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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JOHNNY FUNG Plaintiff and Appellant, v. CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents.	A127482 (City & County of San Francisco Super. Ct. No. CPF-09-509755)

Johnny Fung appeals from an order sustaining without leave to amend a demurrer interposed by the City and County of San Francisco (City) to his petition for a writ of ordinary mandamus. Fung alleged that, under Government Code section 31725,[1] he is entitled to back pay for a period of time he was on unpaid leave due to a work-related injury, and contends the trial court erred in concluding section 31725 does not apply to him.[2] We affirm.

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[1] All further statutory references are to the Government Code unless otherwise indicated.

[2] Ordinarily, an order sustaining a demurrer is not appealable; rather, an appeal lies from an order or judgment of dismissal following the sustaining of a demurrer. (See Code Civ. Proc, §§ 581, subd. (f)(1)-(2), 581d.) Nevertheless, there is authority allowing an appeal from an order sustaining a demurrer as to all causes of action without leave to amend by deeming the order to "incorporate" a "dismissal." (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 528, fn. 1; *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1396.)

BACKGROUND

We begin by observing the unusual state of the record in this appeal. Although an appeal from a demurrer to a writ petition, the record does not contain either Fung's writ petition or the City's demurrer. The City states in its respondent's brief (without citation to the record) that Fung sought mandamus relief under Code of Civil Procedure section 1085 to compel an allegedly mandatory duty to give him back pay under Government Code section 31725. Fung has not disputed this statement. We, therefore, accept the City's representation as to the nature of this writ proceeding.

Fung designated only his counsel's declaration and the attachments thereto for inclusion in the clerk's transcript. The only other documents in the clerk's transcript are those required by California Rules of Court, rule 8.320(b), and include the order sustaining the City's demurrer, the notice of entry thereof, and the register of actions. No reporter's transcript was designated.

Ordinarily, a demurrer is heard solely on the basis of the allegations of the operative pleading, and the court's inquiry, in turn, is limited to determining whether the material allegations are sufficient to state a claim for relief. Yet, in this case, Fung submitted the declaration of his counsel referenced above in opposition to the City's demurrer. Moreover, this declaration contained numerous attachments, including: (a) "Notice of Medically Appropriate Work" stating "[y]our employer does not have work available within your work restrictions" and informing Fung he would be provided a voucher for retraining "as soon as your level of Permanent Disability has been determined by the Administrative Law Judge" (ALJ); (b) "Disability Retirement Election Application" completed by Fung; (c) "Proposed Decision" by the ALJ; (d) an April 15, 2009, letter notifying Fung of the ALJ's proposed decision and the Retirement Board's adoption of the decision; (e) a May 20, 2009, letter from Fung's attorney to the Office of the Sheriff requesting additional benefits under section 31725; (f) a July 23, 2009, letter for the City's Department of Human Resources thanking Dr. Brendan Morley for reevaluating Fung's physical condition; and (g) a copy of a CALPERS "Precedential Decision" in the matter of Ruth A. Keck.

Apparently the City made no objection to the declaration and attachments. No objection is noted in the register of actions or the trial court's order, and we have no idea how the trial court handled the materials since there is no reporter's transcript. Both parties cite to the documents in their briefs on appeal, without shedding any light on the propriety of this evidence being submitted in opposition to a demurrer. We therefore consider the City's demurrer as having been treated in the nature of a "speaking" demurrer, with the trial court considering documents that could have been judicially noticed.

The relevant factual background is the following: In November 2004, Fung sustained an injury while on duty as a deputy sheriff and went out on medical leave. He returned to work in July 2005. In December 2005, Fung again went out on disability leave. On July 18, 2006, the City's workers' compensation administrator informed Fung the Department could not accommodate his medical restrictions. That notice triggered Fung's right to seek employment in a non-law enforcement position with the City. Fung, instead, chose to go on unpaid leave status while applying for industrial disability retirement. During this time, the City maintained a position for Fung and provided health and other benefits, including access to the City's accommodation job search process. The ALJ found Fung's medical condition did not prevent him from performing the usual duties of a deputy sheriff and denied his claim for an industrial disability retirement. The Retirement Board adopted the ALJ's decision. Fung did not seek judicial review of the board's decision. Instead, he returned to work as a deputy sheriff on June 8, 2009.

In the meantime, on May 20, 2009, Fung's counsel wrote to the Office of the Sheriff stating that since Fung had been denied industrial disability retirement, he was entitled to back pay under section 31725. The City did not agree. Fung then filed the instant writ proceeding on August 19, 2009. The City filed a demurrer, which the trial court heard and sustained on October 15, 2009. The trial court issued a written order on November 13, 2009, stating the City's demurrer was sustained without leave to amend "on the ground that a PERS employee is not entitled to the relief under section 31725." Fung's timely appeal followed.

DISCUSSION

Fung concedes he is a Public Employees' Retirement System (PERS) employee and his claim for an industrial disability retirement was submitted and decided under the Public Employee Retirement System Law (PERL). The statutory scheme for PERL is set forth in title 2 of the Government Code (Government of the State of California), Division 5 (Personnel). (See § 20000 et seq.) Section 21151 provides that "[a]ny patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as a the result of an industrial disability shall be retired for disability, *pursuant to this chapter*, regardless of age or amount of service." (§ 21151, subd. (a), italics added.) Section 21151 appears in chapter 12 of Division 5. Thus, disability retirement for employees like Fung is governed by chapter 12 of the PERL. (§ 21060 et seq.)

Section 31725, on the other hand, is a part of the County Employee's Retirement Law of 1937 (CERL) (§ 31450 et seq.), set out in title 3 of the Government Code (Government of Counties). Section 31725 concerns the denial of a CERL member's application for disability retirement. (§ 31725.) If the application is denied on the ground the member is not incapacitated, the Retirement Board must notify the employer. (*Ibid.*) The employer and the member may seek judicial review of the denial by petition for writ of mandate. (*Ibid.*) If no petition is timely filed or the court denies the petition, "and the employer has dismissed the member for disability the employer shall reinstate the member to employment effective as of the day following the effective date of the dismissal." (*Ibid.*)

Fung acknowledges section 31725 is part of CERL, and not part of PERL. He nevertheless contends section 31725 applies to him, even though his disability retirement claim was submitted and processed under PERL.

Fung first relies on *McGriff v. County of Los Angeles* (1973) 33 Cal.App.3d 394 (*McGriff*). In *McGriff*, a county employee applied for disability retirement under CERL. The Retirement Board denied her application and notified the county pursuant to section 31725. The county took the position it was not required to reinstate McGriff under

section 31725 and based on her prior work record refused to do so. (*McGriff*, at pp. 395-396.) McGriff obtained a writ of mandate compelling the county to reinstate her. The county appealed, claiming its civil service system superceded section 31725. The Court of Appeal disagreed. "It is clear that the Retirement Law of 1937, including section 31725 is an established part of the local law of Los Angeles County relating to compensation of county employees who become incapacitated." (*McGriff*, at p. 398.) In short, *McGriff* involved a CERL member, not a PERS employee.

Nevertheless, Fung points to excerpts of legislative history of section 31725 quoted in *McGriff*. Section 31725 was amended in 1970, and the court explained the "purpose of amending the Retirement Act was to eliminate severe financial consequences to an employee resulting from inconsistent decisions between an employer and the Retirement Board as to whether a particular employee is incapacitated and unable to perform the duties of his position. Prior to the 1970 amendment of section 31725, a local government employer could release an employee under rule 10.07(c) [of the County of Los Angeles Civil Service Commission] and the Retirement Board could deny the employee a disability pension on the ground he was not disabled." (*McGriff, supra*, 33 Cal.App.3d at p. 399.) The Assembly Committee on Public Employment and Retirement concluded " 'to remedy this problem . . . the Public Employees' Retirement System should be given authority . . . to mandate reinstatement of an individual—upon a finding of a lack of disability—but that the employing agency have the right of appeal to the courts.' [¶] The committee continued: 'Such a method provides a system which involves only two administrative or judicial proceedings instead of three . . . .' [¶] 'This method, carried to the final appeal, would have financial consequences for both [PERS] and the employing agency. As a result, serious attempts would likely be made between the agencies to resolve the disagreement prior to initiating the full process.' " (*Id.* at pp. 399-400, quoting the Report of the Assembly Committee on Public Employment and Retirement, vol. 1, app. to Journal of Assem. (Reg. Sess. 1970) pp. 11-13.)

This excerpt from an Assembly Committee report, while bearing on the reason why section 31725 was amended in 1970, and useful in the *McGriff* Court's discussion of

that section, says nothing about PERL statutes. While the report refers to PERS, the committee may have used this terminology in a generic sense. Indeed, the committee itself bore the name Assembly Committee on Public Employment and Retirement. In any case, the excerpts pertain to the amendment of section 31725, and not to section 21153 .

Fung also relies on a 1974 Attorney General opinion. That opinion addressed whether, under section 19253.5, subdivision (d), an employer could terminate an employee who has been denied disability retirement. The opinion pointed out the subdivision applied only to employees who were *not* eligible for or who waived the right to a disability retirement. (57 Ops.Cal.Atty.Gen. 86, 87 (1974).) Therefore, a disability retirement decision would not "be relevant" as to that section. (*Id.* at p. 87.)

The opinion then compared section 21023.5 (now § 21153), which provided an employer could not separate an employee otherwise eligible for disability retirement but, instead, had to apply for disability retirement for the employee, unless the employee waived his or her right to retire for disability and elected to withdraw contributions or allow them to remain in the fund with rights to service retirement. (57 Ops.Cal.Atty.Gen., *supra*, at pp. 87-89.) Thus, the opinion explained section 21023.5 provided "the employer may not separate an employee for a disability," but rather, had to "follow the prescribed procedures to separate an employee for a disability." (57 Ops.Cal.Atty.Gen., *supra*, at p. 88.) This also meant the decision of PERS as to whether the employee was disabled "is determinative in the employer's subsequent effort to terminate the employee for medical reasons. A contrary decision would create a severe financial consequence to an employee resulting from inconsistent decisions between an employer and the Board of Administrators of the Public Employees' Retirement System as to whether a particular employee is incapacitated and unable to perform the duties of his position. The employee could find himself without a job or retirement income." (*Ibid.*) In short, the "employer is bound by the PERS decision." (*Ibid.*) The opinion further stated this analysis was "supported" by *McGriff*. (57 Ops.Cal.Atty.Gen., *supra*, at p. 88.) The opinion summarized the case and quoted the excerpts from the Report of the Assembly Committee on Public Employment and Retirement. (*Ibid.*)

The Attorney General Opinion did, indeed, consider a PERS statute. The specific issue concerned section 19253.5, subdivision (d). Furthermore, the issue concerned *termination* of an employee. The Attorney General's discussion comparing section 21023.5 (now § 21153) also concerned *termination* of an employee. While the Attorney General found *McGriff* and the legislative history quoted therein supportive of the point that section 21023.5 protects an employee from inconsistent decisions as to disability, and prevents the employee from being without either employment or disability retirement, the reference to *McGriff* and the quoted committee report by no means suggest the Attorney General viewed PERL as incorporating CERL, and specifically section 31725.

Fung additionally relies on a "Precedential Decision" issued by the PERS Board of Administration (*In re Keck* (Sept. 29, 2000) CalPers Precedential Dec. No. 00-05 (*Keck*)). The issue in *Keck* was whether a PERS member was permanently disabled from performing her duties as a school secretary. (*Id.* at p. 10.) The ALJ found she was not incapacitated. (*Id.* at p. 12.) Keck argued she should be given the benefit of the doubt and awarded disability retirement because an employee who has been terminated for disability but then found ineligible for disability retirement is placed in a "catch-22" situation. (*Ibid.*) Keck relied on *Leili v. County of Los Angeles* (1983) 148 Cal.App.3d 985 (*Leili*), which involved CERL and specifically section 31725.[3] The ALJ agreed with Keck and stated that "[a]lthough Government Code section 31725 is part of a different statutory framework than the [PERL] . . . which governs the operation of CalPERS, the *Leili* court noted that the California Attorney General had reached the conclusion that the same right to reinstatement exists for CalPERS members . . . [c]onsequently, an employer cannot terminate a member of CalPERS, such as respondent Keck, for medical reasons after CalPERS has denied disability retirement to the employee." (*Keck, supra,* at p. 13.) The ALJ thus declared Keck had to be reinstated. (*Ibid.*)

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[3] The court in *Leili* concluded the case was "legally indistinguishable" from *McGriff*. (*Leili, supra,* 148 Cal.App.3d at p. 989.)

As the Attorney General opinion had concluded, *Keck* holds a PERS employer cannot *terminate* an employee for medical disability. Rather, under section 21153, an employer must apply for disability retirement. And, as to such application, the PERS decision will determine whether employment will be terminated. *Keck* does not hold that CERL, and specifically section 31725, is sub silentio part of PERL.

The City, in turn, cites to *Jones v. Los Angeles County Office of Education* (2005) 134 Cal.App.4th 983, 989 (*Jones*). In *Jones*, a PERS employee sustained injuries while working as a paraeducator. She was ultimately "separated from employment" and placed on "the Education Code section 45192 reemployment list." (*Id.* at pp. 985-986.) The employer filed a disability retirement request pursuant to section 21153, which was denied. (*Jones*, at p. 986.) The employee appealed, but then settled her worker's compensation claims, which included retraining for a different job as a medical transcriber. (*Id.* at pp. 987-988.) However, she found she was unable to perform the new job. She then withdrew her appeal from the PERS disability retirement determination and requested "reinstatement" in her paraeducator position. (*Id.* at p. 988.) The employer responded she was on the 39-month reemployment list and to be rehired, she needed a medical release. The employee eventually filed a writ petition seeking reinstatement as a paraeducator and backpay, which was denied. (*Ibid*.)

The Court of Appeal began its discussion by stating that while the employee made "extensive reference to reemployment rights available under" CERL, that law was "irrelevant to the outcome of th[e] case." (*Jones*, *supra*, 134 Cal.App.4th. at p. 989.) Rather, the employee was "subject to the [PERL] which is found in Government Code section 20000 et seq." (*Ibid*.) Accordingly, the provisions of CERL she relied on "are not controlling." (*Ibid.*) The Court of Appeal went on to hold that under the Education Code, the employer could place her on the reemployment list and was not required to reinstate her as a paraeducator or give her backpay. (*Id.* at pp. 991-992.) One justice dissented on the ground section 21153 prohibited *terminating* employment. (*Jones*, at pp. 992-996 (dis. opn. of Armstrong, J.).) Notably, the dissent did *not* take issue with the majority's statement that CERL did not apply. (*Ibid.*)

The City also points out that during the 1970 legislative session, the Legislature dealt with both PERL and CERL.[4] The Legislature amended section 21153 (formerly § 21023.5) in the PERL to add the language that provides "an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled." (§ 21153, citing Stats. 1970, ch. 1447, § 2, p. 2820.) The Legislature added identical language to section 31721, subdivision (a), in the CERL. (Gov. Code, § 31721, subd. (a), citing Stats. 1970, ch. 1016, § 2, p. 1823.)

The Legislature also amended section 31725 in the CERL to add the specific postdisability retirement decision procedures and provide that if the CERL's member's disability retirement application is denied "and the employer has dismissed the member for disability the employer shall reinstate the member to his employment effective as of the day following the effective date of dismissal." (§ 31725, citing Stats. 1970, ch. 1016, §1, p. 1823.) However, the Legislature deleted identical language in the course of amending the PERL. When initially introduced on March 12, 1970, Assembly Bill No. 1153 included the same reinstatement language for PERS members. (Assem. Bill No. 1153 (1970 Reg. Sess.) as introduced Mar. 12, 1970, § 1, pp. 1-2.) The language was subsequently deleted (e.g., Assem. Amend. to Assem. Bill No. 1153 (1970 Reg. Sess.) June 18, 1970, § 3, p. 4; *id*. at p.1), and not included in the statute as finally amended. (Stats. 1970, ch. 1447, § 2, pp. 2817-2822.)

Thus, the Legislature specifically removed from the amendments to PERL the very language Fung asserts we should deem included therein. However, "an oft-cited canon of statutory construction provides: ' " 'The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision.' " ' " (*Berry v. American Express Publishing, Inc.* (2007) 147 Cal.App.4th 224, 230 (*Berry*), quoting *Gikas v. Zolin* (1993) 6 Cal.4th 841, 861 (dis. opn. of Mosk, J.).) "The simple

[4] We grant the City's request for judicial notice of certain legislative history for that session.

reason for this canon is that a court 'should not grant through litigation what could not be achieved through legislation.' " (*Berry*, at pp. 230-231, quoting *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 33 (dis. opn. of Kennard, J.).) Courts therefore should "not interpret a statute to include terms the Legislature deleted from earlier drafts." (*Berry*, at p. 231.)

We heed this maxim of statutory interpretation and agree with the court in *Jones* that the CERL, and specifically section 31725, is not applicable to Fung, who is a PERS member and whose rights in connection with his application for disability retirement is governed by the PERL. Accordingly, we affirm the trial court's order sustaining the City's demurrer on the ground a "PERS employee is not entitled to the relief under section 31725." Given the truncated state of the record, and because Fung does not argue otherwise, we also conclude this ruling is dispositive of his petition for writ of mandate.[5]

DISPOSITION

The order sustaining the City's demurrer without leave to amend, deemed a judgment of dismissal, is affirmed.

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Banke, J.

We concur:

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Margulies, Acting P. J.

_____
Dondero, J.

[5] We therefore do not reach the City's alternative argument, based on cases such as *Stephens v. County of Tulare* (2006) 38 Cal. 4th 793, that, even if the CERL applied, Fung is not entitled to reinstatement and backpay under section 31725 because his employment was never terminated.