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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GOLDEN DAY SCHOOLS, INC,

Plaintiff and Respondent,

v.

CALIFORNIA DEPARTMENT OF
EDUCATION,

Defendant and Appellant.

B239743

(Los Angeles County
Super. Ct. No. BS133991)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Reversed with directions.

Kamala D. Harris, Attorney General, Julie Weng-Gutierrez, Senior Assistant Attorney General, Ismael A. Castro and Lisa A. Tillman, Deputy Attorneys General, for Defendant and Appellant.

Doll Amir & Eley, Gregory L. Doll and Lloyd Vu, for Plaintiff and Respondent.

INTRODUCTION

Defendant, the California Department of Education (CDE), appeals from a judgment granting a petition for writ of administrative mandamus (Code Civ. Proc., § 1094.5) filed by plaintiff Golden Day Schools (Golden Day). In reliance on *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017 (*Haas*), the trial court ruled that a retired annuitant serving as one of the members of the administrative review panel convened to review CDE's decision not to renew a contract with Golden Day had a pecuniary bias requiring the administrative review hearing to be conducted anew. CDE contends that the trial court misconstrued the scope and application of *Haas* and asks that the trial court's decision be reversed. We agree and reverse with directions.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Administrative Proceedings*

Golden Day, which was founded in 1963, is a nonprofit, charitable corporation, which provides child care, education and welfare services to the economically disadvantaged community of South Central Los Angeles. For more than 42 years, Golden Day has received funding under contracts with CDE for a variety of educational programs and social services.¹ Per the terms and conditions of its contract with the State of California, Golden Day was required to submit a financial audit report to the CDE each year.

On April 5, 2011, CDE issued a notice of proposed action not to offer Golden Day continued funding for fiscal year 2011-2012. In correspondence dated April 28, 2011,

¹ During this time, disputes between Golden Day and CDE have resulted in litigation. (See *Golden Day Schools, Inc. v. Department of Education* (1999) 69 Cal.App.4th 681; *Golden Day Schools, Inc. v. State Dept. of Education* (2000) 83 Cal.App.4th 695.)

Golden Day appealed this proposed action. In correspondence dated September 15, 23 and 26, 2011, Golden Day objected to the composition of the Administrative Review Panel (ARP) convened pursuant to section 18303(d) of Title 5 of the California Code of Regulations² to hear the matter.

On September 27, 2011, Golden Day made a presentation before the ARP. At that hearing, Golden Day renewed its challenge to CDE's nonrenewal decision.

On September 30, 2011, the ARP issued a final administrative decision, finding no basis to modify or reverse the Case Conference Committee's recommendation. The ARP thus upheld the CDE's recommendation that Golden Day not be offered continued funding for the fiscal year 2011-2012.

B. Trial Court Proceedings

On October 18, 2011, Golden Day filed a petition for a writ of administrative mandamus (Code Civ. Proc., § 1094.5), alleging that CDE failed to provide it with a fair hearing and committed a prejudicial abuse of discretion by failing to proceed in the manner required by law.³ Golden Day set forth numerous reasons for setting aside CDE's administrative decision. For purposes of this appeal, we need only concern ourselves with Golden Day's assertion that "in convening the Administrative Review Panel . . . to preside over Golden Day's administrative action, CDE failed to provide Golden Day with neutral and unbiased decision-makers." Golden Day expounded that "one decision-maker was a *temporary* employee selected and *paid by the hour* by CDE. Because this decision-maker's financial well-being was dependent upon the good will of CDE—as his income is directly dependent upon the number of assignments CDE

² All further references to regulation sections are to Title 5 of the California Code of Regulations.

³ At the time this case was instituted, another action, *Golden Day Schools, Inc. v. California Department of Education* (Super. Ct. L.A. County, No. BC463175), was pending between the parties.

assigned to him and could rise and fall upon the whim of CDE—his inclusion is strictly prohibited by the California Supreme Court’s decision i[n] *Haas v. County of San Bernardino*, for such a circumstance clearly created the appearance of pecuniary bias.”

On October 25, 2011, the trial court held a hearing on an ex parte application for alternative writ of mandamus and a stay filed by Golden Day pursuant to Code of Civil Procedure sections 1087, 1107 and 1094.5. Golden Day sought an order directing CDE to set aside its decision to deny funding for fiscal year 2011-2012, which was upheld on September 30, 2011. The court granted the alternative writ and designated December 7, 2011 as the date for a hearing on a writ petition.

On November 1, 2011, Golden Day filed a motion for writ of administrative mandamus. Golden Day argued that the administrative decision had to be set aside for the following reasons: (1) one of the members of the ARP held a pecuniary bias; (2) the ARP as constituted violated regulation section 18303; (3) regulation section 18303 is infirm, and (4) Golden Day was not permitted to conduct an examination as to how the members of the ARP were selected. CDE filed an opposition to which Golden Day filed a reply.

On December 7, 2011, the court held a hearing on Golden Day’s petition for administrative mandamus regarding CDE’s decision not to continue funding Golden Day, which resulted in an automatic debarment.⁴ The trial court granted Golden Day’s petition for a writ of mandate on the sole ground that ARP member Ron Kadish (Kadish), a retired annuitant, was disqualified from serving on the panel under *Haas, supra*, 27 Cal.4th 1017. In all other respects, the court denied the petition.

⁴ Regulation section 18001(b) provides: “An applicant that is not a current CDE contractor is not eligible to apply for funding if one of the following conditions apply: [¶] (1) the contractor had a previous contract with the CDE that was terminated or not continued by the CDE for fiscal or programmatic noncompliance as described in section 18303 or 18304 within three years immediately preceding the date the [Request for Applications] was posted.”

On January 31, 2012, the trial court signed the judgment granting Golden Day's petition for a peremptory writ of mandamus. The court's judgment did not award attorney's fees, but it expressly "retain[ed] jurisdiction to adjudicate any dispute concerning costs, including, without any limitation, a motion to tax costs."

On February 8, the trial court issued a writ of mandate commanding CDE to set aside the ARP's September 30, 2011 decision, to rehear Golden Day's appeal of the CDE's Case Conference Committee's Notice of Proposed Action for no offer of continued funding for the fiscal year 2011-2012 and to file a return to the peremptory writ of mandate within 60 days of the date of the judgment. CDE filed its notice of appeal from the judgment on March 8, 2012.

On April 11, 2012, the trial court granted Golden Day's motion for attorney's fees and awarded it \$7,500 in attorney's fees pursuant to Government Code section 800.⁵ CDE did not file a separate notice of appeal from this order.

DISCUSSION

A. *Standard of Review*

"In reviewing an agency's decision under Code of Civil Procedure section 1094.5, the trial court determines whether (1) the agency proceeded without, or in excess of, jurisdiction; (2) there was a fair hearing; and (3) the agency abused its discretion. [Citation.]" (*McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 921; Code Civ. Proc., § 1094.5, subd. (b).) Our role on appeal is identical to that of the trial court. (*McAllister, supra*, at p. 922; *Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1137.) We do not review the actions or reasoning of the trial court. Rather, we review the administrative proceedings de novo and determine whether the trial court ruled correctly as a matter of law. (*TG Oceanside, L.P. v. City of*

⁵ On our own motion, we have augmented the record on appeal to include the trial court's April 11, 2012 minute order. (Cal. Rules of Court, rule 8.155(a).)

Oceanside (2007) 156 Cal.App.4th 1355, 1370; *Hongsathavij, supra*, at p. 1137.) Stated otherwise, “we review the agency’s actions directly and are not bound by the trial court’s conclusions.”” (*Wollmer v. City of Berkeley* (2009) 179 Cal.App.4th 933, 939.)

B. CDE’s Review Process

The Child Care and Development Services Act (Act) (Ed. Code, § 8200 et seq.) governs child care and development programs in the state. (Ed. Code, § 8262; Reg. § 18000 et seq.) This Act governs Golden Day’s child care program. (*Golden Day Schools, Inc. v. State Dept. of Education, supra*, 83 Cal.App.4th at p. 699.)

The purpose of the Act is to “provide a comprehensive, coordinated, and cost-effective system of child care and development services for children from infancy to 13 years of age and their parents, including a full range of supervision, health, and support services through full and part-time programs.” (Ed. Code, § 8201, subd. (a).) These programs are administered under the auspices of CDE and utilize funding provided through the Omnibus Budget Reconciliation Action of 1990 (Public Law 101-508). (Ed. Code, §§ 8206-8206.8; *Golden Day Schools, Inc. v. State Dept. of Education, supra*, 83 Cal.App.4th at p. 699.)

Article 18 of the Act (Ed. Code, § 8400 et seq.) provides for administrative review of disputes between contractors, who are selected to provide services under the program, and CDE. Education Code section 8401 expresses the Legislature’s intent to authorize an appeal process to resolve these disputes. Under certain circumstances inapplicable here, a full Administrative Procedure Act hearing, under the auspices of the Office of Administrative Hearings is permitted. (Ed. Code, §§ 8402-8405; *Golden Day Schools, Inc. v. State Dept. of Education, supra*, 83 Cal.App.4th at p. 699.)

Applications for a contract to provide child care are governed by regulation section 18002. Subdivision (a) of regulation section 18010 makes it clear that contractors who receive a contract “have no vested right to a subsequent contract.” (*Golden Day Schools, Inc. v. State Dept. of Education, supra*, 83 Cal.App.4th at p. 699.)

Regulation section 18303 requires the Child Development Division (CDD) of the CDE to review contract performance annually. CDD staff “shall determine by April 1 of each year whether to offer continued funding on a clear contract, continued funding on a conditional basis or to make no offer of continued funding.” (*Id.*, subd. (a).) If no offer of continued funding is recommended, the contractor “shall be notified in writing of the reasons for the proposed change in contract status by April 7. The notice of proposed action shall be sufficiently specific to allow the contractor to respond to the factual basis for the proposed action.” (*Id.*, subd. (b).)

If a dissatisfied contractor appeals the CDD’s proposed action, “[t]he review panel will consist of representatives of CDD management and the [CDE’s] Local Assistance Bureau, Legal Office, Office of External Audits and Contracts Office and a representative of a child care and development service provider familiar with the type(s) of program(s) operated by the contractor. Upon review of the written submissions, the panel will do one of the following:

“(1) Issue a final decision holding or modifying the proposed change in status if no oral presentation has been requested; or

“(2) Schedule a time and place for an oral presentation by the contractor.

“(3) Issue a final decision to not change the contract status.” (Reg. § 18303(d).)

If an oral presentation is scheduled, the review panel has seven calendar days within which it “shall issue and mail to the contractor a decision upholding, reversing or modifying the proposed change in contract status. The decision of the review panel shall be the final action of the CDE with regard to that contract.” (Reg. § 18303(e), (g).)

C. The Haas Decision

Haas, supra, 27 Cal.4th 1017, involved a due process challenge to the manner in which some counties selected temporary administrative hearing officers under the authority of Government Code section 27721. The Supreme Court agreed that “the practice of selecting temporary administrative hearing officers on an ad hoc basis and paying them according to the duration or amount of work performed . . . gives hearing

officers an impermissible financial interest in the outcome of the cases they are appointed to decide, because the officers' prospects for obtaining future ad hoc appointments depend solely on the county's goodwill and because the county, in making such appointments, may prefer those officers whose past decisions have favored the county." (*Haas, supra*, at pp. 1020-1021, fn. omitted.)

When the Board of Supervisors of the County of San Bernardino revoked Haas's license to operate a massage clinic, Haas appealed. The board set the matter for a hearing and retained Attorney Abby Hyman to serve as the hearing officer. Haas objected, arguing that, in hiring Hyman, the county created an actual or potential conflict of interest in contravention of due process. Haas's proposal that the county seek the services of an administrative law judge through the state Office of Administrative Hearings or, alternatively, permit him to hire a hearing officer was rejected. (*Haas, supra*, 27 Cal.4th at p. 1021.)

At the hearing, Haas renewed his objection. His attorney argued "that Hyman had an impermissible financial interest in the case, arising from the manner in which the County had selected and paid her, and moved that she recuse herself." Hyman denied the recusal motion but permitted Haas to inquire into the County's arrangements with her to make a record. (*Haas, supra*, 27 Cal.4th at p. 1021.)

This inquiry revealed that Hyman had never before served as a hearing officer and had only been hired to preside over Haas's hearing. Deputy County Counsel Alan Green, who hired Hyman, had never met Hyman and retained her on basis of recommendations by his coworkers. He hired Hyman to avoid using the same temporary hearing officer who previously had recommended revocation of Haas's license and told her that "she would be paid the same rate that county counsel charged the County's internal clients for attorneys' time." (*Haas, supra*, 27 Cal.4th at pp. 1021-1022, fn. omitted.)

As the discussion continued, Green confirmed that "he foresaw employing Hyman in the future on an ad hoc basis." As far as Green was concerned, Hyman's contract with the county was "open-ended" and it "certainly" was possible that Hyman would be needed for future hearings. Although Hyman did not recall being told of this possibility,

Green said he assumed Hyman would know that. Finally, Green acknowledged that Hyman would only be paid for work performed in connection with Haas's hearing. (*Haas, supra*, 27 Cal.4th at p. 1022.)

Ultimately, Hyman recommended revocation of Haas's license. Haas pursued his administrative remedies without success and then sought writ relief in the trial court pursuant to Code of Civil Procedure section 1094.5. The trial court granted relief and directed the board to set aside its decision to revoke Haas's license. Following the board's unsuccessful appeal, the state high court granted review and affirmed the decision of the Court of Appeal. (*Haas, supra*, 27 Cal.4th at pp. 1023-1024, 1038.)

The Supreme Court coined the issue before it as "whether a temporary administrative hearing officer has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's goodwill." The high court answered that question in the affirmative and noted: "[D]ue process requires fair adjudicators in courts and administrative tribunals alike. While the rules governing the disqualification of administrative hearing officers are in some respects more flexible than those governing judges, the rules are not more flexible on the subject of financial interest. Applying those rules, courts have consistently recognized that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends on the number of cases handled. No persuasive reason exists to treat administrative hearing officers differently." (*Haas, supra*, 27 Cal.4th at pp. 1024-1025, fns. omitted.) The court in *Haas* further noted that "[w]hen due process requires a hearing, the adjudicator must be impartial." (*Id.* at p. 1025.) "Of all the types of bias that can affect adjudication, pecuniary interest has long received the most unequivocal condemnation and the least forgiving scrutiny." (*Ibid.*)

The hearing at issue in *Haas* fell under Government Code section 27721, which governs matters not subject to the Administrative Procedure Act (Gov. Code, § 11340 et seq.). While the Government Code "offers two methods for obtaining adjudicators that do not necessarily pose the problems created by an ad hoc selection" (*id.*, §§ 27720

[establishing the office of county hearing officer] & 27727 [retaining an administrative law judge through the state Office of Administrative Hearings]), these options were not utilized. (*Haas, supra*, 27 Cal.4th at p. 1037.) The *Haas* court noted that “[t]he problem we address in this case arises only when counties forgo these options and, instead, hire temporary hearing officers under Government Code section 27724.” (*Haas, supra*, at p. 1037.) Because that statutory provision only requires that the hearing officer be a licensed attorney for at least five years, “counties by default have much freedom to experiment and to adopt selection procedures adapted to their individual needs. To satisfy due process, all a county need do is exercise whatever authority the statute confers in a manner that does not create the risk that hearing officers will be rewarded with future remunerative employment for decisions favorable to the county. The requirements of due process are flexible, especially where administrative procedure is concerned, but they are strict in condemning the risk of bias that arises when an adjudicator’s future income from judging depends on the goodwill of frequent litigants who pay the adjudicator’s fee.” (*Ibid.*, fn. omitted.)

D. Law Applicable to Retired Annuitants

Title 2, Division 5, Part 3, Chapter 12, Article 8 of the Government Code contains the statutory provisions that apply with regard to employment after retirement. (Gov. Code, § 21220 et seq.) Subdivision (a) of Government Code section 21220 provides that “[a] person who has been retired under this system, for service or for disability, may not be employed in any capacity thereafter by the state . . . unless the employment, without reinstatement, is authorized by this article. A retired person whose employment without reinstatement is authorized by this article shall acquire no service credit or retirement rights under this part with respect to the employment.” The retirement system referred to is the California Public Employees’ Retirement System (CalPERS).

Government Code section 21224, subdivision (a), states that “[a] retired person may serve without reinstatement from retirement or loss or interruption of benefits provided by this system upon appointment by the appointing power of a state agency or

public agency employer either during an emergency to prevent stoppage of public business or because the retired person has specialized skills needed in performing work of limited duration. These appointments shall not exceed a combined total of 960 hours for all employers each fiscal year. The compensation for the appointment shall not exceed the maximum monthly base salary paid to other employees performing comparable duties as listed on a publicly available pay schedule divided by 173.333 to equal an hourly rate. A retired person appointed pursuant to this section shall not receive any benefit, incentive, compensation in lieu of benefits, or other form of compensation in addition to the hourly pay rate. A retired annuitant appointed pursuant to this section shall not work more than 960 hours each fiscal year regardless of whether he or she works for one or more employers.”

Government Code section 19144 provides: “Subject to Sections 21223 and 21224, a person who has retired from state civil service may be employed temporarily in a civil service position at any time following retirement, provided that the position is either:

“(a) In the class in which the person had permanent or probationary status or a career executive assignment appointment at the time of retirement.

“(b) In another class to which the person could have been permanently transferred, reinstated, or demoted at the time of retirement.”

E. Haas Is Inapplicable in This Case

Kadish, the challenged member of the ARP, worked for the CDE for 36 years as a division director before retiring in November 2010. At some point thereafter, he returned to work as a retired annuitant. In that capacity, in April 2011, he began “serving as the Child Development Division’s Management Representative on all Administrative Review Panels, not just [Golden Day’s].” Kadish also had other assignments. He assisted “the state Special Schools and Services Division with the hiring of their site superintendents at the state schools for the deaf.” He also worked “with a new division director to replace [him], to assist in his transition to this position that I . . . held for a number of years.” Kadish also made “management inquiries” for his “former division, personnel matters,

assisting management in trying to understand employee actions that took place and render a fair decision there.” Kadish described his work as “temporary/permanent.” For all work performed by Kadish in his capacity as a retired annuitant, he was paid on an hourly basis in accordance with Government Code section 21224, subdivision (a).

The term “ad hoc” means “for the special purpose or end presently under consideration” and “concerned or dealing with a specific subject, purpose, or end.” (Webster’s Encyclopedic Unabridged Dict. (2001) p. 24.) As is readily apparent, Kadish was not hired on an ad hoc basis for the special purpose of serving as a hearing officer at Golden Day’s ARP. Rather he returned to state service after a lengthy career with the CDE as a retired annuitant and in that capacity was asked to serve as the CDD’s management representative on *all* ARPs and to perform other varied responsibilities.

For all intents and purposes, Kadish, although a retired annuitant, was a state employee while serving on the ARP and performing his other post-retirement responsibilities for the CDE. His status as a retired annuitant simply served to limit the amount of hours he could work in a fiscal year, rendering him a part-time employee, and made him ineligible for numerous benefits.⁶ That Kadish was paid for his work on an hourly basis is inconsequential here. As a retired annuitant, his service could only be compensated on an hourly basis. The potential pecuniary bias denounced in Haas simply was not demonstrated in this case.

F. Attorney’s Fees

CDE also challenges the trial court’s order awarding Golden Day attorney’s fees pursuant to Government Code section 800. As previously noted, however, CDE did not appeal from that order.

In correspondence dated October 29, 2012, we invited counsel to submit letter briefs addressing whether CDE’s purported appeal from the postjudgment order awarding

⁶ Whatever benefits Kadish did receive would have been retirement benefits provided by CalPERS.

attorney's fees should be dismissed due to its failure to file a notice of appeal from that order. Both parties accepted our invitation.

A postjudgment order awarding attorney's fees, such as that entered in this case, is separately appealable as a postjudgment order. (Code Civ. Proc., § 904.1, subd. (a)(2); *People ex rel. Dept. of Transportation v. Superior Court* (2012) 203 Cal.App.4th 1505, 1509; *R. P. Richards, Inc. v. Chartered Construction Corp.* (2000) 83 Cal.App.4th 146, 158.) The failure to appeal from such an order ordinarily deprives the reviewing court of jurisdiction to review it. (*Silver v. Pacific American Fish Co., Inc.* (2010) 190 Cal.App.4th 688, 693-694; *R. P. Richards, Inc., supra*, at p. 158; *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 45-46.) When, however, the judgment includes an award of attorney's fees but leaves the amounts for later determination, the judgment encompasses the attorney's fees award and the award is subject to review on appeal from the judgment. (*R. P. Richards, Inc., supra*, at p. 158.) This principle is inapplicable in this case because the judgment did not include an award of attorney's fees. Rather, it merely reserved jurisdiction to make such an award in the future.

Inasmuch as CDE did not file a notice of appeal from the order awarding attorney's fees, we are without jurisdiction to review it. "However, this does not mean that an award of attorney fees to the party prevailing stands after reversal of the judgment. 'An order awarding costs falls with a reversal of the judgment on which it is based.' [Citations.] '[T]he successful party is never required to pay the costs incurred by the unsuccessful party.' [Citation.] After reversal of a judgment 'the matter of trial costs [is] set at large.' [Citation.] Although we cannot reverse the order granting costs and fees, the trial court should do so on remand." (*Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284.)

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to vacate its judgment and enter a new judgment denying Golden Day's petition for a writ of administrative mandamus in its entirety. CDE is awarded its costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.