

Case No.: S207030

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DAVID YOST,

Plaintiff and Appellant,

vs.

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

Defendants and Respondents.

DAVID YOST'S REPLY RE PETITION FOR REVIEW

Pursuant to California Rules of Court, Rule 8.500

After a Decision by the
Court of Appeal, Second Appellate District, Division Five
[incorrectly identified as Division One in the Court's *Written Opinion*]
Case No. B232920

Appeal from the Superior Court of Los Angeles County
The Honorable Anthony Mohr, Presiding
Los Angeles Superior Court Case No. BC 444842

JOHN MICHAEL JENSEN (SBN 176813)
Law Offices of John Michael Jensen
11500 W. Olympic Blvd., Ste. 550
Los Angeles, CA 90064

Attorneys for Plaintiff and Appellant
David Yost

David Yost's Reply Re Petition for Review

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Government Code, §20164(b) 1, 12

California Constitution:

Cal. Const., art XVI, §17 1

Treatises:

2 Cal.Jur.3d, *Administrative Law* §445 7
2A Cal.Jur.3d, *Administrative Law*, §698 10

INTRODUCTION

The fundamental legal question presented is whether CalPERS owes lifetime fiduciary duties to unrepresented members who act as part of a class action.

Constitutional law and statutory law expressly obligate CalPERS with *lifetime* fiduciary duties to its members. (Cal. Const., art. XVI, §17; *Government Code*, §§20160(c), 20164(a) and (b).) CalPERS essentially says it does not owe lifetime duties if members file a class action.

The Appellate Court agreed and ruled wrongly that CalPERS can interpose the Government Claims Act ("GCA") against members filing a class action. The Second District's Ruling requires Plaintiffs to file claims with the California Victim Compensation and Government Claims Board ("VCGCB") as the sole means of satisfying the GCA. As a result, CalPERS' primary constitutional lifetime duties to Members are abrogated by GCA statutes. The lifetime duties exist in name only, without practical substance for most members and their claims.

Contrary to CalPERS' *Answer to Petition for Review*, the real problem is this:

(1) CalPERS has failed to establish an administrative process that fulfills its lifetime duties to unrepresented members when adjudicating claims (i.e. class actions are forbidden in CalPERS' administrative process);

(2) As a result of CalPERS' failure to provide an adequate administrative process, Plaintiffs with small or medium sized claims aggregate into class actions and file a Complaint in Superior Court;

(3) Thereafter, CalPERS files a demurrer and interposes the one year VCGCB presentment deadline to limit its constitutional "lifetime" duties to the class members.

Narrowly taking the controversy out of the context presented, the Appellate Court's formal ruling was that Plaintiffs had to file a formal VCGCB claim before filing their class action suit. Although presented, the Court did not rule on whether CalPERS' administrative process was (i) "functionally equivalent" for GCA purposes or (ii) excused under *Rose v. City of Hayward* (1981 CA 1st) 126 Cal.App.3d 926.) Without analyzing the nature of the constitutional duties or the real legal riddle, the Appellate Court assumed that CalPERS' lifetime duties only extend to individuals who file in the administrative process:

Perhaps daunted by the complexity that CalPERS has constructed, the Appellate Court ignored that Plaintiff and Appellant David Yost's class action complaint arose directly as a result of CalPERS' reluctance or failure to provide an adequate administrative process (that adjudicates class action claims with the members' lifetime rights intact). Avoiding deliberation of the difficult statutory and constitutional requirements, the Second District

failed to recognize that CalPERS leveraged its own failure as a defense to unilaterally release itself from its *lifetime* duties (and associated recovery).

A right does not exist without an adequate remedy. The practical result is CalPERS is freed from correcting its errors or paying the vast number of small to medium size individual claims. Individuals simply cannot justify or afford to prosecute smaller claims in the administrative process (which is expensive and favorable to agencies). By an elaborate game of "hide the ball", CalPERS has effectively emancipated itself from its lifetime duties, from adjudication or oversight of its errors, and done so by its own administrative fiat, in defiance of its constitutional and statutory obligations.

Yost offers a compelling harmonization of the GCA and PERL that respects the constitutional lifetime duties and satisfies the purposes of the GCA. First, Yost presented his Complaint with a settlement offer to CalPERS, unilaterally staying all litigation for 30 days to give CalPERS time to investigate the claims and if possible settle them. CalPERS' administrative claims process is "functionally equivalent" for purposes of the GCA, and the agency is put on notice. Second, Yost is excused from CalPERS' defective administrative process because class adjudications are not permitted. The proper result is that Yost's class action Complaint is properly before the Superior Court with the members' lifetime rights and

CalPERS' lifetime duties intact.

A. The Conundrum Faced by Yost

CalPERS' *Answer to Petition* hides the serious bureaucratic conundrum that CalPERS has created, to its benefit, in contravention to a harmonized and reconciled reading of the case law and statutes. Although CalPERS treats this case as nothing but a typical GCA case, CalPERS ignores its obligations as well as the fact it has a "functionally equivalent" claims process which satisfies the GCA, albeit one that is incapable of adjudicating class actions.

Here is the conundrum: If Petitioner David Yost had brought an individual administrative claim, CalPERS says he could take advantage of the lifetime duties that CalPERS owes him, but he could not seek class relief for others.

On the other hand, if Yost sought class relief by filing a class action, CalPERS insists he could *only* do so by first filing a government claim with the Victim Compensation and Government Claims Board ("VCGCB"). The VCGCB provides a one-year "presentation" limitation. (*Government Code*, §911.2.) Thus, CalPERS' interpretation of GCA compliance effectively negates CalPERS' lifetime duties after one year.

Under the Second District's ruling, if Yost wanted to pursue his claims he faced a Hobson's choice that the Legislature has not authorized:

Yost was forced to either (1) give up his right to represent a class of people or (2) give up his right to benefit from the lifetime duties that CalPERS owes him and all other members.

The statutes and Constitution do not support this Hobson's choice. CalPERS points only to GCA issues (while avoiding the question of its own "functionally equivalent" administrative claims process for GCA compliance purposes) and does not harmonize or reconcile its own duties. The statutes and Constitution should be read as providing for Yost and the class to benefit from lifetime duties. The Legislature did not and could not impair CalPERS' lifetime duties simply because a large number of people were injured by CalPERS' misfeasance. As a matter of law,

Statutes must be interpreted in context, and must be read "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain its effectiveness." (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 440, 66 Cal.Rptr.3d 120; see *Air Machine Com SRL v. Superior Court* (2010) 186 Cal.App.4th 414, 422, 112 Cal.Rptr.3d 482.) " "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." [Citation.] " (*Torrey Hills Community Coalition v. City of San Diego* (2010) 186 Cal.App.4th 429, 440, 111 Cal.Rptr.3d 578.) "Thus, although we look first to the statutory language, we do not give the words a literal meaning if to do so would result in an absurd result that was not intended." (*Chaffee v. San Francisco Public Library Com.* (2005) 134 Cal.App.4th 109, 114, 36 Cal.Rptr.3d 1.)

(*Haro v. City of Solana Beach* (2011 CA 4th) 195 Cal.App.4th 542, 553.)

When considering the functional equivalence of CalPERS' administrative process for individuals, in fact and effect, Yost did comply with the GCA, albeit not in the form CalPERS demands.

B. Background to CalPERS' Response

Yost invested tens of thousands of dollars to buy optional service credit, only to have CalPERS seize that money after he was injured on the job and forced to retire on Industrial Disability Retirement ("IDR"). (Yost's *Opening Brief* in the Second District, p. 10.) Yost further believed that CalPERS' illegal policy and practice dates back decades and likely affects hundreds or even thousands of CalPERS members. (Yost's *Opening Brief*, p. 6.)

LAW AND ARGUMENT

A. Yost's Procedural Dilemma

Knowing full well that the vast majority of CalPERS members had neither time nor money to prosecute individual actions, Yost sought to file a class action against CalPERS on behalf of all those similarly harmed. But he immediately faced a mine field of contradictions:

- The Public Employees' Retirement Law ("PERL") imposes lifetime duties on CalPERS to correct its errors and omissions when it owes money to members and their beneficiaries. (*City of Oakland v. Public Employees' Retirement System* (2002 CA

3d) 95 Cal.App.4th 29, 50; *Government Code*, §§20160(c),
20164(a).)

- CalPERS argues that its lifetime duties are only available to those filing *administrative* claims. (CalPERS' *Opposition Brief* in the Second District, pp. 2-3; CalPERS' *Answer to Petition*, p. 3.) CalPERS' concedes that its administrative system is incapable of adjudicating class actions and can only resolve claims of named individuals. (*Answer to Petition*, p. 2, citing *Rose v. City of Hayward* (1981 CA 1st) 126 Cal.App.3d 926.)

- Further, filing an individual administrative claim would mean consenting to CalPERS' administrative process and compelling Yost to fully exhaust the lengthy and costly administrative process. (*Stuck v. Board of Medical Examiners of State* (1949 CA 1st) 94 Cal.App.2d 751; 2 Cal.Jur.3d, *Administrative Law* §445.) If then dissatisfied with the outcome, Yost could at best file a writ of administrative mandamus limited to his *individual* claim. Despite CalPERS' assurances to the contrary, there is no way Yost could convert an *individual* administrative claim into a *class-wide* petition for writ of administrative mandamus. (Yost's *Opening Brief*, pp. 46-51; Yost's *Reply Brief*, pp. 33-41.)

- If Yost wished to seek justice for an *entire class*,

CalPERS insists he first had to file a GCA claim with the Victim Compensation and Government Claims Board ("VCGCB"). (*Answer to Petition*, p. 3.)

- But according to CalPERS' own arguments, a VCGCB claim had to be filed within a year of accrual of Yost's cause of action, *and the entire class would be limited to others who also could have filed within a year*. In short, VCGCB filing would permit CalPERS to completely escape its lifetime duties.

- Further, Yost contends he did not need to file with the VCGCB *because CalPERS has a "functionally equivalent" administrative claims process*. (See, e.g., *Snipes v. City of Bakersfield* (1983 CA 5th) 145 Cal.App.3d 861 [FEHA process is a functionally equivalent claims process; no GCA claim need have been also presented to the City of Bakersfield].)

Yost therefore did the only thing he could to comply with the spirit and intent of the GCA:

- (1) He filed suit in Superior Court (thereby preserving his class-wide claims and avoiding the trap of an administrative system that could at best offer *individual* relief);

- (2) He chose not to file a VCGCB claim (knowing it would absolve CalPERS of its lifetime duties), contending instead that CalPERS'

administrative system is "functionally equivalent" to the VCGCB's system;
and

(3) He presented his lawsuit to CalPERS immediately upon filing, together with a unilateral 30-day stay on prosecution to give CalPERS time to evaluate and possibly settle the suit (thus satisfying the point of GCA filing, i.e., to give the entity time to evaluate and settle a claim before litigation commenced).

B. The "Functional Equivalence" of CalPERS' Administrative Claims Process

CalPERS argues that there is no need to reach the question of whether CalPERS' administrative process is "functionally equivalent" to that of the VCGCB because Yost never filed an administrative claim nor exhausted administrative remedies. (*CalPERS' Reply Brief*, pp. 18-20.) The Second District endorsed the same reasoning. (*Opinion*, p. 12.)

What both ignore is the precedential holding in *Rose v. City of Hayward, supra*, that class actions are *excused* from CalPERS' process because it has no ability to adjudicate such claims. "Excused" does not mean "excused except for a little bit", it means a class action plaintiff has no need to go through the administrative process whatsoever.¹

¹ CalPERS has not established a "right to sue" mechanism, so once a claimant presents an administrative claim, he or she must see the

The point of the *Rose v. City of Hayward* finding was that plaintiff had not filed an administrative claim *and did not need to* because CalPERS' administrative process could not adjudicate class action claims.

"[E]xhaustion of administrative remedies may be excused where an administrative remedy is unavailable, or inadequate." (2A Cal.Jur.3d, *Administrative Law*, §698.)

The question of the "functional equivalence" of CalPERS' administrative claims process remains an issue of first impression which only this Court can resolve. Failure to do so, and instead allowing the Second District *Opinion* to stand, would have the corollary effect of overturning *Rose v. City of Hayward*.

C. **Alleged "Conflating" of GCA Compliance and Administrative Exhaustion**

CalPERS' argues that Yost has conflated GCA compliance and administrative exhaustion, citing to *Bozaich v. State of California* (1973 CA 5th) (1973) CA 5th) 32 Cal.App.3d 688 and *Lozada v. City and County of San Francisco* (2002 CA 1st) 95 Cal.App.4th 29. (*Answer to Petition*, p.7-8.)

CalPERS misses the point and misrepresents the cases it has cited.

Bozaich did not involve a claim that plaintiff had complied with the GCA by filing in a "functionally equivalent" claims process so the issue

administrative process through to completion. (See Yost's *Reply Brief*, pp. 33-34, for further discussion of this point.)

never arose. The *Lozada* court found that plaintiff's constitutional claims under the federal Fair Employment and Housing Act (42 U.S.C., §1983) *could* proceed because Section 1983 provides a "functionally equivalent" claims process, but that his claims under the Public Safety Officers Procedural Bill of Rights Act ("POBRA") could not because POBRA provides no such functional equivalence.

In truth, *CalPERS* is actually the one conflating GCA compliance and administrative exhaustion by arguing that GCA compliance can only come with the filing of a VCGCB claim. Yost contends that CalPERS' "functionally equivalent" claims process provides GCA compliance, but that he was excused from the administrative process pursuant to *Rose v. City of Hayward, supra*.

D. CalPERS' Lifetime Duties and GCA Presentment Deadlines

CalPERS argues that that the "government claim presentation deadline is not a statute of limitations", citing to this Court's decision in *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201. (*Answer to Petition*, p. 9.) Again, CalPERS misses the point and misrepresents its cited authority.

Yost contends that he was not required to file a GCA claim with the VCGCB because he complied with CalPERS' "functionally equivalent" claims process (although he was also excused from exhausting CalPERS'

administrative remedies). Further, he contends that CalPERS' "functionally equivalent" claims process guarantees an ability to file claims throughout the lifetimes of members and their beneficiaries.

Government Code section 911.2 requires claims to be filed with the VCGCB within one year, but the PERL specifies that claims under CalPERS' "functionally equivalent" claim process may be presented at any point during the lifetimes of member/beneficiaries. (*Government Code*, §20164(a) and (b).)

CalPERS insists this distinction is irrelevant because Yost never initiated an administrative claim. This is only because doing so would trap him in an administrative process that would simultaneously force him to give up his class-wide claims. CalPERS should not be permitted to (i) use its failure to establish an administrative process that *could* adjudicate class-wide claims in order to (ii) punish Yost and the putative class by forcing him into the administrative process which would thereby bar him from *representing the class*.

CONCLUSION

If this Court allows CalPERS' interpretation of GCA compliance and the Second District's *Opinion* to stand, it will condone CalPERS' evisceration of the clear legislative mandate that it owes *lifetime* duties to members and their beneficiaries for any attempt to enforce those duties on a

class-wide basis. To quote from the *Petition for Review*:

[T]he Second District's *Opinion*—both what it decides and what it avoids—will likely have serious repercussions affecting the rights of many, many thousands of CalPERS members and their beneficiaries to seek justice by way of the class action mechanism, regardless of the nature of the injuries they have incurred.

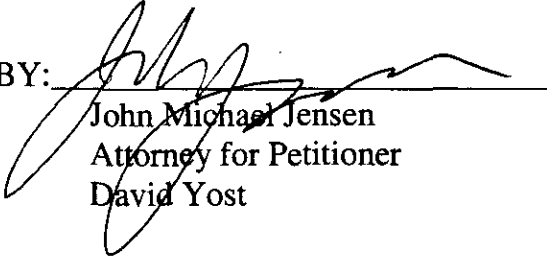
Those members and beneficiaries deserve to have definitive rulings on the three core issues addressed in this Petition: (1) the functional equivalence of CalPERS' administrative claim process; (2) the attempt by CalPERS to use its own failure to establish an administrative process capable of adjudicating class-wide claims to instead demand that claimants comply with *some other* claims process; and (3) whether CalPERS can disavow its lifetime duties if members wish to pursue class action claims against the pension system.

Justice demands that this Court do exactly that.

Respectfully submitted,

DATED: December 27, 2012

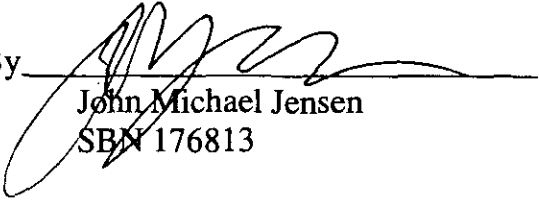
BY:


John Michael Jensen
Attorney for Petitioner
David Yost

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief, double spaced in Times New Roman 13-point font, contains 2,652 words, including footnotes, as counted by the Microsoft Word 2010 program used to generate the brief.

By _____


John Michael Jensen
SBN 176813

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I am employed by the Law Offices of John Michael Jensen, 11500 West Olympic Blvd, Suite 550, Los Angeles, CA 90064. I am over the age of eighteen (18) years and not a party to the within action.

On December 27, 2012, I served the following document: **DAVID YOST'S REPLY RE PETITION FOR REVIEW**

placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Edward Gregory Steptoe & Johnson LLP 633 West Fifth St. Suite 700 Los Angeles, CA 90071	Clerk of the Court Court of Appeal, Second District 300 S. Spring Street Los Angeles, CA 90013
Hon. Anthony Mohr Dept. 309 Los Angeles Superior Court 600 S. Commonwealth Ave Los Angeles, CA 90005	

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(Federal) I declare that I am employed by the office of a member of the of this court at whose directed the service was made.

Executed on December 27, 2012, at Los Angeles, California


Griselda Montes De Oca