

No. S239958

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CAL FIRE LOCAL 2881 et al.,

Petitioners and Appellants,

vs.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, et al.,

Defendant and Respondent,

THE STATE OF CALIFORNIA

Intervener and Respondent.

SUPREME COURT
FILED

JUL 17 2017

Jorge Navarrete Clerk

Deputy

On Review from the Court of Appeal for the First Appellate District,
Division Three, Civil No. A142793

After An Appeal from the Superior Court for the State of California,
County of Alameda, Case No. RG12661622,
Hon. Evelio Grillo, Presiding Judge

**CALPERS' NOTICE OF INTENT TO RELY ON BRIEF
FILED IN THE COURT OF APPEAL**

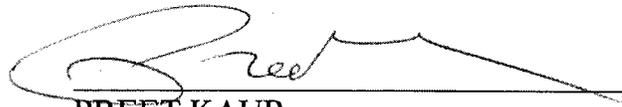
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**NOTICE OF INTENT TO RELY ON BRIEF FILED IN THE COURT OF
APPEAL**

Pursuant to California Rules of Court 8.520(a) (2) and (4), Defendant and Respondent California Public Employees' Retirement System (CalPERS) intends to rely on the attached brief that it previously filed in the Court of Appeal.

Respectfully submitted

Dated: July 14, 2017

A handwritten signature in black ink, appearing to read "Preet", is written over a horizontal line.

PREET KAUR
Senior Staff Attorney
Counsel for Defendant/Respondent,
CalPERS

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

CAL FIRE LOCAL 2881 (formerly
known as CDF Firefighters), et al.,

Petitioners and Appellants,

vs.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM (CalPERS), et
al.,

Respondent.

THE STATE OF CALIFORNIA,

Intervener and Respondent.

Court of Appeal
Case No. A142793

EXEMPT FROM FILING FEES
(Gov. Code, § 6103)

RESPONDENT CALPERS' BRIEF

On Appeal from the Superior Court, County of Oakland
Case No. RG12661622
The Honorable Evelio Grillo, Judge Presiding

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IN THE COURT OF APPEAL, STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CAL FIRE LOCAL 2881 (formerly
known as CDF Firefighters), et al.,

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION THREE		Court of Appeal Case Number: A142793
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APPELLANT/PETITIONER: Cal Fire Local 2881, et al.		FOR COURT USE ONLY
RESPONDENT/REAL PARTY IN INTEREST: California Public Employees' et al.		
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS		
(Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE		
Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.		

1. This form is being submitted on behalf of the following party (name): California Public Employees' Retirement System

2. a. There are no interested entities or persons that must be listed in this certificate under rule 8.208.
 b. Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
--	-------------------------------

- (1)
- (2)
- (3)
- (4)
- (5)

Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: April 6, 2015

Wesley E. Kennedy
(TYPE OR PRINT NAME)

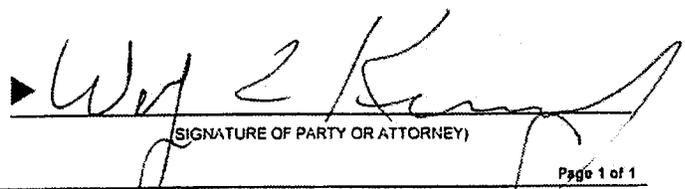

SIGNATURE OF PARTY OR ATTORNEY)

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I.

INTRODUCTION

CalPERS is the sole administrative agency charged with the administration of the California Public Employees' Retirement System ("System"). Its authority and duties are established by the California Constitution pursuant to Article XVI, section 17 of the California Constitution, Government Code section 20000 et seq., (California Public Employees' Retirement Law or (the "PERL") and section 7500 et seq. (the Public Employees' Pension Reform Act of 2013 or ("PEPRA").)¹

Benefits available to members of the System are defined exclusively by statute. CalPERS has no authority to expand benefits beyond those legislatively afforded. *City of San Diego v. San Diego City Employees' Ret. Sys.* (2010) 186 Cal.App.4th 69, 79-80, referring to the San Diego City Employees' Retirement System.

Between January 1, 2003, and January 1, 2013, active members of the System were afforded an opportunity to purchase up to five years of nonqualifying service credit ("ARSC").² Section 20909. Unlike other types of service credit, ARSC would add to the total amount of service credit

¹ Unless indicated otherwise, statutory references are to the California Government Code.

² The additional service credit is considered nonqualifying because the member does not reflect actual service in qualifying employment.

used in calculating a member's retirement allowance, but not affect the vesting of medical coverage or membership. *Ibid.* The cost of purchasing ARSC was calculated as a present value of the projected increase in liability to the System and was intended to be borne entirely by the member. Sections 22050 and 20152. The purchase of ARSC was intended to be cost neutral to the System. (Joint Appendix³ 000255; JA000259; JA000265; JA000271.)

Effective January 1, 2013, section 7522.46 was added to the Government Code and provides:

(a) A public retirement System shall not allow the purchase of nonqualified service credit, as defined by Section 415(n)(3)(C) of the Internal Revenue Code of 1986 (26 U.S.C. Sec. 415(n)(3)(C)).

(b) Subdivision (a) shall not apply to an official application to purchase nonqualified service credit that is received by the public retirement System prior to January 1, 2013, that is subsequently approved by the System.

Effective January 1, 2014, section 20909 was amended. Stats 2013, Chapter 526, section 13 (SB 220). This amendment specifically prohibits CalPERS from accepting a request to purchase ARSC submitted on and after January 1, 2013. *Id.*, at subdivision (g). CalPERS has complied with these specific legislative directives.

³ All future references to the Joint Appendix will be labelled as "JA."

Petitioners have not directly challenged the constitutionality of section 7522.46, yet in their petition below sought an order compelling CalPERS to continue to accept and process applications for the purchase of nonqualified service credit for active members who were employed prior to January 1, 2013. CalPERS is unable to comply with this request without a determination that the otherwise clear and unambiguous language of the above-referenced provision is unconstitutional. CalPERS is unable to administratively make such a determination. California Constitution, Article III, section 3.5.⁴ Under these circumstances, the trial court properly denied issuance of a writ.

The trial court has held that the opportunity to purchase ARSC was not a vested right, and even if it were, the Legislature could eliminate it. (JA000345; JA000352.)

⁴ “An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power: (a) To declare a statute unenforceable or refuse to enforce a statute on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; (b) To declare a statute unconstitutional; (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.”

II.

STATEMENT OF ISSUES

The issues in this case are whether the members of the System enrolled and active as of December 31, 2012, had a vested right in the opportunity to purchase ARSC;⁵ and whether CalPERS can be compelled by issuance of a writ of mandate to accept and process such a member's request to purchase ARSC.

III.

STANDARD OF REVIEW

The issues in this appeal pertain solely to a legal determination subject to this court's de novo review. *CalPERS Bd. of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1128.

IV.

DISCUSSION

Appellants seek issuance of a traditional writ of mandate pursuant to Code of Civil Procedure section 1085, to compel CalPERS to continue to accept and process members' requests to purchase ARSC even after the Legislature truncated that program. (JA0001.) A traditional writ of mandate "may be issued by any court . . . to compel the performance of an act which

⁵ The trial court decided the issue in the petition to be a challenge to the constitutionality of the subject provisions. (JA000360, at least as to § 7522.46.) CalPERS does not express a position in these proceedings on that issue.

the law specifically enjoins, as a duty resulting from an office, trust, or station.” Code of Civil Procedure section 1085. A petitioner seeking such a writ “must demonstrate that there is no other plain, speedy, and adequate remedy, that the respondent has failed to act on a clear ministerial duty to do so, and that the petitioner has a clear right to such performance.”

Morgan v. Bd. of Pension Comrs. (2000) 85 Cal.App.4th 836, 842-843. A ministerial act is one which a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority, without regard to his own judgment or opinion. *Ibid.*

A. CalPERS Has No Clear and Present or Ministerial Duty to Accept and Process Requests for ARSC after January 1, 2013

CalPERS has no duty to disregard the clear and unambiguous mandate and accept and process requests to purchase ARSC from and after January 1, 2013. *City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69, 78-83 (*San Diego*).

In *San Diego*, the County's Employees' Retirement System (SDCERS), the functional equivalent of the CalPERS Board, voted to charge the City, the functional equivalent of the Legislature, for what it determined to be an underfunding of the plan caused by the City's extension of a benefit to its members at a cost less than its anticipated additional liability to the plan. The City sought a writ of mandate to compel the SDCERS to reverse its vote. The court granted, in part, the City's

petition and SDCERS appealed. Notwithstanding the fact that SDCERS held the “sole and exclusive fiduciary responsibility over the assets of the public pension or retirement System” under California Constitution, Article XVI, section 17, its authority was not without limit. *San Diego*, at p. 79, citing, *Westly v. California Public Employees’ Retirement System Bd. of Administration* (2003) 105 Cal.App.4th 1095.

In *Westly*, the court held that the Board “does not have plenary authority to evade the law.” *Id.*, at p. 1100. The plenary authority to administer the pension System was “limited to actuarial services and to the protection and delivery of the assets, benefits, and services for which the Board has a fiduciary responsibility.” *Id.*, at p. 1110. Similarly, the court in *San Diego* concluded that the establishment of retirement benefits was a legislative action within the exclusive jurisdiction of the City. In passing the resolution allowing purchase of service credits, the City had specifically dictated that the total cost of such purchases would be borne by the employees. By charging the City for the underfunding, SDCERS was in violation of the legislation and exceeded its plenary authority “to administer retirement benefits.”

The court concluded: “[i]t is not within SDCERS’ authority to expand pension benefits beyond those afforded by the authorizing legislation. This is because the granting of retirement benefits is a power resting exclusively with the City. The scope of the Board’s power as to

benefits is limited to administering the benefits set by the City. When the Board decided to charge the City for the underfunding, that decision was in violation of the law and thus exceeded its power.” *San Diego*, at p. 80.

In this case, the authority of the Board of Administration of CalPERS to provide ARSC as a benefit has been circumscribed by the Legislature. Contrary to appellants’ contention, CalPERS has no plenary authority to refuse to enforce the PERL or disregard PEPRRA. CalPERS cannot provide a benefit to its members denied by the Legislature. Appellants’ contention that CalPERS fails in its duties “simply by following the [PERL]” at least in this instance, is inapposite to the legal authorities.

“It is well settled that mandamus will not lie to compel the performance of acts which are illegal, contrary to public policy, or which tend to aid an unlawful purpose.” *Cook v. Noble* (1919) 181 Cal. 720, 721; *California Highway Commission v. Riley* (1923) 192 Cal. 97, 112; *Torres v. City of Montebello* (2015) 234 Cal.App.4th 382. CalPERS has no ministerial duty to act contrary to the provisions of section 7522.46 or section 20909, subdivision (g). *Moran v. California Dep’t of Motor Vehicles* (2006) 139 Cal.App.4th 688, 691; *Barnes v. Wong* (1995) 33 Cal.App.4th 390, 395. Accordingly, appellants have not demonstrated a basis for issuance of a traditional writ of mandate in this case.

B. CalPERS Had No Discretion to Disregard Section 7522.46 or Section 20909

Any discretion that CalPERS may possess in the administration of the ARSC program is limited by the doctrine of separation of powers. California Constitution, Article III, section 3.5. Appellants' desire that CalPERS should administer the System to allow the opportunity to purchase ARSC in spite of the clear and unambiguous language of these sections "is not a basis for [CalPERS] to take over for the legislative and executive branches." *Bautista v. State* (2011) 201 Cal.App.4th 716, 735 [referring to Cal. Const., article III, § 3].

Where faced with two facially valid but inconsistent provisions of law, a ministerial officer may construe them, if possible. *Regents of University of California v. Public Employment Relations Bd.* (1983) 139 Cal.App.3d 1037, 1042. However, where such provisions are irreconcilable or where a part of the former may have been repealed by implication in the latter, "[a] ministerial officer cannot be coerced into doing that which his plain duty under the law prohibits him from doing. (Citation)." *Plum v. City of Healdsburg* (1965) 237 Cal.App.2d 308, 316-317. Even if section 20909 had not been amended when a later statute such as section 7522.46 supersedes or substantially modifies an earlier law, but without expressly referring to it, the earlier law is repealed or partially repealed by implication. *Sacramento Newspaper Guild v. Sacramento County Bd. of*

Suprs. (1968) 263 Cal.App.2d 41, 54, [“The courts assume that in enacting a statute the Legislature was aware of existing, related laws and intended to maintain a consistent body of statutes.”].

Section 7522.46, clearly provides that no application shall be taken for the purchase of nonqualified service credit on and after January 1, 2013. To the extent that the antecedent provisions of section 20909 were to the contrary, they must now be understood to have been repealed by the later section. Under these circumstances, a writ of mandate may not issue to compel CalPERS to accept an application for nonqualified serve credit pursuant to section 20909, prior to its amendment. More evident is that if this court were to find section 7522.46 invalid, CalPERS would still be required to deny requests to purchase ARSC from and after January 1, 2013, pursuant to section 20909, subdivision (g). *California State Teachers' Ret. Sys. v. Cnty. of Los Angeles* (2013) 216 Cal.App.4th 41, 59, at fn. 8; *Lockyer v. City & Cnty. of San Francisco* (2004) 33 Cal.4th 1055, 1105, “[It is worth noting that the California rule generally precluding an executive official from refusing to perform a ministerial duty imposed by statute on the basis of the official's determination or opinion that the statute is unconstitutional is consistent with the general rule applied in the overwhelming majority of cases from other jurisdictions.”]

V.

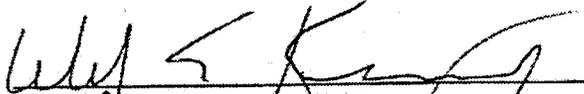
CONCLUSION

Accordingly, this court should affirm the trial court's judgment denying issuance of a writ of mandate as to CalPERS.

Respectfully submitted,

Dated:

4/6/15



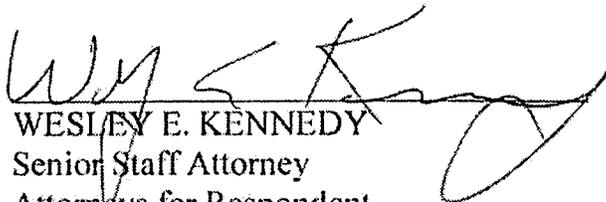
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System

CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Court 8.204(c), and in reliance on the word count of the computer program used to prepare this brief, I certify that this brief contains 1,843 words, not including the words in the Table of Contents, Table of Authorities, and this Certificate of Compliance.

Respectfully submitted,

Dated: April 6, 2015


WESLEY E. KENNEDY
Senior Staff Attorney
Attorneys for Respondent,
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PROOF OF SERVICE
CAL FIRE Local 2881, et al. v. CalPERS (State of California)
California Supreme Court, Case No. S239958

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On July 14, 2017, I served the foregoing document described as:

CalPERS' NOTICE OF INTENT TO RELY ON BRIEF FILED IN
THE COURT OF APPEAL

on interested parties in this action by placing ___ the original XX a true copy thereof enclosed in sealed envelopes addressed and/or e-filed as follows:

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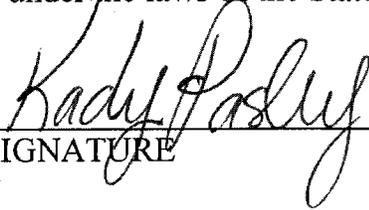
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[**XX**] **BY FEDEX OVERNIGHT DELIVERY:** I caused such envelope(s) to be delivered to the above address(es) within 24 hours by overnight delivery service.

Executed on **July 14, 2017**, at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Kady Pasley
NAME


SIGNATURE