

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CALIFORNIA DEPARTMENT OF
INDUSTRIAL RELATIONS,

Plaintiff and Respondent,

v.

CALIFORNIA STATE PERSONNEL
BOARD,

Defendant and Respondent;

OLGA H. GARAU,

Real Party in Interest and
Appellant.

B230790

(Los Angeles County
Super. Ct. No. BS 113391)

APPEAL from a judgment of the Superior Court of Los Angeles County,
James C. Chalfant and Robert H. O'Brien, Judges. Affirmed.

Olga H. Garau, in pro. per., for Real Party in Interest and Appellant.

Vanessa L. Holton, Chief Counsel, Frank Nelson Adkins, Assistant Chief Counsel,
Fred Lonsdale and Jay J. Lee, Counsel, for Plaintiff and Respondent.

No appearance for Defendant and Respondent.

Real party in interest Olga H. Garau appeals from the judgment denying her cross-petitions for ordinary and administrative mandate and her request for declaratory relief, all regarding entitlement to back pay. We conclude that appellant effectively withdrew her back pay appeal before respondent California State Personnel Board (the Board) rendered a final decision on the merits, and that her doing so bars the relief she was seeking. We affirm the judgment.

PROCEDURAL SUMMARY

This is the third appeal¹ in a civil service employment dispute that has engendered overlapping administrative and judicial proceedings. Its long and tortuous procedural history began on April 25, 2006, when appellant filed an appeal with the Board from a notice of rejection during probation served on her by her employer, respondent California Department of Industrial Relations (the Department). In a decision issued on September 4, 2007, the Board concluded the Department had failed to properly serve appellant with the rejection notice, and appellant had obtained permanent status at the end of her probationary period. The Board specified that appellant was entitled to back pay under Government Code section 19180,² which applies to restored probationers and provides for the payment of back salary but says nothing about benefits or interest. The Board revoked the rejection during probation and ordered the Department to reinstate appellant and pay her “salary, if any,” under section 19180. The case was referred to the Chief Administrative Law Judge to be set for a hearing at either party’s request if the parties

¹ We take judicial notice of the record and our decision in appellant’s prior appeal in this case, *Garau v. California State Personnel Bd.* (Oct. 14, 2009, B210335 [nonpub. opn.]) (case B210335). (Evid. Code, § 452, subd. (c) & (d)(1).) We recently reversed the trial court’s denial of the Department’s second petition for writ of administrative mandate in a related case, *California Dept. of Industrial Relations v. California State Personnel Bd.* (Oct. 5, 2011, B228794 [nonpub. opn.]) (case B228794).

² Subsequent statutory references are to the Government Code unless otherwise specified.

could not agree on the amount of back pay. On September 17, 2007, appellant requested a hearing on back pay. The first such hearing took place on February 25, 2008, but was not completed on that date.

Meanwhile, on February 22, 2008, the Department filed a petition for writ of administrative mandate, challenging the Board's September 4, 2007 decision. On March 11, 2008, appellant filed two cross-petitions: an ordinary mandate petition to compel the Department to comply with the Board's reinstatement order (the reinstatement petition) and an administrative mandate petition to set aside the portion of the Board's decision relevant to the calculation of back pay (the back pay petition). The trial court sustained the Board's demurrer to the back pay petition and, sua sponte, struck the reinstatement petition and the Department's petition on the ground that none of the three petitions was ripe. The entire matter was dismissed on June 26, 2008. On August 22, 2008, appellant appealed the dismissal of her cross-petitions in case B210335.

One day before the trial court dismissed the matter, on June 25, 2008, appellant filed with the Board a request for an order to show cause (OSC) and further findings under section 18710, asking for a clarification of the September 4, 2007 decision and a show cause order against the Department for its failure to reinstate her. The back pay hearing scheduled for that day was taken off calendar. On August 8, 2008, the Board ordered the Department to either reinstate appellant or seek a stay in the Superior Court, and it remanded appellant's request for a back pay hearing to the Chief Administrative Law Judge with directions to provide the parties a peremptory strike list of all administrative law judges (ALJ's) and to schedule a hearing without any further delay. The ALJ assigned to the hearing was to decide whether appellant was entitled to back pay, benefits, out-of-pocket expenses, and interest under section 19180; whether she was required to mitigate her damages; and which party bore the burden of proof on mitigation. Either party could then file a petition for rehearing with the Board.

The next hearing on back pay was held before an ALJ on September 26, 2008. Over the course of the hearing, appellant repeatedly complained about various aspects of the administrative proceeding and other matters, refused to answer questions about

mitigation, and threatened to leave. The ALJ stopped the recording several times when appellant became upset about matters not pertaining to back pay, including her complaint about a previous ALJ having gone to work for the Department. At that point, appellant left the hearing and did not return. Based on her conduct at the hearing, the Department moved to consider appellant's back pay appeal withdrawn under Government Code section 19579. A hearing was held on the motion. On January 27, 2009, the Board adopted the ALJ's decision that, by failing to proceed at the September 26, 2008 hearing without good cause or a request for continuance, appellant had withdrawn her back pay appeal. The Board stated that appellant's underlying appeal from the rejection during probation was unaffected.

Our decision in case B210335 issued on October 14, 2009. We concluded that appellant should be immediately reinstated,³ and we allowed her to amend her back pay petition to allege that the administrative proceedings were over. Appellant filed an amended back pay petition on January 19, 2010. The Department filed an answer on February 23, 2010. Judge Chalfant denied appellant's motions to strike the Department's answer and for judgment under Code of Civil Procedure section 1094. He determined that the Board's January 27, 2009 decision had no impact on appellant's back pay petition and set the case for a hearing. Judge O'Brien then heard the case and denied appellant's petition on the ground that she abandoned the administrative proceeding and thus waived her claim to back pay. A judgment was entered on December 9, 2010. This timely appeal followed.

DISCUSSION

I

Appellant's opening brief asserts in the procedural history and summary of argument that the trial court prejudicially abused its discretion in denying her motion to strike the Department's answer to the amended back pay petition. The table of contents

³ The Department had obtained a stay of the Board's reinstatement order on October 30, 2008, on condition that appellant be paid her salary and benefits.

does not list this as an issue on appeal, and the argument section does not address it. The California Rules of Court require a brief to “[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority.” (Cal. Rules of Court, rule 8.204(a)(1)(B).) An issue not properly briefed may be deemed abandoned. (*Hahn v. Diaz-Barba* (2011) 194 Cal.App.4th 1177, 1186, fn. 3). Nevertheless, we briefly address this issue.

Appellant insists that, under California Rules of Court, rule 3.1320(j)(2), the Department’s answer was due 10 days after she filed her amended petition. The amended petition contains dozens of pages of allegations regarding the administrative proceedings before the Board and purports to seek a writ of administrative mandate. A review of the administrative record is required under the circumstances, and thus an answer is not due until 30 days after receipt of the relevant administrative record. (Code Civ. Proc., §§ 1094.5, subd. (a), 1089.5.) Appellant’s assertion that only the Board, not the Department, may defend the final administrative decision is unsupported by authority and is contrary to established writ practice. (See *Sonoma County Nuclear Free Zone ‘86 v. Superior Court* (1987) 189 Cal.App.3d 167, 173 [a real party in interest has a right to be heard before a writ issues].) The trial court did not abuse its discretion when it denied appellant’s motion to strike the Department’s answer.

Hereafter, we consider only arguments that appear under separate, appropriate headings in appellant’s opening brief. We do not address the plethora of argumentative statements interposed throughout appellant’s statement of facts and procedural history.

II

Code of Civil Procedure section 1094.5, subdivision (a) provides for review 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, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer” Because the Board derives its adjudicatory authority from the state Constitution, a superior court considering a petition for administrative mandate must defer to the Board’s factual findings if they are supported by substantial evidence.

(*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 217, fn. 31 (*Skelly*)). We in turn apply the substantial evidence test to the trial court’s factual determinations. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 824.) We exercise our independent judgment in reviewing questions of law. (*Anserv Ins. Services, Inc. v. Kelso* (2000) 83 Cal.App.4th 197, 204.) The Board’s interpretation of governing statutes is entitled to great weight and respect even if not necessarily to deference. (*California Dept. of Corrections v. State Personnel Bd.* (2004) 121 Cal.App.4th 1601, 1611.)

(a)

Although she styled her petition against the Board as one for a writ of administrative mandate, and thus ostensibly seeks to review a final administrative decision rendered after an evidentiary hearing required by law, appellant asserts that no statute authorizes the Board to conduct a hearing on back pay and no statute governs the award of back pay in her particular case.

The Board administers the state civil service system under article VII of the California Constitution. (Cal. Const., art. VII, § 2, subd. (a).) Section 3, subdivision (a) of article VII provides that “[t]he board shall enforce the civil service statutes and . . . shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions.” (*Ibid.*) The State Civil Service Act (§ 18500 et seq.) authorizes the Board to “hold hearings and make investigations concerning all [civil service] matters.” (§ 18670, subd. (a).) It provides further that these hearings and investigations are governed by statute and by the rules of practice and procedure adopted by the Board. (§ 18675, subd. (a).)

Rejection during probation is governed by Chapter 5, Article 6. (State Civil Service Act, §§ 19170-19180.) Upon a written request, the board “may investigate with or without a hearing the reasons for rejection” during probation. (§ 19175.) Board rule 53.3 assigns all appeals of rejection during probation to the full evidentiary hearing process. (Cal. Admin. Code, tit. 2, § 53.3.) In turn, Board rule 58.3(b) provides: “Failure of any party to proceed at a hearing . . . shall be deemed a withdrawal of the appeal or the action, unless the hearing is continued for good cause.” (*Id.*, tit. 2, § 58.3.)

This rule tracks the language of section 19579, which appears in Chapter 7, Article 1 (§§ 19500-19589), governing disciplinary proceedings. Thus, under its statutory authority to hold hearings and adopt rules of practice and procedure, the Board requires evidentiary hearings on appeals of rejection during probation and deems such appeals withdrawn for failure to proceed at a hearing. The Board deemed the back pay appeal in this case withdrawn under section 19579, but could have done so under Board rule 58.3(b) as well.

The State Civil Service Act mandates that the Board “shall direct the payment of salary” after restoring rejected probationers. (§ 19180.)⁴ The California Supreme Court has held that the act designates the Board as the agency responsible for the determination of the compensatory amount to be paid to reinstated civil service employees. (*Mass v. Board of Education* (1964) 61 Cal.2d 612, 628-629.) In its September 4, 2007 decision, the Board referred appellant’s appeal from the rejection during probation to the Chief ALJ with direction that it “shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary due appellant.” The Board effectively reserved jurisdiction to determine the amount of back pay within the pending appeal from the rejection during probation, which was already assigned to the evidentiary hearing process under Board rule 53.3. While appellant was not required to request a back pay hearing, once she did, the evidentiary hearings held on her request were required by law and were within the Board’s jurisdiction to determine the amount of her back pay.

⁴ Section 19180 provides in full: “If the board restores a rejected probationer to his position it shall direct the payment of salary to the employee for such period of time as the rejection was improperly in effect. ¶ Salary shall not be authorized or paid for any portion of a period of rejection that the employee was not ready, able, and willing to perform the duties of his position, whether such rejection is valid or not. ¶ There shall be deducted from any amount approved under this section any compensation the employee earned or might reasonably have earned in private or public employment during the period the rejection was improperly in effect.”

Appellant argues that section 19180 does not apply to her because she was not a rejected probationer. She draws on the Board's conclusion that her rejection during probation was ineffective and she became a permanent employee at the end of her probationary period.⁵ Her argument is counter to *Santillano v. State Personnel Bd.* (1981) 117 Cal.App.3d 620. There, the trial court was directed to issue a writ ordering the Board to restore the plaintiff, who already had become a permanent employee by the time her employer purported to reject her during probation. Nevertheless, she was deemed entitled to back pay as a rejected probationer under section 19180. (*Id.* at pp. 625, 626.) Appellant's reliance on *Skelly, supra*, 15 Cal.3d 194 is in error since *Skelly* governs the notice of adverse action to be served on an employee that has acquired permanent status before the notice is served. (*Id.* at p. 197, 215.) It does not address the due process rights of a probationary employee who obtains permanent status after having been served with an ineffective notice of rejection during probation. The Board's comment that appellant obtained permanent status at the end of her probationary period means that, in the future, she can be discharged only for cause. It does not change the fact that at the time the Department sought to reject her, appellant was a probationary employee with only statutory rights and no vested interest in her employment. (*Anderson v. State Personnel Bd.* (1980) 103 Cal.App.3d 242, 249.)

We conclude that the Board had jurisdiction to determine appellant's back pay under section 19180 within the appeal from her rejection during probation. The back pay proceedings, like the underlying appeal, were assigned to the mandatory evidentiary hearing process, subject to the withdrawal provisions of section 19579 and Board rule 58.3(b). The Board's final decision is thus reviewable under Code of Civil Procedure section 1094.5, subdivision (a).

⁵ The Board rejected appellant's argument that she already had passed her probationary period when the Department attempted to serve her with the notice of rejection during probation.

(b)

The Board's final decision determined only that appellant withdrew her back pay appeal by failing to proceed at the September 26, 2008 hearing without good cause and without requesting a continuance. There is no final decision from the Board regarding the merits of appellant's contentions that she is entitled to benefits and 10 percent interest on the back pay award or that she had no duty to mitigate her damages. The Board's interim resolution in response to appellant's request for an OSC directed the ALJ assigned to the hearing to decide these issues in the first instance. The resolution advised that either party could petition the Board for a rehearing from the ALJ's decision at the conclusion of the evidentiary hearing. But the evidentiary hearing was never concluded.

Appellant does not appear to challenge the Board's findings about her obstreperous conduct on September 26, 2008, which culminated in her walking out of the hearing, or the Board's conclusion that her failure to exercise self-control did not constitute good cause for her failure to proceed. In any case, these findings are supported by more than substantial evidence in the administrative record. Instead, appellant attempts to characterize the Board's decision as relinquishing to the courts any jurisdiction it had to determine her back pay. Her contention that the real reason the Board considered her appeal withdrawn was because the amount of back pay could not be calculated before she was reinstated is contrary to the administrative record. The ALJ presiding over the September 26, 2008 hearing explained to appellant that the amount of her back pay would be determined as of the date of the hearing, and the decision would include forward-looking language covering any future changes to the memorandum of understanding relevant to her back pay. The Board in its final decision rejected appellant's argument that the Department's failure to reinstate her excused her failure to proceed with the administrative hearing.

Appellant insists that the courts now have jurisdiction to determine its elements and amount. The doctrine of exhaustion of administrative remedies requires going through the entire administrative proceeding to a final decision on the merits. (*McHugh v. County of Santa Cruz* (1973) 33 Cal.App.3d 533, 538-539.) It is "a jurisdictional

prerequisite to resort to the courts.” (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 69-70.) Parties may withdraw from an administrative proceeding to pursue a settlement and thus divest the Board of jurisdiction over their dispute. (*Larson v. State Personnel Bd.* (1994) 28 Cal.App.4th 265, 278-280.) But a party generally may not withdraw from an ongoing administrative proceeding to seek a judicial determination of the same matter unless the administrative remedy is cumulative or the exhaustion requirement is excused. (See e.g. *Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1127-1131.) Appellant advances several arguments as to why the courts should decide her back pay claim. Properly framed, these arguments go to whether appellant had a concurrent judicial remedy or whether the exhaustion requirement was excused. We find appellant’s arguments unconvincing.

Appellant contends that she had no obligation to complete the proceeding before the Board since the Board failed to render a timely decision under Government Code section 18671.1.⁶ In *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1138 (*CCPOA*), where the Board had delayed resolving appeals from disciplinary actions beyond the statutory period, section 18671.1 was deemed not to divest the Board of jurisdiction over the appeals. The court held that when the Board delays resolving an appeal from a disciplinary action, “an employee who has not waived the time limit may seek a writ of mandate against the Board to compel the Board to decide the appeal by a date certain. Alternatively, . . . he or she may seek a writ of

⁶ Section 18671.1 provides in relevant part: “Whenever a hearing or investigation is conducted by the board or its authorized representative in regard to an appeal by an employee, the hearing or investigation shall be commenced within a reasonable time after the filing of the petition and the board shall render its decision within a reasonable time after the conclusion of the hearing or investigation, except that the period from the filing of the petition to the decision of the board shall not exceed six months or 90 days from the time of the submission, whichever time period is less, and except that the board may extend the six-month period up to 45 additional days. . . . The provisions relating to the six-month or the 90-day periods for a decision may be waived by the employee but if not so waived, a failure to render a timely decision is an exhaustion of all available administrative remedies. . . .”

mandate against the appointing authority to set aside the adverse action.” (*Ibid.*) In appellant’s previous appeal, we explained that *CCPOA* did not apply to her case because she already had received a favorable decision from the Board revoking her rejection during probation. We had no occasion to specifically address the applicability of *CCPOA* to the back pay petition in case B210335.⁷ Were we to apply it to appellant’s circumstances, we would have to conclude that appellant waived the time limit under section 18671.1.

The *CCPOA* court held that a petition for ordinary mandate against the appointing authority (i.e. the employer) to set aside the adverse action “should be filed within a reasonable time after expiration of the statutory time limit for decision by the Board and in all cases before the Board renders its decision.” (*CCPOA, supra*, 10 Cal.4th at p. 1156.) The court explained that the employee must act “promptly when the time limit has been exceeded and the employee has no reason to anticipate that decision of the appeal is imminent. Failure to file the petition promptly is an implicit waiver of the statutory time limit. The Legislature did not intend to permit the employee to await a delayed Board decision and then seek traditional mandate rather than review by administrative mandamus if the result of the administrative appeal is unfavorable.” (*Id.* at p. 1156, fn. 6.)

Although her appeal from the rejection during probation was not resolved within six months, appellant did not seek a writ of mandate against the Board to compel a decision by a date certain or against the Department to set aside the rejection during

⁷ Appellant misreads our decision in case B210335 as ordering the trial court to decide back pay on remand. The procedural posture of appellant’s prior appeal was that her back pay petition had been dismissed on demurrer as premature. We took judicial notice that in the interim the administrative proceeding before the Board had terminated, thus mooted the ripeness issue. We declined appellant’s invitation to decide the correctness of the standard for determining her back pay, stating that it should first be reviewed by the trial court on a fully developed record. We ordered the trial court to allow appellant to amend her petition. Our order did not preclude the trial court from deciding on the whole record that appellant had waived her right to a judicial determination of back pay by withdrawing her administrative appeal.

probation. When appellant filed her cross-petitions on March 11, 2008, her appeal from the rejection during probation had been pending for almost two years (since April 25, 2006). Under *CCPOA*, that is a waiver of the six-month time limit. Even assuming that appellant's September 17, 2007 request for a back pay hearing triggered a new six-month time limit and she could seek a writ of ordinary mandate against the Department regarding back pay, the back pay petition she filed on March 11, 2008 did not comply with *CCPOA* because it was filed before, rather than immediately after, the expiration of the new six-month time limit. The amended petition was not filed until January 19, 2010, more than a year after the Board deemed the back pay appeal withdrawn. Although appellant claims to have repeatedly objected to the delay of the administrative proceeding before the Board, she did not seek a writ of mandate to compel the Board to issue a decision by a date certain and her back pay petitions were untimely under *CCPOA*. We conclude that under the circumstances the courts have not acquired jurisdiction to determine appellant's back pay even though the Board failed to render a timely decision under section 18671.1.

Since the Board stated that the withdrawal of the back pay appeal left unaffected the underlying appeal from rejection during probation, appellant seeks to challenge the Board's September 4, 2007 decision on the standard for determining back pay.⁸ But that decision was superseded by the Board's August 8, 2008 resolution, which reopened the issue of the scope of back pay under section 19180. The parties cite several precedential

⁸ Appellant relies on Judge Chalfant's intermediate ruling that the Board's January 27, 2009 decision had no impact on appellant's back pay petition, as well as on his statements at the April 13, 2010 hearing, where he denied her motion for judgment on the writ and set the matter for trial. Appellant does so without regard for the procedural posture of the case, which Judge Chalfant acknowledged, or for the principle that a trial court may change its rulings at any time before entry of judgment. (See *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 388.)

Board decisions on back pay.⁹ One decision provides that salary under section 19180 includes the same benefits as section 19584,¹⁰ which sets the standard for back pay in disciplinary actions. (*In re Harper* (1996) State Personnel Bd. Dec. No. 96-07.) Another decision, on which appellant heavily relies, provides for back pay on the ground that under section 19582, subd. (a) the Board must render decisions that are “just and proper.” (*In re Sanchez* (2000) State Personnel Bd. Dec. No. 00-02.) At the September 26, 2008 hearing, the ALJ urged appellant to present all evidence she considered relevant to back pay and to make legal arguments as to the scope of section 19180 in her closing argument. In light of these precedential decisions, we cannot assume that the Board would have limited appellant’s back pay to back salary had she pursued her appeal to the end, and we cannot excuse her failure to pursue that remedy to a final decision on the merits. (Cf. *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1080 [exhaustion of administrative remedies is futile if the agency has positively predetermined its ruling on a particular case].) Appellant has not established that exhaustion of her remedies before the Board would have been futile.

Nor are we convinced that the due process violations appellant perceived deprived her of a fair hearing before the Board or justified her withdrawal from the administrative proceeding. The Board found as much when it concluded that appellant withdrew from

⁹ The Board may designate certain of its decisions as precedents. (§ 19582.5.) We may take judicial notice of precedential decisions. (*Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 50 fn. 3.)

¹⁰ Section 19584 provides in relevant part: “Whenever the board revokes or modifies an adverse action and orders that the employee be returned to his or her position, it shall direct the payment of salary and all interest accrued thereto, and the reinstatement of all benefits that otherwise would have normally accrued. “Salary” shall include salary, as defined in Section 18000, salary adjustments and shift differential, and other special salary compensations, if sufficiently predictable. Benefits shall include, but shall not be limited to, retirement, medical, dental, and seniority benefits pursuant to memoranda of understanding for that classification of employee to the employee for that period of time as the board finds the adverse action was improperly in effect.”

the back pay hearing without good cause. Appellant couches in due process terms her contention that she should not be required to mitigate her damages because the Department delayed reinstating her. In doing so, she conflates two separate limitations of back pay: mitigation of damages by seeking comparable employment, and availability to perform in one's former position. Both of these limitations are included in the statutory back pay provisions. (See §§ 19180, 19584.) They are discussed in *Carroll v. Civil Service Com.* (1973) 31 Cal.App.3d 561, which appellant cites for the proposition that she need not mitigate her damages. But the court in that case did not hold that a discharged employee had no duty to mitigate; it held rather that the employer offered no evidence of similar employment. (*Id.* at pp. 564-565.) Only as to the requirement that an employee be available to perform the duties of his former position did the court find a reciprocal duty on the part of the employer to offer reinstatement. (*Id.* at p. 567.) The Department did not seek to establish that appellant was unavailable to perform the duties of her former position, and the fact that it delayed reinstating appellant is irrelevant to her duty to mitigate damages.

Appellant refused to answer questions or provide discovery regarding mitigation on the additional ground that mitigation was a defense on which the Department bore the burden of proof and could not shift that burden to her. Appellant's refusal was legally unjustified. A party may examine adverse witnesses to prove facts essential to its case and may do so even before calling its own witnesses. (See *Murry v. Manley* (1959) 170 Cal.App.2d 364, 367; *Dorn v. Pichinino* (1951) 105 Cal.App.2d 796, 802-803 [interpreting former Code Civ. Proc., § 2055 (now Evid. Code, § 776)].) Eliciting testimony or seeking to discover evidence from an adverse party does not shift the burden of proof.

Appellant's other complaints pertain to events that preceded the Board's August 8, 2008 resolution, and were either addressed by the Board or do not clearly establish due process violations. We review them briefly. Appellant claims the Board did not provide her with notice and an opportunity to be heard before it ruled on the standard of back pay in the September 4, 2007 decision. Appellant had an opportunity to address the Board on

this issue in her request for an OSC. Appellant complains of bias on the assumption that ALJ Snyder, who presided over the first back pay hearing on February 25, 2008, and later went to work for the Department, made some unspecified prejudicial rulings against her in order to ingratiate himself with his future employer. In its August 8, 2008 resolution, the Board explained that ALJ Snyder was no longer assigned to appellant's case and invited her to raise any prejudicial rulings in a petition for rehearing at the close of the administrative proceeding. Appellant claims in passing that she was denied subpoenas and that ex parte communications took place, but does not provide sufficient record evidence for us to determine whether the complained-of actions amount to due process violations. We note that the ALJ presiding at the June 25, 2008 hearing explained to appellant that she did not need to subpoena state witnesses when documentary evidence was available, and the Department offered to produce the relevant evidence. We are satisfied that appellant's intransigence rather than any due process violation disrupted the administrative proceeding.

The trial court characterized appellant's withdrawal from the administrative proceeding as a waiver of the right to back pay. The withdrawal is more properly characterized as a waiver of her right to an administrative determination of the amount of back pay and a bar to a judicial determination of the same issue.

III

Code of Civil Procedure section 1085 provides: "A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station" A petitioner can obtain traditional writ relief under section 1085 upon showing that the respondent has a clear, present, ministerial duty to perform an act and the petitioner has a clear, present, beneficial right to the performance of that duty. (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539-540.)

Appellant seeks traditional writ relief under section 1085 to compel the Department to pay her "full back pay" but fails to make the requisite showing under that section. In its September 4, 2007 decision, the Board ordered the Department to reinstate

appellant and pay her “salary, if any” under section 19180. The order to reinstate appellant was final and could be enforced by traditional mandate, as appellant successfully did in her reinstatement petition. The back pay portion of the order was neither final nor unqualified. It allowed for the possibility that appellant may not be entitled to back pay at all. The Board specifically retained jurisdiction to resolve the parties’ disputes over the amount of back pay. Appellant invoked the Board’s jurisdiction only to withdraw her appeal before the Board could render a final decision on the amount of her back pay. The exhaustion of administrative remedies requirement applies even when relief is sought by traditional mandate. (See *Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 619-620.) The involuntary withdrawal of her administrative appeal precludes appellant from seeking such relief.

Under the circumstances, there is no clear, present, ministerial duty on the part of the Department to pay appellant any specific amount. Nor does appellant have a clear, present and beneficial right to back pay without mitigation since, as we explained above, her position on mitigation is legally unsound. She cannot ask the courts to grant her a recovery in excess of make-whole damages. (*Davis v. Los Angeles Unified School Dist. Personnel Com.* (2007) 152 Cal.App.4th 1122, 1134.)

Appellant’s third cause of action seeks a declaration of the elements and amount of back pay. She cannot circumvent the exhaustion requirement by bringing an action for declaratory relief. (See *Bleek v. State Board of Optometry* (1971) 18 Cal.App.3d 415, 432.)

DISPOSITION

The judgment is affirmed. The Department is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.