

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RODGER J. HARTNETT,

Plaintiff and Appellant,

v.

SAN DIEGO COUNTY BOARD OF  
EDUCATION et al.,

Defendants and Respondents.

D059189

(Super. Ct. No. 37-2010-0095925-  
CU-WT-CTL)

APPEALS from a judgment and order of the Superior Court of San Diego County,  
Joel M. Pressman, Judge. Affirmed.

Following his termination from public employment, reinstatement, and retermination, plaintiff and appellant Rodger J. Hartnett sued his former employer San Diego County Office of Education (Office), other public entities and individuals, and the San Diego County Office of Education Personnel Commission (Commission), which had sustained his first termination following an administrative appeal hearing. Commission

successfully moved to strike Hartnett's complaint under Code of Civil Procedure section 425.16, commonly known as the anti-SLAPP statute,<sup>1</sup> on grounds his claims arose from the termination appeal hearing, an "official proceeding" within the meaning of the statute. Hartnett subsequently filed a petition for writ of prohibition to halt further proceedings before Commission relating to his second termination. The trial court denied the petition on grounds, among others, that Commission had jurisdiction over the matter and Hartnett possessed an adequate remedy at law.

Hartnett appeals from the judgment entered on Commission's section 425.16 special motion to strike and from the trial court's order denying his petition for writ of prohibition. As to the section 425.16 motion, Hartnett contends the trial court lacked jurisdiction to grant the motion to strike his federal civil rights cause of action under section 1983 of title 42 United States Code (section 1983) because that claim is not subject to the anti-SLAPP law, his complaint did not allege activity protected by section 425.16, and he demonstrated a probability of prevailing on the merits. With respect to his writ of prohibition, Hartnett contends the writ should have issued on grounds Commission operated under a conflict of interest, he had an inadequate alternate remedy at law, and Commission acted in excess of its jurisdiction to preside over the appeal of his termination. In addition to arguments on the merits, Office and the individual

---

<sup>1</sup> Statutory references are to the Code of Civil Procedure unless otherwise indicated. "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

defendants contend no appeal lies for the order denying Hartnett's writ petition, because it is not an appealable order, and the issues are in any event moot.

We conclude the trial court had jurisdiction to consider Commission's special motion to strike Hartnett's section 1983 cause of action, and that the motion was properly granted, as Hartnett's complaint seeks to impose liability on Commission for employment decisions alleged to have been made by Commission during a statutorily-authorized appeal hearing (Ed. Code, § 45306), or having a connection with issues decided in that hearing. We therefore affirm the judgment granting Commission's special motion to strike. Rejecting Office's challenges to appealability and mootness, we likewise affirm the trial court's order denying Hartnett's petition for writ of prohibition.

#### FACTUAL AND PROCEDURAL BACKGROUND

##### *Hartnett's Termination from Employment and Administrative Appeals to Commission*

After Office terminated Hartnett's employment as a claims coordinator, Hartnett challenged the decision in an administrative appeal before Commission, which rejected Hartnett's claims and sustained his termination in a written opinion. Hartnett thereafter successfully petitioned for a writ of administrative mandamus compelling Office to reinstate him and award him back pay from the date of termination to reinstatement. In granting the petition, the superior court ruled Commission did not proceed in the matter required by law because it had not conducted an investigation before the hearing.

Office placed Hartnett on paid administrative leave and prohibited him from reporting to work. In March 2010, Hartnett was again terminated by Office. Hartnett

again appealed to Commission, denied the charges and demanded a hearing.

Commission proceeded with an investigation.

### *Hartnett's July 2010 Complaint*

In July 2010, before Commission had concluded its investigation or set the matter for a hearing, Hartnett filed a complaint for damages against Commission, Office, the San Diego County Board of Education, Superintendent of Schools Randolph Ward and other individuals working for Office.<sup>2</sup> He alleged the following background facts concerning his termination: He was fired from his claims coordinator position on October 5, 2007, and appealed his firing to Commission, which upheld the decision in June 2008. He filed successive writ petitions to overturn his termination and Commission's decision, and in April 2009, the San Diego County Superior Court issued a writ ordering the San Diego County Superintendent of Schools to reinstate him with back pay. The order and writ were stayed until November 9, 2009, but on November 30, 2009, Hartnett was told he was being placed on paid administrative leave, and in December 2009, was notified he would not be provided full back pay, but partial back pay at a reduced salary classification. Hartnett alleged he thereafter learned Commission had eliminated his former job while his second writ petition was pending. Hartnett was then fired a second

---

<sup>2</sup> Those individuals are Michele Fort-Merrill, Lora Duzyk, and Diane Crosier. Hartnett also sued a corporation named as TSG, Inc., which he alleged was an information technology consultant. In this appeal, Office, Superintendent Ward, Fort-Merrill, Duzyk and Crosier have filed a separate brief responding to Hartnett's challenge to the denial of his petition for writ of prohibition. We refer to Office, Superintendent Ward, Fort-Merrill, Duzyk and Crosier collectively as Office.

time in March 2010 based on the same charges leading to his prior termination "despite the fact that the Commission had not yet cured its due process violation of Education Code [section] 45306 which led to the prior court order and writ of mandate for reinstatement with back pay" and he was being subjected to further proceedings before Commission over his objections that it lacked jurisdiction and was disqualified due to a conflict of interest. Hartnett alleged he "was a classified permanent employee of a government agency whose employment was not terminable at will" and he has "recognized constitutional liberty and property rights in continued public employment" and a "court-ordered right to reinstatement with full back pay pending provision of due process by the Commission." Hartnett asserted causes of action against Commission and some or all of the other defendants for "whistleblower retaliation," civil rights violations, and invasion of privacy (first, third and fifth causes of action).

*Commission's Section 425.16 Special Motion to Strike*

Commission moved to strike Hartnett's complaint under section 425.16. It argued its sole function in the matter was to hold a hearing to determine whether the charges brought against Hartnett were justified and whether to sustain his termination from employment, and thus his allegations arose directly from its role as a neutral hearing body, conduct protected by section 425.16, subdivisions (e)(1) and (e)(2) as before an official proceeding or in connection with an official proceeding. Commission also argued Hartnett could not succeed on the merits of his claims in part because it was immune from liability on each of Hartnett's causes of action; that quasi-judicial immunity

barred his whistleblower and civil rights claims, and his invasion of privacy cause of action was barred under Government Code section 815.

Commission supported its motion with declarations from Mary Beall, Miriam Rothman, and Bert Seal, all appointed members of Commission, who described Commission's authority and function, and explained Commission did not decide whether to discipline a classified employee or participate in any employment actions until that employee appealed the action to Commission. According to Beall, Rothman, and Seal, Commission conducted an evidentiary hearing in connection with Hartnett's October 2007 appeal and heard testimony, reviewed exhibits and deliberated with other Commission members, leading to a written decision sustaining Hartnett's termination. The declarants stated they did not participate in the acts about which Hartnett complained relating to his first or second termination. Commission's attorney submitted a declaration stating, among other things, that Commission holds hearings only pursuant to notice as required by the Government Code, and "[does] not act independently, but only as a body."

#### *The Petition for Writ of Prohibition*

In October 2010, while Commission's section 425.16 motion was pending, Hartnett filed a verified petition for writ of prohibition to halt the administrative proceedings before it. Hartnett alleged Commission lacked jurisdiction to hear the appeal of his March 2010 termination, his pursuit of the administrative process was futile, and Commission operated under a conflict of interest by virtue of his July 2010 lawsuit.

*Hartnett's Statement of Non-Opposition to Commission's Section 425.16 Motion to Strike*

Two days after filing his petition for writ of prohibition, Hartnett filed a response indicating he did not oppose Commission's section 425.16 motion. He stated the motion was moot, as he had filed a first amended complaint removing Commission from all causes of action with the exception of a new cause of action for declaratory relief "solely for retention of jurisdiction over the Commission" for purposes of his writ of prohibition.

*Commission's Reply to Hartnett's Non-Opposition to the Section 425.16 Motion*

In reply, Commission argued Hartnett could not avoid its section 425.16 motion by filing an amended complaint, and sought a ruling on the motion. It asked for an order that Hartnett pay Commission \$5,639 in counsel's fees and costs in preparing the motion and attending the hearing.

*The Trial Court Grants Commission's Motion to Strike*

On November 5, 2010, the trial court granted Commission's section 425.16 motion. It ruled each of Hartnett's claims was subject to section 425.16 because the allegations arose from Hartnett's termination and the termination appeal hearing, an "official proceeding" within the meaning of section 425.16, subdivisions (e)(1) and (e)(2). On November 15, 2010, it entered judgment in Commission's favor, ruling it was entitled to its attorney fees and costs under section 425.16, subdivision (c).

*Hartnett's Petition for Writ of Prohibition is Denied*

In January 2011, the trial court heard argument on Hartnett's petition for a writ of prohibition. Hartnett acknowledged he had initiated the second appeal before the Commission, but argued he did not voluntarily invoke its jurisdiction; that the appeal was

filed "under protest" and as a protective measure to guard against a later assertion of a defense of exhaustion of administrative remedies. He argued Commission had no authority to conduct a second hearing without first curing its due process violation by investigating to decide whether its original finding was accurate. He argued a writ of mandate was not a plain, speedy, or adequate remedy because of the time and expense of another administrative hearing repeating the same arguments with the same witnesses. According to Hartnett, Commission lacked authority to proceed with a second appeal after failing to properly conduct the first appeal.

The trial court denied the writ. It ruled Commission had jurisdiction to conduct the hearing under Education Code section 45306, depriving the court of authority to grant the writ. It further ruled Hartnett had an adequate remedy at law through the writ of mandate process and there were no double jeopardy or equal protection violations resulting from Commission's consideration of his second appeal.

### *Hartnett's Appeals*

Hartnett filed separate notices of appeal from the trial court's judgment and the order denying his petition for writ of prohibition.

## DISCUSSION

### I. *Special Motion to Strike*

#### A. *The Trial Court Had Subject Matter Jurisdiction to Consider Whether Hartnett's Civil Rights Action Under Section 1983 was Subject to Section 425.16*

Hartnett contends the trial court lacked subject matter jurisdiction to grant Commission's section 425.16 motion. He reasons section 425.16 does not apply to a

section 1983 civil rights action (or any "federal law cause[] of action") because such a cause of action requires acts or purported acts in the performance of official duties as an essential element and would always trigger grounds for a section 425.16 motion to strike. Hartnett would have us follow various federal authorities on the question, and disregard the contrary holdings in *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108 (*Bradbury*), and cases following *Bradbury* because the authorities on which *Bradbury* relies are inapt. According to Hartnett, *Bradbury*'s reasoning—that state procedure controls federal claims brought in state court—is a "distinction without a difference" and the real issue is whether federal interests would be undermined regardless of forum.

Hartnett's arguments rest on a meritless premise, namely, the absence of subject matter jurisdiction. "The lack of subject matter jurisdiction is a jurisdictional defect of the fundamental type. A trial court lacks jurisdiction in the fundamental sense where there is 'an entire absence of power to hear or determine the case.'" (*Shisler v. Sanfer Sports Cars, Inc.* (2008) 167 Cal.App.4th 1, 6, quoting *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288; *In re S.W.* (2007) 148 Cal.App.4th 1501, 1508.) Such jurisdiction either exists or does not exist at the time the action is commenced, and it can never be forfeited or waived. (*In re S.W.*, at p. 1508; *Union Pacific Railroad v. Brotherhood of Locomotive Engineers* (2009) 558 U.S. \_\_\_\_ [130 S.Ct. 584, 663].)

"Subject matter jurisdiction concerns the authority of the court to try a certain type of action, and involves areas of exclusive federal jurisdiction, such as bankruptcy, admiralty, and patent law." (*Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1236; see, e.g., *Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP* (2010) 183

Cal.App.4th 238 [upholding trial court's ruling it lacked subject matter jurisdiction over action that depended on resolution of a substantial question of federal patent law].)

Federal civil rights actions are not subject to the federal courts' exclusive jurisdiction; it is settled that California courts have concurrent authority to adjudicate actions for violations of federal civil rights under section 1983 and other federally created causes of action where there is no grant of exclusive jurisdiction to the federal courts. (*Williams v. Horvath* (1976) 16 Cal.3d 834, 837; *Chavez v. Keat* (1995) 34 Cal.App.4th 1406, 1413-1414; *Howlett By and Through Howlett v. Rose* (1990) 496 U.S. 356, 358-359.)

"Where jurisdiction resides in both the federal and state courts, whether [state or] federal law applies is a choice of law question." (*Karlsson v. Ford Motor Co., supra*, 140 Cal.App.4th at p. 1236.) Because choice of law preemption issues may be waived (*ibid.*), such a claim does not involve the trial court's fundamental jurisdiction to act. Here, the superior court was undoubtedly the appropriate court to hear and consider Commission's section 425.16 motion. On that basis alone, we reject Hartnett's challenge to the superior court's asserted lack of subject matter jurisdiction to consider his motion.

Were we to interpret Hartnett's contention as a claim that the court acted *in excess of jurisdiction* (see *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660-661; *Fireman's Fund Ins. Co. v. Workers' Compensation Appeals Bd.* (2010) 181 Cal.App.4th 752, 766-767) by applying section 425.16 to his section 1983 cause of action, we would nevertheless reject such a claim on its merits.

As Hartnett acknowledges, the federal authorities on which he relies do not extend their reasoning to federal causes of action brought in state court, the procedural stance of

this case. The court in *Bulletin Displays, LLC v. Regency Outdoor Advertising* (C.D.Cal. 2006) 448 F.Supp.2d 1172 (*Bulletin Displays*), relying on *United States ex rel Newsham v. Lockheed Missiles & Space Co.* (9th Cir. 1999) 190 F.3d 963, 973 and *Globetrotter Software, Inc. v. Elan Computer Group, Inc.* (N.D.Cal. 1999) 63 F.Supp.2d 1127, states: "Although the anti-SLAPP statute does apply to state law claims brought in federal court . . . it does not apply to federal question claims *in federal court* because such application would frustrate substantive federal rights. . . . *Globetrotter's* holding appears to be based on a finding that to apply the anti-SLAPP statute to federal claims in federal court would undermine the federal interest in determining procedural rules that apply to federal claims in federal court, and/or the substance of federal law. That holding does not appear to be limited to claims exclusively within federal jurisdiction." (*Bulletin Displays*, at pp. 1180-1181, italics added.) In *Summit Media LLC v. City of Los Angeles, CA* (C.D.Cal. 2008) 530 F.Supp.2d 1084, the district court explained that procedural state laws, including discovery-limiting provisions of the anti-SLAPP statute, are not used in federal courts if to do so would result in a direct collision with a Federal Rule of Civil Procedure. (*Summit Media LLC*, at p. 1094.) Acknowledging the various district court holdings that section 425.16 does not apply to federal question claims in federal court because such application would frustrate substantive federal rights, the court denied the plaintiff's motion to strike a single counter claim asserting a federal cause of action seeking declaratory relief. (*Summit Media LLC*, at pp. 1094-1095; see also *Sonoma Foods, Inc. v. Sonoma Cheese Factory, LLC* (2007) 634 F.Supp.2d 1009, 1016 [quoting *Bulletin Displays* and other cases]; *In re Bah* (2005) 321 B.R. 41, 46 [anti-SLAPP statute could

not be applied to matters involving federal questions, particularly those involving federal questions of bankruptcy law, but could be applied to pendent state law claims].)

These federal authorities do not address federal claims brought in state court. In these circumstances, the proper inquiry is whether section 425.16 is a rule of substance or procedure, and if the latter, whether it "purports to alter or restrict federally created rights," invalidating it under the supremacy clause of the United States Constitution (U.S. Const., art. VI, cl. 2). (*Williams v. Horvath, supra*, 16 Cal.3d at pp. 837-838; see *County of Los Angeles v. Superior Court* (2006) 139 Cal.App.4th 8, 17 ["Although federal law controls the substantive aspects of plaintiffs' federal civil rights claim, state rules of evidence and procedure apply unless application of those rules would affect plaintiffs' substantive federal rights"].) The state may not enforce procedural requirements that impose substantive limitations on section 1983 claims, such as California Tort Claims Act filing requirements. (*Williams v. Horvath, supra*, 16 Cal.3d at pp. 841-842 [federal civil rights claims may not be frustrated by state substantive limitations "couched in procedural language"]; see *California Correctional Peace Officers Ass'n v. Virga* (2010) 181 Cal.App.4th 30, 38; *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 764 ["Section 1983 claims are exempt from the state claims requirements because the supremacy clause of the United States Constitution does not permit a state law to alter or restrict federally created rights"].)

California courts that have considered this question hold section 425.16 applies to federal civil rights claims. (See *Bradbury, supra*, 49 Cal.App.4th at pp. 1117-1118 [rejecting a claim that it would "violate[] federal substantive law" to apply 425.16 to a

federal civil rights action brought in state court; appellate court relied on *Chavez v. Keat* (1995) 34 Cal.App.4th 1406, which held state procedure controls an action founded on a federal statute brought in state court, unless the federal statute provides otherwise]; see also *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1392, fn. 4 [relying on *Bradbury* to apply section 425.16 to a section 1983 cause of action by a plaintiff against a manager who acted as a hearing officer over his administrative grievances]; *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1056 [citing *Bradbury* and *Vergos* for the general proposition that section 425.16 applies to federal claims under section 1983].)

Hartnett would have us disregard analytical distinctions based on whether the claim is brought in federal or state court. He argues application of the anti-SLAPP law to section 1983 claims brought in state court superimposes a state procedural hurdle on such claims that does not exist under federal law and "undermines application of civil rights legislation by potentially immunizing exercise of certain First Amendment rights by certain persons in certain situations . . . , whereas federal law protects all persons from all violations of all of their constitutional rights by those persons who act under color of law in the performance of official duties under state or local law." Hartnett also maintains application of section 425.16 in this context would encourage forum-shopping and discourage persons from petitioning for redress of federal civil rights grievances in state court.

Hartnett relies on *Felder v. Casey* (1988) 487 U.S. 131 and *Bulletin Displays, supra*, 448 F.Supp.2d for these propositions. In *Felder v. Casey*, the U.S. Supreme Court held federal law preempted a Wisconsin notice-of-claim statute that permitted dismissal

of an action against governmental defendants for failure to comply with its terms. (*Id.* at p. 134.) The court relied upon the principle that "a state law that immunizes government conduct otherwise subject to suit under [section] 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy." (*Felder*, at p. 139.) The *Felder* court held the state notice-of-claim statute was not "a neutral and uniformly applicable rule of procedure" but a substantive burden whose purpose—to minimize governmental liability—was "manifestly inconsistent with the purposes of the federal statute." (*Id.* at p. 141; see *County of Los Angeles v. Superior Court*, *supra*, 139 Cal.App.4th at p. 18.) It also observed that the claims statute forced the claimant to seek satisfaction in the first instance from the governmental defendant. (*Felder*, at p. 142.) The court reasoned: "We think it plain that Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries." (*Id.* at p. 142.)

*Felder v. Casey*'s principles do not govern section 425.16. Section 425.16 is not an immunity statute that bars all claims regardless of merit. It is a procedural remedy (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 312; *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 21 [anti-SLAPP statute "sets out a mere rule of procedure"]) that prevents wasteful and abusive litigation by requiring the plaintiff to make a showing of some merit in order to proceed. While section 425.16 applies neutrally to all types of causes of action, its remedy targets claims that arise "from any act . . . in furtherance of the . . . right of petition or free speech."

(§ 425.16, subd. (b)(1).) Unlike the notice-of-claims laws, which apply only to government bodies and their officials, section 425.16 does not specifically target the federal right or threaten a civil rights plaintiff's substantive rights. Indeed, as the Ninth Circuit has recognized, section 425.16 serves similar purposes as the Federal Rules of Civil Procedure, "namely the expeditious weeding out of meritless claims before trial." (*United States ex rel Newsham v. Lockheed Missiles & Space Co.*, *supra*, 190 F.3d at p. 972.) Accordingly, we cannot conclude application of section 425.16 is inconsistent with the aims of Congress when it enacted the federal Civil Rights Act, or that it undermines or frustrates any important substantive federal interest. We thus proceed to the merits of Commission's special motion to strike.<sup>3</sup>

---

<sup>3</sup> Both Hartnett and Commission argue the substance of Commission's motion on appeal, despite Hartnett's filing of an amended pleading. There is authority for the proposition that "a plaintiff may not avoid or frustrate a hearing on the anti-SLAPP motion by filing an amended complaint . . . ." (*Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 871-872, quoting *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049.) *Sylmar* relied on authority in which an amended pleading was filed after an adverse ruling had issued on an anti-SLAPP motion (*Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073), and both *Sylmar* and *Simmons* have been distinguished from circumstances where a plaintiff files a voluntary request for dismissal during pendency of an anti-SLAPP motion. (*Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 880.) *Yang* held that when a plaintiff dismisses its case during pendency of an anti-SLAPP motion, the trial court continues to have jurisdiction over the case solely for the limited purpose of ruling on the defendants' motion for attorney fees and costs. (*Yang*, at p. 879.) Here, while Hartnett's filing of his amended complaint eliminated Commission from his retaliation, civil rights and invasion of privacy causes of action, it did not terminate the case against Commission. Thus, the court was not divested of jurisdiction to consider Commission's section 425.16 motion. To the extent Commission is able to show Hartnett's claims arise from protected activity and that he cannot demonstrate a probability of success on those claims, section 425.16, subdivision (c) entitles it to costs and fees irrespective of the allegations in Hartnett's first amended complaint. If the trial court had disregarded Commission's motion, it may have

## B. Section 425.16 Legal Principles

"A special motion to strike is a procedural remedy to dispose of lawsuits brought to chill the valid exercise of a party's constitutional right of petition or free speech.

[Citation.] The purpose of the anti-SLAPP statute is to encourage participation in matters of public significance and prevent meritless litigation designed to chill the exercise of First Amendment rights. [Citation.] The Legislature has declared that the statute must be 'construed broadly' to that end." (*Fremont Reorganizing Corp. v Faigin* (2011) 198 Cal.App.4th 1153, 1165.)

Under section 425.16, subdivision (b)(1), a cause of action is subject to a special motion to strike if the cause of action arises from any act of the defendant in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue, unless the court determines the plaintiff establishes a probability of prevailing on the claim. (§ 425.16, subd. (b)(1).) The statute describes an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' " as including "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, [and] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by

---

deprived Commission of "monetary relief [that] the Legislature intended to give [it]." (*Liu v. Moore* (1999) 69 Cal.App.4th 745, 748.)

law . . . ." (§ 425.16, subd. (e).)<sup>4</sup> If the defendant shows the cause of action arises from a statement described in subdivisions (e)(1) or (e)(2) of section 425.16, the defendant is not required to separately demonstrate that the statement was made in connection with a "public issue." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113.)

"The analysis of an anti-SLAPP motion thus involves two steps. 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity.' " (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819.) The mere fact an action is filed after protected activity takes place, or that the cause of action arguably may have been " 'triggered' " by protected activity, does not mean the action arose from that activity within the meaning of section 425.16. (*In re Episcopal Church Cases* (2009) 45 Cal.4th 467, 477.) " 'In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity.' " (*Ibid.*; see *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 ["defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech"].) The court looks to " 'the gravamen or principal thrust' of the action." (*In re Episcopal Church Cases*, 45 Cal.4th at pp. 477-478, citing *Martinez v. Metabolife*

---

<sup>4</sup> Section 425.16 also includes "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest" and "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subs. (e)(3), (e)(4).)

*Internat., Inc.* (2003) 113 Cal.App.4th 181, 193.) The fact that "protected activity may lurk in the background—and may explain why the rift between the parties arose in the first place—does not transform a . . . dispute into a SLAPP suit." (*In re Episcopal Church Cases*, at p. 478.)

"If the court finds [the threshold] showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.'

[Citation.] 'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.' " (*Oasis West Realty, LLC v. Goldman, supra*, 51 Cal.4th at pp. 819-820.)

"We review an order granting or denying a motion to strike under section 425.16 *de novo*." (*Oasis West Realty, LLC v. Goldman, supra*, 51 Cal.4th at p. 820.)

### C. *Threshold Showing of Protected Activity*

In addressing Commission's motion to strike under section 425.16, Hartnett characterizes his complaint as alleging "that . . . Commission violated his civil rights by its substantive action on October 22, 2008, eliminating his job without notice while he was seeking reinstatement to it."<sup>5</sup> Hartnett thus contends his complaint does not allege

---

<sup>5</sup> The record contains Commission minutes from an October 22, 2008 meeting in which the Commissioners approved a recommendation to reclassify a position from claims coordinator to senior claims adjustor. In part, the minutes state: "The Executive Director of Risk Management has decided that the duties formerly assigned to the classification of Claims Coordinator no longer accurately describe the essential function of vacant position #5180. The incumbent will perform duties similar to the existing classification of Claims Adjuster, however, the incumbent will be assigned the more

protected activity on Commission's part because it is not based on Commission's prior evidentiary hearing conducted in its quasi-judicial capacity, but on its "administrative" action in eliminating his job on October 22, 2008. Hartnett argues those proceedings were not authorized by law because they did not comply with Commission's merit system rules. Also, according to Hartnett, "[t]he fact [Commission's] action was taken by vote after discussion in an official proceeding, regardless of whether Hartnett had notice of it, was not itself an exercise of the Commission's right of petition or free speech." He maintains Commission's section 425.16 motion should have been denied even if it is deemed unopposed, because the motion was based on a false premise and therefore did not address or counter his charging allegations.

Hartnett's discussion of Commission's threshold burden does not distinguish among the causes of action asserted against Commission. His arguments appear to address only his section 1983 cause of action, in which he alleges Commission and the other named defendants "set in motion a series of acts that they knew or should have known would cause [him] to be deprived of his constitutional liberty and property rights to continued public employment" including the elimination of his job, placement on paid administrative leave with partial back pay at a reduced salary classification, and

---

complex cases. As such, the establishment of a Senior Claims Adjustor classification allocated to range 38 allows for the distinction between the two assignments."

"retermination" of his employment in March 2010 without curing its prior due process violations.<sup>6</sup>

In *Vergos v. McNeal*, *supra*, 146 Cal.App.4th 1387, a state university employee sued the Regents of the University of California, a manager, and his supervisor alleging causes of action, among others, for violations of his civil rights. (*Id.* at p. 1390.) The manager had acted as the hearing officer in an administrative proceeding authorized by the Regents, and denied the employee's grievance against his supervisor. The employee alleged the hearing officer had acted under color of state law in "hearing, processing and deciding" his grievances and that the denial of his grievance denied him protections of his federal statutory and constitutional right to be free from future harassment, discrimination and retaliation. (*Id.* at pp. 1390-1392, 1396-1397.) The hearing officer moved to strike the claim, contending her communications were made in connection with an issue under consideration in an official proceeding. (See § 425.16, subd. (e)(2).)

---

<sup>6</sup> In his third cause of action for "whistleblower retaliation," Hartnett alleges he suffered retaliatory adverse employment actions, including elimination of his job while he was seeking reinstatement to it, at the direction of, with the knowledge of, and/or with the authorization or ratification of Commission and the other named defendants after he disclosed information to Office, Commission and other government agencies indicating his supervisors and coworkers had engaged in conduct violating identified state and federal statutes, rules or regulations; operated under conflicts of interest; and had committed ethical violations in referring Office legal business to outside counsel. In his fifth cause of action for invasion of privacy, Hartnett alleges Commission improperly accessed personal emails from his work computer during the period of his employment, and that the individual defendants, with Commission's (and/or other defendants') ratification or authorization, searched his former desk and retrieved personal notes that he had left behind when his original employment was terminated.

The trial court denied the motion, but the appellate court reversed. (*Vergos, supra*, 146 Cal.App.4th at p. 1394.) It held, despite the plaintiff's claim that he did not target the hearing officer as a quasi-judicial officer for her written decision, the challenged acts of the officer's statements in hearing, processing and deciding the employee's grievance were in fact the underlying basis for plaintiff's claim, and the gravamen was her communicative conduct in denying his grievances: "The hearing, processing, and deciding of the grievances . . . are meaningless without a communication of the adverse results." (*Id.* at pp. 1396-1397.) Additionally, the hearing officer's acts were done pursuant to the Regents' statutory hearing procedures, which qualified as "any other official proceeding authorized by law" within the meaning of section 425.16, subdivision (e)(2). (*Vergos*, 146 Cal.App.4th at p. 1396.)

Concededly, a cause of action does not necessarily arise from protected activity merely because it was filed after the defendant engaged in that activity. (*City of Cotati v. Cashman, supra*, 29 Cal.4th at pp. 76-77; *Freeman v Schack* (2007) 154 Cal.App.4th 719, 729-730.) But here, Hartnett alleges Commission engaged in multiple employment decisions: terminating him from employment, placing him on leave with partial back pay, eliminating his job classification, and reterminating him, and these are the very acts on which Hartnett bases liability for his civil rights and whistleblower retaliation claims.<sup>7</sup>

---

<sup>7</sup> Commission points out the evidence it presented shows it is not Hartnett's employer; that it is a hearing body and that the superintendent makes all employment decisions. It states it does not participate in any way in employment actions taken against any classified employee until a recommendation is made by the superintendent to the Commission or an employee requests an appeal. But for purposes of assessing the

Where a cause of action alleges both protected and unprotected activity, the cause of action is subject to an anti-SLAPP motion unless the protected conduct is "' ' 'merely incidental' to the unprotected conduct." ' ' ' (*South Sutter, LLC v. LJ Sutter Partners, L.P.* (2011) 193 Cal.App.4th 634, 669-670.) Hartnett's claims are based on not only Commission's asserted action in eliminating his job classification, but also his termination, reinstatement, and retermination. We cannot say these activities are merely incidental to Hartnett's claims.<sup>8</sup> Like in *Vergos, supra*, 146 Cal.App.4th 1387, Hartnett's assertion of liability is based on Commission actions that are inextricably connected to the issues decided in Commission's hearing, processing and deciding the appeal of his dismissal in accordance with statutory hearing procedures. (Ed. Code, §§ 45305, 45306 [upon an appeal by an employee in the permanent classified service, "[t]he commission shall investigate the matter . . . and may, and upon request of an accused employee shall, order a hearing"].) In short, Commission's employment actions in this respect were made "in connection with an issue under consideration or review" in an official proceeding authorized by law under section 425.16, subdivision (e)(2), like those in *Vergos*. (See *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199-201

---

adequacy of Commission's threshold showing, we accept as true the facts averred by Hartnett. (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1267, fn. 2.)

<sup>8</sup> Though Hartnett argues Commission's proceedings in connection with his job classification were not authorized by law because they violated merit system rules, he merely references the rules without discussion or explanation.

[hospital's peer review proceedings required under the Business and Professions Code, reviewable by administrative mandate, qualify as official proceedings].)

Accordingly, we conclude Commission met its threshold burden as to Hartnett's section 1983 and retaliation causes of action. Hartnett makes no arguments concerning his remaining invasion of privacy cause of action, and thus we conclude he has abandoned any challenge to the court's ruling that Commission met its threshold burden as to that claim. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [absent affirmative showing of error, appellate courts presume correctness of appealed judgments and orders]; *AmeriGas Propane, L.P. v. Landstar Ranger, Inc.* (2010) 184 Cal.App.4th 981, 1001; *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685 [an appellant must demonstrate error through reasoned argument, citation to the appellate record, and discussion of legal authority].)

## II. *Petition for Writ of Prohibition*

Hartnett challenges the trial court's denial of his petition for a writ of prohibition on the same grounds he advanced in the trial court. First, Hartnett argues prohibition should have issued because Commission, a defendant in his damages suit, its secretary, and its attorney acted under conflicts of interest that rendered his administrative appeal futile. Second, Hartnett argues he has no speedy or adequate remedy in a second petition for writ of mandate, which would merely entail a second round of hearings before a conflicted Commission, resulting in a third mandate petition. Finally, Hartnett argues

Commission acted in excess of its authority by violating the "one hearing rule" of Commission's merit system rules and conducting a second hearing on his March 2010 termination based on the same charges for which he was first terminated.

Office counters that the trial court's January 14, 2011 order denying Hartnett's writ is not separately appealable because it does not dispose of all of Hartnett's causes of action. It also maintains the appeal should be dismissed as moot because Hartnett participated in a second round of hearings in February and June of 2011. On the merits, Office argues in part that Commission had jurisdiction to consider Hartnett's second appeal, and prohibition could not issue because Hartnett had an adequate alternate remedy by a petition for writ of administrative mandamus under section 1094.5.

*A. The Order Denying Hartnett's Writ is Appealable*

Office's challenge to appealability of the trial court's January 14, 2011 order is based on section 904.1 and *Griset v. Fair Political Practices Commission* (2001) 25 Cal.4th 688 (*Griset*). In *Griset*, the California Supreme Court observed that trial court orders are appealable when made so by statute, but no statute made an order denying a petition for writ of administrative mandate separately appealable "when, as here, the petition has been joined with other causes of action that remain unresolved." (*Id.* at pp. 696-697.) It explained allowing an appeal in that situation would be contrary to the "one final judgment rule," prohibiting review of intermediate rulings by appeal until final resolution of the case. (*Id.* at p. 697.)

Office argues that, as in *Griset*, Hartnett's writ petition was filed "in an ongoing action in which he asserts other causes of action against the Respondents" and that the

January 14, 2011 order "did not resolve the causes of action that Hartnett continues to assert against the Respondents by means of his Complaint." But as we explain, the order denying Hartnett's writ, combined with the entry of judgment in Commission's favor on its special motion to strike, effectively resolved the issues involving Commission, rendering the order final and appealable as between Hartnett and Commission. (See *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 437; *Pangborn Plumbing Corp. v. Carruthers & Skiffington* (2002) 97 Cal.App.4th 1039, 1046, fn. 3.)

The record indicates Hartnett filed his first amended complaint in October 2010, including a single cause of action for declaratory relief against Commission, as well as causes of action for retaliation, negligent hiring/supervision, violations of civil rights, and "obstruction of employment rights" against some or all of the other defendants. With respect to Commission, Hartnett sought a judicial declaration as to whether he was required to submit to a second hearing before it and whether Commission lacked jurisdiction to hear his appeal for various reasons, including an asserted conflict of interest. The trial court resolved these issues in Commission's favor when it denied Hartnett's writ petition on January 14, 2011.

"At one time, it was thought to be settled law that an order denying a writ of mandate was an appealable order unless the trial court contemplated further orders or action on the petition. [Citations.] However, recent California Supreme Court cases have disapproved this line of authority." (*Bettencourt v. City and County of San Francisco* (2007) 146 Cal.App.4th 1090, 1097, citing in part *Griset v. Fair Political Practices Commission, supra*, 25 Cal.4th at pp. 698-700 & *Morehart v. County of Santa*

*Barbara* (1994) 7 Cal.4th 725.) *Bettencourt* recognizes that an order granting a writ of mandate or prohibition is typically not an appealable order when other causes of action apart from the writ petition remain undecided. (*Morehart*, at p. 743.) In *Bettencourt*, however, the Court of Appeal determined that the trial court's order effectively disposed of an issue essential to all the remaining causes of action—the statute of limitations—such that the petitioners could not prevail on any of them. (*Bettencourt*, 146 Cal.App.4th at pp. 1097-1098; see also *Griset*, at pp. 698-700 [finding trial court's ruling as to one cause of action left no substantive issues for determination and thus order was final and appealable]; *Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th 1064, 1073-1074.)

Here, we conclude, as in *Bettencourt* and other cases, that the trial court's order denying Hartnett's writ petition, in effect, resolved the entire action pending against Commission. The trial court's determinations on the writ adjudicated all of the issues remaining in Hartnett's pending declaratory relief cause of action, and left nothing for further consideration with regard to that defendant. Accordingly, we hold the trial court's January 14, 2011 order is appealable.

*B. Office Has Not Shown Hartnett's Appeal of the Order is Moot*

We cannot conclude on this record that Hartnett's appeal of the order denying the writ is moot. Office states in its brief that Hartnett's hearing before Commission has already taken place over the course of five different days between February and June of 2011, with Hartnett's participation. But the sole support for that assertion is a citation to the respondents' appendix containing Superintendent Ward's closing brief submitted to

Commission. At the cited page, the brief references a motion to dismiss filed on the eve of the "hearing." But the arguments of counsel are not evidence. (*In re Zeth S.* (2003) 31 Cal.4th 396, 414, fn. 11; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 [citation to points and authorities "obviously is not to admissible evidence in the record"].) Office has not otherwise provided us with any minute order or other judicially noticeable matter that would permit us to conclude Hartnett's hearing has taken place and no further proceedings are anticipated. Even if we were to deem Office's pleading a judicially noticeable court record, the truth of the statements therein are not subject to judicial notice. (*Unruh-Hazton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364-365; accord, *StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9 ["When judicial notice is taken of a document . . . the truthfulness and proper interpretation of the document are disputable"]; *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1103-1104.)

### *C. Merits of Hartnett's Writ of Prohibition*

Turning to the merits of Hartnett's writ of prohibition, we uphold the trial court's order denying it. A writ of prohibition "arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person." (§ 1102.) It "may be issued by any court to an inferior tribunal or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law." (§ 1103.)

### 1. *Commission's Purported Conflict of Interest*

Hartnett's conflict of interest argument is not cognizable, because the claim does not raise a jurisdictional error by Commission reviewable by prohibition. A writ of prohibition is limited to restraint of a threatened exercise of judicial power in excess of jurisdiction. (§ 1102; *Aronoff v. Franchise Tax Bd.* (1963) 60 Cal.2d 177, 181.)

"Jurisdictional error" in the context of prohibition is broadly defined to include not only subject matter and personal jurisdiction, but also acts in excess of jurisdiction; that is, it will restrain the exercise of any unauthorized power to act in a particular matter, whether that power is defined by constitutional provision, statutory declaration, or court rules. (See *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288-291; *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 120; see also *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 528-529.) However, the remedy of prohibition does not lie for a mere error of law. (See *County of Santa Clara v. Superior Court* (1971) 4 Cal.3d 545, 549-551 [prohibition did not lie to review trial court's order granting relief from the effect of failing to timely file a claim under Government Code section 946.6, subdivision (c); the matter was one committed to the court's discretion and within its subject matter jurisdiction and its consideration of the action, despite noncompliance with claims filing requirements, was not beyond its jurisdiction]; *Van Hoosear v. Railroad Commission of California* (1922) 189 Cal. 228, 235 [prohibition "does not lie to prevent a subordinate court from deciding erroneously. . .".].)

Hartnett does not explain how Commission's holding of a hearing or issuing a decision under a purported disabling conflict would constitute conduct in excess of

jurisdiction under the rules stated above, other than to state it would render the hearing "an exercise in futility . . . ." He provides no direct or analogous authority on the point. The cases Hartnett cites involve differing contexts where the appellate courts addressed the plaintiff's exhaustion of administrative remedies; two of those courts concluded exhaustion was not required because resort to the administrative process would be futile. (*Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal.App.4th 155, 166, 168-170 [upon filing of mandate petition, administrative body disavowed jurisdiction over the dispute thus inviting judicial intervention; under those circumstances, state employee unions' failure to exhaust administrative remedy by filing charges with the agency was excused in part because the filing would have been futile], superseded by statute on other grounds as noted in *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1018, fn. 19, 1036, fn. 31; *Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 834-835 [appellants' failure to apply for variance of zoning ordinance to city council was subject to exception of exhaustion doctrine where evidence was overwhelming that appellants' project prompted the city council to rezone the area and they could positively state what the administrative agency's decision would be]; see also *Green v. City of Oceanside* (1987) 194 Cal.App.3d 212, 222-223 [summarizing general exceptions to exhaustion doctrine but holding the city waived any argument that the plaintiff had failed to exhaust administrative

remedies].) None of these authorities convince us that prohibition would lie in the circumstances of a presumed conflict of interest as Hartnett describes.<sup>9</sup>

## 2. *Hartnett Has Not Shown He Has an Inadequate Alternate Remedy*

Hartnett argues that it is neither plain nor speedy to force him to undergo a second round of hearings before a conflicted Commission only to file a third petition for writ of mandate, requiring that the trial court issue his writ of prohibition. The trial court found to the contrary in denying Hartnett's petition, and we review that ruling for abuse of discretion. (*Sutco Construction Co. v. Modesto High School Dist.* (1989) 208 Cal.App.3d 1220, 1227; see generally *Evans v. Municipal Court for Beverly Hills Judicial Dist.*

---

<sup>9</sup> Even if it were relevant to demonstrate jurisdictional error, we find unavailing Hartnett's reliance on the futility exception. "The futility exception . . . is a very narrow one" and "does not apply" "unless the petitioner *can positively state* that the [administrative body] has declared *what its ruling will be in a particular case.*" " (*Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 690.) In a declaration accompanying his writ petition Hartnett stated he had sued Commission over his first termination, and could not receive a fair hearing because the legal advisor/hearing officer was Commission's attorney of record in his lawsuit and had filed various challenges to his complaint. He stated: "There is no factual or legal reason why I should be required to indefinitely proceed before the kangaroo court constituting the Personnel Commission over my second termination as a prerequisite to either this action or my first lawsuit. It has been apparent to me from the lengthy proceedings in front of the Commission and its legal advisor/hearing officer with respect to both of my terminations that the outcome of their proceedings (upholding my two terminations) is predetermined and that any proceedings before them are futile." The trial court correctly concluded, implicitly if not explicitly, that Hartnett's mere belief concerning Commission's bias was insufficient to show Commission had already announced its decision or that its decision was otherwise " 'certain to be averse.' " (*Id.* at pp. 690-691 [holding claim of commissioner's bias insufficient to establish futility exception; fact "that the Commissioner may have treated EEF and other intervenors unfairly in other proceedings does not establish that he is bound to do so in this one"].)

(1962) 207 Cal.App.2d 633, 635 disapproved on other grounds in *In re Underwood* (1973) 9 Cal.3d 345.)

Hartnett has not shown the trial court manifestly abused its discretion in denying his petition on the ground he possessed an adequate alternate remedy. Hartnett does not dispute that an alternate remedy exists in mandate under section 1094.5. His sole complaint is the length of time that remedy would take. But an alternate remedy does not fail to be adequate and speedy within the rules of prohibition merely because it is not as expeditious as prohibition. (*Brock v. Superior Court of Stanislaus County* (1947) 29 Cal.2d 629, 638-639; *Corona Unified Hospital Dist. v. Superior Court of Riverside County* (1964) 61 Cal.2d 846, 851.) Hartnett presents no reasoned explanation otherwise why mandate and then appeal is insufficient or would be totally ineffectual to protect his rights. (Compare *Corona*, at pp. 851-852 [in a case involving a hospital district's construction project, prohibition was held available because by the time an appeal could be decided with a hearing in the Supreme Court 15 to 18 months later, adverse consequences would occur including the release of the contractor, termination of authority for leaseback arrangements, and the loss of substantial expenditures for architects, consultants and attorneys].)

### 3. Hartnett's "Double Jeopardy" Argument

Hartnett challenges Commission's actions on grounds he characterizes as "double jeopardy," claiming Commission's conduct of a second hearing violates its own merit

system "one hearing" rule, and otherwise was unauthorized as without any statutory or rule-based support.

For the latter proposition, Hartnett relies on *Heap v. City of Los Angeles* (1936) 6 Cal.2d 405 (*Heap*). In *Heap*, a civil service employee who had been discharged applied to the civil service commission for an investigation of the grounds for his discharge and a hearing. (*Id.* at p. 406.) The commission sustained his discharge but then rescinded its action and entered new findings that the grounds for his discharge were not sustained and ordered him restored to duty. (*Ibid.*) The sole question before the California Supreme Court was whether, "after having passed upon the question submitted to it, [the commission] could thereafter vacate its findings and make another and contrary order." (*Ibid.*) Citing the city's charter, which provided the board of civil service commission's order with respect to removal, discharge or suspension would be " 'final and conclusive[.]' " the court held the commission had no jurisdiction to retry the question and make a different finding at a later time: " 'A civil service commission has *no inherent power* after entering a final order dismissing an officer from the service to entertain a motion for new trial or rehearing and review and set aside its prior order.' " (*Id.* at p. 407, italics added.) The California Supreme Court's holding in *Heap* was plainly based on the principle that a civil service commission has no authority to reconsider its own orders in the absence of express authorization. (*Ibid.*)

*Heap* is inapposite. Unlike in *Heap*, Commission did not purport to exercise any inherent authority to vacate its own decision and set the matter for a new hearing. The superior court granted Hartnett's first petition for writ of mandate under section 1094.5,

relying on *Ahlstedt v. Board of Education* (1947) 79 Cal.App.2d 845 to specifically rule Commission's failure to follow procedures rendered Hartnett's dismissal " 'abortive, ineffective, and for all purposes unauthorized, leaving nothing upon which the [C]ommission could base a hearing or further exercise of its discretion.' " The *Ahlstedt* court found in a similar context that as a result of a personnel commission's failure to investigate charges to support a classified civil service employee's dismissal, the "dismissal was ineffectual and respondent was entitled to reinstatement." (*Id.* at p. 856.)

When Commission reinstated Hartnett's employment and offered him full back pay, it corrected its procedurally inadequate first termination, giving Hartnett the exclusive remedy to which he was entitled. (*Summers v. City of Cathedral City* (1990) 225 Cal.App.3d 1047, 1060-1061.) There is no reason why, by virtue of those prior defects, Office was prevented from again terminating him. (*Ibid.*) And following his termination, Hartnett was entitled to, and indeed sought, an appeal hearing before Commission, which by law and Commission's own merit system rules, required it to schedule and hold a hearing. (Ed. Code, §§ 45260 [requiring Commission to establish merit system rules], 45306 [upon request of an accused employee, Commission "shall[] order a hearing"].)

The Commission's hearing on Hartnett's March 2010 termination is not barred by the "one hearing" rule. (Merit Systems Rules, Chapter VIII, rule 8.) That rule provides: "Limitation on Number of Hearings: A suspended, demoted, or dismissed employee shall be entitled to one hearing only before the Personnel Commission for the same reasons on which such employee's suspension, demotion or dismissal was based." (Some

capitalization and bold omitted.) In attempting to apply this rule, Hartnett does not set forth any legal principles as to its interpretation or construction. He merely reiterates the superintendent's arguments in opposition to his writ of prohibition: that the superior court's actions made it as though Hartnett's first termination never occurred, and then Hartnett queries whether the superintendent was proposing that there were "no limits on the number of hearings to which the employer or the Commission is entitled." Hartnett maintains these points bring this situation directly under the authority of *Heap, supra*, 6 Cal.2d 405.

Nothing in these arguments compels us to conclude Hartnett is entitled to the remedy of prohibition. For the reasons set forth above, *Heap* is factually inapposite. The merit system rule entitling a dismissed employee to only one hearing for the same reasons on which his or her dismissal is based prevents *the employee* from requesting multiple appeal hearings on the same employment action; the rule does not govern the situation present here, where a Commission's decision is annulled for procedural irregularities and the employee is granted relief by reinstatement, but is again terminated. As we have already stated, in such cases, there is no impediment to the employer choosing to again terminate the employee, who is entitled to an appeal hearing on his or her grounds for dismissal.

DISPOSITION

The judgment and order are affirmed.

---

O'ROURKE, J.

WE CONCUR:

---

HUFFMAN, Acting P. J.

---

McDONALD, J.