
No. C056576

**COURT OF APPEAL
STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

**KAREN MATUS, INDIVIDUALLY AND IN VARIOUS REPRESENTATIVE
CAPACITIES AS TRUSTEE, EXECUTOR, AND PERSONAL REPRESENTATIVE;
ALEXANDER FAMILY TRUST, ET AL.,**

Plaintiffs and Respondents,

vs.

**BOARD OF ADMINISTRATION OF THE CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM, LEGISLATORS' RETIREMENT SYSTEM, AND CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM ITSELF AND AS ADMINISTRATOR OF
LEGISLATORS' RETIREMENT SYSTEM,**

Defendants and Appellants.

On Appeal from the Superior Court for Sacramento County
Hon. Jack Sapunor, Presiding Judge
No. 06CS01759

APPELLANTS' BRIEF


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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208(d)(1) and (2), the Board of Administration of the California Public Employees' Retirement System, the Legislators' Retirement System, and the California Public Employees' Retirement System state that no entities or persons have either (1) an ownership interest of ten percent or more in the party or parties filing this certificate or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves.

DATED this 15th day of February, 2008.



Bennett Evan Cooper

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INTRODUCTION

This appeal raises two pure issues of law concerning the procedural rules for an agency's determination of a claim under California Government Code section 11517, subdivision (c)(2).¹ The superior court answered both questions in a manner that contravenes the language of the statute, and with the result that the Board of Administration of the California Public Employees' Retirement System ("CalPERS") was deprived of the ability to review a multimillion-dollar claim against the state pension system by purportedly missing a deadline that the statute does not even impose.

First, the superior court held that if an agency rejects the administrative law judge's proposed decision on a claim, undertakes to decide the claim itself, and chooses to order a transcript of the proceedings before the ALJ, the agency must order the transcript within 100 days after rejecting the claim. On the narrow questions presented here of what restrictions and penalties the *statute* imposes, Government Code section 11517 does not set any specific time limitation for the agency to order a transcript. If an agency elects to reject a proposed decision and decide the case itself, the agency is implicitly given an *unstated* period of time in which to order and receive the transcript, and then is explicitly given an additional 100 days after receipt of that transcript in which to issue its final decision. The

¹ A copy of section 11517 is attached as an appendix to this brief for the Court's convenience.

superior court erred by rewriting the statute to impose a deadline for ordering transcripts that may conform to its view of how the agency process should work, but does not conform to the statute.

Second, the superior court held that the 100-day deadline it invented was mandatory rather than directory; as a result, if the agency fails to order the transcript within 100 days, the ALJ's proposed decision is "deemed adopted" and the agency loses its jurisdiction to decide the claim. Section 11517 provides a "deemed adopted" penalty for an agency's failure to make a timely *initial* decision on which statutory fork to choose for resolving the claim – i.e., whether to adopt, remand, or reject the proposed decision – but it does not impose any such penalty for subsequent deadlines that may apply once the agency chooses a particular fork. It is undisputed that CalPERS timely rejected the ALJ's proposed decision; only the subsequent directory deadlines are at issue in this case.

The superior court expressly found that CalPERS presented "valid" arguments for why the deadlines at issue in this case must be directory and not mandatory, but it felt that its hands were tied by this Court's decision in *St. Francis Medical Center v. Shewry* (2005) 134 Cal.App.4th 1556. While this Court held in *St. Francis* that one of the subsequent deadlines was mandatory, the parties did not contest, much less brief, the mandatory/directory issue in that case, and the Court's opinion concerned instead whether the Government Code or the Health & Safety Code applied to the claim. For the reasons set forth below, the circumstances warrant this Court's reconsideration of its unprecedented and unsupported ruling in *St. Francis*. The Court should reverse the superior court's

ruling and allow the CalPERS Board to decide the large claim in this case on the merits, not on the basis of procedural rules that the Legislature never adopted.

FACTS AND PROCEDURAL HISTORY

A. The Underlying Pension Benefits Dispute

The underlying claim by plaintiffs and respondents Karen Matus and the Alexander Family Trust (collectively "Alexander") concerns the amount of survivor death benefits and interest owed by the Legislators' Retirement System, which is administered by the CalPERS Board, to Frances Alexander, the now-deceased widow of Clarence Alexander. From 1947 to 1969, Mr. Alexander was employed by the State of California as the Business Manager of the State Senate. In January 1969, he was elected Secretary of the Senate, and he retired in December of that year. Mr. Alexander received a monthly retirement allowance until he died in February 1998. Mrs. Alexander then received a monthly survivor death benefit until she passed away in late 2005. Before she died, Mrs. Alexander brought an administrative claim alleging that CalPERS had improperly calculated her monthly benefits; that claim is now being pursued by Alexander on behalf of her heirs. (1 RT 30-31.)

The principal issue is the interpretation of Government Code section 9359.10, which was enacted in 1966 and requires cost-of-living adjustments ("COLAs") for legislative statutory officers and certain other membership classifications. The statute requires that retirement allowances reflect both "cost-of-living increases occurring after the retirement of the legislative statutory officer as determined under Section 9360.10" and changes in the compensation "payable

to the incumbent of that legislative statutory office.” (Gov. Code § 9359.10.) CalPERS interprets this provision in a logical fashion: the Legislature intended that the annual adjustment include any incumbent salary increases plus annual COLAs prospectively, thus assuring retirees of both protection against inflation and the benefits of any increases in the incumbent’s compensation.

In contrast, Alexander interprets this provision to incorporate a multiplier effect: the annual adjustment would include any incumbent salary increase, plus annual COLAs prospectively, plus an additional compounded increase calculated by applying each COLA since the date of retirement to the already-adjusted amount that CalPERS uses. In this case, CalPERS would be required to retroject 1990s compensation levels (which already reflected COLAs) back to the late 1960s and then *reapply* COLAs to already-adjusted amounts to determine later pension benefits. As a result, using Alexander’s interpretation, the monthly pension would far exceed either the member’s COLA-adjusted salary or the incumbent’s actual salary, though the latter is also subject to an annual COLA. (2 CT 315-324.) While Mr. Alexander’s monthly salary at retirement was approximately \$1,800 and the Secretary of the Senate’s monthly salary in 2004 was \$13,992, Alexander’s interpretation of the statute required a *monthly* pension at the time of Mrs. Alexander’s death of \$40,758 – equaling an annual pension of \$489,099 – or nearly three times the incumbent’s salary.

Indeed, prior errors by CalPERS in the calculation of the pension resulted in benefits so high that the state employee himself, Clarence Alexander, once asked CalPERS before his death if he could forgo some of the money. (1 RT 31.)

When CalPERS discovered the errors, it allowed Mr. Alexander's widow, Frances Alexander, to keep the excess benefits she had already received, but it recalculated the correct benefits prospectively. The merits of the pension dispute, however, were not presented to or decided by the superior court, and they are not before this Court on appeal.

B. The Proceedings Below

1. The ALJ issues a proposed decision.

Alexander's case was originally heard by an ALJ rather than CalPERS itself. An evidentiary hearing was held before Administrative Law Judge Jonathan Lew on February 27-28 and March 1, 2006. Judge Lew issued his proposed decision on May 2, 2006, and CalPERS received the proposed decision on May 4, 2006. (2 CT 307, 308, ¶ 4.) The proposed decision would have awarded Alexander \$3,579,578 plus six percent interest, the total of which would near \$8 million. (1 CT 121, 178; 1 RT 35.)

2. The CalPERS Board rejects the proposed decision and undertakes to decide the claim.

At its monthly meeting on June 21, 2006, the CalPERS Board timely voted to reject the ALJ's proposed decision and to decide the case itself based on the administrative record, including the transcript of the evidentiary hearing. (2 CT 307, 308-309, ¶ 5.) The Board also decided to allow the parties to submit additional briefs and offer further argument at a full Board hearing. CalPERS notified Alexander of the Board's decision and that there would be a full hearing before the Board. (*Ibid.*) At the same June 2006 Board meeting, the Chairman of

the CalPERS Board also instructed CalPERS' staff to solicit the opinion of the State Office of Legislative Counsel concerning the correct construction of Government Code section 9359.10. (2 CT 307, 309, ¶ 6.)

CalPERS could not directly ask the Office of Legislative Counsel for such an opinion; instead, it was required to ask a member of the Legislature to request the opinion on CalPERS' behalf. The CalPERS staff investigated how best to proceed, but was impeded because the Legislature was out of session for a month, from July 7 to August 7, 2006. Moreover, the CalPERS staff was obligated to prepare a request that posed the statutory construction issue in a neutral manner that was not based on the facts of the Alexander case. This required preparation of a set of illustrative hypothetical examples of the results of the different interpretations, including complex actuarial computations that were included with the request. These calculations were checked and rechecked by different CalPERS actuaries. (2 CT 307, 309, ¶¶ 6-8.)

This process was delayed by events unrelated to any purported intent to delay proceedings or prejudice Alexander. Critically, Elizabeth Yelland, the CalPERS staff counsel who had been responsible for the Alexander case since its inception, left CalPERS' employ at the end of August 2006, and CalPERS thus lost the considerable expertise she had developed in the complex issues. (2 CT 307, 309, ¶¶ 7-8.) Ultimately, CalPERS completed and approved the request for the opinion of the Office of Legislative Counsel, and presented that request on October 3, 2006, to the Honorable Alberto Torrico, a State Assembly Member and

Chair of the Assembly's Public Employees, Retirement and Social Security Committee. (2 CT 307, 309, ¶ 9; 2 CT 314-324.)

CalPERS, however, had no way of knowing if or when the Office of Legislative Counsel would render the opinion that the CalPERS Board had requested, and it was faced with a statutory deadline for agency decision making: under the Government Code, “[i]f the agency ... has ordered a transcript of the proceedings before the administrative law judge, the agency shall issue its final decision not later than 100 days after receipt of the transcript.” (Gov. Code § 11517, subd. (c)(2)(E)(iv), emphasis added.) Because the CalPERS Board had expressed its desire to decide the case after a thorough consideration that included the Office of Legislative Counsel's input, CalPERS' staff temporarily held off from ordering a copy of the transcript. (2 CT 307, 309-310, ¶ 10.)

On October 6, 2006, three days after it sent its request to Assembly Member Torrico, CalPERS ordered the transcript from the Office of Administrative Hearings (“OAH”). (2 CT 307, 309-310, ¶ 10; 2 CT 326.) OAH was engaged in moving its offices, however, and CalPERS did not receive a response to its request for several weeks. (2 CT 307, 310, ¶ 11.) Eventually OAH informed CalPERS that it no longer processed transcript requests and that CalPERS should contact the court reporters directly. (*Ibid.*) CalPERS immediately did so: on November 6, 2006, it requested the transcripts from Peters Court Reporting. (*Ibid.*; 2 CT 328.) CalPERS received the transcripts on November 13, 2006, triggering the 100-day deadline for issuing a final decision under Government Code section 11517, subdivision (c)(2)(E)(iv). (2 CT 307, 310, ¶ 11.)