing Agent, Executive Director of Light & Power, and Executive
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1 Director of the Redevelopment Agency. (Ex. 46). When CalPERS saw the list of
2 Malkenhorst's positions, it sent two letters to Orosco with the same message: because
3 Malkenhorst's positions apart from City Administrator/City Clerk "would be considered
4 overtime," the City needed to "make notation for the percentage of [Malkenhorst's] time that
5 was spent in each position." (Exs. 47 and 48.)

7 Orosco's practice was to inform Malkenhorst of CalPERS correspondence. (Tr. dated
8 Sep. 3, 2014 at 122:4-7.) Yet neither Malkenhorst nor Orosco responded to CalPERS'
9 concerns. Nor did Malkenhorst honor CalPERS' request that he track the time he spent in
10 each of his positions. (Tr. dated Feb. 19, 2015 at 39:16-25.) Malkenhorst, instead, cancelled
11 his retirement (Tr. dated Feb. 19, 2015 at 68:17-22), hoping the overtime issue would go
12 away. The issue did go away – for more than fifteen years – but resurfaced during a
13 CalPERS audit of the City in 2011.

16 **E. CalPERS' Determinations of Malkenhorst's Payrate and Special Compensation**

17 When Malkenhorst retired in 2005, CalPERS calculated Malkenhorst's Final
18 Compensation based on his payrate and special compensation. With respect to payrate,
19 CalPERS relied upon payroll data the City had submitted for Malkenhorst. CalPERS
20 accepted the City's submission that Malkenhorst had a monthly payrate of \$35,302 for
21 working 40-hour weeks as City Administrator/City Clerk. (Tr. dated Aug. 26, 2014 at 47:23
22 – 49:2.) With respect to special compensation, the City and CalPERS initially had a dispute
23 concerning Malkenhorst's longevity pay – a 25% yearly bonus for 25 years of service – but
24 CalPERS ultimately relented and provided Malkenhorst with the entire bonus as special
25 compensation. (Ex. 65-20.)
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1 CalPERS' perspective on Malkenhorst's Final Compensation changed during the
2 2011 audit of the City. CalPERS saw that Malkenhorst held positions apart from City
3 Administrator/City Clerk and began to question the reliability of basing his payrate upon the
4 City's payroll submissions. (Tr. dated Aug. 26, 2014 at 28:13-23; 29:3-22.) CalPERS sought
5 City records of the time Malkenhorst spent in each position, and publically available pay
6 schedules for Malkenhorst's positions apart from City Administrator/City Clerk, but these
7 did not exist. This made it impossible for CalPERS to conduct its usual weighted payroll
8 analysis to calculate Malkenhorst's payrate. (Tr. dated Aug. 26, 2014 at 12:4-23; 14:22-25;
9 35:17-21.) CalPERS therefore looked for a payrate for a full-time City position that closely
10 resembled Malkenhorst's own position. CalPERS ultimately selected the \$7,875 monthly
11 payrate for the Acting City Clerk position created upon Malkenhorst's retirement. (Tr. dated
12 Aug. 26, 2014 at 51:3-25; 102:20 – 103:23.)

16 Following the City audit, CalPERS also took a closer look at Malkenhorst's longevity
17 pay. CalPERS noted that Malkenhorst was the only City employee entitled to a 25%
18 longevity bonus; at 25 years of service, other department heads could receive only a 20%
19 longevity bonus and would have to work 30 years to receive the 25% bonus. (Ex. 65-20.)
20 CalPERS determined, therefore, that the 20% bonus rate must also apply to the calculation of
21 Malkenhorst's special compensation. (Tr. dated Aug. 26, 2014 at 54:19-22; 55:12-20.)

24 **F. Malkenhorst's Defenses**

25 Malkenhorst has raised and briefed several "defenses" related to CalPERS'
26 determination of his Final Compensation. The evidence received at the Hearing is not
27 relevant to these defenses.
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IV. MALKENHORST'S FINAL COMPENSATION
IS CONSISTENT WITH THE PERL

A. CalPERS Properly Determined Malkenhorst's Payrate

1) Malkenhorst Worked Overtime Hours

In *Matter of Ramirez*, discussed earlier, the Chief of Police of Indio was working full-time but nonetheless agreed to take on the duties of city manager. The city council decided that Ramirez should be paid extra for taking on the additional duties and, in the spirit of transparency, publicly announced that extra amount would be \$2,500 per month. This transparency permitted CalPERS to identify the additional salary as overtime pay and subtract it from Ramirez's final compensation.

But what if the City of Indio had avoided an explicit link between Ramirez's additional work and additional pay? What if, instead of designating a specific salary for the additional city management position, Indio had simply rewarded Ramirez by giving him extra compensation through future merit raises? From CalPERS' perspective, there is no meaningful legal difference between the two scenarios: both reflect compensation "based on" overtime, which is non-PERSable. (§ 20635.) CalPERS so construes Section 20635 because of its need to maintain the fairness of the system. If Section 20635 did not apply to the alternative scenario, non-exempt employees could fairly complain that it is too easy for exempt employees to disguise overtime pay. And other exempt employees, like Ramirez, could fairly complain that they were being disadvantaged by their employers' transparency. Any perception that CalPERS permits such inconsistent results could spark a "race to the bottom," where employers and employees do their best to shield compensation arrangements from CalPERS' scrutiny.

1 The dual policies of consistency and transparency similarly support CalPERS'
2 evaluation of Malkenhorst's payrate. (Ex. 79; Tr. dated Aug. 26, 2014 at 7:7-8; 10:14 – 11:1;
3 212:15-24.) Malkenhorst, whose compensation agreement with the City of Vernon resembles
4 the alternative scenario, was a full-time administrator who took on additional city positions,
5 requiring additional work, for which he later received merit raises. Every hour spent by
6 Malkenhorst in his additional positions would have been an hour of overtime, an hour
7 beyond his normal 40-hour week. Malkenhorst himself admits that his job required him to
8 work 40-45 hour weeks (Tr. dated Feb. 19, 2015 at 37:16 – 38:1), but other evidence
9 indicates he worked even more. Gloria Orosco testified that Malkenhorst was working 40-
10 hour weeks as City Administrator/City Clerk even before taking on his L&P obligations.
11 Malkenhorst was often in the office before she was, and also worked some evenings and
12 weekends.

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16 Of course, there would be no dispute over the amount of Malkenhorst's overtime had
17 he tracked his weekly hours, which CalPERS requested as far back as 1995. (Exs. 47 and
18 48.) In fact, it was Malkenhorst's statutory duty to provide the specific information CalPERS
19 requested. (Section 20221(b), expressly making the "chief administrative officer of a
20 contracting agency" responsible for furnishing CalPERS with "additional information
21 concerning any member that the board may require in the administration of this system.")
22 But Malkenhorst did not track his hours and therefore has no basis to dispute CalPERS'
23 analysis.

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26 **2) Malkenhorst Received Pay "Based On" His Overtime Hours**

27 Under Section 20636, pay "based on" overtime hours cannot be counted towards
28 payrate. Here, when the City gave Malkenhorst merit raises to compensate him for his

1 additional positions/duties, it was providing pay “based on” the need for overtime. Whether
2 Malkenhorst deserved the extra pay is irrelevant to CalPERS. The relevant point is that the
3 published payrate for the City Administrator/City Clerk position includes pay for both
4 Malkenhorst’s full-time hours, as well as his overtime hours. That aggregate payrate,
5 therefore, exceeds the 40-hour payrate that CalPERS can use to determine Malkenhorst’s
6 Final Compensation.
7

8
9 With respect to two of Malkenhorst’s new positions – CEO of the L&P Department
10 and CEO of the Gas Municipal Utility Department – the link between the new position and
11 additional pay is written into the Resolutions. The Resolutions state that Malkenhorst’s pay
12 for these positions would be included within his City Administrator/City Clerk’s payrate.
13 (Ex. 16-20 [“The City Administrator/City Clerk shall serve as the Chief Executive Officer in
14 the Light and Power Department and the compensation for said position is included in the
15 compensation established for the position of City/Administrator/City Clerk....”, emphasis
16 added]; Ex. 37-30.) Moreover, there is a chronological link between Malkenhorst’s work as
17 CEO of the L&P Department and a large pay increase: from July 1981 (the first budget cycle
18 after Malkenhorst became CEO of the L&P Department) to November 1982, Malkenhorst’s
19 City Administrator/City Clerk base salary increased 24%. (Ex. 85.) This increase included a
20 mid-budget merit raise when the City’s policy and practice was to provide only COLA
21 increases to department heads; the COLA in this same period was just 7%.

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25 **3) Malkenhorst Worked in Positions other than City Administrator/City Clerk**

26 Even if Malkenhorst did only work 40-hour weeks, and even if his City
27 Administrator/City Clerk salary did not reflect overtime pay, CalPERS still could not use
28 Malkenhorst’s total salary as payrate. That salary could only be considered payrate if City

1 Administrator/City Clerk was Malkenhorst's only position with the City. But Malkenhorst
2 worked in additional city positions, each of which should have had its own pay schedule.
3 (See, Section 20636(b)(1) and 2 CCR § 570.5(a)(2) and (3), requiring a separate rate of pay
4 for every employee position.)
5

6 Malkenhorst argues that City Administrator/City Clerk was his only position, and it
7 was in that capacity that he carried out the roles of Treasurer, CEO of the L&P Department,
8 and Executive Director and Secretary of the Redevelopment Agency (among others).
9 Malkenhorst suggests that these additional roles did not need separate pay schedules because
10 they were no more than duties assigned to him by the City Council through the resolution
11 process.
12

13 Malkenhorst's argument is not supported by the actual resolutions. The resolutions,
14 for example, use the word "position" in describing the CEO of the L&P Department. (Ex. 14
15 [Resolution entitled: "A Resolution ... Establishing the Position of Chief Executive Officer
16 and Operations Manager."]; see also Ex. 16, first recital.) Other resolutions describe
17 Malkenhorst's "appointment," a word that suggests the existence of a corresponding
18 position. (See, Ex. 10-2 ["appointment" as MERR]; Ex. 31-2 [appointment as Executive
19 Director and Secretary of the Redevelopment Agency]; Ex. 32-2 [appointment as Executive
20 Director, Secretary and Treasurer of the Industrial Development Authority; Ex. 64
21 [appointment as Executive Director of the Vernon Historic Preservation Society.]) Moreover,
22 all the appointments came with formal titles. If the City was merely adding duties for the
23 City Administrator to perform, these formal titles would have been unnecessary.
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28 Although the language of the resolutions supports CalPERS' analysis, they are not
dispositive of the "positions vs. duties" issue. The critical question is whether the new

1 duties/positions/titles needed to be listed on the City's pay schedules. To answer that
2 question, the Court must consider the policies of consistency and transparency that underlie
3 the "publically available pay schedule" requirement. (Ex. 79-3 [explaining that the contents
4 of pay schedules would be regulated to "ensure consistency between CalPERS employers as
5 well as enhance disclosure and transparency of public employee compensation...."])

7 From CalPERS' perspective, consistency and transparency are enhanced when pay
8 schedules provide direct and clear information not only as to the amount of pay an employee
9 earns, but also the nature and hours of the work for which the pay is provided. This level of
10 detail permits the public to compare the salaries that different cities pay their employees for
11 identical or similar positions. For example, the public should be able to see the salary paid by
12 the City of Vernon for the position of treasurer, and the number of hours required of the
13 treasurer, and then compare that with similar information provided by other cities for their
14 treasurers. (Tr. dated Aug. 26, 2014 at 35:9-16; 40:4 – 41:5.) With this position-specific
15 information, the public can exercise the appropriate oversight over employee pay. At the City
16 of Vernon, which lacked this specific information for treasurer and several other positions,
17 public oversight was near impossible.

21 To further enhance the public's oversight, there must be some level of consistency in
22 the types of duties performed by certain positions. "City Clerk," for example, must mean
23 something standard if that position – and the pay for that position – is to be understood by the
24 public. The public could not very well compare clerk positions and salaries across cities if in
25 one city, the clerk spent most of his time on personnel matters, while at another city, the
26 clerk also performed the duties of police chief. And the public would be downright misled by
27 a situation where a highly compensated clerk was spending most of the day doing document
28

1 filing (or the work of some other lower-compensated position). This is why CalPERS insists
2 that distinct positions, which carry with them distinct titles and distinct job duties, be listed
3 separately on pay schedules.
4

5 The City of Vernon's pay schedules fall short of what is required. From the face of
6 Malkenhorst's final pay schedule (Ex. 65), for example, the general public would assume
7 that the City Administrator/City Clerk was spending 40-hour weeks performing the duties of
8 City Administrator and the duties of the City Clerk. The general public would also assume
9 that the duties of those two positions corresponded with the duty statements in the City Code.
10 (Ex. 10-2, and 10-4 to 10-8.) Nothing in that pay schedule, however, indicates to the general
11 public that the City Administrator/City Clerk was also being paid for overseeing the building
12 of a new power plant, working on City redevelopment, or acting as treasurer. Tellingly, the
13 transparency of the City's pay schedules improved once Malkenhorst retired. The resolution
14 effective July 1, 2005 appears to break the single City Administrator/City Clerk position into
15 three: Acting Director L&P (Ex. 75-11), Acting City Clerk (Ex. 75-22), and Acting City
16 Treasurer (Ex. 75-22).
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20 CalPERS is obligated to make the pension system transparent, and transparency is
21 enhanced by more disclosure on pay schedules, not less. It is on this principle that CalPERS
22 strictly construes the "positions" that must be listed on a pay schedule and its conclusion that
23 the salary listed for City Administrator/City Clerk exceeds the amount that qualifies as
24 payrate under Section 20635.
25

26 **4) All Positions Need to be Included on Publicly Available Pay Schedules**

27 Malkenhorst has suggested that his additional positions came with no (direct)
28 additional pay and that it would have made no sense for the City to have listed these

1 positions on a pay schedule with a zero salary. Not so – even the listing of a “zero pay”
2 position would enhance transparency. (Tr. dated Aug. 26, 2014 at 122:7-19.) If, for example,
3 the City had listed Malkenhorst’s Treasurer position with zero pay, the public could have
4 questioned why, after Malkenhorst retired, the City began paying \$7,875 per month for the
5 same work. (Ex. 75-22, July 2005 payrate for Acting City Treasurer).

7 The listing of “zero pay” for Malkenhorst’s positions would also have significantly
8 affected the calculation of his payrate. To see how this would work, assume that Malkenhorst
9 accurately predicted in the City 2003 budget the time he would spend in his various positions
10 (20% to City Administration, 5% to City Clerk, and the remaining 75% across his other
11 positions). (Exs. 67, 81.) These percentages would then be used to provide the weight given
12 to the salary assigned for each position. If the City’s pay schedules had listed “zero pay” for
13 treasurer, redevelopment CEO, and the remaining other positions, then those positions would
14 not have counted towards Malkenhorst’s payrate. Malkenhorst’s payrate would have been
15 25% of the salary listed for City Administrator/City Clerk – not the 100% he is seeking.

18 For Malkenhorst to have received a payrate equal to 100% of the salary listed for City
19 Administrator/City Clerk, the City’s salary schedules would have needed to indicate that the
20 positions of treasurer, redevelopment CEO, and each of the remaining positions held by
21 Malkenhorst, all had *the exact same salary as the position of City Administrator/City Clerk*.
22 Then, regardless of the number of hours Malkenhorst spent in each position, the weighted
23 payroll analysis would have generated the same payrate. But this transparency would
24 undoubtedly have brought public scrutiny. The public may well have accepted a City
25 Administrator being paid more than \$30,000 per month, but the public may have questioned
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1 why the City was paying the Treasurer and the Clerk at the same rate, given that other cities
2 were paying much less.

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4 **5) CalPERS did not Abuse its Discretion in Setting Malkenhorst's Payrate**

5 Malkenhorst did not track his hours as CalPERS had asked, and the City did not list
6 all Malkenhorst's positions on pay schedules. As a result, CalPERS could not use its
7 weighted payroll analysis to calculate Malkenhorst's payrate. Instead, CalPERS looked to the
8 information the City had provided to decide a payrate for Malkenhorst that best fit what
9 CalPERS knew about his employment. (See 2 CCR §570.5(b) [specifying that if CalPERS
10 lacks sufficient data to calculate payrate, "the Board, in its sole discretion, may determine an
11 amount that will be considered to be payrate, taking into consideration all information it
12 deems relevant...."]) CalPERS settled upon the payrate the City had selected for Acting City
13 Clerk (Ex. 75-22), which position was added to the City's pay schedules only after
14 Malkenhorst's retirement. CalPERS acted within its discretion in deciding that the position
15 and pay of Acting City Clerk best approximated Malkenhorst's 40-hour per week time
16 commitment as City Administrator/City Clerk.
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20 **B. CalPERS Correctly Calculated Malkenhorst's Special Compensation**

21 CalPERS determined Malkenhorst's Final Compensation based not only on his
22 payrate, but also upon his Special Compensation. Special Compensation refers to payment
23 for "special skills, knowledge, [and] abilities," as long as such payment does not exceed the
24 amount paid "to similarly situated members of a group or class of employment." (Section
25 20636(c).) "Group or class" can refer to any "work-related grouping" of employees,
26 including a group of employees who merely share the same work location. (Section
27 20636(e)(1).) If a worker is not part of a formal employment group or class, CalPERS may
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1 informally group the worker with others for purposes of determining his special
2 compensation. (*Prentice*, 57 Cal.App.4th at p. 990 [“special compensation shall be limited to
3 that which the board determines is received by similarly situated members in the closest
4 related group or class....”, emphasis added.]

6 Longevity pay – additional compensation paid to employees who have been with an
7 employer for a certain minimum period – can be a legitimate item of special compensation.
8 But longevity pay is PERSable only to the extent the same bonus structure is available to
9 similarly-situated City employees. (*See* section 20636(c).) Here, Malkenhorst received
10 longevity pay from the City of Vernon in the form of a 25% yearly bonus after 25 years of
11 service, while other department heads were to receive only a 20% bonus for the same
12 longevity. (Ex. 65-19, 20.) CalPERS considered all the City’s department heads part of the
13 same “group or class” and therefore used the 20% bonus in determining Malkenhorst’s
14 special compensation. (Tr. dated Aug. 26, 2014 at 54:19-22; 55:12-20.) CalPERS acted
15 within its discretion in placing Malkenhorst in a group with other department heads for
16 purposes of special compensation. (*Prentice*, 57 Cal.App.4th at p. 990.)

20 Malkenhorst suggests that his longevity pay cannot be limited by what other City
21 employees receive because he is in a group of one. It may be true that for purposes of
22 *payrate* Malkenhorst was in a group of one. (20636(b)(1) [describing payrate for members
23 “not in a group or class.”].) But for purposes of *special compensation*, the PERL expressly
24 prohibits a “group of one.” (20636(e)(1) [“One employee may not be considered a group or
25 class.”])
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1 **C. Malkenhorst's Testimony is Irrelevant, Unreliable, and Lacks Credibility**

2 CalPERS' evaluation of Malkenhorst's payrate and special compensation has at every
3 step been tethered to its analysis of City records. CalPERS' reliance on agency records is
4 typical. In determining Final Compensation, CalPERS relies upon the payroll submissions it
5 receives from its contracting agencies, and CalPERS may, if necessary, require the agency
6 and/or its chief administrative officer to provide further documentation. (Section 20221(b).)
7 This records-based decision-making serves the goal of transparency because the records used
8 by CalPERS for deciding Final Compensation can be obtained and reviewed by the public.
9

10 The question to be decided then is whether CalPERS' determination of Malkenhorst's
11 Final Compensation is consistent with the PERL *in light of available City records*. The
12 legality of CalPERS' determination should be judged without respect to the Hearing
13 testimony of witnesses, like Malkenhorst, who have attempted to fill in the gaps years after
14 the pertinent events. Oral statements, whether provided as part of or before litigation, are less
15 reliable than contemporaneously prepared records, are less transparent, and are not used by
16 CalPERS for calculating final compensation.
17

18 Malkenhorst's recollection of events, in any event, lacks credibility. Malkenhorst is a
19 convicted felon who stole money from the City. He apparently has a dulled sense of right and
20 wrong, and where public money is at stake, cannot be relied upon to tell the truth.
21

22 **V. CONCLUSION**

23 CalPERS' determination of Malkenhorst's Final Compensation had a factual and legal
24 component. The factual component required CalPERS to obtain and evaluate City records
25 relevant to Malkenhorst's payrate and special compensation. The legal component required
26 CalPERS to apply the PERL to the City's records, mindful of the public policies of
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1 transparency, consistency, and equal treatment. CalPERS completed both the factual and
2 legal analyses with objectivity and fairness.

3
4 For the reasons set forth above, the Court should rule that CalPERS has met its burden
5 and proved, by a preponderance of evidence, that its Final Compensation determination for
6 Malkenhorst was reasonable and consistent with the PERL.

7
8 DATED: April 6, 2015

STEPTOE & JOHNSON LLP

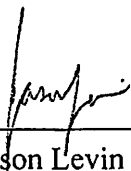
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12 Jason Levin
13 Attorneys for Complainant CalPERS
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EXHIBIT A

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal for Calculation of Benefits Pursuant to The Employer's Report of Final Compensation,)	CASE NO. 2640
ROY T. RAMIREZ,)	OAH NO. L-2000050022
Respondent,)	PRECEDENTIAL DECISION 00-06
and)	EFFECTIVE: December 20, 2000
CITY OF INDIO,)	
Respondent.)	

PRECEDENTIAL DECISION

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own decision the Proposed Decision dated September 18, 2000, concerning the application of Roy T. Ramirez; hereby designates its decision as precedential; RESOLVED FURTHER that this Board decision shall be effective 30 days following mailing of the decision.

* * * * *

I hereby certify that on November 15, 2000, the Board of Administration, California Public Employees' Retirement System, made and adopted the foregoing Resolution, and I certify further that the attached copy of the administrative law judge's Proposed Decision is a true copy of the decision adopted by said Board of Administration in said matter.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
JAMES E. BURTON, CHIEF EXECUTIVE OFFICER

Dated: November 20, 2000 BY _____
BARBARA HEGDAL
ASSISTANT EXECUTIVE OFFICER

**BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

In the Matter of the Appeal of the Calculation
Of Benefits Pursuant to Employer's Report of
Final Compensation Related to

ROY T. RAMIREZ,

Respondent,

And

CITY OF INDIO,

Respondent.

CalPERS Case No. 2640

OAH No. L-2000050022

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 20, 2000, in San Bernardino, California.

Fernando De Leon, Staff Counsel, represented petitioner James Burton, Chief Executive Officer, Public Employees' Retirement System, State of California.

Kasey Christopher Clark, Attorney at Law, represented Roy T. Ramirez, who was present throughout the administrative proceeding, and the City of Indio.

The matter was submitted on August 21, 2000, following the filing of written briefs.

ISSUE

Should the compensation Roy T. Ramirez received during his last year of employment with the City of Indio when working as the interim City Manager should be treated as "final compensation" for the purpose of calculating his CalPERS' service retirement benefits.

FACTUAL FINDINGS

Ramirez' Membership in CalPERS

1. Roy T. Ramirez (hereafter Ramirez) was born on October 22, 1946.

Ramirez became a member of CalPERS as a result of his employment with the Coachella Valley Water District in the mid 1960s. He maintained that employment for about two and one-half years. Ramirez thereafter extended his CalPERS membership by virtue of approximately five years of employment with the City of Coachella in the late 1960s and early 1970s as a law enforcement officer.

In October 1973, Ramirez began working as a patrol officer with the City of Indio. He remained a patrol officer until 1976, when he was promoted to Sergeant. He was promoted to Lieutenant in 1989 and was promoted to Captain in 1993.

In 1993 Ramirez became the Chief of Police, City of Indio. He remained the Chief of Police until his retirement on October 29, 1998. Ramirez' employment with the City of Indio was credited to his CalPERS membership.

2. Ramirez was a career law enforcement officer with the City of Indio who enjoyed the utmost respect of the Indio City Council. Ramirez was instrumental in maintaining and improving morale within the City of Indio Police Department, particularly with the rank and file.

Ramirez earned \$89,000 in salary in his last year of employment as the Chief of Police. He worked well over forty hours a week.

3. On April 15, 1998, Ramirez was at home preparing to attend a City Council meeting. He received a telephone call from Donna French (hereafter French), a Deputy City Clerk with the City of Indio. French invited Ramirez to attend a closed, executive City Council meeting that was taking place.

When Ramirez arrived at the meeting, he was told that the City Manager had just resigned and there was a need to fill the City Manager position on an interim basis. The City Council asked Ramirez to become the interim City Manager pending the appointment of a permanent City Manager. Ramirez agreed to act as the interim City Manager for four months provided that he be permitted to continue acting as the Chief of Police. The City Council agreed.

Almost as an afterthought, the City Council asked Ramirez how much he wanted to be paid as the interim City Manager. Ramirez had not given the matter any thought. One

member of the City Council proposed that Ramirez be given an additional \$2,500 per month. Ramirez agreed. Neither Ramirez nor the City Council considered the impact such additional compensation might have on the retirement benefits Ramirez would receive if he were to retire.

The agreement was not immediately reduced to writing.

4. Ramirez' appointment as the interim City Manager was announced that evening. Ramirez immediately began working as the interim City Manager and he continued working as the Chief of Police. After his appointment as interim City Manager, Ramirez increased his workload to more than sixty hours per week.

5. When Ramirez was appointed interim City Manager, many difficult financial and political issues faced the City of Indio. There was an approximate \$1,000,000 per year operating deficit, work on the 1998 municipal budget had not begun (yet had to be filed within sixty days), morale within the municipal staff was extremely low, there was a need to annex an auto mall into the City of Indio, there was significant litigation pending against the City of Indio with a great deal of exposure which needed to be resolved and there were numerous redevelopment issues.

Ramirez went right to work. He restructured many municipal departments and functions, he downsized the municipal staff, he balanced the budget, he supervised the new annexation project, he assisted in the development of a new municipal golf course, he attended numerous City Council meetings and staff meetings and he continued to meet his responsibilities as Chief of Police.

According to then Mayor Michael H. Wilson (hereafter Mayor Wilson), Ramirez "accomplished more in six and a half months to move this City forward than did the previous City Manger in four years."

6. The outgoing City Manager, Allyn S. Waggle (hereafter Waggle), had earned \$85,000, together with other benefits including an automobile allowance, insurance, paid vacation and sick leave.

The written employment agreement between the City of Indio and Waggle also provided that "in addition to the City's share, the City shall contribute seven percent (7%) of Waggle's contribution to the Public Employees Retirement System (PERS) for Waggle's behalf."

Waggle was a miscellaneous member of CalPERS, not a local safety member.

The Memorandum of Agreement

7. On August 6, 1998, Mayor Wilson signed a Memorandum of Agreement. The agreement concerned “the length of time of the agreement and the premium pay for serving in the upgraded position of Interim City Manager.”

Item 1 memorialized the agreement concerning Ramirez’ service as interim City Manager from April 15, 1998, through August 12, 1998, and the agreement that Ramirez would receive an additional \$2,500 “special compensation” per month in consideration for serving as interim City Manager. Item 1 of the agreement stated the “special compensation constituted premium pay because Mr. Ramirez was requested to work in an upgraded position.”

Item 2 extended the original agreement for an additional 60 days at the “premium pay of \$2,500 per month” and provided “the City Council also agreed to provide an additional \$5,000 of special compensation to recognize the continuing efforts of Mr. Ramirez in the upgraded position of Interim City Manager.”

The memorandum of agreement between the City of Indio and Ramirez was signed *after* Ramirez filed his application for retirement benefits with CalPERS. The compensation Ramirez earned as interim City Manager was not intentionally designed to “spike” the amount of CalPERS retirement benefits Ramirez would receive if he retired although it certainly had that effect.

Ramirez’ Decision to Retire

8. When Ramirez accepted the interim City Manager position, he had no intention to retire as Chief of Police after a permanent City Manager was appointed. In June 1998, when the City of Indio offered “golden handshakes” to its long-term municipal employees, including Ramirez, Ramirez first considered retiring. He discussed the matter with his family and with their counsel and blessing he decided to take advantage of what might be a one-time opportunity.

On June 22, 1998, Ramirez advised the City Council of his intention to retire as the Chief of Police and to resign as interim City Manager as soon as replacements were found and a transition was accomplished.

Ramirez’ Application for CalPERS Retirement Benefits

9. On July 22, 1998, Ramirez signed an Application for Service Retirement which was filed with CalPERS shortly thereafter. In that application, Ramirez stated that he

was employed by the City of Indio as the Chief of Police. He stated his last day of service would be October 29, 1998.

10. Item 17 of the retirement application requested Ramirez to select a "final compensation" period. In that regard, the application stated:

"FINAL COMPENSATION TO BE USED: "Final Compensation" is the highest average compensation earnable by you during a one year or three consecutive year period of employment, whichever your agency has contracted for, immediately preceding the effective date of your retirement, or the date of your last separation from employment, if earlier, or during any other period specified by you in this application. Unless a different period is specified by you, your final compensation will be calculated based upon the one year or three year period immediately preceding your retirement or separation date."

Not surprisingly, Ramirez selected the period October 29, 1997, to October 29, 1998, the year in which he enjoyed his greatest earnings.

CalPERS Response to Ramirez' Application for Retirement Benefits

11. CalPERS requested the City of Indio to provide information related to Ramirez' compensation in his last year of service. The City of Indio provided the requested information. It was established that the amount of compensation Ramirez received in his last year of employment with the City of Indio far exceeded the compensation he received previously. Obviously, this increase was by reason of the additional compensation Ramirez received for serving as the interim City Manager.

12. By letter dated October 20, 1998, Rebecca Bolin (hereafter Bolin), a Retirement Program Specialist II with CalPERS, wrote to Ramirez and to the City of Indio to determine if Ramirez' final year of compensation was reported in accordance with California's Public Employees' Retirement Law (hereafter PERL). Bolin wrote:

"I understand the significant increase in your special compensation was due to the fact that you were acting City Manager for that period of time. However, because I may still need additional documentation to determine if this item was reported in accordance with the PERL and the fact that your retirement is so near, CalPERS will temporarily calculate your retirement compensation using the compensation listed below. This is being done in order to delays in the processing of your retirement application."

In its temporary calculation of Ramirez' service retirement benefits, CalPERS used Ramirez' reported payrate of \$6,7885.89 per month (his salary as Chief of Police) and his "special compensation" of \$299.52 per pay period (Ramirez' uniform allowance and

longevity pay). CalPERS did *not* include in its temporary calculation of Ramirez' service retirement benefits any additional compensation he received as a result of serving as the interim City Manager.

13. Mayor Wilson wrote to Bolin to explain the circumstances surrounding Ramirez' additional compensation as the interim City Manager. He outlined the difficulties the City of Indio had experienced, Ramirez' appointment as interim City Manager by the City Council and Ramirez' dedicated and successful response to an enormous challenge. Mayor Wilson wrote:

“Clearly, we have the authority to pay the salary we felt was appropriate with the responsibility we assigned. It appears to us that you are questioning our authority and responsibility as it pertains to negotiating salaries with our employees. We had an emergency that developed...and we took appropriate action to deal with it. At no time did we act on the salary issue to circumvent PERS rules or processes...”

14. By letter dated November 17, 1998, David F. Tatlock (hereafter Tatlock), Supervisor of CalPERS' Membership and Payroll Review, advised Ramirez that CalPERS “cannot accept this special compensation item” for serving as the interim City Manager for a variety of reasons. Tatlock advised that “the acting pay reported to CalPERS for you [as interim City Manager] cannot be included in your financial compensation calculation.” Ramirez was advised that his service retirement benefits would be based on a payrate of \$6,785.89 per month and on special compensation of \$299.52 per pay period.

Tatlock advised Ramirez of the right to appeal CalPERS' decision.

15. By letter dated December 17, 1998, Brian P. Dolan (hereafter Dolan), Attorney at Law, requested an administrative hearing. Numerous factual and legal issues were raised.

CalPERS accepted the letter as an appeal.

16. On June 2, 2000, Ken W. Marzon, Chief, Actuarial and Employer Services Division, signed the Amended Statement of Issues on behalf of complainant James Burton, Chief Executive Officer of the Public Employees' Retirement System.

The Amended Statement of Issues and other required jurisdictional documents were served on Ramirez and his attorneys.

On July 20, 2000, the record was opened and jurisdictional documents were presented. An opening statement was given on Ramirez' behalf. CalPERS waived the

giving of an opening statement. Various stipulations, sworn testimony and documentary evidence were received thereafter.

The parties' motion to leave the record open through the close of business on August 18, 2000, to permit the simultaneous filing of closing argument was granted.

Written closing arguments were received at the close of business on August 18, 2000. CalPERS' closing argument was marked as Exhibit 12 for identification. Ramirez' closing argument was marked as Exhibit 13 for identification.

On August 21, 2000, the record was closed and the matter was submitted.

Rebecca Bolin's Testimony

17. Relevant information was established through Rebecca Bolin's credible testimony. CalPERS is a pre-funded, defined benefit retirement program. Retirement benefits are paid to CalPERS members according to a formula that includes the retiring member's length of service, a percentage figure based on the member's age on the date of retirement and the member's "final compensation."

Most state employees and all employees of local public agencies which contract with CalPERS are members of CalPERS. Local public agencies contracting with CalPERS are subject to the Public Employees' Retirement Law and all amendments thereto. State and local safety members are eligible for greater retirement benefits under the system than are miscellaneous CalPERS members.

The City of Indio contracted with CalPERS for a "one year final compensation" period. The City of Indio contracted with CalPERS to use a "2% at 50" formula for local safety members and a "2% at 55" formula for miscellaneous members.¹ Rates were charged on that basis.

18. According to Bolin, after CalPERS reviewed the information submitted by Ramirez and the City of Indio, it concluded that certain compensation Ramirez' received in his final year of employment with the City of Indio did not qualify as "final compensation" under pertinent statutes and regulations. CalPERS excluded the \$5,000 performance bonus and the \$2,500 per month paid to Ramirez for services rendered as interim City Manager.

¹ Under this formula, a local safety member's service retirement benefit is 2% of the local safety member's final compensation multiplied by the number of years of his or her CalPERS membership if the employee retires at age 50 years. If the employee is a miscellaneous member, he or she is entitled to 2% of his or her final compensation times the number of years of his or her CalPERS membership upon retirement at age 55 years.

The bonus was rejected because it was not awarded on the attainment of formal goals and objectives and similar bonuses were not available to other municipal employees in Ramirez' class, i.e. other managers employed by the City of Indio.

CalPERS rejected the \$2,500 per month payments that Ramirez received when acting as the interim City Manager because such compensation was negotiated and no person in the same class as Ramirez was eligible to receive similar payments. Under these circumstances, CalPERS was prohibited from concluding that Ramirez' unique monthly payments were includable as "final compensation"² because applicable statutes and regulations do not permit a class consisting of one person.

Finally, serving as the interim City Manager was not a part of Ramirez' normally required job duties as the Chief of Police. Ramirez' compensation in his last year of employment was not historically consistent with the payments previously made to him. The payments made to Ramirez as interim City Manager appeared to be in the nature of "overtime" pay, a type of compensation which does not qualify as "final compensation" for purposes of determining service retirement benefits.

19. Bolin testified that a significant increase in special compensation at or near a member's retirement creates an "unfunded liability" which may increase not only the rates charged by CalPERS to the last employer, but also the rates CalPERS charges to any previous public employers who contract with CalPERS. Some actuarial problems would exist if the compensation Ramirez received as interim City Manager, a miscellaneous status, were included in his "final compensation" as a local safety member.

While Bolin was not an actuary, she had considerable training, knowledge and experience in the determination of retirement service benefits and the manner in which such benefits were funded. There was no testimony to the contrary.

The Disputed Payments to Ramirez Were Made In Good Faith

20. At issue in this matter is the additional compensation Ramirez received from the City of Indio when he provided services as its interim City Manager. These payments exceeded Ramirez' pay rate of \$6,785.89 per month and his additional special compensation of \$299.52 per pay period as Chief of Police. This additional compensation totals \$18,932 and is referred to as the "disputed payments."

² It was established that Harold L. Schilling (hereafter Schilling) became the permanent City Manager after Ramirez' tenure as interim City Manager. Schilling was paid \$95,000 per year.

21. Ramirez established that the disputed payments received from the City of Indio were made in good faith and for valuable services he rendered as the interim City Manager. Ramirez established that the disputed payments were not made in anticipation of his retirement.

LEGAL CONCLUSIONS

The Constitutional Mandate

1. Article XVI, section 17 of the California Constitution provides as follows: “The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purpose of providing benefits to participants...and defraying reasonable expense of administering the system.”

Administration of the Retirement Fund

2. The CalPERS retirement fund was established as a trust, to be administered in accordance with the provisions of the Public Employees Retirement Law solely for the benefit of the participants. Government Code section 20170. The management and control of the retirement system is vested in the CalPERS Board of Administration. Government Code section 20123. The CalPERS Board of Administration has the exclusive control of the administration and investment of the Retirement Fund. Government Code section 20171.

The Nature of the Fund and Determination of Service Benefits

3. As noted in *Hudson v. Board of Administration* (1997) 59 Cal.App.4th 1310, 1316, the Public Employees’ Retirement Law (PERL) establishes a retirement system for employees of the State of California and participating local public agencies. CalPERS determines employees’ retirement benefits based on years of service, final compensation and age at retirement. The system is funded by employer and employee contributions calculated as a percentage of employee compensation. CalPERS determines employer contribution rates based on compensation figures and actuarial assumptions. CalPERS periodically adjusts employers’ rates to compensate for any inaccuracy in those actuarial assumptions. Employee rates, in contrast, are fixed by statute.

4. In a similar vein *Pomona Police Officers’ Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578, 584, noted that CalPERS is a defined benefit plan which sets an employee’s retirement benefit upon the factors of retirement age, length of service and final compensation. Retirement allowances are therefore partially based upon an employee’s compensation. An employee’s compensation is not simply the cash remuneration received,

but is exactly defined to include or exclude various employment benefits and items of pay. The scope of compensation is also critical to setting the amount of retirement contributions, because PERS is funded by employer and employee contributions calculated as a percentage of employee compensation.

“Statutory definitions delineating the scope of PERS compensation cannot be qualified by bargaining agreements.” [Citation.] Nor can the PERS Board characterize contributions as compensation or not compensation under the PERL, those determinations are for the Legislature. [Citation.]” *Pomona Police Officers’ Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578, 585.

Determining “Final Compensation”

5. The analytical approach used to determine whether disputed payments should be included in a member’s “final compensation” has been consistent.

Disputed payments are evaluated in light of relevant code provisions and the Legislative scheme. Where a particular statute is ambiguous, the intent of the act prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. Using this approach, a determination is made concerning the inclusion or exclusion of the disputed payments.³

³ Using this approach, it was determined that a city resolution permitting an eligible city employee to convert employer-paid benefits (such as life and health insurance) to salary increases if the eligible employee retired within twelve months was “final settlement pay” and was properly excluded by CalPERS as “special compensation” in determining the employees’ final compensation. See, *Hudson v. Board of Administration* (1997) 59 Cal.App.4th 1310.

Using this approach, it was determined that a retirement conversion option contained in a collective bargaining agreement between a municipality and a police officers’ association which violated the PERL was unenforceable. The trial court determined, and the appellate court affirmed, that the retirement conversion option was an attempt to recharacterize excluded compensation into included compensation for retirement purposes at no substantial cost to the employer and the employees and would have allowed local government employers and their employees to engage in blatant pension abuse at the expense of CalPERS and its other members. See, *Pomona Police Officers’ Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578.

Using this approach, it was determined in *Oden v. Board of Administration* (1994) 23 Cal.App.4th 194 that tax-deferred, employer-paid contributions made on behalf of CalPERS members did not constitute “compensation” within the meaning of the PERL although the contributions met the literal, common definition an employer “pick up” and employer contribution under Government Code section 20022. In reaching this decision it was noted that “Courts ‘must consider the consequences that might flow from a particular construction and should construe the state so as to promote rather than defeat the statute’s purpose and policy.’” *Ibid.*, at pp. 208-209.

Using this approach, it was determined that a federal act designating “overtime” for firefighters did not preclude the use of payment for the hours worked in excess of federal overtime in calculating service retirement benefits so long as the hours claimed were considered normal for the firefighters. Thus, it was held that the “premium does not constitute ‘overtime,’ that it is properly characterized as ‘compensation’ and that its

Pertinent Statutory Authority

6. Government Code section 20630 provides in pertinent part:
“As used in this part, "compensation" means the remuneration paid out of funds controlled by the employer in payment for the member's services performed *during normal working hours*...When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall be reported in accordance with Section 20636 and shall not exceed compensation earnable, as defined in Section 20636.” (Emphasis added.)

7. Government Code section 20636 provides in pertinent part:

(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. “*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)...

(c)(1) *Special compensation of a member includes any 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*

characterization as such does not distort the compensation base or the legislative scheme.” See, *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, cited portion at 1484.

Using this approach, it was determined that a retired state employee was not entitled to have his service retirement benefits adjusted to a higher amount by CalPERS even though he successfully established before the State Board of Control that he had performed the duties of higher classification during the last four years of his public employment and that he was entitled to more compensation from his employer than he was paid. The appellate court held that the State Board of Control had no authority over CalPERS and that the additional compensation granted to the retiree by the State Board of Control was not “compensation earnable” under the PERL. See, *Snow v. Board of Administration* (1987) 87 Cal.App.3d 484.

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...

...

(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 et seq. 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) Any other payments the board has not affirmatively determined to be special compensation...

...

(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. Under no circumstances shall one employee be considered a group or class.

(2) Increases in compensation earnable granted to any 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 any 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..." (Emphasis added.)

8. Government Code section 20042 provides in pertinent part:

“On the election of a contracting agency...“final compensation” for a local member employed by that agency whose retirement is effective or whose death occurs after the date of the election and with respect to benefits based on service to the agency shall be computed under Section 20037 but with the substitution of the period of one year for three consecutive years...”

9. Government Code section 20635 provides in pertinent part:

“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.” (Emphasis added.)

Pertinent Regulatory Authority

10. Title 2, California Code of Regulations, section 571 defined “special compensation” in pertinent part as follows:

“(a) The following list exclusively identifies and defines special compensation items for members employed by contracting agency...that must be reported to CalPERS if they are contained in a written labor policy or agreement:

...

Bonus – Compensation to employees for superior performance such as ‘annual performance bonus’ and ‘merit pay’. If provided only during a member’s final compensation period, it shall be excluded from final compensation as ‘final settlement’ pay. A program or system must be in place to plan and identify performance goals and objectives.

...

Management Incentive Pay – Compensation granted to management employees in the form of...extra pay due to the unique nature of their job. Employees within the group cannot have the option to ...receive extra pay. This compensation must be

reported periodically as earned and must be for duties performed during normal work hours. This compensation cannot be for overtime...

...

(b) The [CalPERS] Board has determined that all items of special compensation listed in subsection (a) are:

- (1) *Contained in a written labor policy or agreement;*
- (2) *Available to all members in the group or class;*
- (3) *Part of normally required duties;*
- (4) *Performed during normal hours of employment;*
- (5) *Paid periodically as earned;*
- (6) *Historically consistent with prior payments for the job classification;*
- (7) *Not paid exclusively in the final compensation period;*
- (8) *Not final settlement pay; and,*
- (9) *Not creating an unfunded liability over and above PERS' actuarial assumptions."*

Respondents' Contentions

11. Ramirez and the City of Indio raised several contentions, most of which focused on the quality of Ramirez' performance as interim City Manager, the right of the Indio City Council to set Ramirez' pay, its right to reward his superior performance and the parties' good faith in setting Ramirez' compensation as interim City Manager.

Did Ramirez do a good job when he was acting as both Chief of Police and as interim City Manager in his final year of employment with the City of Indio?

No. He did a great job. He more than earned what he was paid. However, service retirement benefits are not based on a formula involving the value of the services provided by an employee.

Did the Indio City Council have the authority to set Ramirez' compensation as its interim City Manager and to award him premium pay for superior performance?

Of course. CalPERS does not dispute the Indio City Council's authority to determine how its employees should be compensated. But, CalPERS cannot calculate service retirement benefits based on compensation when compensation does not qualify as "final compensation" under applicable statutes and regulations.

Did Ramirez and the City Council act in good faith in setting the additional compensation Ramirez was to receive for the valuable services he rendered when he was acting as both Chief of Police and as interim City Manager?

Yes. There is no evidence that such compensation was designed to spike Ramirez' service retirement benefit. However, the issues of questionable intent and good faith are not involved in the statutory and regulatory determination of what constitutes "final compensation."

Was Ramirez' additional compensation for "overtime?"

Sort of. While it is true that Ramirez was not, by virtue of the nature of his employment, subject to federal laws concerning the payment of overtime, that matter does not fully resolve the question. It is clear that Ramirez' additional compensation was earned for taking on additional responsibilities of interim City Manager and for the time required of him to meet those responsibilities.

Ramirez' Compensation as Interim City Manager Should Not Be Included in Calculating Ramirez' Service Retirement Benefits

12. Ramirez was appointed as *interim* City Manager. The Indio City Council did not establish a permanent position of City Manager/Chief of Police. It did not set a payrate for the position of City Manager/Chief of Police.

It was understood that Ramirez' services as interim City Manager would be temporary. Ramirez was compensated for the additional hours he was required to work *beyond his normal working hours as Chief of Police* in order to meet the added but temporary responsibilities of the position.

Ramirez received the payrate, uniform allowance and longevity pay he was entitled to as Chief of Police when he received the additional compensation for acting as the interim City Manager. The monthly compensation Ramirez received as interim City Manager was not pursuant to any labor policy or agreement and it was not available to other City of Indio employees who were similarly situated. It was earned for the valuable services Ramirez provided in excess of the hours he normally worked as Chief of Police.⁴

The performance bonus Ramirez received as interim City Manager was not pursuant to any labor policy or agreement and it was not available to other similarly situated City of Indio employees. It was earned during his final compensation period and it was not awarded as a result of meeting formal goals and objections previously identified. It was earned for services Ramirez provided in excess of the hours he normally worked as Chief of Police.

The compensation Ramirez received as interim City Manager – both the monthly payments and the performance bonus – were for services provided in excess of the hours Ramirez served as Chief of Police. An unfunded liability over and above PERS' actuarial assumptions would exist if Ramirez' were to receive a service retirement benefit based in

⁴ Government Code section 20635 provides in pertinent part:

"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."

part on the compensation he earned as interim City Manager in his final year of employment with the City of Indio.

*Good Cause Exists to Sustain CalPERS' Decision to Exclude
from the Calculation of Ramirez' Retirement Benefit Allowance
All Compensation Ramirez Received as Interim City Manager*

13. Good cause exists to sustain the Chief Executive Officer's determination that the disputed payments made to Roy T. Ramirez in connection with his service as the interim City Manager, City of Indio, be excluded from the calculation of his service retirement benefit allowance.

This conclusion is based on all Factual Findings and on all Legal Conclusions.

ORDER

The Chief Executive Officer's determination that the disputed payments made to Roy T. Ramirez in connection with his service as the interim City Manager, City of Indio, be excluded from the calculation of his service retirement benefit allowance is sustained.

Dated: September 18, 2000

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT B

CPI Detailed Report Data for January 2014

Editors
 Malik Crawford
 Jonathan Church

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Table 24. Historical Consumer Price Index for All Urban Consumers (CPI-U): U. S. city average, all items-Continued

(1982-84=100, unless otherwise noted)

Year	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sep.	Oct.	Nov.	Dec.
1970	37.8	38.0	38.2	38.5	38.6	38.8	39.0	39.0	39.2	39.4	39.6	39.8
1971	39.8	39.9	40.0	40.1	40.3	40.6	40.7	40.8	40.8	40.9	40.9	41.1
1972	41.1	41.3	41.4	41.5	41.6	41.7	41.9	42.0	42.1	42.3	42.4	42.5
1973	42.6	42.9	43.3	43.6	43.9	44.2	44.3	45.1	45.2	45.6	45.9	46.2
1974	46.6	47.2	47.8	48.0	48.6	49.0	49.4	50.0	50.6	51.1	51.5	51.9
1975	52.1	52.5	52.7	52.9	53.2	53.6	54.2	54.3	54.6	54.9	55.3	55.5
1976	55.6	55.8	55.9	56.1	56.5	56.8	57.1	57.4	57.6	57.9	58.0	58.2
1977	58.5	59.1	59.5	60.0	60.3	60.7	61.0	61.2	61.4	61.6	61.9	62.1
1978	62.5	62.9	63.4	63.9	64.5	65.2	65.7	66.0	66.5	67.1	67.4	67.7
1979	68.3	69.1	69.8	70.6	71.5	72.3	73.1	73.8	74.6	75.2	75.9	76.7
1980	77.8	78.9	80.1	81.0	81.8	82.7	82.7	83.3	84.0	84.8	85.5	86.3
1981	87.0	87.9	88.5	89.1	89.8	90.6	91.6	92.3	93.2	93.4	93.7	94.0
1982	94.3	94.6	94.5	94.9	95.8	97.0	97.5	97.7	97.9	98.2	98.0	97.6
1983	97.8	97.9	97.9	98.6	99.2	99.5	99.9	100.2	100.7	101.0	101.2	101.3
1984	101.9	102.4	102.6	103.1	103.4	103.7	104.1	104.5	105.0	105.3	105.3	105.3
1985	105.5	106.0	106.4	106.9	107.3	107.6	107.8	108.0	108.3	108.7	109.0	109.3
1986	109.6	109.3	108.8	108.6	108.9	109.5	109.5	109.7	110.2	110.3	110.4	110.5
1987	111.2	111.6	112.1	112.7	113.1	113.5	113.8	114.4	115.0	115.3	115.4	115.4
1988	115.7	116.0	116.5	117.1	117.5	118.0	118.5	119.0	119.8	120.2	120.3	120.5
1989	121.1	121.6	122.3	123.1	123.8	124.1	124.4	124.6	125.0	125.6	125.9	126.1
1990	127.4	128.0	128.7	128.9	129.2	129.9	130.4	131.6	132.7	133.5	133.8	133.8
1991	134.6	134.8	135.0	135.2	135.6	136.0	136.2	136.6	137.2	137.4	137.8	137.9
1992	138.1	138.6	139.3	139.5	139.7	140.2	140.5	140.9	141.3	141.8	142.0	141.9
1993	142.6	143.1	143.6	144.0	144.2	144.4	144.4	144.8	145.1	145.7	145.8	145.8
1994	146.2	146.7	147.2	147.4	147.5	148.0	148.4	149.0	149.4	149.5	149.7	149.7
1995	150.3	150.9	151.4	151.9	152.2	152.5	152.5	152.9	153.2	153.7	153.6	153.5
1996	154.4	154.9	155.7	156.3	156.6	156.7	157.0	157.3	157.8	158.3	158.6	158.6
1997	159.1	159.6	160.0	160.2	160.1	160.3	160.5	160.8	161.2	161.6	161.5	161.3
1998	161.6	161.9	162.2	162.5	162.8	163.0	163.2	163.4	163.6	164.0	164.0	163.9
1999	164.3	164.5	165.0	166.2	166.2	166.2	166.7	167.1	167.9	168.2	168.3	168.3
2000	168.8	169.8	171.2	171.3	171.5	172.4	172.8	172.8	173.7	174.0	174.1	174.0
2001	175.1	175.8	176.2	176.9	177.7	178.0	177.5	177.5	178.3	177.7	177.4	176.7
2002	177.1	177.8	178.8	179.8	179.8	179.9	180.1	180.7	181.0	181.3	181.3	180.9
2003	181.7	183.1	184.2	183.8	183.5	183.7	183.9	184.6	185.2	185.0	184.5	184.3
2004	185.2	186.2	187.4	188.0	189.1	189.7	189.4	189.5	189.9	190.9	191.0	190.3
2005	190.7	191.8	193.3	194.6	194.4	194.5	195.4	196.4	198.8	199.2	197.6	196.8
2006	198.3	198.7	199.8	201.5	202.5	202.9	203.5	203.9	202.9	201.8	201.5	201.8
2007	202.416	203.499	205.352	206.686	207.949	208.352	208.299	207.917	208.490	208.936	210.177	210.036
2008	211.080	211.693	213.528	214.823	216.632	218.815	219.964	219.086	218.783	216.573	212.425	210.228
2009	211.143	212.193	212.709	213.240	213.856	215.693	215.351	215.834	215.969	216.177	216.330	215.949
2010	216.687	216.741	217.631	218.009	218.178	217.965	218.011	218.312	218.439	218.711	218.803	219.179
2011	220.223	221.309	223.467	224.906	225.964	225.722	225.922	226.545	226.889	226.421	226.230	225.672
2012	226.665	227.663	229.392	230.085	229.815	229.478	229.104	230.379	231.407	231.317	230.221	229.601
2013	230.280	232.166	232.773	232.531	232.945	233.504	233.596	233.877	234.149	233.546	233.069	233.049
2014	233.916											

See footnotes at end of table.

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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 April 6, 2015, I served the following listed document(s), by method indicated below, on the parties in this action: **CALPERS' POST-HEARING BRIEF.**

SEE ATTACHED SERVICE LIST

XX BY U.S. MAIL

By placing the original /**XX 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.

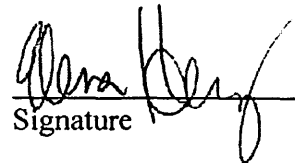
XX BY ELECTRONIC SERVICE

(to individual persons)

On April 6, 2015, I also served 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.

- 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.

ELENA HERNANDEZ
Type or Print Name


Signature

SERVICE LIST

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10 *Attorneys for Respondent Bruce Malkenhorst*

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20 *Counsel for Real Party in Interest of City of Vernon*

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