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BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

9 In Re the Matter of ) CALPERS CASE NO.:  
10 BRUCE V. MALKENHORST, SR and ) OAH CASE NO.: 2013080917  
11 CITY OF VERNON, ) **RESPONDENT MALKENHORST'S**  
12 Respondents. ) **POST-HEARING BRIEF**  
13 ) Hearing Dates: August 25-27, 2014  
14 ) September 3-4, 2014  
15 ) February 19, 2015  
16 ) Location: Los Angeles OAH

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1 **INTRODUCTION**

2 From 1978 on, Vernon employed and paid Malkenhorst solely in the single position of  
3 City Administrator/City Clerk ("CACC") for performing the various duties and responsibilities  
4 the City assigned to the CACC position.<sup>1</sup> Malkenhorst performed all of the CACC duties and  
5 responsibilities during normal work determined to be full-time by Vernon, predominantly at  
6 Vernon City Hall. Malkenhorst was not paid for work over his full-time hours, not paid hourly,  
7 not paid "overtime", did not keep timesheets, and was not paid separately for various duties. The  
8 evidence shows the bi-weekly salary of the CACC position qualifies as payrate under the PERL  
9 entitling Malkenhorst to the higher pension. Malkenhorst is also entitled to 25% longevity pay.

10 Failing to credit the evidence recognized even by CalPERS' employees Rodgers and  
11 Lueras, CalPERS' witness Jimenez misunderstands, misstates, or conjectures that Malkenhorst  
12 held numerous separate jobs, each with separate compensation that was lumped together.  
13 Jimenez wrongly interprets the PERL, ignores the facts, wrongly applies the *Prentice* decision,  
14 and inappropriately applies new regulations retroactively.

15 The documents and testimony are clear, consistent, and overwhelmingly prove  
16 Malkenhorst's entitlement to the higher pension. CalPERS' case, by contrast, suffers an  
17 irreconcilable inconsistency, relying on neither the documents nor the testimony.<sup>2</sup>

18 **FACTUAL BACKGROUND**

19 **I. City of Vernon's Governance and Structure**

20 **Background.** Since its founding in 1905, Vernon's "motto" has been an "exclusively  
21 industrial city." (Councilmember Hilario Gonzales ("HG"), 9/4/14, 110:8-10.)<sup>3</sup> Businessmen  
22

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23 <sup>1</sup> Once the CACC position was established in 1978, Vernon did not assign Malkenhorst  
24 personally or individually to any duty, position or responsibility within City government, other  
25 than CACC. In its charter, resolutions, documents, and structure, Vernon assigned duties to the  
26 CACC *position*. The RDA, Historical Society, and Industrial Development Association are  
27 separate entities, not part of the City administration.

28 <sup>2</sup> CalPERS' *Brief* asks the Court to rely on Vernon's documents (and not the testimony)  
(*Brief*, 26:11-19) but CalPERS' Jimenez testified she did not rely on or believe Vernon's  
documents (TJ2 119:15-120:18.)

<sup>3</sup> See *Appendix A- Finding Guide* attached hereto which lists each witness that testified,

1 founded Vernon "to build a city as a business community for the businessman to bring  
2 businesses to the West Coast". (HG 113:4-6.) The City would be run as a business. (HG 113:16-  
3 17.) Vernon's constituents are largely industries that care about the lower price of electricity.  
4 (Testimony of Gloria Orosco ("GO"), 9/3/14, 136:16-137:2.) Vernon directly supplied electricity  
5 to residents and industry. (GO 136:22-24, testimony of Bruce Malkenhorst ("BM"), 2/1915,  
6 19:20-20:12.) Having electrical prices priced less than Edison was important to the City and  
7 important to the City Council. (GO 138:11-20.)<sup>4</sup>

8 Structure of Vernon's City Government. Vernon is a council-mayor form of government.  
9 It was a general law city until 1988. The Councilmembers retained ultimate authority and power  
10 over decision-making. (HG 111:13-15.) Five councilmembers served continuously for most of  
11 the time in question. (BM 11:11-14) For example, Gonzales was elected in 1974 and  
12 continuously remained a councilmember for 38 years until December 2011. (HG 109:9-18.)

13 Typical City Documentation, Typical City Position. Expert Robert Adams reviewed and  
14 found that Vernon's resolutions and minutes are typical of California cities. (Testimony of  
15 Robert Adams ("RA"), 9/4/14, 166:15-20.) He found that the job duties and descriptions in the  
16 Vernon documents were typical (RA 206:2-9), including the established duties and  
17 responsibilities of the CACC (RA 209:16-19). Adams gave his professional opinion that based  
18 on Vernon's documents, the CACC position was consistent with the practices he has seen in  
19 other cities for a single full-time position with various duties and responsibilities. (RA 180:4-9.)

20 Hyphenated Titles. Single positions often have hyphenated titles in smaller cities. (RA  
21 106:1-3.) Orosco testified that the City used a hyphenated title for one full position so that "one  
22 person did more than one specific task for one specific department." (GO 69:8-15.) Cities can  
23 take a number of duties from one or more position and put them into one and create a new  
24

25 \_\_\_\_\_  
26 their status, the day that each testified, and the page and line where their cited testimony is found  
27 in that day's transcripts. The transcripts were lodged with the OAH on 10/7/14 and 4/13/15.

28 <sup>4</sup> The lower price of electricity was a major selling point. (GO 137:6-15.) Keeping  
electric prices low was part of how the CACC got new business to move to Vernon. (GO 137:3-  
11; BM 9:20-23.)



1 position by resolution or ordinance. (RA 207:16-21, *Gov't Code*, §§36501, *et seq.*, 41005.)<sup>5</sup>

2 City Clerk Position in 1977. Vernon's City Clerk position had multiple duties and  
3 responsibilities before Malkenhorst was hired. (HG 125:17-22.) In 1977, Malkenhorst took over  
4 the multiple duties that the old City Clerk used to perform. (HG 125:22-126:2, Exh. 7-2.)

5 City Administrator Position. Ordinance 883, adopted 8/1/78, established the position of  
6 CACC which was later incorporated into the *Charter*. Vernon hired Malkenhorst into the  
7 position. (HG 110:15-111:12.) Ordinance 883 mandated that the CACC was appointed to serve  
8 as City Clerk, Municipal Employee Relations Representative and Personnel Director. (Exh. 9-4,  
9 9-5.) The *City Code* confirmed this and appointed the CACC to serve as Purchasing Agent. (Exh.  
10 10-2, 10-3, 10-9.) Ordinance 883 and the *Code* set forth various duties of the CACC, including  
11 that the CACC shall "perform such other duties and exercise such other powers ... as may be  
12 assigned or delegated to him, from time to time, by action of the Council." (Exh. 9-12, 10-8.)

13 When Malkenhorst became CACC, "he was responsible for all the departments" in the  
14 City, including the Light & Power and Water Departments. All department or administrative  
15 heads reported to him. (HG 125:1-8.)

16 City Council Retained Power and Control. The Council did not want a city official to  
17 make decisions on his own and then have the Council find out about it later. (HG 112:4-112:15.)  
18 The Council wanted the City Administrator to make suggestions to the Council, including about  
19 "what the department is doing", and then let Council have the final decision. (HG 112:15:22.)  
20 (BM 14:22-16:22.)

21 Duties of CACC Position. Vernon's *Charter*, resolutions, ordinances and the Council  
22 required the CACC position to perform various duties and responsibilities within the single job  
23 of CACC. (HG 115:5-9, GO 30:4-8.) The duties of director of personnel are fully and completely  
24 described within the CACC duties. (GO 31:22-23:2, Exh. 9-8.) The CACC was tasked with  
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26 <sup>5</sup> In 1985, Vernon had two separate positions of Chief Deputy City Clerk and Secretary to  
27 City Administrator, paying top salaries of \$2,982 and \$2,815. (GO 64:4-11; Exh. 22-36.) A year  
28 later Vernon restructured it into Chief Deputy City Clerk/Secretary to City Administrator with a  
top salary of \$3,280. (GO 59:19-21, Exh. 24-40.) Vernon created one position and eliminated  
two. (GO 68:11-14.) With new responsibilities, the job didn't change much. (GO 67:5-8.)

1 purchasing. (GO 38:14-17.) City administrators sign documents under the titles, duties and  
2 responsibilities delegated by the city council to them, even though they only hold a single  
3 position as city administrator. (RA 142:22-143:3, *Gov't Code*, §1220.) The titles merely  
4 informed the public of who to contact on specific issues and for internal chain of command  
5 purposes. (BM 50:3-17, 53:11-14.) As CACC, Malkenhorst was "responsible for the rest of the  
6 City and the other departments" but "he would be doing this under the administration as a City  
7 Administrator." (HG 115:13-14.)

8 Duties and Responsibilities Assigned to CACC Position, Not to Individual. Vernon's  
9 *Charter*, resolutions and ordinances assigned duties and responsibilities to the CACC position  
10 (not to Malkenhorst personally or individually).<sup>6</sup> Joaquin Leon understood and agreed that the  
11 *Charter* authorizes the Council to appoint *the office* of CACC to hold and perform various duties.  
12 (Testimony of Joaquin Leon ("JL"), 8/25/14, 130:3-8.) In its documents, the Council did not  
13 appoint the individual (Malkenhorst) holding the CACC office to personally perform any  
14 municipal duties outside the CACC position. (JL 129:10-25.)

15 Typicality of Multiple Duties and Responsibilities. Typically, multiple responsibilities  
16 and duties (including personnel director, labor negotiator, and labor relations) were assigned by  
17 the city council to be responsibilities and duties within the city administrator position without  
18 additional pay. (RA 100:1-19, 102:3-14, 158:4-13, 163:24-164:25, 173:14-25, 174:8-12, 174:25-  
19 175:5, 176:7-15, 210:1-23.) For example, the various duties<sup>7</sup> of city clerk and treasurer are often  
20 performed within the city administrator position without additional pay. (RA 209:16-210:23.)

21 Vernon's Practice of No Additional Pay. Vernon provided no pay<sup>8</sup> associated with the  
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23 <sup>6</sup> The redevelopment agency (RDA), Vernon Historical Preservation Society (VHPS),  
24 and Industrial Development Association (IDA) are/were separate entities or corporations with  
25 separate bylaws or existence outside city government. (RA 207:2-7, RA 197:9-12.) They do not  
26 contract with CalPERS. (See *Request for Official and Judicial Notice ("RFOAJN")*.)

26 Malkenhorst individually served without pay in the RDA, VHPS and IDA. (JL 168:14-169: 8.)  
27 <sup>7</sup> Additional hours might be required in the first year of a new duty or responsibility, but  
28 in the second or third year, no additional hours might be required. (RA 195:2-15.)

28 <sup>8</sup> Leon demonstrated that in 1983-1984 when the Council assigned the CACC the duties  
of purchasing agent, the CACC position received only a \$195 annual merit raise on the \$7,105

1 CACC assuming the duties and responsibilities associated with the CEO of Light and Power, and  
2 CEO of natural gas financing. (JL 175:24-179:14.) The City provided no compensation for the  
3 RDA, VHPS or IDA duties,<sup>9</sup> for the municipal employees relations duties (JL 147:4-14, Exh. 18-  
4 8) or for personnel director (JL 147:15-25, BM 13-17-14:7.)<sup>10</sup>

5 Vernon's resolutions annually establish the single pay for the single CACC position.  
6 (Exh. 11 to 30, 33 to 43, 49 to 60, 63 to 65) No resolution, contract, ordinance, or other  
7 document provided compensation directly or indirectly for any other or separate duties,  
8 responsibilities or positions. (JL 178:24-179:14.) Leon testified that if there was pay for any of  
9 these duties and responsibilities, it had to have been documented in a resolution. (JL 179:2-3.)  
10 Leon looked but found no resolution, contract, ordinance, or other document that indicated any  
11 pay for any duties, responsibilities or positions other than CACC. (JL 178:24-179:14.)

12 Leon testified that while personally working for Vernon, he was required to perform all  
13 of the duties that the Council placed in the office that he held, whether compensated or not. (JL  
14 155:18-21.) He testified that the Council did not pay its management employees additional  
15 compensation for performing various responsibilities. (JL 142:20-25.) Leon was asked to take on  
16 various responsibilities but was not paid specifically or additionally for them. (JL 143:9-144:6.)

17 Light & Power Duties. On May 5, 1981, the Council reorganized the administration of  
18 the electrical department. (Exh. 14-1.) The CACC was appointed "to serve as CEO of the  
19 Electrical Department ... [and] shall serve in said capacity with no increase in compensation...."  
20 (Exh. 14-2.)<sup>11</sup> The CEO of Light & Power duties were placed within the responsibilities of the

21 \_\_\_\_\_  
22 salary, even though the purchasing agent was previously paid \$2,746. (JL 160:21-163:12; Exh.  
23 19-30, 20-38, KKKKK.) The \$195 or 1.3% was the only increase that year. (JL 163:7-20.)

24 <sup>9</sup> Neither Vernon nor the separate RDA, VHPS, or IDA entities paid the CACC or  
Malkenhorst individually for duties associated thereof. (JL 175:24-179:14.)

25 <sup>10</sup> CalPERS wrongly claimed Malkenhorst received separate pay as Treasurer after  
26 appointed as CACC (CalPERS' *Brief*, 11:15-21) but Malkenhorst clarified on cross-examination  
that the *Assistant* Treasurer received the small stipend, not him. (BM 104:4-105:2; Exh. 8-2.)  
27 Malkenhorst received no compensation separately for his Treasurer duties. (BM 44:2-45:1.)

28 <sup>11</sup> In 1991, the Council appointed the CACC to serve as CEO of the Gas Municipal  
Utility Department and also assigned 4 other positions to perform duties related to the Gas  
Utility Department, with "the compensation for the [Gas Utility] positions included in the  
compensation established" for the existing positions. (Exh. 37-30.)

1 CACC because "there were more things that needed to be looked at from the City as a whole".  
2 (GO 135:12-18.) Vernon banded together with other cities to get better rates from Edison  
3 because "if they were more of a bigger unit as opposed to just the City of Vernon going knocking  
4 on somebody's door and fighting and fighting and fighting, there was some way these  
5 conglomerate of agencies could band together." (GO 135:19-136:11.)

6 Orosco said a CEO was needed at Light & Power because "the City was getting more—  
7 expanding with the electricity issues." (GO 123:1-5.) She said the City needed somebody that  
8 could meet with other agencies that had their own electrical utility departments, with Southern  
9 California Edison on litigation, and meet with attorneys. (GO 123:5:12.)<sup>12</sup> Although Malkenhorst  
10 "would spend the time that he had to spend with the financial people, the political position...he  
11 also maintained his other responsibilities that he had to do." (HG 134:2-7.) Malkenhorst was not  
12 so busy working on the new power generators that he did not perform all of the CACC duties.  
13 (HG 134:8-12.) Malkenhorst worked on the new power plant only in the capacity or position as  
14 CACC. (HG 139:14-20.) The assignment of Light & Power-related duties to the CACC did not  
15 create a separate position, but was simply part of the Council tasking existing City personnel to  
16 handle Light & Power-specific tasks as part of their existing jobs.<sup>13</sup>

17 Leon agreed that if no document designates salary for CEO of Light & Power, no salary  
18 should be attributed to that position. (JL 108:3-7.) For pay to be attributed to Light & Power, a  
19 resolution or document would have to specify that Malkenhorst was paid for the CEO duties.<sup>14</sup>

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21 <sup>12</sup> The CEO "was a bigger scope than the director in the daily immediate operations."  
22 (GO 123:13-14.) Dealing with the other agencies in SCPA became the CACC's responsibility,  
23 instead of taking the Light & Power department head away from daily operations of operating  
24 that department. (GO 135:22-136:11.)

25 <sup>13</sup> Vernon's Council tasked at least 8 separate positions (that each earned a single salary in  
26 different departments) with tasks in L&P—(i) the CACC; (ii) the Director of the Water  
27 Department; (iii) the Accountant, (iv) Senior Utility Clerk, (v) Utility Clerk; (vi) Chief Diesel  
28 Operator, (vii) Diesel Operations I–V and (viii) Engineering Aide III. (E.g., Exh. 17-16, 17-19,  
17-36, 17-37; 20-13, 20-17, 20-38, 20-39.) The salary resolutions state that pay for the Light &  
Power-related duties "is included in the compensation established" for the existing positions.  
(Exh. 17-22, 20-23.) This continued to Malkenhorst's retirement. (Exh. 65-73:65-75.)

<sup>14</sup> At one point, Leon speculated that the City paid Malkenhorst for the CEO duties

1 Leon never found a document, resolution, or minute order that attributes any compensation to the  
2 CEO of Light & Power. (JL 108:21-23.) Instead, City documents clarify that the CACC served  
3 as CEO of Light & Power with no compensation. (JL 165:18-25; Exh. 14-2.)<sup>15</sup>

4 As CalPERS' and Vernon's witness, Leon clarified that no increase in compensation  
5 meant that "he's receiving no additional compensation for the added position." (JL 86:4-21.)  
6 "[S]ince he is not receiving any form of compensation for that position, we will not add it to the  
7 payroll module." Leon would not have entered the CEO of Light and Power in the payroll reports  
8 because "he's not being paid." (JL 87:8-25.)<sup>16</sup> Leon would not have reported a separate position  
9 for the CEO of Light & Power based on the records in evidence. (JL 111:13-18.)

10 Charter City. In 1988, Vernon exercised its rights to become a charter city and not be  
11 restrained by the "general law". The *Charter* authorizes "the City Council may appoint the City  
12 Administrator to any other office in the City and direct the City Administrator to carry out the  
13 duties of that office of any other position of employment with the City in addition to his or her  
14 duties as City Administrator." (Exh. 29-21.) Pursuant to Ordinance 883, Council required the  
15 CACC to devote his entire full time to City interests in the capacity of CACC. (Exh. 9-11.)

16 Vernon's Experience. Under Malkenhorst's guidance, Vernon prospered and changed.  
17 (HG 112:23-113:1.) As this happened, the Council required the CACC position to perform more  
18 responsibilities, including communicating with people outside the City. (HG 114:6-22.)

19 **II. Elements of the CACC Position and Duties**

20 Work Performed Only As CACC. Orosco reviewed everything that came into the CACC

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23 contrary to Vernon's resolutions: "It said no compensation, but [the later pay schedule] says it's  
24 included. So there's something in there, and it doesn't specify the amount and it's vague." (JL  
25 153:3-5.) Leon focused on the words "included in" but he did not know how much, and indicated  
26 that words "included in" were not sufficient in itself to establish compensation. (JL 154:11-16.)

27 <sup>15</sup> CalPERS says Malkenhorst received a 24% pay increase over the 1.5 years after the  
28 Council tasked the CACC with duties in Light & Power, claiming it was delayed compensation  
for previously taking on the new Light & Power duties. But CalPERS ignores that the Council  
provided Malkenhorst with a raise to retain him after Nevada Light & Power tried to hire him  
away at a higher salary. Vernon ended up providing a smaller pay increase. (BM 56:10-58:11.)

<sup>16</sup> Leon testified that the ADP reports attribute 16 hours to the code for the Electrical  
Department and \$3,954.74 in earnings.

1 office from 1981 to 2004. (GO 28:3-4, 72:16-73:11.) She was aware of the nature of work that  
2 Malkenhorst performed from 1981 to 2004. (GO 73:12-74:5.) Orosco testified that 100% of  
3 Malkenhorst's work was performed as CACC. (GO 74:6-19.)

4 Duty Statements. Formal duty statements are not required. Chief officers can be required  
5 to perform tasks that are listed in the duty statement of different positions. (RA 198:10-17.) Like  
6 the CACC duties described in Vernon's *Charter*, most executive job descriptions include an  
7 additional or appointed duties clause at the end. (RA 200:10-18.) No formal duty statements for  
8 the Treasurer and Deputy Treasurer positions existed when Malkenhorst was working.  
9 (Testimony of Sharon Duckworth ("SD"), 9/3/14, 180:4-19.) Duty statements do not need to be  
10 updated or provided to citizens unless the citizens specifically ask for them. (RA 201:19-22.)

11 Delegation. Malkenhorst delegated many day-to-day tasks but retained decision-making  
12 power. (BM 24:9-24, 42:2-43:16.; also see *Gov't Code*, §1194.) For example, Malkenhorst  
13 delegated the day-do-day Treasurer duties to Duckworth as Deputy City Treasurer,<sup>17</sup> but "if there  
14 was something we were trying to invest in, then I had to ... talk to [the CACC] to get approval."  
15 (SD 179:6-10.) "So he was involved in the decision making, but not in the day-to-day ... work."  
16 (SD 179:18-23.) Duckworth worked a 40-hour week as City Treasurer. (SD 177:10-17.) When  
17 Malkenhorst was City Treasurer, Duckworth did the actual day-to-day duties as Deputy City  
18 Treasurer. (SD 178:8-14.) When she was promoted to City Treasurer, she performed much the  
19 same day-to-day duties that she had previously as Deputy. (SD 178:15-17.) The CACC also  
20 delegated agenda items and minutes for personnel meetings. (GO 21:16-18.)

21 Full-Time Position. Vernon specified that the CACC position was full-time. (RA 149:8-  
22 16; Exh. 9-11, Ordinance 883, Ex 63-56) Orosco and Gonsales testified that Malkenhorst worked  
23 full-time as CACC position from 1981 to 2004. (GO 74:20-22, HG 116:19-21.)

24 Work Location. Malkenhorst worked regular hours at Vernon City Hall. (BM 37:1-15.)

25 Hours. From 1987 through the end of Malkenhorst's tenure, Vernon's pay resolutions  
26 explicitly stated that the CACC's full-time "hours of work [are] to be as necessary". (GO 130:25-  
27

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28 <sup>17</sup> "When not otherwise provided for, each deputy possesses the powers and may perform  
the duties attached by law to the office of his principal." (*Gov't Code*, §1194.)

1 131:5, JL 166:6-15; Exh. 27-3 through Exh. 65-47.) The normal working hours for City  
2 Managers and City Administrators are 8am to 5pm but obviously there are more hours. (RA  
3 145:4-8) Orosco said Malkenhorst worked more than 32 hours a week. (GO 40:18-20.)  
4 Malkenhorst normally averaged 40-45 hours a week, all in the CACC position. (BM 23:14-16,  
5 180:6-22.) Orosco was aware of when he came to work because he had to walk past her to get to  
6 his office. (GO 22:11-13, 25:24-26:2.) He was usually in the office before Orosco arrived. (GO  
7 26:3-6.) Malkenhorst left at different times. (GO 26:13-16.) Even the hotly disputed ADP reports  
8 show "full-time", 80 hours for 2 weeks. (Exh. 67, 68.) Gonzales considered Malkenhorst to be  
9 "on call" 24 hours a day. (HG 117:18-21.)

10 40-Hour Work Week Does Not Apply. Vernon's resolutions exclude the CACC from a  
11 40-hour week. (Exh. 27-3 through Exh. 65-47.) Vernon specifically forbade any compensation to  
12 the CACC for work beyond his full-time work week. (Ex 63- 45, 65-37.) The CACC was  
13 salaried and not paid an hourly rate. (See, e.g., Exh. 24-22, 24-23, Ex 63-56.) Leon recognized  
14 that Vernon's statement that all employees *other than* 24-hour shift fire department personnel,  
15 the CACC and the director of environmental health "shall be paid on an hourly basis" means that  
16 the CACC position is salaried, managerial, and will not be paid on an hourly basis. (JL 78:2-5,  
17 170:14-17; Exh. 37-21, Ex 63-56.)<sup>18</sup> Even when cities establish a 40-hour week, it only applies  
18 to regular employees and not to management such as City Administrator. (RA 187:21-189:24,  
19 213:19-23.)

20 No Time Sheets. Likely because the CACC was a full-time, salaried, managerial position,  
21 Vernon never kept track of CACC hours, or how other management employees spent their time.  
22 (Ex 63-56, GO 40:21-41:1, 80:21-81:2.) Generally, city executives do not clock in or keep time  
23 sheets. (RA144:24-145:3.) Duckworth started as Vernon's payroll clerk in 1979, worked for over  
24 31 years and said there were no time sheets for managerial employees or department heads. (SD  
25 145:8-16, 151:2-4.) She entered hours for those who had hours. (SD 145:22-25.)

26 Work Schedule. The entire City of Vernon worked a four-day work week. (GO 97:10-  
27

28 \_\_\_\_\_  
<sup>18</sup> The director of environment health also was not paid on an hourly basis. (*Ibid.*)

1 25.) The Council did not put Malkenhorst on a daily work schedule. (HG 118:17-18.) The  
2 Council did not require Malkenhorst to attend work on weekends "unless there was a situation  
3 that required him to be there for the City at the time." (HG 117:18-22.) With respect to  
4 Malkenhorst's occasional meetings on Fridays, Orosco was not there and did not know how  
5 frequent or long the Friday meetings were. (GO 115:8-20.) Gonzales lived next door to City  
6 Hall, but he did not go there on Fridays, as it was closed. (HG 119:5-14.)

7 No Overtime. Orosco testified from her review of the payroll from 1981 to 2004 that  
8 Malkenhorst was never paid any overtime. (GO 57:2-12.) City Administrator is a managerial  
9 position paid a salary; there is no overtime pay. (Ex 63- 45, RA 152:2-6, 176:16-18.) Duckworth  
10 defined an exempt employee as "they don't get overtime." (SD 150:23-151:1, See *RFOAJN*.)

11 No Part Time Employees. Vernon did not have any part-time employees. All Vernon's  
12 employees were full-time. (SD 174:20-24.)

13 Single Salary, Single Pay Check from General Fund, Paid Only in CACC Position. City  
14 leaders are paid a single payroll check from the city's general fund. (RA 144:2-11.) Gonzales  
15 testified that Vernon paid Malkenhorst a single payroll check for the performance of his CACC  
16 position. (HG 115:16-19.) Malkenhorst was paid by payroll check drawn only from the City's  
17 general fund. (GO 75:6-10, JL 125:12-13, 126:1-7.) In review of the payroll from 1981 to 2004,  
18 Orosco said Malkenhorst was never paid in any position other than CACC. (GO 57:13-58:4.)

19 Pay Schedules. From 1978 to 2005, Vernon listed the CACC pay rate (and longevity pay)  
20 on its pay schedules. (Exh. 11 to 30, 33 to 43, 49 to 60, 63 to 65.) Vernon paid the CACC a  
21 single monthly salary of \$35,302 in 2005. In the pay resolutions, there is no separate finance,  
22 personnel, or treasury department. Those are all included in the CACC department. (JL 174:5-17,  
23 182:10-15; Exh. 65-73.) Generally, cities do not list a position with no pay on a "pay schedule"  
24 because the position was not paid. (RA 211:23-212:16.)

25 Public Availability. From 1986 to 2004, Orosco prepared the Council minutes, pay rates,  
26 ordinances, agendas, salary resolutions and other resolutions of the City and made them publicly  
27 available pursuant to the Brown Act. (GO 81:10-82:7, 83:9-84:6.) Upon request, Orosco would  
28 make "everything and anything" of Vernon's documents (except those privileged) publicly



1 available. (GO 83:9-14.) Agendas were posted prior to meetings. (GO 84:11-18.) CalPERS'  
2 Jimenez testified that there was no issue that the resolutions were adopted in open meetings and  
3 publicly available. (Testimony of Tomi Jimenez ("TJ"), 8/27/14, TJ3 72:16-73:3.)

4 City Policy About Raises. There were two raises a year for all city employees, one on  
5 their anniversary date where the employee would be reviewed by their department head and then  
6 an annual cost of living raise. (HG 130:2-15.)

7 Salary Negotiation. It is a standard practice for City Managers and City Administrators to  
8 renegotiate their salary with the city council every year. (RA 190:6-8, 203:10-13.) Generally,  
9 they receive raises at annual review. (RA 153:9-20.) Neither common nor uncommon,  
10 sometimes mid-year increases were given. (RA 190:9-17, 204:10-15.) The increases "were  
11 strictly based on performance". (RA 153:24-154:1.) The annual increases in the salary were not  
12 associated with taking on various duties and responsibilities.<sup>19</sup> (RA 153:24-154:6.) Generally, the  
13 city council does not provide salary increases for additional hours worked. (RA 203:14-19.)

14 Negotiation of CACC Salary, Vernon's Annual Review. As one member of Vernon's City  
15 Council where all the councilmembers participated, Gonzales participated annually in merit  
16 salary negotiations with Malkenhorst. (HG 127:25-128:4.) In deliberations before either the  
17 finance committee or the personnel committee, the committee reviewed "what [Malkenhorst] had  
18 accomplished during the prior year that fell under his responsibilities." (GO 125:22-126:7.)  
19 Malkenhorst talked about the results during the prior year (HG 135:7-12) and requested a pay  
20 increase because "we have accomplished this much during this past year through my oversight  
21 and participation" (GO 128:3-8). The Council considered all of the things that he performed over  
22 the year in his CACC position, but did not give him a greater salary for any "extra work". (HG  
23 134:23-135:2.) Malkenhorst did not seek increased pay for taking on additional responsibilities.  
24 (GO 128:3-8.) Malkenhorst never made a salary request based on the number of hours that he  
25 worked. (HG 135:7-12.) Vernon's finance committee made recommendations to the entire City  
26 Council about the amount and timing of raises. (HG 131:10-13.) Over 30 years, the salary for the  
27

28 <sup>19</sup> Leon testified that if he sought a raise solely for performing additional responsibilities,  
then the raise would be related to those additional responsibilities. (JL 159:6-12.)

1 CACC position grew large because the City kept growing, the City kept looking "ahead to the  
2 future of the City", the City maintained its objectives and made responsible financial  
3 arrangements to keep Vernon friendly to business. (HG 115:20-116:5.)

4 City Charter Requires Accounting for Costs by Department for Accounting Purposes.

5 Vernon's *Charter* requires that staff estimate revenues and expenditure for each City  
6 department<sup>20</sup> for the next fiscal year. (Exh. 29-24.) The *Charter* requires costs, including salaries,  
7 to be allocated over different "departments". (JL 127:15-25, 138:2-7.) Departments are "the way  
8 that the City's accounting system is kept". (JL 67:22-23.) Specifically, departments refer to the  
9 "City's general ledger accounting system". (JL 68:4-6.) Departments are "not listed separately  
10 [on the pay schedule], but our accounting system does have them separately." (JL 183:13-17.)

11 Vernon used the term "departments" in at least three disjointed and contrary ways that  
12 should not be confused or equated. Vernon's staff used the term "departments" differently when  
13 discussing organizational structure, salary schedules, and cost accounting. "The salary schedule  
14 does not represent the way the City is structured or the accounting system." (JL 183:23-24.)<sup>21</sup>

15 Home Departments. Although "under Mr. Malkenhorst's name he had [cost allocation]  
16 charges to different departments... he is included in [only] one department's payroll." (SD  
17 163:18-20, 166:6.) "He's in our home department 1002 [City Administrator]...that's his home  
18 department, and then all of these other ones are afterwards according to the budget, the way the  
19 budget was allocated for his salary." (SD 164:3-7.) "The City Administrator/City Clerk and  
20 finance department were all listed in the same salary resolution section." (SD 164:9-13.)

21 Cost Accounting and Codes. The separation of departments and coding have no  
22 significance outside of "cost" accounting. (GO 132:14-17.) For "cost" accounting purposes, a  
23 "department head" would have to in some instances oversee two or more accounting  
24 "departments". (GO 107:8-12.) Orosco identified department codes 1001, 1002, 1003, 1004,  
25

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26 <sup>20</sup> Duckworth listed the departments in 1979 as fire, health, city clerk's office and  
27 community services. (SD 150:1-2, see also BM 30:12-6.)

28 <sup>21</sup> Leon testified that there is a different department head for the accounting version of the  
department. (JL 183:25-184:3.)

1 1014, 1015, 1018, 1022, 1023 and 9000 as only associated with the CACC department from  
2 1981 to the time that she retired in 2005. (GO 50:10-51:15, 53:4-14.) Malkenhorst would oversee  
3 these "departments" within his capacity as CACC. (GO 133:14-134:13.) When asked whether  
4 Malkenhorst as CACC was head of different departments,<sup>22</sup> Councilmember Gonzales answered  
5 that Malkenhorst was the City Administrator of all these departments. (HG 137:21-23.)

6 Budgeting, Cost Accounting, Allocation of Salaries is Not Actual Hours or Even  
7 Estimated Hours. Even before it was computerized, Duckworth was involved in Vernon's  
8 budgeting and the salary resolutions. (SD 154:16-155:4.) As part of the annual budgeting for the  
9 coming year, the Council allocated salaries prospectively across departments.<sup>23</sup> (JL 118:19-  
10 120:1.) Vernon had the same budgeting process for allocating percentages to different  
11 departments from 1985 to 2004. (SD 160:24-161:1.) In the budgets, "we had several people that  
12 their salary was allocated to different departments under the same title."<sup>24</sup> (SD 155:19-22.) Leon  
13 testified that this was proper so long as an employee works in a job allocated across different  
14 departments but paid from the same fund (e.g., the general fund). (JL 120:24-121:1, 126:16-19.)

15 The allocation of the managers' salaries across departments was by percentage. (SD  
16 155:17-22, 160:4-8.) The percentage was based on the department's budget. (BM 63:17-23.)<sup>25</sup>

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18 <sup>22</sup> Leon testified that for accounting purposes, each department has a department head  
19 that determines the allocation. (JL 181:1-3, 187:22-23.) But there was not a separate department  
20 head for each department listed in the accounting codes. (GO 47:24-48:8.)

21 <sup>23</sup> CalPERS claims Gonzales testified that salary was allocated by estimates of time to be  
22 spent in various departments in the coming year. (CalPERS' *Brief*, 13:5-7.) Gonzales' testimony  
23 actually was much less definitive, simply that salary might be allocated from one part of the  
24 budget to another "as part of the time he spent with the department." (HG 136:14-20.) Indeed,  
25 Gonzales never discussed with Malkenhorst the number of hours he worked. (HG 119:21-120:3.)  
26 But Gonzales clarified that Malkenhorst performed all duties solely as CACC. (HG 139:15-20.)

27 <sup>24</sup> The 1979 pay resolution said the Accountant II salary was to be "charge[d] half to city  
28 clerk, a quarter to water department and a quarter to Light & Power." (SD 148:9-23; Exh. 11-12.)  
Other positions, like switchboard, were also charged to different departments. (SD 149:20-22.)

<sup>25</sup> In some cities the "oversight functions such as HR, finance city management, city  
council, city attorney, risk management" were allocated by percentage over different  
departments. (RA 94:13-16.) At Dinuba, the amount of the percentage of salary that was  
allocated to a specific department was based on the percentage of the City Council agenda that  
was allocated to that department. (RA 95:2-96:24.) At Lafayette, the City Manager's salary was

1 The managers' salaries were not allocated by hours (GO 46:22-47:1) or based on actual hours  
2 worked (SD 160:13-14, GO 55:20-56:3). The allocation was percentage of salary, and "not  
3 necessarily his time."<sup>26</sup> (SD 181:3-5.) The salary was "allocated", not necessarily "attributed" to  
4 work in Light & Power. (SD 182:4-5.) Malkenhorst's salary as CACC was allocated by  
5 percentages over different departments because the CACC managed those departments in his  
6 CACC position. (GO 55:20-56:3, 55:23-56:1.)

7 Other Employees' Salaries Were Also Allocated. "The director of community service, the  
8 city administrator, the chief deputy city clerk, the finance office manager, the director of  
9 environment health" and others in the water and electrical departments were examples of single  
10 managerial positions at Vernon that were paid one salary where the expense was allocated across  
11 different departments. (SD 158:21-160:23.)<sup>27</sup> Community Services Department employees had  
12 their salaries allocated over three departments: water, street, and public works. (GO 42:21-47:2.)

13 Annual Budgeting Process For Prospective Fiscal Year. Starting before the beginning of  
14 the new fiscal year, Vernon's budgets went through the treasurer's office to prepare for  
15 submitting a proposed budget to the Council. (GO 35:10-11.) Malkenhorst would meet with the  
16 finance department and go over the budget for the next fiscal year. (GO 35:14-20.) Vernon's  
17 finance committee contained three council members who had the only votes. (SD 191:4-10 )  
18 Malkenhorst was not a member of the finance committee and did not vote. (SD 190:17-18.) The  
19 finance committee was very involved in overseeing the budget (SD 189:21-24) and did not  
20

21 allocated by percentage across different departments. (RA 159:11-12.) The allocation was a  
22 whole department expense or resource in a budget transfer. (RA 213:3-11.) Allocation of salaries  
23 is "a budgetary issue" where you take a cost and apply it to next year's budget by percentage.  
(RA 160:23-162:17.)

24 <sup>26</sup> Duckworth did not know the reasons why any percentages were allocated to Light &  
25 Power or any other departments (SD 182:7-11) nor who determined the percentages (SD 182:21-  
26 183:1.) For budgeting, Orosco forwarded information to finance or treasurer "to delegate budget-  
wise, percentage-wise to City Clerk, the City Treasurer and those kind of things." (GO 121:2-6.)

27 <sup>27</sup> The CACC's "salary was allocated to different department within – according to the  
28 budget and then we had our director of community services was also allocated to different  
departments." (SD 156:1-4.) The "director of community services, but he had—he had duties,  
say director—like he was in charge of the water department." (SD 156:4-6.) But he had one title  
on the salary resolution and was paid one salary from the general fund. (SD 156:14-21.)

1 simply accept whatever the department head said (SD 189:25-190:2.)

2 The CACC presented all the budgets to the finance committee for approval. (GO 34:22,  
3 62:25-64:7.) Every year, the finance committee would change the budgets proposed by the  
4 departments. (SD 188:13-21.) After the finance committee made changes, the department heads  
5 did not have power to override the changes made by the committee. (SD 188:22-25.) The finance  
6 committee "went through all the detail and saw the whole budget, and then it was submitted to  
7 the City Council for approval. (SD 189:10-12, GO 34:22, 62:25-64:7.) The City council did not  
8 always agree to the proposed budgets, but made changes to them. (GO 36:13-37:5.) After finance  
9 committee review, the whole Council reviewed the budget again, made changes if desired, made  
10 final determinations and then finally approved the budget. (SD 189:1-20.)

11 Erroneous Reading of ADP Records. In 2012, CalPERS (and apparently Vernon) had no  
12 information about how or why Malkenhorst's costs were allocated over different departments  
13 other than the ADP reports. (JL 137:22-24.) Leon admitted that he did not know how costs are  
14 allocated over different departments. (JL 118:12-15.)<sup>28</sup> "It could be based on hours, it could be  
15 based on a lot of different factors. So how were those factors determined by the departments, I  
16 don't know." (JL 118:23-25.) Leon then admitted, "the hours are not factored in." (JL 119:10-15.)

17 Leon testified that the accounting system generates a default of 80 hours for management  
18 personnel without respect to how many hours they actually work. (JL 116:4-9.) The accounting  
19 system assigns the salaried employees an hourly rate even though management employees are  
20 not paid at an hourly rate. (JL 116:4-8; see also, e.g., Exh. 63-65, 63-66, especially subsection 4.)

21 Vernon Testified That ADP Reports Are Not Evidence of Separate Pay or Separate  
22 Positions. Vernon's employee Leon testified that even if an individual is not receiving  
23 compensation for performing certain duties, part of the position for which he is being  
24 compensated might be allocated to the department associated with the duties that are not  
25 compensated. "Even though it doesn't have any compensation, the department might decide, well  
26 even though he's not being compensated for that particular position, he is performing a task of a  
27

28 <sup>28</sup> Leon originally testified that each department allocated based on "time an individual is spending in the department", then corrected his misstatement. (JL 117:12-13.)

1 City Clerk and incurs costs. So they may want to allocate a portion of his earnings to that  
2 department." (JL 132: 8-13.) Costs are allocated because "if they [think] that their cost is  
3 significant and it needs to extend to more than just one department, then they will allocate  
4 based—based on their understanding of that portion". (JL 117:13-17.) Costs are allocated  
5 because "those are the departments that absorb or benefit from those costs." (JL 119:24-120:1.)  
6 Departments do not have to recognize that a managerial employee is taking on "additional  
7 responsibilities." (JL 136:21-23.) The number of hours do not matter. (JL 136:24-25.)

8 Robert Adams' Professional Opinion. Over 33 years, Adams served as chief executive  
9 officer of five different municipalities. (RA 89:13-25; Exh. LLLL.) In addition, with a Masters  
10 degree in public administration, Adams is familiar with the policies and practices of  
11 municipalities as far as the duties and responsibilities of chief executive officers. (RA 90:5-24.)  
12 Adams gave his professional opinion that based on Vernon's resolutions and minutes, the CACC  
13 position was consistent with the practices that he has seen in other cities for a single, full-time  
14 position with various duties and responsibilities. (RA 180:4-9.) Adams found that the job duties  
15 and descriptions in the Vernon documents were typical. (RA 206:2-9.)

16 **III. CalPERS' Reviews of Malkenhorst's Compensation and Pension**

17 Orosco's Response to CalPERS in 1995-96. When CalPERS began looking at  
18 Malkenhorst's compensation in 1995, Orosco said the *single position* of CACC handled many  
19 responsibilities and that finance, personnel matters, and purchasing were under his direction.  
20 (GO 77:1-12.) Orosco thought that CalPERS was asking for comparison salaries, and she was  
21 telling them that there were no comparison salaries. (GO 77:1-4.) She only sent the CACC's  
22 salary schedule. (GO 78:17-20; Exh. 46.) The duties of City Treasurer, Director of Finance and  
23 Personnel, Purchasing Agent, or Director of Light & Power were in the CACC position and not  
24 part-time, not paid separately and not listed on salary schedules. (GO 78:11:16, 79:13-16.)

25 2005-2006 Process. Weeks after Malkenhorst retired in 2005, CalPERS commenced a  
26 compulsory formal quasi-judicial administrative process with appeal rights that challenged  
27 Malkenhorst's longevity pay and immediately reduced his pension. (Exh. VV.) CalPERS' denial  
28 letter required Malkenhorst and Vernon to "set forth the factual basis and legal authorities" to

1 support the higher pension. (Exhibit VV-3.) The issues involved were the same ones of alleged  
2 "multiple positions" and "overtime" raised by CalPERS in 1995. (Exh. WW.)

3         Loeb & Loeb attorneys Carla Feldman and Marla Aspinwall represented Malkenhorst  
4 and Vernon. (Testimony of Carla Feldman ("CF"), 8/27/14, 133:11-14.) No separate engagement  
5 letter was involved. (CF 137:16-19.) Aspinwall consulted Vernon's resolutions. (Testimony of  
6 Marla Aspinwall ("MA"), 8/27/14, 161:3-4.) Vernon told her the CACC position held a number  
7 of different job titles and duties, all included in the single full-time job as CACC (MA 161:25-  
8 162:9) and that "the positions were not separately compensated, but included in his  
9 responsibilities as a City Administrator and at no time did he receive overtime or additional  
10 compensation for performance of such duties." (MA 169:1-19.) She believed this to be factually  
11 true. (*Ibid.*)

12         On August 11, 2005, Loeb timely filed a formal Notice of Appeal that contained legal  
13 argument and submitted evidence. (Exh. XX, CF 138:17-141:7.) Among other things, Loeb  
14 argued that the CACC position "incorporates a number of different job titles and duties all of  
15 which are included in the single full-time job of City Administrator." (Exh. XX-3.) CalPERS  
16 acknowledged the Notice of Appeal on September 23, 2005 and expanded the scope of the  
17 litigation to place in controversy "multiple positions" and "overtime". (Exh. YY.) On November  
18 3, 2005 Loeb filed a second Notice of Appeal with additional evidence and law that Malkenhorst  
19 held only one full-time paid position as CACC with a single base salary. (Exhibit AAA.)

20         A year of litigation, delay, and exchange of telephone calls followed. Aspinwall  
21 understood that CalPERS' legal department was reviewing the appeal. (MA 173:19-25.) If  
22 CalPERS believed that there was a contested fact or if CalPERS wished to reduce appellant's  
23 benefit, CalPERS was required to file a *Statement of Issues* and initiate an evidentiary hearing  
24 under the APA. CalPERS did not do so. Instead, on August 17, 2006, CalPERS sent a  
25 "determination" letter that explicitly referred to Loeb's second Notice of Appeal and stated,  
26 "*CalPERS<sup>29</sup> has determined*" that Malkenhorst was entitled to the higher pension. (Exh. BBB.)

27  
28         <sup>29</sup> CalPERS delegated authority to make *final* decisions. (§§20099, 20134; CCR §555.)

1           Loeb's attorneys thought they won. (CF 145:25, MA 173:15-18.)<sup>30</sup> Aspinwall believed it  
2 was a final resolution of all the matters presented. (MA 177:5-10.) She understood that CalPERS  
3 resolved all of the issues in Malkenhorst's favor or not pursued them. (MA 175:23-25.) On  
4 November 30, 2006, CalPERS confirmed the upward pension adjustment based on a finding that  
5 Malkenhorst held a single paid position as CACC and was entitled to 25% longevity. (Exh.  
6 CCC.) No reservation of rights to re-litigate was signed. The appeal was not withdrawn. In 2006,  
7 CalPERS paid Malkenhorst a lump sum of \$136,083.13 previously withheld from his allowance  
8 that represented all underpaid monies since retirement. (Exh. CCC.)

9           CalPERS' Second Process in 2012. CalPERS paid the correct benefit for 6 years. Neither  
10 the attorneys nor Malkenhorst heard CalPERS raise any issue for 6 years. (MA 178:20-179:3, CF  
11 149:18-20.) After the City of Bell scandal erupted, however, CalPERS initiated a second  
12 administrative process re-litigating the same facts and law previously determined. (Exh. 3.)

13           CalPERS sought documents from Vernon employee Joaquin Leon. (JL 18:12-18.) Leon  
14 was not a percipient witness until January 2008. (JL 16:18-20.) Leon went to various places  
15 where city kept records (JL 19:18-21:23.) He looked for minute orders or other documents that  
16 would appoint an employee to a position as well as for compensation. (JL 30:3-4.) He found no  
17 documents providing Malkenhorst with compensation outside his CACC duties. (JL 179:1-14.)

18           Terrance Rodgers worked in CalPERS' Compensation Review Unit ("CRU") as a Staff  
19 Service Manager I for less than 3 years but was involved in CRU's efforts "establishing a  
20 determination on the amount of compensation earnable that could be used in" Malkenhorst's  
21 retirement calculation in 2012. (Testimony of Terrance Rodgers ("TR"), September 4, 2014, TR  
22 8:11-14, 9:12-14, 32:9-11, Exh. NNNNN.) CRU reviews the compensation reported to verify  
23 that it complies with the PERL. (TR 8:18-21.) Rodgers reviewed more than 50 managerial  
24 employees, such as City Managers, Assistant City Managers, CEOs and General Managers,  
25 while he worked in the CRU. (TR 32:22-23, TR 32:5-6.) "We're looking at all material facts, all  
26

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27           <sup>30</sup> Feldman said "when someone says we won that means we won..." (CF 146:8-9.) The  
28 client expressed gratitude to Feldman for a "job well done". (CF 149:6-7.)



1 the relevant documents<sup>31</sup>, and applying it against case law." (TR 12:14-16, 30:4-11.) Rodgers  
2 testified that Exh. 65-73 satisfies the pay schedule requirements. (TR 28:11-13.)

3 Rodgers looked at Vernon documents that "showed that [Malkenhorst] had served in  
4 several capacities with the City of Vernon" (TR 12:22-13:1) and a chart prepared by CalPERS  
5 (TR 16:22-24) that listed several positions (TR 14:11-23, Exh. MMMMM.) But Rodgers  
6 concluded that "it appears that there's only one position." (TR 15:2, Exh. MMMMM.) Further, "it  
7 appears no compensation is related when additional positions are added." (TR 18:7-14.) Rodgers  
8 answered that zero compensation was not "compensation" with reference to *Gov't Code* §20630.  
9 (TR 26:10-11.) With respect to whether an unpaid duty or position had to be reported on a pay  
10 schedule or otherwise, "The definition of pay rate [in *Gov't Code* §20636(b)(1)] is rendering  
11 service *and* receiving compensation." (TR 24:7-8, emphasis added.) With reference to the chart  
12 in Exh. MMMMM, Rodgers found disjuncture in time between pay increases and the addition of  
13 new positions or responsibilities and noted pay increases at times when no positions were added  
14 to the chart. (TR 18:3-21.) Rodgers found that there were no multiple jobs and that the pay  
15 increases were independent of changes in the CACC job duties. (Exh. MMMMM.)

16 Rodgers testified there could be differing interpretations in CRU of PERL compliance.  
17 (TR 12:8-17, 38:3-13; Exh. ZZ, OOOOO.) Doing his best to interpret the PERL, Rodgers  
18 determined that Malkenhorst "was only in the position of City Administrator/City Clerk." (TR  
19 14:4-19, 48:1-9; Exh. MMMMM.) Based on the chart, pay increases after 1979 were not  
20 associated with various titles or responsibilities. (TR 19:3-18.) Rodgers has learned nothing since  
21 the date of his email in May 2012 that would have changed his opinion. (TR 19:19-21.)

22 Rodgers said that the employer (i.e. Vernon) determines whether a position is full-time.  
23 (TR 29:5-23.) CalPERS' CRU would be satisfied by the employer determination that a  
24 managerial employee worked full-time, especially if the hours were within the 34-60 hours  
25 range. (TR 29:24-30:3, 30:13-18.) In Rodgers' review of 70 or so high level employees, he never  
26

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27 <sup>31</sup> Rodgers looked into how the salary costs of managerial employees were allocated in  
28 the budget of the City. (TR 32:24-33:2.) CalPERS does not have a policy or procedure for taking  
into accounting how those salary costs are allocated over different departments. (TR 33:7-11.)

1 saw CalPERS divide a single full time position into multiple part-time positions. (TR 36:10-15.)

2 CalPERS' CRU employee Lueras reviewed Vernon's payroll reporting to CalPERS.  
3 (Testimony of Lolita Lueras ("LL"), September 4, 2014 62:22- 67:15.) Vernon reported  
4 Malkenhorst as a full-time salaried employee, including using code 173. (*Ibid.*, 81:14-23; Exh.  
5 FFFFF.) Lueras still believes him to be a full-time employee. (LL 67:15.)<sup>32</sup>

## 6 LAW AND ANALYSIS

### 7 I. Threshold Legal Issues

8 Independent Judgment Standard. Malkenhorst obtained a vested fundamental right in his  
9 pension, at the earlier of retirement or CalPERS' 2006 determination. The ALJ must exercise  
10 independent judgment and weigh all the evidence when making a finding. CCP §1094.5.

11 Evidentiary Presumption Regarding Vernon's Resolutions, Actions, Offices and Pay. It is  
12 presumed that official duty has been regularly performed. (*Evid. Code*, §664.)

13 CalPERS' Contrary and Inconsistent Positions Are Irreconcilable. CalPERS' Brief argues  
14 that the matter should be determined based on Vernon's records (CalPERS' *Brief*, 26:11-18.)  
15 CalPERS says the testimony of percipient witnesses should be ignored. (CalPERS' *Brief*, 26:11-  
16 18.) Contrarily and inconsistently, Jimenez argues that the documents themselves are not to be  
17 believed and that CalPERS has authority to determine what really went on. (TJ2 119:15-120:18.)

18 Collateral Estoppel and Res Judicata. Collateral estoppel and *res judicata* apply to bar  
19 CalPERS' reduction of Malkenhorst's pension in this second quasi-judicial proceeding. (*Y.K.A.*  
20 *Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4<sup>th</sup> 339, 356-  
21 357.) (1) The issues in the 2005-2006 process and the 2012-2015 process are identical; (2) The  
22 2005-2006 matter was actually litigated in a quasi-judicial process once Loeb timely filed the  
23 first Notice of Appeal in 2005. *Sims* explained, "[a]n issue is actually litigated '[w]hen [it] is  
24 properly raised, by the pleadings or otherwise, and is submitted for determination, and is  
25 determined...." (*People v. Sims* (1982) 32 Cal.3d 468, 484, italics in original.) CalPERS had the  
26

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27 <sup>32</sup> CalPERS credited Malkenhorst with full-time service credit every year. (LL 67:25-  
28 68:3.) Lueras acknowledged that Vernon's pay resolutions disclosed a CACC position and a pay  
rate associated with that CACC position. (LL 81:24-82:3.)

1 opportunity to litigate the matter further in 2006 but chosen not to; (3) The contested separate  
2 offices, longevity, and pay issues were necessarily decided in 2006 when CalPERS provided  
3 Malkenhorst the higher pension amount and paid the lump sum in 2006; (4) CalPERS'  
4 determination showed it considered and resolved the matter in 2005-2006; (5) The  
5 determination, the attorneys' understanding, the back payment of \$135,000 and then ongoing  
6 correct payment for 6 years indicated that the 2006 determination was final; and (6) The dispute  
7 was between the same parties (Malkenhorst and CalPERS, and likely Vernon).

8 *Res judicata* gives certain conclusive effect to a former judgment in subsequent litigation  
9 involving the same controversy. (*Commissioner of Internal Revenue v. Sunnen* (1948) 333 U.S.  
10 591.) *Res judicata* and collateral estoppel bar CalPERS from re-litigating a quasi-judicial action  
11 considering evidence. (*Hollywood Circle, Inc. v. Dep't of Alcoholic Beverage Control* (1961) 55  
12 Cal.2d 728, 732.) The re-litigation of issues that could and should have been pursued in a prior  
13 proceeding action is also barred. (*Takahashi v. Board of Regents* (1988) 202 Cal.App.3d 1464.)  
14 Collateral estoppel is grounded on the premise that "once an issue has been resolved in a prior  
15 proceeding, there is no further fact-finding function to be performed." (*Murray v. Alaska*  
16 *Airlines, Inc.* (2010) 50 Cal.4<sup>th</sup> 860, 864.) No new fact has arisen. (*Hughes v. Board of*  
17 *Architectural Examiners* (1998) 17 Cal.4th 763.) CalPERS does not have statutory authority to  
18 reopen a decided matter.<sup>33</sup> (*Gutierrez v. Bd of Ret. of Los Angeles Cnty Employ. Retirement Ass'n*  
19 (1998) 62 Cal.App.4<sup>th</sup> 745.) Collateral estoppel and *res judicata* can prevent the impeachment of  
20 a prior final judgment. *Berg v. Davi* (2005) 130 Cal.App.4th 223. Additionally, CalPERS has  
21 failed to state a fact or law that would allow it to proceed under *Gov't Code* section 11506.

22 Judicial Estoppel: CalPERS and Vernon. Vernon and CalPERS are judicially estopped  
23 from taking inconsistent positions from (i) Vernon's statements made in the 2005-2006 process  
24 and *in its 2012 audit response*, and (ii) CalPERS' statements on August 17, 2006 and November  
25 30, 2006 that the CACC is a single position, with a single compensation, and longevity pay. (See  
26 *People ex rel. Sneddon v. Torch Energy Servs., Inc.* (2002) 102 Cal.App.4th 181, 188.

27  
28 <sup>33</sup> The correction of errors and omissions is not authority to reopen a case. (See *Gov't*  
*Code* §§20160, 20164; *Gutierrez v. Bd. of Ret. of Los Angeles Cnty Employees Ret Ass'n.*)

1           **Laches.** Litigated in 2005-2006, laches bars CalPERS' prosecution of this case. CalPERS  
2 argues in 2015 that it could not previously figure out what occurred, but CalPERS had the  
3 opportunity to litigate further in 2006 when information was fresher but chose not to pursue it.

4           **Statute of Limitations.** If CalPERS had any authority to commence a new administrative  
5 process to again attempt to reduce Malkenhorst's pension, CalPERS was required to do so before  
6 2009 when the three-year statute of limitations ran on bringing a new administrative proceeding.

7           **Charter City Autonomy.** Charter cities enjoy "autonomous rule over municipal affairs  
8 pursuant to article XI, section 5 of the California Constitution, 'subject only to conflicting  
9 provisions in the federal and state Constitutions and to preemptive state law.' " (*Associated*  
10 *Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352.) Two core  
11 "municipal affairs" reserved for determination by charter cities are (i) the compensation of  
12 municipal employees and (ii) the structure of government (including structuring offices, duties,  
13 and positions). (*Cal. Const.*, art. XI, §5(b); *Johnson v. Bradley* (1992) 4 Cal.4th 389.)

14           In 1988, Vernon exercised its right to become a charter city and reserved complete  
15 power over compensation of its government officials and the structure of its sub-government  
16 offices. (*Vernon City Charter*, Exh. 29-19, 29-20, 29-21; *First Street Plaza Partners v. City of*  
17 *Los Angeles* (1998) 65 Cal.App.4th 650.) Vernon structured the CACC as a single full-time  
18 position that performed a wide range of activities. (Exh. 29-19, 29-20, 29-21.) Pursuant to its  
19 *Charter*, resolutions, and ordinances, Vernon paid the CACC (i.e. Malkenhorst) in cash, pursuant  
20 to publicly available pay schedules, for services that the City required that the CACC render on a  
21 full-time basis during normal working hours. Vernon maintained its reserved rights to determine  
22 compensation and office structure. (*Batters v. City of Santa Monica*, (1980) 101 Cal.App.3d  
23 595.) Factually, Vernon never delegated its reserved charter autonomy to CalPERS. The Vernon-  
24 CalPERS contract does not limit Vernon's power to designate compensation and office structure.  
25 (*Campbell v. City of Monrovia* (1978) 84 Cal.App.3d 341.) The PERL does not preempt charter  
26 city autonomy. (*Johnson v. Bradley, supra*, at 398-399.)

27           However, accepting *arguendo* the PERL as applied by contract or otherwise, the PERL  
28 does not preempt or override Vernon's decisions, especially because there is no conflict or

1 inconsistency between them.<sup>34</sup> For example, the PERL has no express term limiting the duties or  
2 responsibilities that can be performed in an office or position. Especially when they arise from  
3 charter decisions, CalPERS is without authority in the language of the PERL to divide the CACC  
4 duties and create separate "positions". CalPERS' prosecution fails for lack of authority to revise  
5 Vernon's "home rule" decisions. (*Gov't Code*, §11507, *et seq.*)

6 **II. City Establishes Duties; Few Limitations**

7 Even under the more restrictive general law, the City establishes the duties or position.  
8 (*Gov't Code*, §§36501, 36505, 41005.) By ordinance, the City may authorize or require one  
9 position to perform various duties, including of other positions. (*Gov't Code*, §40805.5, 40812.)  
10 For example, the City by ordinance may transfer or require performance of the City Clerk's  
11 duties and responsibilities by other offices. (*Gov't Code*, §40805.5; see also §§51505, 51507.)  
12 The City can require the City Clerk and other positions to perform "additional duties". (*Gov't*  
13 *Code*, §40812.) (Once a charter city in 1988, Vernon had vastly greater power to establish duties  
14 or position. *Gov't Code* § 34004) When not otherwise provided for, each deputy possesses the  
15 powers and may perform the duties attached by law to the office of his principal. (*Gov't Code*,  
16 §1194.) When an officer discharges *ex officio* the duties of another office than that to which he is  
17 elected or appointed, his official signature and attestation shall be in the name of the office the  
18 duties of which he discharges. (*Gov't Code*, §1220.) The limitations on performing multiple  
19 duties are against an individual simultaneously being elected to "incompatible offices" (which  
20 does not apply to this situation). (*Gov't Code*, §1099; *Eldridge v. Sierra View Local Hospital*  
21 *Dist.* (1990) 224 Cal.App.3d 311.)<sup>35</sup>

22 **PERL Scheme.** The PERL does not address duties or positions. There is no implication in  
23 the PERL that the Legislature delegated authority to CalPERS to restrict or proscribe duties.

24 **III. Public Employees' Retirement Law ("PERL")**

25 **Interpretation in Favor.** The Supreme Court has held that "[a]ny ambiguity or uncertainty  
26

27 <sup>34</sup> The amount that Vernon paid the CACC position should establish the pay rate under  
28 the PERL. The amount of the future pension arises from and during a member's employment  
with the agency. (*Frank v. Board of Administration* (1976) 56 Cal.App.3d 236, 242.)

<sup>35</sup> Jimenez admitted she was not familiar with these code sections. (TJ3 9:16.25.)

1 in the meaning of pension legislation must be resolved in favor of the pensioner." (*Ventura*  
2 *County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4<sup>th</sup> 483, 490.)

3 Zero Compensation is Not Compensation under Section 20630. Other than the CACC  
4 salary and longevity, neither the CACC position nor Malkenhorst (either inside or outside the  
5 CACC position) was paid separately or additionally for various duties. Since zero compensation  
6 is not "compensation" under Government Code 20630, CalPERS cannot attribute any  
7 compensation, time, or service to any duty or position except CACC. (See also TR 26:7-11.)

8 No Overtime Under Section 20635. "Overtime is the aggregate service performed by an  
9 employee as a member for all employers and in all categories of employment in excess of the  
10 hours of work considered normal for employees on a full-time basis, and for which monetary  
11 compensation is paid". (*Gov't Code*, §20635.) Vernon as the employer determined the CACC to  
12 be a full-time position. (Exh. 27-3 through Exh. 65-47) Vernon only paid Malkenhorst for his  
13 full-time work performing the various duties of the single managerial CACC position within the  
14 normal time established by Vernon. The CACC was not paid any overtime. Every percipient  
15 witness testified that Malkenhorst worked full-time and performed all of his duties in the single  
16 position of CACC. The Vernon documents say the same. Since the VHPS, RDA, and IDA are  
17 independent entities that are not CalPERS contracting agencies, Malkenhorst could not perform  
18 services for them as a member. In any case, he was not paid for those.

19 CalPERS cites a STRS case, *O'Connor*, where teachers worked 2 separate full time jobs  
20 with 2 separate paychecks. Under STRS, second job is required to be overtime. See RFOAJN.  
21 *O'Connor* is irrelevant (other than to show that no PERL statute or caselaw supports CalPERS).

22 Pay Rate Under Section 20636. The controlling documents resolutions, ordinances, and  
23 pay schedules of Vernon clearly establish the CACC as a single full-time managerial position  
24 tasked with performing various duties during normal work as assigned by the City's *Charter* and  
25 resolutions. From its general fund, Vernon paid the CACC one single base salary in cash  
26 pursuant to publicly available pay schedules. The monthly base pay or pay rate for the CACC  
27 satisfies the PERL definition of "pay rate" and "compensation earnable"

28 With respect to whether an unpaid duty or position had to be reported on a pay schedule

1 or otherwise, "The definition of pay rate in Government Code 20636(b)(1) is rendering service  
2 *and* receiving compensation." (TR 24:7-8, emphasis added.) If no pay and no benefit arises from  
3 an act or designation by the City, the PERL cannot reach out and attempt to control it.

4 No Authority to Divide a Managerial Position. Vernon determines the "normal" full time  
5 duties and responsibilities to be performed within a single position, the work schedule, the  
6 number of hours for full-time status and the pay rate. "It has been beyond dispute that pay  
7 received for the performance of all normally required duties ... constitutes compensation under  
8 PERS law.' " (*City of Fremont v. Board of Administration*, supra, 214 Cal.App.3d at p. 1031,  
9 263 Cal.Rptr. 164.) *City of Sacramento v. Pub. Employees Ret. Sys.*, 229 Cal. App. 3d 1470,  
10 1484, (Ct. App. 1991) CalPERS cannot construe the performance of the normal duties that  
11 Vernon assigned in and to the CACC *position* by Malkenhorst as separate jobs or positions,  
12 especially for purposes of reducing Malkenhorst's retirement allowance.

13 No Facts to Assert Multiple Positions. CalPERS has not provided any fact or document  
14 that indicates that Malkenhorst held separate positions or received separate pay. (JL 179:1-14.)  
15 The pay resolutions and testimony prove that he received no salary but his CACC salary.<sup>36</sup>

16 No Authority to Divide Salary. CalPERS could not provide any PERL authority to divide  
17 a single salary for a single full time position into multiple salaries related to titles or duties  
18 assigned to be performed in that position. Without any facts in Vernon's records, CalPERS  
19 cannot construe a large salary for one position as multiple separate salaries.

20 Publicly Available. CalPERS acknowledges that the pay schedules containing the base  
21 salary and longevity for CACC were publicly adopted and publicly available. (TJ3 72:16-73:3.)<sup>37</sup>

22 Special Compensation: Longevity Pay. As allowed as special compensation under CCR  
23 571(a), longevity pay is additional compensation to employees who have been with an employer

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24  
25 <sup>36</sup> CalPERS offers disproven speculation that Malkenhorst's pay increases "seemed a  
26 clear indicator that ... his increase [ ] included multiple positions" (TJ2 16:6-9); or that CalPERS  
27 "could see that [Vernon was] adding positions.... They're labeled positions." (TJ2 15:15-20.)

28 <sup>37</sup> CalPERS' *Brief* argues incorrectly that the PERL *requires disclosure of job duties and hours* in pay schedules. (CalPERS' *Brief*, 21:7-22:3.) Jimenez, however, admitted job duties are *not* required in pay schedules. (TJ2 86:24-87:9.) It is a conceptual fallacy to assert that job titles like "Clerk" involve the same duties in all cases; see discussion in Section II, *supra*.

1 for a certain minimum period of time exceeding five years. Vernon publicly approved and  
2 included 25% longevity pay for councilmembers and the CACC in its written policies, pay  
3 schedules and otherwise satisfied the terms in regulation and Section 20636. CalPERS  
4 specifically approved it in 2006.

5 Prentice and Ramirez are Not on Point. First, Ramirez's and Prentice's increases occurred  
6 within three years of their retirement and thus were limited by "look back" provisions. (See *Gov't*  
7 *Code* section 20636(e)(2) which limit pay increases in the final compensation and "look back"  
8 period to the average of those in the same group.) Malkenhorst had no above-average or  
9 significant pay increases in the three to five years preceding retirement.<sup>38</sup>

10 Second, Ramirez and Prentice received pay *specifically for and concurrently with* taking  
11 specific new and different responsibilities *outside* their current position. Vernon's resolutions  
12 assigned various duties and responsibilities *within* the CACC position itself, and the CACC  
13 position did not receive a pay increase for or simultaneously with any increased responsibilities.  
14 (See TR 18:7-13; Exh. MMMMM.)

15 Third, Prentice's higher pay was not included *at all* on any publicly available pay  
16 schedule. (Prentice's pay was above the amount listed for the position Prentice held.) The  
17 *Prentice* court said "Because [the increase] was not reflected in the city's published salary range,  
18 it was not part of the manager's regular payrate." (*Prentice v. Bd. of Admin., California Pub.*  
19 *Employees' Ret. Sys.* (2007) 157 Cal.App.4th 983, 987.) While requiring the pay to be disclosed,  
20 *Prentice* does not require or imply that an employer must list duties or unpaid "positions". In  
21 *Ramirez*, the City of Indio indicated the City Manager job was not part of the "normally required  
22 duties" of Police Chief so the City Manager compensation was not part of "payrate" for Police  
23 Chief and was instead "overtime".<sup>39</sup> (*In re Ramirez* (2000) CalPERS' Prec. Decis. 00-06, pg. 8.)

24 No Retroactive Application. CalPERS must apply statutes in the PERL and/or the  
25 *California Code of Regulations* that were in effect on July 1, 2005. Even the term "publicly  
26

27 <sup>38</sup> CalPERS has not sought to limit the increases in Malkenhorst's pay in the last 5 years.

28 <sup>39</sup> Ramirez was Police Chief of Indio working well over 40 hours a week and nearing retirement when the council paid Ramirez an extra \$2,500 a month to serve as City Manager.



1 available pay schedule" was added in statute in 2006, after Maleknhorst retired. (See *RFOAJN*;  
2 *Prentice, supra.*) CalPERS cites *C.C.R.* §570.5, even though it did not become operative until  
3 August 10, 2011, more than six years after Malkenhorst's retirement.

4 Interest On Underpayments. CalPERS established Malkenhorst's right to the higher  
5 pension in 2006. CalPERS has since wrongfully withheld it and owes interest.

6 CalPERS Seeking Repayment of Overpayments. If the administrative process upholds  
7 CalPERS' reduction of Malkenhorst's pension, CalPERS may *prospectively* seek to reduce the  
8 benefit only after the decision becomes final but cannot seek "overpayments". In 2006, CalPERS  
9 determined the amount of the higher benefit. CalPERS cannot seek to recollect an overpayment  
10 of the pension that it has determined is correct.<sup>40</sup> In addition, the statute of limitations of three or  
11 four years has run in 2009, so CalPERS is barred completely. (*CCP*, §337(1).)

12 Offsets If Reduction. Malkenhorst paid for five (5) years of Additional Retirement  
13 Service Credit ("ARSC") based on the base salary and longevity pay of approximately \$44,128  
14 per month. If CalPERS prevails, it must refund any excess payment, with interest.

15 **IV. CalPERS' Arbitrary Determinations to Reach a Predetermined Result**

16 In this case, CalPERS' Jimenez interprets the PERL, whether certain or ambiguous,  
17 *against* Malkenhorst at every step.<sup>41</sup> For example, Jimenez focuses on Malkenhorst's increased  
18 pay over 30 years, his entire career. (TJ2 16:1-5.) Jimenez refused to limit her salary comparison  
19 to the final compensation period (one year) plus the two preceding years in *Government Code*  
20 section 20636(e)(2) (TJ2 128:12-16)<sup>42</sup> but could provide no authority for looking beyond the 3  
21

22 <sup>40</sup> At most, the look back period would start to run only when and if the CalPERS Board  
23 makes a final determination that it can reduce the pension (i.e. some time in the future). (*City of*  
*Oakland v. Oakland Police and Fire Retirement System* (2010) 224 Cal.App.4<sup>th</sup> 210, fn. 18.)

24 <sup>41</sup> To show CalPERS' arbitrary and capricious punitive action, assuming *arguendo* that  
25 Malkenhorst worked multiple positions, Rodgers thought a "payrate" for a comparable position  
26 in the Light & Power Department "may be more in alignment with the 'spirit' of SB 53 and the  
27 definition of payrate in GC 20636(b)(2)." (Exh. NNNNN.) Minimally this would qualify  
28 Malkenhorst for the \$24,000 salary for Acting Director L&P position (Exh.75-11) (a position  
CalPERS claims he held), rather than the \$7,875 salary for Acting City Clerk (Exh. 75-22.)

<sup>42</sup> Jimenez also admitted CRU only looked at pay increases of "some" of the department  
heads, but she has no documentation even of those increases. (TJ2 134:23-135:5.)

1 years to the whole career (TJ2 132:23-133:20.)<sup>43</sup>

2 **V. Court's Questions** The Court raised 5 questions in its *Order Regarding Closing Briefs*:

3 1. ***Q. Whether and how rules about a group or class comprising a single employee,***  
4 ***or rules about different treatment for members of the same group or class, should apply (i) to***  
5 ***Malkenhorst's longevity pay, his pay rate increases, or his 'final compensation,' or (ii) to City***  
6 ***Administrators or City Managers in general.*** A: For 25% longevity, see above at pg. 25-26.

7 CalPERS resolved the special compensation issue in 2006, agreeing that Malkenhorst was part of  
8 the "group or class" composed of himself and the City Council. (Exh. BBB.) For increases in  
9 payrate, the CACC did not have any "above average" increases in the final three years of  
10 Malkenhorst's employment. The CACC's pay increases averaged less than 3.75% annually for  
11 his last eight years at Vernon (Exh. MMMMM-2.) CalPERS has authority to compare increases  
12 in payrate to others only if his payrate raises exceeded the average received by everyone else  
13 during his highest three years of compensation. (§20636(e)(2).) The increase did not.

14 2. ***Q: Whether the PERL excludes from 'final compensation' calculations any***  
15 ***hours worked in excess of the number of hours defined by the City as full-time for managerial***  
16 ***employees.*** A: Yes, the PERL can exclude compensation associated with overtime if the hours  
17 exceed what Vernon defined as full time, related to managerial employees. But factually, Vernon  
18 determined to the CACC position to be full-time with hours as necessary and excluded the  
19 CACC from the hourly schedule and the 40-hour week applicable to Vernon's regular non-  
20 management employees. (Ex 63-45, 63-56) Factually, Malkenhorst *did not work* any hours above  
21 the full-time amount, did not work overtime, was not paid or credited with overtime, and no  
22

23 \_\_\_\_\_  
24 <sup>43</sup> Jimenez also claims Section 20635 disallows alleged overtime by wrongly assuming  
25 Malkenhorst held multiple positions *since 1981*, but she ignores that Section 20635 says "[t]his  
26 provision shall apply *only to service rendered on or after July 1, 1994*". In 1994, Malkenhorst  
27 had a base salary of \$26,493, which is triple the amount after CalPERS' recent reduction.  
28 Although Jimenez repeatedly said CalPERS had no policies and provisions, CalPERS' printed  
procedures say if "the participant holds more than one part-time position with the same CalPERS  
covered employer ... [a]ll part-time positions are reportable to CalPERS as the law does not  
specifically provide for the exclusion of such positions." (RFOAJN; Exh. HHHH-2413.)

1 overtime was reported *anywhere*.<sup>44</sup> Malkenhorst worked the full-time normal hours for CACC  
2 that Vernon established. Vernon reported him as full-time. Misleadingly, CalPERS quotes only  
3 part of the Vernon pay resolutions for hourly employees, "All employees of the City of Vernon  
4 shall be considered forty (40) hours per week personnel" but neglects to add the relevant  
5 continuing phrase applicable to managerial employees, "*unless otherwise specified by the City*  
6 *Council...*" (See, e.g., Exh. 63-24, 65:25, emphasis added.) Vernon specified the CACC was  
7 managerial, full-time (Ordinance 883) and the full-time "hours of work [are] to be as necessary".  
8 Vernon excluded the CACC from hourly calculations. (See pay resolutions from November  
9 1987, Exh. 27-3, through July 2004, Exh. 65-47.)<sup>45</sup>

10 CalPERS' Jimenez testified that full-time for managerial employees is between 36 and 60  
11 hours per week. (TJ1 206:25-207:1.) CalPERS admits that Malkenhorst said he worked 40-45  
12 hour weeks. (CalPERS' *Brief*, 18:9-10.) However, CalPERS *asserts* he worked multiple positions  
13 as a backdoor ploy of claiming he worked "overtime". Both CalPERS' claims fail, overwhelmed  
14 by the evidence. Even if one were to believe CalPERS' baseless assertion, no evidence implied  
15 that he worked over 60-hours or in separate "jobs".<sup>46</sup>

16 3. ***Q: Whether and where the record reflects that Vernon identified on a publicly***  
17 ***available pay schedule each pay rate paid to Malkenhorst over the course of his employment at***  
18 ***Vernon.*** A: Vernon paid the CACC a single salary pursuant to publicly available pay schedules  
19 that clearly disclosed the payrate and longevity pay for the single position of CACC in every pay  
20 resolution. (Exh. 11 to 30, 33 to 43, 49 to 60, 63 to 65.) The other "positions" that CalPERS  
21

22 <sup>44</sup> CalPERS' arguments about FSLA confuse the issues. We raised FSLA issues to  
23 emphasize that Vernon always deemed Malkenhorst as a managerial or exempt employee who  
24 was not paid hourly, not entitled to overtime pay, and who was expected to work the hours  
25 necessary to complete his duties, even if that exceeded the 40-hour-week of regular employees.

26 <sup>45</sup> CalPERS argues it demanded in 1995 that he keep track of his "overtime" and that  
27 Malkenhorst subsequently did not comply. But to the extent there was any demand in 1995, (a)  
28 CalPERS wrongly assumed that his CACC work was "different positions", and (b) ignored that  
seven years earlier Vernon established CACC's full time workweek as "hours ... as necessary".

<sup>46</sup> Orosco testified that Malkenhorst was often in the office before her and sometimes  
worked evenings and weekends (*Brief*, 18:11-15) but no facts points to more than 60 hours or  
even regular work outside Vernon's normal work schedule.

1 insists had to be on the pay schedule were not positions, but at most various responsibilities  
2 *within the CACC job*. Vernon did not pay for those duties so no pay schedule reflects them.

3 4. ***Q. Whether a publicly available pay schedule must list a job title for which there***  
4 ***is no associated salary.*** A. The Regulation 570.5 relates to “compensation earnable” and “pay  
5 rate” in Section 20636. If there is no “compensation” paid, then there is no "pay rate" and no  
6 "compensation earnable". Neither Section 20636 nor CCR 570.5<sup>47</sup> could apply if no  
7 compensation is paid. (*RFOAJN.*) Lastly, the CACC *position* itself held the other duties.  
8 Malkenhorst personally did not occupy or have a separate municipal job title after CACC.

9 5. ***Q. Whether and how evidence introduced at hearing bears upon any of the***  
10 ***issues Malkenhorst raised in his motion to dismiss, including res judicata and collateral***  
11 ***estoppel.*** A. See pgs. 20-23 above. CalPERS already determined Malkenhorst's right to the full  
12 pension in 2006. No new facts arose in 2015. For political reasons, CalPERS simply wanted to  
13 *reach a different result*. Collateral estoppel/*res judicata* apply to bar this process and restore the  
14 full pension. Vernon's charter city autonomy and the other defenses raised in the “motion to  
15 dismiss” deny CalPERS the right to proceed or to reduce Malkenhorst’s pension. In briefing,  
16 CalPERS waives any contest as it fails to address Malkenhorst's defenses (*Brief*, 16:26-27.)

17 **CONCLUSION**

18 Ignoring the facts and law, CalPERS' unwarranted second prosecution fails under the  
19 weight of false assumptions, multiple irreconcilable inconsistencies, and denial of proven facts.  
20 CalPERS has failed to put on a *prima facie* case, and utterly failed to meet its burden.  
21 Malkenhorst's legal rights to the higher pension are clearly supported with authority, case law,  
22 and CalPERS prior rulings. The evidence, documents and testimony are well-cited, consistent,  
23 credible, independently reinforcing, and persuasive. Malkenhorst is entitled to full recovery on  
24 all grounds and all matters raised, including the full pension that should be provided retroactively  
25 with interest and attorney fees.

26 Dated: May 22, 2015

27 By:   
John Michael Jensen, Attorney for Malkenhorst

28 <sup>47</sup> While "transparency" may be a laudable addition to the Brown Act, there is no basis in  
the PERL for CalPERS to insist on listing duties or "positions" without compensation.

**APPENDIX "A": FINDING GUIDE**

**References to Testimony of Witnesses Cited in the Brief**

| <b><u>Initials</u></b> | <b><u>Name of Witness, Capacity, Date of Transcript, Page Location in Transcript</u></b>  |
|------------------------|---|
| BM                     | <b>Bruce Malkenhorst, February 19, 2015, pages 7 to 182</b>   |
| CF                     | <b>Carla Feldman, attorney Loeb &amp; Loeb, August 27, 2014, pages 131 to 150</b>   |
| HG                     | <b>Hilario Gonzales, Vernon Councilmember, September 4, 2014, pages 108 to 141</b>  |
| GO                     | <b>Gloria Orosco, Deputy City Clerk, September 3, 2014, pages 14 to 142</b>   |
| JL                     | <b>Joaquin Leon, Deputy City Treasurer for the City of Vernon, August 25, 2014, pages 16 to 195</b>   |
| LL                     | <b>Lolita Lueras, CalPERS Retirement Program Specialist II, September 4, 2014, pages 51 to 88</b>   |
| MA                     | <b>Marla Aspinwall, Loeb &amp; Loeb attorney, August 27, 2014, pages 151 to 179</b>   |
| RA                     | <b>Robert Adams, Expert Witness on Municipal Practices and Procedures, September 4, 2014, pages 89 to 107 and pages 142 to 215</b>  |
| SD                     | <b>Sharon Duckworth, former Assistant Treasurer, Treasurer, September 3, 2014, pages 144 to 191</b>   |
| TJ                     | <b>Tomi Jimenez, CalPERS Assistant Division Chief in the Customer Account Services, August 25, 2014, pages 196 to 218 ("TJ1"); August 26, 2014, pages 6 to 180 ("TJ2"); August 27, 2014, pages 7 to 113 ("TJ3")</b> |
| TR                     | <b>Terrance Rogers, CalPERS Retirement Program Specialist II, September 4, 2014, pages 8 to 50</b>  |

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Law Offices of John Michael Jensen, 11500 West Olympic Blvd, Suite 550, Los Angeles, CA 90064-1524.

On May 22, 2015, I served the following document (s) by the method indicated below:

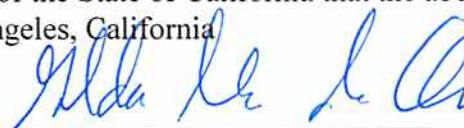
**RESPONDENT MALKENHORST'S POST-HEARING BRIEF**

By placing the document (s) listed above in a sealed envelope (s) and consigning it First Class Mail through the U.S. Postal Service to the address (es) set forth below:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 22, 2015, at Los Angeles, California



Griselda Montes De Oca