



Board of Administration

Agenda Item 9a7

April 22, 2020

Item Name: Proposed Decision on Remand– In the Matter of the Calculation of Final Compensation of BRUCE MALKENHORST, SR., Respondent, and CITY OF VERNON, Respondent.

Program: Employer Account Management Division

Item Type: Action

Parties' Positions

Staff argues that the Board of Administration should adopt the Proposed Decision on Remand.

Respondent Bruce Malkenhorst, Sr.'s (Respondent Malkenhorst) position is included in Attachment C, if any.

Respondent City of Vernon's (Respondent Vernon) position is included in Attachment C, if any.

Strategic Plan

This item is not a specific product of either the Strategic or Annual Plans. The determination of administrative appeals is a power reserved to the Board of Administration.

Procedural Summary

Respondent Malkenhorst retired for service in June 2005. At that time, his employer, Respondent Vernon, reported a single payrate of \$35,302 per month, to be used to calculate Respondent Malkenhorst's retirement allowance. CalPERS relied upon that reporting to issue Respondent Malkenhorst's retirement benefit payments, totaling \$44,128 per month.

Following an audit of Respondent Vernon in 2011-2012, CalPERS learned that Respondent Vernon had over-reported Respondent Malkenhorst's compensation by including payments that did not meet the definition of compensation earnable under the California Public Employees' Retirement Law (PERL). CalPERS, in October 2012, reduced Respondent Malkenhorst's monthly final compensation to \$9,450 per month, based on a payrate of \$7,875 per month plus certain items of special compensation which are not at issue in this proceeding. The matter was heard by the Office of Administrative Hearings (OAH) over a period of days between August 2014 and February 2015. A Proposed Decision (PD) was issued on July 14, 2015, affirming that the originally reported payrate for Respondent Malkenhorst (\$35,302 per month) was not valid, but rejecting the lower payrate selected by CalPERS.

On December 16, 2015, the CalPERS Board of Administration issued a Final Decision rejecting the PD in part, and affirming a monthly payrate of \$7,875 for Respondent Malkenhorst. The Final Decision also affirmed CalPERS' authority to collect up to 10 years of erroneously paid retirement warrants that were based upon the \$35,302 monthly payrate, on grounds that Respondents had made "fraudulent reports of compensation" on behalf of Respondent Malkenhorst.

On December 5, 2016, a Judge of the Superior Court, County of Los Angeles, ruled that CalPERS erred in using the \$7,875 monthly payrate, and that CalPERS must give Respondent Malkenhorst administrative process regarding CalPERS' finding that the 10-year statute of limitations for recoupment applied due to Respondents' fraudulent reports of compensation.

Thereafter, CalPERS issued a revised determination, finding that Respondent Malkenhorst's monthly payrate should be \$14,020.00, representing the average compensation paid to directors and officers at Respondent Vernon during the relevant time period. Respondent Malkenhorst appealed this determination. A further hearing on these issues was held before an ALJ with OAH on September 17, 2018. The ALJ issued a PD on February 11, 2019, granting in part, and denying in part, the appeal. The ALJ found that Respondents had submitted "fraudulent reports of compensation" sufficient to invoke the 10-year statute of limitations but held that CalPERS had not demonstrated that the \$14,020.00 payrate complied with the suggestions made by the Superior Court Judge in his order of December 5, 2016.

The Board remanded the decision for the taking of additional evidence on Respondent Malkenhorst's payrate, including additional evidence showing that the payrate would have been only \$13,370.03 had Malkenhorst received average merit and cost of living increases that are used by CalPERS' actuaries to estimate potential salary increases across all employers who participate in the retirement system.

The matter was heard for a third time by the Office of Administrative Hearings on November 12, 2019. A Proposed Decision on Remand was issued on February 20, 2020, affirming CalPERS' determination to set Respondent Malkenhorst's payrate at \$14,020 per month, and denying the appeal. The decision also affirmed that CalPERS could apply the 10-year statute of limitations, due to fraud committed by Respondent Malkenhorst, for the recoupment of overpayments.

Alternatives

- A. For use if the Board decides to adopt the Proposed Decision on Remand as its own Decision:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own Decision the Proposed Decision on Remand dated February 20, 2020, concerning the appeal of Bruce Malkenhorst, Sr.; RESOLVED FURTHER that this Board Decision shall be effective 30 days following mailing of the Decision.

- B. For use if the Board decides not to adopt the Proposed Decision on Remand, and to decide the case upon the record:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, after consideration of the Proposed Decision on Remand dated February 20, 2020, concerning the appeal of Bruce Malkenhorst, Sr., hereby rejects the Proposed Decision on Remand and determines to decide the matter itself, based upon the record produced before the Administrative Law Judge and such additional evidence and arguments that are presented by the parties and accepted by the Board; RESOLVED FURTHER that the Board's Decision shall be made after notice is given to all parties.

- C. For use if the Board decides to remand the matter back to the Office of Administrative Hearings for the taking of further evidence:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, after consideration of the Proposed Decision on Remand dated February 20, 2020, concerning the appeal of Bruce Malkenhorst, Sr., hereby rejects the Proposed Decision on Remand and refers the matter back to the Administrative Law Judge for the taking of additional evidence as specified by the Board at its meeting.

- D. Precedential Nature of Decision (two alternatives; either may be used):

1. For use if the Board wants further argument on the issue of whether to designate its Decision as precedential:

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System requests the parties in the matter concerning the appeal of Bruce Malkenhorst, Sr., as well as interested parties, to submit written argument regarding whether the Board's Decision in this matter should be designated as precedential, and that the Board will consider the issue whether to designate its Decision as precedential at a time to be determined.

2. For use if the Board decides to designate its Decision as precedential, without further argument from the parties.

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, hereby designates as precedential its Decision concerning the appeal of Bruce Malkenhorst, Sr..

Budget and Fiscal Impacts: Not applicable

Attachments

Attachment A: Proposed Decision

Attachment B: Staff's Argument

Attachment C: Respondent(s) Argument(s)

Anthony Suine
Deputy Executive Officer
Customer Services and Support