ONLINE SERVICES

Tentative Rulings

DEPARTMENT 82 LAW AND MOTION RULINGS
Hon. Mary H. Strobel

The clerk for Department 82 may be reached at (213) 893-0530.

Case Number: 21STCP02293 **Hearing Date:** October 25, 2022 **Dept:** 82

Gerardo Navarro-Salgado,	Judge Mary Strobel Hearing: October 25, 2022
v.	
Los Angeles County Civil Service Commission, et al.	Tentative Decision on Petition for Writ of Mandate

Case No. 21STCP02293

In his first, second, and third causes of action, Petitioner Gerardo Navarro-Salgado ("Petitioner") petitions for a writ of ordinary mandate pursuant to CCP section 1085, as follows:

- directing Respondents County of Los Angeles, Los Angeles County Probation Department, and Alfonso Gonzales, Chief Probation Officer (collectively, "County") "to provide Petitioner with post-removal safeguards in the form of a full trial type evidentiary hearing" in connection with his discharge from County employment as a Supervising Deputy Probation Officer. (First Amended Petition ("FAP") Prayer ¶ 1.)

- directing County and its Civil Service Commission ("Commission" or "CSC") "to provide a full post-deprivation evidentiary hearing before CSC to Petitioner, as well as any other County employee who has expressed an unequivocal desire to obtain reinstatement to County employment but was involuntarily retired from County service, or is for any other reason considered not to be within the jurisdiction of CSC, to contest any disciplinary penalty against that employee, including to obtain reinstatement and back pay." (Supplemental Opening Brief ("OB") 14:14-21; FAP Prayer ¶ 3.)

- directing Respondent Los Angeles County Employees Retirement Association ("LACERA") to "notify[] any member involuntarily retired that such retirement will divest CSC of jurisdiction over any pending administrative appeal of discipline the member has pending at the time of such retirement; and further ... to ... revok[e] Petitioner's previously imposed retirement ...." (OB 15:10-19; FAP Prayer ¶ 2.)

In his fourth cause of action pursuant to Government Code section 3309.5, Petitioner seeks an injunction ordering County to "provide a forum to provide full, evidentiary type post-deprivation hearings for any County employee to contest any discipline which is found to be not within the jurisdiction of Respondent Civil Service Commission or the County Employee Relations Commission." (FAP Prayer ¶ 4.) Petitioner also seeks an award of civil penalties pursuant to section 3309.5(e) against County "in the amount of Twenty Five Thousand Dollars ($25,000.00) per day for each day since County's motion to dismiss Petitioner's CSC appeal was granted by CSC and for which County has failed to take steps to create an alternate, due process compliant forum to complete Petitioner's appeal hearing, continuing to the final completion of Petitioner's CSC appeal of his discharge." (OB 15:5-9; FAP Prayer ¶ 5.)

Finally, Petitioner seeks an award of backpay or damages against LACERA "equal to the value of the pay and benefits lost by Petitioner as the result of his coerced retirement and his inability to complete his appeal hearing before CSC, together with interest pursuant to Civil Code § 3287." (OB 15:20-24; FAP Prayer ¶ 6.)

Respondents County and LACERA separately oppose the petition. Commission has filed a notice of no beneficial interest in outcome.

Background and Procedural History

Petitioner's Employment History; Membership in LACERA; and Discharge

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Petitioner was hired by the Los Angeles County Probation Department ("Department") on June 23, 2000. (Navarro-Salgado Decl. ¶ 4.) Petitioner became a member of LACERA on July 1, 2000, and participated in general contributory retirement Plan D, which means he paid monthly contributions to LACERA during his tenure with the County. (Cochran Decl. ¶ 4.)

On April 3, 2019, Petitioner was served with a letter of intent, notifying him of County's intent to discharge him from his position as Supervising Deputy Probation Officer ("SDPO"). (Navarro-Salgado Decl. ¶¶ 6, 9.) Petitioner states that the conduct upon which the notice of intent was based occurred between January 31, 2018, and June 8, 2018. (Id. ¶ 8.) On April 30, 2019, Petitioner participated in a pre-deprivation *Skelly* hearing. (Id. ¶ 9.) Petitioner was terminated from his County position on June 21, 2019. (Ibid.; Cochran Decl. ¶ 7.)

At the time of his discharge, Petitioner was 70 years old with 19 years of pensionable service credit and was eligible for retirement. Petitioner reached the age of 70 ½ in November 2019. (Cochran Decl. ¶ 7; see also Navarro-Salgado Decl. ¶¶ 3, 10.)

However, Petitioner did not want to retire at the time of his discharge. He declares, as follows: "[E]ven though I was 70 years old at the time, I was not interested in retiring. I wanted nothing more than to get my job back and return to work with the Probation Department. I believe the allegations made by the Department against me are untrue and I was then, and remain confident now that I can prove this in a Civil Service appeal hearing." (Navarro-Salgado Decl. ¶ 11.) Petitioner also declares, and Respondents have not disputed, that there is no mandatory retirement age for Los Angeles County employees. (Id. ¶ 14.)

Petitioner's Communications with LACERA about Retirement

Starting in March 2019, Petitioner had several communications with LACERA regarding his retirement options and the impact of a possible termination on his retirement benefits. (See Cochran Decl. ¶¶ 5-11; Navarro-Salgado Decl. ¶¶ 20-28.) Relevant communications between Petitioner and LACERA are discussed *infra* in the Analysis section.

Civil Service Commission Proceedings; and Petitioner's Retirement from County Service

On July 2, 2019, Petitioner appealed his discharge to the Commission and requested a hearing on that appeal. (Id. ¶ 13; AR 1-9.) The Commission granted Petitioner a hearing and defined the issues as: (1) Are the allegations contained in the Department's letter of June 21, 2019, true?; (2) If any or all are true, is the discipline appropriate? (AR 34-35.) Hearings were conducted before the assigned hearing officer on January 24, 2020, January 28, 2020, and January 30, 2020. (AR 36.)

On February 28, 2020, Petitioner executed a voluntary retirement election form and was retired by LACERA, effective March 1, 2020. (Navarro-Salgado Decl. ¶¶ 21-24; Cochran Decl. ¶ 11, Exh. C.) As discussed below, Petitioner contends that he was forced to execute this retirement election due to IRS and pension regulations.

Additional Commission hearing dates were scheduled for March 27 and 31, 2020. (AR 80.) On or about March 20, 2020, in compliance with Executive Orders issued by Gov. Newsom and the County Board of Supervisors in response to the COVID-19 pandemic, Commission cancelled all pending and scheduled hearings. (Navarro-Salgado Decl. ¶16.)

On April 8, 2020, Department moved to dismiss Petitioner's appeal of his discharge because he separated from County service when he retired, depriving Commission of jurisdiction. (AR 99-110; Navarro-Salgado Decl. ¶ 17.) On February 17, 2021, the Commission granted the Department's motion to dismiss. (AR 135-139.)

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Petitioner's Request to Rescind Retirement, and Administrative Appeal to Board of Retirement of LACERA

On March 4, 2020, Petitioner requested that LACERA rescind his retirement. LACERA staff denied his request. (Cochran Decl. ¶ 12, Exh. D.) Petitioner challenged staff's denial of his rescission request pursuant to the Administrative Appeals Procedures adopted by the LACERA Board of Retirement. (Id. ¶ 13, Exh. E.) Petitioner alleged that LACERA impermissibly forced him to retire and failed to advise him of the relevant pension requirements. (Id. ¶ 13, Exh. F.) LACERA staff denied Petitioner's requests to rescind or delay retirement in letters dated March 3, June 5, and October 20, 2020. (Id. ¶ 13, Exh. G.) On April 7, 2021, the Board of Retirement considered Petitioner's appeal. (Id. ¶ 13.) On April 9, 2021, LACERA notified Petitioner that the Board denied his appeal on the grounds that "LACERA was mandated by Section 31706 [of CERL] and federal IRS regulations to start making distributions to you by April 1, 2020." (Id. ¶ 14, Exh. H; see also Navarro-Delgado Decl. ¶¶ 25-29.)

Writ Proceedings

On July 15, 2021, Petitioner filed his original petition for writ of mandate. On October 5, 2021, Petitioner filed the operative FAP. County and LACERA answered the FAP.

On July 29, 2022, Petitioner filed his supplemental opening brief in support of the petition. The court has received County's opposition, LACERA's opposition, Petitioner's consolidated reply, the joint appendix, and the administrative record.

Standard of Review

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The petition for writ of mandate is brought pursuant to CCP section 1085. (See Pet. ¶¶ 25-60.) There are two essential requirements to the issuance of an ordinary writ of mandate under Code of Civil Procedure section 1085: (1) a clear, present, and ministerial duty on the part of the respondent, and (2) a clear, present, and beneficial right on the part of the petitioner to the performance of that duty. (C*alifornia Ass'n for Health Services at Home v. Department of Health Services* (2007) 148 Cal.App.4th 696, 704.) "An action in ordinary mandamus is proper where … the claim is that an agency has failed to act as required by law." (Id. at 705.)

"'On questions of law arising in mandate proceedings, [the court] exercise[s] independent judgment.'" (*Christensen v. Lightbourne* (2017) 15 Cal.App.5th 1239, 1251.) A claim of "lack of jurisdiction … constitutes a pure question of law." (*Zuniga v. Los Angeles County Civil Service Com.* (2006) 137 Cal.App.4th 1255, 1260.)

Petitioner bears the burden of proof and persuasion in a mandate proceeding brought under CCP section 1085. (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1154.) An agency is presumed to have regularly performed its official duties. (Evid. Code § 664.) A reviewing court "will not act as counsel for either party … and will not assume the task of initiating and prosecuting a search of the record for any purpose of discovering errors not pointed out in the briefs." (*Fox v. Erickson* (1950) 99 Cal.App.2d 740, 742.)

County contends that "Petitioner's claims more properly sound in administrative mandamus, Code of Civ. Proc. §1094.5." (County Oppo. 4.) There may be merit to County's position, especially with respect to the writ petition challenging Commission's order granting dismissal of the appeal before Commission. (See CCP § 1094.5(a) [administrative mandate is used to challenge "the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given"].) However, County does not analyze the appropriate standard of review for all writ claims at issue. In any event, for all of Petitioner's claims the evidence is effectively uncontradicted. The court would reach the same result on the petition even if certain claims are governed by section 1094.5 and even if the independent judgment test applies to any issues. (See *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 388-89 ["Where the facts before the administrative body are uncontradicted, the determination of their effect is a question of law."].)

Analysis

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Petitioner's Writ Petition Against LACERA

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Petitioner contends that LACERA breached its fiduciary duties "by failing to fully assist Petitioner in ensuring that his forced retirement did not negatively impact his pending CSC appeal." (OB 10.) As a remedy, Petitioner seeks a writ directing LACERA "to restore Petitioner to the status he held prior to that breach, to wit: not retired and facing the choice between involuntary retirement with the imposed monetary penalty and the ability to continue to pursue his CSC appeal, or voluntary retirement and the forfeiture of his CSC appeal." (OB 10-11.) Alternatively, Petitioner contends that "LACERA should be required to pay, as damages directly caused by its breach of its duty to Petitioner, the full amount of back pay and benefits lost by Petitioner, with interest thereon, if he is not allowed to continue to pursue his CSC appeal." (OB 11.)

Summary of Required Minimum Distribution ("RMD") Rule

Petitioner's claims against LACERA require some explanation of the Required Minimum Distribution ("RMD") Rule, which precipitated Petitioner's decision to retire.

Internal Revenue Code ("IRC") section 401(a) states that "[a] trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section."[1] It is undisputed that LACERA is a public pension plan subject to IRC section 401(a). (See LACERA Oppo. 5; Reply 7:27-28.)

The RMD Rule is found in IRC section 401(a)(9), which states in pertinent part:

(9) REQUIRED DISTRIBUTIONS —

(A) In general.— A trust shall not constitute a qualified trust under this subsection unless the plan provides that the entire interest of each employee—

(i) will be distributed to such employee not later than the required beginning date, or

(ii) will be distributed, beginning not later than the required beginning date, in accordance with regulations, over the life of such employee or over the lives of such employee and a designated beneficiary (or over a period not extending beyond the life expectancy of such employee or the life expectancy of such employee and a designated beneficiary).

....[¶]

(C) Required beginning date.—For purposes of this paragraph—

(i) In general.—The term "required beginning date" means April 1 of the calendar year following the later of—

(I) the calendar year in which the employee attains age 70 ½, or

(II) the calendar year in which the employee retires."

LACERA contends, and Petitioner does not dispute, that section 31706 codifies the RMD Rule into California law. (Oppo. 5.) At the pertinent time, Section 31706 stated in relevant part:

> Any member who has left county service and has elected to leave accumulated contributions in the retirement fund or who is deemed to have elected a deferred retirement pursuant to subdivision (b) of Section 31700 and has attained age 70 but has not yet applied for a deferred retirement allowance and who is not a reciprocal member of a retirement system established pursuant to this chapter or the Public Employees' Retirement Law shall be notified in writing by the treasurer, or other entity authorized by the board, that the member is eligible to apply for and shall begin receiving a deferred retirement allowance by April 1 of the year following the year in which the member attains age 70½. The notification shall be made at the time the deferred member attains age 70 and shall be sent by certified mail to the member's last known address, or to the member's last known employer, as shown by the records of the retirement system.

LACERA contends that "[a]t the time Petitioner turned age 70 ½, both the I.R.C. and CERL therefore required that he withdraw his contributions or take a distribution from his retirement plan by April 1st of the following year." (LACERA Oppo. 6.) LACERA contends that "if Petitioner had not elected to retire effective March 1, 2020, LACERA was statutorily required by CERL, including § 31706, to retire him by that date to ensure distribution before the April 1, 2020 RMD deadline." (Ibid.) The court agrees with this interpretation of sections 409(a)(9) and 31706 based on the plain language of those provisions. Petitioner develops no contrary interpretation of the RMD Rule.

LACERA's Member Services Division Manager also declares as follows: "As a tax-qualified public retirement system, I.R.C. § 401(a)(9) is a qualification issue for LACERA. If the plan fails to satisfy I.R.C. 401(a)(9), the plan and trust are subject to disqualification under I.R.C. 401(a) and 501(a), which ultimately affects all plan participants in a negative manner. Also, for the member, failure to make required minimum distributions under I.R.C. 401(a)(9) will also trigger a 50% excise tax under I.R.C. § 4974 with respect to the employee based on the amount of the required minimum distribution that was not distributed." (Cochran Decl. ¶ 15.) Petitioner does not rebut that statement in reply with citation to any contrary legal authority or evidence.

Petitioner's Breach of Fiduciary Claim

Petitioner contends that LACERA breached its fiduciary duties "by failing to fully assist Petitioner in ensuring that his forced retirement did not negatively impact his pending CSC appeal." (OB 10.) "[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 *fiduciary trust* in good faith and must deal fairly with the pensioners-beneficiaries." (*Hittle v. Santa Barbara County Employees Retirement Association* (1985) 39 Cal.3d 374, 392.) Under *Hittle*, LACERA had a fiduciary duty to adequately inform Petitioner of his pension rights and benefits, including with respect to the RMD Rule. The evidence shows that LACERA satisfied that duty.

In his opening brief, Petitioner suggests that his primary communications with LACERA occurred on February 27 and 28, 2020, shortly before he elected to retire. (OB 2-4.) However, LACERA submits evidence that it advised Petitioner regarding his pension rights and obligations, including the effect of the RMD Rule, starting much earlier and before he even filed his appeal with Commission. Petitioner has not disputed LACERA's evidence, which shows the following.

On March 27, 2019, prior to his termination and shortly before he was served with the letter of intent to discharge his employment on April 3, 2019, Petitioner called LACERA to discuss the impact of a possible termination on his benefits. Following this call, LACERA mailed member information to Petitioner, including a Summary Plan Description Booklet and Pre-Retirement Guide. The Summary Plan Description Booklet contains detailed plan information, including an explanation and discussion of the RMD Rule. (Cochran ¶ 5, Exh. A at pp. 17-18.) In relevant part, the Booklet states:

> Internal Revenue Code (IRC) § 401(a)(9) requires individuals who reach age 70.5 having left County service ... to begin taking a distribution from their LACERA retirement plan.... In accordance with IRC requirements and applicable retirement law, this means those individuals must either elect to retire or to withdraw their accumulated contributions.
>
> ....[¶]
>
> **Note:** Rather than apply for retirement, a deferred member age 70.5 may elect to withdraw his or her accumulated contributions. **By taking such action, however, the member terminates his or her membership and forfeits all rights to future retirement benefits from LACERA ....**
>
> ....[¶]
>
> The payment of a retirement allowance or a refund of accumulated contributions becomes mandatory on April 1 of the year following the year in which the individual reaches age 70.5. Those who fail to take the required minimum distributions may be

subject to IRS penalties.

(Cochran ¶ 5, Exh. A at pp. 17-18.)

On May 27, 2019, Petitioner again called LACERA to discuss his retirement options. The RMD Rule was discussed during this recorded telephone call, and staff informed Petitioner that if he did not voluntarily retire after he turned 70 ½ years old, LACERA was required to retire him pursuant to the RMD Rule. (Id. ¶ 6.)

On July 15, 2019, shortly after Petitioner's discharge and shortly after Petitioner filed an appeal with Commission on July 2, 2019, LACERA mailed Petitioner a letter that outlined Petitioner's options upon separation of service. On the second page, the letter included the following advisement:

Note: Under Internal Revenue Code (IRC) Section 401 (a)(9), if you reach age 70.5 having left County service with your contributions on deposit, you must either apply for retirement or withdraw your accumulated contributions.

(Cochran Decl. ¶ 8, Exh. B.)

On July 19, 2019, LACERA staff again advised Petitioner in a recorded telephone call that he was required to withdraw his contributions or take a distribution after he reached age 70 ½. It is undisputed that, at the end of the recorded call, Petitioner thanked the Call Center specialist for being "very informative and clear." (Id. ¶ 9.)

Petitioner still had not elected to withdraw or take a distribution by February 2020. LACERA therefore contacted Petitioner on February 27, 2020, by telephone to remind him that he must withdraw his contributions or retire by March 1, 2020 in order to ensure distribution by the April 1, 2020 RMD deadline. (Id. ¶ 10; Navarro-Salgado Decl. ¶ 20.)

Finally, on February 28, 2020, Petitioner visited LACERA's Member Service Center with his attorney, Mary Dederick, who was also representing him in his Commission appeal against the County. Petitioner informed staff he was concerned that retiring would interfere with his CSC appeal. He asked to delay his retirement until the completion of the appeal. Staff informed Petitioner that LACERA had no discretion regarding the RMD, and that he was required to retire by March 1, 2020 to ensure distribution by the RMD deadline. That day, after consultation with his lawyer, Petitioner applied to retire on March 1, 2020. (Cochran, Decl. ¶ 11, Exh. C.)

In his declaration, Petitioner states that, at the February 28, 2020, meeting, "I was told that my refusal to voluntarily retire would result in LACERA designating me in an 'involuntary retirement status' which would result in taxable penalties of 50% being imposed on my required minimum monthly pension distribution." (Navarro-Salgado Decl. ¶ 23.) Petitioner declares that his attorney "brought up the fact that I had a pending Civil Service appeal contesting my discharge and seeking my reinstatement as an SDPO." (Id. ¶ 23.) Petitioner declares: "I was told that I had four (4) hours to make my decision whether to voluntarily retire that day. It was my understanding from the information provided by the LACERA representatives at the meeting that I had no viable option but to retire, due to Federal tax rules.... Based on that understanding, and in order to avoid the loss of 50% of my retirement benefits if it was possible, I executed a voluntary retirement election form on February 28, 2020 and was retired effective March 1, 2020." (Id. ¶ 24.) In his points and authorities, Petitioner also represents that "Attorney Dederick likewise informed LACERA Petitioner's forced retirement would be used by County as a basis to dismiss Petitioner's pending CSC appeal." (OB 3.)

Petitioner has not argued that LACERA inaccurately informed him of the impact of the RMD Rule on an employee's retirement options, including with respect to an employee who has left County service due to discharge. Petitioner concedes that "[t]he RMD is, unquestionably, an IRS rule with which LACERA is required to comply." (Reply 7:27-28.) Petitioner appears to concede that, after he was discharged, the RMD Rule required him to retire by April 1st of the year following the year he turned 70 ½ (i.e. by April 1, 2020), or to take a one-time distribution of all accumulated contributions by that date. (Reply 7-8; see also OB 8 [stating that his retirement was "required ... by LACERA's rules and Federal tax regulations"].)

LACERA discussed the RMD Rule with Petitioner on May 27, 2019, July 15, 2019, and July 19, 2019. These discussions occurred either before Petitioner filed his Commission appeal or shortly thereafter. The evidence shows that Petitioner was represented by counsel and could have made an informed decision about the impact of the RMD Rule on his Commission appeal. (See e.g. AR 1 [request for Commission hearing filed by attorney Dederick on July 2, 2019].) Indeed, Petitioner concedes that Attorney Dederick was aware that "Petitioner's forced retirement would be used by County as a basis to dismiss Petitioner's pending CSC appeal." (OB 3; see also Navarro-Salgado Decl. ¶ 23.)

Petitioner relies on *Hittle v. Santa Barbara County Employees Retirement Association* (1985) 39 Cal.3d 374. In that case Hittle had worked for the County of Santa Barbara for a few months before being injured at work. Both Hittle's and County's doctors concluded within the year that Hittle would be unable to return to work. Hittle was terminated and the County pension system (SBCERA) sent him two letters notifying him that his contributions to the retirement plan would revert to the system fund unless he filed an allowable deferred retirement election or claimed a refund of his contributions. SBCERA sent a form with two options: to either withdraw his contribution, or for employees with 5 years' service credit, leave the money in the system as a deferred retirement election. The trial and appellate courts upheld SBCERA's action.

The California Supreme Court found otherwise. It concluded that Hittle's withdrawal of his contributions did not constitute a valid waiver of his right to apply for disability benefits. The court found the burden was on SBCERA to establish waiver. Further, the Court found that SBCERA had a fiduciary duty to fully inform its members, including Hittle, of their retirement options.

Hittle is distinguishable. As discussed above, the undisputed evidence shows that LACERA adequately informed Petitioner starting in March 2019 of his retirement options, the RMD Rule, and the impact of a possible termination on his retirement benefits. (See Cochran Decl. ¶¶ 5-11, A-C.) Petitioner does not show that LACERA made any misleading statements that prejudiced his pension rights.

Petitioner complains that LACERA failed to "take any steps, in keeping with its fiduciary duty, to assist Petitioner in protecting his CSC discharge appeal." (OB 10.) However, Petitioner does not explain what further steps LACERA could have taken, consistent with its duties as a public pension, that would have enabled him to continue his Commission appeal. Petitioner cites no authority that LACERA or its representatives had any duty to provide him legal advice on how to prosecute his Commission appeal in light of his potential retirement caused by the RMD Rule.

Petitioner asserts that LACERA representatives did not follow through on certain statements they made on or after February 28, 2020, including to "attempt to delay the effective date of my retirement to March 30, 2020" and "to provide Petitioner with a letter of explanation that the retirement was required by law and not voluntary." (OB 10:20-28; Navarro-Salgado Decl. ¶¶ 26-28 and AR 1403, 1410.) This argument and cited evidence do not prove a breach of fiduciary duty. Petitioner does not show that LACERA had the power to delay the effective date of his retirement, or that a delay to March 30, 2020, would have made a difference to his Commission appeal. Petitioner also does not show that an additional written statement from LACERA that his retirement was required by law could have impacted his Commission appeal.

Petitioner contends that LACERA stated it could have involuntarily retired him subject to 50% tax penalties. (OB 3-4, 10-11.) Petitioner implies that an involuntary retirement may have enabled him to continue his Commission appeal. (OB 10:26-11:14.) However, Petitioner does not explain how an involuntarily retirement would materially differ from a voluntary retirement for purposes of his Commission appeal. In either case, he would be retired and Commission would lack jurisdiction.

In reply, Petitioner argues for the first time that LACERA should have pursued an exception to the RMD Rule on his behalf. Petitioner asserts that "LACERA has offered no evidence to establish that the IRS will never under any circumstances allow any deviation from the [RMD] rule." (Reply 8.) Petitioner asserts that LACERA "never made any attempt to contact the IRS or anyone else to determine if any type of special dispensation could be provided to Petitioner." (Ibid.) "The salutary rule is that points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before." (*Balboa Ins.*

Co. v. Aguirre (1983) 149 Cal.App.3d 1002, 1010.) Petitioner does not show good cause to raise these arguments in reply. Moreover, Petitioner has the burden of proof under CCP section 1085. Petitioner cites no evidence, and discusses no legal authority, suggesting LACERA could have obtained an exception to the RMD Rule. Finally, *Hittle* stands for the proposition that a pension has a fiduciary duty to adequately inform a pensioner of his or her pension rights and benefits. *Hittle* does not suggest that a pension, or its trustees, have an obligation to seek exceptions to applicable IRS and pension laws, risking possible disqualification as a tax-qualified public retirement system. (Cochran Decl. ¶ 14.)

Based on the foregoing, the petition for writ of mandate against LACERA based on alleged breach of fiduciary duty is DENIED. (FAP ¶¶ 42-49.) Petitioner's requests for a writ directing LACERA to revoke his retirement election and for damages and/or backpay against LACERA are also DENIED. (OB 15:10-19; FAP Prayer ¶ 6.)

Petitioner Does Not Show Error in Denial of Appeal by LACERA Board

While not expressly requested in the petition, Petitioner may also seek a writ directing the LACERA Board to set aside its decision affirming the LACERA staff's denial of his request to rescind his voluntary retirement. (See OB 9-11 and 15:10-19.)

Board denied Petitioner's appeal on the grounds that "LACERA was mandated by Section 31706 [of CERL] and federal IRS regulations to start making distributions to you by April 1, 2020." (Cochran Decl. ¶ 14, Exh. H.) Petitioner does not show any legal error in that decision.

Petitioner made the request to rescind on March 4, 2020, after the effective date of his retirement of March 1, 2020. (Cochran Decl. ¶ 12, Exh. C, D.) As discussed, the RMD Rule required Petitioner either to withdraw his contributions to LACRA or retire by March 1, 2020, to ensure a distribution by April 1, 2020. (See Id. ¶ 11.) Petitioner concedes that LACERA was required to comply with the RMD Rule. (Reply 7:27-28.) Petitioner did not offer, in his request for rescission, to withdraw his retirement contributions to LACERA consistent with the RMD Rule. (See Cochran Decl. Exh. D.) Nor has Petitioner argued in his writ briefs that he ever indicated he would withdraw his contributions. Under these circumstances, LACERA did not err, or breach any fiduciary duty by denying Petitioner's request to rescind his retirement.

Petitioner Is Not Entitled to a Writ Directing LACERA to Provide Notices to Other LACERA Members

Petitioner also broadly seeks a writ directing LACERA to "notify[] any member involuntarily retired that such retirement will divest CSC of jurisdiction over any pending administrative appeal of discipline the member has pending at the time of such

retirement." (OB 15:10-19; FAP Prayer ¶ 2.)

Petitioner does not show that he has standing to seek such relief. To have standing to seek a writ of mandate, a party must be "beneficially interested." (CCP § 1086.) "A petitioner is beneficially interested if he or she has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal. App. 4th 899, 913.)

Petitioner seeks a writ directing LACERA to give the specified notice "in the future." (OB 15:12.) Petitioner, who has retired from County service, has no special interest to be served in a writ directing LACERA to give the specified notice. Nor does Petitioner identify any public interests that could justify an exception to the standing rule for this writ. (See *Rialto Citizens, supra,* 208 Cal. App. 4th at 913-914.)

Moreover, even if Petitioner had standing, he does not show that LACERA has a legal duty to give the specified notice. A pension has a fiduciary duty to adequately inform a pensioner of his or her pension rights and benefits. (See *Hittle, supra*.) Petitioner does not show that LACERA has a legal duty to give generalized advice to pensioners regarding the impact of retirement decisions on Commission appeals. The court also notes that, in this case, Petitioner was represented by an attorney who Petitioner contends knew of the possible impact of his retirement on a Commission appeal. (OB 3:12-15; Navarro-Salgado Decl. ¶ 23.)

The second cause of action against LACERA is DENIED.

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Petitioner's Writ Petition Against Commission

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Commission Did Not Have Jurisdiction to Hear Petitioner's Appeal After He Retired from County Service

Petitioner contends that the Commission "retained jurisdiction over the pending appeal filed and fully pursued by Petitioner in light of his failure to ever unequivocally express his desire to permanently sever his employment relationship with County." (OB 9.) Accordingly, Petitioner contends that Commission erred in dismissing his administrative appeal and he seeks a writ directing Commission to provide him a post-deprivation evidentiary hearing. (OB 9 and 14:14-21; FAP Prayer ¶ 3.) The court concludes that Commission correctly dismissed Petitioner's appeal because it had no jurisdiction to order reinstatement of a retired person or to award Petitioner backpay.

"The commission's jurisdiction derives from the Charter of the County of Los Angeles. [Citation.] ... 'Thus, the Commission has authority to act as an appellate body in very narrow circumstances related to appeals by employees (or applicants for employment) of discrimination claims, or appeals by employees regarding 'discharges and reductions.'" (*Deiro v. Los Angeles County Civil Service Commission* (2020) 56 Cal.App.5th 925, 930.)

"Several cases have held, under varying circumstances, that an employee who properly appealed his discharge or other discipline, but then resigned, retired, or died, was no longer an employee, and the commission no longer had jurisdiction to continue to adjudicate his appeal." (*Deiro, supra,* 56 Cal.App.5th at 930; *County of Los Angeles Dept. of Health Services. v. Civil Service Commission (Latham)* (2009) 180 Cal.App.4th 391 [Commission lacked jurisdiction to adjudicate claims for reinstatement and backpay of plaintiff that was discharged, but the retired from County service while Commission appeal was pending]; *Zuniga v. Los Angeles County Civil Service Commission* (2006) 137 Cal.App.4th 1255, 1258-59 [same as to plaintiff challenging suspension who resigned]; *Monsivaiz v. Los Angeles County Service Commission* (2015) 236 Cal.App.4th 236, 242 [same as to deceased former employee].)

"In short, the Commission has authority to address only matters involving a member of the civil service, and a person who has retired is no longer a member of the civil service." (*Latham, supra,* 180 Cal.App.4th at 401.) "Because of plaintiff's death [or retirement], he could not be restored to service, nor could the Commission resolve his claim for backpay. There was no act the superior court could mandate the Commission to perform that was within its authority to undertake." (*Monsivaiz, supra,* 236 Cal.App.4th at 242.)

This case falls squarely within the jurisdictional rule set forth in *Deiro, Zuniga, Latham,* and *Monsivaiz*. On February 28, 2020, while the Commission proceedings were still pending, Petitioner executed a voluntary retirement election form and was retired by LACERA, effective March 1, 2020. (Navarro-Salgado Decl. ¶¶ 21-24; Cochran Decl. ¶ 11, Exh. C.) As a result of Petitioner's retirement, Commission had no jurisdiction over Petitioner's appeal seeking reinstatement or his related claim for backpay.

Petitioner argues for a different result in this case based on *Hudson v. County of Los Angeles* (2014) 232 Cal.App.4th 392. (OB 6-9.) As summarized by the Court of Appeal in a subsequent decision, "*Hudson* concerned the civil service appeal of a discharged deputy sheriff who, during the pendency of her appeal, was placed on 'statutorily mandated' disability retirement by her employer, not by her own choice.... The record before the Commission demonstrated the former deputy had since been cleared for full duty by a physician, and the hearing officer had determined the deputy's discharge had been unjustified. *Hudson* concluded, given the factual record there, that the former deputy's disability retirement did not equate with an 'unequivocal intention' to sever her employment with the county, unlike the voluntary retirements at issue in *Zuniga* and *Latham,* and should not result in her discharge being immunized from review by the Commission." (*Monsivaiz, supra,* 236 Cal.App.4th at 242.)

Petitioner argues that "[t]wo subsequent Court of Appeal decisions reiterated the *Hudson* holding that it is the employee's 'unequivocal expression of an intent to forever abandon her Department employment' which divests CSC of jurisdiction over the employee's pending disciplinary appeal proceeding, not the simple fact of the employee's retirement." (OB 7-8, citing *Deiro, supra,* and *Monsivaiz, supra*.) This is inaccurate. The Court of Appeal in *Deiro* expressly disagreed with *Hudson* on this point, stating:

> *Hudson* said nothing about displacing the *Zuniga/Latham* rule in the case of any disability retirement. To the extent *Hudson* may be read to suggest that the commission retains jurisdiction unless a retiree "unequivocally demonstrate[s] his intention and determination not to seek restoration of his employment" (*Hudson, supra,* 232 Cal.App.4th at p. 412, 181 Cal.Rptr.3d 109), and that a disability retiree never does so, we disagree with that analysis. The essence of the *Zuniga/Latham* rule is that a plaintiff's future status as an employee is not at issue after he has retired. ... As in any other retirement case, only a wage claim remains, over which the charter gives the commission no authority. (*Zuniga, supra,* 137 Cal.App.4th at p. 1259, 40 Cal.Rptr.3d 863.)
>
> (*Deiro, supra,* 56 Cal.App.5th at 925.)

To the extent there is a conflict between *Hudson* and *Deiro* on the question of whether Commission retains jurisdiction unless a retiree "unequivocally demonstrate[s] his intention and determination not to seek restoration of his employment," the court finds the analysis from *Deiro* more compelling and follows it here. *Hudson* involved unique and "egregious" facts, and the *Hudson* Court's reasoning "is to be understood in accordance with the facts and issues before the court.'" (*People v. Knoller* (2007) 41 Cal.4th 139, 154-55.)

Petitioner nonetheless contends that this case is similar to *Hudson* because "Petitioner did not want to retire; he was required to do so by LACERA's rules and Federal tax regulations." (OB 8.) Petitioner states that "the only reason Petitioner's discharge appeal hearing was not completed was due to CSC's cancellation of hearings in compliance with COVID-19 pandemic related health restrictions, entirely outside Petitioner's control." (OB 8.) Petitioner contends that he, like Hudson, "is fully capable of returning to perform his duties" as a county employee. (OB 9.) Petitioner further contends that he "went further than Hudson in establishing his unequivocal intent to restore his employment relationship with County by attempting to withdraw his retirement application immediately upon learning that it could result in the dismissal of his CSC appeal." (OB 9.)

While the circumstances of Petitioner's retirement may be relevant to the existence of some remedy, see infra, the Commission lacks jurisdiction to reinstate or award backpay to a retired employee. Further, many facts distinguish this case from *Hudson*. Petitioner executed a voluntary retirement election form. Department did not submit retirement papers to LACERA or request Petitioner's retirement. Nor did Department return Petitioner to work. Commission did not order that Petitioner's

employment be restored. Unlike *Hudson*, Petitioner had some options to maintain his Commission appeal. He could have withdrawn his contributions from LACERA and thereby avoided retirement. Petitioner did not elect that option.

Based on the foregoing, Commission properly dismissed Petitioner's appeal for lack of jurisdiction.

Petitioner Is Not Entitled to a Writ Directing Commission to Provide Post-Deprivation Hearings to Other Employees

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Petitioner also seeks a writ directing Commission to provide a post-deprivation evidentiary hearing to "any other County employee who has expressed an unequivocal desire to obtain reinstatement to County employment but was involuntarily retired from County service, or is for any other reason considered not to be within the jurisdiction of CSC, to contest any disciplinary penalty against that employee, including to obtain reinstatement and back pay." (OB 14:14-21; FAP Prayer ¶ 3.)

Petitioner does not show that he has standing to seek that relief. (CCP § 1086.) Petitioner, who has retired from County service, has no beneficial interest in a writ directing Commission to provide post-deprivation hearings to other persons. Nor does Petitioner show that the public interest exception to standing applies.

Moreover, pursuant to the weight of the published appellate authority, Commission does not have a legal duty to provide a post-deprivation evidentiary hearing to retired employees, even if such persons have "expressed an unequivocal desire to obtain reinstatement to County employment." (See *Deiro, supra* and related cases, discussed above.)

The third cause of action against Commission is DENIED.

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Petitioner's Writ Petition Against County; and Fourth Cause of Action for Injunctive and Monetary Relief Pursuant to Government Code Section 3309.5

Petitioner seeks a writ directing County "to provide Petitioner with post-removal safeguards in the form of a full trial type evidentiary hearing" in connection with his discharge from County employment as a Supervising Deputy Probation Officer. (FAP Prayer ¶ 1.) More broadly, Petitioner seeks an injunction under section 3309.5 ordering County to "provide a forum to provide full, evidentiary type post-deprivation hearings for any County employee to contest any discipline which is found to be not within the jurisdiction of Respondent Civil Service Commission or the County Employee Relations Commission." (FAP Prayer ¶ 4.) Petitioner also seeks an award of civil penalties against County pursuant to section 3309.5(e).

As justification for this relief, Petitioner contends that County violated his due process rights and also statutory rights under Government Code section 3304(b) by not providing some alternative forum to a Commission appeal to challenge his discharge after he retired and Commission lost jurisdiction. (OB 5-6, 11-14.) Petitioner also argues, very broadly, that County has a duty to "create[] a forum to hear and decide post-deprivation hearings required by Gov't. Code section 3304(b) which are not within the jurisdiction of CSC." (OB 12-13.)

Due Process Principles and Government Code Section 3304(b)

"[D]ue process is a flexible concept that requires protections appropriate to the particular situation." (*Rondon v. Alcoholic Beverage Control Appeals Bd.* (2007) 151 Cal.App.4th 1274, 1284.) "[A]t a minimum [due process] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." (*Goss v. Lopez* (1975) 419 U.S. 565, 579.) A litigant asserting a deprivation of due process generally must show "(1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections." (*Franceschi v. Yee* (9th Cir. 2018) 887 F.3d 927, 935.)

In California, permanent civil service employees and public safety officers "have a constitutionally protected property interest in continued employment. [Such employees] may not be deprived of that employment without due process of law." (*Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2011) 648 F.3d 986, 991 [hereafter "*ALADS*"]; see also Gov. Code § 3304(b) and *Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 314.)

In *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 (hereafter *"Skelly"*), the California Supreme Court determined that "due process does not require the state to provide the [permanent civil service] employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action." (Id. at 215.) Rather, prior to the deprivation, the employee must receive "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (Ibid.)

The U.S. Supreme Court also "has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause." (*Gilbert v. Homar* (1997) 520 U.S. 924, 930.) Generally, "[a] full hearing to determine whether there was good cause to discharge a civil service employee can be conducted, consistent with procedural due process, *after the discharge*." (Asimow, et al., Cal. Practice Guide: Administrative Law, ¶ 3:195; see also *Cleveland Bd. of Ed. V. Loudermill* (1985) 470 U.S. 532, 547-548 (hereafter "*Loudermill*") ["We

conclude that all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures ...."].)

California statute also requires an administrative appeal with respect to public safety officers that are disciplined. Specifically, Government Code section 3304(b) states: "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required by his or her employing agency without providing the public safety officer with an opportunity for administrative appeal."

"While the precise details of the procedure required by Government Code section 3304 are left to local law enforcement agencies ..., the law is clear that the administrative appeal provided by the Public Officers Bill of Rights requires 'an '*independent re-examination*' of an order or decision made. [Citations.] At a minimum the reexamination must be conducted by someone who has not been involved in the initial determination. [Citations.] .... [T]he result of any hearing required by Government Code section 3304, subdivision (b), is subject to review by way of a writ of administrative mandate under Code of Civil Procedure section 1094.5...." (*Caloca v. County of San Diego* (2002) 102 Cal.App.4th 433, 443-44.)

Is Petitioner Entitled to a Non-Commission Post-Deprivation Hearing Related to his Discharge?

Petitioner contends that he is entitled to the protections of section 3304(b) as a Supervising Deputy Probation Officer. (OB 11-14.) County has made no argument to the contrary. Furthermore, as a permanent civil service employee, Petitioner was entitled to an opportunity to challenge his discharge in some administrative process. As discussed above, Petitioner does not show that his LACERA retirement should be set aside. Nonetheless, even if the retirement is not set aside, Petitioner still has a property interest in the pay he lost after discharge. Petitioner was discharged on June 21, 2019, he did not retire until March 1, 2020, and he lost his pay for that entire period. Petitioner cannot be deprived of that employment benefit "without due process of law." (See *ALADS, supra,* 648 F.3d at 991.) The question remains whether the procedures afforded to Petitioner satisfied section 3304(b) and due process principles.

The parties disagree whether a pre-deprivation *Skelly* hearing satisfies due process or whether a post-deprivation hearing is always required. Both *Skelly* and *Loudermill,* which Petitioner cites, considered when a pre-deprivation process was required, and did not hold that a post-deprivation hearing is required in all cases. (See e.g. *Loudermill, supra,* 470 U.S. at 535 ["In these cases we consider what pretermination process must be accorded a public employee who can be discharged only for cause."]; and Id. 547, fn. 12 ["the existence of post-termination procedures is relevant to the necessary scope of pretermination procedures."].)

Neither Petitioner nor County discuss the nature of the *Skelly* proceedings, the evidence submitted, whether the *Skelly* officer was involved in the original disciplinary decision, whether sufficient findings were issued for section 1094.5 judicial review, or other factors that would be relevant to whether the pre-deprivation hearing, in itself, satisfied Petitioner's due process rights. (See Navarro-Salgado Decl. ¶ 9; see also OB 11-14 and Reply 1-7.) The Notice of Discipline does not suggest that any formal evidentiary hearing was held prior to the discharge. (See AR 2.) Given the seriousness of the allegations and the penalty at issue, the court questions whether an informal meeting, in itself, satisfied due process. Counsel may further address this issue at the hearing. Subject to argument, the court tentatively concludes that the *Skelly* meeting, while relevant, did not in itself fulfill County's due process obligation to afford Petitioner an opportunity to challenge his discharge. Indeed, it seems noteworthy that County has specifically created the Commission to afford discharged employees an opportunity to appeal. A Commission appeal would arguably be unnecessary if the *Skelly* proceedings themselves fully satisfied due process.

Petitioner also contends that he was not afforded the administrative appeal required by section 3304(b). Pursuant to section 3304(b), Petitioner was entitled to an administrative appeal that would include an "independent re-examination ... by someone who has not been involved in the initial determination." (*Caloca,* 102 Cal.App.4th at 443-44.) The appeal decisionmaker must "set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (Ibid.) "[T]he independent fact finding implicit in the concept of an administrative appeal requires at a minimum that the hearing be treated as a de novo proceeding at which no facts are taken as established and the proponent of any given fact bears the burden of establishing it." (Ibid.) Subject to argument, it does not appear that the *Skelly* meeting met those requirements.

County contends: "The Peace Officers Bill of Rights required the County to provide Petitioner with a hearing. It is undisputed that the Commission granted him a hearing. Gov. Code §3304(b) and 3309.5 do not require, nor does Petitioner cite any authority that the County is required to provide, a post deprivation hearing to a retired peace officer, who is no longer an employee of the Probation Department." (Oppo. 14.)

Nothing in the statutory language of section 3304(b) suggests that a public safety officer loses the right to appeal a discharge or other punitive action upon retirement. Petitioner does cite some authority in support of his position that he is entitled to a due process and POBRA-compliant hearing, even though he retired. Specifically, in *ALADS, supra*, the Ninth Circuit considered the due process rights of two Los Angeles County deputy sheriffs (Wilkinson and Sherr) who were suspended, then discharged, and then granted disability retirement while their appeals before the Commission were still pending. The Commission issued final decisions stating that it did not have jurisdiction over the appeals of retired deputies. Wilkinson and Sherr brought claims under 42 U.S.C. § 1983 in federal court, alleging violations of due process rights. The district court granted motions to dismiss, and the Ninth Circuit reversed in part, holding that the employees had alleged violations of due process.

In relevant part, the Ninth Circuit reasoned as follows:

> Plaintiffs allege that Defendants have adopted a policy of denying post-suspension hearings to employees who resigned after the suspension was imposed but before the hearing was completed. As discussed above, due process requires that an employee suspended solely on the basis that felony charges were filed against him must be granted a post-suspension hearing. Because plaintiffs Wilkinson and Sherr were denied any post-suspension hearing at all, pursuant to Defendants' policy, they have sufficiently stated a *Monell* claim.
>
> The district court relied on *Zuniga v. Los Angeles County Civil Service Commission,* 137 Cal.App.4th 1255, 40 Cal.Rptr.3d 863 (2006), a California case, to dismiss Wilkinson and Sherr's *Monell* claim. *Zuniga* held that the Commission lacks jurisdiction to hear appeals from retired employees. *Id.* at 866. The district court stated, "Because the Commission lacks jurisdiction, it cannot be simultaneously denying the individuals their constitutional right to due process."
>
> But the fact that the Commission is precluded from hearing Wilkinson's and Sherr's appeals does not remove the County's constitutional obligation to provide some form of post-suspension hearings. Summary suspensions with minimal or no pre-suspension due process are constitutional only if followed by adequate post-suspension procedures. Take away those post-suspension procedures, and the suspensions are no longer constitutional under the Due Process Clause. The issue is not whether the Commission had jurisdiction, but whether Wilkinson and Sherr received sufficient post-suspension process to satisfy constitutional requirements. They did not receive such process, based on Defendants' policy to deny hearings to retired employees, and thus Wilkinson and Sherr have successfully stated a *Monell* claim.

(*ALADS, supra* at 993-994.)

County argues Petitioner's case is different. The *ALADS* deputies were suspended because criminal charges had been filed against them, and the Ninth Circuit found (in ruling on a motion to dismiss) that any pre-deprivation hearing may not have complied with due process. (Oppo. 13.) While these are distinctions, as noted above, County has not developed any argument that the *Skelly* meeting here was sufficiently detailed, in itself, to satisfy due process or section 3304(b).

ALADS is not binding on this court. The Ninth Circuit was reviewing a ruling on a motion to dismiss, in which it was required to accept as true all factual allegations pleaded in the complaint and to construe the pleading in the light most favorable to the nonmoving party. Nonetheless, the Ninth Circuit's decision is relevant authority that the court may consider. The Ninth Circuit

concluded that even though Wilkinson and Sherr retired during the pendency of the Commission appeals, that County deprived Wilkinson and Sherr of due process.

ALADS does not compel a ruling in favor of Petitioner here, but does support his position he was entitled to a post-deprivation challenge to his discharge. In considering how persuasive the *ALADS* reasoning is, the court notes that the *ALADS* Court did not analyze the effect of voluntary retirement when a post-deprivation remedy is available. The *ALADS* court appeared to find, without analysis, that voluntarily retirement during the pendency of a post-deprivation hearing does not constitute a waiver of due process rights to that hearing.

In addition to *ALADS*, Petitioner also cited *Hunter v. Los Angeles Civil Service Comm.* (2002) 102 Cal.App.4th 191. In *Hunter*, a senior district attorney investigator filed an appeal with the Commission claiming the denial of promotion was on grounds other than merit and requested an evidentiary hearing pursuant to section 3304(b). The Commission denied the appeal on the grounds it lacked jurisdiction. The Court of Appeal affirmed the dismissal on jurisdictional grounds, but also stated the following:

> The County acknowledges that it has a legal obligation to provide an administrative appeal to Hunter pursuant to section 3304(b). The issue is whether the Commission has jurisdiction to conduct the appeal, either under its own authority or pursuant to court order. We conclude it does not.
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> ...
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> Writ relief pursuant to Code of Civil Procedure section 1085 is available to compel a public agency to perform an act prescribed by law. [Citations.] If the County has not yet performed its duty under section 3304.5 to establish a forum for administrative appeals brought under section 3304(b), writ relief may be available to compel the County to do so. (See also § 3309.5.) That was not the relief sought or ordered in the trial court.

(*Hunter, supra,* 102 Cal.App.4th at 194-198.)

County has not responded to the *Hunter* decision at all in its opposition brief. *Hunter* is relevant to whether under appropriate circumstances the County may have as duty to "establish a forum" for a hearing, even if the Commission itself would lack jurisdiction to conduct the hearing. Nonetheless, Petitioner's case is distinguishable from *Hunter*. The Commission did have authority to hear Petitioner's challenge to his discharge up until the time he retired.

In considering what process is due Petitioner under constitutional principles or under section 3304, the court finds it important to consider the unique facts of this case. The court is not persuaded that *ALADS* and *Hunter* establish that any employee who retires during the pendency of their administrative appeal of discharge is entitled to a post-deprivation hearing. Here however the result might be different. While Petitioner signed a voluntary retirement election form, he was in the difficult position of having to either withdraw all his pension contributions or retire thereby losing his ability to challenge his discharge. The court does not find that Commission or LACERA unlawfully created this dilemma; it resulted from the unique circumstances of Petitioner's age at the time of discharge and applicable federal and state pension requirements.

While Petitioner voluntarily retired, he did so under circumstances that suggest it may be unfair and inconsistent with due process principles to deprive him of a post-deprivation hearing because of his retirement. In these unique circumstances, the County may have an obligation to afford Petitioner an opportunity to have an administrative hearing challenge his discharge as a means to establish his right to backpay. While Petitioner would no longer be eligible for reinstatement, he nonetheless would be entitled to back pay if his discharge was found erroneous. Petitioner had no avenue to have that hearing once he retired and the Commission lost jurisdiction. *ALADS* and *Hunter* suggest he was entitled to a post-deprivation hearing, albeit not one before the Commission.

The parties' briefs do not fully address the relevant legal and factual issues, as set forth above. The court is tentatively inclined to conclude that County has a clear, present, and ministerial duty to provide Petitioner a post-deprivation hearing to challenge his discharge, despite his LACERA retirement. However, the court invites oral argument on the issues outlined above and will also consider supplemental written briefing.

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Does Petitioner Have Standing to Seek an Order Directing County to Create an Alternative Forum for Post-Deprivation Hearings?

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As noted above, to have standing to seek a writ of mandate, a party must be "beneficially interested." (CCP § 1086.) Petitioner must also have standing to seek an injunction under section 3309.5. "This standard ... is equivalent to the federal 'injury in fact' test, which requires a party to prove by a preponderance of the evidence that it has suffered 'an invasion of a legally protected interest that is '(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" (*Associated Builders and Contractors, Inc. v. San Francisco* (1999) 21 Cal.4th 352, 361-362.)

Petitioner does not have a beneficial interest in the broad writ or injunction he seeks directing County to "create" an entirely new forum for post-deprivation hearings. Petitioner has the burden to prove standing and he does not address that issue in his legal briefs. Petitioner has retired from County service. While Petitioner may be entitled to a hearing for his own discharge, Petitioner

does not show that he would personally benefit if the court issued the broad order against County that he seeks, or that he would be harmed if the court did not issue the order.

"A petitioner who is not beneficially interested in a writ may nevertheless have 'citizen standing' or 'public interest standing' to bring the writ petition under the 'public interest exception' to the beneficial interest requirement. The public interest exception 'applies where the question is one of public right and the object of the action is to enforce a public duty—in which case it is sufficient that the plaintiff be interested as a citizen in having the laws executed and the public duty enforced.'" (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal. App. 4th 899, 913-914.) In a citizen standing analysis, "[t]he courts balance the applicant's need for relief (i.e., his beneficial interest) against the public need for enforcement of the official duty. When the duty is sharp and the public need weighty, the courts will grant a mandamus at the behest of an applicant who shows no greater personal interest than that of a citizen who wants the law enforced." (*Citizens for Amending Proposition L v. City of Pomona* (2018) 28 Cal.App. 5th 1159, 1174.) "Judicial recognition of citizen standing is an exception to, rather than repudiation of, the usual requirement of a beneficial interest." (*Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 873-874.)

Petitioner does not address the public interest exception as applied to his causes of action seeking to compel County to create a new alternative forum for post-deprivation hearings. County also does not address that issue in opposition. Counsel may address that issue at the hearing.

Petitioner Does Not Prove that County Has a Generalized Duty to Create an Alternative Forum for Post-Deprivation Hearings When Commission Lacks Jurisdiction

Even if Petitioner has standing to seek an order directing County to create an "alternative forum" for post-deprivation hearings, Petitioner has not proven his case. Specifically, Petitioner does not analyze the relevant due process factors or show that they weigh for a conclusion that County must create a new alternative forum for post-deprivation hearings.

"More specifically, identification of the dictates of due process generally requires consideration of (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.' (*Id.* at p. 269, citations omitted, italics added; followed in *In re Malinda S.* (1990) 51 Cal.3d 368, 383 [272 Cal.Rptr. 787, 795 P.2d 1244].) A similar balancing test was adopted by the United States

Supreme Court in *Mathews v. Eldridge* (1976) 424 U.S. 319, 335 [47 L.Ed.2d 18, 33, 96 S.Ct. 893] (hereafter *Mathews*)." (*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 286-287.)

As this case shows, it is conceivable that some small percentage of County employees will be deprived of a post-deprivation hearing before Commission under circumstances largely beyond their control, including due to age and the RMD Rule. However, Petitioner cites no evidence or reason to believe that this would be a common occurrence. In most circumstances, a voluntary choice to forego the completion of Civil Service hearing and retire instead may be considered a waiver of completion of the post-deprivation hearing. The court need not decide that issue for Petitioner's own case, as Petitioner's circumstances are unique.

Against the private interests of such employees, the court must also balance "the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Petitioner wholly fails to address that issue. An order directing County to create an entirely new forum for post-deprivation hearings would certainly impose fiscal and administrative burdens on the County. Because 1085 relief in unique circumstances may be available, the balance tips against an order requiring County to create a post-deprivation hearing for all employees who retire while civil service proceedings are pending. Subject to argument, Petitioner's request for a broad order directing County to create an "alternative forum" for post-deprivation hearings is denied.

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Section 3309.5(e) Penalties

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Government Code section 3309.5(e) provides in pertinent part, as follows: "In addition to the extraordinary relief afforded by this chapter, upon a finding by a superior court that a public safety department, its employees, agents, or assigns, with respect to acts taken within the scope of employment, maliciously violated any provision of this chapter with the intent to injure the public safety officer, the public safety department shall, for each and every violation, be liable for a civil penalty not to exceed twenty-five thousand dollars ($25,000) to be awarded to the public safety officer whose right or protection was denied and for reasonable attorney's fees as may be determined by the court. If the court so finds, and there is sufficient evidence to establish actual damages suffered by the officer whose right or protection was denied, the public safety department shall also be liable for the amount of the actual damages."

Petitioner seeks penalties against County pursuant to section 3309.5(e) based on its alleged failure to comply with section 3304(b) and to create an alternative forum for post-deprivation hearings for employees not within Commission jurisdiction. Petitioner contends that "[e]vidence of County's malicious violation of § 3304(b) is the fact that County has made no effort since 1998 to create a forum or process for due process hearings not within the jurisdiction of CSC." (OB 13.) For reasons discussed above, Petitioner has not sufficiently analyzed the *Mathews v. Eldridge* factors or shown that County has a generalized obligation to create the alternative forum that he seeks. Accordingly, penalties based on that alleged violation of section 3304(b) are not justified.

Petitioner also seeks penalties under section 3309.5(e) "of $25,000 for each day since County's motion to dismiss Petitioner's CSC appeal was granted by CSC on which County has failed to take any steps to create an alternate, due process compliant forum in which to complete Petitioner's hearing." (Oppo. 13-14.) The court defers a ruling on this issue until it decides whether a writ or injunction should issue compelling County to provide Petitioner a post-deprivation hearing to challenge his discharge, separate from the Commission hearing.

Qualified Immunity

County asserts a defense of qualified immunity. (County Oppo. 14-15.) "Qualified immunity applies to claims for monetary relief against officials in their individual capacities, but it is not a defense against claims for injunctive relief against officials in their official capacities." (*Meiners v. University of Kansas* (10th Cir. 2004) 359 F.3d 1222, 1233, fn. 3.) County does not show that qualified immunity applies to the extent Petitioner seeks a writ or injunction directing County to provide him a post-deprivation hearing.

County also does not cite authority that qualified immunity is a defense to civil penalties under section 3309.5(e). The parties may address that issue at the hearing. As noted, the court defers a ruling on Petitioner's request for penalties until it decides whether a writ or injunction should issue compelling County to provide Petitioner a post-deprivation hearing to challenge his discharge, separate from the Commission hearing.

Conclusion

The second cause of action against LACERA, and the third cause of action against Commission are DENIED.

For the causes of action against County, the court denies Petitioner's request for an injunction under section 3309.5 directing County to "provide a forum to provide full, evidentiary type post-deprivation hearings for any County employee to contest any discipline which is found to be not within the jurisdiction of Respondent Civil Service Commission or the County Employee Relations Commission." (FAP Prayer ¶ 4.) The court also denies Petitioner's associated request for penalties under section 3309.5(e) not specific to Petitioner's discharge or administrative appeal rights.

The court tentatively concludes that County has a clear, present, and ministerial duty to provide Petitioner a post-deprivation hearing to challenge his discharge, despite his LACERA retirement. However, the court requires further argument on that issue, as outlined above.

Among other issues that may be discussed at the hearing, the court will consider ordering supplemental briefing on the following issues: (1) whether Petitioner's *Skelly* meeting satisfied due process and Government Code section 3304(b); (2) whether County should be ordered to provide an alternative post-deprivation hearing for Petitioner under the circumstances of this case; and (3) whether civil penalties under section 3309.5(e) should be imposed on County for any period of time after Commission dismissed his appeal.

[1] The court judicially notices the relevant provisions of the IRC. (See e.g. https://www.law.cornell.edu/uscode/text/26/401.)