
Civil No. C056576

**COURT OF APPEAL
STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

**KAREN MATUS,
INDIVIDUALLY AND AS TRUSTEE, ETC., ET AL.,**

Plaintiffs and Respondents,

vs.

**BOARD OF ADMINISTRATION OF
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM ET AL.,**

Defendants and Appellants.

On Appeal from the Superior Court for Sacramento County
Hon. Jack Sapunor, Presiding Judge
No. 06CS01759

APPELLANTS' REPLY BRIEF

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INTRODUCTION

This appeal raises two questions of statutory construction. First, does Government Code section 11517 contain a 100-days-after-rejection deadline for ordering the administrative transcript that does not appear, expressly or impliedly, anywhere in the language of the statute? Second, is that deadline *mandatory*, so that an agency that fails to meet it loses its jurisdiction to hear the claim and must deem adopted an ALJ's proposed decision that the agency has already timely rejected? Putting aside all of Alexander's immaterial and spurious allegations of misconduct by CalPERS over decades (see part III below), including unsupported and patently false assertions of gamesmanship and even perjury by CalPERS and its in-house counsel, Alexander has remarkably little to say about these pure issues of law. That is particularly true of the "deemed adopted" issue, which is dispositive of Alexander's action for writ of mandate.

As to the first legal issue (see part I below), the unavoidable fact is that subdivision (c)(2)(E)(iv) does not set any explicit or even implied deadline for ordering the transcript, whether arithmetic (100 days after rejection) or equitable (based on reasonableness). The absence of any deadline was acknowledged in the legislative history as well as this Court's prior decision in *Poliak v. Board of Psychology* (3d Dist. 1997) 55 Cal.App.4th 342, 351, to which Alexander repeatedly cites, but the Legislature never responded by creating a deadline. Alexander's argument that the absence of a time limit would allow an agency to regain "lapsed"

jurisdiction by belatedly ordering the transcript erroneously presupposes that the 100-days-after-rejection deadline is mandatory and carries the “deemed adopted” penalty in the first place. (Alexander Br. 50-51.) As shown below, that is not the case, and there is no issue of agency jurisdiction lost and regained.

As to the second legal issue (see part II below), Alexander relies almost entirely on the stare decisis effect of *St. Francis Medical Center v. Shewry* (2005) 134 Cal.App.4th 1556. While *St. Francis*, which did not involve any transcript issue, held that the 100-days-after-rejection deadline carried the “deemed adopted” penalty, this Court did not receive any substantive briefing on what was an uncontested issue in that case, and the Court’s opinion does not address the critical statutory language: “If the agency fails to act as prescribed in subparagraphs (A) to (E), inclusive, *within 100 days of receipt of the proposed decision*, the proposed decision shall be deemed adopted by the agency.” (Gov. Code § 11517, subd. (c)(2), emphasis added.) The mandatory feature of the statute applies only to an agency’s failure to take the initial fork in the administrative road (by accepting, rejecting, or remanding the proposed decision) “within 100 days of receipt of the proposed decision,” i.e., not to post-rejection time limits that may and usually will run well after the expressly designated initial 100-day period. This Court has indicated a willingness to revisit its own prior constructions of statutes even without intervening legal developments, and this case is one that merits such reconsideration.

ARGUMENT

I. CalPERS Did Not Violate any Deadlines Under the Government Code.

CalPERS complied with all of section 11517's express time periods: the CalPERS Board rejected the ALJ's proposed decision within 100 days of receiving it, and it was scheduled to issue its final decision within 130 days of receiving the transcript, which included a 30-day extension allowed under subdivision (c)(2)(E)(iv). While CalPERS did not order the transcript within 100 days of rejecting the proposed decision, section 11517 contains no express statutory deadlines for *ordering* or *receiving* the transcript. Indeed, section 11517's legislative history expressly recognized the absence of a deadline, yet the Legislature has made "no substantive changes" to section 11517's timeframe requirements. (1 CT 233.) Accordingly, the superior court erred in implying a mandatory deadline for ordering the transcript based on policy reasons and grammatical arguments when the Legislature did not provide for *any* deadline, let alone a mandatory one.

A. The Plain Language of the Government Code Does Not Include any Deadline for an Agency to Order the Transcript.

Alexander lists a number of dates and timelines in its response brief, most of which have no meaning under section 11517 and only muddle its distinct timeframes. Under subdivision (c)(2), an agency must act "[w]ithin 100 days of receipt by the agency of the administrative law judge's proposed decision" by either (A) adopting the proposed decision, (B)

mitigating the proposed penalty and adopting the rest of the proposed decision, (C) making technical or other minor changes in the proposed decision and then adopting it, (D) rejecting the proposed decision and referring the case to the same or another ALJ to take additional evidence, or (E) rejecting the proposed decision and undertaking to decide the case itself. (Gov. Code § 11517, subd. (c)(2)(A)-(E).) The proposed decision is deemed adopted only if the agency fails to take one of these initial actions “*within 100 days of receipt of the proposed decision.*” (Gov. Code § 11517, subd. (c)(2), emphasis added.)

Alexander argues that a final decision must be rendered no later than 200 days after the ALJ issues a proposed decision, but this argument misreads section 11517. (Alexander Br. 16, 43.) There is no 200-day time period in the statute, but instead distinct 100-day periods that operate independently and indeed sequentially. First, an agency has 100 days from *receipt*, not *rendering*, of the proposed decision to initially reject it. (Alexander Br. 19.) CalPERS received Judge Lew’s proposed decision on May 4, 2006, triggering the first 100-day period, and the CalPERS Board timely rejected the rejected the proposed decision on June 21, 2006. (2 CT 307, 308-09, ¶¶ 4-5.) Alexander does not – and cannot – argue that CalPERS failed to reject the proposed decision within 100 days of receiving it. This is *all* that section 11517 required CalPERS to do “*within 100 days of receipt of the proposed decision.*” (Gov. Code § 11517, subd. (c)(2).)

Second, as the superior court correctly acknowledged, if the agency rejects the proposed decision, it will then face new, distinct, and *alternative* subsequent 100-day periods. (3 CT 799, 802, citing *Poliak v. Board of Psychology* (1997) 55 Cal.App.4th 342, 349, 351.) Under the alternative second sentence, if the agency orders a transcript, this second 100-day period does not *begin* until the agency *receives* the transcript. (Gov. Code § 11517, subd. (c)(2)(E)(iv).) Depending on when the transcripts are ordered and how long it takes to prepare them, the final decision may well be rendered more than 200 days after the agency first received the ALJ's proposed decision.

Critically, however, section 11517 contains no express timeframe for *ordering or receiving* the transcript. Instead, it provides only a timeframe for *issuing a final decision* that is keyed to "receipt of the transcript." (Gov. Code § 11517, subd. (c)(2)(E)(iv), *emphases added*.) Thus, the superior court could not point to any explicit time limit, which the Legislature could have provided had it intended to do so. (See 3 CT 799, 804-805.) Accordingly, Alexander's appeal to the plain meaning of the statute necessarily fails.

B. The Superior Court Erred in Implying a 100-Day Deadline for Ordering the Transcript.

Because the detailed statute does not contain an explicit 100-day deadline, Alexander resorts to the legislative history of the statute and the Legislature's use of the present perfect tense, i.e., "has ordered a

transcript.” Neither aid to construction supports the superior court’s implication of a 100-day deadline for ordering that the Legislature did not include expressly.

1. *Legislative History.* As to the legislative history of section 11517, when the Legislature first included specific time limits in section 11517 to avoid “administrative limbo,” it was focused on ensuring that agencies picked that initial administrative fork in the road, not on whether they ordered the transcript within a certain time period. (*Poliak v. Board of Psychology* (1997) 55 Cal.App.4th 342.) As Alexander admits, the Legislature expressly recognized when it first adopted the timeframes in 1979 that the legislation “contains a *loophole*” enabling the agency to forestall *commencing* the second 100-day period “until *delivery* of the transcript.” (1 CT 121, 290-291, *emphases added*.)

Subsequent legislative amendments did not address this transcript “loophole.” The next substantive amendments, adopted in 1995, required the agency to “accept, reject, or modify the proposed decision” within 100 days of receiving the proposed decision. (*Poliak*, 55 Cal.App.4th at p. 350.) By imposing on agencies a requirement to make solely this *initial* choice of which fork in the road to take, “[a]dministrative limbo’ and lengthy periods of uncertainty have been eliminated.” (*Id.* at p. 351.) Similar to the current section 11517, the 1995 version required agencies only to “commenc[e] proceedings to decide the case upon the record, including the transcript,” within 100 days of receiving the proposed decision and, if it

ordered a transcript, "issue its decision within 100 days of receiving the transcripts." (*Id.* at 347, 351.) As this Court concluded in *Poliak*, "'commencing proceedings' means issuing a notice of nonadoption and electing either to decide the case itself or remand it to the ALJ for additional evidence, [which] furthers the concept of timeliness incorporated in this statute." (*Id.* at 351.) It is undisputed that CalPERS did this within 100 days of receiving the proposed decision. This Court further noted, "Nothing in the language of section 11517, subdivision (d), supports plaintiff's claim that an agency 'commences proceedings' only when a transcript has been ordered." (*Ibid.*)

As this Court in *Poliak* expressly determined, the statute did *not* implicitly require the agency to order the transcript within a certain time period. (*Id.* at pp. 349-350.) To the contrary, "[h]ad the Legislature intended to require that a transcript be ordered within the first 100-day period, the statute could easily have been drafted to reflect that fact. No such interpretation can be imputed to the language as it now exists." (*Id.* at p. 351.) This makes sense because, as this Court noted in *Poliak*, "[t]he act of ordering a transcript does nothing to speed up the administrative process since ... agencies are under no statutory constraints to prepare a requested transcript within a particular time frame." (*Ibid.*)

This Court in *Poliak* thus expressly held that the 1995 version of section 11517 did *not* require an agency to order the transcript within a certain time period, and the Court noted that the Legislature could easily

amend the statute to include an express timeframe if desired. The Legislature, fully aware of the transcript "loophole" and the court's interpretation, has never taken the *Poliak* court up on its suggestion. "It is a well-established principle of statutory construction that when the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction." (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734.)¹

In 1999, the Legislature repealed the then-existing section 11517 and adopted the current version. (Act of Sept. 7, 1999, ch. 339, §§ 1-2, 1999 Cal. Stat. 95.) Contrary to Alexander's argument, these amendments did not "increas[c] limits and restrictions" by requiring an agency to order the transcript within a certain time period. (Alexander Br. 27.) Rather, the Legislature adopted the amendments because the subsequent "100 day period for agencies to devise their own decisions after rejecting an administrative law judge's decision" was not as clear in the statute as it was in practice. (1 CT 121, 239.) As the Legislative Analysis specifically

¹ In contrast, the Legislature has not amended section 11517 since *St. Francis*, and the doctrine of legislative acquiescence does not apply. Moreover, given that no other courts have followed *St. Francis* and at least one other court has reached a contrary conclusion, Alexander errs in suggesting that resolution of this issue should be left to the Legislature. (Alexander Br. 34-35.)

stressed, “The bill makes *no substantive changes* in existing law.” (1 CT 233, emphasis added.) Rather, it simply clarified the existing requirements “that an agency must accept or reject an administrative law judge’s proposed decision within 100 days of receiving the decision. . . . [I]f the decision is rejected, the agency has *another* 100 days from the date of rejection *or the date it receives a transcript of the proceedings* to issue its own final decision.” (1 CT 239, emphases added.)

“It is a well recognized principle of statutory construction that when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded.” (*Jones v. Catholic Healthcare W.* (2007) 147 Cal.App.4th 300, 307, internal citation omitted.) Given that the Legislature amended section 11517 several times to include several specific timeframes, yet chose not to adopt any express time period for ordering a transcript even after *Poliak*, the clear legislative intent was not to fix the transcript “loophole.” The superior court erred in taking it upon itself to imply a deadline where the Legislature has excluded it.

2. *Present Perfect Tense.* Alexander argues that the Legislature’s use of the present perfect tense in “has ordered” somehow “[u]nquestionably” fills the hole in an otherwise admittedly silent statute. (Alexander Br. 48.) While insisting that “[g]rammar is important,” Alexander summarily dismisses the California precedent cited by CalPERS on the ground that “each statute and case was different, [thus] these cases

fail to provide a consistent definition or statutory meaning of the present perfect tense.” (*Id.* at pp. 47, 49.) This inconsistency, however, is precisely why the present perfect tense is too slim a reed to support a judicial re-writing to close a loophole recognized by both the legislative history and the Court in *Poliak*.

Alexander’s purportedly grammatical argument really masks an argument about supposed policy considerations. Alexander argues that if “has ordered” relates to the issuance of the final decision, then agencies will have no time limit at all on ordering transcripts or issuing final decisions. (*Id.* at pp. 48-49.) That policy argument, however, is not a justification for inserting restrictive provisions in a procedural statute that does not contain them on its face. The “limbo” the Legislature was concerned with was that *before* the initial adoption or rejection of the proposed decision, not post-rejection delays in ordering the transcript. Moreover, Alexander explicitly assumes that a party would have no recourse against an agency that simply refused to order a transcript at any time. Yet Alexander admits that Civil Code section 1085 allows a court to issue a writ of mandate compelling an agency to undertake a ministerial act (*id.* at p. 57), and Alexander further admits that ordering a transcript is a “ministerial act” (*id.* at p. 29). It is puzzling that the private party is here insisting that an agency has immunity from judicial review that the agency itself disavows.

C. CalPERS Did Not Request a Delay of More than Sixty Days in Violation of the Government Code.

Alexander argues that an agency is limited by Government Code section 11517 to a single thirty-day extension, and that CalPERS somehow violated that provision by “request[ing] a delay of more than 60 days.” (Alexander Br. 50, 52.) Under the third sentence of subdivision (c)(2)(E)(iv), an agency can extend either of the alternative 100-day time periods for issuing a final decision by 30 days as “required by special circumstance.” (Gov. Code § 11517, subd. (c)(2)(E)(iv).) That provision does not address ordering the transcript. Moreover, Alexander fails to explain how the CalPERS Board’s order delayed the final decision for more than sixty days. CalPERS received the transcript on November 13, 2006, triggering the subsequent 100-day deadline for issuing a final decision under the second sentence of subdivision (c)(2)(E)(iv). (2 CT 307, 310, ¶ 11.) That alternative timeframe required CalPERS to issue its final decision by February 21, 2007. As CalPERS explained in its opening brief, the Board issued an order delaying the final decision until March 14, 2007 – *less than thirty days* – in light of a state holiday and to allow sufficient time for the Board to decide the claim and then have a final decision drafted and approved. (CalPERS Br. 8-9, citing 2 CT 307, 308, ¶¶ 2-3, 310-311, ¶¶ 12-15, 329-333.) Indeed, had Alexander not insisted the superior court stay the full hearing before the Board scheduled for February 22, 2007, CalPERS would have been able to comply with all of section 11517’s timeframes and would have issued its final decision over a year ago.

II. The Post-Rejection Deadlines in Government Code Section 11517(c)(2)(E) Do Not Carry the “Decemed Adopted” Penalty.

A. This Court Should Reexamine Its Decision in *St. Francis v. Shewry*.

The core and near entirety of Alexander’s argument for the purportedly mandatory nature of the post-rejection follow-up time limits in subdivision (c)(2)(E)(iv) is this Court’s 2005 decision in *St. Francis*. Indeed, the district court found that CalPERS’ contrary arguments were valid, but it felt compelled solely by *St. Francis* to rule in Alexander’s favor. (3 CT 799, 807.) As CalPERS showed in its opening brief, this Court should revisit *St. Francis* and decide the issue differently. (CalPERS Br. 31-35.)

1. *Stare Decisis*. Alexander’s argument for treating *St. Francis* as stare decisis rests on several erroneous premises. First, this Court has never required a “compelling reason” to revisit and overrule a prior decision. (Alexander Br. 33 [citing *Childers v. Childers* (2d Dist. 1946) 74 Cal.App.2d 56].) Indeed, the California Supreme Court has repeatedly advised that “[a]lthough the doctrine [of stare decisis] does indeed serve important values, it nevertheless should not shield court-created error from correction.” (*Moradi-Shalal v. Fireman’s Fund Ins. Companies* (1988) 46 Cal.3d 287, 296, quoting *Cianci v. Superior Court* (1985) 40 Cal.3d 903,

924.)² Nor has this Court required an intervening Supreme Court decision or statutory enactment to justify overruling a prior decision, or hesitated to revisit a decision because it was fairly recent or involved statutory interpretation. (Alexander Br. 1, 36-37.) This Court's decision in *City of Oakland v. Public Employees' Retirement System* (3d Dist. 2002) 95 Cal.App.4th 29, refutes each of Alexander's assertions about stare decisis and provides a model for reconsideration here. In *City of Oakland v. PERS*, this Court revisited and overruled its own *three-year-old* decision on a issue of statutory interpretation on the ground "that our prior opinion was in error," without citing any intervening legal developments. (*Id.* at p. 33 [overruling *County of Mono v. Public Employees' Retirement System* (3d Dist. 1999) 69 Cal.App.4th 1105].) In *County of Mono*, the Court concluded that the three-year mistake statute of limitations applied to CalPERS reclassification proceedings; in *City of Oakland*, the Court "conclude[d] it is inappropriate to import the mistake statute of limitations into an administrative reclassification proceeding" and "declin[e]d to follow our prior decision in *County of Mono*." (95 Cal.App.4th at p. 53.)

² *People v. Latimer* (1993) 5 Cal.4th 1203, cited by Alexander, quotes *Moradi-Shalal* and *Cianci* for this proposition, and notes that even "decisions of statutory interpretation" may be overruled. (*Id.* at p. 1213.) As the Supreme Court noted, "questions of reliance are often crucial," and it looked to whether the legislature or "citizens, in the private realm, have acted in reliance on a previous decision." (*Ibid.*) There is no evidence of any legislative or private-sphere reliance on *St. Francis*.

The parallels between *City of Oakland v. PERS* and this case are striking. First, like the district court in this case, the trial court in *City of Oakland* ruled against CalPERS because it “felt bound by a ... holding in one of our prior opinions, ... with which the trial court disagreed.” (*Id.* at p. 37.) Second, as in this case, the Court’s prior decision contained a “critical omission” because it did not “discuss” or “address” key issues, including the relevant portions of the statute at issue. (*Id.* at p. 44.) Third, the Court ultimately reversed its prior opinion because the Legislature had failed to specify a particular limitation on CalPERS when “it could easily have done so.” (*Id.* at p. 58; see also *id.* at 50 [“We should not supply a limitation period not contemplated by the Legislature.”].)

2. “*Established Precedent.*” Alexander also errs by according *St. Francis* the status of “established precedent.” (Alexander Br. 34.) As *City of Oakland* attests, a single decision does not become “established precedent” simply by virtue of having been decided three years ago; rather, that term is used by California courts to refer to a proposition that has been applied repeatedly by the courts over time. (See, e.g., *Perez-Torres v. State* (2007) 42 Cal.4th 136, 143 [“We further note that by now the principles we enunciated in *Johnson* are approaching four decades of established precedent.”].) *St. Francis* has not been cited by any other California appellate decisions, whether published or unpublished. Indeed, as CalPERS noted in its opening brief, *St. Francis* is contrary to the only other decision on this issue, in which the Fourth District concluded, after painstaking

statutory analysis in an unpublished memorandum, that the post-rejection time limits in subsection (c)(2)(E)(iv) are directory, not mandatory. (*Rached v. Superior Court* (Cal. App. 4th Dist. Dec. 7, 2005) 2005 WL 3307099.)

Alexander erroneously argues that CalPERS “systematically relie[d] on” *Rached* and violated California Rule of Court 8.1115 but did not attach a copy. (Alexander Br. 1, 37 fn. 11.) CalPERS did not cite *Rached* as precedent under the exceptions in Rule 8.115; instead, it noted the case in a non-precedential way to indicate a split among the courts of appeal and suggested that this Court should not treat *St. Francis* as inviolable precedent. In fact, CalPERS cited the decision but *once*, in a footnote and without quotation, and provided California precedent acknowledging that *this Court* was free to consider the reasoning of the unpublished decision. (CalPERS Br. 33-34 & fn. 5.) Alexander responds by suggesting a dichotomy between *unpublished* and *depublished* decisions where none exists (Alexander Br. 38): a decision that is depublished becomes unpublished. In any event, Alexander studiously avoids distinguishing or even acknowledging *Ray v. Goodman* (2006) 142 Cal.App.4th 83, discussed by CalPERS (CalPERS Br. 34), in which the court cited “at least one unpublished appellate decision [that] has addressed this issue [of statutory interpretation] and found, as we do here, notwithstanding the holdings” in two published decisions. (142 Cal.App.4th at p. 90 fn. 5.) Alexander argues that *Rached* is “poorly reasoned” and “factually

ambiguous,” but the publicly available decision speaks for itself as to the falsity of that mischaracterization. (Alexander Br. 1, 37.) Ultimately, this Court on its own can give *Rached*'s reasoning the weight it deserves in determining whether *St. Francis* should be overruled.

3. *Briefing in St. Francis.* Most curious of all, Alexander argues that the mandatory nature of the post-rejection time limits was “sufficiently briefed” in *St. Francis*, when it was not “briefed” at all. (Alexander Br. 34.) The pertinent portions of the briefs in that appeal are included in the record and reveal that the issue was not even contested, let alone analyzed for the Court’s benefit. The Appellant’s opening brief merely argued the point in a conclusory fashion:

First, DHS' final administrative decision was issued beyond the deadline established by Government Code Section 11517. As a result of missing this deadline, the final decision is void, and the proposed decision issued by the Administrative Law Judge must be reinstated.

* * *

E. THE FINAL DECISION IS UNTIMELY

1. The Proposed Decision must Be Reinstated Because the Final Decision Is Untimely under Government Code § 11517(c)(2).

a. The Final Decision Was Issued After the Deadline Established by Section 11517.

As discussed below, the Medi-Cal administrative appeal process is subject to the California Administrative Procedure Act, Government Code Section 11500 *et seq.* Pursuant to Section 11517(c)(2), an agency is required to take

one of five actions within 100 days of receipt by the agency of a proposed decision. If the agency fails to act within the 100-day period, the proposed decision becomes the final agency decision. One of the actions the agency may take within the 100-day period is to advise the parties that the proposed decision is rejected and that a new decision will be issued. The final decision must then be issued within 100 days of the rejection of the proposed decision. Cal. Gov't Code § 11517(c)(2)(E).

DHS rejected the proposed decision on the date it was issued pursuant to Section 11517(c), October 23, 2001. However, DHS did not issue a Final Decision until February 23, 2002, *113 days after it had rejected the proposed decision and thirteen days after the deadline imposed by Section 11517(c)*. As such, the Proposed Decision must be reinstated because the Final Decision was not issued within the statutorily authorized time period.

(3 CT 701, 702-703, available at 2004 WL 3252020, at *2, 10-11.)

The respondent's brief filed by the agency did not even address whether the deadline was mandatory. It stated only this:

Appellant argues the final decision is untimely under Government Code section 11517(c)(2)(E), and as a result the proposed decision should be reinstated as the Department's final decision. (AOB, pp. 10-11.) However, appellant acknowledges that Welfare and Institutions Code section 14171 is the controlling statute for the administrative appeals process regarding audits or examination findings. (AOB, p. 4, lines 9-20.) The general provisions of Government Code section 11500 et seq. relating to administrative procedure in hearings must yield to a special statute where a variance exists. (*Lacy v. Orr* (1969) 276 Cal.App. 2nd, 198.)

(3 CT 704, 705-706, available at 2005 WL 1124551, at *15-16.) In his reply brief, the appellant merely argued:

B. Application of AFA: The Department does not dispute that the application of the California Administrative Procedure Act ("AFA") would require

the reinstatement of the Administrative Law Judge's proposed decision in favor of St. Francis. Rather, the Department contends that the AFA is not applicable even though the Legislature has decreed that the AFA is to be applied to all hearings conducted by the Department "notwithstanding any other provision of law."

* * *

The Department does not dispute in its opposition that, if the California AFA is applicable, the Department's final decision was untimely and the proposed decision must be reinstated as required by Government Code § 11517(c)(2)(E). The Department argues only that the AFA does not apply

(3 CT 707, 708-709, 710.) Thus, the briefing amounted to an *ipse dixit* by the appellant and a "who cares?" by the respondent. No one analyzed the statute, particularly the limitation of the "deemed adopted" penalty to an agency's "fail[ure] to act as prescribed in subparagraphs (A) to (E), inclusive, *within 100 days of receipt of the proposed decision.*" (Gov. Code § 11517, subd. (c)(2), emphasis added.)

4. *Analysis in St. Francis.* Similarly, Alexander errs by arguing that "[t]his Court has already analyzed Section 11517(e) and its subparagraphs in great detail." (Alexander Br. 44.) With all due respect, this Court's discussion of the issue in *St. Francis* reflected the conclusory nature of the briefing. The Court's opinion, which did not involve any issue of a deadline for ordering transcripts, did not analyze the statutory text of section 11517(c)(2). Rather, its entire discussion of the statute and the purportedly mandatory nature of the post-rejection deadlines was as follows:

Section 11517 provides that an agency must act on an administrative appeal within 100 days of the receipt of a proposed decision from the ALJ. (§ 11517, subd. (c)(2).) If the agency fails to act or, as here, fails to issue a final decision within 100 days of the act of rejection of the proposed decision, it "shall be deemed adopted by the agency." (§ 11517, subds. (c)(2) & (c)(2)(E)(iv).) We refer to this rule as the 100-day rule.FN2

FN2. Calling this a 100-day rule is somewhat of a misnomer. In the case where the agency acts to reject a proposed ALJ decision within 100 days of its receipt it has an additional 100 days within which to file its final decision, for a maximum of 200 days. In this case, the Department's rejection of the ALJ decision occurred on the same day as its receipt, leaving the Department with 100 days in which to file its final decision.

The agency claims the two rules are in conflict and that section 14171 applies as the more specific rule. We disagree.

The two rules serve different purposes, run from different starting dates and have different consequences. The 100-day rule runs from the date of receipt or rejection of the ALJ decision. It establishes whether a proposed ALJ decision shall be deemed the final decision of the agency. The 420-day rule runs from the closure of the record before the ALJ. It affects the amount of any overpayment.

We will conclude that since the Department failed to file a final decision within 100 days of its rejection of the proposed ALJ decision, it is deemed adopted by the Department.

(134 Cal.App.4th at pp. 1558-1559 & fn. 2.) Footnote 6 in the opinion, cited by Alexander, merely *quotes* the statute without further analysis. At no point did the Court address the precise wording of the statute, or whether the initial 100-day period from receipt of the proposed decision in

subsection (c)(2) was of a character different from the post-rejection time limits in subsection (c)(2)(E)(iv). It should do so now.

B. The Plain Language of Subsection (c)(2) Limits the “Deemed Adopted” Penalty and the Mandatory Effect to the 100-Day Period Running from Receipt of the Proposed Decision.

Alexander’s brief shares with *St. Francis* the fundamental flaw of failing to address the key statutory language in subsection (c)(2): “If the agency fails to act as prescribed in subparagraphs (A) to (E), inclusive, *within 100 days of receipt of the proposed decision*, the proposed decision shall be deemed adopted by the agency.” Alexander argues that this provision is mandatory because it establishes the “deemed adopted” penalty for violation (Alexander Br. 61), and that *St. Francis* applied the penalty to violation of the post-rejection period for issuing the final decision of “not later than 100 days after rejection of the proposed decision” in subsection (c)(2)(E)(iv). But those arguments miss the point. The first issue is *not* whether the “deemed adopted” penalty is itself mandatory, but instead to which time limits it applies, and the second issue is *not* what *St. Francis* held, but whether it was correct and can be squared with the statutory text. Both Alexander and *St. Francis* are silent on these points, and the district court itself noted that CalPERS’ arguments on this issue are valid. (3 CT 799, 807.)

1. The distinguishing feature of this case is that the Legislature provided an express mandatory penalty but limited its applicability to

certain deadlines. The Legislature provided the “deemed adopted” penalty *solely* for a failure to act “*within 100 days of receipt of the proposed decision.*” It did *not* provide a similar penalty for failure to meet any of the other deadlines that Alexander concedes are designed to run *more than* “100 days of receipt of the proposed decision.” As Alexander now admits, the statutory text and the legislative history confirm that the post-rejection deadline for filing the final decision is a separate deadline that is not anticipated to run “within 100 days of receipt of the proposed decision.” Indeed, in *St. Francis*, which did not involve any post-receipt ordering of the transcript, the Court acknowledged that there was “a maximum of 200 days” for issuing the proposed decision. (134 Cal.App.4th at p. 1559 fn. 2.) The “deemed adopted” penalty by its own terms cannot apply to failures after the first 100-day period. As explained above (see *supra* pp. 5-9), the distinction between the first 100-day period from receipt and the subsequent 100-day periods is not a matter of legislative oversight, but instead reflects the legislative history of the statute as it has developed.

2. Rather than dealing with the intrinsic limitation of the “deemed adopted” penalty to an agency’s “fail[ure] to act as prescribed in subparagraphs (A) to (E), inclusive, *within 100 days of receipt of the proposed decision.*” (Gov. Code § 11517, subd. (c)(2), emphasis added), Alexander argues that the use of the term “inclusive” means that the legislature intended to make every deadline in subparagraphs (A) through (E) mandatory. (Alexander Br. 58-59.) But Alexander cites no authority for

imparting such meaning to “inclusive.” Indeed, that word does not indicate anything about the internal operation of the provisions of a statute. Rather, the use of “inclusive” is a drafting convention in California and other states that indicates that the legislature’s identification of the starting and ending points in a range includes everything between them, rather than simply those two outside provisions. Thus, if “several consecutive sections” are to be identified, “it is sufficient to give the numbers of the first and last sections of the group and add the word ‘inclusive.’” (1A Norman J. Singer (6th ed. 2002) *Sutherland Statutes and Statutory Construction* § 22:9, at pp. 281-282 fn. 16, citing *State ex rel. Bray v. Long* (Mont. 1898) 52 P. 645, 646-647 [holding that the title of amendment “fairly apprised one of the subject of the legislation” because “the sections between sections 1770 and 1782 ... are very plainly covered by the word ‘inclusive’”].)

Similarly, Alexander misplaces reliance on the clause that introduces (i) through (iv) in subparagraph (E): “If the agency acts pursuant to this subparagraph, all of the following provisions apply” (Gov. Code § 11517, subd. (c)(2)(E); see Alexander Br. 59-60.) That sentence is *not* part of the “deemed adopted” penalty clause in subdivision (c)(2), which, as noted above, is limited by its terms to “fail[ures] to act as prescribed in subparagraphs (A) to (E), inclusive, *within 100 days of receipt of the proposed decision.*” If the Legislature had intended to apply the “deemed adopted” penalty to all of the subsequent time periods, it could have easily rewritten the penalty provision to eliminate the restrictive clause and

provide, "If the agency fails to act according to any of the time limits prescribed in subparagraphs (A) to (E), inclusive, the proposed decision shall be deemed adopted by the agency." That would have closed any loophole. The Legislature, however, did not do that in any of the many revisions to section 11517.

3. Ultimately, Alexander argues principles of policy, suggesting that the only way to enforce a timing provision is to make it mandatory; if it not mandatory, Alexander argues, it is merely discretionary and permissive. (Alexander Br. 57-58.) But that confuses directory with permissive. "[T]he 'directory' or 'mandatory' designation does not refer to whether a particular statutory requirement is 'permissive' or 'obligatory,' but instead simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates." (*Morris v. County of Marin* (1977) 18 Cal.3d 901, 908.) If an agency delays in ordering a transcript or deciding the case, it is well established that the claimant may seek judicial relief in the form of a writ of mandate requiring the agency to proceed. (*Edwards v. Steele* (1979) 25 Cal.3d 406, 412 ["We conclude that although the board could have been mandated to comply with the 15-day and 40-day requirements, these provisions are not to be deemed jurisdictional"]; *LT-WR, L.L.C. v. California Coastal Commission* (2007) 151 Cal.App.4th 427, 431 [claimant "was not without a remedy in the face of the [agency's] delay in hearing the matter" because it "could have filed a petition for writ

of mandate to compel the [agency] to hear and decide the ... application”]; *Board of Education v. Sacramento County Board of Education* (2001) 85 Cal.App.4th 1321, 1332 [statutory time requirement was only directory where “any delay beyond the 40-day statutory deadline for decisionmaking is remediable by petition for writ of ordinary mandamus to compel the School Board to perform its duty”]; *Kaiser Foundation Hospitals v. Sacramento County Superior Court* (2005) 128 Cal.App.4th 85, 105 [“Dr. Dennis could have sought a writ of mandate from the superior court to compel the Hospital to begin the hearing”].) Alexander offers no contrary authority.

Thus, it is irrelevant whether, as the superior court stated without explanation, CalPERS’ initial delay in ordering the transcript was purportedly unreasonable. The proper remedy would have been a writ compelling the agency to proceed, not the “deemed adopted” penalty. In this case, no writ proceeding was necessary, as the CalPERS Board had *already* ordered and received the transcripts and scheduled the hearing and decision making process. Indeed, it was Alexander who invoked judicial authority by petition for writ of mandate to *stay and then preclude* the CalPERS Board from deciding the case.

III. Alexander’s Factual Assertions Are Unsupported and Immaterial.

CalPERS’ opening brief set forth the facts and procedural history pertinent to this writ appeal. In response, Alexander recites at length events

that purportedly occurred before CalPERS received and rejected the ALJ's proposed decision. (Alexander Br. 6-9, 56.) Those facts are irrelevant to, and serve only to mask, the procedural issues on appeal. Alexander's brief, however, contains several false and unsubstantiated assertions that might mislead the Court and should be addressed.

1. Contrary to Alexander's strange and repeated assertion, it was never a "secret" that CalPERS was operating with respect to the ALJ's proposed decision under Government Code section 11517, and this was not an obscure point that was suddenly revealed for the first time on December 8, 2006. (Alexander Br. 5, 17, 32, 51, 56.) Section 11517 is the generally applicable statute governing how agencies handle proposed decisions, and Alexander, who was represented by the same counsel at all material times, does not point to any other statute under which CalPERS could have been proceeding. (See Alexander Br. 32, 56.) In addition, as Alexander's response brief admits, CalPERS's general counsel recommended a full hearing on the case and answered multiple questions regarding the relevant administrative procedures during the CalPERS Board's June 21, 2006 meeting. (Alexander Br. 10-11, 53; 1 CT 214-215.) At that same meeting, the CalPERS Board ultimately voted to reject the proposed decision and decide the case itself. (2 CT 307, 308-309, ¶ 5.) Moreover, as the superior court noted, CalPERS informed Alexander's counsel on July 13, 2006, that its Board had rejected the proposed decision. (3 CT 799, 800 fn. 2.)

Accordingly, Alexander was fully aware that CalPERS was operating under section 11517; that is the *only* statute under which it could operate.

2. CalPERS does not dispute that it intentionally deferred ordering the transcript. (2 CT 307, 309-310, ¶ 10.) Contrary to Alexander's contentions, however, CalPERS did not delay ordering the transcript to prejudice Alexander or "game" the system; instead, its reasons for doing so were utterly benign.³ (Alexander Br. 15.) Rather, CalPERS was at all times candid and forthright that it had deferred ordering the transcript for the sole purpose of *improving* the Board's decision making by obtaining, at the request of the Chairman of the Board in an open meeting, the independent legal opinion of the Office of Legislative Counsel based on a set of representative and accurately computed hypothetical tables. (2 CT 307, 309, ¶¶ 6-7.) It is true that, as Alexander asserts, the hypothetical submitted to Legislative Counsel was not in the administrative record (Alexander Br. 14, 56), but CalPERS did not simply "invent" new calculations to

³ While CalPERS admits that it delayed in order to obtain an opinion of the Office of Legislative Counsel, CalPERS did *not* "admit[] to purposely waiting to order transcripts after the *second* 100 day time line." (Alexander Br. 31, emphasis added.) Rather, CalPERS reasonably believed the second 100-day deadline was not even triggered until it received the transcript on November 13, 2006, allowing it to obtain the requested opinion and facilitate a fully informed Board decision. (CalPERS Br. 7, citing 2 CT 307, 311, ¶ 11.)

“manipulate the case and evidence in its favor.” (Alexander Br. 14, 56.) To the contrary, CalPERS was obligated to provide illustrative hypotheticals in a neutral manner because the Office of Legislative Counsel will not issue an opinion based on case-specific facts and information. (2 CT 307, 309, ¶¶ 6-7.)

Whether the Office of Legislative Counsel had previously rendered a legal opinion in 1998 is irrelevant to this writ appeal. (Alexander Br. 16-17.) Indeed, Alexander’s counsel admitted during the February 2, 2007, hearing before the superior court that the 1998 opinion was “irrelevant to the writ issue.” (1 RT 32:13-24.) The superior court agreed and excluded the 1998 opinion on relevance grounds. (1 RT 32:26-33:1.) At any rate, it is not clear what information the Office of Legislative Council had in drafting that opinion ten years ago, and the CalPERS Board was under no duty to rely on it rather than obtaining a current opinion based on a full set of neutral hypotheticals.

In any event, Alexander’s assertions of a malicious motive for the delay are completely unsupported by any shred of evidence. There is no evidence that CalPERS act to compromise or take advantage of Alexander’s situation. (Alexander Br. 55-56.) There is no evidence that CalPERS tried to use the delay to extract a favorable settlement – a speculative assertion that Alexander raises for the first time on appeal. (Alexander Br. 55.) Indeed, there is no evidence that CalPERS and Alexander were even discussing settlement at any time.

Similarly, there is no evidence that CalPERS deferred ordering the transcript to obtain a “blank slate” because there would be two new members of the CalPERS Board in January 2007 – an assertion made by counsel for the first time at the April 2007 writ hearing before the superior court. (Alexander Br. 54.) Indeed, contrary to Alexander’s assertion, by the time the new members joined the Board, the merits had not yet been briefed or argued, and the new members would not have been rushed to vote at their very first meeting. (Alexander Br. 54-55.) To the contrary, precisely because the case presents complex issues, the Board exercised its discretion under subdivision (c)(2)(E)(iv) to issue “an order delaying its decision for 30 additional days to consider and issue its decision in the case.” (2 CT 307, 311 ¶ 15, 329-333.) This would have allowed the new and old Board members to consider both sides’ briefs, hear full argument at the February 22, 2007, Board meeting, and then adopt a final decision at the March 14, 2007, Board meeting. (2 CT 307, 311 ¶ 15.)

3. Alexander harps on the fact that CalPERS initially ordered the transcript directly from the Office of Administrative Hearings, when attorney Elizabeth Yelland and her secretary Jocelyn were apparently aware that the transcript was available from Peters Court Reporting. (Alexander Br. 12-13.) CalPERS’ mistake is immaterial to the legal issues presented, since CalPERS did not order the transcript from either entity until more than 100 days after the rejection of the proposed decision. (2 CT 307, 309-310, ¶¶ 10-11, 328).

At any rate, Alexander's assertion that "CalPERS' attorney, Marguerite Seabourn, falsely declared under oath that CalPERS learned on or after October 6, 2006 that it was required to order transcripts from Peters," first made at the April 2007 writ hearing, is both gratuitous and meritless. (Alexander Br. 20, 31.) Ms. Seabourn, who had just started at CalPERS a few months before the Alexander hearing, had never before requested an administrative hearing transcript and was unfamiliar with the process. Moreover, contrary to Alexander's unfounded assertion, Ms. Seabourn had never received any transcript ordering instructions during the hearing before the ALJ. (Alexander Br. 9.) As Alexander recognizes, it was Ms. Yelland and her secretary who made the prior calls to Peters, not Ms. Seabourn. (Alexander Br. 12-13.) By the time her office ordered the transcript, Ms. Yelland and her secretary both had left CalPERS' employ (2 CT 307, 309, ¶¶ 7-8), and Ms. Seabourn was unaware that they had previously contacted Peters.⁴ In any event, these insidious assertions of perjury are irrelevant to the legal issues before this Court. The superior

⁴ Alexander erroneously argues that Barbara Lipnofsky of CalPERS contacted Peters on October 20, 2006, but "intentionally failed to order the transcripts." (Alexander Br. 15.) Alexander cites scrawled notes from someone at Peters which indicate, *to the contrary*, that Ms. Lipnofsky tried to order the transcripts. The notes indicate that Ms. Lipnofsky said CalPERS "would like a copy of ea. [transcript] ... [a]nd would like them by 11/15/06 if possible." (2 CT 468.) The notes further state that Peters "[t]old her we needed request in writing." (*Ibid.*)

court made no findings on these matters, and this Court should disregard Alexander's attempt to distort the record.

CONCLUSION

The Court should reverse the judgment of the superior court and vacate the writ of mandate, allowing the CalPERS Board to resume administrative proceedings on Alexander's claim.

DATED this 17th day of June, 2008.

STEPTOE & JOHNSON LLP

By 

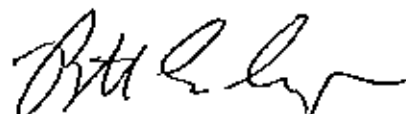
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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 14(c)(1), the undersigned counsel certifies that the text in this Appellants' Reply Brief contains 7,438 words and uses proportionately spaced, 13-point type.

DATED this 17th day of June, 2008.



Bennett Evan Cooper

CERTIFICATE OF SERVICE

I am employed in Phoenix, Arizona. I am over the age of 18 and not a party to the within action. My business address is Steptoe & Johnson LLP, Collier Center, 201 East Washington Street, Suite 1600, Phoenix, Arizona 85004-2382. On this 17th day of June, 2008, I served the Appellants' Reply Brief on the parties by placing a true copy thereof in a sealed envelope addressed as follows: John M. Jensen, Roberti Jensen LLP, 3600 Wilshire Boulevard, Suite 714, Los Angeles, California 90010, counsel for the respondents and plaintiffs.

I also served the Appellants' Reply Brief on the Supreme Court of California by placing four true copies thereof in a sealed envelope addressed as follows: Supreme Court of California, 350 McAllister Street, San Francisco, California 94102-4783.

I also served the Appellants' Reply Brief on the Superior Court for Sacramento County for delivery to the trial judge by placing a true copy thereof in a sealed envelope addressed as follows: Hon. Jack Sapunor, Presiding Judge, Superior Court for Sacramento County, Gordon D. Schaber Downtown Courthouse, 720 Ninth Street, Sacramento, California 95814.

I caused such envelopes to be sealed and placed for collection and mailing on this date at Phoenix, Arizona, following ordinary business practices. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice for collecting and processing of correspondence for mailing with the U.S. Postal Service. Under that practice, the correspondence is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that, on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing contained in the declaration.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of Arizona. Executed this 17th day of June, 2008.



A handwritten signature in black ink, appearing to read 'John M. Jensen', is written over a horizontal line.