EXHIBIT 1

Mass v. Board of Ed. of San Francisco Unified School Dist.

Supreme Court of California, In Bank. | August 11, 1964 | 61 Cal.2d 612 | 394 P.2d 579

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Outline

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Woodbury v. Brown-Dempsey, Cal.App. 4 Dist., April 30, 2003

61 Cal.2d 612
Supreme Court of California, In Bank.

John W. MASS, Plaintiff and Appellant,
v.
The BOARD OF EDUCATION OF the SAN FRANCISCO UNIFIED SCHOOL DISTRICT et al., Defendants and Appellants.

S. F. 21690. | Aug. 11, 1964. | As Modified on Denial of Rehearing Sept. 10, 1964.

Mandamus proceeding by suspended school teacher against local board of education and others for reinstatement and back pay. The Superior Court, City and County of San Francisco, Byron Arnold, J., denied teacher's claim for reinstatement, awarded back pay from day of suspension to date of lapse of teaching credential, denied retirement benefits for suspension period, and struck claim or general damages, and teacher appealed. The Supreme Court, Tobriner, J., held that board failed to establish right to mitigation of damages, that board's refusal to reinstate could not properly rest upon automatic termination of teacher's employment rights as result of lapse of his teacher's credential, and that teacher had right to past salary less amounts which would have been deducted for retirement contributions and to prejudgment interest as element of damages on each salary payment from date of accrual to date of entry of judgment.

Judgment affirmed in part and reversed in part, and cause remanded for proceedings consistent with opinion.

McComb and Schauer, JJ., dissented.

Opinion, Cal.App., 37 Cal.Rptr. 351, vacated.

West Headnotes (26)

[1] **Education**
Reinstatement; Back Pay

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)5Adverse Personnel Actions
141Ek616Reinstatement; Back Pay
141Ek617In general
(Formerly 345k147.47, 345k147.46, 345k141(6) Schools)

Teacher is entitled to reinstatement, full salary from date of suspension, retirement benefits, and interest from dates on which salary payments were due, where local board of education suspends teacher upon charges which board fails to establish as proper. West's Ann.Education Code, §§ 12955, 13412, 13436, 13439.

11 Cases that cite this headnote

[2] **Damages**
Matter of mitigation

115Damages
115VIIIPleading
115k155Matter of mitigation

Failure to plead or prove mitigation of damages, asserted as an affirmative defense, resulted in defendant's waiver of defense.

3 Cases that cite this headnote

[3] **Education**
Reinstatement; Back Pay

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)5Adverse Personnel Actions
141Ek616Reinstatement; Back Pay
141Ek617In general
(Formerly 345k147.47, 345k147.46, 345k141(1) Schools)

Local board of education could dismiss teacher possessing tenure only by complying with applicable statutory procedures. West's Ann.Education Code, §§ 13401–13452.

Cases that cite this headnote

[4] **Education**
Proceedings

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)5Adverse Personnel Actions
141Ek589Proceedings
141Ek590In general
(Formerly 345k147.31, 345k147.30, 345k141(5) Schools)

Local board of education could not obtain judgment determining that school teacher, who was a permanent employee, could be dismissed, where only action which board instituted pursuant to Education Code for determination of that issue had been dismissed, judgment of dismissal was final, and, under applicable statutes of limitation, no new statutory proceeding could be filed. West's Ann.Education Code, §§ 13401–13452.

2 Cases that cite this headnote

[5] **Education**
Persons entitled

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)2Tenure; Continuing Contract Status
141Ek495Persons entitled
(Formerly 345k133.6(6), 345k133.10 Schools)

Education Code provisions restricting employment by local boards of education to teachers holding credentials from state board of education and provision confining payment to such teachers implement a state-wide system of certification by requirement that only teachers so qualified shall be eligible for employment by local boards but do not automatically deprive teachers of tenure or of status as permanent employees. West's Ann.Education Code, §§ 13251, 13252, 13274, 13511.

2 Cases that cite this headnote

[6] **Education**
Abrogation or modification of rights

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)2Tenure; Continuing Contract Status
141Ek504Abrogation or modification of rights
(Formerly 345k133.6(6), 345k133.10 Schools)

Lapse of teacher's credential due to failure of teacher, who had tenure as a "permanent employee", to renew credential during period of teacher's suspension by local board of education which failed to comply with statutes relating to dismissal of teachers having tenure did not automatically terminate teacher's employment rights, where teacher's act of applying for renewal would have automatically renewed his credential. West's Ann.Education Code, §§ 12955, 13251, 13252, 13274, 13401–13452, 13511.

4 Cases that cite this headnote

[7] **Education**
Presumptions and burden of proof

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)5Adverse Personnel Actions
141Ek589Proceedings
141Ek600Evidence
141Ek600(2)Presumptions and burden of proof
(Formerly 345k147.40(1), 345k141(5) Schools)

Local board of education which initiated suspension of teacher having tenure had burden of demonstrating teacher's unfitness. West's Ann.Education Code, §§ 13401–13452.

1 Cases that cite this headnote

[8] **Education**

Evidence

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)5Adverse Personnel Actions
141Ek589Proceedings
141Ek600Evidence
141Ek600(1)In general
(Formerly 345k147.40(1), 345k141(5) Schools)

Evidence was not sufficient to establish that school teacher who had tenure but who was suspended by local board of education was incompetent. West's Ann.Education Code, §§ 13401–13452.

Cases that cite this headnote

[9] **Education**
Compensation on removal, suspension, or resignation

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)3Compensation
141Ek519Compensation on removal, suspension, or resignation
(Formerly 345k144(3), 345k44(3) Schools)

School teacher who had tenure and who had right to be reinstated after suspension by local board of education was not precluded from recovering past salary due to lapse of his teacher's credential during period of suspension, where credential was available to teacher and would have been automatically forthcoming if he had applied for it. West's Ann.Education Code, §§ 2, 13516.5.

3 Cases that cite this headnote

[10] **Education**
Determination and disposition

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)5Adverse Personnel Actions
141Ek589Proceedings
141Ek603Judicial Review
141Ek603(5)Determination and disposition
(Formerly 345k147.44, 345k141(5) Schools)

Upon local board of education's failure to obtain judgment upholding board's dismissal of teacher having tenure, original suspension or dismissal became contrary to provisions of Education Code and unlawful. West's Ann.Education Code, § 13436.

Cases that cite this headnote

[11] **Education**
Reinstatement; Back Pay

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)5Adverse Personnel Actions
141Ek616Reinstatement; Back Pay
141Ek617In general
(Formerly 345k147.47, 345k147.46, 345k141(6) Schools)

Suspended teacher having tenure was restored to his position "pursuant to judicial proceedings" within Education Code, where local board of education, after suspending teacher, failed to obtain favorable judgment in its original suit to dismiss teacher, and Supreme Court had ordered teacher's reinstatement. West's Ann.Education Code, § 13516.5.

Cases that cite this headnote

[12] **Education**
Reinstatement; Back Pay

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)5Adverse Personnel Actions
141Ek616Reinstatement; Back Pay
141Ek617In general
(Formerly 345k144(3) Schools)

Education Code provision that governing board

of school district "may" pay back salary of school teacher discharged contrary to provisions of Education Code and thereafter restored to his position pursuant to judicial proceedings is not merely permissive but would be considered mandatory where public duty was involved. West's Ann.Education Code, §§ 10, 36, 13516.5, 13439.

2 Cases that cite this headnote

[13] **Statutes**
Associated terms and provisions; noscitur a sociis
Statutes
Mandatory or directory statutes

361Statutes
361IIIConstruction
361III(E)Statute as a Whole; Relation of Parts to Whole and to One Another
361k1159Associated terms and provisions; noscitur a sociis
(Formerly 361k193)
361Statutes
361IVOperation and Effect
361k1407Mandatory or directory statutes
(Formerly 361k227)

Word "may" customarily implies permissiveness, but words must be construed in their textual context. West's Ann.Education Code, §§ 10, 36.

2 Cases that cite this headnote

[14] **Statutes**
Mandatory or directory statutes

361Statutes
361IVOperation and Effect
361k1407Mandatory or directory statutes
(Formerly 361k227)

Words permissive in form are considered mandatory when a public duty is involved.

3 Cases that cite this headnote

[15] **Education**
Compensation on removal, suspension, or resignation

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)3Compensation
141Ek519Compensation on removal, suspension, or resignation
(Formerly 345k144(3) Schools)

Right of teacher having tenure to past salary after teacher had been ordered reinstated following his suspension by local board of education covered his rights in board's retirement fund, but amounts which would have been deducted for retirement contributions from his salary would haveto be deducted from his recovery. West's Ann.Education Code, §§ 13516.5, 13435.

3 Cases that cite this headnote

[16] **Education**
Compensation on removal, suspension, or resignation

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)3Compensation
141Ek519Compensation on removal, suspension, or resignation
(Formerly 345k144(3) Schools)

Under Education Code provision that employee shall be paid "full salary" for period of his suspension, quoted phrase includes right to participate in retirement benefits. West's Ann.Education Code, § 13439.

1 Cases that cite this headnote

[17] **Education**

Reinstatement; Back Pay

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)5Adverse Personnel Actions
141Ek616Reinstatement; Back Pay
141Ek617In general
(Formerly 345k147.47, 345k147.46, 345k141(6) Schools)

Teacher entitled to full salary for period of his suspension after he had been ordered reinstated by court would not be entitled to recover for loss of fringe benefits such as medical benefits and other insurance plans for local board of education's employees, where teacher proved no incurred medical expenditures or losses from other insurance plans. West's Ann.Education Code, § 13439.

9 Cases that cite this headnote

[18] **Mandamus**
Award and assessment of damages
Education
Reinstatement; Back Pay

250Mandamus
250IIIJurisdiction, Proceedings, and Relief
250k177Award and assessment of damages
141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)5Adverse Personnel Actions
141Ek616Reinstatement; Back Pay
141Ek617In general
(Formerly 345k147.54, 345k142 Schools)

Teacher who had tenure and who was entitled to past salary after having been ordered reinstated following his suspension by local board of education would be entitled to prejudgment interest as an element of damages on each salary payment as it accrued from date of accrual to entry of judgment, and such interest could obtained in teacher's mandamus proceeding against board and others for reinstatement and back pay. West's Ann.Civ.Code, § 3287; West's Ann.Education Code, §§ 12955, 13408.

27 Cases that cite this headnote

[19] **Education**
Reinstatement; Back Pay

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)5Adverse Personnel Actions
141Ek616Reinstatement; Back Pay
141Ek617In general
(Formerly 345k147.47, 345k147.46, 345k141(6) Schools)

Local board of education incurred liability for breach of its contractual, monetary obligation in regard to teacher as to whom board denied back pay after teacher was ordered reinstated by court after board had suspended teacher. West's Ann.Education Code, § 1011.

1 Cases that cite this headnote

[20] **Mandamus**
Award and assessment of damages

250Mandamus
250IIIJurisdiction, Proceedings, and Relief
250k177Award and assessment of damages

Mandamus action may include monetary damages for breach of contractual or tort obligations. West's Ann.Code Civ.Proc. § 1095.

4 Cases that cite this headnote

[21] **Education**
Damages

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)5Adverse Personnel Actions
141Ek604Actions
141Ek614Damages
(Formerly 345k147.54, 345k142 Schools)

Obligation to reimburse teacher for amount of salary wrongfully withheld may be mitigated by deducting teacher's earnings from other employment.

5 Cases that cite this headnote

[22] **Education**
Damages

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)5Adverse Personnel Actions
141Ek604Actions
141Ek614Damages
(Formerly 345k147.54, 345k142 Schools)

Local board of education which has wrongfully withheld salary from teacher has burden of establishing mitigation of damages in form of other earnings by teacher.

2 Cases that cite this headnote

[23] **Education**
Damages

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(D)Teachers and Education Professionals
141EII(D)5Adverse Personnel Actions
141Ek604Actions
141Ek614Damages
(Formerly 345k147.54, 345k142 Schools)

In absence of proof of other earnings of teacher from whom local board of education has wrongfully withheld salary, presumption is that amount of teacher's damages is amount of salary withheld.

2 Cases that cite this headnote

[24] **Damages**
Mitigation of damages and reduction of loss

115Damages
115IXEvidence
115k163Presumptions and Burden of Proof
115k163(2)Mitigation of damages and reduction of loss

Burden of showing mitigation of damages rests upon defendant.

7 Cases that cite this headnote

[25] **Witnesses**
Examination of adverse party or witness as on cross-examination

410Witnesses
410IIIExamination
410III(B)Cross-Examination
410k276Examination of adverse party or witness as on cross-examination

Local board of education could call teacher, who was entitled to reinstatement following his suspension by board and to back pay, as an adverse witness to inquire as to his interim employment for purposes of mitigating damages. West's Ann.Code Civ.Proc. § 2055.

Cases that cite this headnote

[26] **Mandamus**
Issues, proof, and variance

250Mandamus
250IIIJurisdiction, Proceedings, and Relief
250k167Issues, proof, and variance

Teacher seeking, by mandamus proceeding against local board of education and others, to obtain reinstatement following his suspension and back pay was not required to allege and prove availability of funds from which board could pay the amount sought. West's Ann.Education Code, § 1011.

Cases that cite this headnote

Attorneys and Law Firms

***741 **581 *615** Marshall W. Krause, San Francisco, and Albert M. Bendich, Berkeley, for plaintiff and appellant.

Joseph Genser, as amicus curiae on behalf of plaintiff and appellant.

Thomas M. O'Connor, City Atty., George E. Baglin, Deputy City Atty., and Irving ***742 **582** G. Breyer, San Francisco, for defendants and appellants.

Opinion

***616** TOBRINER, Justice

[1] [2] In a case in which a local board of education suspends a teacher upon charges which the board fails to establish as proper, pursuant to statutory requirements, the teacher is entitled to reinstatement, to full salary from the date of suspension, including retirement benefits, and to interest from the dates upon which such salary payments were due. The board fails in its attempt to defeat such recovery upon the ground of an alleged automatic termination of employment rights because of a lapse of the teacher's credential during a part of the period of the suspension. It fails, too, in its effort to mitigate damages since it waived this affirmative defense by neither pleading nor proving such mitigation.

This litigation now presents its third appeal. Over ten years ago, on December 8, 1953, when the Board of Education of the San Francisco Unified School District (hereinafter called board) suspended plaintiff for failure to answer questions propounded by a congressional subcommittee (Ed.Code, s 12955), this case started upon its long course. At that time, in accordance with the statute, plaintiff demanded a hearing; the board thereupon filed an action incorporating the requisite charges. (Ed.Code, s 13412; at that date, s 13529.) The trial court upheld the charges and found that they constituted grounds for dismissal.

Plaintiff appealed the judgment to this court; we reversed it and remanded it for a new trial; we held that plaintiff had been deprived of a proper hearing under Education Code section 12955 because of the failure to inquire into plaintiff's reasons for invoking the privilege against self-incrimination (Board of Education of San Francisco Unified School District v. Mass (1956) 47 Cal.2d 494, 304 P.2d 1015). We filed our remittitur on January 27, 1957.

On May 29, 1957, plaintiff moved to remand the proceeding to the board for full hearing in accordance with the remittitur but the court denied the motion without prejudice. Thereafter the board did not initiate retrial but permitted plaintiff's status to remain in this uncertain and suspended condition.[1]

Despite its role as plaintiff in the action which we had remanded, ***617** the board failed to bring it to trial; the present plaintiff, after the elapse of three years from the date of the remittitur, moved for dismissal pursuant to section 583 of the Code of Civil Procedure. Although the trial court denied the motion, the District Court of Appeal issued its writ of mandate ordering that the action be dismissed (Mass v. Superior Court (1961) 197 Cal.App.2d 430, 17 Cal.Rptr. 549). Accordingly, on January 30, 1962, the trial court entered a dismissal of the board's suit to remove plaintiff from his position.

On January 31, 1962, plaintiff notified the board of the dismissal, demanding, pursuant to Education Code sections 13436 and 13439, reinstatement to his former position within five days as well as payment of full salary from December 8, 1953, plus all allowable costs and damages. On February 6, 1962, the board rejected these demands. Plaintiff then brought the present proceeding in mandamus.

The undisputed facts as to plaintiff's teaching credentials are that plaintiff renewed ***743 **583** his general secondary credential, under which he taught, on September 13, 1951; that over five years later, on November 30, 1956, it expired; that on May 30, 1960, plaintiff applied for a reissuance of the credential, but, because of a change in the requirements, the State Board of Education issued to him a junior college credential retroactive to that date. The local board did not learn of the lapse of the credential until almost four years after the date of its expiration, but on September 6, 1960, adopted a resolution that plaintiff's 'services as a certificated employee be terminated as of December 1, 1956. * * *'

The trial court denied plaintiff's claim for reinstatement; it awarded him back salary from December 8, 1953, only to November 30, 1956; it denied retirement benefits for that period; it struck the claim for general damages.

1. The right to reinstatement.

[3] We shall point out that since plaintiff admittedly possessed tenure, the board could dismiss him only if it

complied with statutory procedures which it confessedly did not pursue. We also explain our rejection of the board's contention that, *618 irrspective of the statutory procedures, its refusal to reinstate could properly rest upon automatic termination of plaintiff's employment rights as a consequence of the lapse of his credential.

The strict statutory procedures for dismissal of a teacher are set forth in sections 13401-13452 of the Education Code; section 13403 provides that the board can dismiss a 'permanent employee' only for the causes there specified. The board does not question the fact that plaintiff was a 'permanent employee.' The section does not list a lack of credential as one of such bases. Section 13412 provides that if a teacher, having 'been served with notice of the governing board's intention to dismiss him,' demands a hearing, the board must either 'rescind its action' or, upon the filing of a complaint in the superior court, prove the asserted charges. Section 13436 declares that '(i)f the judgment determines that the employee may be dismissed, the governing board may dismiss him * * *. Otherwise the employee may not be dismissed. * * *' Indeed, if he has been suspended pending the court action, the teacher 'shall be reinstated within five days after the entry of judgment in his favor, and shall be paid full salary by the governing board for the period of his suspension.' (s 13439.)

[4] The board has not obtained, and, indeed, cannot now obtain, a judgment determining 'that the employee plaintiff may be dismissed.' The only action which the board instituted, pursuant to statute (Ed.Code, s 13412 et seq.), for the determination of that issue, has been dismissed; the judgment of dismissal is final. Under the applicable statutes of limitation, no new statutory proceeding can now be filed (Ed.Code, s 13413) or tried (Ed.Code, s 13433). The board cannot found the dismissal upon its own failure properly to pursue the provisions of the statute.

The board, however, seeks to defeat the statutory command by the contention that plaintiff's failure to renew his credential in 1956 automatically forfeited his status as a permanent employee and absolved the board of any further obligation. This hypothesis, however, rests upon sections of the Education Code and upon decisions that do not support it.

[5] The board's cited sections 13251, 13252, and 13274, which restrict employment by local boards to teachers holding credentials from the State Board of Education, and section 1351, which confines payment to such teachers, do not *619 automatically deprive teachers of tenure or of status as permanent employees. These statutes implement a statewide system of certification by the requirement that only teachers so qualified shall be eligible for employment by the local boards. These provisions do not condition tenure rights or status upon certification; such rights are separately defined in other sections of the code.

***744 **584 Indeed, the Legislature has provided employment protection for eligible teachers who have inadvertently allowed their credentials to lapse; none of the statutes remotely suggest that tenure rights terminate with the expiration of a credential.[2] To the contrary, section 13253, operative from the date when plaintiff failed to renew his credential to the date when he obtained a new credential, authorized 'the governing boards of school districts' to employ a person without a credential if he applied for 'such certification document' before '* * * the actual service' of such person commenced. If, pursuant to section 13439, the board had 'reinstated' plaintiff, no question as to his credential would have arisen; plaintiff could have applied for his credential, and it would have been automatically furnished.

As the board points out, 'had petitioner applied for renewal he would have been absolutely entitled thereto. (Hall v. Scudder, (74) 73 Cal.App.2d 433, 436 (168 P.2d 990); Payne v. Real Estate Comr., 93 Cal.App.2d 532, 535-536 (209 P.2d 419); Matteson v. State Board of Education, 57 Cal.App.2d 991 (136 P.2d 120).)' The board further explains that the Legislature did not give the State Board of Education or the commission of credentials 'power to deny an application for renewal of a credential because a local board of education has brought charges of violation of the Dilworth Act, *620 insubordination, or unprofessional conduct.' Consequently, the renewal of plaintiff's certificate entailed nothing more than the technicality of application.

[6] We cannot find any basis in the Education Code for predicating the loss of a teacher's tenure rights upon his filure to perform a purely perfunctory act of application that would have automatically renewed his credential. We cannot ignore the sections, and the legislative history, to tie an automatic termination of plaintiff's rights to the distorted ballooning of a formality.

The board's citations emphasize the incongruity of equating a lapse of a certificate with an automatic termination of the tenure rights of a permanent employee. The cases illustrate the difference between the mere lapse of a credential, such as occurred here, and the revocation of a credential because of the teacher's disqualification. Disqualification, because of sexual offenses, led to automatic termination of credentials in Lerner v. Los Angeles City Board of Education (1963) 59 Cal.2d 382,

383, 390, fn. 4, 29 Cal.Rptr. 657, 380 P.2d 97, and Di Genova v. State Board of Education (1955) 45 Cal.2d 255, 263, 288 P.2d 862. Such revocation constitutes a declaration by the state board of the teacher's disqualification; the local board then cannot employ the teacher. Such a situation contrasts with the instant mechanical lapsing of a certificate which is automatically renewable.

Neither the cases nor the statutes support the asserted automatic termination of plaintiff's status; the statutes, indeed, compel his reinstatement.

[7] [8] The board argues, however, that even if plaintiff's emplоment were not ***745 **585 automatically terminated, plaintiff, in order to obtain reinstatement, must still demonstrate that he possesses the requisite qualifications to teach; the board is not required to reinstate unqualified personnel. In the instant case, however, plaintiff obtained a junior college credential, dated May 30, 1960; his tenure stems from employment at City College of San Francisco, a junior college; he is accordingly qualified to teach.[3] Furthermore, the board initiated plaintiff's suspension and failed to substantiate the charges. The burden rests on it to demonstrate plaintiff's unfitness. Not only has the board failed to show plaintiff's incompetence, but the only evidence adduced pertinent to this issue, consisting *621 of plaintiff's proof that he obtained subsequent certification, tends to show that he is so qualified.[4]

2. The right to past salary.

[9] We cannot agree with the board that, granting plaintiff's right to be reinstated, he cannot recover salary from 1956 to 1961 because he failed to show his professional qualification for a proper credential during that period. We have explained that the credential, which constituted plaintiff's certification of qualification, was available to plaintiff, and would, if he had applied for it, have been automatically forthcoming. As we have explained, to regard plaintiff's failure to pursue the mechanics of certificate-renewal as equivalent to plaintiff's disqualification is to misconceive the scheme of the state system of certification.

In any event, and because of these very premises, the Legislature has explicitly provided that the lack of a credential will not preclude the payment of back salary to a teacher who has allowed the lapse of a credential. Section 13516.5 of the Education Code provides that past salary may be paid to a teacher reinstated by court order 'irrespective of whether such employee was the holder of a valid certification document during the period of such unlawful removal from his position.'[5] (Italics added.)

Despite the literal application of the section to the instant case, the board attempts to avoid its impact upon three premises, none of which can stand: (1) that the suspension here *622 was 'lawful' and hence plaintiff was not discharged 'contrary to the provisions of this code,' (2) that plaintiff was not restored to his position 'pursuant to judicial proceedings,' and (3) that the statute provides only that the school district 'may' pay the back salary and thus is purely permissive.[6]

**586 ***746 [10] Despite the board's construction, the words 'discharged * * * contrary to the provisions of this code' clearly apply to the instant situation. A teacher has been dismissed upon charges which failed of proof in court; his dismissal therefore violates the legal mandate of section 13436. Upon the board's failure to obtain a judgment upholding the teacher's dismissal, as required by that section, the original suspension or dismissal becomes 'contrary to the provisions of this code.'

[11] The board's second contention that the reinstatement must be 'pursuant to judicial proceedings' collapses because our order commanding that petitioner be reinstated must itself be 'pursuant to judicial proceedings.' Furthermore, if the board failed to obtain a favorable judgment in its original suit to dismiss plaintiff, then reinstatement as ordered by the code is 'pursuant to' that judicial proceeding.

[12] [13] [14] Finally, the board contends that although section 13516.5 permits it to compensate petitioner, the statute does not require it to do so. Although the word 'may' customarily implies permissiveness (Ed.Code, s 36), words must be construed in their textual context. (Ed.Code, s 10.) The *623 word 'may here occurs in a statute defining a public duty. "Words permissive in form, when a public duty is involved, are considered as mandatory." (Harless v. Carter (1954) 42 Cal.2d 352, 356, 267 P.2d 4, 7.) Otherwise the statute would condone arbitrary action of the board in selective compensation of discharged employees covered by the section. Moreover, the board asserts that it cannot perform the statutory dictate of section 13439 to reinstate and recompense plaintiff because to do so would violate the provisions of the code. Section 13516.5, however, which at least permits the board to compensate petitioner, belies this contention.

The section rests upon the sound consideration that a teacher precluded from employment as a result of an unsubstantiated discharge cannot reasonably be required to perform the useless act of renewing his certification if it appears that the local board will not employ him. The Legislature has recognized that the teacher who has been

unlawfully discharged but who has been restored to his position by court order should not be penalized by a nonperformance of a perfunctory act of application for renewal. The section particularly applies to a suspension ordered by the board upon charges which the board has failed to sustain.

[15] We conclude that section 13516.5 vindicates plaintiff's right to compensation whether or not he held 'a valid certification document during the period of such unlawful removal.' We proceed to explain that such compensation covers his rights in the board's retirement fund.

[16] [17] Section 13439 provides that the employee 'shall be paid full salary * * * for the period of his suspension.' (Italics added.) Contrary to the conclusion of law ***747 **587 of the trial court, 'full salary' includes the right to participate in retirement benefits.' (See Benson v. City of Los Angeles (1963) 60 Cal.2d 355, 359, 33 Cal.Rptr. 257, 384 P.2d 649; Titus v. Lawndale School District (1958) 157 Cal.App.2d 822, 830, 322 P.2d 56.) Although plaintiff asserts an additional claim 'for the loss of other fringe benefits such as medical benefits *624 and other insurance plans for the board's employees' plaintiff proved no incurred medical expenditures or 'losses' from 'other insurance plans.' Plaintiff is therefore not entitled to any recovery on these latter matters.

3. The right to interest.

[18] Plaintiff is entitled to prejudgment interest as an element of damages on each salary payment as it accrued. Civil Code, section 3287, which governs interest as an element of damages, reads in part: 'Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day * * *. This section is applicable to recovery of damages and interest from any such debtor, including the State or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the State.' (As amended Stats.1955, ch. 1477, p. 2689, s 1; Stats.1959, ch. 1735, p. 4186, s 1. In 1955 the Legislature applied the section to any 'political subdivision of the State'; the 1959 amendment added the other named governmental bodies.)

This section authorizes prejudgment interest on salary payments from the date of accural to the entry of judgment. (Benson v. City of Los Angeles (1963) 60 Cal.2d 355, 363-366, 33 Cal.Rptr. 257, 384 P.2d 649; W. F. Boardman Co. v. Petch (1921) 186 Cal. 476, 484-485, 199 P. 1047; Canavan v. College of Osteopathic P. & S. (1946) 73 Cal.App.2d 511, 521, 166 P.2d 878.) We shall show that the Board's three arguments against the payment of interest cannot stand and that, further, such interest may be obtained in this proceeding of mandamus.

The board first contends that section 13408 of the Education Code affords the suspended employee an alternative means of obtaining his salary by posting a bond, thus rendering Civil Code section 3287 inapplicable. Section 13408 of the Education Code, however, by its very terms does not apply to section 12955 of that code; plaintiff's suspension rests upon that section.

The board secondly contends that Civil Code, section 3287, which was amended in 1959 to include rights against local governmental agencies, does not operate retroactively. The instant cause arose on February 5, 1962, wheh the board refused to reinstate plaintiff. In *625 Abbott v. Los Angeles (1958) 50 Cal.2d 438, 467, 326 P.2d 484, this court, in an action pending at the time of the effective date of the 1955 amendment, impliedly recognized the applicability of the 1955 amendment to payments which accrued before 1955.

The board finally argues that interest only accrues from the date when the board bore the legal duty to reinstate plaintiff because until that time the 'right to recover' did not 'vest' in him (Civ.Code, s 3287) and until then he was legally suspended. The Civil Code requires vesting, however, only in order to fix with sufficient certainty the time when the obligation accrues so that interest should not be awarded on an amount before it is due. Each salary payment in the instant case accured on a date certain. Unless the suspension itself can be sustained and the board thus relieved of ***748 **588 any obligation whatsoever, the salary payments became vested as of the dates they accrued. If plaintiff had not been wrongfully suspended, he would have obtained the benefit of the moneys paid as of those dates; he has thus lost the natural growth and productivity of the withheld salary in the form of interest.

Although some decisions suggest that interest cannot be recovered in a mandamus action (see Sheehan v. Board of Police Commissioners (1922) 188 Cal. 525, 206 P. 70; Nilsson v. State Personnel Board (1939) 36 Cal.App.2d 186, 97 P.2d 843; Jorgensen v. Cranston (1962) 211 Cal.App.2d 292, 300-303, 27 Cal.Rptr. 297; Gibbons & Reed Co. v. Dept. of Motor Vehicles (1963) 220 A.C.A. 276, 286-289, 33 Cal.Rptr. 688; see discussion in Benson v. City of Los Angeles (1963) 60 Cal.2d 355, 363-365, 33 Cal.Rptr. 257, 384 P.2d 649),[8] we hold that the present action in mandamus *626 may support a judgment for

interest since it involves recovery upon a general underlying monetary obligation.

The theory that recovery in a mandamus action could not under any circumstances include interest arose from assumptions which subsequent decisions and legislation have nullified. In the first place some courts refused to allow interest because they concluded that the judgment in those cases did not rest upon underlying monetary obligations and that mandate would issue only 'to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.' (Code Civ.Proc. s 1085.) For example, the court in Sheehan noted that 'petitioner * * * would not have been entitled to sue the board * * * to recover the amount due him on account of his said pension.' (188 Cal. at p. 531, 206 P. at p. 73.) Secondly, Civil Code, section 3287, as it then read, foreclosed the recovery of interest against the state in any type of proceeding unless otherwise authorized.
[19] [20] At the present time, however, Civil Code, section 3287, having been amended, allows for recovery of interest against a governmental entity. Furthermore, in the instant case, the board incurs liability for breach of its contractual monetary obligation (see Ed.Code, s 1011; Benson v. City of Los Angeles (1963) 60 Cal.2d 355, 33 Cal.Rptr. 257, 384 P.2d 649). A mandamus action may include monetary damages for breach of contractual or tort obligations. (Code Civ.Proc. s 1095; Cason v. Glass Bottle Blowers Assn. (1951) 37 Cal.2d 134, 142, 231 P.2d 6, 21 A.L.R.2d 1387.) Thus the abstract conception that interest could not be recoverable in any mandamus action, because the judgment could not be based on a monetary obligation, does not apply to this situation. In the instant case the judgment did rest upon a monetary obligation and we see no reason to foreclose the collection of interest because of the form of the action.

***749 **589** Indeed, we allowed post-judgment interest in Cason v. Glass Bottle Blowers Assn., supra, a mandamus action. The cases cited above have treated post-judgment and prejudgment interest alike (see Nilsson v. State Personnel Board, supra, 36 Cal.App.2d at p. 189, 97 P.2d 843) and their force is thus vitiated by Cason. An action upon contract or for declaratory relief will lie to determine ***627** a plaintiff's right to wrongfully withheld payments and can properly include interest as an element of damages; plaintiff should surely recover interest in a mandamus action which covers damages based on an identical monetary obligation. Since mandate is the most expeditious and the most frequently used procedure of relief for persons improperly discharged from their positions, such persons should not be subjected to the loss of full restitution, by the denial of interest, merely because of the selection of this procedure for redress.[9]

4. Mitigation of Damages.

The trial court awarded back salary for the period December 8, 1953, to November 30, 1956. The board did not plead or prove that plaintiff earned any other compensation during that period or for the subsequent period of December 1, 1956, to the present. Plaintiff, on the other hand, failed to prove that he did not earn any offsetting compensation. In the absence of the board's showing that plaintiff received other compensation we do not see how the board can now properly assert that damages should be mitigated.
[21] [22] [23] [24] The cases have long held that the obligation to reimburse the teacher for the amount of salary wrongfully withheld may be mitigated by deducting earnings from other employment. (Hancock v. Board of Education (1903) 140 Cal. 554, 562, 74 P. 44; Ramsay v. Rodgers (1923) 60 Cal.App. 781, 785, 214 P. 261.) These cases also hold, however, that the burden of establishing mitigation rests with the defendant, and that in the absence of any proof of other earnings, a presumption arises that the amount of damages is the amount of withheld salary. As the early decision in Rosenberger v. Pacific Coast Ry. Co. (1896) 111 Cal. 313, 318, 43 P. 963, 964 states: 'The burden is on the defendant to show that he could, by diligence, have obtained employment elsewhere. Whatever compensation may have been received in such employment is also to be shown by the defendant in mitigation of damages; otherwise, the damages will be measured by the salary or wages ***628** agreed to be paid.' (To the same effect: Ramsay v. Rodgers (1923) 60 Cal.App. 781, 785, 214 P. 261.) These decisions do nothing more than apply to cases of wrongful discharge the general principle that the burden of showing mitigation of damages rests upon defendant. (Steelduct Co. v. Henger-Seltzer Co. (1945) 26 Cal.2d 634, 654, 160 P.2d 804; Hunter v. Croysdill (1959) 169 Cal.App.2d 307, 318, 337 P.2d 174.)

The rule has uniformly been applied to the wrongful discharge of teachers; thus Hancock v. Board of Education (1903) 140 Cal. 554, 562, 74 P. 44, 47 states: 'Under these circumstances, in the absence of any claim by the defendant that the plaintiff could have obtained or did obtain other employment, the presumption is that he was damaged in the sum which he would have received under the contract if he had performed the duties required.' (See also La Rue v. Board of Trustees (1940) 40 Cal.App.2d 287, 296, 104 P.2d 689.)

The board cites no cases holding otherwise as to teachers but submits decisions dealing with dismissals of civil service employees under the State Civil Service Act (***750 **590** Stockton v. Dept. of Employment (1944) 25 Cal.2d 264, 273-274, 153 P.2d 741; State Board of

Equal. of State of California v. Superior Court (1942) 20 Cal.2d 467, 475, 127 P.2d 4; Wiles v. State Personnel Board (1942) 19 Cal.2d 344, 352, 121 P.2d 673) and a case involving an analogous situation (Rexstrew v. City of Huntington Park (1942) 20 Cal.2d 630, 634, 128 P.2d 23.) These decisions, we believe, do not apply to the instant case.

The decisions involve the statutory requirements of the State Civil Service Act, which, as amended in 1939, declared that the State Personnel Board 'shall in rendering its decision, authorize payment of salary for the period of suspension if it finds the charges made were untrue.' (Subd. (d) of $173 of the State Civil Service Act as added in 1939, State.1939, p. 2514.) (Italics added.) This the State Personnel Board exercises the authority to determine the 'salary' to be paid to the discharged civil servant. As the decision in Stockton v. Department of Employment, supra, recognizes, the cases have held that the civil service employee is 'to recover the amount of his accrued salary during the period he is prevented from performing his duties, less the amount he has received from private or public employment ***629** during that period' (25 Cal.2d p. 273, 153 P.2d p. 746).[10] The statute designates the State Personnel Board as the agency responsible for the reinstatement of civil service employees and for the determination of the compensatory amount to be paid them. Its determination controls unless the discharged civil servant can present a contrary showing, but, of course, the burden rests upon him to do so. Thus, in these cases the court did no more than interpret the meaning and effect of the personnel board's authorization.

In the instant case we do not interpret any authorization of payment of salary by the involved agency; no such authorization exists; the statutory procedure here contains no direction to a supervisory board, such as the personnel board, for ordering the board to reinstate a discharged teacher or for declaring that it 'shall in rendering its decisions authorize the payment of salary.'[11] In the absence of such special statutory procedures, we conclude that the general rule should prevail, and that the burden of mitigation should be borne by the defendant.

[25] The imposition of the burden on the board rests upon sound considerations. The board can call the teacher under Code of Civil Procedure, section 2055 as an adverse witness to inquire as to his interim employment; it can utilize discovery procedures for the same purpose. Since the board here undertakes to limit its liability and since it additionally possesses the techniques for ascertaining the facts, the board should, as to this issue, bear the burden of proof.[12]

We hold that although the trial court awarded plaintiff his salary, without mitigation of amounts otherwise earned, ***630** for the period from December 8, 1953, to November 30, 1956, the judgment should thus have covered the entire period of plaintiff's suspension.

*****751 **591 5. Availability of Funds for Payment.**

[26] We find no merit in the board's contentions that plaintiff did not allege and prove the availability of funds from which the board could pay the sought amounts and that the cases require such a showing in a mandamus action. (Tevis v. San Francisco (1954) 43 Cal.2d 190, 200, 272 P.2d 757, and San Bernardino Fire & Police Protective League v. City of San Bernardino (1962) 199 Cal.App.2d 401, 417, 18 Cal.Rptr. 757.) This rule does not apply to actions against school districts for wrongful dismissal. (La Rue v. Board of Trustees (1940) 40 Cal.App.2d 287, 296, 104 P.2d 689; accord, Lotts v. Board of Park Comrs. (1936) 13 Cal.App.2d 625, 635, 57 P.2d 215; see also Ed.Code, s 1011 (liability of school board for debts and contracts); cf. Kinnear v. City & County of San Francisco (1964) 61 A.C. 339, 342, 338 Cal.Rptr. 631, 392 P.2d 391 (above rule did not apply to reinstatement of wrongfully discharged city employee).)

We conclude as to the whole matter that the statutory scheme did not design that dormant and unproved charges should forfeit the teacher's right to pursue his profession or should cause the protracted delay that has occurred here. A decade of debate should be long enough to define rights; the day for final settlement has come. To that end, and in accordance with the analysis we have set forth in this opinion, we order the reinstatement of plaintiff; the payment of salary that plaintiff would have earned if he had been employed from the date of dismissal to the date of his reinstatement minus deductions which would have been made for the retirement contributions; interest on each such payment from the time it would have been paid; and participation in retirement benefits as if plaintiff had been continually employed. We deny all other claims of plaintiff. Judgment affirmed in part and reversed in part and remanded to the trial court for proceedings consistent with the opinion of this court. Plaintiff shall recover his costs on the appeals.

GIBSON, C. J., and TRAYNOR, PETERS and PEEK, JJ., concur.

***631** McCOMB, Justice.

I dissent. I would affirm the portion of the judgment in favor of defendant board. In my opinion, plaintiff was guilty of laches, for the following reasons:

First: By choice, he let his credential expire on November 30, 1956, apparently for the purpose of rendering moot the board's charges against him.

Second: After letting his credential expire, he delayed 3 1/2 years (until May 30, 1960) before applying for a new one, this period blanketing the three-year period (January 27, 1957, to January 27, 1960) when, but for the expiration of his credential, the board could have prosecuted the charges against him.

Third: In that three-year period, plaintiff could, under section 13416 of the Education Code, have brought action 434449 (the action filed by the board against him) to trial and obtained an adjudication of the same rights (reinstatement and back salary) which he now seeks to establish, but he did nothing.

Fourth: He delayed another four months (until May 30, 1960) before obtaining a new credential.

Fifth: He delayed almost another year (until April 18, 1961) before moving to dismiss action 434449.

Sixth: He delayed more than five years after the expiration of his credential before bringing the present action (November 30, 1956, to February 16, 1962).

Seventh: During this period the board was paying the salary of another teacher in plaintiff's place. ('It is presumed that where one has been dismissed from an active position in the public service, someone else has been chosen to take his place.' (Wolstenholme v. City of Oakland, 54 Cal.2d 48, 50(2), 4 Cal.Rptr. 153, 154, 351 P.2d 321, 322, cert. denied, 364 U.S. 865, 81 S.Ct. 110, 5 L.Ed.2d 88.)) Meanwhile, plaintiff was running up a claim to back salary and ***752 **592** damages totaling to date $132,476 ($82,476 salary and $50,000 general damages), plus interest and fringe benefits in an undisclosed amount. (Only $18,915 of plaintiff's salary claim is for the period prior to expiration of his credential.)

The rule of laches is founded in sound policy, and its application prevents inequity and injustice. (Callender v. County of San Diego, 161 Cal.App.2d 481, 484, 327 P.2d 74.) Rights should be promptly asserted to protect against dual *632 payment for the same service. (Hermanson v. Board of Pension Commrs., 219 Cal. 622, 625, 28 P.2d 21; Callender v. County of San Diego, supra, 161 Cal.App.2d 481, 484, 327 P.2d 74; Donovan v. Board of Police Commrs., 32 Cal.App. 392, 399, 163 P. 69, et seq.; Harby v. Board of Education, 2 Cal.App. 418, 420, 83 P. 1081.

In United States ex rel. Arant v. Lane, 249 U.S. 367, 372, 39 S.Ct. 293, 294, 63 L.Ed. 650, it is stated: 'When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.'

In Wolstenholme v. City of Oakland, supra, 54 Cal.2d 48, 50(1), 4 Cal.Rptr. 153, 351 P.2d 321, we said: 'Public policy requires that an employee of a public body who claims to have been improperly or illegally discharged must act with the utmost diligence in asserting his rights.' At page 51 of 54 Cal.2d, 4 Cal.Rptr. 153, 154, 351 P.2d 321, 322 we referred to cases holding that delays of 9, 12, 15, 16, and 18 months were incompatible with the utmost diligence with which an employee of a public body must assert his rights. The delay held to constitute laches in Wolstenholme was 19 months.

To similar effect, and reversing judgments because of laches, are Hayman v. City of Los Angeles, 17 Cal.App.2d 674, 680-681, 62 P.2d 1047 (9 months' delay), and Kramer v. Board of Police Comrs., 39 Cal.App. 396, 400-401, 179 P. 216 (4 years, 9 months' delay). (See also Doan v. City of Long Beach, 130 Cal.App. 526, 528(2), 20 P.2d 777, affirming a judgment based on an order sustaining a demurrer where the delay was 18 months.)

The prompt action which plaintiff, in the exercise of diligence, should have taken to assert his rights was to (1) renew his credential instead of letting it expire, thus keeping alive the charges against him, (2) have action 434449 retried instead of waiting more than four years (January 27, 1957, to April 18, 1961) to move for its dismissal for want of prosecution, (3) apply promptly for a new credential after he let his old one expire, instead of waiting 3 1/2 years (November 30, 1956, to May 30, 1960), and (4) promptly after November 30, 1956, seek a dismissal of action 434449 and bring *633 this action, instead of waiting until February 16, 1962, to do so.

Under the circumstances, plaintiff did not act with 'the utmost,' or any, diligence.

SCHAUER, J., concurs.

Rehearing denied; SCHAUER and McCOMB, JJ., dissenting.

Parallel Citations

61 Cal.2d 612, 394 P.2d 579

Footnotes

1 On March 17, 1960, plaintiff filed an affidavit with the board alleging that he was willing to answer questions (a) through (f) listed in section 12955 to the effect that he presently did not personally advocate the violent overthrow of the government, that he presently did not hold knowing membership in any organization which advocated such violent overthrow, that he had no knowing past membership since October 3, 1945, in such an organization, that he belonged to the Communist Party from 1947-1949, that he did not presently belong, and that he presently did not advocate the support of a foreign government against the United States in the event of hostilities.

2 The history of the protective statutes shows a legislative intent to avoid technical automatic termination of a teacher's rights because of an inadverent lapse of a credential. The Legislature provided, for instance, in a previous statute for which another has now been substituted, 'There are many teachers who through inadvertence or misunderstanding failed to make application' for renewal of teaching credentials (Stats.1959, ch. 193, p. 2087, s 8). That finding was include in a curative statute designed, despite section 13511, to permit compensation to teachers whose certification had lapsed and had been renewed. Many such curative or relieving statutes have been adopted in the past (Stats.1953, ch. 621; Stats.1955, ch. 1673; Stats.1957, ch. 896; Stats.1959, 1st Ex.Sess.1958, ch. 68; Stats.1961, ch. 898). Payment to such a teacher is now permitted upon approval by the State Board of Education (s 13515).

3 Actually, under Education Code, section 25423.5, plaintiff could be hired to teach English, his former subject, even if he had no certificate.

4 Similarly, the board's claim that plaintiff's laches bars his recovery cannot prevail. Since the board initiated the proceedings the burden of taking affirmative action rested with the board, not plaintiff. Nevertheless, plaintiff did undertake to remand the proceedings to the board for a new hearing after our last decision in this case but the board successfuly objected to such a disposition of the matter. Plaintiff also filed an affidavit with the board which demonstrated his willingness to answer all pertinent questions. The board failed to sustain the charges; it cannot successfully defend upon the basis of plaintiff's alleged laches.

5 Section 13516.5 reads: 'Notwithstanding any other provision of law, if prior to the effective date of this section any certificated employee of any school district is discharged from a position requiring certification qualifications contrary to the provisions of this code and is thereafter restored to his position pursuant to judicial proceedings in a court of competent jurisdiction, the governing board of the school district may pay such employee an amount equal to the amount which would have been paid to such employee from the date of such discharge to the date of restoration to his position, irrespective of whether such employee was the holder of a valid certification document during the period of such unlawful removal from his position.'

6 The statute requires liberality of interpretation of its provisions. Section 2 of the Education Code states that the code's 'provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice.' In the instant matter of redress for unlawful discharge, we accord this direction full application in view of the increasing importance in our society for protection from wrongful discharge of employees by governmental agencies, or wrongful deprivation of the right to pursue one's livelihood by private associations wielding semi-governmental powers. (See Traynor, Better Days in Court for a New Day's Problems (1963) 17 Vand.L.Rev. 109, 117; Gellhorn, Individual Freedom & Governmental Restraints (1958) ch. 3, p. 105; Hale, Freedom Through Law (1952) pp. 335-336.) We expressed the same approach in dealing with a different factual situation in Lerner v. Los Angeles City Board of Education, supra (1963) 59 Cal.2d 382, 29 Cal.Rptr. 657, 380 P.2d 97: 'In conclusion, we do not believe that in a society in which the individual so often finds himself dependent upon the action of administrative tribunals he should automatically suffer the loss of the right to pursue his profession by reason of time consumed by the administrative process itself in perfecting and enforcing his rights.' (P. 399, 29 Cal.Prtr. p. 667, 380 P.2d 107.)

7 Of course, the amounts which would have been deducted for retirement contributions from plaintiff's salary should be deducted from his recovery. Hereinafter, in using the term 'full salary including retirement benefits' we mean (1) an amount of money equal to the plaintiff's salary minus the deduction for retirement contributions, and (2) the right to participate in retirement benefits as if plaintiff had been continually enrolled in the program.

8 All of the above cited cases except Nilsson may be distinguished on the narrow ground that they involved mandamus

actions against a trustee of a special fund. (Sheehan, supra, Jorgensen, supra, and Gibbons & Reed, supra. Thus in Benson, supra, a declaratory relief action in which we allowed interest on prejudgment damages, we distinguished these cases by stating: 'Moreover the judges' retirement fund is a special trust fund and as such may not fall within the meaning of section 3287 (see Jorgensen v. Cranston, supra, 211 Cal.App.2d 292 (301), 27 Cal.Rptr. 297), whereas it is well established that liability for pensions such as the instant one is not limited to any particular fund, but rather is a general obligation imposed by law upon the city.' (60 Cal.2d at p. 365, 33 Cal.Rptr. at p. 263, 384 P.2d at p. 655.) In the Jorgensen case itself, the court stated: 'Our conclusion is that whatever (the Legislature's) intent with reference to mandamus proceedings involving contractual obligations of the State or its agencies payable out of the General Fund, it does not apply to obligations payable out of the Judges' Retirement Fund.' (Italics added.) 211 Cal.App.2d at p. 301, 27 Cal.Rptr. at p. 302.) The contractual obligation for payment of salary in the present case, as in Benson, supra, is a general obligation and thus does not fall within the 'special fund' rule.

9 To the extent that language in Sheehan v. Board of Police Commissioners, supra (1922) 188 Cal. 525, 206 P. 70, Nilsson v. State Personnel Board, supra (1939) 36 Cal.App.2d 186, 97 P.2d 843, Jorgensen v. Cranston, supra (1962) 211 Cal.App.2d 292, 27 Cal.Rptr. 297, and Gibbons & Reed Co. v. Dept. of Motor Vehicles, supra (1963) 220 A.C.A. 276, 33 Cal.Rptr. 688, is inconsistent with the above analysis it is disapproved.

10 This method of computation, developed by the cases, has now been incorporated into statute. Government Code section 19584, subd. (b) provides that the State Personnel Board shall deduct from the amount accrued '(a)ny compensation employee earned or might reasonably have earned in private or public employment during the period of suspension.'

11 Rexstrew v. City of Huntington Park, supra (1942) 20 Cal.2d 630, 128 P.2d 23, likewise involved civil service employees and an apparently comparable civil service system.

12 The usual reasons for requiring a party interested in obtaining a certain result to produce and prove the facts requisite to that result similarly apply in the instant situation. Not all earnings would be deductible; for example, earnings from night or weekend work, which would not have been inconsistent with school employment, are not to be deducted. (Beseman v. Remy (1958) 160 Cal.App.2d 437, 445, 325 P.2d 578.) Hence the burden should rest upon the board to prove which particular earnings, if any, qualify for mitigation.

End of Document

EXHIBIT 2

Tripp v. Swoap

Supreme Court of California, In Bank. | August 3, 1976 | 17 Cal.3d 671 | 552 P.2d 749

Tripp v. Swoap

Supreme Court of California, In Bank. | August 3, 1976 | 17 Cal.3d 671 | 552 P.2d 749

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Outline

17 Cal.3d 671
Supreme Court of California,
In Bank.

Kathleen TRIPP, Plaintiff and Respondent,
v.
David B. SWOAP, as Director, etc., Defendant and Appellant.

S.F. 23423. | Aug. 3, 1976.

Mandamus proceeding was brought challenging director of State Department of Social Welfare's determination that applicant was ineligible for benefits under the aid to the needy disabled program. The Superior Court, San Mateo County, Melvin E. Cohn, J., entered judgment ordering issuance of writ directing director to pay benefits retroactively with attorney fees and interest at legal rate, and director appealed. The Supreme Court, Sullivan, J., held that director's decision denying benefits had to be set aside as not supported by substantial evidence; that trial court acted properly within scope of its power in ordering award of retroactive benefits; and that where recipient of welfare benefits is adjudged entitled to retroactive payment of benefits pursuant to statutory obligation of state, such recipient is entitled to award of prejudgment interest at legal rate from time each payment becomes due.

Affirmed as modified and remanded with directions.

Clark, J., filed dissenting opinion in which McComb, J., joined.

West Headnotes (19)

[1] **Mandamus**
Scope of inquiry and powers of court
Mandamus
Questions of fact

250Mandamus
250IIIJurisdiction, Proceedings, and Relief
250k172Scope of inquiry and powers of court
250Mandamus
250IIIJurisdiction, Proceedings, and Relief
250k187Appeal and Error
250k187.9Review
250k187.9(6)Questions of fact

In mandamus proceeding challenging director of State Department of Social Welfare's determination that applicant was ineligible for benefits under aid to needy disabled program, under substantial evidence test it was duty of trial court to review director's decision in light of entire administrative record; Supreme Court's task on appeal was defined by same standard of review.

2 Cases that cite this headnote

[2] **Mandamus**
Weight and sufficiency
Public Assistance
Weight and sufficiency

250Mandamus
250IIIJurisdiction, Proceedings, and Relief
250k168Evidence
250k168(4)Weight and sufficiency
(Formerly 356Ak175.30, 356Ak175, 356Ak242 Social Security and Public Welfare)
316EPublic Assistance
316EIVState Assistance for Blind, Disabled, and Elderly Persons
316Ek177State Assistance to Blind and Disabled
316Ek185Administrative Proceedings
316Ek185(5)Evidence
316Ek185(8)Weight and sufficiency
(Formerly 356Ak175.30, 356Ak175, 356Ak242 Social Security and Public Welfare)

In mandamus proceeding challenging director of State Department of Social Welfare's determination that applicant was ineligible for benefits under aid to needy disable program based on disabling injury to her back, report made by applicant's doctor one month after her surgery indicating that, inter alia, applicant's functional limitations were "temporary" did not constitute substantial evidence supporting director's decision but rather trial court properly concluded that there was substantial evidence, including doctor's opinion that she would never return to her prior work and would probably require additional surgery, that her impairments were sufficiently permanent to entitle her to

benefits subject to periodic review. West's Ann.Welfare & Inst.Code, §§ 13500–13801; Social Security Act, §§ 1601–1634, 42 U.S.C.A. §§ 1381–1383c.

3 Cases that cite this headnote

[3] **Mandamus**
Scope of inquiry and powers of court

250Mandamus
250IIIJurisdiction, Proceedings, and Relief
250k172Scope of inquiry and powers of court

In mandamus proceeding challenging director of State Department of Social Welfare's determination that applicant was ineligible for benefits under aid to needy disabled program, trial court, which at beginning of memorandum decision and immediately preceding summary of evidence clearly and explicitly stated that review of decision was confined to issue whether there was substantial evidence to support director's decision and which at end of decision concluded that it was apparent from evidence that there were substantial facts to support finding of permanence and no substantial evidence that applicant would improve applied proper scope of review.

Cases that cite this headnote

[4] **Public Assistance**
Payment; payees
Public Assistance
Findings and determination

316EPublic Assistance
316EIVState Assistance for Blind, Disabled, and Elderly Persons
316Ek177State Assistance to Blind and Disabled
316Ek184Payment; payees
(Formerly 356Ak175.30, 356Ak175, 356Ak242 Social Security and Public Welfare)
316EPublic Assistance
316EIVState Assistance for Blind, Disabled, and Elderly Persons
316Ek177State Assistance to Blind and Disabled
316Ek186Judicial Review; Actions
316Ek186(5)Findings and determination
(Formerly 356Ak175.30, 356Ak175, 356Ak242 Social Security and Public Welfare)

Award of retroactive benefits by trial court, which, after determining that applicant had been wrongfully denied aid to the needy disabled benefits as a matter of law, merely rendered judgment ordering director of State Department of Social Welfare to discharge his legal obligations by paying applicant benefits as of date eligibility was established, did not invade director's discretion but rather constituted proper action within scope of trial court's power; however, effective date of applicant's entitlement to benefits was not date of application but rather first day of month following date of application. West's Ann.Code Civ.Proc. § 1094.5(e); West's Ann.Welfare & Inst.Code, § 11056.

7 Cases that cite this headnote

[5] **Statutes**
Purpose and intent

361Statutes
361IIIConstruction
361III(A)In General
361k1074Purpose
361k1076Purpose and intent
(Formerly 361k181(1))

Court should ascertain intent of legislature so as to effectuate purpose of the law.

19 Cases that cite this headnote

[6] **Statutes**
Statute as a Whole; Relation of Parts to Whole and to One Another

361Statutes
361IIIConstruction
361III(E)Statute as a Whole; Relation of Parts to Whole and to One Another
361k1151In general
(Formerly 361k205)

In interpreting particular words, phrases or clauses in a statute, entire substance of statute or that portion relating to subject under review should be examined in order to determine scope and purpose of provision containing such words, phrases or clauses.

4 Cases that cite this headnote

[7] **Statutes**
Language and intent, will, purpose, or policy
Statutes
Context

361Statutes
361IIIConstruction
361III(A)In General
361k1078Language
361k1080Language and intent, will, purpose, or policy
(Formerly 361k184)
361Statutes
361IIIConstruction
361III(E)Statute as a Whole; Relation of Parts to Whole and to One Another
361k1153Context
(Formerly 361k208)

Statutory words in question must be construed in context, keeping in mind nature and obvious purpose of statute in which they appear.

15 Cases that cite this headnote

[8] **Statutes**
Construction of Revised Statutes and Codes

361Statutes
361VIRevision and Codification
361k1477Construction of Revised Statutes and Codes
(Formerly 361k231, 361k223.1)

Where two codes are to be construed, they must be regarded as blending into each other and forming a single statute, and thus must be read together and so construed as to give effect, when possible, to all provisions thereof.

20 Cases that cite this headnote

[9] **Mandamus**
Existence and Adequacy of Other Remedy in General
Public Assistance
Amount of assistance

250Mandamus
250INature and Grounds in General
250k3Existence and Adequacy of Other Remedy in General
250k3(1)In general
(Formerly 356Ak8.20, 356Ak9 Social Security and Public Welfare)
316EPublic Assistance
316EIPrograms in General
316Ek42Amount of assistance
(Formerly 356Ak8.20, 356Ak9 Social Security and Public Welfare)

Statutory language making judicial review under certain statutory provision of determinations of eligibility for welfare benefits "exclusive remedy" without specifically providing for interest refers only to manner in which aggrieved party may seek review of adverse determination and scope of review to which he is entitled, and thus, inasmuch as aggrieved party must proceed by way of administrative mandamus, availability of interest as element of damages remains open. West's Ann.Welfare & Inst.Code, § 10962; West's Ann.Code Civ.Proc. §§ 1094.5, 1095.

Cases that cite this headnote

[10] **Public Assistance**
Amount of assistance
Public Assistance
Judicial Review; Actions

316EPublic Assistance
316EIPrograms in General
316Ek42Amount of assistance
(Formerly 356Ak8.20, 356Ak2 Social Security and Public Welfare)
316EPublic Assistance
316EIPrograms in General

316Ek61Judicial Review; Actions
316Ek62In general
(Formerly 356Ak8.20, 356Ak2 Social Security and Public Welfare)

Purpose of statute, which permits applicant or recipient of welfare benefits to seek judicial review of adverse determination by director of Department of Social Welfare and which authorizes recipient to secure judicial review without payment of filing fee and further authorizes successful recipient to recover attorney fees and costs, is to insure access to judicial review rather than defining extent of recipient's recovery and thus fact that legislature did not specifically mention interest, which relates to extent of recovery inasmuch as it constitutes element of damages, does not mean that a successful recipient is precluded from receiving award of interest. West's Ann.Welfare & Inst.Code, § 10962.

8 Cases that cite this headnote

[11] **Interest**
Demands Not Liquidated
Interest
Amount readily ascertainable by computation

219Interest
219IRights and Liabilities in General
219k19Demands Not Liquidated
219k19(1)In general
219Interest
219IRights and Liabilities in General
219k19Demands Not Liquidated
219k19(2)Amount readily ascertainable by computation

Under statute authorizing recovery of interest on damages, claimant in order to recover interest in mandamus action against state must show underlying monetary obligation, that recovery is certain or capable of being made certain by calculation, and that right to recovery vested on particular day. West's Ann.Civ.Code § 3287(a).

8 Cases that cite this headnote

[12] **Interest**
Demands Not Liquidated
Interest
Amount readily ascertainable by computation

219Interest
219IRights and Liabilities in General
219k19Demands Not Liquidated
219k19(1)In general
219Interest
219IRights and Liabilities in General
219k19Demands Not Liquidated
219k19(2)Amount readily ascertainable by computation

Administrative mandamus action challenging director of State Department of Social Welfare's determination that applicant was ineligible for benefits under aid to needy disabled program was action for damages within meaning of statute authorizing recovery of interest on damages that are certain or capable of being made certain by calculation where right to recover has vested on a particular day. West's Ann.Civ.Code, § 3287(a).

8 Cases that cite this headnote

[13] **Public Assistance**
Obligation of public authorities
Public Assistance
Retroactive payment of benefits

316EPublic Assistance
316EIPrograms in General
316Ek10Obligation of Support in General
316Ek12Obligation of public authorities
(Formerly 356Ak9.1, 356Ak9 Social Security and Public Welfare)
316EPublic Assistance
316EIPrograms in General
316Ek44Retroactive payment of benefits
(Formerly 356Ak9.1, 356Ak9 Social Security and Public Welfare)

State has legal obligation to furnish welfare benefits to all persons who meet applicable standards of eligibility, which obligation becomes debt due as of date applicant is first entitled to receive aid, and thus action to recover wrongfully withheld benefits is action on underlying monetary obligation for purposes of statute authorizing recovery of interest on

damages which are certain or capable of being made certain by calculation where right to recover has vested on a particular day. West's Ann.Civ.Code, § 3287(a).

20 Cases that cite this headnote

[14] **Public Assistance**
Retroactive payment of benefits

316EPublic Assistance
316EIPrograms in General
316Ek44Retroactive payment of benefits
(Formerly 356Ak9.1, 356Ak9 Social Security and Public Welfare)

Once applicant's entitlement to welfare benefits is established, calculation of amount of such benefits becomes mechanical exercise of applying appropriate standard of assistance, and thus recovery of wrongfully withheld benefits is not subject to uncertainty that would otherwise bar award of interest.

2 Cases that cite this headnote

[15] **Interest**
Creation or accrual of indebtedness

219Interest
219IIITime and Computation
219k44Creation or accrual of indebtedness

For purposes of awarding interest an award of retroactive benefits to welfare recipient who successfully challenges director of State Department of Social Welfare's adverse determination, each payment of benefits should be viewed as vesting on date it became due. West's Ann.Welfare & Inst.Code, § 11056; West's Ann.Civ.Code, § 3287(a).

2 Cases that cite this headnote

[16] **Public Assistance**
Retroactive payment of benefits

316EPublic Assistance
316EIPrograms in General
316Ek44Retroactive payment of benefits
(Formerly 356Ak9.1, 356Ak9 Social Security and Public Welfare)

Public policy that favors award of retroactive welfare benefits also favors award of prejudgment interest on awards of retroactive benefits.

2 Cases that cite this headnote

[17] **States**
Interest

360States
360VClaims Against State
360k171Interest

Whether federal reimbursement is available to state for interest payments is irrelevant to determination of issue whether interest is recoverable against state by recipient of welfare benefits who has been adjudged entitled to retroactive payment of benefits pursuant to state's statutory obligation and whose claims are based upon entitlement to benefits as matter of state law. West's Ann.Civ.Code, § 3287(a); West's Ann.Welfare & Inst.Code, § 10962.

Cases that cite this headnote

[18] **Public Assistance**
Retroactive payment of benefits

316EPublic Assistance
316EIPrograms in General
316Ek44Retroactive payment of benefits
(Formerly 356Ak9.1, 356Ak9 Social Security and Public Welfare)

Award of prejudgment interest to recipient of wrongfully withheld welfare benefits is in conformity with statutory mandate requiring law relating to public assistance programs to be liberally construed. West's Ann.Civ.Code, §§

3287, 3287(a); West's Ann.Welfare & Inst.Code, §§ 10962, 11000.

4 Cases that cite this headnote

[19] **Interest**
Computation of rate in general
Public Assistance
Retroactive payment of benefits

219Interest
219IIRate
219k31Computation of rate in general
316EPublic Assistance
316EIPrograms in General
316Ek44Retroactive payment of benefits
(Formerly 356Ak9.1, 356Ak9 Social Security and Public Welfare)

Where recipient of welfare benefits is adjudged entitled to retroactive payment of benefits pursuant to statutory obligation of state, such recipient is entitled to award of prejudgment interest at legal rate from time each payment becomes due; disapproving Luna v. Carleson, 45 Cal.App.3d 670, 119 Cal.Rptr. 711. West's Ann.Civ.Code, § 3287(a); West's Ann.Welfare & Inst.Code, § 10962.

8 Cases that cite this headnote

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Opinion

***675** SULLIVAN, Justice.

This is an appeal from a judgment awarding plaintiff Kathleen Tripp retroactive payment of welfare benefits with attorneys' fees and prejudgment interest.

On July 25, 1972, plaintiff presented an application for benefits under the aid to the needy disabled program (ATD)[1] based on a disabling injury to her back sustained in 1970. The ATD review team initially denied plaintiff benefits on the ground that she had not established the requisite permanent disability on which such benefits were conditioned. After a hearing to review the denial the hearing officer found that plaintiff was eligible for Group II benefits. These benefits were available to an applicant whose impairments were reasonably expected to continue throughout the applicant's lifetime, but might improve at some future, undetermined date and therefore were subject to periodic review. Despite the hearing officer's finding, on August 28, 1973, defendant Director of the State Department of Social Welfare (hereafter Director and DSW)[2] denied plaintiff's claim on the ground that her impairments were not permanent in that they would improve with time or medical treatment and therefore did not appear reasonably certain to continue for the duration of her life.

Plaintiff commenced the instant proceedings in administrative mandamus to challenge the Director's determination of her ineligibility. The trial court determined that there was substantial evidence to support a finding that plaintiff's disability was permanent, and that there was no substantial evidence that her condition would improve.[3] The court entered judgment accordingly ordering the issuance of a peremptory writ of mandate directing defendant to set aside his decision of August 28, 1973, in the underlying administrative proceeding and to pay plaintiff benefits retroactively from July 25, 1972, with attorney's fees and interest ***676** at the legal rate. The writ issued forthwith. This appeal by the Director followed.

*****793 **753** [1] We agree at the outset with the trial court's conclusion that the Director's decision denying benefits to plaintiff must be set aside as not supported by substantial evidence. Under the substantial evidence test it was the duty of the trial court to review defendant's decision in light of the entire administrative record. Our task is defined by the same standard of review. (Bixby v. Pierno (1971) 4 Cal.3d 130, 149, 93 Cal.Rptr. 234, 481 P.2d 242; Merrill v. Department of Motor Vehicles (1969) 71 Cal.2d 907, 915—916, 80 Cal.Rptr. 89, 458 P.2d 33.)

[2] Defendant denied plaintiff's claim for benefits on the ground that her impairments would improve. However, the only evidence adduced by defendant to support his

finding was a report by plaintiff's physician made one month after she underwent surgery. In his report the doctor noted that prognosis was 'fair' but that a final prognosis could not be rendered for another year, and further noted that plaintiff's functional limitations were 'temporary.' On the other hand, the remaining evidence disclosed that five months after her surgery plaintiff was required to wear a back brace to stand; that in her doctor's opinion she would never return to her prior work and would probably require additional surgery; that she still suffered from dizziness and had difficulty speaking; that her doctor had diagnosed deterioration of the spine; that after a short period of improvement following her operation, she began hemorrhaging in her back; and that her condition was becoming progressively worse.

On the basis of the above facts, the trial court properly concluded that there was substantial evidence that plaintiff's impairments were sufficiently permanent to entitle her to ATD benefits subject to periodic review. Considered in the light of the entire record, the report made by plaintiff's doctor one month after her surgery did not constitute substantial evidence to support defendant's decision denying plaintiff benefits. Accordingly, the trial court did not commit error in ordering the decision to be set aside.

[3] We reject as devoid of merit the Director's related contention that the trial court did not in fact apply the 'substantial evidence test' in reversing the Director's decision. Defendant argues that the trial court reweighed the evidence and exercised its independent judgment in reviewing the administrative record. It is urged that this is manifest in the ***677** trial court's memorandum decision where after summarizing the evidence, the court stated that 'it is apparent that a preponderance of evidence pointed to the conclusions of the referee that the disability was indeed permanent.' Defendant complains that at least the court alternatively used the 'independent judgment' test and the 'substantial evidence' test to overturn his decision. We do not agree. At the very beginning of the memorandum decision and immediately preceding the above summary of evidence, it is clearly and explicitly stated that 'The trial court's review of this decision is confined to the issue of whether or not there was substantial evidence to support the (Director's) decision.' Again at the end of the decision the court concluded: 'Thus, it is apparent from the evidence there were substantial facts to support a finding of permanence, and no substantial evidence to find that petitioner 'will improve. " We are satisfied that the trial judge applied the proper scope of review.

[4] We also uphold the trial court's award of retroactive benefits. Defendant contends that the power to grant aid was vested in the DSW subject to review by the trial court and that consequently although the court could order defendant to pay benefits to plaintiff, it was without power to order such payments to be made retroactively or to fix the date on which payments were to commence. Contrary to the Director's claim, however, it has been held on a number of occasions over the last 30 years that where the circumstances so warrant, it is within the power of a trial court to order that the *****794 **754** payment of benefits be made retroactive. (See e.g., Bd. of Soc. Welfare v. County of L.A. (1945) 27 Cal.2d 81, 86—89, 162 P.2d 630; Smock v. Carleson (1975) 47 Cal.App.3d 960, 964, 121 Cal.Rptr. 432; Leach v. Swoap (1973) 35 Cal.App.3d 685, 689—690, 110 Cal.Rptr. 62; Mooney v. Pickett (1972) 26 Cal.App.3d 431, 435, 102 Cal.Rptr. 708.

When in its review of an administrative decision the court enters judgment commanding the respondent to set aside the decision, it 'may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent.' (Code Civ.Proc., s 1094.5, subd. (e).) In the instant case, having determined that plaintiff had been wrongfully denied ATD benefits as a matter of law, the trial court merely rendered a judgment ordering defendant to discharge his legal obligation. Inasmuch as an ATD applicant is entitled by statute to benefits as of a particular date once eligibility is established (s 11056), there was no issue remaining on which the trial court could invade the Director's discretion.

***678** Under these circumstances, it is manifest that the trial court acted properly within the scope of its power. We observe, however, that the court erroneously applied July 25, 1972, the date of plaintiff's application for benefits, as the effective date of her entitlement to benefits. Under section 11056, plaintiff's entitlement to benefits commenced on August 1, 1972, as the first day of the month following the date of application. Accordingly the judgment must be modified to reflect August 1, 1972, as the proper date of commencement of plaintiff's benefits.

We turn to the issue whether the recipient of wrongfully withheld welfare benefits is entitled to prejudgment interest. Defendant contends that plaintiff is not entitled to interest because it is not specifically authorized under section 10962[4] which provides for judicial review of benefit determinations. Plaintiff, on the other hand, contends that section 3287, subdivision (a), of the Civil Code,[5] which provides generally for the award of interest on damages, authorizes the interest awarded her by the trial court.[6]

***679 ***795 **755** [5] [6] [7] The resolution of this issue thus calls for the statutory construction of section 10962 and Civil Code section 3287, subdivision (a). We begin with the fundamental rule that a court 'should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' (Select Base Materials v. Board of Equalization (1959) 51 Cal.2d 640, 645, 335 P.2d 672, 675.) In interpreting particular words, phrases, or clauses in a statute, 'the entire substance of the statute or that portion relating to the subject under review should be examined in order to determine the scope and purpose of the provision containing such words, phrases or clauses.' (West Pico Furniture Co. v. Pacific Finance Loans (1970) 2 Cal.3d 594, 608, 86 Cal.Rptr. 793, 803, 469 P.2d 665, 675.) The words in question 'must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear.' (Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230, 110 Cal.Rptr. 144, 149, 514 P.2d 1224, 1229, quoting from Johnstone v. Richardson (1951) 103 Cal.App.2d 41, 46, 229 P.2d 9.)

[8] Where as here two codes are to be construed, they 'must be regarded as blending into each other and forming a single statute.' (Armenta v. Churchill (1954) 42 Cal.2d 448, 455, 267 P.2d 303, 307.) Accordingly, they 'must be read together and so construed as to give effect, when possible, to all the provisions thereof.' (Pareses v. State Board of Prison Directors (1929) 208 Cal. 353, 355, 281 P. 394, 395.) With these guiding principles in mind, we proceed to an examination of the statutes involved in the instant action.

[9] [10] Section 10962 permits an applicant or recipient of welfare benefits to seek judicial review of an adverse determination by the Director of the DSW.[7] Appellate courts have construed section 10962 in part as having as its purpose to ensure that aggrieved recipients have access to the judicial system to establish their statutory rights. (Silberman v. Swoap (1975) 50 Cal.App.3d 568, 571, 123 Cal.Rptr. 456; Trout v. Carleson (1974) 37 Cal.App.3d 337, 343, 112 Cal.Rptr. 282.) Defendant correctly points out that section 10962 authorizes a recipient to secure judicial ***680** review without payment of a filing fee, and further authorizes a successful recipent to recover attorney's fees and costs. However, it does not follow that by enumerating these specific items, the Legislature has evinced an intent to foreclose a recipient from recovering interest on a retroactive benefit award.[8]

*****796 **756** The provisions embodied in section 10962 relating to filing fees, attorney's fees, and costs ease the financial burden which a recipient seeking judicial review otherwise would encounter. Payment of a filing fee is required generally by statute as a condition to bringing suit. (Code Civ.Proc., s 411.20.)[9] Attorney's fees ordinarily are not recoverable except as provided by statute or agreement of the parties. (Code Civ.Proc., s 1021; see County of Humboldt v. Swoap (1975) 51 Cal.App.3d 442, 444, 124 Cal.Rptr. 510.) Finally, the award of costs to a prevailing applicant in a mandamus proceeding normally lies within the discretion of the court under Code of Civil Procedure section 1095. (Gould v. Moss (1910) 158 Cal. 548, 549, 111 P. 925; Oksner v. Superior Court (1964) 229 Cal.App.2d 672, 690, 40 Cal.Rptr. 621; Ellis v. City Council (1963) 222 Cal.App.2d 490, 500—501, 35 Cal.Rptr. 317; Kramer v. State Board of Accountancy (1962) 200 Cal.App.2d 163, 177, 19 Cal.Rptr. 226.)

In the absence of the specific provisions in section 10962 relating to filing fees, attorney's fees, and costs, a needy person unable to bear the cost of bringing suit might be foreclosed from vindicating rights which have been conferred upon him by statute. The Legislature's inclusion of ***681** these provisions thus supports the view that the purpose of section 10962 is to ensure access to judicial review, rather than to define the extent of a recipient's recovery.[10] Interest, on the other hand, relates to the extent of recovery inasmuch as it constitutes an element of damages. Under this construction the fact that the Legislature did not mention interest specifically does not mean that a successful recipient is precluded from receiving it. Rather, we must determine whether there is some other authority on which it should be awarded.

Civil Code section 3287, subdivision (a), (see fn. 5 Ante) authorizes the recovery of interest on damages which are certain or capable of being made certain by calculation, where the right to recover has vested on a particular day. In Mass v. Board of Education, supra, 61 Cal.2d 612, 39 Cal.Rptr. 739, 394 P.2d 579, we construed this statute as providing for prejudgment interest in actions based upon a general underlying monetary obligation, including the obligation of a governmental entity determined by way of mandamus. Since Mass our courts on numerous occasions have awarded prejudgment interest in mandamus proceedings brought to recover sums of money pursuant to a statutory obligation. (City and County of San Francisco v. Cooper (1975) 13 Cal.3d 898, 932, 120 Cal.Rptr. 707, 534 P.2d 403 (San Francisco Ord., No. 152—74); Sanders v. City of Los Angeles (1970) 3 Cal.3d 252, 262—263, 90 Cal.Rptr. 169, 475 P.2d 201 (Los Angeles City Charter, s 425); Squire v. City and County of San Francisco (1970) 12 Cal.App.3d 974, 982, 91 Cal.Rptr. 347 (San Francisco City and County Charter, s 151.3.1); Mullins v. Toothman (1965) 231 Cal.App.2d 756, 769, 42 Cal.Rptr. 254 (Oakland City Charter, s 91b).)

Defendant argues that the award of interest authorized under Civil Code section 3287 is limited to contract actions and actions **757 ***797 sounding in tort. This contention simply is not supported by the cases just cited. In each of them the court was confronted with a claim based on a statutory obligation and did not mention the existence of a contract as underlying plaintiff's suit.[11] In each case the court awarded interest *682 pursuant to section 3287 despite the absence of specific statutory authority.

[11] [12] Under section 3287, subdivision (a), as interpreted in Mass, supra, a claimant must satisfy three conditions for the recovery of interest in a mandamus action against the state:[12] (1) There must be an underlying monetary obligation; (2) the recovery must be certain or capable of being made certain by calculation; and (3) the right to recovery must vest on a particular day.

[13] These three requirements are satisfied in the instant case. First, we observe that the state has a legal obligation to furnish welfare benefits to all persons who meet applicable standards of eligibility. (See Mooney v. Pickett (1971) 4 Cal.3d 669, 676, 94 Cal.Rptr. 279, 483 P.2d 1231.) This obligation becomes a debt due as of the date an applicant is first entitled to receive aid. (Bd. of Soc. Welfare v. County of L.A., supra, 27 Cal.2d 81, 86, 162 P.2d 630.) Accordingly, an action to recover wrongfully withheld benefits is an action on an underlying monetary obligation to the same extent as an action to recover back salary under Mass, supra. (See Leach v. Swoap, supra, 35 Cal.App.3d 685, 690, 110 Cal.Rptr. 62.)

[14] Secondly, we observe that the entire scheme of our welfare laws serves to promote certainty as to the amount of benefits payable by setting forth fixed payment schedules. (See, e.g., Cooper v. Swoap (1974) 11 Cal.3d 856, 861—862, 115 Cal.Rptr. 1, 524 P.2d 97, cert. den. (1974) 419 U.S. 1022, 95 S.Ct. 498, 42 L.Ed.2d 296.) Once an applicant's entitlement to benefits is established, the calculation of the amount of such benefits becomes a mechanical exercise of applying the appropriate standard of assistance. The recovery of wrongfully withheld benefits thus is not subject to the uncertainty that would otherwise bar an award of interest. (See Lineman v. Schmid (1948) 32 Cal.2d 204, 212, 195 P.2d 408.)

[15] Finally, we note that section 11056 specifically provides that once eligibility has been determined, payment of a recipient's benefits must *683 commence on a particular day. We have made it clear that for purposes of ordering retroactive payments, the right to receive benefits vests in the recipient on the first date of his entitlement. (Bd. of Soc. Welfare v. County of L.A., supra, 27 Cal.2d at p. 86, 162 P.2d 630.) For purposes of awarding interest, each payment of benefits similarly should be viewed as vesting on the date it becomes due. (See Mass v. Board of Education, supra, 61 Cal.2d at p. 625, 39 Cal.Rptr. 739, 394 P.2d 579.)

***798 **758 In Bd. of Soc. Welfare v. County of L.A., supra, 27 Cal.2d 81, 162 P.2d 630, we recognized the strong public policy in favor of retroactive payment of welfare benefits. (Id. at pp. 85—86, 162 P.2d 630.) This policy has been articulated as 'securing to those entitled to aid the full payment thereof 'from the date . . . (they were) first entitled thereto' regardless of errors or delays by local authorities. . . .' (Mooney v. Pickett, supra, 26 Cal.App.3d at p. 435, 102 Cal.Rptr. at p. 711.)

[16] The same public policy that favors the award of retroactive benefits would appear to favor the award of prejudgment interest on such benefits. Indeed, we have recognized in the context of an interest award on retroactive salary payments that '(i)f plaintiff had not been wrongfully suspended, he would have obtained the benefit of the moneys paid as of those dates; he has thus lost the natural growth and productivity of the withheld salary in the form of interest.' (Mass v. Board of Education, supra, 61 Cal.2d at p. 625, 39 Cal.Rptr. at p. 748, 394 P.2d at p. 588.) The policy rationale behind awarding prejudgment interest articulated in Mass takes on particular significance in the context of wrongfully withheld welfare benefits. In some instances, it may take long periods of time for an applicant to vindicate his entitlement to aid and in the interval the delay inevitably exacts its toll from that portion of our society least able to bear the deprivation.

The dual concept of debt and public policy articulated in Bd. of Soc. Welfare, supra, supplies a strong rationale for the award of prejudgment interest in the case at bench. (See Leach v. Swoap, supra, 35 Cal.App.3d at p. 689, 110 Cal.Rptr. 62.) In the recent case of Luna v. Carleson (1975), 45 Cal.App.3d 670, 119 Cal.Rptr. 711, however, the court held as a matter of first impression that prejudgment interest was not available to the recipient of wrongfully withheld welfare benefits. In a brief opinion the court set forth essentially four grounds for its reversal of the trial court's award of interest in a proceeding brought under section 10962. We are not persuaded that any of the grounds on which the court relied provide authority for the position which the court adopted.

First, the court appears to have misapplied the general rule that interest cannot be recovered against a state or municipality. While it is *684 true that governmental entities traditionally have been immune from liability for interest, Civil Code section 3287 as amended in 1959 provides a clear statutory exception to the general rule, and this exception has been consistently recognized by

this court as imposing liability for interest on such entities. (E.g., Sanders v. City of Los Angeles, supra, 3 Cal.3d at p. 262, 90 Cal.Rptr. 169, 475 P.2d 201; Benson v. City of Los Angeles, supra, 60 Cal.2d 355, 364, 33 Cal.Rptr. 257, 384 P.2d 649.)

Second, the court was of the view that in the face of the provision in section 10962 for attorney's fees and costs, the Legislature's failure to include interest was not an inadvertence. The court was unable to find any legislative authorization for the payment of interest in a section 10962 proceeding. However, as we have pointed out above, the fact that the Legislature did not specify interest is not probative on the issue whether it is recoverable under the view that the purpose of section 10962 is to ensure access to judicial review and not to define the extent of recovery. (See Silberman v. Swoap, supra, 50 Cal.App.3d at p. 571, 123 Cal.Rptr. 456.) Moreover, by failing to find any legislative authorization for the payment of interest in a section 10962 proceeding, the court completely ignored the general availability of interest under Civil Code section 3287, subdivision (a). As we have explained, we are satisfied that section 3287, subdivision (a), reaches actions brought to recover sums of money owing as a statutory obligation. In Mass v. Board of Education, supra, 61 Cal.2d 612, 39 Cal.Rptr. 739, 394 P.2d 579, the statute under which we ***799 **759 awarded back salary did not provide for the recovery of interest.[13] Rather than imply a legislative bar of interest from that fact, we awarded interest pursuant to the general authority of section 3287, subdivision (a). (See also City and County of San Francisco v. Cooper, supra, 13 Cal.3d at p. 932, 120 Cal.Rptr. 707, 534 P.2d 403; Sanders v. City of Los Angeles, supra, 3 Cal.3d at pp. 262—263, 90 Cal.Rptr. 169, 475 P.2d 201; Squire v. City and County of San Francisco, supra, 12 Cal.App.3d at p. 982, 91 Cal.Rptr. 347; Mullins v. Toothman, supra, 231 Cal.App.2d at p. 769, 42 Cal.Rptr. 254.)

Third, the Luna court observed that of the many cases decided by our appellate courts involving welfare payments, none of them discussed the matter of interest. As the court acknowledged, however, the fact that interest has not been discussed in similar decisions is not the most convincing authority for denying it.

[17] Finally, the court noted that the federal government funds a large share of the welfare payments made by the state and that there is no *685 federal statute authorizing reimbursement to the state for interest payments. As amici have pointed out, however, whether federal reimbursement is available is irrelevant to the determination of the issue whether interest is recoverable against the state. The claims of a recipient such as plaintiff are based upon an entitlement to benefits as a matter of state law. (See Bd. of Soc. Welfare v. County of L.A., supra, 27 Cal.2d 81, 162 P.2d 630.) The procedure for judicial review of a denial of benefits is a creature of state law under section 10962 and the entitlement to interest is a matter of state policy as articulated in Civil Code section 3287, subdivision (a).

[18] We believe that sound statutory construction of section 10962 reveals no intent on the part of the Legislature to deny prejudgment interest to the recipient of wrongfully withheld welfare benefits. On the other hand, there is clear authority for awarding such interest pursuant to Civil Code section 3287, subdivision (a). We are further of the view that the award of such interest would be in conformity with the statutory mandate requiring the law relating to public assistance programs to be liberally construed. (s 11000; see County of Los Angeles v. Frisbie (1942) 19 Cal.2d 634, 644, 122 P.2d 526.)[14]

[19] Accordingly, we hold that where a recipient of welfare benefits is adjudged entitled to retroactive payment of benefits pursuant to the statutory obligation of the state, such recipient is entitled to an award of prejudgment interest at the legal rate from the time each payment becomes due. To the extent that Luna v. Carleson, supra, 45 Cal.App.3d 670, 119 Cal.Rptr. 711, is inconsistent with the views expressed herein, it is disapproved.

The cause is remanded to the trial court with directions to modify its judgment by directing defendant to pay retroactive aid to plaintiff effective August 1, 1972, instead of July 25, 1972. As modified, the judgment is affirmed. The trial court is further directed to determine a reasonable attorneys' fee to be awarded to plaintiff's attorneys for their services on appeal. Plaintiff shall recover costs on appeal.

WRIGHT, C.J., and TOBRINER, MOSK and RICHARDSON, JJ., concur.

*686 CLARK, Justice (dissenting).

The majority err in allowing a welfare recipient interest on unpaid aid, contravening ***800 **760 both legislative intent and welfare's purpose.

The Legislature has provided the recipient judicial review, mentioning filing fees, attorney's fees and court costs. (Welf. & Inst. Code, s 10962.) But the same code makes no mention of interest.

The purpose of welfare is to provide subsistence to the needy. (Welf. & Inst. Code, ss 10000, s 10001; Goldberg v. Kelly (1970) 397 U.S. 254, 264, 90 S.Ct. 1011, 25 L.Ed.2d 287.) But it has not been shown that the addition of interest will alleviate Mrs. Tripp's needs.

The welfare fund is a limited resource, derived from the labor of others. By now adding interest to the aid of one, we reduce the aid available to another. Today's decision is inequitable to all.

McCOMB, J., concurs.

Parallel Citations

17 Cal.3d 671, 552 P.2d 749

Footnotes

1 The ATD program (former Welf. & Inst.Code, ss 13500—13801) has since been superseded by the supplemental security income program (42 U.S.C. ss 1381—1383c) and the ATD statutes have been repealed (Stats.1973, ch. 1216, p. 2923, s 55, effective Dec. 5, 1973).
Hereafter, unless otherwise indicated, all section references are to the Welfare and Institutions Code.

2 The Department of Social Welfare is now known as the Department of Benefit Payments. (s 10054.)

3 This determination is reflected in the court's memorandum decision. Written findings of fact and conclusions of law apparently were not requested. (Code Civ.Proc., s 632; Cal.Rules of Court, rule 232.)

4 Section 10962 provides: 'The applicant or recipient or the affected county, within one year after receiving notice of the director's final decision, may file a petition with the superior court, under the provisions of Section 1094.5 of the Code of Civil Procedure, praying for a review of the entire proceedings in the matter, upon questions of law involved in the case. Such review, if granted, shall be the exclusive remedy available to the applicant or recipient or county for review of the director's decision. The director shall be the sole respondent in such proceedings. Immediately upon being served the director shall serve a copy of the petition on the other party entitled to judicial review and such party shall have the right to intervene in the proceedings.
'No filing fee shall be required for the filing of a petition pursuant to this section. Any such petition to the superior court shall be entitled to a preference in setting a date for hearing on the petition. No bond shall be required in the case of any petition for review, nor in any appeal therefrom. The applicant or recipient shall be entitled to reasonable attorney's fees and costs, if he obtains a decision in his favor.'

5 Section 3287, subdivision (a), provides: 'Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state.'

6 Contrary to defendant's contention, we do not comprehend plaintiff's position to be that the express amendment of Civil Code section 3287 in 1959 to make interest recoverable against the state constitutes an implied amendment of section 10962. Rather, plaintiff simply contends that independently of section 10962, Civil Code section 3287 as construed by our courts authorizes recovery of prejudgment interest on wrongfully withheld welfare benefits. Accordingly, defendant's reliance on Myers v. King (1969), 272 Cal.App.2d 571, 579, 77 Cal.Rptr. 625, 631, for the statement of the 'general rule of statutory interpretation that an implied amendment of one code section by an express amendment of another code section is disfavored . . . (citations)' does not support his contention that interest is unavailable in an action to recover retroactive welfare benefits.

7 Defendant contends that plaintiff is not entitled to interest since section 10962 makes judicial review under Code of Civil Procedure section 1094.5 plaintiff's 'exclusive remedy' without specifically providing for interest. However, defendant misconstrues the purpose of the exclusory language by taking it out of context. A closer reading of the statute reveals that this language refers only to the Manner in which an aggrieved party may seek review of an adverse determination and the Scope of review to which he is entitled. Indeed, inasmuch as an aggrieved party must proceed by way of administrative mandamus, the availability of interest as an element of damages remains open. (See Code Civ.Proc., s 1095.)

8 Defendant contends that the express provision for the award of attorney's fees and costs implies the exclusion of interest pursuant to the statutory rule of interpretation Expressio unius est exclusio alterius. He bolsters his argument by pointing out that the Legislature has authorized recovery of interest in some statutorily created remedies, while failing to do so in others. However, as plaintiff points out, the only statute defendant cites as exemplifying specific legislative authority for interest—section 19091 of the Revenue and Taxation Code—was enacted prior to the amendment of Civil Code section 3287, in order to create a narrow exception to the then prevailing rule that interest was not recoverable against the state. Section 42231 of the Vehicle Code, relied on by defendant as illustrative of the Legislature's failure to authorize interest in particular cases, similarly has no relevance to the issue at bar inasmuch as claims under section 42231 are payable from a special fund. (Gibbons & Reed Co. v. Department of Motor Vehicles (1963) 220 Cal.App.2d 277, 289, 33 Cal.Rptr. 688, 927, disapproved on other grounds, Mass v. Board of Education (1964) 61 Cal.2d 612, 627, fn. 9, 39 Cal.Rptr. 739, 394 P.2d 579.)

9 Of course we recognize that California courts retain a common law authority to waive the payment of filing fees in the case of indigent litigants. (Conover v. Hall (1974) 11 Cal.3d 842, 850—851, 114 Cal.Rptr. 642, 523 P.2d 682.) Nevertheless, statutory waiver of such fees avoids burdening our courts with a potentially great volume of pro forma applications.

10 Additional indicia that the purpose of section 10962 is to ensure access to judicial review are the provisions which confer a preference in setting a date for hearing and waive payment of bond on appeal.

11 We recognize that Mass contains language of contract at one point in the decision. (Mass v. Board of Education, supra, 61 Cal.2d at p. 626, 39 Cal.Rptr. 739, 394 P.2d 579.) However, our holding that the petitioner Mass was entitled to the payment of past salary did not rest on the fact of a contractual obligation but rather on Education Code section 13516.5, which imposed liability for past due salary without mention of an underlying contract. Moreover, our recognition of a contractual relation was grounded on Education Code section 1011, which imposed yet another statutory obligation for both debt and contract.

12 Of course, the operation of section 3287, subdivision (a), is further predicated on the existence of damages. Actions to recover retroactive salary increases and wrongfully withheld pension payments have been held to constitute actions for damages. (Sanders v. City of Los Angeles, supra, 3 Cal.3d 252, 262—263, 90 Cal.Rptr. 169, 475 P.2d 201; Benson v. City of Los Angeles (1963) 60 Cal.2d 355, 365—366, 33 Cal.Rptr. 257, 384 P.2d 649.) For purposes of section 3287, subdivision (a), we find wrongfully withheld welfare benefits analytically indistinguishable from salary increases and pension payments. Accordingly, we are of the view that the action before us is an action for damages within the meaning of that statute. (See also Edelman v. Jordan (1974) 415 U.S. 651, 668, 94 S.Ct. 1347, 39 L.Ed.2d 662.)

13 Education Code section 13516.5.

14 Defendant argues that to award interest under Civil Code section 3287 on retroactive benefits to welfare recipients who have been denied benefits but are successful in obtaining them after Judicial review will discriminate against recipients who have been denied benefits but are successful in obtaining them after an administrative appeal to the Director. We fail to see how this argument assists defendant. We are not presented with the question whether the latter class of recipients are similarly entitled to interest and do not now decide that question which in our view defendant lacks standing to raise.

End of Document

EXHIBIT 3

Rose v. City of Hayward

Court of Appeal, First District, Division 2, California. | December 18, 1981 | 126 Cal.App.3d 926 | 179 Cal.Rptr. 287

Rose v. City of Hayward

Court of Appeal, First District, Division 2, California. | December 18, 1981 | 126 Cal.App.3d 926 | 179 Cal.Rptr. 287

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Outline

126 Cal.App.3d 926
Court of Appeal, First District, Division 2, California.

Frank ROSE; Mrs. John S. Munoz; Frank Tapia, et al., Plaintiffs and Appellants,
v.
CITY OF HAYWARD, William C. Hanley, Board of Administration of the Public Employees' Retirement System, Defendants and Respondents.

Civ. 47885. | Dec. 18, 1981. | Hearing Denied Feb. 24, 1982.

Retired police officer and fire fighter and widows of deceased police officer and fire fighter brought petition for writ of mandate seeking an order to compel city and retirement system to include certain fringe benefits in salary base from which pension benefits were computed. The Superior Court, Alameda County, Robert K. Barber, J., denied plaintiffs' motion for class certification and dismissed the action. Plaintiffs appealed. The Court of Appeal, Miller, J., held that: (1) where claims of each member of proposed class presented single legal issue of whether retirement benefits should be calculated with respect to uniform allowances, ammunition allowances, holiday pay and lump-sum unused sick leave pay, class action was maintainable; (2) where parties stipulated that trial court could determine liability before deciding whether action could be maintained as class action, defendant waived due process right to pretrial determination of class maintainability; (3) where fire fighters and police officers were required to work five holidays a year for double their normal pay, such holiday pay was required to be included in salary base from which pension benefits were computed; (4) uniform allowance given to fire fighters and police officers was required to be included in salary base from which pension benefits were computed; and (5) ammunition allowance given to police officers was not included in salary base from which pension benefits were computed since benefit that ostensibly accrued to officers merely offset risks attendant upon employment with police department.

Affirmed in part, reversed in part and remanded.

West Headnotes (23)

[1] **Parties**
Factors, grounds, objections, and considerations in general
Parties
Community of interest; commonality

287Parties
287IIIRepresentative and Class Actions
287III(A)In General
287k35.5Factors, grounds, objections, and considerations in general
(Formerly 287k9)
287Parties
287IIIRepresentative and Class Actions
287III(A)In General
287k35.17Community of interest; commonality
(Formerly 287k11)

Two requirements must be met to sustain class action: there must be ascertainable class and there must be well-defined community of interest in questions of law and fact involved. West's Ann.C.C.P. § 382.

4 Cases that cite this headnote

[2] **Parties**
Identification of class; subclasses

287Parties
287IIIRepresentative and Class Actions
287III(B)Proceedings
287k35.41Identification of class; subclasses
(Formerly 287k9)

Class members are ascertainable where they may be readily identified without unreasonable expense or time by reference to official records. West's Ann.C.C.P. § 382.

8 Cases that cite this headnote

[3] **Parties**
Community of interest; commonality

287Parties
287IIIRepresentative and Class Actions
287III(A)In General
287k35.17Community of interest; commonality
(Formerly 287k10, 287k11)

Community interest requirement for class actions embodies three factors: predominant common questions of law or fact, class representatives with claims or defenses typical of class, and class representatives who can adequately represent class. West's Ann.C.C.P. § 382.

2 Cases that cite this headnote

[4] **Parties**
Employees

287Parties
287IIIRepresentative and Class Actions
287III(C)Particular Classes Represented
287k35.75Employees
(Formerly 287k11)

Where claims of each member of proposed class of retired police officers and fire fighters and widows of police officers and fire fighters who had vested pension rights and were receiving monthly pensions presented single legal issue of whether retirement benefits should be calculated with respect to uniform allowances, ammunition allowances, holiday pay and lump-sum unused sick leave pay, class action was maintainable. West's Ann.C.C.P. § 382.

7 Cases that cite this headnote

[5] **Parties**
Impracticability of joining all members of class; numerosity

287Parties
287IIIRepresentative and Class Actions
287III(A)In General
287k35.11Impracticability of joining all members of class; numerosity
(Formerly 287k11, 287k12)

Where question is of common interest to many persons, action may be maintained as class action even where parties are numerous and it is in fact practicable to join them all. West's Ann.C.C.P. § 382.

3 Cases that cite this headnote

[6] **Parties**
Impracticability of joining all members of class; numerosity

287Parties
287IIIRepresentative and Class Actions
287III(A)In General
287k35.11Impracticability of joining all members of class; numerosity
(Formerly 287k12)

No set number is required as matter of law for maintenance of class action. West's Ann.C.C.P. § 382.

5 Cases that cite this headnote

[7] **Parties**
Factors, grounds, objections, and considerations in general

287Parties
287IIIRepresentative and Class Actions
287III(A)In General
287k35.5Factors, grounds, objections, and considerations in general
(Formerly 287k9)

Possibility of potential recovery for each class member larger than nominal sum does not in itself militate against maintenance of such action. West's Ann.C.C.P. § 382.

Cases that cite this headnote

[8] **Administrative Law and Procedure**

Exhaustion of administrative remedies

15AAdministrative Law and Procedure
15AIIIJudicial Remedies Prior to or Pending Administrative Proceedings
15Ak229Exhaustion of administrative remedies

Plaintiffs in class action need not exhaust their administrative remedies prior to instituting judicial proceedings where administrative remedies available to plaintiffs do not provide for class relief. West's Ann.C.C.P. § 382.

6 Cases that cite this headnote

[9] **Municipal Corporations**
Proceedings to Obtain Pensions or Benefits
Municipal Corporations
Proceedings to Obtain Pensions or Benefits

268Municipal Corporations
268VOfficers, Agents, and Employees
268V(B)Municipal Departments and Officers Thereof
268k179Police
268k187Pensions and Benefit Funds
268k187(8)Proceedings to Obtain Pensions or Benefits
268k187(8.1)In general
(Formerly 268k187(8))
268Municipal Corporations
268VOfficers, Agents, and Employees
268V(B)Municipal Departments and Officers Thereof
268k193Fire
268k200Pensions and Benefit Funds
268k200(8)Proceedings to Obtain Pensions or Benefits
268k200(8.1)In general
(Formerly 268k200(8))

Where statutory provision for administrative appeal from denial of claim to include annual uniform allowance, holiday pay, lump-sum unused sick leave pay, and ammunition allowance from salary base used in computing pension benefits for fire fighters and police officers was premised upon individual claim and made no mention of class relief, class action could be maintained even though class members had not exhausted administrative remedies. West's Ann.C.C.P. § 382; West's Ann.Gov.Code § 20133.

12 Cases that cite this headnote

[10] **Administrative Law and Procedure**
Proceedings at hearing in general

15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D)Hearings and Adjudications
15Ak469Hearing
15Ak475Proceedings at hearing in general

Hearing officer's discretionary authority may be broad, but it is not so broad that all other statutes relating to conduct of administrative hearings will be denied effect in deference to hearing officer's discretion.

Cases that cite this headnote

[11] **Administrative Law and Procedure**
Parties

15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D)Hearings and Adjudications
15Ak450Parties
15Ak450.1In general
(Formerly 15Ak450)

Hearing officer would violate both statutory and constitutional authority in opening his hearing room to class action in absence of legislative authorization.

1 Cases that cite this headnote

[12] **Constitutional Law**
Class Actions
Parties
Time for proceeding and determination

92Constitutional Law
92XXVIIDue Process
92XXVII(E)Civil Actions and Proceedings
92k3980Class Actions

92k3981In general
(Formerly 92k309(1.5))
287Parties
287IIIRepresentative and Class Actions
287III(B)Proceedings
287k35.39Time for proceeding and determination
(Formerly 287k9)

Defendant in class action has due process right to secure determination of issues relating to suitability of action as class matter prior to determination of merits of action. West's Ann.C.C.P. § 382.

1 Cases that cite this headnote

[13] **Parties**
Time for proceeding and determination

287Parties
287IIIRepresentative and Class Actions
287III(B)Proceedings
287k35.39Time for proceeding and determination
(Formerly 287k9)

Where defendant in class action voluntarily accedes to trial court hearing on merits prior to determination of class issue, he thereby waives his right to class certification prior to hearings on substantive merits. West's Ann.C.C.P. § 382.

1 Cases that cite this headnote

[14] **Parties**
Employees

287Parties
287IIIRepresentative and Class Actions
287III(C)Particular Classes Represented
287k35.75Employees
(Formerly 287k9)

Where parties to proceeding to determine whether certain fringe benefits should be included in salary base from which pension benefits for fire fighters and police officers were computed stipulated that trial court could determine liability before deciding whether action could be maintained as class action, defendant waived due process right to pretrial determination of class maintainability. West's Ann.C.C.P. § 382.

2 Cases that cite this headnote

[15] **Appeal and Error**
Relating to parties or process

30Appeal and Error
30IIIDecisions Reviewable
30III(E)Nature, Scope, and Effect of Decision
30k95Relating to parties or process

Decision by trial court denying certification to entire class is appealable order. West's Ann.C.C.P. § 382.

Cases that cite this headnote

[16] **Appeal and Error**
Scope of Inquiry

30Appeal and Error
30XVIReview
30XVI(A)Scope, Standards, and Extent, in General
30k838Questions Considered
30k839Scope of Inquiry
30k839(1)In general

Where trial court determined merits of substantive issue before denying class action certification, and since order denying class action certification was appealable, Court of Appeal could, upon finding that class action should have been certified, review merits of case. West's Ann.C.C.P. § 382.

2 Cases that cite this headnote

[17] **Officers and Public Employees**
Pensions and Benefits

283Officers and Public Employees
283IIIRights, Powers, Duties, and Liabilities

283k93Compensation and Fees
283k101.5Pensions and Benefits
283k101.5(1)In general
(Formerly 283k94)

Pension provisions shall be liberally construed in favor of applicant.

Cases that cite this headnote

[18] **Municipal Corporations**
Rate or amount
Municipal Corporations
Rate or amount

268Municipal Corporations
268VOfficers, Agents, and Employees
268V(B)Municipal Departments and Officers Thereof
268k179Police
268k187Pensions and Benefit Funds
268k187(7)Rate or amount
268Municipal Corporations
268VOfficers, Agents, and Employees
268V(B)Municipal Departments and Officers Thereof
268k193Fire
268k200Pensions and Benefit Funds
268k200(7)Rate or amount

Where fire fighters and police officers were required to work five holidays a year for double their normal pay, such holiday pay was required to be included in salary base from which pension benefits were computed. West's Ann.Gov.Code §§ 20022, 20024.01, 20024.2, 20450 et seq., 21252.01, 21252.5, 21252.6, 21294.

5 Cases that cite this headnote

[19] **Administrative Law and Procedure**
Plain, literal, or clear meaning; ambiguity
Administrative Law and Procedure
Consistent or longstanding construction; approval or acquiescence
Administrative Law and Procedure
Erroneous construction; conflict with statute

15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C)Rules, Regulations, and Other Policymaking
15Ak428Administrative Construction of Statutes
15Ak432Plain, literal, or clear meaning; ambiguity
(Formerly 361k219(4))
15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C)Rules, Regulations, and Other Policymaking
15Ak428Administrative Construction of Statutes
15Ak434Consistent or longstanding construction; approval or acquiescence
(Formerly 361k219(4))
15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C)Rules, Regulations, and Other Policymaking
15Ak428Administrative Construction of Statutes
15Ak435Erroneous construction; conflict with statute
(Formerly 361k219(4))

Where there is no ambiguity in statute and administrative interpretation of it is clearly erroneous, even fact that such administrative interpretation is long-standing one does not give legal sanction.

Cases that cite this headnote

[20] **Municipal Corporations**
Rate or amount
Municipal Corporations
Rate or amount

268Municipal Corporations
268VOfficers, Agents, and Employees
268V(B)Municipal Departments and Officers Thereof
268k179Police
268k187Pensions and Benefit Funds
268k187(7)Rate or amount
268Municipal Corporations
268VOfficers, Agents, and Employees
268V(B)Municipal Departments and Officers Thereof
268k193Fire
268k200Pensions and Benefit Funds
268k200(7)Rate or amount

Uniform allowance given to fire fighters and police officers was required to be included in salary base from which pension benefits were computed since it was compensation because it allowed for substitution of personal attire which

employee would otherwise be forced to acquire with personal resources. West's Ann.Gov.Code §§ 20022, 20024.01, 20024.2, 20450 et seq., 21252.01, 21252.5, 21252.6, 21294.

5 Cases that cite this headnote

[21] **Labor and Employment**
Retirement Benefits

231HLabor and Employment
231HIVCompensation and Benefits
231HIV(A)In General
231Hk218Retirement Benefits
231Hk219In general
(Formerly 255k78.1, 255k78.1(3) Master and Servant)

Where employee is provided with allowance to acquire goods or services which mitigate risk inherent in employment, benefit to employee is not compensable for pension purposes.

Cases that cite this headnote

[22] **Municipal Corporations**
Rate or amount

268Municipal Corporations
268VOfficers, Agents, and Employees
268V(B)Municipal Departments and Officers Thereof
268k179Police
268k187Pensions and Benefit Funds
268k187(7)Rate or amount

Ammunition allowance given to police officers was not included in salary base from which pension benefits were computed since allowance merely offset risks attendant upon employment with police department. West's Ann.Gov.Code §§ 20022, 20024.01, 20024.2, 20450 et seq., 21252.01, 21252.5, 21252.6, 21294.

Cases that cite this headnote

[23] **Municipal Corporations**
Proceedings to Obtain Pensions or Benefits
Municipal Corporations
Proceedings to Obtain Pensions or Benefits

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268Municipal Corporations
268VOfficers, Agents, and Employees
268V(B)Municipal Departments and Officers Thereof
268k193Fire
268k200Pensions and Benefit Funds
268k200(8)Proceedings to Obtain Pensions or Benefits
268k200(8.1)In general
(Formerly 268k200(8))

Where city and city manager would be affected by judgment in class action which challenged computation of pension benefits for fire fighters and police officers since amount of city's contributions to pension system would need adjustment to make up for city's failure to include certain fringe benefits in computation of pension benefits, city and city manager were proper, if not necessary, party defendants to class action. West's Ann.C.C.P. § 382; West's Ann.Gov.Code §§ 20022, 20024.01, 20024.2, 20450 et seq., 21252.01, 21252.5, 21252.6, 21294.

Cases that cite this headnote

Attorneys and Law Firms

***929** ****290** Duane W. Reno, Davis, Cowell & Bowe, San Francisco, for plaintiffs and appellants.

John W. Scanlon, City Atty., Myron A. Johnson, Asst. City Atty., Hayward, for defendant and respondent, City of Hayward.

***930** George Deukmejian, Atty. Gen., Eleanor Nisperos, Deputy Atty. Gen., San Francisco, for defendant and respondent, Public Employees' Retirement System.

Opinion

MILLER, Associate Justice.

This is an appeal by retired public employees from a judgment denying a petition for writ of mandate seeking an order compelling the City of Hayward and the Public Employees Retirement System (hereinafter "PERS") to include certain "fringe benefits" in the salary base from which their pension allowances are computed. Appellants also appeal from an order entered by the trial court denying certification as a class action.

The parties have stipulated to the facts of the case. We summarize the relevant facts from that stipulation. The named plaintiffs in this action are a retired police officer and a retired fire fighter and the widows of a deceased police officer and a deceased fire fighter formerly employed by the City of Hayward. Named petitioners have vested pension rights and at the time they filed their petition, were receiving monthly pensions from PERS (the System).

During their tenure with the City of Hayward, both the fire fighters and police officers received an annual uniform allowance, holiday pay, and/or lump sum payment for unused sick leave time. The police officers also received an ammunition allowance.

Pursuant to the state retirement law, by which the City agreed by written contract to be bound, respondent PERS administers the City's pension plan for the police officers and fire fighters ("local safety members"). In calculating retirement benefits for appellants, respondent PERS did not consider the local safety members' uniform allowances, ammunition allowance, holiday pay and lump sum unused sick leave pay as part of their "final compensation," a factor used in PERS' service retirement formula.

Appellants filed their petition for a writ of mandate on December 22, 1976, to compel PERS to include the "fringe benefits" in its calculation of the pension benefits. Appellants did not seek an administrative hearing with PERS prior to instituting the action. PERS and the City of ***931** Hayward demurred to the petition on the ground that the court lacked jurisdiction because appellants did not exhaust their administrative remedies. Respondent City of Hayward also demurred on the ground that no cause of action was stated against the city. The trial court overruled those demurrers on January 31, 1977.

On March 28, 1977, appellant moved for class action certification. Respondents PERS and the City of Hayward objected to certification, but stipulated that liability be determined prior to determination of class ****291** maintainability. Thereafter, the trial court held that the annual uniform allowance should be included in the computation of pension benefits, but that holiday pay, ammunition allowance and cash payment upon retirement for unused sick leave should be excluded. At the same time, the trial court ruled that appellants need not have exhausted their administrative remedies prior to filing suit if the action is certified as a class action, but if appellants were not certified as class representatives, their suit would be barred by their failure to individually seek administrative relief.

On June 30, 1978, the trial court denied the motion for class certification and ordered that the action be dismissed for failure of appellants to exhaust their administrative remedies.

On appeal, appellants contend that they are entitled to certification as a class action suit in order to present their claims without exhausting their administrative remedies. Appellants also urge the court of appeal to reach the merits of the case, and to hold that not only the annual uniform allowance, but also the ammunition allowance, the holiday pay, and the lump sum payment of sick leave time, qualify as "compensation" that must be considered in the computation of their pension benefits.

Respondent PERS contends that appellants do not represent an ascertainable class with a well-defined community of interest and that, as individuals, appellants must exhaust their administrative remedies. Respondents also contend that the merits are not properly before the court in that the trial court's immediate order of February 1, 1978 that the uniform allowance be included in the computation of pension benefits was an interlocutory judgment. Respondents further contend that if this court does reach the merits, the trial court's interim decision that appellants' uniform allowance be considered in the computation of pension benefits should be reversed. Respondent City of Hayward also contends ***932** that the trial court's decision overruling its demurrer to the petition of mandate should be reversed in that no cause of action has been stated against the city.

Class Certification

[1] Section 382 of the Code of Civil Procedure provides, in pertinent part, "... when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." Two requirements must be met to sustain a

class action under section 382: There must be an ascertainable class, and there must be a well-defined community of interest in the questions of law and fact involved. (Richmond v. Dart Industries, Inc. (1981) 29 Cal.3d 462, 470, 174 Cal.Rptr. 515, 629 P.2d 23.) We find the present action eminently suitable for class action disposition.

[2] Class members are "ascertainable" where they may be readily identified without unreasonable expense or time by reference to official records. (Hypolite v. Carleson (1975) 52 Cal.App.3d 566, 579, 125 Cal.Rptr. 221.) The identity of the class in the instant case is readily ascertainable from PERS' departmental records. Respondents' contention that the four named appellants cannot be certified as representatives of present and future recipients of benefit is erroneous. In construing the class to include future retired local safety members, respondents apparently relied upon the language in the appellant's original petition for writ of mandate rather than the subsequent notice of motion and motion for order determining that action is maintainable as a class action. The latter document seeks an order certifying a class to include only present retirees or widowed spouses receiving pensions. Moreover, in a very practical sense, named appellants are representative of future member employees. Their representative capacity stems from the fact that PERS will likely amend its administrative procedures to harmonize with the ultimate outcome of the substantive merits of this litigation, rather than pursue the undesirable alternative of repetitive and unavailing litigation.

**292 [3] [4] The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (Richmond v. Dart Industries, Inc., supra, 29 Cal.3d 462, 470, 174 Cal.Rptr. 515, 629 P.2d 23.) In the present action, only the first *933 two elements are disputed by the litigants. We find that appellant has satisfied both of the elements in question. The one decisive issue pervading the litigation, whether the class members have been wrongfully deprived of pension benefits by an improper method of computation, will not be decided on the basis of facts peculiar to each class member, but rather, on the basis of a single set of facts applicable to all members. Thus, appellants' action involves only one claim which turns on only one question of law common to all class members. Consolidation in a class action thereby creates substantial benefits for both the parties and the courts in that class action disposition averts the unnecessary risk of numerous and repetitive administrative and judicial proceedings with the attendant possibility of inconsistent adjudication.

A finding of common questions of law and fact in the present case accords fully with prior decisions where plaintiffs seeking retroactive payment of governmental benefits have sued as a class. In Hypolite v. Carleson, supra, the plaintiff sought class certification in an action for AFDC benefits which were allegedly wrongfully withheld under a statute that provided for aid to families with children during the continued absence of a parent. Pursuant to this statute, the Department of Social Welfare denied AFDC benefits to families where parents maintained a home together but apart from their child. The defendant agency conceded that the designated class shared a common question of law because each plaintiff's case turned on construction of the same statute regulating AFDC payments. In contending that the action should not be certified, the agency's argument rested on the premise that the many variables which determine eligibility would have to be evaluated in each case in order to determine the propriety of the retroactive aid. Since such an evaluation would require inquiry into "a myriad of factors," the agency inferred that plaintiffs failed to make a showing of common questions of fact. The court of appeal rejected the agency's argument, holding that the designated class consisted only of those individuals who were rendered ineligible for AFDC solely because their parents maintained a home together elsewhere. Thus, the court found it clear that but one essential fact was to be pursued by appellant with respect to each class member who claims retroactive AFDC benefits.

Respondents cannot distinguish the instant case from Hypolite. In fact, resolution of each applicant's claim requires no inquiry into any peripheral issues. The single, decisive issue for all class members is whether the pertinent allowances should be included in the computation *934 of retirement benefits. While the amount of individual claims may vary from member to member, the introduction of that variable into the equation in no way alters our decision. The law unequivocally provides that each class member may establish damages independently without threatening the integrity of the class action. (Vasquez v. Superior Court (1971) 4 Cal.3d 800, 815, 94 Cal.Rptr. 796, 484 P.2d 964; Daar v. Yellow Cab Co. (1967) 67 Cal.2d 695, 709, 63 Cal.Rptr. 724, 433 P.2d 732.)

[5] [6] A major thrust of respondents' argument centers on alleged alternatives to a class action, including joinder and intervention. Once again, we are unconvinced by respondents' argument. The requirement of Code of Civil Procedure section 382 that there be "many" parties to a

class action suit is indefinite and has been construed liberally. Where a question is of common interest to "many" persons, an action may be maintained as a class action even where the parties are numerous and it is in fact practicable to join them all. (Renken v. Compton City School Dist. (1962) 207 Cal.App.2d 106, 113, 24 Cal.Rptr. 347.) No set number is required as a matter of law for **293 the maintenance of a class action. (Hebbard v. Colgrove (1972) 28 Cal.App.3d 1017, 1030, 105 Cal.Rptr. 172.) Thus, our Supreme Court has upheld a class representing the ten beneficiaries of a trust in an action for removal of the trustees. (See Bowles v. Superior Court (1955) 44 Cal.2d 574, 283 P.2d 704.) Similarly, in Hebbard, a class action on behalf of a minimum of 28 beneficiaries of a trust alleging improper conduct by trustees was not inappropriate on the theory that the class was too small. (See also, Collins v. Rocha (1972) 7 Cal.3d 232, 102 Cal.Rptr. 1, 497 P.2d 225, upholding a class action filed by 9 named plaintiffs on behalf of 35 others.) The class of 42 retirees in the present is quantitatively sufficient for a class action.

[7] Numbers alone do not compel our decision. Considerations of equity as well counsel us toward a decision in favor of certification. The right to file a class action originates in equity, with the objective of redressing small wrongs that otherwise might go unredressed. (Bauman v. Islay Investments (1975) 45 Cal.App.3d 797, 802, 119 Cal.Rptr. 681.) The alternatives of multiple litigation (joinder, intervention, consolidation, the test case) often do not sufficiently vindicate legal rights because these devices " 'presuppose "a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits. " ' " (Vasquez v. Superior Court, supra, 4 Cal.3d 800, 808, 94 Cal.Rptr. 796, 484 P.2d 964.) Respondents suggest that appellants represent *935 a group of economically powerful parties, able and willing to take care of their interests. They contend that at least one class member, and possibly more, might gain up to $3,700, a sum which respondents' find to be sufficient incentive for litigation on an individual basis. We disagree. Even were respondents to convince us that all class members stood to realize a substantial gain, we remain unconvinced that class action certification should be denied. The possibility of a potential recovery for each class member larger than a nominal sum does not in itself militate against the maintenance of such an action. (Collins v. Rocha, supra, 7 Cal.3d 232, 238, 102 Cal.Rptr. 1, 497 P.2d 225.) To hold otherwise would impose upon any reasonable man's sense of justice. A brief review of the facts of the case reveals a history of three and a half years of protracted litigation. Attorney's fees for that period alone would devour a substantial portion on individual litigant's potential recovery of $3,700. We see no basis in law or equity for making a sacrificial lamb of Rose or any other individual class member on behalf of the other 41 class members. The course respondents suggest may effectively discourage the issue from being adjudicated. We cannot permit such an inequity when the very purpose of class actions is to open a practical avenue of redress to litigants who would otherwise find no effective recourse for the vindication of their legal rights.

Exhaustion of Administrative Remedies

[8] [9] Contrary to respondents' contentions, plaintiffs in a class action need not exhaust their administrative remedies prior to instituting judicial proceedings where the administrative remedies available to the plaintiffs do not provide for class relief. (Ramos v. County of Madera (1971) 4 Cal.3d 685, 690-91, 94 Cal.Rptr. 421, 484 P.2d 93.) Here, as in Ramos, the statutory provision for an administrative appeal is premised upon an individual claim and makes no mention of class relief. Government Code section 20133, which codifies the retirement system's administrative remedy, states: "The board (of administration of the Public Employees' Retirement System) may, in its discretion, hold a hearing for the purpose of determining any question presented to it involving any right, benefit, or obligation of a person under this part..." (Gov.Code, s 20133.) The reference to "a person" clearly contemplates individualized treatment of claims for retirement benefits rather than class actions.

The absence of an adequate administrative remedy becomes even clearer when we consider that the Administrative Procedure Act (*936 Gov.Code, s 11500, et seq.) has no **294 provisions for pretrial proceedings in which prompt and early determination of class membership may be made. Nor are there any provisions for notice to the absent class members informing them that they are required to decide whether to remain members of the class represented by counsel for the named plaintiffs, whether to intervene through counsel of their own choosing, or whether to pursue independent remedies. Such pretrial proceedings are constitutionally required as a matter of due process when an adjudication is to be made which will be binding upon the entire class. (Home Sav. & Loan Assn. v. Superior Court (1976) 54 Cal.App.3d 208, 126 Cal.Rptr. 511.) Hence, the administrative hearing procedure established by the Legislature for claims of rights arising from the Public Employees' Retirement Law is constitutionally inadequate for class action hearings, thus defeating respondent's contention that appellants must seek administrative relief as a class.

[10] [11] Respondent contends that as an administrative agency empowered by the Administrative Procedure Act, its board has the power to consolidate several actions into a "test case/class action involving many persons similarly situated." As authority for this proposition, respondents cite Government Code section 11512, which states, in pertinent part, as follows: "(b) ... When the hearing officer alone hears a case he shall exercise all powers relating to the conduct of the hearing." Respondents point to one case in which the statute was interpreted liberally to permit the hearing officer to continue a case without issuing written notice (McPheeters v. Board of Medical Examiners (1947) 82 Cal.App.2d 709, 187 P.2d 116) and another in which the hearing officer was upheld in deciding the order of procedure of evidence and witnesses at his hearing. (Ehrlich v. McConnell (1963) 214 Cal.App.2d 280, 29 Cal.Rptr. 283.) The cases cited by respondents are inapposite, and we differ substantially with respondents' construction of Government Code section 11512. Although section 11512 may on its surface read as a plenary grant of authority to hearing officers, the section must nonetheless be read conjunctively with all other pertinent statutes relating to administrative hearings. As we have seen, Government Code section 20133 grants a right only to individuals to present claims to PERS. A hearing officer's discretionary authority may be broad, but it is not so broad that all other statutes relating to the conduct of administrative hearings will be denied effect in deference to the hearing officer's discretion. A hearing officer would clearly exceed his authority under Government Code section 11512 in entertaining a class action. Moreover, even were the statute the absolute grant of authority respondents interpret it to be, ***937** constitutional questions would again lurk in the shadows. The due process requirement of notice to absent class members must not be left to the hearing officer's discretion. A hearing officer would violate both statutory and constitutional authority in opening his hearing room to a class action.[1]

Due Process

[12] A defendant in a class action has a due process right to secure a determination of the issues relating to the suitability of the action as a class matter prior to determination of the merits of the action. (People v. Pacific Land Research Co. (1977) 20 Cal.3d 10, 16, 141 Cal.Rptr. 20, 569 P.2d 125.) When a determination as to class certification is postponed until after proceedings on the substantive merits, the defendant "is subject 'to one-way intervention,' which would allow potential class members to elect whether to join in the ****295** action depending upon the outcome of the decision on the merits." (Ibid.) Such a consequence is prejudicial to the defendant in that, while an adverse ruling on the merits would bind the defendant under collateral estoppel principles, the defendant would not necessarily gain a reciprocal benefit if he prevailed, since the ruling in his favor would not be binding on class members who had no notice of the proceedings.

[13] [14] Where a defendant voluntarily accedes to a trial court hearing on the merits prior to determination of the class issue, he thereby waives his right to a class certification prior to hearings on the substantive merits. (Civil Service Employees Ins. Co. v. Superior Court (1978) 22 Cal.3d 362, 373, 149 Cal.Rptr. 360, 584 P.2d 497.) In the case before us, the parties stipulated to a trial court determination of liability prior to deciding whether the action could be maintained as a class action. The defendant thereby waived his due process right to a pretrial determination of class maintainability. Thus, the trial court's decision against the PERS with regard to the annual uniform allowance is binding on the defendant as to all class members. On the other hand, the trial court's decisions in favor of the system with regard to holiday pay, ammunition ***938** allowance, and unused sick leave are binding only as to the four plaintiffs who sued in an individual capacity. All other local safety members whom the named plaintiffs purported to represent are free to relitigate these issues with the sole protection for defendant being stare decisis. We make note of the defendant's waiver in order to clarify the procedural posture of the case, and with an eye toward expediting the ultimate outcome of this protracted litigation by precluding further superfluous appeals on what is, at this time, a "non-issue."

Review of the Merits is Appropriate

Respondents contend that the merits of this case are not properly before this court in that the trial court's order of February 1, 1978 after hearings on the merits was an interlocutory judgment. The order stated, in pertinent part "... the court concludes that the annual uniform allowance should be included in the computation of pension benefits. The ammunition allowance, holiday pay, and lump sum unused sick leave should be excluded from the computation of pension benefits. (P) With respect to this court's jurisdiction, petitioners need not have exhausted administrative remedies prior to this proceeding if they are certified as representatives of a class action suit. If, however, petitioners are not certified as class representatives, petitioners' failure to individually exhaust administrative remedies bars relief...." Respondent argues that by subsequently denying appellant's petition for certification as a class action, the court "voided" its order of February 1, 1978. We nonetheless find that the merits

are before this court.

The trial court's ruling on the merits prior to the decision on the class action issue was not a final judgment. It is true that as such the order was not directly appealable. (Travelers Insurance Co. v. Superior Court (1977) 65 Cal.App.3d 751, 754, 135 Cal.Rptr. 579.) It is also true that many other orders are not directly appealable, that is, not reviewable on a direct appeal, and that some judgments which are regarded as interlocutory and not final are similarly not directly appealable. But it is also recognized that virtually all such orders are ultimately reviewable, either by extraordinary writ, or more often on appeal from a final judgment or an appealable order. (6 Witkin Cal. Procedure (2d ed. 1971) Appeal, ss 34, 36, pp. 4048-4050.)

[15] [16] A decision by a trial court denying certification to an entire class is an appealable order. (Richmond v. Dart Industries, Inc., supra, 29 Cal.3d 462, 470, 174 Cal.Rptr. 515, 629 P.2d 23.) Given the availability of appellate review for an order **939 denying the class action certification, it would be wholly inconsistent with the principle of judicial economy to refuse to reach the merits in a case such as this where the parties stipulated to a hearing on the merits prior to determination of suitability as a class action. To hold otherwise would lead **296 to anomalous and wasteful consequences. On remand to the trial court, the same court which heard the original trial of the merits would be required to hold a second trial on the same issue of pension benefits, litigated by the same parties who litigated the merits of the case in the trial court in 1977 and 1978. Given the enthusiasm both parties have displayed in litigating the issues of this case for the past five years, in all probability an appeal would ensue whatever the decision of the trial court on the merits. Inasmuch as the trial court has already reached the merits of this case through the "inverse" procedure to which the parties stipulated, failure to reach the merits at this time would squander the time, energy and resources of both the parties and the courts. In fact, the course that respondents suggest would be wholly adverse to the policy underlying the "one final judgment" rule-to avoid piecemeal litigation. To preclude such an improvident result, we hold that where the parties have stipulated to a hearing on the merits prior to class certification, on an appeal from the denial of the class certification, the reviewing court may properly reach the merits.

Respondents' contention that the denial of the class action certification "voided" the order as to the merits does not convince us that we should hold otherwise. Though the trial court may have made the granting of the class action certification a condition precedent to its order's effectiveness, the pivotal fact remains that the trial court did hear the arguments on the merits from both parties and thereafter issued an order. Further, at this stage in the litigation, the order of February 1, 1978 is effective in that the condition precedent of class certification has been met by way of our reversal of the trial court's order denying certification.

Pension Benefits

The provisions governing the administration of the Public Employees' Retirement System (PERS) are set forth in Part 3 of Division 5 of Title 2 of the California Government Code. (Gov.Code, s 20000, et seq.) Local public agencies, such as the City of Hayward, may elect to participate in the state retirement system. (Gov.Code, s 20450, et seq.) Such agencies are then subject to the Government Code.

*940 The amount of the pensions provided to local members of PERS is a percentage of the "final compensation" received by such members. (See, e.g., Gov.Code, ss 21252.01, 21252.5, 21252.6 and 21294.) "Final compensation" is defined as "the highest average annual compensation earnable by a member" during a certain period immediately preceding the date of the local safety member's retirement. (See Gov.Code, ss 20024.01, 20024.2.) "Compensation" is defined as "the remuneration paid in cash out of funds controlled by the employer, plus the monetary value, as determined by the (Board of Administration) of living quarters, board, lodging, fuel, laundry, and other advantages of any nature furnished a member by his employer in payment for his services or for time during which the member is excused from work because of holidays, sick leave, vacation, compensating time off, or leave of absence...." (Gov.Code, s 20022.)

[17] If an ambiguity or uncertainty exists, the foregoing statutory provisions are to be construed in favor of the pensioner. Thus, it is well established that pension provisions shall be liberally construed in favor of the applicant. (Terry v. City of Berkeley (1953) 41 Cal.2d 698, 701-702, 263 P.2d 833.)

Holiday Pay

[18] "Holiday pay" for the police officers and fire fighters of the City of Hayward is provided pursuant to Administrative Rule 2.2 of the City of Hayward. Rule 2.2 states that it applies only to sworn, uniformed personnel of the Police and Fire Departments who are regularly required to work on holidays. According to this rule, the

employees of those departments are to be provided with holiday pay for the first five holidays of the year which they work.

Respondents apparently concede that the holiday pay provided to Hayward's police officers and fire fighters is remuneration **297 paid in cash out of funds controlled by the employer in payment for their services and therefore within the definition of "compensation" set forth in Government Code section 20022. However, they argue that such compensation is "compensation based on overtime," and thus is to be excluded from computation of retirement benefits pursuant to Government Code section 20025.2. That section defines overtime work as service performed "in excess of the hours of work considered normal for employees on a full-time basis." (emphasis added).

*941 Respondents' characterization of the holiday pay as overtime is clearly erroneous. Administrative Rule 2.2 plainly states that Hayward's police officers and fire fighters are regularly required to work on legal holidays. Accordingly, the hours worked by a police officer or a fire fighter on any "legal holiday" designated by the City are not "overtime work" because they are part of the normal hours of work for those employees, rather than in excess of such hours. Hence, the holiday pay provided to Hayward's police officers and fire fighters cannot be considered as compensation based on overtime and therefore cannot be excluded from the salary upon which their retirement benefits are based.

Respondents contend that holiday pay should be excluded from the computation of benefits because not all employees are required to work the same holidays. "By the very nature of holidays falling at different parts of the year, some members receive 'holiday pay' and others do not." Respondents' contention is irrelevant with regard to the five holidays which the local members are required to work. Although the city might stagger the five holidays that any given employee must work, the pertinent fact remains that all employees work five holidays for which they receive twice their normal amount of pay. Thus, the holiday pay clearly falls within the definition of "compensation earnable" rather than "overtime." It must be included in the computation of pension benefits. (Accord, Santa Monica Police Officers Assn. v. Board of Administration (1977) 69 Cal.App.3d 96, 100, n. 3, 137 Cal.Rptr. 771.)

[19] Insofar as respondent PERS relies on the fact that it has made an administrative interpretation that the holiday pay provided to Hayward police officers and fire fighters is compensation for overtime, where there is no ambiguity in a statute and the administrative interpretation of it is clearly erroneous, even the fact that such administrative interpretation is a longstanding one does not give it legal sanction. (California Drive-In Restaurant Assn. v. Clark (1943) 22 Cal.2d 287, 294, 140 P.2d 657.) The enduring nature of the interpretation gives it no intrinsic validity.

Payments for Unused Sick Leave

Justice Kaus addressed the issue of whether lump sum payments for unused sick leave should be included in PERS' computation of pension *942 benefits in Santa Monica Police Officers Assn. v. Board of Administration, supra, 69 Cal.App.3d 96, 137 Cal.Rptr. 771. He held that they were not, and his decision is dispositive.

"First, as noted above, a pension is generally based on two factors: compensation and time, or length of employment (s 21252.01.) Sick leave and vacation time are treated by the Legislature as a time factor. Thus, in 'computing the service with which a member is entitled to be credited ... time during which the member is excused from working because of holidays, sick leave, vacation, or leave of absence, with compensation, shall be included.' (s 20810.) And, when an employee has not used all the sick leave time to which he is entitled, such sick leave time is credited when the employee retires as '0.004 year of service credit for each unused day of sick leave....' (s 20862.8; see also s 20862.5.) The legislative intent was to assure that an employee, entitled to certain time off from work, was nevertheless treated as if he had worked continuously. (P) Second, in defining 'compensation earnable,' section 20023 refers to 'average monthly compensation' and 'same rate of pay,' suggesting, as noted, that the Legislature intended to exclude nonperiodic payments that did not apply to **298 all employees similarly situated. (Footnote omitted.) Specifically, the Legislature has excluded overtime pay from the compensation to be included in computing a pension. (s 20025.2.) (P) Lump-sum payments for unused sick leave and vacation time, although not conventional instances of overtime pay, are analogous in that an employee is entitled to receive such lump-sum payments when he has worked more time than he was expected to work. (Footnote omitted.) Besides, as noted, when the Legislature in section 20862.8 did specifically permit unused sick leave-extra work time-to be used in pension computations, it did so as a factor of time. Finally, given what appears to be a random policy concerning a public employee's right to accrue sick time and vacation time, the Legislature had no great incentive to enact specific legislation on the subject. (Footnote omitted.) (P) Third, section 20024.01 limits the relevant period to 'compensation earnable' during the three years preceding

retirement. Lump-sum payments may-or may not (ante, fn. 3)-cover only a three-year period. Certainly, amounts accrued over a lengthy period of time would totally distort the legislative scheme. (P) In short, we conclude that, viewing the State Retirement System as an entity, the Legislature intended to exclude lump-sum payments for unused sick leave and vacation time from pension computations. (Footnote omitted.)" (Pp. 99-101, 137 Cal.Rptr. 771.)

***943 Uniform Allowance**

[20] Public safety members have received an annual uniform allowance since 1960. In testimony at the trial court, an administrator for PERS contended that the uniform allowance should not be included in the computation of pension benefits because the Legislature has, in effect, limited the goods and services which can be included in the computation of pension benefits to those items expressly listed in section 20022. The administrator clearly misinterprets the statute. By its express terms, section 20022 does not purport to be an exhaustive list of goods and services which may be included in the computation of benefits. Compensation is defined as remuneration paid in cash "... plus the monetary value ... of living quarters, board, lodging, fuel, laundry, and other advantages of any nature furnished a member in payment for his services." (Emphasis added.) The express provisions of the statute make it clear that the uniform allowance must be included in the computation of pension benefits.

When asked to explain the rationale behind excluding the uniform allowance from the pension benefits, the administrator for PERS stated, "This is something for the convenience of the employer. It's a condition of employment and it's not compensation for services." We would agree with the administrator in that a uniform allowance benefits the employing police and fire department. To say that the uniform allowance benefits the employer, however begs the question. The issue is whether or not the allowance provides an "advantage" to the employee. While it is accurate to say that uniformity of attire provides a benefit to the employer in that it makes these civil servants readily identifiable to the public, it is at the same time accurate to say that the uniform allowance provides a benefit to the employee in that the uniform substitutes for personal attire which the employee would otherwise be forced to acquire with personal resources. Therefore, the uniform allowance must be included in the computation of pension benefits.[2] (See also, Anderson v. City of Long Beach (1959) 171 Cal.App.2d 699, 702, 341 P.2d 43.)

***944 Ammunition Allowance**

[21] [22] Appellants contend that an ammunition allowance is directly analogous to a uniform allowance. We disagree. In fact, the ammunition allowance is not an ****299** "advantage" to the employee in the same sense as is a uniform allowance. The uniform allowance provides an employee with funds with which to purchase clothing, a good which the employee would have to purchase regardless of the nature of his occupational duties. Ammunition is simply not analogous. While it is true in one sense that the employee "benefits" from the ammunition in that it protects him, the employee would not need to purchase the ammunition but for his employment. Where an employee is provided with an allowance to acquire goods or services which mitigate a risk inherent in the employment, the "benefit" to the employee is not compensable for pension purposes. The "benefit" that ostensibly accrues to the policemen merely offsets the risks attendant upon employment with the police department. Therefore, the ammunition allowance should not be included in the calculation of benefits.

Status of City of Hayward as a Proper Party

[23] Respondents City of Hayward and City Manager Hanley argue on appeal that no cause of action has been stated against the city and the city manager in that "(n)o effective order could be made against them ordering them to determine a pension computation for any one of the appellants, because it is the obligation of respondent PERS to make such determination, nor could any effective order be made against the city respondents ordering them to pay a pension from the Public Employees' Retirement System because respondent PERS runs the system and pays the pensions." We disagree. Respondents City of Hayward and City Manager Hanley will be affected by the judgment in this action since the amount of the city's contributions to PERS will need adjustment in accordance with section 20527 of the Government Code to make up for the fact that the city has failed to include holiday and the uniform allowance in the salaries upon which its contributions were previously based. Hence, respondents City of Hayward and Hanley are proper, if not necessary, parties defendant and a cause of action was stated against them.

The judgment of the trial court denying class certification is reversed. The order of February 1, 1978 on the merits is affirmed as to the uniform ***945** allowance, the unused sick leave, and the ammunition allowance, but is reversed as to holiday pay.

We remand for notice to absent class members and other proceedings consistent with our decision.

ROUSE, Acting P.J., and SMITH, J., concur.

Hearing denied; MOSK and REYNOSO JJ., dissenting.

Parallel Citations

126 Cal.App.3d 926

Footnotes

1 Respondents also submit that Code of Civil Procedure section 382 gives any court, "including an administrative tribunal," discretion to hear a class action. Respondent's construction of the statute is an act of linguistic legerdemain. There is no language in Code of Civil Procedure section 382 to suggest that it applies to any but judicial tribunals. And even if the statute did confer a general authority to administrative bodies to entertain class actions, Government Code section 20133, limiting PERS hearings to individual actions, would supervene to preclude the maintenance of a class action.

2 We note that our reasoning as to the uniform allowance in this case may not be applicable in all instances where an employer provides an employee with work-related attire, or with an allowances for work-related attire. For example, if a fire department provided its workers with specially-designed asbestos uniforms, these could hardly be characterized as a ready substitute for personal attire and could not fairly be added in the computation of pension benefits.

EXHIBIT 4

Olson v. Cory
Supreme Court of California. | December 30, 1983 | 35 Cal.3d 390 | 673 P.2d 720

Olson v. Cory

Supreme Court of California. | December 30, 1983 | 35 Cal.3d 390 | 673 P.2d 720

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Outline

35 Cal.3d 390
Supreme Court of California.

Lester E. OLSON et al., Plaintiffs and Appellants,
v.
Kenneth CORY, as State Controller, et al.,
Defendants and Respondents.

L.A. 31780. | Dec. 30, 1983.

Judges and judicial pensioners petitioned for interest on salary and pension increases mandated in prior action, 27 Cal.3d 532, 178 Cal.Rptr. 568, 636 P.2d 532. The Superior Court, Los Angeles County, John A. Loomis, J., entered order denying plaintiffs' motion for determination that their right to interest was without substantial controversy, and plaintiffs appealed. The Supreme Court, Reynoso, J., held that: (1) although order was not appealable, Supreme Court would treat it as petition for writ of mandate; (2) certainty requirements of statute providing for recovery of interest on damages which vested upon particular day were met; (3) state, not controller, was "debtor" and thus, alleged restrictions on controller's power to pay salary or pension increases in disregard of statute which was subsequently held unconstitutional did not make debtor "prevented by law" from paying the debt; (4) fact that judicial pensions were payable entirely under judges' retirement fund rather than out of state's general fund did not disentitle judicial pensioners from interest on increases on pensions; (5) right to interest on municipal court judge's salary claims was barred neither by duties of county fiscal officers to withhold legal questionable payments until uncertainties were judicial dispelled nor by fact that state had order salaries paid out of county funds; and (6) state and counties would not be held liable for interest accruing while preliminary injunction ordering controller and county auditors to withhold 25% of payments due under *Olson v. Cory I*, apparently to secure plaintiffs' attorney fees, in that as to such 25%, the state and counties were "prevented by law" from making the payments.

Peremptory writ of mandate issued.

Bird, C.J., concurred with opinion.

Opinion, 140 Cal.App.3d 379, 189 Cal.Rptr. 570, vacated.

West Headnotes (22)

[1] **Appeal and Error**
Determination of Questions of Jurisdiction in General

30Appeal and Error
30IINature and Grounds of Appellate Jurisdiction
30k23Determination of Questions of Jurisdiction in General

Since question of appealability of trial court's denial of motion by plaintiff judges and judicial pensioners, who were claiming interest on salary and pension increases, for an order specifying the right to interest as an issue without substantial controversy went to jurisdiction of Supreme Court, Supreme Court was duty bound to consider it on its own motion.

85 Cases that cite this headnote

[2] **Appeal and Error**
Determination of Part of Controversy
Appeal and Error
Necessity

30Appeal and Error
30IIIDecisions Reviewable
30III(D)Finality of Determination
30k75Final Judgments or Decrees
30k80Determination of Controversy
30k80(6)Determination of Part of Controversy
30Appeal and Error
30IIIDecisions Reviewable
30III(F)Mode of Rendition, Form, and Entry of Judgment or Order
30k134Entry of Judgment or Order
30k134(1)Necessity

Trial court's ruling, in action by judges and judicial pensioners claiming interest on salary and pension increases, denying plaintiffs' motion for order specifying their right to interest as an issue without substantial controversy, was not a "final judgment," in the absence of judgment entered on the order and in light of contemplation of further proceedings. West's

Ann.Cal.C.C.P. §§ 437c, 437c(f, i), 904.1(b).

39 Cases that cite this headnote

[3] **Appeal and Error**
Orders After Judgment

30Appeal and Error
30IIIDecisions Reviewable
30III(D)Finality of Determination
30k82Orders After Judgment
30k82(1)In General

To be appealable as an "order after judgment," an order must either affect the judgment or relate to it by enforcing it or staying its execution. West's Ann.Cal.C.C.P. § 904.1(b).

29 Cases that cite this headnote

[4] **Appeal and Error**
Confirming or Carrying Out or Enforcing Previous Decision

30Appeal and Error
30IIIDecisions Reviewable
30III(E)Nature, Scope, and Effect of Decision
30k114Confirming or Carrying Out or Enforcing Previous Decision

In judges' and judicial pensioners' action for interest on salary and pension increases, trial court's order refusing to uphold plaintiffs' rights to interest for purposes of subsequent trial was not an order relating to enforcement of a judgment, and was thus not appealable, where prior declaratory judgment contained no enforcible provision and was purely declaratory. West's Ann.Cal.C.C.P. §§ 437c(f, i), 904.1(b).

7 Cases that cite this headnote

[5] **Declaratory Judgment**
Object and Purpose

118ADeclaratory Judgment
118AINature and Grounds in General
118AI(A)In General
118Ak2Object and Purpose

Purpose of declaratory relief is to enable parties to shape their conduct so as to avoid a breach.

1 Cases that cite this headnote

[6] **Declaratory Judgment**
Executory or Coercive Relief

118ADeclaratory Judgment
118AIIIProceedings
118AIII(G)Judgment
118Ak386Executory or Coercive Relief
118Ak386.1In General
(Formerly 118Ak386)

Declaratory relief may properly be accompanied by coercive relief.

Cases that cite this headnote

[7] **Mandamus**
Motions and Orders in General

250Mandamus
250IISubjects and Purposes of Relief
250II(A)Acts and Proceedings of Courts, Judges, and Judicial Officers
250k42Motions and Orders in General
(Formerly 250k6)

Denial of motion for summary judgment is reviewable by writ of mandate.

1 Cases that cite this headnote

[8] **Mandamus**
Parties Defendant or Respondents

250Mandamus
250IIIJurisdiction, Proceedings, and Relief
250k150Parties Defendant or Respondents

250k151In General
250k151(1)In General

Fact that trial court was not party to purported appeal by plaintiff judges and judicial pensioners from trial court's order denying plaintiffs' motion for determination that their right to interest on salary and pension increases was without substantial controversy was not insuperable obstacle to treating purported appeal as petition for writ of mandate, absent indication that the court as respondent would appear separately or become more than a nominal party. Cal.Rules of Court, Rules 5.1(i), 56(a); West's Ann.Cal.C.C.P. § 1086.

33 Cases that cite this headnote

[9] **Mandamus**
Form, Requisites, and Sufficiency in General

250Mandamus
250IIIJurisdiction, Proceedings, and Relief
250k154Petition or Complaint, or Other Application
250k154(2)Form, Requisites, and Sufficiency in General

Supreme Court should not exercise power to treat purported appeal as petition for writ of mandate except under unusual circumstances.

94 Cases that cite this headnote

[10] **Mandamus**
Form, Requisites, and Sufficiency in General

250Mandamus
250IIIJurisdiction, Proceedings, and Relief
250k154Petition or Complaint, or Other Application
250k154(2)Form, Requisites, and Sufficiency in General

Supreme Court treated purported appeal by judges and judicial pensioners from order of trial court denying their motion for determination that their right to interest on salary and pension increases was without substantial controversy as petition for writ of mandate where record sufficiently demonstrated lack of adequate remedy of law necessary for issuance of the writ, issue of appealability was far from clear in advance, and one issue remaining to be resolved had been thoroughly briefed and argued and all parties strongly urged that Supreme Court decide it rather than dismiss the appeal, and where to dismiss the appeal would have been unnecessarily dilatory and circuitous.

162 Cases that cite this headnote

[11] **Interest**
Judgments Sounding in Damages
Interest
Labor Relations and Employment

219Interest
219IRights and Liabilities in General
219k22Judgments
219k22(6)Judgments Sounding in Damages
219Interest
219IIITime and Computation
219k39Time from Which Interest Runs in General
219k39(2.5)Prejudgment Interest in General
219k39(2.40)Labor Relations and Employment
(Formerly 219k39(2))

Amounts recoverable as wrongfully withheld payments of salary or pensions are "damages" within meaning of statute providing that every person who is entitled to recover damages certain, or capable of being made certain by calculation, and right to recover which is vested in him upon a particular date, is entitled also to recover interest thereon from that day, and interest is recoverable on each salary or pension payment from date it fell due. West's Ann.Cal.Civ.Code § 3287(a).

23 Cases that cite this headnote

[12] **Interest**
Demands Not Liquidated

219Interest
219IRights and Liabilities in General
219k19Demands Not Liquidated
219k19(1)In General

Generally, certainty required of statute providing that every person who is entitled to recover damages certain, or capable of being made certain by calculation, and right to recover which is vested in him upon a particular day is entitled to also recover interest thereon from that day is absent when amounts due turn on disputed facts, but not when dispute is confined to rules governing liability. West's Ann.Cal.Civ.Code § 3287(a).

16 Cases that cite this headnote

[13] **Interest**
Judgments Sounding in Damages

219Interest
219IRights and Liabilities in General
219k22Judgments
219k22(6)Judgments Sounding in Damages

Certainty required of statute providing that every person who is entitled to recover damages certain, or capable of being made certain by calculation, and right to recover which is vested in him upon a particular day is entitled to also recover interest thereon from that day, was present where uncertainty of amount due judges of courts of record and judicial pensioners was either of two readily calculable amounts, which did not depend on any factual uncertainty or dispute but solely on proper answers to questions of law ultimately resolved in civil action. West's Ann.Cal.Gov.Code § 68203; West's Ann.Cal.Civ.Code § 3287(a).

19 Cases that cite this headnote

[14] **States**
Interest

360States
360VClaims Against State
360k171Interest

State, not controller, was "debtor" with respect to judges' and judicial pensioners' claim for interest on salary and pension increases, and thus, exception to statutory right to interest on damages certain where right to recover such damages vested on particular day when debtor is prevented by law from paying the debt did not apply on ground that controller was precluded by constitutional and statutory limitations from drawing money from treasury to pay such debt. West's Ann.Cal.Gov.Code §§ 12440, 68203; West's Ann.Cal.Civ.Code §§ 3287, 3287(a); West's Cal.Const. Art. 3, § 3.5; Art. 16, § 7.

5 Cases that cite this headnote

[15] **States**
Interest

360States
360VClaims Against State
360k171Interest

State is subject to claims of interest under statute providing for recovery of interest on damages certain which vested upon a particular day. West's Ann.Cal.Civ.Code § 3287(a).

Cases that cite this headnote

[16] **Interest**
Default in Payment in General

219Interest
219IRights and Liabilities in General
219k13Default in Payment in General

Amendment to statute governing salaries of judges providing that salaries should be increased according to consumer price index each July 1 and that each increase should not exceed 5%, subsequently declared unconstitutional, did not constitute a "law" that would have prevented state as debtor from paying debts to judges and judicial pensioners on which interest was being claimed. West's Ann.Cal.Gov.Code § 68203; West's Ann.Cal.Civ.Code § 3287(a).

1 Cases that cite this headnote

[17] **Interest**
Default in Payment in General

219Interest
219IRights and Liabilities in General
219k13Default in Payment in General

Although component organs of state government, including legislature, could have made payments due judges and judicial pensioners during period pending final judicial determination of constitutionality of statute governing judicial salaries, it does not necessarily follow that controller during that period could have been judicially compelled to make the payments or that he would incur personal liability for failing to do so. West's Ann.Cal.Gov.Code § 68203; West's Ann.Cal.Civ.Code § 3287(a).

2 Cases that cite this headnote

[18] **Interest**
Judgments

219Interest
219IRights and Liabilities in General
219k22Judgments
219k22(1)In General

Fact that judicial pensions were payable entirely out of judges' retirement fund rather than out of state's general fund did not disentitle judicial pensioners to interest on increases on judicial pensions mandated by *Olson v. Cory I* ; disapproving *Jorgensen v. Cranston*, 211 Cal.App.2d 292, 27 Cal.Rptr. 297, *Willens v. Cory*, 53 Cal.App.3rd 104, 125 Cal.Rptr. 670, and *Gibbons & Reed Co. v. Dept. of Motor Vehicles*, 220 Cal.App.2d 277, 33 Cal.Rptr. 688.

1 Cases that cite this headnote

[19] **Judges**
Right to Compensation in General

227Judges
227IIIRights, Powers, Duties, and Liabilities
227k22Compensation and Fees
227k22(1)Right to Compensation in General

With respect to municipal court judges' compensation, counties function solely as legal subdivision of state having purely ministerial functions, and legislature's power to fix that compensation is immune from any interference or modification by county boards of supervisors or county officials, who have no choice but to pay the compensation out of county funds as ordered by legislature. West's Ann.Cal.Const. Art. 6, § 5(a); Art. 11, § 1(a); West's Ann.Cal.Gov.Code § 23002.

2 Cases that cite this headnote

[20] **Counties**
Interest

104Counties
104XICIaims Against County
104k198Interest

Right to interest on municipal court judge's salary claims was barred neither by duties of county fiscal officers to withhold legally questionable payments until uncertainties were judicially dispelled nor by fact that state had ordered salaries paid out of county funds; since the salaries were prescribed exclusively by legislature, amendment of statute governing judicial salaries, insofar as held inoperative in *Olson v. Cory I*, could not be deemed a "law" that prevented counties from paying the municipal court judicial salary claims. West's Ann.Cal.Const. Art. 6, § 5(a); Art. 11, § 1(a); West's Ann.Cal.Gov.Code §§ 23002, 68203; West's Ann.Cal.Civ.Code § 3287(a).

Cases that cite this headnote

[21] **Interest**
Injunction

219Interest
219IIITime and Computation
219k48Suspension
219k52Injunction

State and counties would not be held liable for interest accruing while preliminary injunction, which ordered controller and county auditors to withhold 25% of payments due judges and judicial pensioners under *Olson v. Cory I*, apparently to secure judges' and judicial pensioners' attorney fees, was in effect, in that the state and counties were "prevented by law," i.e., the injunction, from making such payments. West's Ann.Cal.Gov.Code § 68203; West's Ann.Cal.Civ.Code § 3287(a).

1 Cases that cite this headnote

[22] **Interest**
Default in Payment in General

219Interest
219IRights and Liabilities in General
219k13Default in Payment in General

Statute providing for recovery of interest on damages certain when damages vest upon a particular date relieves debtor of obligation for interest when payment is prevented by law, regardless of equitable considerations such as fact that debtors had use of money in question. West Ann.Cal.Civ.Code § 3287(a).

1 Cases that cite this headnote

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Opinion

REYNOSO, Justice.

Plaintiff judges and judicial pensioners claim interest on the salary and pension increases to which this court held them entitled in *Olson v. Cory* (1980) 27 Cal.3d 532, 178 Cal.Rptr. 568, 636 P.2d 532 (*Olson v. Cory I*). They appeal from the trial court's order denying their motion for a determination that their right to the interest is without substantial controversy.

We reach the following conclusions: The plaintiffs are entitled to interest on amounts due as increases in salaries of judges of courts of record (Cal. Const., art. VI, § 1) and in pensions payable under the Judges' Retirement **396 Law (**724 Gov.Code, § 75000 et seq.).[1] The trial court's order was not appealable; nonetheless, under the unusual circumstances of this case we reach the merits by treating the appeal as a petition for a writ of mandate.

Before being amended in 1976, effective January 1, 1977, Government Code section 68203 (hereafter section 68203) provided that salaries of justices of the Supreme Court and Courts of Appeal and of judges of the superior and municipal courts were to be increased on September 1st of each year in accordance with the California consumer price index.[2] The 1976 amendment provided that the salaries should be increased according to that index each July 1st, beginning with July 1, 1978, and that each increase should not exceed 5 percent.[3]

***848** Plaintiffs brought this action on August 3, 1977, alleging that they were superior and municipal court judges and recipients of pensions under the Judges' Retirement Law and praying for a declaration that the 1976 amendment was unconstitutional and that they therefore were entitled to salary and pension increases in accordance with section 68203 prior to the amendment. The complaint named as defendants the State Controller and the Los Angeles County Auditor-Controller and declared that the action was being brought on behalf of all judges of California courts of record and all retired judges and judges' widows entitled to pensions. By stipulation filed February 17, 1978, the complaint was amended to pray also for damages consisting of salary and retirement benefits due under section 68203 prior to the amendment, together with interest "at the lawful rate" and attorney fees (sought under various theories). On February 21, 1978, the trial court rendered judgment declaring that the 1976 amendment to section 68203 was unconstitutional and reserving jurisdiction over all other matters including class certification, interest, and attorney fees.

*397 *Olson v. Cory I* was filed March 27, 1980, and, after modification, became final on June 27, 1980. The opinion concluded that the 1976 amendment to section 68203 "cannot be constitutionally applied to (1) a judge or justice during any term of office, or unexpired term of office of a predecessor, if the judge or justice served some portion thereof (a 'protected term') prior to 1 January 1977, and (2) a judicial pensioner whose benefits are based on some proportionate amount of the salary of the judge or justice occupying that office." (27 Cal.3d at p. 546, 178 Cal.Rptr. 568, 636 P.2d 532.) To that extent, the judgment was affirmed; in other respects it was reversed.
On April 18, 1980, three municipal court judges filed a complaint in intervention naming as defendants in intervention the auditors or controllers of some thirty counties (in addition to Los Angeles) and asking relief similar to that sought in the principal complaint.

In August and September 1980, at the request of plaintiffs, the trial court enjoined defendants from paying more than 75 percent of the back salaries due under *Olson v. Cory I.* (Such an order is not in **725 the record but is inferred from references in later trial proceedings and in the briefs.) The apparent purpose of the order or orders was to secure payment of plaintiffs' attorney fees.

On October 8, 1980, the Board of Administration of the Public Employees' Retirement System was made a defendant by a stipulation reciting that it had succeeded the Controller, as of July 1, 1979, as administrator of the Judges' Retirement Fund. (See Gov.Code, § 75005, fn. 4, *post.*)

On the same date, October 8, plaintiffs filed a motion for "an order determining that there is no substantial controversy that plaintiffs are entitled to recover interest at the legal rate on the retroactive salary and pension payments due them pursuant to the opinion of the California Supreme Court in this action." The accompanying memorandum stated that the motion was made "pursuant to Code of Civil Procedure section 437c, for an order specifying issues without substantial controversy."

On December 12, 1980, the trial court certified plaintiffs' suit as a class action on behalf of all judges of California courts of record and all judicial pensioners under the Judges' Retirement Law.

The following month, on January 7, 1981, the trial court denied plaintiffs' motion for an order specifying their right to interest as an issue without substantial controversy. It ruled that "no interest is payable for the period prior to June 27, 1980, when [*Olson v. Cory I*] became final" and that "no *398 interest is due on amounts withheld under the court order of September 1980, which amounts cannot be paid until further order of court."

Plaintiffs filed a timely notice of appeal from the trial court's denial of the motion.

APPEALABILITY OF ORDER: TREATING APPEAL AS PETITION FOR WRIT OF MANDATE

[1] Though one of the briefs suggests that the trial court's ruling was not appealable, all the principal defendants, as well as ***849** plaintiffs, urge that we review the ruling on its merits. Nonetheless, since the question of appealability goes to our jurisdiction, we are duty-bound to consider it on our own motion. (*Collins v. Corse* (1936) 8 Cal.2d 123, 64 P.2d 137; *DeGrandchamp v. Texaco,*

Inc. (1979) 100 Cal.App.3d 424, 430, 160 Cal.Rptr. 899.)

[2] The ruling was not a final judgment. Plaintiffs' motion for the ruling was made explicitly under Code of Civil Procedure section 437c, which provides for summary judgments. After prescribing the showing necessary to support a motion for summary judgment, the section provides in subdivision (f): "[I]f it appears that the proof supports the granting of such motion as to some but not all the issues involved in the action, ... the court shall, by order, specify that such issues are without substantial controversy. ... At the trial of the action the issue so specified shall be deemed established and the action shall proceed as to the issues remaining." Subdivision (i) provides: "Except where a separate judgment may properly be awarded in the action, no final judgment shall be entered on a motion for summary judgment prior to the termination of the action, but the final judgment shall, in addition to any matters determined in the action, award judgment as established by the summary proceeding herein provided for."

No judgment was entered on the trial court's order denying the motion, and the record makes clear that further proceedings were contemplated. Thus, plaintiffs' notice of class action, filed December 30, 1980, explains that the complaint sought not only declaratory relief, but also damages consisting of salary and retirement benefits, interest, and attorney fees. The notice characterizes the trial court's 1978 ruling that the 1976 amendment to section 68203 was unconstitutional as "an interlocutory declaratory judgment" and states that this court subsequently "rendered a decision" in *Olson v. Cory I,* reaching conclusions that are explained in detail. The notice further states: "If you are a member of the class who does not request exclusion and you wish to be included in, obtain the benefits ****726** of, and *be* ***399** *bound by the final judgments* entered in this class action, you need do nothing." (Emphasis supplied.)

Thus, it is apparent that plaintiffs anticipated entry of one or more final judgments (i.e., final as to various plaintiffs or sub-classes) subsequent to the ruling from which the present appeal was taken. The ruling therefore was not a final judgment.

Whether the ruling was appealable as an order after judgment is a closer question. Code of Civil Procedure section 904.1, subdivision (b), requires that the order be made after a judgment that was itself appealable. In *Olson v. Cory I,* this court did not consider the appealability of the declaratory judgment that it affirmed in part and reversed in part, and apparently the question of appealability was never raised. This court has held with respect to the finality, and consequent appealability, of declaratory judgments that "[a]s a general test, ... it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory." (*Lyon v. Goss* (1942) 19 Cal.2d 659, 670, 123 P.2d 11.) By this test, the judgment in *Olson v. Cory I* was not appealable since the trial court had expressly reserved jurisdiction to certify the plaintiff class, award past due salary and interest, and award attorney fees and litigation expenses to plaintiffs' counsel.

Appealability appears to have been established, however, under the doctrine of the law of the case. "Generally, the doctrine of law of the case does not extend to points of law which might have been but were not presented and determined in the prior appeal. [Citation.] As an exception to the general rule, the doctrine is ... held applicable to questions not expressly decided but implicitly decided because they were essential to the decision on the prior appeal [citing *****850** *Nevcal Enterprises v. Cal-Neva Lodge, Inc.* (1963) 217 Cal.App.2d 799, 804, 32 Cal.Rptr. 106]." (*Estate of Horman* (1971) 5 Cal.3d 62, 73, 95 Cal.Rptr. 433, 485 P.2d 785; accord: *Wood v. Elling Corp.* (1977) 20 Cal.3d 353, 360, 142 Cal.Rptr. 696, 572 P.2d 755; *Davis v. Edmonds* (1933) 218 Cal. 355, 358–359, 23 P.2d 289.) In *Olson v. Cory I,* the proposition that the declaratory judgment was appealable was "implicitly decided because ... essential to the decision" and therefore became the law of the case under the foregoing rule.

Since, for purposes of this case, the declaratory judgment that plaintiffs were entitled to back salary and pension payments was final and appealable, does it follow that the present ruling denying a declaration of ***400** plaintiffs' right to interest on those payments was an "order made after [an appealable final] judgment" (Code Civ.Proc., § 904.1, subd. (b))?

[3] To be appealable as an order after judgment, the order must either affect the judgment or relate to it by enforcing it or staying its execution. (*Williams v. Thomas* (1980) 108 Cal.App.3d 81, 84, 166 Cal.Rptr. 141; 6 Witkin, Cal.Procedure (2d ed. 1971) Appeal, § 81.) Under that rule, an order denying interest on funds paid into court pursuant to a condemnation judgment has been held appealable as "any order relating to enforcement of a judgment" by analogy to a postjudgment order determining costs. (*Redevelopment Agency v. Goodman* (1975) 53 Cal.App.3d 424, 429, 125 Cal.Rptr. 818.)

[4] [5] [6] Here the trial court's refusal to uphold plaintiffs' rights to interest for purposes of subsequent trial (Code Civ.Proc., § 437c, subds. (f), (i)) was not an order relating to enforcement of a judgment because the declaratory judgment adjudicated in *Olson v. Cory I* was not in itself enforceable. The purpose of declaratory relief is "to enable the parties to shape their conduct so as to avoid a breach." (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 848, 92 Cal.Rptr. 179, 479 P.2d 379.) Though declaratory relief may properly be accompanied by coercive relief (see, e.g., *Staley v. Board of Medical Examiners* (1952) 109 Cal.App.2d 1, 6, 240 P.2d 61), the judgment in *Olson v. Cory I* was purely declaratory. It ****727** contained no enforceable provision, such as one directing a particular party to pay a specified sum to another party. Hence, the trial court's order now before us related not to enforcement of the *Olson v. Cory I* judgment but only to whether there should be a new declaration that plaintiffs have further rights in addition to those declared in the judgment. Accordingly, the order did not affect the judgment or relate to its enforcement and was not appealable as an order after judgment or on any other basis.

[7] It is urged, however, that instead of dismissing the appeal, we treat it as a petition for an extraordinary writ. We are referred to cases in which Courts of Appeal have followed that course. (See *Barnes v. Molino* (1980) 103 Cal.App.3d 46, 51, 162 Cal.Rptr. 786; *People v. Cimarusti* (1978) 81 Cal.App.3d 314, 320, 146 Cal.Rptr. 421; *Estate of Hearst* (1977) 67 Cal.App.3d 777, 781, 136 Cal.Rptr. 821; *Branham v. State Farm Mut. Auto Ins. Co.* (1975) 48 Cal.App.3d 27, 32, 121 Cal.Rptr. 304. Denial of a motion for summary judgment is reviewable by writ of mandate. (*Roman Catholic Archbishop v. Superior Court* (1971) 15 Cal.App.3d 405, 410, 93 Cal.Rptr. 338.) To require the parties to wait for resolution of plaintiffs' interest claim until disposition of all matters yet to be resolved by the trial court might lead to unnecessary trial proceedings since, for example, the award of attorney fees might well be influenced by final determination of ***401** the interest claim. Thus the record sufficiently demonstrates the lack of adequate remedy at law necessary for issuance of the writ.

[8] The records and briefs before us include in substance the elements necessary to a proceeding for writ of mandate. The record consists of an "Appellant's Appendix in Lieu of Clerk's Transcript," and the provisions for sanctions designed to assure its accuracy (Cal.Rules of Court, rule 5.1(i)) are the functional equivalent of the verification required by Code of Civil Procedure section 1086 and rule 56(a). The fact that the trial court is not a party is not an insuperable obstacle since there is no indication that the court as respondent would appear separately or become more *****851** than a nominal party. (*People v. Cimarusti,* supra, 81 Cal.App.3d 314, 320, 146 Cal.Rptr. 421; *U.S. Financial v. Sullivan* (1974) 37 Cal.App.3d 5, 12, fn. 6, 112 Cal.Rptr. 18.)

[9] [10] Though we thus have power to treat the purported appeal as a petition for writ of mandate, we should not exercise that power except under unusual circumstances. Such circumstances are present here. Though we have concluded that the trial court's ruling was not appealable, the reasoning that led us to that conclusion demonstrates that the issue of appealability was far from clear in advance. Moreover, even though the ruling appears from its statutory basis and procedural history to have been made in anticipation of a subsequent trial and judgment, we are assured by plaintiffs, and by counsel speaking for most of the county defendants, that all issues in this litigation have now been resolved except for the one now presented to this court—that of plaintiffs' right to interest. That issue has been thoroughly briefed and argued, and all parties strongly urge that we decide it rather than dismiss the appeal. To dismiss the appeal rather than exercising our power to reach the merits through a mandate proceeding would, under the unusual circumstances before us, be " 'unnecessarily dilatory and circuitous.' " (See *Shepardson v. McLellan* (1963) 59 Cal.2d 83, 88, 27 Cal.Rptr. 884, 378 P.2d 108.) Accordingly, we treat the appeal as a petition for writ of mandate.

CERTAINTY REQUIREMENTS OF CIVIL CODE SECTION 3287, SUBDIVISION (a)

Plaintiffs base their claims to interest on Civil Code section 3287, subdivision (a). It provides: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable ****728** to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal ***402** corporation, public district, public agency, or any political subdivision of the state."

[11] Amounts recoverable as wrongfully withheld payments of salary or pensions are damages within the meaning of these provisions. (*Sanders v. City of Los*

Angeles (1970) 3 Cal.3d 252, 262–263, 90 Cal.Rptr. 169, 475 P.2d 201; *Benson v. City of Los Angeles* (1963) 60 Cal.2d 355, 365–366, 33 Cal.Rptr. 257, 384 P.2d 649; see also *Tripp v. Swoap* (1976) 17 Cal.3d 671, 681–683, 131 Cal.Rptr. 789, 552 P.2d 749.) Interest is recoverable on each salary or pension payment from the date it fell due. (*Mass v. Board of Education* (1964) 61 Cal.2d 612, 624–625, 39 Cal.Rptr. 739, 394 P.2d 579.)

Defendants contend that plaintiffs' salary and pension claims were not "damages certain, or capable of being made certain by calculation" (Civ.Code, § 3287, subd. (a)). They argue that until *Olson v. Cory I* was filed in its final form, there was uncertainty over (1) the identity of the judges and pensioners entitled to back salary and pension payments and (2) the amounts of each of those payments.

[12] [13] Generally, the certainty required of Civil Code section 3287, subdivision (a), is absent when the amounts due turn on disputed facts, but not when the dispute is confined to the rules governing liability. (*Esgro Central, Inc. v. General Ins. Co.* (1971) 20 Cal.App.3d 1054, 1060–1063, 98 Cal.Rptr. 153; *McConnell v. Pacific Mutual Life Ins. Co.* (1962) 205 Cal.App.2d 469, 477–480, 24 Cal.Rptr. 5.) Here, the amount due each member of the plaintiff class—judges of courts of record and judicial pensioners—at any point in time between January 1, 1977, and June 27, 1980 (when *Olson v. Cory I* became final) was either of two readily calculable amounts: (1) the salary or pension due under section 68203 as it read before the 1976 amendment or (2) that due under the section as amended. The question whether to pay any judge or pensioner under one ***852** version of the statute or the other did not depend on any factual uncertainty or dispute but solely on the proper answers to the questions of law ultimately resolved in *Olson v. Cory I.* Uncertainty over those legal issues did not prevent the amounts due from being "certain or capable of being made certain by calculation" (Civ.Code, § 3287, subd. (a)).

"PREVENTED BY LAW" EXCEPTION: APPELLATE AND SUPERIOR COURT JUDGES

The right to interest under Civil Code section 3287, subdivision (a), is subject to an express exception: the right arises "except during such time as the debtor is prevented by law, or by the act of the creditor from paying *403 the debt." The Controller contends that this exception precludes recovery of any interest on salaries or pensions withheld by him before, and contrary to, this court's 1980 decision in *Olson v. Cory I* that the 1976 amendment to section 68203 was invalid as to certain judges and pensioners during certain periods. He relies on constitutional and statutory limitations on his power as a state official. Thus, article XVI, section 7, of the Constitution provides: "Money may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn warrant." Government Code section 12440 provides: "The Controller shall draw warrants on the Treasurer for the payment of money directed by law to be paid out of the treasury; but a warrant shall not be drawn unless authorized by law, and unless unexhausted specific appropriations provided by law are available to meet it." The Controller also contends that he was precluded from giving effect to the 1976 amendment of section 68203 by article III, section 3.5 of the Constitution, adopted June 6, 1978, which provides that an "administrative agency" has no power to refuse to enforce a statute on grounds of constitutional invalidity unless an appellate court has declared it unconstitutional.

[14] Whatever the effect of these restrictions on the Controller's power to pay salary or pension increases in disregard of a **729 statute that was subsequently held unconstitutional, the restrictions are not determinative here. The exception provided by Civil Code section 3287, on which he relies, applies only when the "debtor" is prevented by law from paying the debt. The Controller is not the debtor. The 1976 amendment of section 68203 was held invalid because it violated the contractual rights of judges and pensioners not against the Controller but against the State of California. "When agreements of employment between the state and public employees have been adopted by governing bodies, such agreements are binding and constitutionally protected. [Citation.] In the instant case the Legislature in 1969 adopted the full cost-of-living increase provision, *binding the state* to pay persons employed at the represented compensation for their terms of office." (*Olson v. Cory I,* supra, 27 Cal.3d 532, 538, 178 Cal.Rptr. 568, 636 P.2d 532, emphasis supplied.)

[15] The state is therefore the debtor; moreover, it is subject to claims of interest under Civil Code section 3287, subdivision (a), which states that it "is applicable to recovery of damages and interest from any such debtor, including the state, or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state."

[16] The only "law" that might plausibly be claimed to have prevented the state as debtor from paying the debts to plaintiffs on which interest is *404 now claimed was the 1976 amendment to section 68203. But the adoption

of that amendment was an act of the state itself that conflicted with its constitutional obligations toward plaintiffs. Regardless of the amendment's effect on the duties of the Controller and other public officials, it would be anomalous to hold that legislation voluntarily promulgated by the debtor itself constitutes a "law" by which the debtor is "prevented" from fulfilling its overriding obligations.

***853** This conclusion is consistent with *Benson v. City of Los Angeles* (1963) 60 Cal.2d 355, 33 Cal.Rptr. 257, 384 P.2d 649, where a claimant to widow's pension benefits was awarded interest notwithstanding the defendant city's contention that a city charter amendment purporting to deny the benefits caused the city to be "prevented by law" from paying them. Emphasizing prejudgment uncertainty over the charter amendment's constitutionality, this court held in effect that the city could not use its own charter provision as a defense to the claim of interest under Civil Code section 3287. Though plaintiffs here cite an Attorney General's opinion (60 Ops.Cal.Atty.Gen. 153 (1977)) to show preexisting doubts over the validity of the 1976 amendment to section 68203, plaintiffs' right to interest does not turn on their ability to establish that any such doubts were brought to the attention of one or more state officials. An invalid statute voluntarily enacted and promulgated by the state is not a defense to its obligation to pay interest under Civil Code section 3287, subdivision (a).

[17] The Controller expresses concern that to exclude a constitutionally defective statute as the source of a "prevented-by-law" defense to a claim for interest accruing against the state prior to the final judicial determination of unconstitutionality may put him in the untenable position of having to foresee at his own risk what that determination will be. But questions of the Controller's duties to pay the disputed amounts during that period are distinct from the obligation of the *state* to make such payments. A parallel distinction was made in *California State Employees' Assn. v. Cory* (1981) 123 Cal.App.3d 888, 176 Cal.Rptr. 904. There, state employees sought a writ of mandate to compel the Controller to pay interest on lump sum salary payments that had accrued while the constitutionality of the bill appropriating funds for the payments was litigated and finally upheld by this court (see *Jarvis v. Cory* (1980) 28 Cal.3d 562, 170 Cal.Rptr. 11, 620 P.2d 598). The Controller conceded, and the Court of Appeal apparently agreed, that the plaintiff employees had a right to the interest under Civil Code section 3287. (123 Cal.App.3d at pp. 891, 895, 176 Cal.Rptr. 904.) Nonetheless, it was held that the Controller could **730 not be compelled by mandate to pay the interest in the absence of a legislative appropriation of the amount required. So here, we have concluded that the plaintiffs' rights to interest under Civil Code section 3287 cannot be defeated by a claim that the State of California was prevented *405 by law from paying the full amounts due plaintiffs during that period. That conclusion implies that component organs of state government, including the Legislature, could have made the payments. It does not necessarily follow that the Controller during that period could have been judicially compelled to make the payments or that he incurred personal liability for failing to do so.

INTEREST ON JUDICIAL PENSIONERS' CLAIMS

[18] Defendants contend that plaintiffs are not entitled to interest on the increases in judicial pensions mandated by *Olson v. Cory I* because those pensions were and are payable entirely out of the Judges' Retirement Fund (Gov.Code, § 75100). They rely on *Jorgensen v. Cranston* (1962) 211 Cal.App.2d 292, 27 Cal.Rptr. 297, and *Willens v. Cory* (1975) 53 Cal.App.3d 104, 125 Cal.Rptr. 670, holding that the right to interest against the state or its subdivisions under Civil Code section 3287 does not apply to "claims against public retirement funds [such as the Judges' Retirement Fund] reasonably challenged by the State Controller" (*Jorgensen,* 211 Cal.App.2d at p. 302, 27 Cal.Rptr. 297, quoted and followed in *Willens,* 53 Cal.App.3d at p. 106, 125 Cal.Rptr. 670). A legislative intent to exclude such claims from Civil Code section 3287 was inferred from the perceived duty of the Controller, as trustee of the Judges' Retirement Fund, to resolve any doubts about claims against the fund before making payment (citing Rest.2d Trusts, § 207, com. c, at p. 470).[4]

***854** This court, however, has not adopted any such special-fund exception to the right of interest under Civil Code section 3287. In *Benson v. City of Los Angeles,* supra, 60 Cal.2d 355, 365, 33 Cal.Rptr. 257, 384 P.2d 649, we simply distinguished *Jorgensen* as inapplicable to salary or pension obligations payable out of the public debtor's general fund by observing that "the judges' retirement fund is a special trust fund and as such *may* not fall within the meaning of section 3287" (emphasis added). In *Mass v. Board of Education,* supra, 61 Cal.2d 612, 39 Cal.Rptr. 739, 394 P.2d 579, we upheld a claim for interest on wrongfully withheld salary "since it involves recovery upon a general underlying monetary obligation" (id. at p. 626, 39 Cal.Rptr. 739, 394 P.2d 579) and noted that *Jorgensen* and other cases "may be distinguished on the narrow ground that they involved mandamus actions against a trustee of a special fund." (Id.

at p. 625, fn. 8, 39 Cal.Rptr. 739, 394 P.2d 579.) Recoverability of interest on judicial pension claims under Civil Code section 3287 was thus left an open question in this court.

*406 Nothing in the wording of Civil Code section 3287 suggests that the right to recover interest from the state varies in accordance with the particular fund out of which the underlying obligation was payable. As explained, we have concluded that even the right to interest on salary increases payable out of the state's general fund is not nullified or diminished by any obligation that the Controller may have to refrain from paying apparent debts of the state that are clouded by legal uncertainties until those uncertainties are removed. Thus, the existence of such an obligation with respect to the Judges' Retirement Fund, relied on in *Jorgensen,* does not establish any difference between the right to interest on debts payable out of that fund and the right to interest on debts payable out of the state's general fund. Accordingly, plaintiffs are entitled to interest on judicial pension payments adjudged in *Olson v. Cory I.* Statements to the contrary in *Jorgensen v. Cranston,* **731 supra, 211 Cal.App.2d 292, 300–302, 27 Cal.Rptr. 297, *Willens v. Cory,* supra, 53 Cal.App.3d 104, 125 Cal.Rptr. 670, and *Gibbons & Reed Co. v. Dept. of Motor Vehicles* (1963) 220 Cal.App.2d 277, 289, 33 Cal.Rptr. 688, are disapproved.

INTEREST ON MUNICIPAL COURT JUDICIAL SALARY CLAIMS

Salaries of municipal court judges, unlike those of other courts of record, are paid solely out of county funds. (Gov.Code, § 71220.) The county-auditor defendants contend that therefore the increases in municipal court salaries ordered in *Olson v. Cory I* were county obligations on which the county need not pay prejudgment interest accruing before that decision was rendered because during that time they were "prevented by law" (Civ.Code, § 3287) from paying the increases. They rely on *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 152 Cal.Rptr. 903, 591 P.2d 1.

In *Sonoma,* this court held that a statute that purported to nullify wage increase agreements between local public entities (including counties) and their employees was an unconstitutional impairment of the obligation of contract, and we ordered the increases paid. The plaintiffs' claim to interest on those payments, however, was denied on the ground that the local entities were "prevented by law ... from paying the debt" (Civ.Code, § 3287) on account of the serious financial hardship, through withholding of state funds, provided by the unconstitutional statute as a penalty for exceeding its guidelines.

The present case resembles *Sonoma* in that the counties were powerless to contravene an invalid statute in order to pay the debts in question before the statute's invalidity was judicially determined. But in *Sonoma* the debts were created by contracts independently entered into by the counties, whereas here the municipal court judges' salary claims were based wholly on state *407 statutes (Gov.Code, §§ 68202–68203) enacted pursuant to the Legislature's sole constitutional power to prescribe the number and compensation of municipal court judges (Cal. Const., art. VI, §§ 5, 19). The increases in such compensation, on which interest is now claimed, were held owing in *Olson v. Cory I* because section 68202 prior ***855 to its 1976 amendment constituted a contract between municipal court judges and the *state.*

"A county is the largest political division of the State having corporate powers." (Gov.Code, § 23000.) Counties have corporate powers conferred by the Constitution (e.g., art. XI, §§ 1(b), 3, 4) and by statute (e.g., Gov.Code, § 23003, et seq.). Thus, in *Sonoma* the wage increase claims on which interest was denied emanated from the powers of the counties' governing bodies to provide for the compensation of county employees (Cal. Const., art. XI, § 1, subd. (b)) through collective bargaining contracts with employee organizations (Gov.Code, § 3500, et seq.; *Sonoma,* 23 Cal.3d at p. 304, 152 Cal.Rptr. 903, 591 P.2d 1).

[19] With respect to municipal court judges' compensation, however, counties function solely as "legal subdivisions of the State" (Cal. Const., art. XI, § 1, subd. (a); Gov.Code, § 23002) having purely ministerial functions. The Legislature's power to fix that compensation (Cal. Const., art. VI, §§ 5, subd. (a), 19) is immune from any interference or modification by county boards of supervisors or county officials, who have no choice but to pay the compensation out of county funds as ordered by the Legislature (Gov.Code, § 71220).

[20] Earlier in this opinion, we concluded that the liability for interest on state-paid judicial salary claims is not barred by any right or duty of the Controller to withhold payments that are clouded by legal uncertainty, and that such liability for interest on judicial pensioners' claims is not barred by the fact that the pensions are payable out of a special retirement fund. In light of those conclusions, we hold that the right to interest on municipal court judges' salary claims is barred neither by duties of county fiscal officers to withhold legally questionable payments

until the uncertainties are judicially dispelled nor by **732 the fact that the state has ordered the salaries paid out of county funds. Since the salaries are prescribed exclusively by the Legislature, the Legislature's 1976 amendment of section 68203, insofar as held inoperative in *Olson v. Cory I,* cannot be deemed a "law" that prevented counties from paying the municipal court judicial salary claims.

EFFECT OF PRELIMINARY INJUNCTION

[21] [22] As noted earlier the trial court granted plaintiffs a preliminary injunction by which the Controller and county auditors were ordered to withhold 25 *408 percent of the payments due under *Olson v. Cory I,* apparently to secure plaintiffs' attorney fees. As to this 25 percent, the state and counties clearly were "prevented by law," i.e., the injunction, from making such payments and so cannot be held liable for interest accruing while the injunction is in effect. Plaintiffs contend they are equitably entitled to such interest because the debtors have had use of the money. Civil Code section 3287, however, relieves debtors of the obligation for interest when payment is prevented by law, regardless of such equitable considerations. Plaintiffs, of course, do not and could not dispute the validity of the injunction which they themselves obtained.

Let a peremptory writ of mandate issue, directing the trial court to vacate its order denying plaintiffs' motion for an order specifying that plaintiffs' right to interest is an issue without substantial controversy and to make a different order consistent with this opinion.

The parties shall bear their own costs.

MOSK, RICHARDSON, KAUS, GRODIN and EVANS,* JJ., concur.

BIRD, Chief Justice, concurring.

Under the compulsion of *Olson v. Cory* (1980) 27 Cal.3d 532, 178 Cal.Rptr. 568, 636 P.2d 532 (*Olson v. Cory I*), I concur in Justice Reynoso's well-reasoned opinion in this case.

However, I believe that *Olson v. Cory I* was wrongly decided, and I view that opinion as a legal disaster. My concurrence in this opinion is not meant to imply my approval of any portion of the decision in *Olson v. Cory I.*

Parallel Citations

35 Cal.3d 390, 673 P.2d 720

Footnotes

1 To avoid any possibility of a disqualifying conflict of interest, each member of this court hearing this case has waived all right to receive any of the interest payments sought herein by plaintiffs.

2 Before the 1976 amendment, section 68203 provided: "... [o]n the effective date of the 1969 amendments to this section and on September 1 of each year thereafter the salary of each justice and judge named in Sections 68200 and 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year." (Stats.1969, ch. 1507, § 1.)

3 As of January 1, 1977, section 68203 provided: "On July 1, 1978, and on July 1 of each year thereafter the salary of each justice and judge named in Sections 68200 to 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year, but not to exceed five percent (5%)." (Stats.1976, ch. 1183, § 4.)

4 As of July 1, 1979, most of the Controller's responsibilities for the fund were assumed by the Board of Administration of the Public Employees' Retirement Fund. All payments from the fund are "made upon warrants drawn by the State Controller upon demands by" that board. (Gov.Code, § 75005.)

* Assigned by the Chairperson of the Judicial Council.

EXHIBIT 5

Hittle v. Santa Barbara County Employees Retirement Assn.
Supreme Court of California. | August 5, 1985 | 39 Cal.3d 374 | 703 P.2d 73

Hittle v. Santa Barbara County Employees Retirement Assn.

Supreme Court of California. | August 5, 1985 | 39 Cal.3d 374 | 703 P.2d 73

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Outline

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Montisano v. San Mateo County Employees Retirement Association, Cal.App. 1 Dist., October 24, 2014

39 Cal.3d 374
Supreme Court of California.

William T. HITTLE, Plaintiff and Appellant,
v.
SANTA BARBARA COUNTY EMPLOYEES RETIREMENT ASSOCIATION, Defendant and Respondent.

No. L.A. No. 31931. | Aug. 5, 1985.

Former member of county employees' retirement system filed a petition seeking a writ of mandate to require the system to allow him to redeposit his retirement contributions and reinstate him as a member with full rights to apply for disability retirement. The Superior Court, Santa Barbara County, Patrick L. McMahon, J., denied the petition. Appeal was taken. The Supreme Court, Reynoso, J., held that: (1) the petition for a writ of mandate was timely; (2) there was no substantial evidence to support the conclusion that the former member's withdrawal of his retirement contributions constituted a knowing and valid waiver of his right to apply for disability retirement and, therefore, the denial of the request for reinstatement in order to file an application for disability retirement constituted a prejudicial abuse of discretion; and (3) the system did not fulfill its fiduciary duty to the former member to deal fairly and in good faith.

Judgment reversed and cause remanded with directions.

Kaus, J., concurred with opinion.

Lucas, J., concurred in part and dissented in part with opinion.

West Headnotes (13)

[1] **Counties**
Pensions and benefits

104Counties
104IIIOfficers and Agents
104k68Compensation
104k69.2Pensions and benefits
(Formerly 104k69(3))

Procedure contained in bylaws of county employees' retirement system requiring that, when application for benefits has been rejected by retirement board, board notify applicant that he or she is entitled to administrative hearing upon request is applicable to situation in which "prior" members may seek reinstatement in order to apply for disability retirement or challenge decision denying reinstatement, even though bylaws did not expressly provide for that situation.

5 Cases that cite this headnote

[2] **Mandamus**
Counties or towns and their boards or officers

250Mandamus
250INature and Grounds in General
250k3Existence and Adequacy of Other Remedy in General
250k3(2)Remedy at Law
250k3(5)Counties or towns and their boards or officers

Former member of county employees' retirement system who requested reinstatement for purposes of seeking disability retirement was excused from exhausting his administrative remedies where he repeatedly sought relief from appropriate administrative officials before filing action seeking writ of mandate and where retirement board did not advise former member that any administrative review procedure was available to him when it formally rejected his application.

10 Cases that cite this headnote

[3] **Counties**
Pensions and benefits

104Counties
104IIIOfficers and Agents

104k68Compensation
104k69.2Pensions and benefits
(Formerly 104k69(3))

Section of county employees' retirement system bylaws requiring that petition for judicial review of proceedings before retirement board be filed within 60 days from date notice of board's decision is delivered to party or applicant, or served by mail upon him or his attorney, violated statute [West's Ann.Cal.C.C.P. § 1094.6] permitting local agencies to adopt either 90–day statute of limitations or remain subject to longer statutory limitations periods governing regular civil actions.

4 Cases that cite this headnote

[4] **Counties**
Pensions and benefits

104Counties
104IIIOfficers and Agents
104k68Compensation
104k69.2Pensions and benefits
(Formerly 104k69(3))

County employees' retirement system exceeded its authority in adopting and seeking to apply 60–day limitation period during which judicial review of its decisions could be sought and shorter than 90–day statute of limitations could not be justified under exception to statute [West's Ann.Cal.C.C.P. § 1094.6] allowing local agencies to apply shorter than 90–day limitation period only if shorter statute of limitation is a state or federal law.

5 Cases that cite this headnote

[5] **Mandamus**
Time to Sue, Limitations, and Laches

250Mandamus
250IIIJurisdiction, Proceedings, and Relief
250k143Time to Sue, Limitations, and Laches
250k143(1)In general

Where county employees' retirement system did not adopt 90–day limitations period authorized by statute [West's Ann.Cal.C.C.P. § 1094.6], general statutes of limitation for commencement of civil actions governed and, therefore, former member's petition for writ of mandate in which he requested reinstatement for purposes of seeking disability retirement was timely filed where it was filed within 85 days of retirement board's decision, even though system's bylaws provided for 60–day statute of limitations.

5 Cases that cite this headnote

[6] **Mandamus**
Scope and extent in general

250Mandamus
250IIIJurisdiction, Proceedings, and Relief
250k187Appeal and Error
250k187.9Review
250k187.9(1)Scope and extent in general

Ordinarily, decision of trial court that has employed the independent judgment test in an administrative mandate proceeding will be reviewed on appeal pursuant to substantial evidence test.

4 Cases that cite this headnote

[7] **Counties**
Pensions and benefits

104Counties
104IIIOfficers and Agents
104k68Compensation
104k69.2Pensions and benefits
(Formerly 104k69(3))

Withdrawal by former member from county employees' retirement system of his retirement contributions could not be deemed to constitute valid waiver of his right to apply for disability retirement where there was no substantial evidence to support determination that association adequately informed member of existence of his right to apply for disability retirement when he withdrew his retirement

contributions. West's Ann.Cal.Gov.Code §§ 31721, 31727.4.

7 Cases that cite this headnote

[8] **Counties**
Pensions and benefits

104Counties
104IIIOfficers and Agents
104k68Compensation
104k69.2Pensions and benefits
(Formerly 104k69(3))

There was no substantial evidence to support determination that former member of county employees' retirement system was knowledgeable of his right to apply for disability retirement when he withdrew his retirement contributions where employee stated that he was not aware that he might qualify for disability retirement and, had he been aware of that fact, he would not have considered withdrawing his contributions, and disposition of retirement contribution forms set forth only two options, withdrawal of contributions or deferred retirement, for which employee was not eligible. West's Ann.Cal.Gov.Code §§ 31721, 31727.4.

1 Cases that cite this headnote

[9] **Labor and Employment**
Plan as contract

231HLabor and Employment
231HVIIPension and Benefit Plans
231HVII(B)Plans in General
231Hk412Plan as contract
(Formerly 296k26, 255k78.1(5) Master and Servant)

Employee who serves under pension plan acquires vested contractual right to pension.

2 Cases that cite this headnote

[10] **Trusts**
Transactions Creating or Operating as Trusts in General

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k30.5Transactions Creating or Operating as Trusts in General
390k30.5(1)In general
(Formerly 390k301/2(1))

Officers of county employees' retirement system, by acceptance of their appointments, were "voluntary trustees" under sections [West's Ann.Cal.Civ.Code §§ 2216, 2222] defining voluntary trust and creation of voluntary trust as to trustee and, as such, were charged with fiduciary relationship imposed by section [West's Ann.Cal.Civ.Code § 2228] governing trustee's good-faith obligation.

3 Cases that cite this headnote

[11] **Counties**
Pensions and benefits

104Counties
104IIIOfficers and Agents
104k68Compensation
104k69.2Pensions and benefits
(Formerly 104k69(3))

County employees' retirement system did not fulfill its fiduciary duty to former member to deal fairly and in good faith when it used obscure handwritten notation on form to indicate to member that he should not withdraw his disability retirement contributions if he intended to file for disability retirement and, thus, means by which system sought to inform member of his options in disposing of his retirement contributions were tantamount to misrepresentation and concealment, however "slight," prohibited by section [West's Ann.Cal.Civ.Code § 2228] imposing obligation to act in good faith.

11 Cases that cite this headnote

[12] **Counties**
Pensions and benefits

104Counties
104IIIOfficers and Agents
104k68Compensation
104k69.2Pensions and benefits
(Formerly 104k69(3))

Where no reference to disability retirement was contained in either form letter or "Distribution of Retirement Contribution" form which county employees' retirement system sent to former member to provide for distribution of his retirement contributions, there was only obscure handwritten notation informing employee of his option to apply for disability retirement and form letter merely invited retiring employee to contact system if any additional information was required, it could be presumed under statute [West's Ann.Cal.Civ.Code § 2235] governing transactions between trustees and beneficiaries, that advantage to system resulting from member's choice to withdraw his retirement contributions, rather than seek lifetime allowance, was gained without sufficient consideration and under undue influence.

1 Cases that cite this headnote

[13] **Labor and Employment**
Summary Plan Description

231HLabor and Employment
231HVIIPension and Benefit Plans
231HVII(C)Fiduciaries and Trustees
231Hk479Notice and Disclosure Requirements
231Hk483Summary Plan Description
231Hk483(1)In general
(Formerly 296k47, 255k78.1(7) Master and Servant)

If booklet provided employee at time he becomes member of pension plan fully and fairly describes plan and its various options and procedures, and copies are made available, obligation of trustees toward terminating employee may be satisfied by appropriate reference to booklet itself, supplemented by provisions of forms pertaining to all available choices.

7 Cases that cite this headnote

Attorneys and Law Firms

***735 **75 *379** James R. Christiansen, Ronald E. Williford and Haws, Record & Williford, Santa Barbara, for plaintiff and appellant.

***380** Adrian Kuyper, Santa Ana, and Kenneth L. Nelson, County Counsel, and William R. Allen, Deputy County Counsel, Santa Barbara, for defendant and respondent.

Adrian Kuyper, County Counsel (Orange), and Donald H. Rubin, Deputy County Counsel, Santa Ana, as amici curiae for defendant and respondent.

Opinion

REYNOSO, Justice.

We are asked to decide whether the decision of the Santa Barbara County Employees Retirement Association (hereafter SBCERA or Association) denying the request of William T. Hittle to be reinstated as a member of the Association for purposes of seeking disability retirement was properly upheld by the Santa Barbara County Superior Court. Specifically, we must decide whether Hittle waived his right to apply for disability retirement upon the withdrawal of his retirement contributions from the Association, and whether his petition for writ of mandate before the trial court was timely filed.

While it is well established that a county employee may apply for disability retirement only if he or she is a member of the county employees' retirement association (see Gov.Code, § 31720 et seq.; *Dodosh v. County of Orange* (1981) 127 Cal.App.3d 936, 179 Cal.Rptr. 804), we conclude that the termination of such membership by the withdrawal of retirement contributions can be enforced only upon a showing that the decision was an informed one. We also conclude that Hittle's petition for writ of mandate was timely filed.

I.

Hittle began his employment as a heavy truck operator with the Santa Barbara County Public Works Department

in July 1977. He became a member of the Association **76 the following month. (See Gov.Code, § 31552.)

In September 1977, Hittle sustained a lower back injury while at work when he slipped as he dismounted from his truck.[1] His treating chiropractor, Dr. Richard Bluhm, authorized him to return to work on June 21, 1978. *381 However, within a week, on June 28, 1978, a second chiropractor, Dr. Ronald Kemp, recommended to Hittle that he not return to work until the last part of August, when he would be reexamined. On August 14, 1978, an orthopedic surgeon, Dr. W. Gordon Smith, reported to Hittle's attorney that Hittle was "[a]t the present time ... totally disabled as a direct result of his industrial injury of September 21, 1977." The following ***736 month, on September 8, 1978, a doctor employed by Santa Barbara County, Dr. Dean Smith, reported to Santa Barbara County Special Services[2] that "as strenuous as [Hittle] described his work as a truck driver, it would be unrealistic to think that he would ever be able to return to that occupation."[3]

Meanwhile, Hittle had not reported for work after Dr. Bluhm's authorization, nor responded to a notice that his absence following this authorization provided grounds for termination under the county's civil service rules. SBCERA thereafter sent Hittle two form letters, in August and September 1978, notifying him that his contributions ($187.49) would revert to the retirement system fund after five years if he failed to provide for their disposition. These letters provided in full:

"According to our records, you have terminated your full time employment and have money on deposit with the Santa Barbara County Employees Retirement Association. [¶] *Unless you file an allowable deferred retirement election, you must claim a refund* of your contributions and interest within 5 years from the date of this notice, or such money will be deposited in and become a part of the fund of the retirement system. Thereafter, the fund shall not be liable to you for any portion of your contributions and interest. [¶] *Enclosed is a form for your use* in advising us as to the disposition of your retirement account. Please complete and return promptly. Contact our office if any additional information is required." (Emphasis added.)

The first of these letters was dated August 22, 1978, and enclosed a form entitled "Disposition of Retirement Contribution." Consistent with the letter, this form provided two options: (1) withdrawal from SBCERA and a complete refund of contributions and interest, *or* (2) for employees who had at least five years service or were transferring to a reciprocating retirement system, a deferred retirement election.

*382 The second letter was dated September 29, 1978, three weeks after Santa Barbara County Special Services had received Dr. Dean Smith's letter indicating that it would be unrealistic for Hittle to return to his job. This second form letter bore the following handwritten notation: "Dear Mr. Hittle—if you have filed or intend to file for *disability retirement* you should not withdraw the above contribution. C. Bolt." (Emphasis added.) The option of filing for disability retirement was not set forth on the form entitled "Disposition of Retirement Contribution."

Limiting himself to the options provided on the "Disposition of Retirement Contribution" form, Hittle requested a refund of his retirement contributions by so indicating on the form, which he executed on October 4, 1978. Hittle received a warrant **77 refunding him the amount of $187.49 on October 12, 1978.

Two and one-half years later, Hittle learned that he may have been eligible for disability retirement at the time he withdrew his contributions. On March 17, 1981, his attorney submitted a disability retirement application to SBCERA on Hittle's behalf. Apparently receiving no response, Hittle's attorney wrote to the county personnel director on June 1, 1981. He requested rescission of his client's "unjustified termination" and reinstatement of his benefits upon Hittle's return of his retirement contributions. The letter indicated that at the time Hittle was released by his chiropractor to return to work he was still "totally temporarily disabled." Enclosed were the reports of Drs. Kemp, W. Gordon Smith, and Strait.

The personnel director referred this letter to the director of the public works ***737 department. In letters dated June 22, and June 26, 1981, the director rejected Hittle's request on the basis that the additional medical reports did not provide timely satisfactory evidence of good cause for Hittle's absence. The director further stated that he continued to rely on the medical report of Dr. Bluhm, submitted by Hittle at the time of his termination.

On July 30, 1981, Hittle's attorney wrote a letter to the county treasurer, offering to return to SBCERA his client's contributions plus interest, in return for reinstatement of his right to request disability retirement. In a one-sentence letter dated August 20, 1981, the county treasurer notified Hittle's attorney that the retirement board had denied "your request for Mr. Hittle to redeposit his retirement contributions so that he might apply for a disability retirement."

A month and a half later, on September 15, 1981, Hittle's attorney wrote to the assistant county treasurer requesting reconsideration by the retirement *383 board of its decision. Enclosed were his client's declaration, the medical reports of several doctors (including each of those named above), and a formal points and authorities. On November 19, 1981, the assistant county treasurer, on behalf of SBCERA, replied simply that "[t]he motion was made seconded and passed that the Retirement Board would not accept the application of William T. Hittle for Service Connected Disability Retirement."

Hittle sought judicial review 85 days following the denial of his request for reconsideration. Pursuant to a petition for writ of mandate (Code Civ.Proc., § 1094.5), Hittle sought an order requiring SBCERA to allow him to redeposit his retirement contributions and to reinstate him as a SBCERA member with full rights to apply for disability retirement.

After reviewing the administrative record and hearing the arguments of counsel, the trial court exercised its independent judgment to determine whether the weight of the evidence supported the agency's findings. (Citing *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 112 Cal.Rptr. 805, 520 P.2d 29.) The trial court held that the evidence did not support Hittle's assertion that he was ignorant of his rights to file for disability retirement when he withdrew his contributions, because respondent had placed him on "specific notice" of these rights by its September 29, 1978, letter. The trial court found that once Hittle withdrew his funds from SBCERA he was no longer one of its "members," and thus not entitled to file an application for disability retirement with that system. (Citing *Dodosh v. County of Orange,* supra, 127 Cal.App.3d 936, 938, 179 Cal.Rptr. 804.) The trial court also concluded that SBCERA had not committed a prejudicial abuse of discretion in denying Hittle's request to regain his membership. Finally, the trial court held that as a "party" (within the definition of the SBCERA by-laws, art. IX, § B(2)) seeking to reenter the retirement system, Hittle was bound by the 60-day time limit for judicial review provided by article IX, section R of the SBCERA By-Laws, and that his petition for writ of mandate was therefore untimely. Accordingly, **78 the trial court entered judgment denying the petition for writ of mandate.

On appeal, Hittle contends that (1) his petition for writ of mandate was timely filed with the trial court, and (2) this court should independently weigh the evidence to conclude that (3) he did not knowingly waive his right to disability retirement at the time he withdrew his retirement contributions, primarily because SBCERA did not fulfill its fiduciary duty to disclose to him this option.

***384 II.**

Though the issue of exhaustion of administrative remedies is not raised by the parties, it is a condition to the court's jurisdiction which must be addressed before turning to petitioner's contentions. (See, Deering, Cal. Administrative Mandamus (Cont.Ed. Bar 1966) § 6.18, p. 103, and cases cited therein.)

***738 [1] While the SBCERA by-laws do not expressly provide a procedure by which "prior" members may seek reinstatement in order to apply for disability retirement, or challenge a decision denying reinstatement, they provide generally "a procedure for acting upon applications for rights, benefits and privileges under the County Employees Retirement Law of 1937 ..." (Art. IX, § A.) This procedure requires that when an application for benefits has been rejected by the retirement board, it notify the applicant that he or she is entitled to an administrative hearing upon request. We see no reason why this procedure should not apply to permit an application by an individual who claims that his withdrawal of membership from the Association was based on SBCERA's failure to properly notify him of his rights and options within the system.[4]

[2] We conclude, however, that Hittle was excused from exhausting this available administrative remedy. Hittle repeatedly sought relief from the appropriate administrative officials before filing this action in the superior court. Finally, when the board formally rejected Hittle's application, it did not advise him that any additional administrative review procedure was available to him. Under these circumstances, SBCERA could not—and does not—claim that Hittle's action should be barred by the exhaustion of remedies doctrine. (See *Westlake Community Hosp. v. Superior Court,* supra, 17 Cal.3d at pp. 477–478, 131 Cal.Rptr. 90, 551 P.2d 410.)

***385** Thus, we conclude that Hittle's petition for writ of mandate before the trial court was not barred by a failure to exhaust administrative remedies. We now turn to an examination of petitioner's contentions.

A. *Statute of Limitations for Seeking Judicial Review*

Hittle contends that the 60-day limit for seeking judicial review specified in article IX, section R of the SBCERA

by-laws (hereafter, Section R) constitutes a private statute of limitations that is contrary to law and therefore void.[5] He asserts that **79 his petition for writ of mandate, filed with the trial court 85 days after SBCERA's denial of his request for reconsideration, was timely. We agree.

[3] Section R, adopted by SBCERA on July 16, 1980, provides: "In those cases where the party or applicant is entitled to a judicial review of the proceedings before this Board, the petition to the court shall be filed within sixty (60) days from the date the notice of this Board's decision is delivered to the party or applicant, or served by mail upon him or his attorney."

This provision is contrary to the express provisions of Code of Civil Procedure section 1094.6, which permits, with one limited inapplicable exception, local agencies to adopt either a 90-day statute of limitations or remain subject to the longer statutory ***739 limitation periods governing regular civil actions.[6]

*386 Section 1094.6 represents the Legislature's response to the disparity between state and local agencies in the time prescribed for seeking judicial review of their administrative decisions. (See, generally, Note, *Review of Selected 1976 California Legislation* (1977) 8 Pacific L.J. 165, 247–249; see also *City of Sacramento v. Superior Court* (1980) 113 Cal.App.3d 715, 722, fn. 6, 170 Cal.Rptr. 75 (conc. and dis. opn. by Justice Carr).) Prior to the enactment of section 1094.6, local agencies simply followed the general statutes of limitation for the commencement of civil actions (see *Allen v. Humboldt County Board of Supervisors* (1963) 220 Cal.App.2d 877, 884–885, 34 Cal.Rptr. 232), which is three years in the case of statutory liability (§ 338), and four years in all other cases unless otherwise specified (§ 343). Judicial review of the decisions of state administrative agencies, which are governed by the Administrative Procedure Act (Gov.Code, § 11370 et seq.), must be sought within 30 days. (Gov.Code, § 11523.)

In *Allen,* the Court of Appeal rejected the contention that all petitions for administrative mandamus, whether they sought to review the action of state or local agencies, must be subject to the 30-day limitation period prescribed by Government Code section 11523. The court stated that although the longer periods of limitation applicable to local agencies may be excessive and "obstruct the prompt and clear determination of the rights of litigants," these disadvantages did not "justify ... holding that the Administrative Procedure Act covers administrative agencies clearly not within its ambit." (220 Cal.App.2d at p. 885, 34 Cal.Rptr. 232.) Six years later, in **80 *Conti v. Board of Civil Commissioners* (1969) 1 Cal.3d 351, 82 Cal.Rptr. 337, 461 P.2d 617, this court noted that many local administrative mandamus cases had found laches "for delays of far less than three or four years," indicating that the three- or four-year statutes of limitation applicable to the review of local administrative actions, "although suitable for a truly original mandamus action, is far too long for a proceeding which in substance is a form of appellate review of an administrative decision." (Id., at p. 357, fn. 3, 82 Cal.Rptr. 337, 461 P.2d 617.)

In response to this problem, the Legislature enacted section 1094.6, giving local agencies (other than school districts) the *option* of adopting, by ordinance or resolution, a 90-day limitation period for seeking judicial review of their administrative decisions. ***740 (See generally *Foster v. Civil Service* *387 *Com.* (1983) 142 Cal.App.3d 444, 449–451, 190 Cal.Rptr. 893.) As the Legislative Counsel's Digest of Assembly Bill No. 82 (1975–1976 Reg.Sess.) Summary Digest, page 69, states: "Existing law establishes a maximum time limit for seeking review of administrative determinations of designated state agencies by means of administrative mandamus, but does not generally provide for such a limitation for that type of judicial review of decisions of local agencies. [¶] This bill would limit to 90 days following specified final decisions in adjudicatory administrative hearings of local agencies, as defined, the time within which an action could be brought to review such decisions by means of administrative mandamus .... [¶] This bill would apply to local agencies only if their governing board adopts an ordinance or resolution making it applicable."

Section 1094.6 permits local agencies to apply a shorter-than-90-day limitation period only if the shorter statute of limitations is a state or federal law. Section R does not come within this exception.

[4] SBCERA has therefore exceeded its authority in adopting and seeking to apply a 60-day limitation period during which judicial review of their decisions may be sought. The Legislature has jurisdictional authority to determine statutes of limitation. (*Valley Circle Estates v. VTN Consolidated, Inc.* (1983) 33 Cal.3d 604, 615, 189 Cal.Rptr. 871, 659 P.2d 1160; *Scheas v. Robertson* (1951) 38 Cal.2d 119, 125, 238 P.2d 982.) The legislation providing for the creation of local retirement associations (the County Employees Retirement Law of 1937, Gov.Code, § 31450 et seq.) makes no provision for the local promulgation of any statutes of limitation other than those provided by section 1094.6. (See, e.g., Gov.Code, §§ 31526, 31527, which set forth the permissible scope and content of local retirement board regulations.)' "The administrative agency must confine itself to reasonable

interpretation in adopting regulations for administration of its governing statute; if it goes beyond that, the legislative area has been invaded and the regulation counts for nought. [Citations.]" (*County of L.A. v. State Dept. Pub. Health* (1958) 158 Cal.App.2d 425, 437, 322 P.2d 968.) Moreover, a local regulation affecting the jurisdiction of state courts impermissibly intrudes on a legislative function. " 'It is well settled ... that laws passed by the Legislature under its general police power will prevail over regulations made by [an agency] with regard to matters which are not exclusively [that agency's] affairs.' " (Ibid., quoting *Tolman v. Underhill* (1952) 39 Cal.2d 708, 712, 249 P.2d 280.)

***388** As matter of policy, a 90-day limitation period suffices to keep stale issues out of court. Any shorter period would not further advance that purpose and might tend to impede the bringing of meritorious actions.

[5] Since SBCERA did not adopt the 90-day limit of section 1094.6, the general ****81** statutes of limitation for commencement of civil actions govern, and Hittle's petition for writ of mandate was therefore timely filed.[8]

*****741 B.** ***Standard of Appellate Review***

Hittle contends that this court should independently weigh the evidence in reviewing the decision of the trial court because this case (a) involves the deprivation of a fundamental vested right; (b) was not accorded an evidentiary hearing before the administrative tribunal; (c) was tried solely on the documentary record in the trial court; and (d) was decided by the trial court without the benefit of the statutory presumption set forth in Civil Code section 2235.

[6] Ordinarily the decision of a trial court that has employed the independent judgment test in an administrative mandate proceeding will be reviewed on appeal pursuant to the substantial evidence test. (See, Deering, Cal.Administrative Mandamus, supra, § 15.25, pp. 280–281.)[9] We need not determine whether to depart from this rule in the instant case since, as discussed below, we conclude as a matter of law that there is no substantial evidence to support the conclusion that Hittle's withdrawal of his retirement contributions constituted a knowing and valid waiver of his right to apply for disability retirement. "Where the facts before the administrative ***389** body are uncontradicted, the determination of their effect is a question of law and the findings and conclusions of the trial court, whether the scope of review be the substantial evidence or independent judgment test, are not controlling on appellate review. [Citations.]" (See *Aries Dev. Co. v. California Coastal Zone Conservation Com.* (1975) 48 Cal.App.3d 534, 545, 122 Cal.Rptr. 315.)

C. ***No Valid Waiver of Right to Apply for Disability Retirement***

[7] Hittle contends that the trial court erred in finding that he knowingly waived his right to apply for disability retirement. The trial court's finding that Hittle was not ignorant of this right when he withdrew his retirement contributions was based on the court's determination that the handwritten notation on the second form letter Hittle received from SBCERA—which provided simply, "If you have filed, or intend to file for disability retirement you should not withdraw the above contributions"—constituted "specific notice" to him of his right to apply for disability retirement. We conclude that there is no substantial evidence to support the trial court's findings that SBCERA adequately informed Hittle of the existence of his right to apply for disability retirement and that Hittle was therefore apprised of this right when he withdrew his retirement contributions. Accordingly, we conclude that Hittle's withdrawal of his retirement contributions cannot be deemed to constitute a valid waiver of his right to apply for disability retirement.

****82** Government Code section 31727.4 entitles any member of a county employees' retirement system who is retired for service-connected disability to receive an annual retirement allowance payable in monthly installments, equal to one-half of the employee's final compensation. A member of a county retirement system may be retired for disability upon proper application "... unless the member waives the right to retire for disability and elects to withdraw contributions...." (Gov.Code, § 31721.)

"[I]t is settled law in California that a purported 'waiver' of a statutory right is not legally effective unless it appears that the party executing it had been fully informed of the existence of that right, its meaning, the effect of the 'waiver' presented to him, and his full understanding of the explanation." (*Bauman v. Islay Investments* (1973) 30 Cal.App.3d 752, 758, 106 Cal.Rptr. 889, fn. omitted.) "The first requirement of any waiver of statutory or *****742** constitutional rights, of course, is that it be knowingly and intelligently made." (*In re Walker* (1969) 71 Cal.2d 54, 57, 77 Cal.Rptr. 16, 453 P.2d 456; see also *Jones v. Brown* (1970) 13 Cal.App.3d 513, 519, 89 Cal.Rptr. 651 ["the valid waiver of a right presupposes an actual and demonstrable knowledge of the very right being waived"]; and *People v.* ***390** *Connor* (1969) 270 Cal.App.2d 630, 634, 75 Cal.Rptr. 905 ["One can waive only that of which he is aware and cannot

waive that of which he is ignorant"].)

"The burden ... is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver.' [Citation.] This is particularly apropos in cases in which the right in question is one that is 'favored' in the law...." (*City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107–108, 48 Cal.Rptr. 865, 410 P.2d 369.) The right to a pension is among those rights clearly "favored" by the law. " ' "[T]he rule [is] firmly established in this state that pension legislation must be liberally construed and applied to the end that the beneficent results of such legislation may be achieved. Pension provisions in our law are founded upon sound public policy and with the objects of protecting, in a proper case, the pensioner and his dependents against economic insecurity. ..." ' [Citations.]" (*Eichelberger v. City of Berkeley* (1956) 46 Cal.2d 182, 188, 293 P.2d 1, quoting from *Cordell v. City of Los Angeles* (1944) 67 Cal.App.2d 257, 266, 154 P.2d 31; cf. *Heaton v. Marin County Employees Retirement Board* (1976) 63 Cal.App.3d 421, 429, 133 Cal.Rptr. 809.)

Our inquiry must therefore be whether Hittle had a full understanding of his right to apply for disability retirement at the time he withdrew his retirement contributions. In his declaration submitted to the trial court, Hittle stated that "[a]t the time I withdrew the contributions, I had absolutely no knowledge of the fact that I might qualify for a service-connected disability retirement ... At no time that I can recall had anyone ever told me that a County employee with less than five years of service credit had any form of retirement benefits. Had I been aware of the fact that a County employee who incurs a service-connected disability may apply for a service-connected disability retirement regardless of the length of employment, I would not even have considered withdrawing the $187.49 that the County was offering me."

[8] Hittle's declaration is not only well supported by the record, but provides the only rational explanation for his decision to seek reimbursement of his retirement contributions. The "Disposition of Retirement Contributions" form that SBCERA twice directed Hittle to complete and return set forth only two options: withdrawal of his contributions, or deferred retirement. Since Hittle did not have five years service credit and was not transferring to a reciprocating retirement system, he did not qualify for deferred retirement. The handwritten notation did not explain that disability retirement ***391** was distinct from deferred retirement, nor did it indicate that Hittle could be eligible for disability retirement with fewer than five years of service.

****83** Experience tells us that an informed individual would not knowingly choose a reimbursement of $187.49 in retirement contributions rather than seek to obtain an annual allowance equal to one-half of his regular compensation for the remainder of his life. Surely Hittle, who did not seek other employment and continued to incur substantial medical expenses, would have sought disability retirement before March 1981 had he been aware of this option.

We therefore conclude that there is no substantial evidence to support the trial court's determination that Hittle was knowledgeable of his right to apply for disability retirement at the time he withdrew his retirement contributions. As SBCERA has not presented clear and convincing evidence to prove that Hittle waived this right, we cannot find an effective waiver pursuant to Government Code section 31721. (*****743** *City of Ukiah v. Fones,* supra, 64 Cal.2d at pp. 107–108, 48 Cal.Rptr. 865, 410 P.2d 369.)

D. *SBCERA's Fiduciary Obligations as a Pension Fund Trustee*

We turn to the issue of SBCERA's fiduciary duty to fully inform its members, in this case Hittle, of their retirement options.[10] As concluded above, there is no substantial evidence to ***392** support the trial court's finding that SBCERA had placed Hittle on "specific notice" of his right to apply for disability retirement by its handwritten notation of September 29, 1978. This notation was inherently ambiguous and uninformative, and cannot be said to have satisfied SBCERA's fiduciary obligation to adequately inform Hittle of his membership options upon termination of his employment.

****84** [9] An employee who serves under a pension plan acquires a vested contractual right to a pension. (*Wallace v. City of Fresno* (1954) 42 Cal.2d 180, 183, 265 P.2d 884.) "A pension plan offered by the employer and impliedly accepted by the employee by remaining in employment constitutes a contract between them, whether the plan is a public or private one, and whether or not the employee is to contribute funds to the pension. [Citations.] The continued employment constitutes consideration for the promise to pay the pension, which is deemed deferred compensation. [Citations.]" (*Hannon Engineering, Inc. v. Reim* (1981) 126 Cal.App.3d 415, 425, 179 Cal.Rptr. 78.) As a result, "[p]ension plans create a trust relationship between pensioner beneficiaries and the trustees of pension funds who administer

retirement benefits ... and the trustees must exercise their ***744 *fiduciary trust* in good faith and must deal fairly with the pensioners-beneficiaries. [Citations omitted.]" (Ibid.; original emphasis.)

[10] The SBCERA officers, by the acceptance of their appointment, are voluntary trustees, within the meaning of Civil Code sections 2216 and 2222,[11] of the retirement plans available to the beneficiary-members of the Association. *393 (Cf. *Hannon Engineering, Inc. v. Reim*, supra, 126 Cal.App.3d at pp. 425–426, 179 Cal.Rptr. 78.) As such, the SBCERA officers are charged with the fiduciary relationship described in Civil Code section 2228: "In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."

As this court has previously noted, "[i]n the vast development of pensions in today's complex society, the numbers of pension funds and pensioners have multiplied, and most employees, upon retirement, now become entitled to pensions earned by years of service. We believe that courts must be vigilant in protecting the rights of the pensioner against powerful and distant administrators; the relationship should be one in which the administrator exercises toward the pensioner a fiduciary duty of good faith and fair dealing." (*Symington v. City of Albany* (1971) 5 Cal.3d 23, 33, 95 Cal.Rptr. 206, 485 P.2d 270.)

This fiduciary relationship is judicially guarded by the application of Civil Code section 2235, which provides that "[a]ll transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence."

[11] [12] With these considerations in mind, we conclude that SBCERA did not fulfill its fiduciary duty to Hittle to deal fairly and in good faith.[12] The *394 means by **85 which SBCERA sought to inform Hittle of his options in disposing of his retirement contributions are tantamount to the misrepresentation and concealment, however ***745 "slight," prohibited by Civil Code section 2228. SBCERA's obscure handwritten notation constituted its sole effort to inform Hittle of his option to apply for disability retirement. No reference to disability retirement was contained in either the form letter or "Distribution of Retirement Contribution" form which SBCERA sent to Hittle to provide for the distribution of his retirement contributions. This omission was not remedied by the form letter's invitation to retiring employees to contact the Association if any additional information is required. These factors also support the presumption of Civil Code section 2235, that the advantage to SBCERA resulting from Hittle's choice to withdraw his retirement contributions, rather than seek a life-time allowance, was gained without sufficient consideration and under undue influence.

[13] SBCERA's incomplete communications with Hittle are apparently standard and used routinely to inform SBCERA members of their options for disposing of their retirement contributions. It would be a small matter to add to these forms all of the retirement options available to employees. It is not this court's intention to impose unreasonable obligations upon the trustees of a pension trust. Ordinarily when an employee becomes a member of a pension plan he is provided with a booklet or other materials describing the plan in some detail. If the booklet fully and fairly describes the plan and its various options and procedures, and copies are made available, the obligation of the trustees toward a terminating employee may be satisfied by appropriate reference to the booklet itself, supplemented by a provision of forms pertaining to all available choices. (Cf. fn. 10, *ante.*)

CONCLUSION

In the absence of an adequate showing that Hittle's decision to terminate his membership in the Association was an informed one, SBCERA's denial of Hittle's request for reinstatement in order to file his application for disability retirement constituted a prejudicial abuse of discretion within the meaning of section 1094.5, subdivision (b).

The judgment of the superior court is reversed, and the cause is remanded with directions to issue a writ of mandate commanding SBCERA to reinstate Hittle's membership upon remittance of his retirement contributions plus interest and process his application for disability retirement pursuant to its established administrative procedures.

BIRD, C.J., and MOSK, BROUSSARD and GRODIN, JJ., concur.

*395 KAUS, Justice, concurring.

I concur in the court's conclusion that there is no substantial evidence to support the trial court's determination that Hittle knew of his right to apply for disability retirement when he withdrew his contributions.

Since that conclusion disposes of the case, I see no need for the court to go out of its way to find further that SBCERA did not fulfill its fiduciary duty to deal with Hittle fairly and in good faith. Whatever shortcomings may be laid at SBCERA's door, to characterize its handling of Hittle's case as "tantamount to ... misrepresentation **86 and concealment, however 'slight' " (p. 745 of 216 Cal.Rptr., p. —— of —— P.2d, *ante*), is making words do tricks they were not meant to perform.

LUCAS, Justice, concurring and dissenting.

I concur with the majority opinion in three respects: (1) Plaintiff need not exhaust his administrative remedies; (2) the 60-day statute of limitations in section R runs afoul of Code of Civil Procedure section 1094.6; and (3) our standard of review is the substantial evidence test.

***746 I disagree with the majority's conclusion that plaintiff's withdrawal of his pension contribution did not constitute a knowing and intelligent waiver of his right to receive disability benefits. Under the substantial evidence test, the trial judge's decision must be affirmed if any substantial evidence, no matter how slight, supports the judgment. "[T]he power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429, 45 P.2d 183.) Here, the conclusion that plaintiff's withdrawal was an informed one was amply supported by the handwritten notation on defendant's second letter.

The majority does not suggest that defendant's evidence was inadmissible or irrelevant to whether plaintiff's waiver was knowing. Rather, its characterization of that evidence, coupled with plaintiff's declaration and an inference from plaintiff's actions, cause the majority to conclude that no substantial evidence supports the trial court's decision. (See *ante,* p. 741, 742, 743 of 216 Cal.Rptr., p. ——, ——, —— of —— P.2d.) Plaintiff's declaration states that he was unaware of his right to disability benefits and that, had he known of those rights, he would not have withdrawn from the retirement association. The majority infers from plaintiff's withdrawal that it was not an informed decision, because it was not in his economic best interest. (*Ante,* p. 743 of 216 Cal.Rptr., p. —— of ——P.2d.) Neither the declaration nor inference is, in my view, sufficient to reverse the trial judge.

Plaintiff's declaration must be disregarded on appeal because a reviewing court " '*looks only at the evidence supporting the successful party, and* *396 *disregards the contrary showing.*' [Citation.]" (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925, 101 Cal.Rptr. 568, 496 P.2d 480, italics in original.) "Of course, all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity, to be accepted by the trier of fact." (*Estate of Teel* (1944) 25 Cal.2d 520, 527, 154 P.2d 384.) Likewise, the majority's inference cannot be drawn, because we must give defendant "the benefit of *every reasonable inference.*" (6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 245, p. 4236, italics in original.)

Both the declaration and inference could have been rejected as not being sufficiently credible, as well. "All issues of credibility are ... within the province of the trier of fact. [Citation.]" (*Nestle,* supra, 6 Cal.3d 920, 925, 154 P.2d 384.) The trial judge could have disbelieved plaintiff's declaration in light of intrinsic facts. The declaration was prepared, for purposes of this litigation, several years after plaintiff's withdrawal. The declaration bears on a matter peculiarly within the knowledge of plaintiff—his state of mind *when he withdrew* —and not otherwise subject to verification. While none of these characteristics renders the declaration inherently untrustworthy, they do go to its weight and suggest why a factfinder might discount its credibility.

The trial judge might also have disbelieved the declaration in light of extrinsic facts. Plaintiff had access to professional advice, being represented by counsel at the time he filed his withdrawal. He also had ample opportunity to consider his options before filing his withdrawal. Both forms sent to plaintiff in connection with his withdrawl **87 clearly stated, in printed language, that plaintiff had five years in which to make his election; he was not pressured by defendant to make his choice.

Finally, of course, the trial judge could have disbelieved plaintiff's declaration in the face of the handwritten notation from defendant which stated "Dear Mr. Hittle—if you have filed or intend to file for disability retirement you should not withdraw the above

contribution." Despite the majority opinion's characterization of this notation ***747 as "inherently ambiguous and uninformative" (*ante,* p. 744 of 216 Cal.Rptr., p. ——of —— P.2d), and "obscure" (*ante,* p. 745 of 216 Cal.Rptr., p. ——of ——P.2d) the trial judge could have found the notation a clear, accurate instruction, specifically addressed to plaintiff, advising him not to withdraw his contribution if he contemplated disability retirement. In sum, the evidence easily supports the conclusion that plaintiff had notice that he might have been entitled to disability retirement benefits and hence that he withdrew voluntarily.

The majority opinion argues that plaintiff's withdrawal was not a knowing one, because it was against his economic best interest. Empirically, the premise that no one knowingly acts against his economic best interest is *397 false. People do so frequently and for a variety of reasons. The error of the majority's argument can be readily seen by assuming that plaintiff had had absolutely every datum of information bearing on his options and their consequences. If he withdrew his contribution, the majority's analysis would still lead to the conclusion that that withdrawal was not knowing and hence involuntary.

As an alternative ground for finding in plaintiff's favor, the majority concludes that defendant breached its fiduciary duty to inform its members, including plaintiff, of their retirement options. In my view, we should not consider this untimely argument. The fiduciary duty argument was first raised in plaintiff's petition for rehearing in the Court of Appeal, evidently as a result of his changing counsel after that court's decision. The Court of Appeal apparently invoked the rule that a plaintiff may not raise an issue for the first time on rehearing, a rule we have followed since at least 1915. (See *Prince v. Hill* (1915) 170 Cal. 192, 195, 149 P. 578; *County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 513, 138 Cal.Rptr. 472, 564 P.2d 14.) This rule is closely related to the rule that a party may not, except in rare instances, change his theory from that upon which the case was tried. Underlying these rules is the idea that it is fundamentally unfair to the court and opposing litigants to present a new argument after having the opportunity to present any and all theories and evidence.

These rules are relaxed where the new argument relates to the court's jurisdiction or where the record contains all relevant evidence that could bear on the new theory. In such instances, considering the new theory does no prejudice to opposing party or the court. Here, though, no such considerations support ignoring these rules. Absolutely no evidence was submitted, pro or contra, on the nature and extent of defendant's fiduciary obligation to plaintiff and whether any such obligation was met. For example, the record does not disclose whether defendant may have given plaintiff a handbook of rules or bylaws when he became a member of the retirement association. All we have is evidence bearing on whether plaintiff's choice was an informed one. By relying on this theory, we have greatly prejudiced defendant.

Accordingly, for the foregoing reasons, I would affirm the trial court judgment.

Parallel Citations

39 Cal.3d 374, 703 P.2d 73

Footnotes

1 Although not in the record, counsel for Hittle stated at oral argument that Hittle had successfully pursued a workers' compensation claim. Counsel for SBCERA stated that information pertaining to workers' compensation claims is not generally made available to the Association.

2 According to statements at oral argument by counsel for the respondent, Santa Barbara County Special Services is a special division of the county that administers the workers' compensation program; it is distinct from SBCERA.

3 In March 1981, Hittle underwent surgery. His surgeon, Dr. Strait, later noted that "it seems obvious to me that Hittle had a disc rupture at that time [when he failed to report to work] and could not return to work."

4 The by-laws indicate that only an "applicant" may file an application for benefits and, upon the board's denial of benefits, request a hearing. The by-laws define an "applicant" as "a member of the County Employees Retirement System claiming benefits, rights or privileges under the County Employees Retirement Law of 1937 or any other person claiming such benefits through any member." (Art. IX, § B.) There is nothing in the by-laws to preclude the term "member" from including an individual whose membership status is the threshold issue presented by his claim for benefits under the County Employees Retirement Law.

Nonetheless, defendants do not contest the trial court's finding that Hittle was a "party" within the meaning of the

SBCERA by-laws, specifically, "any person disclosed by the records of the retirement system or by the application to have an interest or possible interest in the subject matter of a hearing." (Ibid.)
Accordingly, we find both terms—"applicant" and "party"—to be sufficiently ambiguous that we cannot say as a matter of law that no further administrative remedy was available to Hittle. (See *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 477, 131 Cal.Rptr. 90, 551 P.2d 410.)

5 We reject SBCERA's assertion that we need not reach this issue because the trial court heard and denied Hittle's petition for writ of mandate on its merits, not on the basis of timeliness. Rather, the trial court denied the petition both on its merits and as untimely filed.

6 All further statutory references are to the Code of Civil Procedure unless otherwise indicated. Section 1094.6 (added by Stats.1976, ch. 276, § 1, p. 581, as amended by Stats.1983, ch. 818, § 3, p. 4400) provides in pertinent part:
"(a) Judicial review of any decision of a local agency other than a school district, ... may be had pursuant to Section 1094.5 of this code only if the petition for writ of mandate pursuant to such section is filed within the time limits specified in this section.
"(b) Any such petition shall be filed not later than the 90th day following the date on which the decision becomes final.... [I]f reconsideration is sought ... the decision is final for the purposes of this section on the date that reconsideration is rejected.
"...
"... (e) As used in this section, decision means a decision subject to review pursuant to section 1094.5, suspending, demoting, or dismissing an officer or employee, revoking, or denying an application for a permit, license, or other entitlement, or denying an application for any retirement benefit or allowance.
"(f) In making a final decision as defined in subdivision (e), the local agency shall provide notice to the party that the time within which judicial review must be sought is governed by this section. As used in this subdivision, 'party' means an officer or employee who has been suspended, demoted or dismissed; a person whose permit, license, or other entitlement has been revoked or suspended, or whose application for a permit, license, or other entitlement has been denied; or a person whose application for a retirement benefit or allowance has been denied.
"(g) This section shall be applicable to a local agency only if the governing board thereof adopts an ordinance or resolution making this section applicable. If such ordinance or resolution is adopted, the provisions of this section shall prevail over any conflicting provision in any otherwise applicable law relating to the subject matter, unless the conflicting provision is a state or federal law which provides a shorter statute of limitations, in which case the shorter statute of limitations shall apply."

7 Even if these statutes could be interpreted as delegating to local retirement boards the discretion to determine their own statutes of limitations, the absence of standards to guide such boards in exercising this discretion would render the delegation invalid. (See *Estate of Stobie* (1939) 30 Cal.App.2d 525, 528, 86 P.2d 883.)

8 Of course, had SBCERA adopted the 90-day limitation period of section 1094.6, Hittle's petition for writ of mandate (filed 85 days after the Board's denial of his application) would still have been timely under the statute.
We also note that in contrast to SBCERA's failure to notify Hittle of its own statute of limitations, section 1094.6, subdivision (f) requires local agencies to provide notice to "a person whose application for a retirement benefit or allowance has been denied" that the agency has adopted the shorter limitations period of that statute.
Our disposition precludes the necessity of addressing Hittle's alternative argument that SBCERA was required to provide for the filing of late petitions for judicial review, for good cause, as part of the county's duty of good faith and fair dealing. (See *Faulkner v. Public Employees' Retirement System* (1975) 47 Cal.App.3d 731, 735–736, 121 Cal.Rptr. 190, decided before the enactment of § 1094.5.)

9 In applying the substantial evidence test, "[t]he appellate court focuses on the findings of the trial court, rather than those of the administrative agency. [Deering, Cal. Administrative Mandamus (Cont.Ed.Bar 1966) § 15.25, pp. 280–281.] The judgment will be upheld if there is any substantial evidence in support of each of the trial court's essential findings; all contrary evidence will be disregarded on appeal (ibid.)." (*Thompson v. Department of Motor Vehicles* (1980) 107 Cal.App.3d 354, 358, 165 Cal.Rptr. 626; see also *Moran v. Board of Medical Examiners* (1948) 32 Cal.2d 301, 308–309, 196 P.2d 20.)

10 Although raised for the first time by Hittle in his petition for rehearing before the Court of Appeal, the issue of SBCERA's fiduciary duty to fully inform Hittle of his retirement options is properly before this court.
Issues raised for the first time on appeal or rehearing will normally not be considered. (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 513, 138 Cal.Rptr. 472, 564 P.2d 14 [rehearing before this court] app. dism. (1977) 434 U.S. 944, 98 S.Ct. 469, 54 L.Ed.2d 306; *Panopulos v. Maderis* (1956) 47 Cal.2d 337, 340–341, 303 P.2d 738 [appeal]; *People ex rel. Dept. of Public Works v. Mascotti* (1962) 206 Cal.App.2d 772, 779–780, 24 Cal.Rptr. 679 [rehearing before CA].) "The general rule confining the parties upon appeal to the theory advanced below is based

on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that 'contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial.' (*Panopulos v. Maderis, supra,* 47 Cal.2d at 341 [303 P.2d 738].)" (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742, 336 P.2d 534.) However, "the rule does not apply when the facts are not disputed and the party merely raises a new question of law. (*Burdette v. Rollefson Construction Co.* (1959) 52 Cal.2d 720, 725–726 [344 P.2d 307].)" (*UFITEC, S.A. v. Carter* (1977) 20 Cal.3d 238, 249, fn. 2, 142 Cal.Rptr. 279, 571 P.2d 990.)

Evidence relevant to the particular fiduciary obligation at issue here—SBCERA's duty to fully inform Hittle of his retirement options—was fully presented to the trial court. The central issue in this case—whether Hittle's decision to remove his retirement contributions constituted a valid waiver of his right to apply for disability retirement—necessarily involves a determination whether Hittle was fully informed of his retirement options; the two are flip sides of the same coin. SBCERA was therefore on notice that it should present at trial all evidence pertaining to this issue, and it is a logical assumption that SBCERA did so. Surely, had SBCERA given Hittle "a handbook of rules or bylaws when he became a member of the retirement association" (diss. opn. at p. 748 of 216 Cal.Rptr., p. —— of —— P.2d, post), which clearly set forth Hittle's retirement options, SBCERA would have presented this evidence at trial. The SBCERA bylaws which are contained in the trial record contain no reference to a retiree's options; nor was there any indication in the materials sent Hittle by SBCERA that such a reference was available. (Cf. fn. 13, *post.*) SBCERA makes no assertions to the contrary in its substantive and complete response to Hittle's fiduciary duty contention before this court.

Moreover, the facts presented which pertain to the issue of SBCERA's fiduciary duty to Hittle—the contents of the two letters Hittle received from SBCERA following the termination of his employment—are undisputed. Accordingly, while the Court of Appeal was not compelled to consider the issue on rehearing (see, e.g., *People ex rel. Dept. of Public Works v. Moscotti,* supra, 206 Cal.App.2d at pp. 779–780, 24 Cal.Rptr. 679; *Bradley v. Bradley* (1949) 94 Cal.App.2d 310, 312, 210 P.2d 537), whether SBCERA met its fiduciary obligation to fully inform Hittle of his retirement options is a question of law properly considered by this court.

11 Civil Code section 2216 provides: "A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another."

Civil Code section 2222 provides: "Subject to the provisions of Section eight hundred and fifty-two, a voluntary trust is created, as to the trustee, by any words or acts of his indicating, with reasonable certainty:

1. His acceptance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence; and,
2. The subject, purpose, and beneficiary of the trust."

12 SBCERA must meet its fiduciary obligation to fully inform its members of their options in obtaining retirement benefits notwithstanding the extent of the Association's knowledge of each member's particular situation or entitlement. Nonetheless, the failure to satisfy this obligation is particularly egregious where the Association is on notice that a member may meet the qualifications to apply for a specific type of benefit. In the instant case, three aspects of the record support a reasonable inference that SBCERA was informed of the continuing disablement caused by Hittle's injury. First, SBCERA's second form letter, containing the handwritten reference to disability retirement, was sent *after* a County doctor (Dr. Dean Smith) had sent a letter to Santa Barbara County Special Services indicating that it would be unrealistic for Hittle to return to his job. The inference that SBCERA was then aware of Dr. Smith's diagnosis indicating permanent disability—and therefore not limited to the information contained in Dr. Bluhm's letter authorizing Hittle to return to work—is reasonable notwithstanding respondent's observation that information pertaining to workers' compensation claims, which are administered by the special services division, is not generally made available to SBCERA. (See fns. 1 and 2, ante.) Second, even if SBCERA was unaware of Dr. Smith's letter at the time it sent Hittle the second form letter, it is undisputed that SBCERA received a copy of Dr. Smith's letter when Hittle requested reconsideration of the Association's decision. Third, at a minimum, SBCERA was aware at the time it sent the second form letter that Hittle had been absent from work for nearly a year due to an apparently work-related injury, and should have considered the possibility that Hittle had terminated his employment with Santa Barbara County because of a permanent disability arising from that injury.

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