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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JOSHUA HIRAOKA,

Plaintiff and Respondent,

v.

THE COUNTY OF RIVERSIDE,

Defendant and Appellant.

E052981

(Super.Ct.No. RIC513890)

OPINION

APPEAL from the Superior Court of Riverside County. Ronald L. Taylor, Judge.
(Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art.
VI, § 6 of the Cal. Const.) Reversed.

The Zappia Law Firm, Edward P. Zappia and Brett M. Ehman for Defendant and
Appellant.

Tosdal, Smith, Steiner & Wax, Jonathan Y. Vanderpool and Georgiana
D'Allesandro for Plaintiff and Respondent.

On July 25, 2007, plaintiff and respondent Joshua Hiraoka (hereinafter plaintiff) suffered an epileptic seizure while on patrol in a squad car working as a deputy sheriff for the Riverside County Sheriff's Department (the department). On October 8, 2008, Ronald Komers, the Assistant CEO and Human Resources Director for defendant and appellant County of Riverside (hereinafter the County), determined plaintiff to be incapacitated for his duties as a deputy sheriff; that plaintiff's disability was non-industrial, i.e., his incapacity was not due to the performance of his job; and that his disability retirement would thereby be effective September 26, 2008. Plaintiff appealed the County's determination, requesting a hearing before an Administrative Law Judge (ALJ) of the Office of Administrative Hearings (OAH) pursuant to Government Code section 21156, subdivision (b)(2)¹ contending he was in sufficient medical condition to return to his duties.²

On January 7, 2010, the ALJ issued a 34 page, single spaced "proposed decision" finding that "[a] preponderance of the evidence established that [plaintiff] was not permanently incapacitated from substantially performing [his] duties as a deputy sheriff in October 2008 and that the County did not act appropriately when it issued him a disability retirement." The ALJ granted plaintiff's appeal and ordered he "be reinstated

¹ All further statutory references are to the Government Code unless otherwise indicated.

² Section 21156, subdivision (b)(2) provides: "The local safety member may appeal the determination of the governing body. Appeal hearings shall be conducted by an [ALJ] of the [OAH] pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of this title."

as a deputy sheriff effective September 25, 2008, and . . . be entitled to all back pay and benefits from that date to present.” On March 1, 2010, plaintiff filed a petition for writ of mandate in the superior court seeking to compel the County’s compliance with the ALJ’s decision.

On April 22, 2010, the County gave plaintiff notice that it intended to reject the ALJ’s “proposed decision” in its entirety pursuant to section 11517, subdivision (c)(2)(E).³ On July 29, 2010, the County issued its final decision to reject the ALJ’s “proposed decision.” After a hearing, the superior court denied plaintiff’s petition for writ of mandate and entered judgment in favor of the County. Plaintiff filed a motion for reconsideration in which he contended County Resolution 2007-236 (hereinafter the resolution) expressly delegated all decision making authority in disability retirement matters of sworn safety members to the ALJ, i.e., the County had no authority to reject unilaterally the ALJ’s findings and order. The superior court granted reconsideration, vacated its previous order, and ordered the County to comply with the ALJ’s decision. The County appeals, arguing the superior court erred in determining that the resolution revoked its statutory authority to reject the ALJ’s decision. We reverse the judgment.

³ Section 11517, subdivision (c)(2)(E) provides, in pertinent part, the County may “Reject the proposed decision, and decide the case upon the record, including the transcript, or upon an agreed statement of the parties, with or without taking additional evidence.”

FACTUAL AND PROCEDURAL HISTORY

Plaintiff had his first seizure at the age of 17 when he was diagnosed with epilepsy. According to one source, plaintiff had three seizures since the onset of his condition, but then remained seizure-free until 2002. The County hired plaintiff on April 22, 2002; plaintiff disclosed his condition, but the County determined it was under control with medication. Plaintiff testified he had a daytime seizure in 2001, which he did not report to the County. Plaintiff also testified he had two nocturnal seizures in 2003 and two in 2006, which he did not report to the County.

On June 27, 2007, during a visit with his physician, Dr. Jack Lin, plaintiff informed Lin that he and his wife were trying to have a child. They had learned that a side effect of one of his epileptic medications was reduced sperm count. A decision was made to taper plaintiff off that medication. It was of concern to Dr. Lin that taking plaintiff off the medication would allow recurring seizures. Plaintiff did not inform the County about the reduction in his medication.

On July 25, 2007, while driving his patrol car, plaintiff experienced an “aura,” a feeling which typically precedes a seizure, but does not necessarily result in one. Plaintiff was able to pull the vehicle over and come to a full stop before he became unconscious. He awoke to being treated by paramedics. The County placed plaintiff on medical leave requiring that he use his sick and vacation time.

County physician Dr. Stephen Sparks sent a letter to Dr. Lin requesting an evaluation of plaintiff’s fitness to return to duty; in the letter Dr. Sparks enumerated the required contents of such an evaluation, and included a list of the activities required of a

deputy sheriff. Dr. Lin responded with a short history of plaintiff's medical condition noting it was "unclear if the recurrence of seizure is related to the change in his antiepileptic medication." Dr. Lin advised that plaintiff "may return to work but should not drive until he is cleared by the DMV."

Dr. Sparks issued a determination regarding plaintiff's fitness for duty in which he concluded "[t]he officer is clearly not fit for duty as a patrol officer at this time. He is not able to drive and for the same reasons is not fit for any safety-sensitive duties. [¶] It should also be noted that the risk of recurrent seizure over the next [two] years is unacceptably high in this patient considering his law enforcement work. If the details of the current history had been known in the pre-placement setting he would not have been cleared." Dr. Sparks sent another letter to Dr. Lin requesting an evaluation in light of Police Officer Standards and Training (POST) guidelines.

On November 1, 2007, plaintiff filed a grievance petition requesting reinstatement and back pay. On November 2, 2007, Dr. Tony Kwon wrote a letter noting he had previously determined plaintiff clear to return to work on August 1, 2007. Dr. Kwon maintained plaintiff remained free to return to work without restrictions. On November 6, 2007, the County informed plaintiff "it has been determined that you cannot be effectively accommodated in your current position and department." The County indicated it would expand its search for effective accommodation to all the County departments. Plaintiff disputed the County's determination he was unfit for duty and asked to be reinstated to active duty as a deputy sheriff.

On December 3 and 4, 2007, Dr. Sparks gave the County a list of work restrictions he would apply to plaintiff including restriction “from safety-sensitive duties (law enforcement duties) as well as the usual restrictions for those with seizure disorder such as working at heights, on ladders, around dangerous equipment, in or over water, confined spaces, etc. Also, I would restrict from driving while at work” A letter from the DMV dated December 8, 2007, provided that plaintiff must submit a Driver Medical Evaluation in six months to have his eligibility, for having his driver’s license reinstated, reconsidered.

On December 10, 2007, in response to plaintiff’s grievance, the County placed plaintiff on paid administrative leave effective September 7, 2007, with back pay and benefit reimbursement from that date forward. On December 11, 2007, Dr. Lin responded to Dr. Spark’s letter answering a few of his questions, but noting “I am not qualified to assess the application of POST . . . guidelines on [plaintiff].”

On February 1, 2008, the County notified plaintiff of its intent to release him from his position effective February 15, 2008: “This action is being taken because after careful evaluation it has been determined that you cannot perform the essential functions of your position, either with or without reasonable accommodation.”

A May 5, 2008, letter from Dr. Kwon reflected that “[a]fter reviewing the attached POST documents, it is my opinion that [plaintiff] can complete all of the necessary duties of a Riverside County deputy sheriff, and is able to return to full duty with no restrictions.” A letter dated June 17, 2008, from the DMV to plaintiff indicated that his license would remain on medical probation, to be reevaluated in six months.

On August 5, 2008, Dr. Devin Binder wrote the County to inform it plaintiff had been treated in the Comprehensive Epilepsy Program at UCI for seizure disorder since April 18, 2007. Dr. Binder noted they continue to monitor and provide treatment to plaintiff as medically necessary. Plaintiff's "condition has improved sufficiently to allow his return to light duty capacity in the Sheriff's department. He has a return appointment in September, and at that point we will reassess his functional status. His prognosis is excellent and he is expected to return to full active duty status."

On August 22, 2008, Dr. Sparks recorded notes of his telephone conversation with a physician's assistant at UCI during which he learned that plaintiff had undergone brain surgery in which portions of his brain were removed. Plaintiff could not drive and was having short-term memory problems that "may pass with time." Rather than provide specific work limitations at that time, the physician's assistant preferred to wait until plaintiff's next postsurgical examination on September 3, 2010.

On September 12, 2008, Dr. Binder wrote the County to inform it plaintiff had undergone surgery on July 8, 2008. Dr. Binder cleared plaintiff for light duty for the next 90 days: "His activities should not include any job responsibilities where instant memory recall or life and death situations are involved." Plaintiff would "undergo a neurocognitive evaluation by our neuropsychologist in mid-November 2008, at which time we will be able, within reasonable medical certainty, to attest to any neuropsychological changes that have occurred since [his] previous neuropsychological exam pre-operatively."

Dr. Gayle Deutsch conducted a neuropsychological assessment of plaintiff on October 16, 2008. She noted plaintiff had been diagnosed with medically intractable seizure disorder. He had undergone a left temporal lobectomy and an amygdalohippocamectomy on July 8, 2008. She administered a battery of tests and concluded that, on some, plaintiff showed little or no difference from before the surgery. However, on a number of measures he performed slightly lower than presurgical performance, displaying in the mildly impaired range. “The neurocognitive profile is remarkable for significant declines in confrontation naming, verbal memory, as well as some declines in visual memory” Dr. Deutsch deemed plaintiff had “severely impaired performance” with respect to short-term memory after a distractor list had been introduced.

“My assessment does not allow me to predict how well he will actually perform if he returns to work on a modified duty assignment. That judgment should be made by his supervisors. I recommend that if he does elect to try returning to work he should be proctored until it is determined he is fully capable of working independently. [¶] [Plaintiff] is approximately 4-months post surgery and there may be improvement in his confrontation naming within the next 12 months, but many individuals continue to have verbal memory problems long term. You may wish to consider re-evaluation in 12 months to document any change over time.”

On January 12, 2009, the DMV wrote plaintiff to inform him his license remained on medical probation due to his epilepsy surgery, but that he could be reevaluated in six months. In a letter dated July 15, 2009, Dr. Binder noted plaintiff had fully recovered

from his procedure and had no physical limitations: “He may return to work and engage in unlimited activities.” On July 29, 2009, Dr. Lin wrote plaintiff “is now completely seizure free and fully functional. He should return to work without any limitations.”

Dr. Binder testified during his deposition on August 13, 2009, that plaintiff’s diagnosis of medically intractable epilepsy meant “that a variety of . . . drugs or anti-seizure medications have been tried over a period of time and have, nevertheless, despite adequate dosages and adequate periods of trial have not adequately controlled the seizure activity.” The surgery performed on July 8, 2008, removed the portions of plaintiff’s brain believed to be responsible for the seizures. Sixty-six percent of individuals undergoing the operation remain seizure-free if they remain on medication. Most neurologists will monitor the individual for several years after surgery, but most individuals who remain seizure-free for one year have a “good chance” of remaining so forever. Dr. Binder estimated plaintiff had a 90 to 100 percent chance of remaining seizure-free.

Dr. Binder testified side effects from the surgery included potential language and memory deficits. He wrote a letter clearing plaintiff to return to work, but testified, “I’m not qualified to discuss what [plaintiff’s] job was because he’s never really explained it to me in great detail.” “I can’t claim that I have any specific knowledge of [plaintiff’s] job. [¶] . . . [¶] Furthermore, my understanding of ‘light duty’ consists of [plaintiff] being in a courtroom sitting behind [a] desk and checking people in and out.” Dr. Binder did not feel qualified to answer whether one month after the surgery plaintiff would have been capable of performing the “light” duties of a deputy. He testified someone should be at

least six months seizure-free before they drive. “[W]e don’t want to provide specific work limitations, but simply the fact that a patient is able to return to work and we would defer based upon the nature of the job to that person’s supervisor as to exactly what the supervisor felt comfortable with that person doing in the job capacity.”

Dr. Kim testified during his deposition that he instructed plaintiff in February 2008 not to drive, operate heavy machinery, bathe alone, swim alone, or engage in any activity in which loss of consciousness could cause harm to himself or others. He further suggested he would not have recommended that plaintiff drive a patrol car between September 2007 and July 2008. Likewise, he would not have recommended plaintiff become involved in a foot pursuit of a suspect or be armed, during the same period and up to a year after his surgery.

On August 17, 2009, Dr. Susan Brookheimer, a neuropsychologist and professor of cognitive neuroscience at UCLA, released a neuropsychological evaluation report of her examinations of plaintiff that occurred on May 21, 2009, and August 14, 2009. She indicated plaintiff suffered his on-the-job seizure three weeks after cessation of his epileptic medication. She concluded, “[T]he patient is considered effectively cured of his seizure disorder.” Dr. Brookheimer evaluated plaintiff for POST criteria and found “[t]he skills most critical to police work . . . are all intact, and in many cases better than the average person. . . . [¶] . . . [¶] . . . I can see no reason that [plaintiff] should not be able to perform all duties listed in the POST and in the job description. There are no cognitive limitations to any activities he may wish to perform, either on or off the job.” She further noted plaintiff’s “neuropsychological test results indicate that he is cognitively intact,

with average or better performance on tasks relevant to his work as a police officer. His most serious difficulty is a below average performance in his ability to name objects, a problem caused by his epilepsy surgery. However this domain has improved significantly since his surgery and is now in the low average range.”

Dr. Lin testified at his deposition on August 19, 2009, that in September 2007, in addition to actually recommending plaintiff not drive, he would hypothetically not have recommended work involving chasing suspects, directing traffic, holding or aiming a weapon, or determining when reasonable to use deadly force. He continued to believe it was not his duty to determine whether plaintiff was fit for his job; rather, it was the County’s duty to make such a determination. He testified that between August 2007 and July 2008, when plaintiff had the surgery, plaintiff “was having some seizures, so he was not completely controlled on his medication” Between July 2007 and April 10, 2008, the frequency of plaintiff’s seizures was approximately one every other month; this was what resulted in the consensus opinion of plaintiff’s treating doctors in April 2008, that plaintiff had a “left temporal lobe epilepsy which ha[d] taken a disabling medically intractable course.”

Dr. Lin testified plaintiff continued to remain on medication since his surgery. Although he did not clear plaintiff for work based on POST standards, he would not restrict plaintiff from many of those duties. Having remained free from seizures for a year typically prognosticates a 58 to 80 percent chance of remaining free from future seizures; thus, plaintiff’s seizure risk was much less than before.

On September 14, 2009, the DMV issued an “order of set aside or reinstatement”:
“[T]he action taken effective December 12, 2007, pursuant to section 13593 of the
Vehicle Code . . . is ended [¶] . . . [¶] You may: [¶] Retain any valid license
which you have in your possession.”⁴

Plaintiff’s three-day OAH hearing before the ALJ began on September 29, 2009.
The ALJ preliminarily ruled the County had the burden of proof, and that it would hear
and consider all evidence up to and including the date of the hearing despite the fact that
the County’s disability retirement of plaintiff occurred on October 8, 2008. Dr. Sparks,
the County’s Medical Director for Occupational Health, testified he conducts fitness for
duty examinations for the County. He did not examine plaintiff because plaintiff elected
to go to his own physician. Dr. Sparks concluded as of September 18, 2007, that plaintiff
was not fit to return to duty. He did not regard either Dr. Lin or Dr. Binder’s evaluations
around that time as compelling because neither considered POST guidelines. Indeed, it
was revealed plaintiff had seizures subsequent to Dr. Lin’s letter clearing him for duty.
Dr. Sparks also found plaintiff incapable of returning to work in March 2009, based upon
Dr. Deutsch’s report that plaintiff had severely impaired performance in confrontation
naming, and a decline on verbal memory measures particularly for long-term retrieval.

⁴ Vehicle Code section 13953 provides, in pertinent part: “[I]n the event the
department determines upon investigation or reexamination that the safety of the person
subject to investigation or reexamination or other persons upon the highways require such
action, the department shall forthwith and without hearing suspend or revoke the
privilege of the person to operate a motor vehicle or impose reasonable terms and
conditions of probation which shall be relative to the safe operation of a motor vehicle.”

Valerie Hill, the department undersheriff, testified they could not place plaintiff on temporary light duty because guidelines required that such duty last no longer than 90 days with, at maximum, one 90-day extension, and it was required a determination be made that the officer's incapacitation would be remedied within that period; plaintiff was denied light duty because they could not say his problems would be remedied within the requisite time period. Undersheriff Hill had concerns regarding plaintiff's ability to drive, officer safety, memory issues when testifying in court, *Brady* disclosures,⁵ and liability if something happened and it were known they reinstated someone into a peace officer position whom they knew to have epilepsy. The department required that anyone who was involved in some sort of medical incident be cleared pursuant to POST guidelines before being returned to duty. She testified that retaining plaintiff, even on unpaid leave, would deprive the public of an active duty officer position.

Komers testified he was the designated official to determine whether someone met the requirements of disability retirement. The standard he applied was whether an individual can safely perform the duties of a peace officer without harming themselves or others and without risk to the County; Dr. Sparks's evaluation was dispositive as to his determination of plaintiff's fitness for duty. Since plaintiff could not perform all the

⁵ *Brady v. Maryland* (1963) 373 U.S. 83, 87 (The suppression of evidence by the prosecution favorable to an accused violates due process where the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecution.). Undersheriff Hill's concern was apparently that the prosecution would be required to disclose to defense counsel in all cases in which plaintiff was involved, his epilepsy, his brain surgery, and his subsequent neurocognitive impairments, which might be deemed relevant to impeaching his recall of any law enforcement activities he became involved.

requisite activities itemized by Dr. Sparks, he was, therefore, not fit for duty. Komers testified, however, that neither he nor Dr. Sparks reevaluated plaintiff for fitness for duty after plaintiff's surgery.

Dr. Brookheimer testified she applied POST standards in rendering her previous findings and conclusions. Generally, a determination of whether a patient can drive or is cured should wait at least a year postsurgery. She noted 92 percent of patients who do not have a seizure within a year of the surgery remain seizure-free for 10 years. All the factors indicated plaintiff's was a curative case. However, she conceded that as of October 1, 2008, there was not sufficient medical information to determine with a reasonable degree of certainty whether plaintiff's epilepsy was cured or that he could return to full active duty pursuant to POST guidelines.

Assistant Sheriff Peter Labahn testified the department had attempted to accommodate plaintiff by paying for his training in polygraphy. Nevertheless, plaintiff continually sought reinstatement as a deputy, but never informed the department of his subsequent seizures or that he was planning on undergoing surgery. Labahn believed he had taken plaintiff off administrative leave and placed him back on medical leave on June 30, 2008.

Plaintiff testified Dr. Lin told him not to drive until cleared by the DMV; plaintiff did not drive for a month and a half after his on the job seizure. He testified his driver's license was never suspended, it was only placed on probation with no restrictions; the DMV had cleared him to drive. Plaintiff disputed testimony he was having seizures

every other month between July 2007 and February 2008.⁶ Plaintiff was in the hospital for three days in February 2008, during which they induced three seizures for EEG measurements; he did not inform the County of the hospitalization.

Plaintiff testified he attended polygraphy school between April and June 2008, which he completed. He informed the department he would be undergoing “minor surgery”; he characterized it as minor because he had been informed the surgery was done multiple times annually, and because of the area of the brain on which the operation was conducted. He was in the hospital for one and a half to two weeks; he was there postoperatively for two to three days. At the time of his testimony, he remained on the same level of medications he was on before he had the on-duty seizure. Plaintiff testified he returned to his full level of physical regimen postoperatively in November or December 2008. He did not believe he was neurocognitively intact until the beginning of 2009. He testified he still had some minor memory issues.

On January 7, 2010, the ALJ issued her “Proposed Decision.” The “Proposed Decision” consisted of a presentation of the issues, 107 separate “factual findings,”⁷ and nine legal conclusions. In a subsection of the ALJ’s legal conclusions titled “evaluation,”

⁶ Plaintiff attributed the testimony to Dr. Kim, but our review of the record indicates it was Dr. Lin who so testified. Moreover, Dr. Lin testified plaintiff was having seizures every other month between July 2007, and *April 10, 2008*.

⁷ The “factual findings” are largely unhelpful as titled because they are, in fact, an objective recantation of the evidence offered as a whole during the hearing. In other words, a number of the “factual findings” are conflicting as they incorporate the evidence adduced by both sides, rather than a determination that one side’s evidence on a particular matter was more credible than the other’s.

the ALJ found, “Fear and ignorance regarding epilepsy seemed to be the driving force behind the County’s actions. The County questioned the fact that [plaintiff] had been hired in the first place. The County focused on the phrase ‘brain surgery.’” The ALJ found “Dr. Brookheimer’s opinions that [plaintiff] was fit to return to duty were the most credible and convincing expert opinions . . . introduced at the hearing.”⁸ The ALJ found the County’s decision to issue a disability retirement was not justified based on its belief plaintiff had misled it about the surgery.

The ALJ ultimately concluded that “[a] preponderance of the evidence established that [plaintiff] was not permanently incapacitated from substantially performing the duties [of] a deputy sheriff in October 2008, and that the County did not act appropriately when it issued him a disability retirement. A preponderance of the evidence established that [plaintiff] can substantially perform the duties of a deputy sheriff.” Further, “[a] preponderance of the credible evidence established that [plaintiff] was not permanently incapacitated from performing the usual and customary duties of a sheriff’s deputy with Riverside County. His condition was not permanent and stationary at the time the County issued him a disability retirement. The County’s fear that [plaintiff] ‘may suffer’ a seizure in the future was insufficient for the County to meet its burden . . . and the overwhelming medical evidence to the contrary.” The ALJ ordered that plaintiff “be

⁸ Dr. Brookheimer’s opinions were rendered significantly after the County had issued its disability retirement of plaintiff in October 2008. Dr. Brookheimer’s initial report was dated August 17, 2009, and her testimony at the hearing was taken on September 30, 2009.

reinstated as a deputy sheriff effective September 25, 2008, and shall be entitled to all back pay and benefits from that date to present.”

At the hearing on September 17, 2010, on plaintiff’s petition for writ of mandate seeking to compel the County’s compliance with the ALJ’s proposed decision, the superior court stated, “I believe, under the circumstances, that the County does have the discretion to accept, reject, or modify the ALJ’s decision.” It clarified the issue before it, as “whether the weight of the evidence shows that Petitioner [was] substantially incapacitated from performing his usual duties as deputy sheriff at the time the disability issued.” The court found sufficient evidence that petitioner was substantially incapacitated from performing his usual duties as a sheriff at the time of his disability retirement. The court denied plaintiff’s writ petition and entered judgment in favor of the County.

On September 24, 2010, plaintiff moved for reconsideration of the order denying the petition. Plaintiff maintained he recently discovered the resolution and Policy C-32, its corresponding guidelines effectuating the resolution that he contended negated the County’s ability to unilaterally reject the ALJ’s decision. On November 18, 2010, the superior court heard plaintiff’s motion. The court found the resolution was a new and different fact not presented at the original hearing. The court granted the writ “on the grounds that the Court’s interpretation of Resolution 2007-236 is that the decision of the ALJ is final, as opposed to a proposed decision. The County lacks authority to review the decision, absent requesting review by the Superior Court.” The court ordered “[t]he County . . . to comply with the decision of the [ALJ] reinstating the petitioner as a deputy

sheriff with the County . . . effective September 25, 2008, and he shall be entitled to all back pay and benefits from that date to present.”

DISCUSSION

The County contends the superior court erred in determining, as a matter of law, that the resolution negated its authority to reject the decision of the ALJ. We agree.

“We independently review questions of statutory construction. [Citation.] In doing so, ‘it is well settled that we must look first to the words of the statute, “because they generally provide the most reliable indicator of legislative intent.” [Citation.] If the statutory language is clear and unambiguous our inquiry ends. “If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.” [Citations.] In reading statutes, we are mindful that words are to be given their plain and commonsense meaning. [Citation.] We have also recognized that statutes governing conditions of employment are to be construed broadly in favor of protecting employees. [Citations.] Only when the statute’s language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation. [Citation.]’ [Citation.]” (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1250.) “We interpret ordinances by the same rules applicable to statutes.” (*Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Bd.* (1999) 70 Cal.App.4th 281, 290.) We have found no published case, nor have the parties presented us with any, defining how the County resolutions or

the guidelines effectuating them should be interpreted. Nonetheless, assuming arguendo, without deciding, we shall apply the typical rules of statutory construction.⁹

Section 11517, subdivision (c)(2)(E) provides the County may “[r]eject the proposed decision [of the ALJ], and decide the case upon the record, including the transcript, or upon an agreed statement of the parties, with or without taking additional evidence.” The pertinent portions of the resolution are as follows: “In the event of a dispute regarding retirement or reinstatement of a sworn local safety officer, where a determination of incapacity is necessary, the Board of Supervisors is required by [sections] 21156 and 11512, as well as the holdings in *Usher v. The County of Monterey* (1998) 65 Cal.App.4th 210 [*Usher*] and *Langan v. City of El Monte* (2000) 79 Cal.App.4th 608, [*Langan*] either to hear the appeal itself with an [ALJ] who will then submit a proposed decision to the Board upon which it may act.”

The resolution further provides that “[i]n accordance with the authority of the Human Resources Director to make determinations of disability . . . the Board of Supervisors of [the] County hereby delegates full authority to the [OAH] (including such [ALJs] as may be appointed from time to time) to adjudicate individual disputes regarding the disability status of a sworn local safety officer or the reinstatement of a previously retired employee, subject to judicial review in the Riverside County Superior

⁹ However, we note that in *San Luis Obispo County Employees’ Association v. Freeman* (1973) 30 Cal.App.3d 511, 516-517, although the appellate court held the county board of supervisors was required to act pursuant to the terms of its own resolutions and guidelines, it interpreted the language of the resolution at issue in light of the board’s policy statements in support of the resolutions without discerning whether there was any ambiguity in the resolution itself.

Court; and to make any other related determinations which are necessary in order to adjudicate the rights and duties of the parties. [¶] . . . In the absence of judicial review that may be sought by any aggrieved party, the [ALJ's] decision shall be certified by the County in PERS in the manner and within the time provided by law.”

Policy C-32, which according to plaintiff is the effectuating guidelines for the resolution, has the subject heading on each page reading “Industrial Disability Safety Retirement and Reinstatement Procedures.” Policy C-32 provides, in pertinent part: “If timely objection is made by the employee to the County’s determination regarding retirement or reinstatement, the Board of Supervisors or their designee shall endeavor to schedule a hearing with the Office of Administrative hearings no later than ninety (90) calendar days after the date of the appeal notification. [¶] . . . [¶] Following a determination by the County and the timely filing of an appeal by the employee/retiree, the appeal hearing shall be conducted by the ALJ in conformity with the Administrative Procedures Act (‘APA’).” “An [ALJ] shall conduct the hearing, and shall render a decision on all contested issues Review of the ALJ’s decision may be by Writ of Mandate in the Riverside Superior Court. [¶] . . . [¶] [T]he ALJ shall render a decision in the matter containing the findings of fact and conclusions of law reached by said ALJ. In the absence of request for judicial review by any aggrieved party the County shall certify the ALJ’s decision to CalPERS, or shall order or deny reinstatement of a retiree based thereon. . . . [¶] . . . [¶] . . . The decision of the ALJ will be considered final for purposes of any appeal or writ upon service of the decision on the parties.”

Read alone, the portion of the resolution providing the County delegates “full authority” to the OAH including an ALJ who may be appointed to adjudicate disputes regarding the disability status of local safety officers subject, apparently, only to judicial review, appears to negate its statutory authority under section 11517, subdivision (c)(2)(E) to reject the ALJ’s proposed decision. Similarly, the section reflecting that in the absence of judicial review, the ALJ’s decision shall be certified by the County seems to contradict its assertion of a right to reject the ALJ’s “proposed decision.” Likewise, the policy’s provision that review of the ALJ’s decision be by resort to writ of mandate and, in absence of such resolution, be considered final, suggests a repudiation of the County’s prior authority to reject independently the ALJ’s decision. Nevertheless, we, like the superior court, find other portions of the resolution and policy conflicting with this interpretation.

Indeed, the superior court noted the resolution was “arguably contradictory in certain parts.” The court went so far as to recommend “the County Board of Supervisors . . . consider rewriting the resolution at some point in the future.” In particular, the resolution’s language reading that the ALJ “will . . . submit a *proposed* decision to the Board upon which it may act” is reasonably susceptible to the interpretation that that ALJ’s decision was not final and that the County retained its power to reject it. Furthermore, the resolution’s citations to *Usher* and *Langan* suggest an intent in enacting the resolution that had nothing to do with the finality of the ALJ’s decision.

In *Usher*, the plaintiff deputy sheriff sought an industrial disability retirement, which the County denied. The plaintiff appealed. A hearing was held before a hearing

officer and an ALJ. (*Usher, supra*, 65 Cal.App.4th at p. 214.) The hearing officer issued findings that the plaintiff was capable of performing his job when he left and he was not substantially incapacitated when he was terminated. The plaintiff filed a petition for writ of mandate alleging the proceedings were unfair because the hearing officer employed by the County, rather than the ALJ, conducted the hearing and issued the findings. The superior court granted the writ. (*Id.* at p. 215.)

On appeal, the court concluded that “the County did not proceed in a manner required by law by failing to follow the mandate of . . . section 21156 to appoint an [ALJ] to conduct the appeal hearing in this matter. Failure to provide an [ALJ] where one is required is a ground for nullifying the agency’s action for lack of jurisdiction. [Citation.]” (*Usher, supra*, 65 Cal.App.4th at p. 219.) In other words, the County may not delegate the decision making authority of the administrative hearing to a hearing officer. (*Id.* at p. 218.) Thus, “the County was required to appoint an [ALJ] to conduct the proceedings. Because the hearing officer appointed by the County did not have the authority under the relevant statutes to hear the case and render findings, the County was without jurisdiction to make a decision based on those findings.” (*Id.* at p. 212.)

In *Langan*, the city denied the plaintiff police officer’s request for an industrial disability retirement. The plaintiff appealed. The city notified her that a city official would act as the hearing officer or trier of fact and that an ALJ would only advise on questions of evidence and procedure. The plaintiff objected to the proposed proceedings and filed a petition for writ mandate. The trial court granted the plaintiff’s petition ordering the appeal proceedings be heard either by the city council in its entirety or

conducted solely by an ALJ. The city appealed. On appeal, the court held that the “City cannot designate a hearing officer to serve as the trier of fact in a disability retirement benefits appeal hearing. [The plaintiff] is entitled to a hearing conducted by either an ALJ who will render a ‘proposed’ decision to [the] City, or the entire . . . City Council sitting in bank.” (*Langan, supra*, 79 Cal.App.4th at p. 611.)

Thus, neither *Usher* nor *Langan* dealt with the respective municipalities’ authority pursuant to section 11517, subdivision (c)(2)(E) to reject the decisions of an ALJ after a proper hearing conducted pursuant to section 21156. Indeed, *Langan* specifically noted that any appropriate hearing conducted by an ALJ would be followed by a “‘proposed,’” not final, decision. (*Langan, supra*, 79 Cal.App.4th at p. 611.) Here, the administrative hearing was presided over by an ALJ who issued the proposed decision. Therefore, the proceedings below were carried out in compliance with *Usher*, *Langan*, section 21156, and ultimately the resolution. The latter resolution did not negate the County’s authority to reject the ALJ’s proposed decision.

Furthermore, both *Usher* and *Langan* involved industrial disability retirements. (*Usher, supra*, 65 Cal.App.4th at p. 214; *Langan, supra*, 79 Cal.App.4th at p. 611.) Policy C-32 explicitly indicates on each page that the guidelines apply to “*Industrial Disability Safety Retirement and Reinstatement Procedures.*” (Italics added.) Here, The County placed plaintiff on a *non*-industrial disability retirement. Thus, to the extent the resolution could be deemed an effective surrender of the County’s authority pursuant to section 11517, subdivision (c)(2)(E) to reject the decision of an ALJ, it would appear to apply only in industrial disability retirements. At a minimum, the resolution appears

capable of more than one reasonable interpretation permitting our resort to extrinsic aids to assist in our interpretation.

The resolution is preceded by a “Background” that provides, in pertinent part, “Under [section] 21550, et seq., it is the responsibility of the County . . . to make determinations relating to *industrial* disability retirements for local safety members as well as reinstatement of such retirees. Following the decision in *Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453, it has become necessary to revise the procedures previously adopted on August 26, 2003.” “These revisions pertain to cases where either the County or the safety member challenges medical evidence of substantial incapacity, and the County is required to originate an application for *industrial* disability retirement with CalPERS pursuant to . . . section 21153.” (Italics added.) First, again, the background explicitly provides the resolution will be applicable to *industrial* disability retirements. Second, the *Lazan* court held the County had a ministerial duty to apply for the plaintiff deputy sheriff’s industrial disability where substantial evidence supported a determination the County believed the plaintiff was incapable of performing her duties as a deputy sheriff. (*Langan, supra*, 79 Cal.App.4th at p. 464.) Thus, the background further supports an interpretation that, at most, the resolution limited the County’s power to reject the ALJ’s findings solely with respect to industrial disability retirements. Again, plaintiff’s disability retirement was *non*-industrial.

Finally, the background provides that “clarification is needed regarding Board of Supervisors’ procedures for dealing with an [ALJ’s] proposed decision. *The final determination on substantial incapacity on an application for industrial disability*

retirement lies with the Board of Supervisors. A final decision may be subject to review by the Superior Court at the request of either party.” (Italics added.) Yet again, the background makes express reference to industrial disability retirements. Moreover, the background makes clear that the County maintains its authority pursuant to section 11517, subdivision (c)(2)(E), to reject the ALJ’s “proposed decision.” Thus, it is ultimately the County’s decision, or lack thereof, which is subject to writ review in the superior court. The resolution did not deprive the County of its statutory authority to reject the ALJ’s proposed decision. The superior court erred in finding otherwise.

DISPOSITION

The judgment is reversed. The superior court is directed to reinstate its original decision denying plaintiff’s petition for writ of mandate. In the interest of justice, the parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RICHLI
Acting P. J.

CODRINGTON
J.