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10 **BOARD OF ADMINISTRATION**
11 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**
12 **STATE OF CALIFORNIA**

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

This dispute boils down to two issues. The “overtime” issue is whether Malkenhorst’s base salary included, directly or indirectly, payment for having to work more than “normal working hours.” The “multiple positions” issue is whether Malkenhorst’s base salary included payment for assuming City positions distinct from that of City Administrator/City Clerk. If Malkenhorst’s base salary included payment for either overtime or multiple positions, it cannot be used as “payrate” for purposes of calculating his Final Compensation.

Neither the “overtime” nor the “multiple positions” issue is new to the City or to Malkenhorst. CalPERS raised both issues in letters to the City in the mid-1990s. (Exs. 47 and 48.) Malkenhorst was responsible for addressing the issues, but he paid no heed to those letters. Nor did Malkenhorst communicate with CalPERS to ensure the City was properly tracking his work hours, work schedule, and work duties.

The “overtime” and “multiple positions” issues remained buried until a 2010 CalPERS audit, during which the City produced what business records it did keep. CalPERS reasonably relied on those records to determine that Malkenhorst’s base salary could not be used as his payrate. That determination was not, as Malkenhorst suggests, based on statutory ambiguities that might be resolved in his favor. There is no ambiguity. Malkenhorst’s interpretation of the operative law is in no way “consistent with the clear language and purpose of the [PERL].” (*Ventura County Deputy Sheriffs’ Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 490.)

II. MALKENHORST’S BASE SALARY INCLUDED OVERTIME PAY

Final Compensation excludes overtime pay, which is pay for work hours “in excess of the hours of work considered normal for employees.” (Section 20635.) That means

1 Malkenhorst received overtime pay if he routinely worked and was compensated for working
2 more hours than considered normal.

3
4 **A. City Administrator/City Clerk was Considered a Forty-Hour Position**

5 The PERL limits pensionable payrate to what a member is paid for work during
6 “normal working hours.” (Section 20636(b)(1).) “Normal working hours” for full-time
7 employees must be a specific number between 36 and 60 hours a week. (Tr. dated Aug. 25,
8 2014 at 206:19 – 207:2.)

9
10 Here, the City declared all positions outside the Fire Department to be 40-hour
11 positions “unless otherwise specified by the City Council...” (Ex. 35-8.) It also defined its
12 employees’ normal 40-hour work schedule: four days a week from “7:00 a.m. to 5:30 p.m. or
13 from 6:30 a.m. to 5:00 p.m. with [breaks].” (Ex. 35-9.)

14
15 The City Council never specified a number other than 40 as the number of hours
16 considered normal for the City Administrator/City Clerk. The City did declare that the City
17 Administrator/City Clerk was to work “hours as necessary.” (Malk. Brief at p. 28; Ex. 65-
18 47.) But “hours as necessary” simply means that the City expected the City
19 Administrator/City Clerk to work, when necessary, hours in excess of his normal 40-hour
20 work week. This interpretation is consistent with Councilman’s Gonzales’s testimony that
21 Malkenhorst was expected to work as many hours as needed to get good results. (Tr. dated
22 Sep. 4, 2014 at 135:13-19.) The PERL’s prohibition against overtime pay would become too
23 easily evaded if “hours as necessary” were accepted as a statement of normal work hours.
24
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26 The Court should find that Malkenhorst’s normal work hours were 40 hours per week.
27
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1 **B. CalPERS Reasonably Concluded Malkenhorst was Paid for Working Overtime**

2 CalPERS analyzed the City's business records and reasonably concluded Malkenhorst
3 routinely worked beyond his normal 4-day, 40-hour week and was compensated for doing so.
4 CalPERS would have preferred to base its overtime analysis on contemporaneously kept
5 records of the total number of hours Malkenhorst worked each week, the number of weekly
6 hours he worked in various City departments, and the number of weekly hours he worked in
7 his various positions/duties. But Malkenhorst had not tracked those hours despite CalPERS'
8 letters asking that he do so. (Exs. 47 and 48.)
9
10

11 Yet the City records that do exist provide ample support for CalPERS' conclusion.
12 The clearest evidence comes from City resolutions showing Malkenhorst, while working
13 full-time (40-hours per week) as City Administrator/City Clerk, assumed new duties as CEO
14 of the Light & Power Department and CEO of the Gas Municipal Utility Department. In both
15 cases, the City made a direct link between these new duties and additional pay that would be
16 wrapped into Malkenhorst's base salary as City Administrator/City Clerk. (*See, e.g.*, Ex. 16-
17 18
19 20 ["The City Administrator/City Clerk shall serve as the Chief Executive Officer in the
20 Light and Power Department and the compensation for said position is included in the
21 compensation established for the position of City Administrator/City Clerk....", emphasis
22 added]; Ex. 37-30.) After Malkenhorst became Light and Power CEO, his base salary
23 jumped 24% as compared with a 7% hike in the Consumer Price Index. (*See* CalPERS Post-
24 Hearing Brief at pp. 11-12 and fn. 3.)
25

26 The City's payroll records strengthen CalPERS' analysis. In Malkenhorst's last two
27 years of work, the majority of his salary was budgeted to Redevelopment, Gas, Light &
28 Power, and other City departments; a minority was budgeted to the City Administration and

1 City Clerk departments. (See CalPERS Post-Hearing Brief at p. 13.) Thus, it was reasonable
2 to infer that Malkenhorst was performing substantive duties tailored to the needs of these
3 other departments, doing something more than and distinct from the City Administrator's
4 usual, 40-hour role as titular supervisor of the entire City. (See *Prentice v. Board of Admin.,*
5 *California Public Employees' Retirement System* (2007) 157 Cal.App.4th 983, 992) ("the
6 Legislature has specifically considered instances where an employee is asked to take on
7 additional duties and found that such additional duties are to be treated as excluded
8 overtime.")
9

10
11 Malkenhorst rejects CalPERS' analysis of the City's records, relying instead on
12 witness testimony, including his own. But that approach presents two problems.

13
14 As a preliminary matter, witness accounts should have little role in determining
15 employee overtime. One good reason for basing payrate determinations primarily on agency
16 records is that the PERL expressly grants CalPERS access to those records. (Section
17 20221(b).) Also, agency records provide objective, transparent, and verifiable data, the use of
18 which engenders public trust in the pension system. Historical accounts from witnesses, on
19 the other hand, are nowhere described in the PERL as a source of information CalPERS can
20 or should obtain. Such accounts can be tainted by faded memories, bias, and subjectivity. For
21 CalPERS to rely upon witness accounts over agency records, would reward poor record-
22 keeping and invite pension manipulation. As a matter of public policy, witness accounts
23 should play little or no role in CalPERS' payrate analysis and should carry little weight here.

24
25 Nonetheless, the witness testimony supports CalPERS' view that Malkenhorst
26 received overtime pay. Malkenhorst testified he routinely worked 40-45 hour weeks and
27 expected to be compensated for any additional work the City assigned him. (Tr. dated Feb.
28

1 19, 2015 at 37:16 – 38:1; 140:21-25.) His secretary, Gloria Orosco, worked 40-hour weeks,
2 but noted Malkenhorst was usually in the office before her and stayed in the office as long as
3 (if not longer than) she did. (Tr. dated Sep. 3, 2014 at 25:24 – 26:26.) And Councilman
4 Hilario Gonzales considered Malkenhorst “on call or full-time duty almost 24 hours a day.”¹
5 (Tr. dated Sep. 4, 2014 at 117:15 – 118:19).

7 The Court should find the record evidence supports CalPERS’ analysis that
8 Malkenhorst’s base pay included pay for working overtime and uphold CalPERS’ conclusion
9 that the entirety of that base pay could not be used as his PERL-defined payrate.
10

11 **III. MALKENHORST HELD MULTIPLE**
12 **POSITIONS NOT REFLECTED ON CITY PAY SCHEUDLES**

13 PERL-defined payrate also excludes any part of an employee’s salary attributable to
14 positions not described on a “publicly available pay schedule.” (20636(b)(1).)² CalPERS
15 reviewed the City’s pay schedules for compliance with its publicly available pay schedule
16

17
18 ¹ Spending hours “on call” – or working while “on call” – would not be part of
19 Malkenhorst’s normal schedule, and pay for doing so would have to be excluded from
20 payrate. (Cf. *City of Pleasanton v. CalPERS* (2012) 211 Cal.App.4th 522, 537, 539 [agreeing
21 with CalPERS that a firefighter’s “standby pay was compensation for services [] rendered
outside of his normal 40-hour workweek” and excluded from payrate.])

22 ² Malkenhorst argues for the first time in closing that the “publicly available pay schedule”
23 requirement does not apply to him because it was added in 2006, after he left the City. But
24 that requirement was added to the statute as “a matter of clarification.” (*Prentice v. Board of*
25 *Admin.* (2007) 157 Cal.App.4th 983, 990, fn.4.) And amendments clarifying preexisting law
26 apply retroactively. (*Gallup v. Superior Court* (2015) 235 Cal.App.4th 682, 690 [“A statute
27 that merely clarifies, rather than changes, existing law [may be] applied to transactions
predating its enactment because the true meaning of the statute remains the same.”]) Hence,
28 the “publicly available pay schedule” requirement applies to Malkenhorst’s payrate.

1 regulation, Section 570.5.³ (Cal. Code Regs., tit. 2, § 570.5.) A pay schedule complies if it
2 “[i]dentifies the *position title* for every employee position” and “[s]hows the payrate for each
3” (Cal. Code Regs., tit. 2, § 570.5(a)(2) and (a)(3), emphasis added.)
4

5 City records revealed that, over the course of Malkenhorst’s employment, the City
6 found it had unmet needs in several departments. It bundled together job responsibilities in
7 those departments and created titles for the employees who would perform the work,
8 including CEO of the L&P Department and Executive Director and Secretary of the
9 Redevelopment Agency. The City gave Malkenhorst those titles and compensated him for
10 taking on the responsibilities associated with those positions. But instead of listing separate
11 payrates for those positions on publicly available pay schedules, the City folded the pay
12 associated with those positions into the listed payrate for City Administrator/City Clerk. The
13 PERL does not permit final compensation to be based upon a single bundled payrate
14 associated with multiple positions.
15

16
17 According to Malkenhorst, the other titles the City gave him – CEO of the Light &
18 Power Department, for example – did not reflect new positions, only new responsibilities to
19 be carried out by the City Administrator/City Clerk. (Malk. Brief at pp. 3-4.) But if the City
20 truly did not intend to create new positions, it could have dispensed with the new titles and
21 assigned specific, limited duties to the City Administrator/City Clerk. For example, a City
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24 _____
25 ³ Malkenhorst insists Section 570.5 does not apply to him because it became operative in
26 2011, after he retired. (Malkenhorst Brief at pp. 26-27.) But CalPERS adopted Section 570.5
27 to clarify publicly available pay schedule requirements. (Ex. 79.) Clarifying regulations—
28 like clarifying statutes—govern retroactively. (*People ex rel. Deukmejian v. CHE, Inc.*
(1983) 150 Cal.App.3d 123, 134–35.)

1 resolution might have directed the City Administrator/City Clerk to negotiate a labor
2 agreement or oversee the construction of a power plant. That is not what the City did.

3
4 CalPERS' construction of the pay schedule requirement—that those schedules must
5 reflect the reality of what positions exist and are being paid for—is entirely in keeping with
6 the policies of consistency and transparency inherent in the PERL's dictate that the schedules
7 be "publicly available." Malkenhorst's construction—that it was fine for the City to create
8 and pay for positions out of public view—finds no support in law or policy and would lead to
9 unjust results.
10

11 Consider *Matter of Ramirez*, discussed in and attached to CalPERS' initial brief.
12 There, the full-time Indio police chief took on extra work as interim city manager, a specific
13 position that paid an additional \$2,500 per month that CalPERS determined to be overtime.
14 Let's say Indio instead delisted "interim city manager" from its pay schedule, resolved to add
15 the city manager function to the police chief's duties, and, with a wink and a nod, promised
16 the police chief a \$2,500 "merit increase" in the next budget. Under any principled view of
17 the PERL, the result *should* be the same: the \$2,500 monthly raise is excluded from payrate
18 as pay for either overtime work or work in a position not listed on a publicly available pay
19 schedule. But under Malkenhorst's construction of the law, Indio and the police chief would
20 have done nothing more than exploit "ambiguities" in the law. That is simply not "consistent
21 with the clear language and purpose of the [PERL]." (*Ventura County Deputy Sheriffs' Assn.*,
22 *supra*, 16 Cal.4th at p. 490.)
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26 Malkenhorst calls CalPERS' position untenable because he believes it would require
27 agencies to place "zero pay" position titles on pay schedules, something for which he says
28 there is "no basis in the PERL." (Malkenhorst Brief at p. 30, fn. 47.) Not so.

1 To begin, it is unlikely there would be much of a need for “zero pay” positions.
2 Positions would be “zero pay” only in the unlikely circumstance that agencies created
3 positions for which no additional compensation of any type—including merit raises—would
4 be provided. That was not the case at the City: Malkenhorst expected and then received merit
5 raises to compensate for his additional duties. But even if some agency were able to fashion a
6 legitimate “zero pay” position, CalPERS would still insist it be placed on a pay schedule—a
7 demand well within its authority for “management and control” of the pension system and
8 power to make “rules as it deems proper.” (Sections 20120 and 20121.)
9

10
11 As with overtime, the record evidence supports CalPERS’ multiple positions analysis.
12 Malkenhorst was paid for working multiple positions nowhere listed on City pay schedules
13 but instead aggregated and buried under the City Administrator/City Clerk listing. The Court
14 should find, therefore, that CalPERS reasonably concluded that the entirety of Malkenhorst’s
15 base pay could not be used as his payrate.
16

17 **IV. CALPERS DID NOT ABUSE ITS DISCRETION IN SELECTING**
18 **A PAYRATE FOR MALKENHORST**
19

20 Because of Malkenhorst’s overtime and multiple position problems, CalPERS could
21 not use his base pay as his payrate. Instead, CalPERS had to select a payrate that best fit what
22 CalPERS knew about his employment. (See 2 CCR §570.5(b) [if CalPERS lacks sufficient
23 data to calculate payrate, “the Board, in its sole discretion, may determine an amount that
24 will be considered to be payrate, taking into consideration all information it deems
25 relevant....”]) CalPERS settled on the salary the City paid for the Acting City Clerk position
26 (Ex. 75-22) and added to its pay schedules after Malkenhorst retired. Malkenhorst has not
27
28

1 established an abuse of discretion in using the publicly available, full-time salary for that
2 single position as his payrate.

3
4 **V. MALKENHORST'S DEFENSES AND OTHER ARGUMENTS**

5 Malkenhorst reargues that CalPERS' payrate and special compensation
6 determinations are barred by various defenses. Those defenses were previously briefed and
7 have not been impacted by any evidence received at the Hearing.

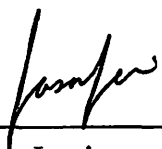
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9 Similarly, Malkenhorst makes arguments concerning offsets, interests, and the statute
10 of limitations on any recovery action by CalPERS. These arguments are neither relevant nor
11 supported by the record evidence. Like the defenses, they pertain solely to previously
12 submitted briefs.

13
14 **VI. CONCLUSION**

15 The Court should rule CalPERS has met its burden and proved, by a preponderance of
16 evidence, that its Final Compensation determination for Malkenhorst was reasonable and
17 consistent with the PERL.

18
19 DATED: June 15, 2015

STEPTOE & JOHNSON LLP

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22 By: 
23 Jason Levin
24 Attorneys for Complainant CalPERS
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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 June 15, 2015, I served the following listed document(s), by method indicated below, on the parties in this action: **CALPERS' REPLY POST-HEARING BRIEF.**

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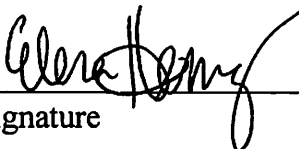
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On June 15, 2015, I also served by electronically transmitting the document(s) listed above to the email address(es) of the person(s) set forth on the attached service list. The transmission was reported as complete and without error. See Rules of Court, rule 2060.

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- 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

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