ATTACHMENT A

TRACK CHANGES - FINAL DECISION

BEFORE THE
BOARD OF ADMINISTRATION OF THE
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Calculation of Final Compensation of:	Case No. 2012-0671
BRUCE MALKENHORST, SR.,	OAH No. 2013080917
Respondent,	
and	
CITY OF VERNON,	
Respondent.	

~~PROPOSED~~ FINAL DECISION

Howard W. Cohen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on August 25 through August 27 and September 3 and 4, 2014, and February 19, 2015, in Los Angeles.

Jason Levin, Attorney at Law, of Steptoe & Johnson~~,~~ LLP, represented petitioner Karen DeFrank, Chief, Customer Account Services Division (CASD), California Public Employees' Retirement System (CalPERS).

Joung H. Yim, Attorney at Law, of Liebert Cassidy Whitmore, represented the respondent City of Vernon (Vernon).

John Michael Jensen, Attorney at Law, represented respondent Bruce Malkenhorst, Sr. (respondent Malkenhorst), who was at times present.

The parties filed various pre-trial motions. Those motions were ruled on before or during the course of the hearing, with the exception of motions filed by respondent Malkenhorst, in support of his notice of defense, by which he seeks to dismiss this action based on various legal theories. The dismissal motions will be addressed in this Proposed Decision.

Oral and documentary evidence was received. During the hearing, respondent Malkenhorst moved to seal a portion of the transcript comprising approximately five minutes of testimony on August 27, 2014; there was no objection. Given the innocuous nature of the testimony offered during that time period, the motion is denied.

The record was held open to June 15, 2015, to allow the parties to file closing briefs. CalPERS's closing brief and reply brief were timely filed and marked for identification as exhibits 90 and 91, respectively. Vernon did not file a closing brief. Respondent Malkenhorst's closing brief was timely filed and marked for identification as exhibit YYYYY. Respondent Malkenhorst concurrently filed a request that official notice be taken of certain documents; the documents were marked for identification as exhibits ZZZZZ through LLLLLL. CalPERS objected to official notice being taken of several of those exhibits. The objections are sustained as to exhibits AAAAAA, JJJJJJ, KKKKKK, and LLLLLL, on grounds of relevance, foundation, and failure to demonstrate that the documents are the proper subject of official notice. Official notice is taken of exhibits ZZZZZ and BBBBBB through IIIIII.

The record was closed and the matter was submitted on June 15, 2015.

SUMMARY

In 2012, seven years after respondent Malkenhorst retired from employment with Vernon, CalPERS recalculated respondent Malkenhorst's "final compensation," a term defined in the Public Employees' Retirement Law (PERL) (Gov. Code, § 20000 et seq.),[1] and decreased his retirement allowance. The issues in this case are whether CalPERS correctly found that respondent Malkenhorst's final compensation as previously calculated did not comply with the PERL, whether CalPERS has now correctly determined respondent Malkenhorst's final compensation, and whether CalPERS was barred by res judicata, collateral estoppel, or another legal or equitable theory, from recalculating respondent Malkenhorst's final compensation after having calculated a different figure in 2005. Because the evidence at hearing established that respondent Malkenhorst's final compensation had been incorrectly determined, and that CalPERS permissibly and reasonably ~~was not barred from~~ recalculated~~ing~~ his final compensation, respondent Malkenhorst's appeal ~~from CalPERS's benefits~~ is denied~~ in part~~. ~~It is granted in part, however, because CalPERS' current calculation of respondent Malkenhorst's final compensation is arbitrary and constitutes an abuse of discretion.~~

FACTUAL FINDINGS

Jurisdiction and Parties

---

[1] All further statutory references are to the Government Code, except where otherwise stated.

1. CalPERS is a unit of the Government Operation Agency. (Gov. Code, § 20002.) Under the PERL, CalPERS administers the retirement system for employees of the State of California and other public entities. The CalPERS Board of Administration (Board) administers CalPERS' defined benefit retirement plan. Benefits for members are funded by member and employer contributions, and by interest and other earnings on those contributions.

2. Vernon is a public agency that contracts with CalPERS for retirement benefits for its eligible employees under Government Code section 20460 et seq. Vernon was incorporated as a general law city; it became a charter city in 1988.

3. Respondent Malkenhorst was hired by Vernon in April 1975 as Deputy City Clerk/Deputy Director of Finance. Over the years he was employed by Vernon, respondent Malkenhorst's job titles and duties changed. By 1978, respondent Malkenhorst had become City Administrator/City Clerk and City Treasurer. Subsequently, while remaining the City Administrator/City Clerk and City Treasurer, respondent Malkenhorst also accrued the titles and duties of Director of Finance and Personnel, Executive Director of Light and Power/Chief Executive Officer of Electrical Department, Executive Director of the Redevelopment Agency, Secretary of the Redevelopment Agency, CEO of the Gas Municipal Utility Department, Executive Director of the Industrial Development Authority, Secretary of the Industrial Development Authority, Treasurer of the Industrial Development Authority, and Executive Director of the Vernon Historic Preservation Society.[2] Respondent Malkenhorst retired in 2005. By virtue of his employment with Vernon, respondent Malkenhorst is a local miscellaneous member of CalPERS.

4. On June 6, 2005, respondent Malkenhorst signed an application for service retirement, requesting that his pension be calculated on the basis of his highest City Administrator payrate, including longevity pay. Using those amounts, CalPERS calculated respondent Malkenhorst's final compensation in the amount of $44,128 per month, which was then used to calculate his retirement allowance in the amount of $40,022.66 per month. Respondent Malkenhorst retired from service effective July 1, 2005, with just over forty years of service credit, and has been receiving his retirement allowance from that date.

5. In 2011, respondent Malkenhorst pled guilty and was convicted of felony misappropriation of public funds.[3]

---

[2] Respondent Malkenhorst argued that he personally did not assume these titles and duties; rather, each of the titles and duties was assigned, by City Council resolution, to the City Administrator/City Clerk. The record indicates otherwise; in any event, respondent Malkenhorst being the only City Administrator/City Clerk during the relevant time period, the supposed distinction is illusory.

[3] CalPERS did not argue and offered no authority for the proposition that respondent Malkenhorst's felony conviction renders him ineligible to receive a retirement allowance through CalPERS or in any way affects the amount he is entitled to receive under the PERL.

6. By letter dated October 22, 2012, CalPERS notified respondent Malkenhorst that his compensation had been over-reported by Vernon due to inclusion of payments that do not meet the definition of "compensation earnable" set forth in the PERL. CalPERS informed respondent Malkenhorst that it had recalculated his "final compensation," that it would be reduced from $44,128 to $9,450 per month, and that a corresponding downward adjustment would be made to respondent Malkenhorst's retirement allowance. CalPERS also advised respondent Malkenhorst and Vernon of their right to appeal the determination.

7. By letter dated December 21, 2012, respondent Malkenhorst filed a timely appeal and requested an administrative hearing.[4]

8. CalPERS filed a Statement of Issues on September 27, 2013. Respondent Malkenhorst timely filed a Notice of Defense.[5] This hearing ensued.

---

[4] Respondent Malkenhorst first filed a complaint and petition for writ of mandate against CalPERS in Los Angeles Superior Court, arguing that CalPERS was barred from proceeding because it had made a binding pension benefits determination in a "quasi-adjudication" in 2005. (See Factual Findings 35-39.) The court sustained a demurrer to the complaint, holding that respondent Malkenhorst must exhaust his administrative remedies against CalPERS. In March 2013, respondent Malkenhorst filed a notice of appeal from the superior court's ruling; that appeal was still pending at the time of this hearing. On February 13, 2015, the Court of Appeal affirmed the trial court's sustaining the demurrer against Malkenhorst's complaint. On March 19, 2015, respondent Malkenhorst petitioned the California Supreme Court for review; no evidence was submitted regarding the outcome of that petition. Respondent Malkenhorst also filed petitions for a writ of supersedeas and request for stay in the Court of Appeal to stay this administrative hearing. The petitions were denied.

[5] Respondent Malkenhorst also filed numerous pre-hearing motions, among them a motion to dismiss the case on the grounds that CalPERS must proceed by Accusation rather than by Statement of Issues, must present its evidence first, and must bear the burden of proof. At a motion hearing held on June 13, 2014, the parties stipulated that CalPERS would present its evidence first and that it would have the burden of proof in this case. The ALJ, therefore, denied respondent Malkenhorst's motion in part, ordering that CalPERS present its case first and bear the burden of proof by a preponderance of the evidence, but that CalPERS could proceed by Statement of Issues and need not file an Accusation. (See Legal Conclusion 1.) In other pre-hearing papers, motions, and a demurrer, respondent Malkenhorst argued, among other things, that CalPERS' pleading was fatally indefinite or uncertain. After argument was heard at the prehearing conference and at hearing, orders issued addressing those motions and a portion of the demurrer. The remainder of the demurrer and other motions, which collectively were treated as a motion to dismiss, are addressed below, at Legal Conclusions 2 through 10.

Respondent Malkenhorst's Salary History at Vernon[6]

9. Respondent Malkenhorst started his employment at Vernon as Deputy City Clerk/Deputy Director of Finance in April 1975, earning about $39,000 per year. He became City Clerk/Director of Finance two years later; by that time, his annual salary had increased to $59,000. In 1978, respondent Malkenhorst was City Administrator/City Clerk and City Treasurer and his annual salary increased to $84,000. Over the next two and one-half years, his annual salary increased to $115,000. In sum, respondent Malkenhorst's salary nearly tripled in his first six years working for Vernon.

10. In May 1981, respondent Malkenhorst assumed the additional title and duties of Chief Executive Officer of the Electrical Department. From 1981 to 1988, respondent Malkenhorst's annual salary again approximately tripled, to about $375,000; his annual raises during that period were as low as six percent and as high as 23.49, 23.55, and 24.55 percent.[7]

11. In December 1988, respondent Malkenhorst assumed the additional titles and duties of Executive Director of the Redevelopment Agency and Secretary of the Redevelopment Agency. From 1988 to 1993, respondent Malkenhorst's annual salary increased nearly 70 percent, from about $375,000 to about $636,000; his annual raises during that period were as low as about two percent and as high as 16.14 and 16.33 percent.

12. In December 1993, respondent Malkenhorst assumed the additional titles and duties of Executive Director of the Industrial Development Authority, Secretary of the Industrial Development Authority, and Treasurer of the Industrial Development Authority. From 1993 to 2003, respondent Malkenhorst's annual salary increased by more than half, from about $636,000 to about $999,000, with annual increases ranging from three percent to 9.27 percent.

13. In December 2003, respondent Malkenhorst assumed his final additional title, Executive Director of the Vernon Historic Preservation Society. By the time he retired in 2005, his annual salary had increased to about $1,056,000.

---

[6] This reconstruction of respondent Malkenhorst's salary history is based on Vernon's City Council resolutions. Respondent Malkenhorst did not offer any substantive refutation of this history.

[7] Official notice was taken of the fact that, from July 1981 to November 1982, the Consumer Price Index increased approximately seven percent; during that time, respondent Malkenhorst's payrate increased by approximately 24 percent. CalPERS determined that respondent Malkenhorst's salary increased faster than any class of Vernon employees, including the class comprising department heads.

CalPERS'~~s~~ 2012 Audit of Vernon

14. CalPERS audits municipalities and other agencies for compliance with laws related to, among other things, compensation, health benefits vesting, and payroll reporting. In 2011, CalPERS began auditing Vernon. Early in the auditing process, CalPERS' Office of Audit Services (OAS) asked Tomi Jimenez, then Section Manager of a Compensation Review Unit (CRU), to help ascertain how many hours were associated with each position held by respondent Malkenhorst. CRUs ensure that retiring members' payrates are reported in compliance with the PERL. Jimenez began at CalPERS in 2002 and was a CRU section manager from 2010 until 2014. She is now Assistant Division Chief in the CASD at CalPERS.

15. Jimenez testified that, in addition to OAS asking her to assist the auditors, the CalPERS Board asked her, as a CRU section manager, to make a final retirement benefits determination regarding respondent Malkenhorst. Jimenez, therefore, obtained documentation from Vernon to enable her to calculate respondent Malkenhorst's final compensation, as that term is defined in the PERL.

16. CalPERS concluded in its review of respondent Malkenhorst's positions and payrate, and argued variously at the hearing, that:

a. In assuming his numerous duties and titles, respondent Malkenhorst must have been working overtime and that, under the PERL, payment for overtime cannot be used to calculate final compensation;

b. The documentation from Vernon does not show how many hours respondent Malkenhorst worked or was required to work in each position he held, that if the City Administrator/City Clerk position was a full time position the additional titles must have been part-time positions requiring overtime, and that, under the PERL, payment for overtime~~part-time work~~ cannot be used to calculate final compensation;

c. Neither the additional positions respondent Malkenhorst assumed, nor the ~~The~~ compensation provided him ~~salaries~~ for assuming each of the additional positions, ~~respondent Malkenhorst assumed~~ was~~ere~~ ~~n~~ever listed in publicly available pay schedules, as required by the PERL and regulations; and

~~d. Even if those salaries were not required to be listed because there was no salary ostensibly associated with the various titles, or even if City Council resolutions indicating no salary were adopted in open council session and posted throughout the City, the increases in salary respondent Malkenhorst received over the years must have been for his assumption for those titles and Vernon concealed that fact by delaying respondent Malkenhorst's salary raises so they would not conspicuously coincide with the assumption of new titles; and~~

~~e~~d. The "special compensation" that respondent Malkenhorst received as longevity pay was impermissibly based on compensation for a class of one, consisting of only the City Administrator/City Clerk.

~~*Overtime and Part-Time*~~

~~17. With respect to the first two arguments, based on the evidence as a whole, respondent Malkenhorst was a full-time employee; he did not work overtime and he did not work part-time. There was no evidence that respondent Malkenhorst worked fewer than 40 or more than 45 hours per week. The additional positions assigned to respondent Malkenhorst as City Administrator/City Clerk did not require him to work overtime for PERL purposes, nor did they constitute part-time positions.~~

~~18. Various City Council resolutions provide that all employees "shall be considered forty hours per week personnel unless otherwise specified." Respondent Malkenhorst testified that he worked the standard Vernon workday, from 7:00 a.m. to 5:30 p.m., during Vernon's four-day work week, for a total of forty hours per week, with occasional exceptions. For instance, he worked some weekends during the firefighters' strike negotiations. He worked late twice per month, on those evenings when the City Council met. He occasionally had to attend a meeting on a Friday, when the city government offices were closed. He testified, though, that he accomplished all his work in 40 to 45 hours per week.~~

~~19. City department heads would report to respondent Malkenhorst as City Administrator/City Clerk. Respondent Malkenhorst also spent time on projects assigned to him by virtue of the various titles and responsibilities assigned to him by City Council resolution. Regardless of the additional duties that entailed, such as attending meetings regarding financing a new power plant, respondent Malkenhorst was still expected to perform his other duties at City Administrator/City Clerk, according to former City Council person Hilario Gonzalez.~~

~~20. There was a significant degree of flexibility in how respondent Malkenhorst would spend his work hours. Respondent Malkenhorst would delegate City Councilman dated tasks to various department heads, and supervise and review their work. One of the titles assigned to respondent Malkenhorst was City Treasurer, but he delegated to the Assistant Treasurer most of his duties, including preparing the city's proposed annual budget; respondent Malkenhorst would review and revise the budget and then present it to the City Council Finance Committee. As City Administrator/City Clerk, respondent Malkenhorst was responsible for purchasing for the city; he would delegate purchasing duties, however, to the Assistant Purchasing Agent, and then approve or reject proposed purchases. The Assistant Finance Director prepared reports on financial conditions; respondent Malkenhorst reviewed them. Mail to the City Council came through the City Clerk's office; respondent Malkenhorst delegated mail distribution functions to the Assistant City Clerk. Respondent Malkenhorst testified that he focused his personal efforts on whatever had to be done to administer the city, which varied over time. He was the~~

~~Municipal Employee Relations Representative (MERR) for all the years he was City Administrator/City Clerk, but the bulk of the work he did as MERR was during a firefighters' strike in 1978 and 1979. There were always non-routine matters associated with new titles assigned to him by the City Council that could take up most of his time, such as his work on the city's generating plant and finalizing an electric power contract with Southern California Edison. Respondent Malkenhorst testified that, though some weeks required a good deal of work as CEO of the Light and Power Department, other weeks required no work, and the result is that over the years the addition of the CEO title added only a nominal amount of work to his workload. He worked a significant amount as CEO of the Gas Municipal Utility Department from 1991 through 1993, but only a nominal amount after that, though he retained the title.~~

~~21. For its assertion that respondent Malkenhorst worked overtime or held several part-time positions, CalPERS in part relies on ADP payroll registers, which report respondent Malkenhorst's time in multiple departments. The evidence, however, reflects only that respondent Malkenhorst's salary was prospectively allocated over various departments for purposes of developing annual departmental budgets. The allocation did not track the number of hours respondent Malkenhorst expected to work on matters pertaining to each department receiving an allocation of some of his time. According to respondent Malkenhorst, the allocation was used for the purpose of offsetting income generated by income-generating departments.~~

Publicly Available Pay Schedules

17~~22~~. For all~~most~~ of the positions assigned to respondent Malkenhorst except for City Administrator/City Clerk , there was no publicly available pay schedule and there was no public accountability for payrates associated with newly-created positions. Vernon and respondent Malkenhorst obscured any connection between respondent Malkenhorst's pay increases and the positions and duties he was assigned, making it impossible for any member of the public to ascertain how much the city was paying for services associated with numerous important city functions.[8] Indeed, at the hearing, respondent Malkenhorst vigorously denied any connection between any of his payrate increases and any of the titles and responsibilities he accrued over the years. All of this obfuscation and blurring of the line between job title and payrate subverted the transparency requirements of the PERL.

[8] While the increases in respondent Malkenhorst's salary over the course of his years at Vernon and the amount of the salary he received in his last 15 years may be astonishing, they do not constitute the basis for CalPERS' claim that respondent Malkenhorst's "final compensation" included payments that do not comply with the PERL. Nor did CalPERS allege or submit evidence of any unfunded liabilities or other irregularities with respect to contributions into the CalPERS system by respondent Malkenhorst or Vernon based on the salary Vernon paid respondent Malkenhorst.

18~~23~~. Illustrative of Vernon's practice when assigning to respondent Malkenhorst additional job titles and responsibilities are City Council resolution numbers 4803, adopted May 5, 1981, and 4817, adopted June 30, 1981.

19~~24~~. With resolution number 4803, the City Council reorganized the electrical department administration, creating the position of Chief Executive Officer "to coordinate the development of policies involved in all phases of the electrical department .... " (Ex. 14, p. 1.) "The City Council of the City of Vernon hereby ... appoints the City Administrator, Bruce V. Respondent Malkenhorst, to serve as the Chief Executive Officer of the Electrical Department in which said Mr. Respondent Malkenhorst shall serve in said capacity with no increase in compensation and shall have the duties and responsibilities described in Exhibit 'A' which is attached hereto and made a part hereof." (*Id.* at pp. 1-2.) Those duties included coordinating the development of procedures, supervising and coordinating the duties of the operations manager, and serving as a director on the Board of Directors of Southern California Public Power Authority. Gloria Orosco, respondent Malkenhorst's secretary from 1981 to 2004, testified that Vernon's electricity needs were expanding and that the city needed respondent Malkenhorst to provide oversight and to meet with other cities, with Southern California Edison regarding litigation, and with other agencies. Resolution number 4817 established salary schedules for the Light and Power Department and the City Administrator/City Clerk Department. The pay schedule for the Light and Power Department recites that "[t]he City Administrator/City Clerk shall serve as the Chief Executive Officer in the Light and Power Department and the compensation for said position is included in the compensation established for the position of City Administrator/City Clerk Department." (Ex. 16, at p. 20.) The pay schedule for the City Administrator/City Clerk Department identifies a salary scale with six steps for the position of City Administrator/City Clerk, ranging from $4,110 per month to $5,373 per month.

20~~5~~. Respondent Malkenhorst testified that he received no salary increases for assuming the many titles assigned to him over the years since he became City Administrator/City Clerk in 1978. Respondent Malkenhorst's salary increased by leaps and bounds throughout his 30 years at Vernon, sometimes close in time to, and sometimes at a significant remove in time from, his assumption of a new title. Respondent Malkenhorst attributes the raises he received to the results he produced for the City in the overall performance of his job, as determined by the Finance Committee and the City Council in his salary reviews. Respondent Malkenhorst disputes that his salary increases were directly related to hours worked or to any of the many titles and responsibilities he assumed. His testimony was corroborated by former City Council person Hilario Gonzalez.

21~~6~~. But although respondent Malkenhorst received no increase in salary directly attributable to any given new title, his testimony and the testimony of former City Councilman Gonzalez make clear that respondent Malkenhorst was rewarded for successfully performing tasks associated with those new titles, such as when, as CEO of the Light and Power Department, he helped ensure a supply of cheap electricity to the businesses located in Vernon. Tomi Jimenez testified that, from 1979 to 2004, respondent Malkenhorst's payrate increased nine-fold, while other employees' payrates increased three

or four-fold, supporting a conclusion that respondent Malkenhorst was compensated for holding multiple positions.

22~~7~~. Based on the evidence received at the hearing, salary resolutions and resolutions assigning new titles to respondent Malkenhorst were adopted in open session of the Vernon City Council. Gloria Orosco, who became Deputy City Clerk of Vernon in 1986, testified that she was in charge of posting in public places the agenda for the City Council meetings, and for then making the Vernon City Council minutes and resolutions, which were not posted, publicly available. If members of the public wanted a copy of a resolution, they could contact the City Clerk's office; Orosco would determine whether Vernon had the document and would make arrangements to provide a copy.

Overtime

23. Various City Council resolutions indicate that City Administrator/City Clerk was a 40-hour per week position, and that the base salary for the City Administrator/City Clerk position was based on a presumed 40-hour work week. Thus, CalPERS reasonably presumed that if respondent Malkenhorst was in fact receiving the entire base salary listed for the City Administrator/City Clerk position, he must have been working 40-hour weeks carrying out the duties of that position alone.

24. But respondent Malkenhorst not only worked 40-hour weeks carrying out the responsibilities of the City Administrator/City Clerk position, he also spent time on projects assigned to him by virtue of the various positions, titles, and responsibilities assigned to him by City Council resolution. As described above, Malkenhorst received compensation from the City for undertaking the tasks associated with the additional titles and positions.

25. In 1995, in the context of an earlier (and subsequently retracted) retirement application submitted by Malkenhorst, CalPERS evaluated Malkenhorst's Final Compensation. CalPERS learned at that time that respondent Malkenhorst was serving the City as City Administrator/City Clerk, City Treasurer, Director of Finance and Personnel, Purchasing Agent, Executive Director of Light & Power, and Executive Director of the Redevelopment Agency. When CalPERS saw the list of positions, it sent two letters (in 1995 and 1996) to Gloria Orosco, respondent Malkenhorst's personal secretary. CalPERS stated that respondent Malkenhorst's positions apart from City Administrator/City Clerk "would be considered overtime," so the City needed to "make notation for the percentage of [Malkenhorst's] time that was spent in each position." (Exs. 47 and 48.) Neither Orosco, respondent Malkenhorst, nor any other City employee responded to CalPERS. Nor did Malkenhorst comply with CalPERS' request that he track the time spent in each of his positions.

27. The evidence is sufficient to establish that the compensation for the City Administrator/City Clerk position, as specified on Vernon pay schedules, included compensation for overtime hours. Respondent Malkenhorst denied that he worked overtime hours at Vernon, testifying that with few exceptions, he only worked a standard 40-hour

week. But witness testimony, whether obtained as part of a final compensation determination or during an administrative hearing, cannot rebut CalPERS' reasonable interpretation of contemporaneously prepared agency records. CalPERS relies upon these agency records because, by law, they must be made available, and because such records provide an objective basis for CalPERS' ultimate decision. On the other hand, witness statements and testimony may reflect faded memories and can be self-serving. Elevating witness accounts over agency records would therefore reward poor record-keeping, invite manipulation, and frustrate efforts to enhance transparency.

Special Compensation (Longevity Pay)

28. The evidence is sufficient to establish that, for purposes of longevity pay, respondent Malkenhorst was placed in a class consisting of one person.

29. Vernon reported longevity pay for respondent Malkenhorst; longevity pay is a permitted item of special compensation, one of the components of final compensation. Respondent Malkenhorst, though, received a longevity payment only available to him, creating a group or class of one, which the PERL prohibits. Department heads received as longevity pay an additional 20 percent of their base salary per month after 20 years, and 25 percent after 30 years. Only the City Administrator was to receive 25 percent after 25 years. CalPERS determined to move respondent Malkenhorst into the next class, the class comprising department heads, and allow him their longevity pay, which after 25 years was 20 percent, not 25 percent.[9]

CalPERS' Current Determination of Respondent Malkenhorst's Final Compensation

30. When r~~R~~espondent Malkenhorst retired~~ in 2005~~, ~~and~~ the pay rate that Vernon reported for the position of City Administrator/City Clerk was used to generate a retirement benefit. But during the audit, Tomi Jimenez learned that respondent Malkenhorst had multiple job titles and duties, and she concluded that, without publicly available pay schedules for any of respondent Malkenhorst's positions other than City Administrator/City Clerk, which improperly served as a catch-all payrate category, CalPERS could not properly calculate respondent Malkenhorst's final compensation.

31. CalPERS argues that the only full-time position respondent Malkenhorst held at Vernon for which CalPERS can document a single, publicly available payrate is the position of City Clerk, which respondent Malkenhorst held before that position was wrapped into a new ~~he was appointed~~ City Administrator/City Clerk position. When respondent Malkenhorst retired, Vernon separated his simultaneously held job titles into three multiple

[9] CalPERS took this position in 2005, retreated from it (see Factual Findings 35-39), and now reasserts it, finding its 2005 retraction to have been erroneous. CalPERS is required to correct past errors in determining retirement benefits. (See Legal Conclusion 21.)

full-time positions: Acting City Clerk, Acting City Treasurer, and Acting Director of the Light & Power Department. Because no City Administrator position was listed on the new pay schedule, CalPERS recalculated respondent Malkenhorst's final compensation using the payrate for the position of Acting City Clerk published by Vernon when respondent Malkenhorst retired: $7,875 per month. Jimenez decreased respondent Malkenhorst's allowable payrate and longevity pay, recalculated respondent Malkenhorst's final compensation, and sent the figures to the Benefits Department, which calculated respondent Malkenhorst's retirement benefit.

32. CalPERS'~~s~~ stated method of calculating respondent Malkenhorst's final compensation is reasonable. ~~arbitrary and without sufficient legal authority. (Legal Conclusions 22-26.)~~

33. ~~Respondent Malkenhorst's responsibilities as City Administrator/City Clerk and City Treasurer exceeded his responsibilities as City Clerk, even before other titles and duties were assigned to him. Evidence on the record established that the City Clerk's duties, during the relevant time period, included placing items on the agenda for City Council meetings, keeping minutes of City Council meetings, drafting ordinances, and, while serving concurrently as Finance Director, having responsibility for the city's finances. As City Administrator, on the other hand, respondent Malkenhorst's responsibilities and authority increased; department heads reported to respondent Malkenhorst on budget issues and on significant matters to be considered before being brought to the City Council. He continued to fulfill the functions of City Administrator even as he accrued the additional titles; though he delegated duties to assistants and department heads, he was still responsible to the City Council with respect to those duties. Although i~~It was understandably ~~may be~~ difficult to identify a payrate for City Administrator/City Clerk, a difficulty created by Vernon's practices and respondent Malkenhorst's cooperation in obscuring what exactly he was being compensated for. However, ~~,~~ there is a significant amount of data that CalPERS could and did ~~can and should~~ review to ascertain an appropriate pay-rate for respondent Malkenhorst as City Administrator/City Clerk.

34. The determination of respondent Malkenhorst's final compensation in accordance with the PERL is within CalPERS'~~s~~ expertise. During the audit and payrate review process, CalPERS considered alternative measures for determining respondent Malkenhorst's final compensation, but decided against using them. Ultimately, CalPERS decided that respondent Malkenhorst should have the same payrate as the Acting City Clerk because that position, by name, most closely approximated the former City Administrator/City Clerk position. It was not unreasonable for CalPERS to believe that the Acting City Clerk would be, on a full-time basis, doing many of the same duties that respondent Malkenhorst once performed.~~Consistent with the conclusions set forth in this Proposed Decision, CalPERS might now determine that some elements of those measures can be appropriately applied. Pertinent payrate data might be derived from several sources. For example, it may be useful to CalPERS's calculations that within a year of adding City Administrator to his City Clerk title, respondent Malkenhorst's salary increased over 40 percent. No evidence was offered regarding the salary of respondent Malkenhorst's successor~~

~~as City Administrator; the other titles having been stripped from that position, the payrate for the current City Administrator might provide data useful to CalPERS in recalculating an appropriate payrate for respondent Malkenhorst. Respondent Malkenhorst's enhanced responsibilities as City Administrator, and data bearing on his relative increase in pay rate for assuming that position, mandate a dispassionate evaluation and recalculation, all in accordance with the principles set forth in the PERL.~~

CalPERS'~~s~~ 2005 Proposal to Reduce Respondent Malkenhorst's Retirement Allowance

35. Not long after respondent Malkenhorst retired, CalPERS informed respondent Malkenhorst by letter dated July 18, 2005, that his retirement allowance was to be adjusted downward because his payrate and longevity pay did not comply with the PERL. CalPERS notified respondent Malkenhorst of his right to appeal and request an administrative hearing.

36. Marla Aspinwall, an attorney with Loeb & Loeb, then representing respondent Malkenhorst, wrote to CalPERS a letter dated August 11, 2005, challenging the basis of CalPERS'~~s~~ proposed adjustment and requesting an appeal. In the letter, Aspinwall contended that CalPERS'~~s~~ proposed adjustment was erroneous. With respect to respondent Malkenhorst's longevity pay, Aspinwall argued that respondent Malkenhorst should be considered in a class consisting of himself, as City Administrator/City Clerk, and the City Councilmembers, who received, by resolution, 25 percent longevity pay after 25 years of service.

37. Rather than proceeding with the administrative appeal process by filing a pleading and setting the matter for hearing, CalPERS wrote back to Aspinwall, by letter dated September 23, 2005, requesting additional information about respondent Malkenhorst's payrate and, with respect to the longevity pay calculation, the class to which respondent Malkenhorst belonged. CalPERS wrote that Government Code section 20322 makes City Councilpersons, as elected officials, a separate group to which the City Administrator could not belong.

38. There then followed further written and oral negotiations between CalPERS and Aspinwall. By letter dated November 3, 2005, Aspinwall wrote that "at no time did [Malkenhorst] receive overtime or additional compensation for performance of ... duties" associated with the additional titles assigned to him. (Ex. AAA.) She wrote that Vernon "has not hired a replacement for Mr. Respondent Malkenhorst, but is currently engaged in the process. As with Mr. Respondent Malkenhorst, any salary paid to the new City Administrator will be based upon the experience and abilities of the individual." (*Ibid.*) With respect to longevity pay, Aspinwall wrote that the PERL did not mandate a separate class for elected officials, that Government Code section 20636, subdivision (e)(1), provides that a class may include employees who share similarities in job duties and who logically form a work-related grouping, and that Malkenhorst and the City Council members were logically grouped together because "their positions relate to implementation and administration of the City and its policies." (*Ibid.*)

39. The negotiations concluded when CalPERS informed respondent Malkenhorst that it had reconsidered its position and retracted its proposed change to respondent Malkenhorst's retirement allowance. CalPERS never filed a pleading with OAH, and the matter never went to hearing.

LEGAL CONCLUSIONS

1. CalPERS initiated this action by filing a Statement of Issues. (Factual Finding 8.) Prior to the hearing, the parties stipulated, and the ALJ ordered, that CalPERS has the burden of proof in this proceeding.[10] The standard of proof is a preponderance of the evidence, meaning that CalPERS is obliged to adduce evidence that has more convincing force than that opposed to it. (Evid. Code, § 115; *Glover Vernon. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

Respondent Malkenhorst's Pre-Trial Motion to Dismiss

2. Prior to hearing, respondent Malkenhorst filed a motion to dismiss this action.[11]

3. Respondent Malkenhorst requested that the motion to dismiss be the subject of a separate evidentiary hearing bifurcated from the remainder of the hearing on the merits. His request was denied by Order dated April 17, 2014, which provided as follows:

> Respondent Malkenhorst's motion to dismiss will not be bifurcated from the remainder of the hearing; rather, it will be

---

[10] See Order Re Pretrial Motions, dated June 18, 2014.

[11] What is referred to here and in various OAH orders as respondent Malkenhorst's "motion to dismiss" actually comprises a plenitude of motions and objections, and a demurrer, that variously cross-reference and incorporate by reference some or all of the other motions and objections. Those include the following: (a) Object[ion]s to and Challenges [to] CalPERS' and OAH's Jurisdiction or Authority, Including Under Government Code 11506; (b) Points and Authorities on Laches, Statute of Limitations, Affirmative Defenses; (c) Assertion of Judicial Estoppel to Bar Evidence; (d) Memorandum of Points and Authorities Regarding Charter City Autonomy; (e) Points and Authorities on Parol Evidence Rule; (f) Memorandum of Points and Authorities Regarding Collateral Estoppel, Res Judicata, Issue Preclusion, and Claim Preclusion; (g) Request for Official and Judicial Notice; (h) two Notices of Defense raising affirmative defenses and new matter; (i) Demurrer, Including Under Government Code Sections 11506(a)(2)-(3); and (j) Motion to Strike Statement of Issues. Demurrers are not recognized in proceedings under Government Code section 11500 et. seq.; the arguments raised in respondent Malkenhorst's demurrer were treated as further grounds raised in support of respondent Malkenhorst's motion to dismiss.

> heard as part of, and with, the hearing on the merits of the pleading, and a ruling on the motion to dismiss will be included in the proposed decision issued pursuant to Government Code section 11517.

Respondent Malkenhorst moved for reconsideration of the bifurcation motion. The Presiding Administrative Law Judge denied the motion for reconsideration in an Order dated August 22, 2014, after letter briefs were filed and oral argument was heard at a telephonic status conference held on July 29, 2014. Respondent Malkenhorst again requested bifurcation at the hearing; the request was denied.

4. The motion to dismiss is based on legal grounds of collateral estoppel, res judicata, issue preclusion, claim preclusion, judicial estoppel, charter city autonomy, appellate court exclusive jurisdiction, CalPERS's limited agency jurisdiction, laches, and the statute of limitations.

5. The res judicata, collateral estoppel, issue preclusion, and claim preclusion grounds for the motion to dismiss derive from respondent Malkenhorst's argument that, in 2005, CalPERS finally adjudicated a calculation of respondent Malkenhorst's "final compensation" and is bound by that calculation. Respondent Malkenhorst's motion on these grounds is without merit and is denied. CalPERS's proposal to reduce respondent Malkenhorst's benefits in 2005 was resolved through informal negotiations. No initial pleading invoking the jurisdiction of OAH was ever filed. (Factual Findings 35-39.) The matter never went to hearing and was never adjudicated. (See *Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 483.)[12] "Only issues actually litigated in the initial action may be precluded from the second proceeding under the collateral estoppel doctrine. [Citation.]" (*People v. Sims* (1982) 32 Cal.3d 468, at p. 484 [the matter "was actually litigated at the DSS fair hearing"].) "For an administrative decision to have collateral estoppel effect, it and its prior proceedings must possess a judicial character. Indicia of proceedings undertaken in a judicial capacity include a hearing before an impartial decision maker; testimony given under oath or affirmation; a party's ability to subpoena, call, examine, and cross-examine witnesses, to introduce documentary evidence, and to make written and oral argument; the taking of a record in the proceeding; and a written statement of reasons for the decision. [Citation.]" (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943-944, quoted in *Y.K.A. Industries, Inc. v. Redevelopment Agency of the City of San Jose* (2009) 174 Cal.App.4th 339, 357.)

6. Respondent Malkenhorst argues that CalPERS and Vernon are judicially estopped to introduce evidence that contradicts prior statements made by them or on their behalf in 2005, when CalPERS notified Vernon and respondent Malkenhorst of a proposed

---

[12] The fact that the subject line of some CalPERS letters referred to "Notice of Appeal," which first appeared in the subject line of a Loeb & Loeb letter, is not determinative of the nature or legal effect of the correspondence.

reduction in respondent Malkenhorst's retirement benefits based on a recalculation of his pay rate and his longevity pay. To the extent the motion to dismiss is based on judicial estoppel, it is denied. Judicial estoppel might apply if there had been a hearing at which CalPERS had adopted respondent Malkenhorst's position, and respondent Malkenhorst was now taking a different position. (See §§ 11440.10, subd. (a), 20123-20125, 20134 (requiring evidence that Board adopted the position of the party to be estopped); see also *Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 846.) Judicial estoppel applies to prevent a party from changing position to gain an advantage, after his or her interests have changed, "to the prejudice of the party who has acquiesced in the position formerly taken ...." (*People v. Torch Energy Services, Inc.* (2002) 102 Cal.App.4th 181, 189.) Here, there was no prior proceeding, and respondent Malkenhorst did not acquiesce in negotiations with CalPERS; rather, CalPERS acquiesced and accepted respondent Malkenhorst's position. Finally, Vernon did not attempt to introduce any evidence in this hearing.

7. Respondent Malkenhorst argues that CalPERS'~~s~~ re-calculation of his final compensation, both to determine future retirement benefits and to recoup alleged overpayments made to him, is barred by the statute of limitations and the doctrine of laches.

a. Respondent Malkenhorst's statute of limitations argument lacks merit, and the motion to dismiss on this ground is denied. CalPERS maintains that its earlier calculations of respondent Malkenhorst's final compensation were erroneous. The PERL mandates that CalPERS "correct all actions taken as a result of errors or omissions of ... this system." (Gov. Code, § 20160, subd. (b); see *Welch v. California State Teachers' Retirement Bd.* (2012) 203 Cal.App.4th 1, 27.) The PERL provides no time limit for CalPERS to perform its statutory obligation to correct its actions. Finding "a legislative purpose of 'correcting system errors or omissions wherever possible,'" the court in *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29 concluded that "[w]e should not supply a limitation period not contemplated by the Legislature." (*Id.*, at p. 50.)

b. With respect to laches and future retirement benefits, respondent Malkenhorst has not cited to any authority that the doctrine of laches may be used to prevent CalPERS from complying with obligations mandated by a statute that intentionally imposes no time limitation on corrective actions. The motion to dismiss, to the extent it is based on an assertion of laches, is denied.

c. As for recoupment of the ~~alleged~~ overpayments, ~~to~~ respondent Malkenhorst's argument lacks merit.~~,~~ T~~t~~he statutory requirement that CalPERS correct all actions based on error ~~appears to~~ encompasses the power to recoup overpayments. (See, e.g., §§ 20160, 20163.) In some instances, the power to recoup may be subject to a three-year limitation period, or in the case of "fraudulent reports for compensation," a ten-year limitation period.~~.~~ (§ 20164, subds. (b) and (d).) ~~(See, e.g., §§ 20163, 20164.)~~ The Board has "conclusive and binding" authority to determine the applicability of these limitation periods. (§ 20164, subd. (e) ["The board shall determine the applicability of the period of limitations in any case, and its determination with respect to the running of any period of limitation shall be conclusive and binding for purposes of correcting the error or omission."]) Here, the

Board has determined that the ten-year period would apply to any civil recoupment action that CalPERS may choose to file against Malkenhorst. Malkenhorst participated in the submission of a fraudulent payrate by obscuring his compensation for working unlisted positions and overtime hours, and by refusing to comply with CalPERS' lawful requests that he track the time spent in his various positions. In addition, the Board has determined that for purposes of final compensation determinations, the limitation periods specified in the PERL are subject to rules of accrual and tolling: the periods will not accrue until CalPERS discovers its overpayment, and the periods are tolled during the time the overpayment is the subject of an administrative proceeding or civil action. Here, CalPERS' power to recoup overpayments from respondent Malkenhorst did not accrue until April 27, 2012, the date on which CalPERS finalized its written audit of Vernon, and has been tolled since December 21, 2012, the date of respondent Malkenhorst's administrative appeal. Accordingly, CalPERS is not time barred from recouping the entirety of overpayments made to respondent Malkenhorst.

~~CalPERS has alleged in the Statement of Issues that the only issues in this matter are whether it previously erroneously calculated, and has now correctly calculated, respondent Malkenhorst's final compensation. Respondent Malkenhorst argues that any attempt at recoupment is timebarred. CalPERS has not yet sought recoupment of past payments, nor has it elected how it will proceed if it is determined that it made overpayments in this case. No determination about recoupment, therefore, may be made in this matter. The motion to dismiss with respect to recoupment is premature, and is denied on that ground.~~

Formatted: Indent: First line: 1"

8. Respondent Malkenhorst argues that CalPERS'~~s~~ determination of his "final compensation" violates Vernon's autonomy as a charter city.

a. Regardless of whether respondent Malkenhorst has standing to bring this argument-and Vernon maintains that he does not-the argument is without merit, and the motion to dismiss on this ground is denied. Vernon exercised its autonomy to enter into a contract with CalPERS and to enroll its employees as members of the CalPERS system. By virtue of Vernon's contract with CalPERS, Vernon agreed that the PERL would govern its employees' retirement benefits. (§ 20506.)

b. Whatever compensation Vernon agreed to pay respondent Malkenhorst during the course of his employment, and however it chose, for its own purposes, to structure its government and the duties, salary, and job titles of its employees, Vernon agreed by virtue of its contract that CalPERS must determine respondent Malkenhorst's retirement benefits based on what the PERL defines as "final compensation." "Final compensation" is a function of "compensation earnable," which incorporates both "payrate" and "special compensation," all terms defined in the PERL. (§§ 20037, 20636, subd. (a).)

c. No evidence was submitted on the record that Vernon has adopted an ordinance that conflicts with the PERL, but in the event of such a conflict the PERL provisions regarding retirement benefits would prevail. (*City of Los Altos v. Board of*

Administration (1978) 80 Cal.App.3d 1049, 1052 (City of Los Altos);[13] compare *Batters v. City of Santa Monica* (1980) 101 Cal.App.3d 595, *Campbell v. City of Monrovia* (1978) 84 Cal.App.3d 341 [unlike retirement benefits provisions, sick leave provisions of the PERL specifically defer to local laws].) A determination by CalPERS that respondent Malkenhorst's employment encompassed multiple part-time positions, or constituted a single position with overtime, would not be, as respondent Malkenhorst argues, an infringement of Vernon's autonomy,[14] so long as that determination is justified by evidence of the actual nature of respondent Malkenhorst's employment and the appropriate application of the PERL. The labels Vernon assigned to that employment for operational purposes do not carry weight in a dispute about retirement benefits except insofar as they reflect facts relevant to the application of the PERL.

9. Respondent Malkenhorst argues that the Fourth District Court of Appeal has exclusive jurisdiction to hear issues related to the offices respondent Malkenhorst held while employed by Vernon, by virtue of respondent Malkenhorst's pending appeal from the superior court's finding that he must exhaust administrative remedies before proceeding to civil court. (Factual Finding 7, fn. 4.) The argument is not persuasive; the Fourth District Court of Appeal has directed respondent Malkenhorst to exhaust his administrative remedies in this forum. The motion, to the extent it is based on this ground, is denied.

10. Respondent Malkenhorst argues that CalPERS and OAH lack jurisdiction over this matter because filing the Statement of Issues in this case is an act in excess of CalPERS's limited agency jurisdiction. The argument was not supported by persuasive authority or argument and, to the extent the motion to dismiss relies on this argument, it is denied.

Applicable Provisions of the PERL

11. The amount of a member's service retirement allowance is calculated by applying a percentage figure, based upon the member's age on the date of retirement, to the member's years of service and the member's final compensation. In computing a member's retirement allowance, CalPERS staff may review the salary reported by the employer for the member to ensure that only those items allowed under the PERL will be included in the member's final compensation for purposes of calculating the retirement allowance.

---

[13] Contrary to what is stated in respondent Malkenhorst's Reply in Support of Motion to Dismiss, the case of *Marsille v. City of Santa Ana* (1976) 64 Cal.App.3d 764, on which City of Los Altos relies in part, is still good law.

[14] See *City of Los Altos, supra*, 80 Cal.App.3d at p. 1052, in which the court wrote that "PERS has contracts with several hundred public agencies and cannot be expected to accept different interpretations for different agencies. Uniformity of interpretation between PERS and all of its contracting agencies can be achieved by allowing the board of administration to establish the standards defining full-time and part-time status."

12. The PERL vests the management of the retirement system in the CalPERS board, and gives the board the authority to make rules binding on its members. (§§ 20120-20122.) Subject to other provisions of the PERL and pertinent regulations, "the board shall determine and may modify benefits for service and disability" for those it determines are entitled to receive benefits. (§§ 20123, 20125.)

13. The contract between CalPERS and respondent Vernon incorporates the definitions of words and terms set forth in the PERL. (§ 20000 et seq.) "Any contract ... entered into shall subject the contracting agency and its employees to all provisions of this part and all amendments thereto applicable to members, [and] local miscellaneous members . . . ." (§ 20506.)

14. The PERL defines "final compensation" for a local member who is an employee of a contracting agency as "the highest average annual compensation earnable by a member during the three consecutive years of employment immediately preceding the effective date of his or her retirement . . . ." (§ 20037.) Final compensation excludes overtime pay, which is pay for work hours "in excess of the hours of work considered normal for employees." (§§ 20630, subd. (a), 20635; see *City of Sacramento v. Public Employees' Retirement System* (1991) 229 Cal.App.3d 1470, 1486.) "If a member concurrently renders service in two or more positions, one or more of which is full time, service in the part-time position shall constitute overtime." (§ 20635.) "PERS is not preempted from defining 'overtime' in a manner which may be ... different in purpose and effect, from the use of the term in the [Fair Labor Standards Act]." (*City of Sacramento*, supra, 229 Cal.App.3d at p. 1484.)

15. The calculation of "compensation earnable" is governed by section 20636, which provides:

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

> (c)(1) Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions.
>
> (2) Special compensation shall be limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate. If an individual is not part of a group or class, special compensation shall be limited to that which the board determines is received by similarly situated members in the closest related group or class that is in addition to payrate, subject to the limitations of paragraph (2) of subdivision (e). [¶] ... [¶]
>
> (e)(1) As used in this part, "group or class of employment" means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical work-related grouping. One employee may not be considered a group or class. [¶] ... [¶]

(§ 20636.) In defining "compensation earnable" and "final compensation," the PERL contemplates equality in benefits between members of the "same group or class of employment and at the same rate of pay." (*City of Sacramento v. Public Employees' Retirement System* (1991) 229 Cal.App.3d 1470, 1492.)

16. The CalPERS Board of Administration has promulgated regulations to implement the PERL. The regulations relevant to this matter are found at Title 2 of the California Code of Regulations (CCR).[15]

17. One element of an employee's "compensation earnable" is the employee's payrate. "Payrate shall be limited to the amount listed on a pay schedule that meets all of the following requirements:

> (1) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;
>
> (2) Identifies the position title for every employee position;
>
> (3) Shows the pay rate for each identified position, which may be stated as a single amount or as multiple amounts within a range;

[15] All further references to CCR shall be to Title 2 thereof, unless otherwise stated.

(4) Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, bimonthly, or annually;

(5) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;

(6) Indicates an effective date and date of any revisions;

(7) Is retained by the employer and available for public inspection for not less than five years; and

(8) Does not reference another document in lieu of disclosing the payrate.

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

(1) Documents approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer;

(2) Last payrate listed on a pay schedule that conforms to the requirements of subdivision (a) with the same employer for the position at issue;

(3) Last payrate for the member that is listed on a pay schedule that conforms with the requirements of subdivision (a) with the same employer for a different position;

(4) Last payrate for the member in a position that was held by the member and that is listed on a pay schedule that conforms with the requirements of subdivision (a) of a former CalPERS employer." (CCR section 570.5.)

18. The PERL requires a "publicly available pay schedule for services rendered on a full time basis during normal working hours." (*Molina v. Board of Admin., California Public Employees' Retirement System* (2001) 200 Cal.App.4th 53, 66-67.) The Legislature intended that a public employee's 'payrate' be readily available to an interested person

without unreasonable difficulty." (*Randy G. Adams*, Prec. Dec. No. [unassigned], effective Jan. 16, 2013, Case No. 2011-0788 (*Adams*).) CalPERS'~~s~~ Notice of Proposed Regulatory Action regarding CCR section 570.5, effective August 10, 2011, states that the section was intended to "ensure consistency between CalPERS employers as well as enhance disclosure and transparency of public employee compensation. . . . This proposed regulatory action clarifies and makes specific requirements for publicly available pay schedule and labor policy or agreement . . ." and was intended to "be declaratory of the existing law. . . ." (See Ex. 79.~~)~~) "Generally the law requires that . . . all records establishing and documenting payrate and special compensation be available for public scrutiny. . . ."' (*Id.*) Indicia of a publicly available pay schedule include formal approval by the City Council, in open session after notice to the public, of a salary or salary range for a given position, described in the detail required by Government Code section 20636, subdivision (b)(1), and CCR section 570.5, and the schedule's ready availability for review by any member of the public without the necessity of a public records request, subpoena, or other legal process. (*Adams, supra.*) A pay increase is not included in an employee's payrate unless it is published in a pay schedule. (*Molina v. Bd. of Administration, California Public Employees' Retirement System* (2011) 200 Cal.App.4th 53, 66 (citing *Prentice v. Bd. of Administration, California Public Employees' Retirement System* (2007) 157 Cal.App.4th 983).)

19. Another component of "compensation earnable" is special compensation, which must be reported to CalPERS if contained in a written labor policy or agreement Special compensation includes incentive pay, a category that includes longevity pay. "Longevity pay" is defined as "[a]dditional compensation to employees who have been with an employer, or in a specified job classification, for a certain minimum period of time exceeding five years." (CCR, § 571, subd. (a)(l).) All special compensation items must be available to all members in the group or class. (CCR, § 571, subd. (b).)

20. "[B]oth components of 'compensation earnable,' an employee's payrate and special compensation, are measured by the amounts provided by the employer to similarly situated employees. (See § 20636, subds. (b)(l), (2), (c), (e)(2).)" (*Prentice, supra*, at p. 992.)

21. CalPERS has the authority and the responsibility to correct errors in the calculation of benefits under section 20160, which provides:

> (a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member. . . . [¶] . . . [¶]
>
> (b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of . . . any contracting agency . . . or this system.
>
> (c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of

> obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164. [¶] . . . [¶] (§ 20160, italics added.)

CalPERS' Calculation of Respondent Malkenhorst's Final Compensation

22. Whether the additional titles, additional attendant responsibilities, and additional payrates assigned to respondent Malkenhorst were identified on a publicly available pay schedule is central to the determination of this matter. CalPERS correctly determined that respondent Malkenhorst was not paid according to publicly available pay schedules.[~~16~~]

23. The requirement of a publicly available pay schedule, set forth in section 20636, subdivision (b)(1), and the requirements for the pay schedule set forth in CCR section 570.5, apply to respondent Malkenhorst's payrate. Though the amendment to the PERL at section 20636, subdivision (b)(1), and to the regulations at section 570.5, were added by amendment after respondent Malkenhorst retired, they were "a matter of clarification," and apply retroactively. (*Prentice v. Board of Admin., California Public Employees' Retirement System*, *supra*, 157 Cal.App.4th at p. 990, fn. 4; *Gallup v. Superior Court* (2015) 235 Cal.App.4th 682, 690; *People v. CRE, Inc.* (1983) 150 Cal.App.3d 123, 135 [statutory rule of construction applies equally to administrative regulations].)

24. The City Council resolutions adding titles and duties to respondent Malkenhorst's position as City Administrator/City Clerk were adopted in publicly-noticed open sessions. Those resolutions did not, however, identify any pay respondent Malkenhorst was to receive for assuming those additional titles and duties; on the contrary, the resolutions specified that he was to receive no additional pay. The dramatic increases in respondent Malkenhorst's salary over the many years he served Vernon were reflected in schedules attached to City Council resolutions, and were identified only as pay for City Administrator/City Clerk. (Factual Findings 3, 9-27.) This is insufficient to satisfy the detailed requirements under section 20636 and CCR section 570.5, which are designed to ensure transparency for the benefit of the public. Payrate schedules, adopted in City Council resolutions, were not published or posted publicly, nor was it established that they were available to the public immediately upon request. (Factual Finding 27.) Accordingly, City Council resolutions assigning additional titles and duties to respondent Malkenhorst do not satisfy the PERL's pay schedule requirements and may not be used to calculate his payrate.

~~[16] CalPERS incorrectly concluded that the time respondent Malkenhorst spent on his additional duties and titles should be treated as excluded overtime or as pay for separate parttime positions. Although respondent Malkenhorst was asked to take on additional duties, he devoted to the work associated with each title as much time as circumstances required, and he did not exceed normal working hours in performing his duties. (Factual Findings 17-21).~~

25. Even if, after submitting a request, members of the public could easily obtain a copy of the resolutions–a fact not established by this record–they would not be able to discern any connection between respondent Malkenhorst's payrate and any of the titles and duties assigned to him. Vernon successfully concealed from public view any connection between respondent Malkenhorst's payrate increases and the new job titles and responsibilities assigned to him, making it impossible for any citizen of Vernon to ascertain what the payrate was for each of those positions. And respondent Malkenhorst, in testimony at hearing, denied there was any direct connection between his payrate increases and the additional titles and duties he assumed after becoming City Administrator.

26. CalPERS also correctly determined that the base salary for the City Administrator/City Clerk position, as specified on Vernon pay schedules, included compensation for respondent Malkenhorst working overtime hours.

27. CalPERS may require contracting agencies, through their chief administrative officer, to furnish CalPERS with, "[a]ny additional information concerning any member that the board may require in the administration of this system." (See § 20221, subd. (b).) CalPERS, suspecting that respondent Malkenhorst was being compensated for working overtime hours, requested that Vernon track the time respondent Malkenhorst spent in each of his various positions. Neither respondent Malkenhorst nor Vernon complied. Under the circumstances, CalPERS reasonably determined that respondent Malkenhorst was a full-time employee in the capacity of City Administrator/City Clerk, who worked overtime hours, with compensation, to accomplish the work of the additional positions he assumed.

Formatted: Indent: First line: 0.5"

28~~6~~. ~~Though~~ CalPERS has discretion to determine payrate when there is no publicly available pay schedule that meets regulatory standards.~~, CalPERS must apply appropriate methods to ascertainable data in doing so~~ (CCR, § 570.5, subd. (b).) CalPERS' selection of ~~Selecting~~ the $7,875 monthly salary for the Acting City Clerk position created ~~current~~ at the time of respondent Malkenhorst's retirement was reasonable~~, even though respondent Malkenhorst's duties and compensation as City Administrator, minus his additional titles and duties, exceeded those of the City Clerk position, is not appropriate under the PERL~~ and ~~is not~~ a proper exercise of discretion.

29. CalPERS also correctly determined that respondent Malkenhorst's longevity pay, as an item of special compensation, should be reduced from 25 percent to 20 percent, placing respondent Malkenhorst in the same class as other Vernon department heads.

ORDER

The appeal of respondent Bruce Malkenhorst, Sr., from CalPERS's reduction of his retirement benefits based on a recalculation of his final compensation is denied in full.~~granted in part and denied in part.~~

CalPERS is properly providing respondent Malkenhorst with a retirement benefit based on a final compensation of $9,450 – a payrate of $7,875 plus 20 percent longevity pay. CalPERS had previously provided respondent Malkenhorst a retirement benefit based upon a submitted final compensation of $44,128. CalPERS may recoup the overpayments arising from this erroneous final compensation.

Formatted: Indent: First line: 0.5"

~~CalPERS's determination that the payrate used to determine respondent Malkenhorst's final compensation does not comply with PERL requirements is affirmed.~~

~~CalPERS recalculation of respondent Malkenhorst's longevity pay is affirmed.~~

~~CalPERS recalculation of respondent Malkenhorst's final compensation based on the payrate for Acting City Clerk is reversed. CalPERS shall recalculate respondent Malkenhorst's final compensation using a pay rate that appropriately credits respondent Malkenhorst for duties performed as City Administrator/City Clerk, without additional titles and responsibilities, consistent with the requirements of the PERL, including the requirement that the payrate component of respondent Malkenhorst's final compensation be reflected in publicly available pay schedules.~~

DATED: December 16~~July 14~~, 2015

~~HOWARD W. COHEN~~
~~Administrative Law Judge~~
~~Office of Administrative Hearings~~

Formatted: Indent: Left: 0", First line: 0"