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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

DEPARTMENT OF MENTAL HEALTH,
Plaintiff and Respondent,
v.
STATE PERSONNEL BOARD,
Defendant;
LUCKY MEYER,
Real Party in Interest and Appellant;
VICTOR CLARK THUESEN,
Intervener.

A132921
(Napa County
Super. Ct. No. 26-47332)

Appellant Lucky Meyer, acting in propria persona, appeals from an order denying her former attorney’s motion seeking an award of attorney fees and costs pursuant to the private attorney general doctrine. (See Code Civ. Proc., § 1021.5.) The trial court denied the motion, reasoning that the litigation did not confer a significant benefit on the general public or a large class of persons and that Meyer had a sufficient financial incentive to pursue the litigation. We affirm the trial court’s order.

BACKGROUND

As set forth in our prior, nonpublished opinion in this matter, Lorene “Lucky” Meyer began working as a psychiatric technician at Napa State Hospital in July 1999. (*Department of Mental Health v. State Personnel Board* (Jan. 31, 2011, A127362) 2011 Cal. App. Unpub. LEXIS 812, at p. *1.) In October 2007, she received a notice of

medical demotion from the Department of Mental Health (Department), informing her that she was being demoted to custodian based on a psychiatric evaluation that concluded she was unfit to perform the duties of a psychiatric technician. (*Id.* at pp. *9-*10.) She appealed the decision to the State Personnel Board (Board), which revoked the medical demotion. (*Id.* at pp. *4, *6.)

The Department filed a petition for writ of administrative mandate in the trial court seeking to set aside the Board's decision. (*Department of Mental Health v. State Personnel Board, supra*, A127362, 2011 Cal. App. Unpub. LEXIS 812, at p. *6.) After the trial court denied the petition, the Department appealed the decision to this court. (*Ibid.*) In a nonpublished opinion filed January 31, 2011, we affirmed the judgment denying the Department's administrative mandate petition. (*Id.* at p. *11.) Among other things, our decision turned upon whether the Board was entitled to rely upon "later acquired information" consisting of a doctor's report and testimony that postdated the Department's demotion decision. (*Id.* at pp. *7-*9.) On May 11, 2001, the Supreme Court denied a request to publish our opinion.

Victor Thuesen is an attorney who represented Meyer in opposing the Department's administrative mandate petition. He initially consulted with Meyer in June 2009 and represented her throughout the trial court proceedings and during the briefing phase of the subsequent appeal. After he filed a respondent's brief in the appeal, he sought to withdraw as Meyer's counsel in September 2010. We granted Thuesen's motion to withdraw on September 28, 2010. Meyer was unrepresented at the time the court heard oral argument in the Department's appeal.

Following the issuance of this court's opinion in the Department's appeal, Thuesen—who was no longer representing Meyer—filed a motion to intervene in the trial court action for the purpose of filing a motion to recover attorney fees and costs from the Department pursuant to Code of Civil Procedure section 1021.5. Thuesen served a copy of his motion on Meyer. The Department did not oppose the motion to intervene but reserved the right to oppose any motion for attorney fees and costs. Meyer opposed

Thuesen's motion for reasons that are unclear.¹ The court granted Thuesen's motion to intervene, noting that Meyer had failed to "present any cognizable legal basis for denying the motion."

After the trial court permitted him to intervene, Thuesen filed an attorney fee motion in which he sought an order directing the Department to pay his fees and costs associated with representing Meyer. Thuesen served a copy of his attorney fee motion on Meyer. As set forth in the motion, Thuesen had a written legal services agreement with Meyer providing that he would be paid from any monetary recovery Meyer received. The written agreement also provided Meyer would be obligated to pay a reasonable fee out of any recovery in the event Thuesen withdrew as Meyer's counsel. Thuesen stated that Meyer was unable to pay for the legal work associated with his handling of the case. He applied for an order shifting the obligation to pay attorney fees and costs to the Department pursuant to the private attorney general doctrine, as codified in Code of Civil Procedure section 1021.5, on the ground the decision in the case had conferred a significant benefit on a large class of persons. Thuesen sought fees and costs totaling over \$75,000.

The Department opposed Thuesen's attorney fee motion. It argued the litigation did not vindicate an important right and did not confer a significant benefit on the general public or a large class of persons. According to the Department, "[t]he only effect of this Court's decision is to uphold the [Board's] decision restoring Ms. Meyer to her position as a psychiatric technician at Napa State Hospital and award her back salary and benefits." It also contended that Meyer did not suffer a financial burden out of proportion to her economic stake in the case. Among other things, the Department pointed out that Meyer was slated to receive a "minimum recovery" of \$176,191.44 in back pay and

¹ It is unclear why Meyer opposed Thuesen's motion to intervene, given that Thuesen was seeking to have the Department pay fees and costs Meyer would presumably otherwise be required to pay. Meyer's written opposition to the motion is not included in the record on appeal.

interest, with “substantially more when increased retirement benefits, medical insurance, and further interest are added by the [Board].”

The Department did not serve its opposition on Meyer. Instead, it served the opposition on Thuesen, as “[a]ttorney for Real Party in Interest Lucky Meyer.” At that point in time, it had been over ten months since Thuesen withdrew from his representation of Meyer.

On August 4, 2011, Thuesen filed a reply in support of his motion, which he served on Meyer as well as the Department. Thuesen’s reply reflected that the motion was set to be heard on August 11, 2011, at 8:30 a.m. in courtroom B of the Napa County Superior Court. Among other things, Thuesen disputed that Meyer’s financial interest in the litigation precluded an award of attorney fees, arguing that Meyer “was without the financial resources necessary to challenge [the Department’s] refusal to comply with the decision of the [Board] or this Court’s ruling on the writ petition.”

The trial court posted a tentative ruling denying the motion. No one requested oral argument on the motion. Consequently, the trial court issued a minute order on August 11, 2011, adopting its tentative ruling denying the motion. The court’s order states: “Intervenor’s motion for attorney’s fees under the private attorney general doctrine is DENIED for the reasons set forth in the State’s opposition to the motion. Specifically the court does not find that its decision, affirmed by an unpublished appellate opinion, confers any significant benefit on the general public or on a large class of persons, as required by Code of Civil Procedure section 1021.5. Additionally, given Ms. Meyer’s fairly significant financial stake in this proceeding, the court does not find that the litigation imposed a financial burden on her that was disproportionate to her individual stake.”

Meyer filed a notice of appeal on August 12, 2011, the day after the trial court issued its minute order denying the attorney fee motion. In her notice of appeal, she claimed she was “denied [her] right to appear at [Code of Civil Procedure section]1021.5 hearing that adversely affected [her] rights.”

DISCUSSION

“Code of Civil Procedure section 1021.5 authorizes an award of attorney fees to a ‘private attorney general,’ that is, a party who secures a significant benefit for many people by enforcing an important right affecting the public interest.” (*Serrano v. Stefan Merli Plastering Co.* (2011) 52 Cal.4th 1018, 1020, fn. omitted.) A fee award is authorized when “(1) the action ‘has resulted in the enforcement of an important right affecting the public interest,’ (2) ‘a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons . . . ,’ and (3) ‘the necessity and financial burden of private enforcement . . . are such as to make the award appropriate’ [Citations.]” (*Id.* at p. 1026.)

In reviewing an order granting or denying a request for attorney fees under Code of Civil Procedure section 1021.5, we normally apply the deferential abuse of discretion standard of review. (*Serrano v. Stefan Merli Plastering Co.*, *supra*, 52 Cal.4th at pp. 1025-1026; *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175; *Robinson v. City of Chowchilla* (2011) 202 Cal.App.4th 382, 391.) We apply de novo review when the determination of whether to award fees turns on statutory interpretation. (*Ibid.*) Here, because there is no claim that the trial court misinterpreted the governing statute, we review the challenged decision for abuse of discretion.

Meyer takes particular exception to the trial court’s conclusion that, “given Ms. Meyer’s fairly significant financial stake in this proceeding, the court does not find that the litigation imposed a financial burden on her that was disproportionate to her individual stake.” She seems to interpret this statement to mean the court concluded she did not suffer a financial burden as a result of the litigation, a conclusion she stridently disputes. However, the challenged finding does not suggest Meyer suffered no financial burden as a result of the litigation arising from her demotion. Rather, the court simply found that she also had a significant financial stake in the outcome of the litigation, a finding that makes an award of attorney fees inappropriate under Code of Civil Procedure section 1021.5.

The court’s finding properly bears upon what has been referred to as the “financial burden” requirement, which may be stated as follows: “ ‘An award on the “private attorney general” theory is appropriate when the cost of the claimant’s legal victory transcends his personal interest, that is, when the necessity of pursuing the lawsuit placed a burden on the plaintiff “out of proportion to his individual stake in the matter.” [Citation.]’ ” (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 941.) Because Meyer had a substantial financial incentive to pursue the litigation even without the potential for recovering attorney fees under Code of Civil Procedure section 1021.5, the purpose of the private attorney general statute would not be served by awarding fees, even though she may have also incurred a substantial financial burden during the course of the litigation. Meyer has offered no evidence that would undermine the trial court’s finding regarding the financial burden requirement.

Further, even if we were to question the basis for the trial court’s finding that Meyer’s financial burden was not disproportionate to her individual stake, we would still be left with the trial court’s finding that the litigation did not confer any significant benefit on the general public or on a large class of persons. She does not challenge this finding, which constitutes a separate and independent basis for denying the attorney fee motion. (See *RiverWatch v. County of San Diego Dept. of Environmental Health* (2009) 175 Cal.App.4th 768, 775 [because criteria for attorney fee award are stated in the conjunctive, each must be satisfied to justify award].) Because the nonpublished decision in the Department’s appeal has no application to any person other than Meyer, it was not unreasonable for the trial court to conclude that the litigation did not confer a significant benefit on a large class of persons. Accordingly, the court did not abuse its discretion in denying the request for attorney fees under Code of Civil Procedure section 1021.5.

Notwithstanding Meyer’s obvious interest in her former attorney’s efforts to require the Department to pay fees and costs incurred on her behalf, she purports to clarify in her reply brief that she did not file the appeal “because the Superior Court denied the motion for attorney’s fees.” Rather, her primary complaint appears to be that she did not receive a copy of the Department’s opposition to the attorney fee motion. She

claims the opposition contains “false, disparaging, and misleading information purportedly pertaining to [her].” She seems to believe the court’s ruling has or will have a bearing upon her right to back pay, and she complains that she was not afforded an opportunity to be heard and to defend her interests. More specifically, she argues that the trial court violated her due process and equal protection rights when it concluded “based on false and inaccurate information,” and without giving her the “opportunity to be heard,” that the litigation did not impose a financial burden on her that was disproportionate to her individual stake.

Procedural due process focuses on the fairness of a procedure that may deprive an individual of important rights. (*In re Crystal J.* (1993) 12 Cal.App.4th 407, 412.) “ ‘[T]he central meaning of procedural due process [is] clear: ‘Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.’ [Citations.] It is equally fundamental that the right to notice and an opportunity to be heard “must be granted at a meaningful time and in a meaningful manner.” [Citation.]’ ” (*Ibid.*)

In this case, Meyer’s former attorney served her with his motion requesting attorney fees. Her former attorney also served her with his reply brief, which contained the date, time, and place of the hearing on the motion. Thus, Meyer received notice of the motion and what was at stake. She also had ample notice of the hearing date and, like other parties and members of the general public, had access to the trial court’s tentative ruling, which was issued the day before the scheduled hearing date. (See Local Rules for the Superior Court of the State of California, County of Napa, rule 2.9 [tentative rulings available on the court’s website or by phone no later than 3:00 p.m. on day before scheduled hearing].) Thus, her claim that the trial court conducted a “clandestine” or “ex parte” hearing that violated her due process rights is simply without foundation.

Meyer’s due process claim turns entirely on her contention that she did not receive a copy of the Department’s opposition brief, which she claims contains “false and misleading information.” Yet, nowhere does Meyer specifically state how or in what particular fashion the Department’s brief was false or misleading. Based upon our

review, the brief and supporting documentation contain a fairly straightforward and unvarnished recitation of the procedural history and current case status. Nor does Meyer say what evidence she would have offered on the issue of whether the litigation's financial burden was disproportionate to her individual stake. We observe that her former attorney's interests were aligned with hers, and that he in fact did respond to the Department's argument on the financial burden requirement in his reply brief. Further, as discussed above, Meyer's objection to the court's finding on that issue appears to be based on a misunderstanding of the import of the finding. The court did not suggest Meyer suffered no financial burden or that her entitlement to back pay was somehow affected by its assessment of the attorney fee motion. Indeed, Meyer's entitlement to back pay was not an issue before the court. Despite Meyer's claims to the contrary, the court's order denying her former attorney's fee motion has no bearing upon her entitlement to back pay or any amount that might be awarded. In short, we fail to see how Meyer suffered a deprivation of her due process rights simply because she did not receive a copy of the Department's opposition brief.

Finally, we note that Meyer seeks relief in the form of a protective order directed at the Deputy Attorney General who has represented the Department in this litigation. Among other things, she also seeks to be placed in the proper bargaining unit and to receive the proper amount of her back pay and interest along with other benefits owed, and she asks that the determination and implementation of the back pay decision be made by an entity or person other than the Department or the Deputy Attorney General who has represented the Department in this litigation. Because these issues were not raised or otherwise addressed below, they are not properly within the scope of this appeal.² (See *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 631, fn. 7.)

² We have also disregarded documents Meyer attached to her briefs that were not part of the record before the trial court at the time it issued the challenged decision. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 [appellate court considers only matters that were part of the record at the time judgment was entered].)

DISPOSITION

The trial court's August 11, 2011, order denying the request for attorney fees and costs is affirmed. Each party shall bear its own costs on appeal.

McGuiness, P.J.

We concur:

Siggins, J.

Jenkins, J.