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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| BRIAN A. LANE et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>THE BOARD OF TRUSTEES OF CALIFORNIA STATE UNIVERSITY,<br><br>Defendant and Appellant. | B278007<br><br>(Los Angeles County Super. Ct. No. LC102821) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Huey P. Cotton, Judge. Affirmed.

Caldwell Law Firm, Larry J. Caldwell, for Plaintiffs and Appellants.

Lynberg & Watkins, Ric C. Ottaiano, Ruben Escobedo III, and Ronnie Arenas, for Defendant and Appellant.

Plaintiffs Brian Lane, Michael Pounds, Maria Beatty and Hamid Hefazi (plaintiffs) are retired professors formerly employed by the California State University, Long Beach (CSULB). Plaintiffs are also members of the California Public Employees' Retirement System (CalPERS) and now receive pension benefits from CalPERS. In 2015, plaintiffs sued the Board of Trustees of California State University (defendant), alleging defendant violated various statutes and regulations by publishing inaccurate "payrate" schedules, misidentifying the pay periods in which plaintiffs earned their compensation, and mislabeling plaintiffs' final payments—all of which, they contended, caused CalPERS to under-calculate the pension payment amounts they are due. Plaintiffs asked the court to order defendant to correct the alleged errors so that CalPERS would, in turn, increase plaintiffs' pension payments. Both sides filed cross-motions for summary judgment, and the court entered judgment for defendant, finding plaintiffs had failed to exhaust administrative remedies and defendant, in any event, had no duty or ability to change plaintiffs' pension benefits. We agree exhaustion of available administrative remedies was both required and lacking.

## I. BACKGROUND

### *A. Plaintiffs Retire from CSU*

All four plaintiffs were previously employed as professors at CSULB. Plaintiff Brian Lane (Lane) was a professor at CSULB from 2002 until he retired in February 2014. Plaintiff Michael Pounds (Pounds) was a professor in from 1986 until he retired in May 2014. Plaintiff Maria Beatty (Beatty) was employed by CSULB for various periods starting in the 1980s

until she retired in August 2010. Plaintiff Hamid Hefazi (Hefazi) was a professor at CSULB from 1985 until he retired in 2014. All four plaintiffs participated in defendant's pension plan.

CSULB runs on an academic year calendar. Each academic year from 2009 to 2014 had eight pay periods, and had a specified number of academic work days that fell in each of those pay periods. During the relevant time period, plaintiffs, as CSULB professors, did not have regular work days during the summer months, but did receive a paycheck every month of the year, including over the summer. In other words, although plaintiffs worked eight to nine months during the academic year, defendant divided each plaintiff's annual salary into twelve equal amounts and paid plaintiffs each month over the full calendar year.

Defendant reports its employees' payrates to the State Controller's Office, and that office provides the information to CalPERS. CalPERS uses that information to calculate professors' final compensation for purposes of determining their pensions.

### *B. Plaintiffs' Correspondence with CSULB and CalPERS Regarding Their Retirement*

The day Lane's resignation from CSULB became effective, CSULB's Academic Employee Relations Manager for Faculty Affairs, Neil Iacono (Iacono), sent Lane an email confirming his resignation and reminding him that he was responsible for completing and submitting required retirement application documents to CalPERS. Iacono also sent Lane a breakdown of Lane's final payment from CSULB. Because Lane did not understand the breakdown, Iacono referred Lane to Jeanene

Berumen (Berumen), CSULB's Manager for Payroll Services. In the course of Berumen's correspondence with Lane, Berumen informed Lane that the State Controller's Office communicates information from CSULB to CalPERS. Berumen further told Lane that "[o]nce the State Controller's Office has communicated the pay information to CalPERS, you can revisit your concerns with CalPERS directly at that time."

A few weeks later, Lane contacted Iacono and Berumen and told them he spoke to the "higher-ups at CalPERS" who told him CSULB inaccurately reported his earnings, the published payrate academic year dates, and his date of separation. Lane requested a meeting with Iacono and Berumen to discuss these issues. Lane emailed them twice more over the following days, explaining what the "higher-ups at CalPERS" had purportedly told him CSULB needed to communicate to CalPERS,[1] and requesting a "quick sitdown" to discuss. Iacono responded to Lane's last email and advised him he needed to "work with CalPERS to retire."

Although Lane claimed he spoke to "various people at CalPERS" during this time period, he only identified one CalPERS employee by name—Dominic Trillo (Trillo), a CalPERS retirement program specialist. There is no indication in the record that Lane spoke to CalPERS's Executive Officer or anyone

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[1] During litigation that later ensued, Lane produced copies of the emails he sent to Iacono and Berumen reflecting "what [he] had learned" from CalPERs and "what [he] thought" CSULB needed to do to address these issues. He did not, however, submit to the trial court any written instructions or other verification from CalPERS that confirmed his understanding of CalPERS' instructions was accurate.

on CalPERS's Board of Administration. According to a "confirming letter" Lane sent Trillo, Trillo and Lane discussed Lane's complaints regarding the calculation of his final compensation, Lane's request to have his pension benefit recalculated, and what steps Lane could take to have the benefit recalculated. According to Lane's letter, Trillo informed Lane that his only recourse was to return to his employer and ask the employer to issue a monthly payrate adjustment.[2] About a month later, Trillo emailed Lane his payroll reports that CalPERS received from CSULB via the California State Controller's Office.

The record indicates Lane had two other written communications with CalPERS. On April 14, 2014, Lane faxed a letter to the Pension Benefit Services Division stating the amount of his first monthly pension benefit check was "incorrect." In that letter, Lane asked the Pension Benefit Services Division to advise him regarding the steps he needed to take to formalize an appeal and request adjustment. Lane did not receive a response to that letter, and there is no indication he attempted to follow up.

About two months later, Lane received a letter from CalPERS stating that CalPERS had received additional

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[2] The record contains two declarations by Lane that address his conversation with Trillo. In the first of those declarations, signed in February 2016, Lane stated that Trillo also told him CalPERS had no administrative remedy or appeal he could use, though no such statement appears in Lane's March 2014 confirming letter. In his second declaration, signed in June 2016, Lane states that "[b]ased upon" his March 2014 conversations with Trillo, "it was [his] understanding that CalPERS did not have any administrative review or appeal procedure to deal with the problem [he] was having . . . ."

information about Lane's retirement benefit, and was adjusting the calculation of his benefit due to a "[c]hange in final compensation and/or service credit." Lane's benefit increased as a result of this change. Lane called CalPERS seeking both an explanation of the changes and an administrative review or appeal of the changes. According to Lane, the unnamed CalPERS employees he spoke to "reiterated" Trillo's earlier statement that there was no administrative review or appeal for the matters he protested.[3]

Before this lawsuit was filed, Lane informed Pounds, Hefazi, and Beatty that it was his understanding CalPERS had no administrative review or appeal procedure available to address their issues regarding how CalPERS calculated their pension amounts based on information from CSULB, and that it would be futile for them to attempt to pursue administrative review. Pounds, Beatty, and Hefazi represented in discovery responses that they contacted defendant, CalPERS, and the California Faculty Association to determine if there was a means for them to file an administrative appeal "regarding California State University's failure to comply with applicable statutes and regulations in reporting [their] compensation to CalPERS" and were informed by unnamed individuals that no administrative right to appeal or grievance procedure was available.[4]

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[3] CalPERS employee Robin Owens later explained Lane's benefit increased because CalPERS changed the date range used to calculate Lane's final compensation so that his final paycheck was included in the calculation.

[4] Those discovery responses were not verified, but plaintiffs' attorney informed defendant's counsel that plaintiffs would not

*C. Plaintiffs' Lawsuit*

Plaintiffs sued defendant in April 2015. Plaintiffs' complaint alleged defendant violated certain statutes and regulations that govern the manner in which employers report employees' compensation to CalPERS. According to the complaint, these alleged reporting errors altered the way plaintiffs' compensation was calculated for the purpose of determining their pension amounts.

Specifically, plaintiffs contended defendant violated requirements that employers identify the pay period in which compensation is earned, regardless of when the compensation is reported or actually paid (Gov. Code, § 20630, subd. (b))[5] and that employers publish pay schedules that conform to a litany of requirements (§ 20636, subd. (g)(2); Cal. Code Reg., tit. 2, § 570.5). Defendant allegedly violated those statutes and regulations by reporting plaintiffs' annual compensation as having been earned over a twelve-month period (as it was paid), rather than over the eight or nine months[6] of the academic year—the only months during which plaintiffs actually worked for defendant.

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object to defendant using them as though they were verified in connection with the summary judgment motions.

[5] Statutory references that follow are to the Government Code.

[6] Plaintiffs' complaint alleges their annual salary was earned solely during the nine months of the academic year, but plaintiffs' motion for summary judgment and opening brief reference an eight-pay-period academic year.

Plaintiffs alleged defendant's actions constituted "systematic underreporting of [their] monthly pay rate by 25% and misreporting of the work periods in which compensation was earned [that] has resulted in substantially lower monthly pension benefits to Plaintiffs for the rest of their or their beneficiaries' lives."[7] Plaintiffs alleged that this misreporting resulted in a reduction of their monthly pension benefits. They also alleged that because defendant ostensibly had no administrative procedures available to address their complaints, they should be "excused from exhausting an administrative remedy."

Based on these allegations, plaintiffs prayed for declaratory relief or relief in the form of mandamus. Plaintiffs further asked the court to order defendant to revise its published pay rate schedules, to communicate the revised schedules to CalPERS, and to ask CalPERS to recalculate plaintiffs' pension benefits.

Defendant answered plaintiffs' complaint and asserted, among other affirmative defenses, that plaintiffs had failed to exhaust available administrative remedies. Defendant specifically alleged plaintiffs' claims were barred "because of their failure to exhaust available internal and administrative remedies, including but not limited to that provided by . . . section 20134."[8]

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[7] Plaintiffs also alleged defendant had misinterpreted, misapplied, and thus violated section 20630 and Code of Regulations, title 2, section 570 by describing plaintiffs' final paychecks as "settlements."

[8] Section 20134 provides, in relevant part: "The [CalPERS] board may, in its discretion, hold a hearing for the purpose of determining any question presented to it involving any right, benefit, or obligation of a person under this part."

Months later, plaintiffs moved for summary judgment. Plaintiffs' motion argued, in essence, that defendant misreported plaintiffs' compensation, and that defendant's misreporting harmed plaintiffs because it resulted in substantially lower pension benefits. Defendant opposed plaintiffs' motion on a number of grounds, including (1) plaintiffs had failed to exhaust administrative remedies available through CalPERS, such as the right to appeal any determination by CalPERS as codified at California Code of Regulations, title 2, section 555.1;[9] and (2) plaintiffs' causes of action did not warrant relief because defendant's reporting did not impact the amount of plaintiffs' pension.

At the same time, defendant filed its own motion for summary judgment (or summary adjudication in the alternative). Defendant reprised some of the same arguments it made in opposing plaintiffs' summary judgment motion—including, as most relevant for our purposes—that plaintiffs had not exhausted available administrative remedies. Defendant argued section

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[9] The regulation states: "Any applicant dissatisfied with the action of the [CalPERS] Executive Officer on his application [for crediting of service or correction of records, among other things] . . . may appeal such action to the Board by filing a written notice of such appeal at the offices of the Board within thirty days of the date of the mailing to him by the Executive Officer, at his most recent address of record, of notice of the action and right of appeal. An appeal shall contain a statement of the facts and the law forming the basis for appeal. Upon a satisfactory showing of good cause, the Executive Officer may grant additional time not to exceed 30 days, within which to file such appeal."

20134 conferred upon CalPERS the jurisdiction to determine "any question" involving obligations under the Public Employees' Retirement Law (PERL) and to "resolve public pension disputes in an administrative proceeding." With respect to plaintiffs' allegation that defendant had not maintained an accurate payrate schedule, defendant also argued CalPERS was "authorized to determine an amount that will be considered to be [the] payrate [w]henever an employer fails to maintain a proper pay schedule." Defendant accordingly maintained the issues raised by plaintiffs fell within CalPERS's jurisdiction and plaintiffs should have pursued the issues to a final CalPERS determination before filing suit.

Plaintiffs opposed defendant's cross-motion for summary judgment, arguing, among other things, that they had attempted to pursue further administrative review with defendant but no such review was available. Plaintiffs additionally contended the "nature of the deficiency at issue here would not have lent itself to review, appeal, or curative action by CalPERS."

In opposing defendant's argument that plaintiffs had failed to exhaust administrative remedies, plaintiffs highlighted statements made by CalPERS employee Trillo in communications with Lane and in Trillo's deposition. Plaintiffs referenced a March 2014 phone call between Lane and Trillo, the contents of which Lane characterized in his confirming letter. Specifically, plaintiffs focused on Trillo's statements that he would not adjust Lane's pension benefits based on Lane's complaints, and that Lane's only recourse was to get his employer to send Trillo a monthly payrate adjustment. Plaintiffs also highlighted this exchange during Trillo's deposition: "Q But that would be something that would be taken up with the employer? [¶] A In

this specific case? [¶] Q Right. [¶] A There's nothing to appeal because CalPERS made no determination. Nothing was withheld from him. [¶] Q Okay. [¶] We took the data that was provided by his employer."[10]

The trial court denied plaintiffs' motion for summary judgment and granted defendant's.[11] The court concluded (1) plaintiffs failed to exhaust administrative remedies, and (2) defendant had no duty or ability to alter any final compensation benefits to plaintiffs. The court proceeded on the understanding that Lane had been told, in conversations with Trillo, that there was no appeals process. But the trial court found that did "not change the conclusion that administrative remedies were not exhausted." As to plaintiffs' contention that Lane had filed a request for an appeal, the court found there was no evidence to support it; Lane had inquired about how he might pursue an appeal, but he had not actually pursued one. The court accordingly found there were "no triable issues of fact that [p]laintiffs failed to exhaust the administrative remedies available to them through CalPERS prior to filing the instant action."

The court further found, as an independent legal basis for granting defendant's motion for summary judgment, that the

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[10] The deposition excerpt submitted in connection with the summary judgment briefing provides minimal context regarding what the "that" was in the first of these questions Trillo was asked.

[11] The record on appeal does not include a transcript of the summary judgment hearing. The detail that follows is from the court's minute order and ruling.

determination of pension benefits and potential alterations to the pay rates was within the exclusive control and jurisdiction of CalPERS. The court concluded that even if plaintiffs had viable causes of action, the sole named defendant in the litigation "is barred by statute to change [p]laintiffs' benefits" because "the determination of benefits and any potential alterations to the payrates is exclusively within the control and jurisdiction of CalPERS."

## II. DISCUSSION

We need discuss only one of the issues raised by the parties: the question of whether plaintiffs failed to exhaust available avenues for effective administrative relief before filing suit.[12] Based on our review of the record and the pertinent statutes and regulations, we conclude the CalPERS administrative appeal process enshrined in law provides an adequate administrative remedy for plaintiffs' claims, plaintiffs failed to exhaust that remedy, and plaintiffs' failure is not excused by any exception to the exhaustion doctrine.

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[12] During briefing on appeal, defendant filed a motion to sanction plaintiff Lane for making what defendant viewed as frivolous arguments in plaintiffs' opening brief. Three days later, plaintiffs moved to strike portions of defendant's brief on the ground it contained citations to "unofficial authority," namely, an unpublished CalPERS administrative ruling. Defendant opposed the motion to strike, and plaintiffs filed a reply. Plaintiffs then filed a second motion to strike portions of defendant's brief for the same reason asserted in their first motion. All pending motions are hereby denied, and "[t]he parties are advised to chill." (*Mattel, Inc. v. MCA Records* (9th Cir. 2002) 296 F.3d 894, 908.)

Accordingly, we hold summary judgment for defendant was proper.

*A. Standard of Review*

On appeal from a trial court's ruling on summary judgment, "we take the facts from the record before the trial court when it ruled on that motion. [Citation.] 'We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections were made and sustained.' [Citation.]" (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1034-1035.) We will affirm a summary judgment ruling if it is correct on any legal ground applicable to the case. (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1071.) And it is well established that summary judgment is appropriate when a plaintiff fails to exhaust administrative remedies. (See, e.g., *Westinghouse Elec. Corp. v. County of Los Angeles* (1974) 42 Cal.App.3d 32, 37 ["[I]t is [plaintiffs'] burden to plead and establish as a part of their case in chief that they exhausted their administrative remedy . . ."]; *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 594.)

*B. Plaintiffs Failed to Exhaust Their Administrative Remedies, and No Exception to the Exhaustion Requirement Applies*

A party must ordinarily exhaust available administrative remedies before seeking judicial relief. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321 (*Campbell*).) "In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the

administrative body and this remedy exhausted before the courts will act." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292 (*Abelleira*); see also *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1080 (*Coachella Valley*).) The rule "is not a matter of judicial discretion, but is a fundamental rule of procedure . . . binding upon all courts." (*Abelleira*, *supra*, at p. 293.) "The exhaustion requirement affords the administrative agency an opportunity to provide the relief requested in whole or in part, so as to avoid costly litigation or reduce the scope of litigation. (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 501, 87 Cal.Rptr.2d 702, 981 P.2d 543 [(*Sierra Club*)]; *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 476, 131 Cal.Rptr. 90, 551 P.2d 410 [(*Westlake*)].) The exhaustion requirement also facilitates the development of a complete factual record and allows the agency to apply its expertise, both of which can assist later judicial review, if necessary. (*Campbell*, *supra*, at p. 322[ ]; *Sierra Club*, *supra*, at p. 501[ ].)" (*Richards v. Department of Alcoholic Beverages Control* (2006) 139 Cal.App.4th 304, 315 (*Richards*); see also *California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1489-1491 ["The principal purposes of exhaustion requirements include avoidance of premature interruption of administrative processes, allowing an agency to develop the necessary factual background of the case, letting the agency apply its expertise and exercise its statutory discretion, and administrative efficiency and judicial economy"] (*California Water*).)

The exhaustion requirement applies both "when a statute and lawful regulations pursuant thereto establish a quasijudicial

administrative tribunal to adjudicate statutory remedies," and "'when a private or public organization has provided an internal remedy.'" (*Jonathan Neil & Assoc. Inc. v. Jones* (2004) 33 Cal.4th 917, 930 (*Jonathan Neil).*) The requirement has also been applied where "the legislative intent to resort in the first instance to administrative remedies is not entirely clear, [but] courts . . . 'have expressly or implicitly determined that the administrative agency possesses a specialized and specific body of expertise in a field that particularly equips it to handle the subject matter of the dispute.'" (*Id.* at p. 931; see also *Marquez v. Gourley* (2002) 102 Cal.App.4th 710, 713-714 [where administrative remedy is couched in "permissive language," an aggrieved party need not seek relief, but if the party wishes to do so, the party must first pursue the available administrative remedy].)

Nevertheless, "[t]he doctrine requiring exhaustion of administrative remedies is subject to exceptions." (*Coachella Valley*, *supra*, 35 Cal.4th at p. 1080.) The exceptions include two that plaintiffs invoke here, namely, that administrative remedies need not be exhausted where (1) they are inadequate or (2) exhaustion would be futile. (See, e.g., *AIDS Healthcare Foundation v. State Dept. of Health Care Services* (2015) 241 Cal.App.4th 1327, 1349-1350.)

*1. An adequate administrative remedy exists*

The parties agree *defendant* had no administrative remedy or appeal procedure through which plaintiffs could have sought review. But that, of course, says nothing about whether an administrative remedy exists with CalPERS that could afford plaintiffs the relief they seek. There is such a remedy, and its existence is fatal to plaintiffs' ability to maintain this lawsuit.

An administrative remedy is available, and must be exhausted, where an administrative agency has the power to assess the relevant claims and provide the requested relief. (*California Water*, *supra*, 161 Cal.App.4th at pp. 1489-1491.) This is true even where one of the issues the agency may have to decide is whether part of the controversy falls within its jurisdiction. (*Ibid.*; see also *Alta Loma School Dist. v. San Bernardino County Com. on School Dist. Reorganization* (1981) 124 Cal.App.3d 542, 556; *Bennett v. Borden, Inc.* (1976) 56 Cal.App.3d 706, 709 ["Before judicial relief may be obtained, the administrative agency has power to determine whether a given controversy falls within its statutory jurisdiction"] (*Bennett*).)

"The [PERL] establishes [Cal]PERS, a retirement system for employees of the state and participating local public agencies. [Cal]PERS is a prefunded, defined benefit plan which sets an employee's retirement benefit upon the factors of retirement age, length of service, and final compensation. [Citation.] . . . An employee's compensation is not simply the cash remuneration received, but is exactingly defined to include or exclude various employment benefits and items of pay." (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198, fn. omitted.)

The Legislature has created a comprehensive administrative scheme to manage the CalPERS system. The CalPERS Board of Administration (the Board) is vested with broad powers, and charged with the management and control of the Public Employees' Retirement System. (See, e.g., §§ 20004, subd. (b) [granting the Board "all powers reasonably necessary to . . . implement the provisions of[ ] the California Public Employees' Pension Reform Act of 2013, to the extent and with the same effect as if the provisions of the act are contained in the

[PERL]"], 20120 [vesting management and control of CalPERS "in the board"], 20121 [authorizing the board to make "such rules as it deems proper"].) Among other things, the Board (1) "shall determine and modify benefits for service," (2) "shall determine who are employees," and (3) "is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits." (§§ 20123, 20125.)

All CalPERS members are subject to its statutory and regulatory scheme. (§ 20122.) The CalPERS Board has the power to correct errors and omissions with respect to active and retired members. (§§ 20160, 20164.) The power to "correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member" may be exercised at the Board's "discretion and upon any terms it deems just" so long as certain requirements are met. (§ 20160, subd. (a).) Relatedly, the Board *must* correct "all actions taken as a result of errors or omissions" of, among others, "any contracting agency, any state agency or department, or this system." (§ 20160, subd. (b) [providing that the Board "shall correct" such actions].) "The party seeking correction of an error or omission pursuant to [section 20160] has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b)." (§ 20160, subd. (d).) Correction of errors and omissions is retroactive, unless retroactive correction is not possible or is not consistent with the purposes of the PERL. (§ 20160, subd. (e).)

The Board also has the discretion to "hold a hearing for the purpose of determining any question presented to it involving any right, benefit, or obligation of a person" under the PERL. (§ 20134.) Although section 20134 is couched in permissive

language, the applicable regulations require the Board to engage in a fulsome review process when a CalPERS member files an administrative appeal. Under the pertinent regulations, a member dissatisfied with a CalPERS action "may appeal such action to the Board by filing a written notice of such appeal at the offices of the Board . . . ." (Cal. Code Regs., tit. 2, § 555.1.) A member who files an appeal "shall be entitled to a hearing," and CalPERS must "execute a statement of issues" in connection with that appeal. (Cal. Code Regs., tit. 2, § 555.2.) These hearings are conducted in accordance with the administrative hearing provisions of the Government Code (§§ 11500 et seq.; Cal. Code Regs., tit. 2, § 555.4), and the resulting administrative decisions may be reviewed by way of a petition for writ of mandate (§§ 20134, 11523).

Among the many issues governed by the PERL is the determination of the amount of a member's compensation for the purposes of calculating pension benefits. (§§ 20035, 20636.) Employers are required to report employees' compensation to CalPERS and must "identify the pay period in which the compensation was earned regardless of when reported or paid." (§ 20630, subd. (b).) The payrate listed on a pay schedule must also conform to various requirements specified in the Code of Regulations. (Cal. Code Regs., tit. 2, § 570.5, subd. (a).) If an employer fails to meet those requirements, the Board "may determine an amount that will be considered to be payrate." (Cal. Code Regs., tit. 2, § 570.5, subd. (b).)

*2. The administrative remedies available from CalPERS are adequate to address plaintiffs' claims*

Via the CalPERS administrative remedies just described, California law provides a mechanism by which plaintiffs can pursue all the relief they seek in this action. Members (i.e., beneficiaries) have the right to appeal actions taken by CalPERS (Cal. Code Regs., tit. 2, § 555.1), and once a member appeals, CalPERS is required to generate a statement of the dispute and hold a hearing (§ 20134; Cal. Code Regs., tit. 2, § 555.2). Critically, and as discussed, CalPERS is also required to correct any actions it has taken as a result of an omission or error by defendant. (§ 20160, subd. (b) ["[T]he [B]oard shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system"].) Thus, contrary to plaintiffs' assertion that "CalPERS does not have the legal authority to order [defendant] to correct . . . its compensation reporting," section 20160 and the other statutes and regulations we have cited establish CalPERS is empowered to grant plaintiffs what they demand by this lawsuit (and more). If CalPERS were to agree with plaintiffs, CalPERS would have to correct any actions it or defendant took that led to the complained-of misreporting and miscalculations—regardless of whether defendant agrees or provides additional information to CalPERS.[13]

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[13] Although a CalPERS administrative determination would not take the form of "declaratory relief" or "mandamus" issued by a court, the precise form the relief would take is immaterial so long as it is the functional equivalent of the relief they seek in this lawsuit. (*Acme Fill Corp. v. San Francisco Bay Conservation*

Plaintiffs' arguments against applying the exhaustion doctrine contend there is no adequate CalPERS administrative remedy because CalPERS did not make the administrative remedy "available" to them. Specifically, Plaintiffs rely heavily on (1) Trillo's asserted statement to Lane that his only recourse was to have defendant issue a monthly pay rate adjustment, (2) Lane's understanding from his conversations with Trillo that CalPERS did not have an administrative review or appeal procedure to deal with Lane's problem, and (3) Trillo's statement in deposition that "[t]here's nothing to appeal because CalPERS made no determination. Nothing was withheld from him." We find these arguments unpersuasive for a number of reasons.

We begin with a general point: the administrative remedy CalPERS provides is codified in statutes and regulations. Although there is no denying the benefit of having helpful, knowledgeable public servants, we do not believe an administrative remedy established by publicly-promulgated statutes and regulations is inadequate or unavailable because a public agency employee does not affirmatively identify those provisions or is unaware they exist. Nor would such a rule make

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*etc. Com.* (1986) 187 Cal.App.3d 1056, 1064-1065 ["[W]here 'a plaintiff may obtain the functional equivalent of judicial remedies, there is substantial authority which holds that there exist salutary reasons for requiring that the administrative remedy be pursued *even though it may not resolve all issues* or provide the precise relief requested by [the] plaintiff'"], quoting *Karlin v. Zalta* (1984) 154 Cal.App.3d 953, 980.) The CalPERS-related statutes and regulations we have already outlined provide plaintiffs with just such a functionally equivalent remedy.

sense, because it would allow a plaintiff to avoid the administrative exhaustion doctrine by privileging, for instance, customer service phone contact over the published law of this state.

To be sure, so called "hidden remedies" have been held insufficient to trigger the exhaustion doctrine. (See, e.g., *Westlake*, *supra*, 17 Cal.3d at p. 478 [defendant could not rely on plaintiff's failure to exhaust an internal remedy provided for solely in ambiguous bylaw where defendant did not inform plaintiff of her rights under that bylaw]; *Shuer v. County of San Diego* (2004) 117 Cal.App.4th 476, 486-487 [county could not rely on failure to exhaust administrative remedy established in county charter and rules where, among other things, discovery of the right "require[d] not merely close reading but relatively creative interpretation"].) Here, however, there is no basis to argue that clearly defined remedies enshrined in statute and regulation are in any way hidden.

To make the point more concretely on the facts here, the trial court correctly found there was no evidence "of any appeals request to CalPERS of any kind." Lane inquired about how he might file an appeal but then appears to have pursued the matter no further, other than prematurely filing this lawsuit, that is.[14]

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[14] Even construing Lane's letter as itself an appeal (despite his unanswered request for instructions on how to formalize such an appeal), we would still conclude Lane has not *exhausted* available administrative remedies. (*California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1151 [exhaustion of administrative remedies "usually contemplates termination of all available, nonduplicative administrative review procedures"].) At most, Lane's letter was

Further, none of Trillo's statements, even viewed in the light most favorable to plaintiffs, can support an argument that the administrative remedies provided by CalPERS were unavailable to them. As we have explained, the mere opinion of an agency "point of contact" like Trillo that Lane's only recourse was to obtain a payrate adjustment, and his opinion that there was nothing to appeal, does not negate the existence and adequacy of the administrative remedy. (See *Wilkinson v. Norcal Mutual Ins. Co.* (1979) 98 Cal.App.3d 307, 313-315 ["If the doctrine requiring exhaustion of administrative remedies could be satisfied by an oral hearsay statement from an employee of the governmental administrative agency involved the doctrine would be rendered meaningless and ineffective"] (*Wilkinson*).) That is especially true when it comes to savvy parties like plaintiffs here, one of whom is an attorney, and all of whom ultimately engaged counsel to represent them before filing a lawsuit. Further, there was no substantial evidence before the trial court that Trillo was authorized to speak authoritatively for the Board or could himself resolve appeals. Indeed, plaintiffs' reply brief in this court expressly concedes the contrary when it states Trillo was "not the PMK on pension benefits" and "his testimony does not constitute CalPERS's official position on the subject."

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the first step in the administrative review process. Though there is some indication in the record that Lane spoke to other CalPERS employees after sending the letter, there is no indication that he took any other steps to "formalize" or otherwise pursue his appeal, or that he attempted to follow the administrative review procedures set forth in the Code of Regulations.

Other cases plaintiffs cite to argue, alternatively, that the CalPERS administrative remedy suffers from procedural deficiencies are also inapposite. The court in *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328 held the proffered administrative remedy was "manifestly inadequate" to resolve the "crucial and complex" issues raised by the lawsuit because the administrative remedy provided "merely for the submission of a grievance form, without the taking of testimony, the submission of legal briefs, or resolution by an impartial finder of fact." (*Id.* at pp. 342-343.) The robust CalPERS appeal process available here is not similarly inadequate. In addition, *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597 does not aid plaintiffs, as that case merely determined administrative remedies provided by the Public Employment Relations Board are sometimes, but not always adequate. (*Id.* at p. 609.)

*3. Seeking an Administrative Remedy from CalPERS Would Not Have Been Futile*

Plaintiffs also argue that they are excused from the exhaustion requirement because pursuing administrative remedies would have been futile. There is no support for such an argument in the record.

The "futility" exception to the exhaustion of administrative remedies "is a very narrow one." (*County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 77.) "Failure to exhaust administrative remedies is excused if it is clear that exhaustion would be futile." (*Jonathan Neil*, *supra*, 33 Cal.4th at p. 936.) "'The futility exception requires that the party invoking the exception "can positively state that the [agency] has declared

what its ruling will be on a particular case.'" [Citations.]" (*Coachella Valley*, *supra*, 35 Cal.4th at pp. 1080-1081.)

Plaintiffs again argue that Trillo's statements establish CalPERS would have ruled against plaintiffs if plaintiffs had pursued an administrative remedy. They base this argument on Trillo's statements, as set to paper by Lane in his confirming letter, that the "only recourse" available to Lane was to get defendant to send CalPERS a "monthly payrate adjustment." From this, plaintiffs conclude that CalPERS had "made it clear" it would not change its position. They also argue that, even if they had sought to have CalPERS correct defendant's alleged error pursuant to section 20160, they would not have been able to provide "documentation or other evidence" as required by subdivision (d) of that statute, because the "only evidence" CalPERS would accept was a payrate adjustment from CSU. When evaluated on the record presented, these contentions are unpersuasive.

As already explained, evidence that a member of the administrative staff of an agency expressed an opinion that the agency could do nothing further for the plaintiff is insufficient to constitute evidence of exhaustion. (*Wilkinson*, *supra*, 98 Cal.App.3d at p. 315; see also *Abelleira*, *supra*, 17 Cal.2d at pp. 292-295, 301 [rejecting as "illogical and impractical" the contention that if a party "learn[s] upon hearsay or by analogy that the administrative board may take a certain action, the board may be ignored and its action treated as already taken"].) A plaintiff's preconceptions regarding the futility of an administrative remedy similarly fail to qualify plaintiff for the futility exception. (*Bennett*, *supra*, 56 Cal.App.3d at p. 710.)

Here, plaintiffs' sole support for the contention that exhaustion would have been futile were Trillo's statements, as memorialized by Lane and in deposition. These statements do not establish a triable issue of fact as to whether the Board had declared what its ruling would be in this case, either on the merits or on any evidentiary questions if plaintiffs had pursued an administrative appeal—indeed, if anything, Trillo's deposition (in which he said "CalPERS [had] made no determination") indicates the opposite.

Plaintiffs cite only one case in which a court actually held that seeking an administrative remedy would have been futile. That case, *Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 834, presents a factual scenario very different from this case. In *Ogo*, the plaintiff sought a writ of mandate to compel the City of Torrance to issue the plaintiff a building permit. The city had enacted an ordinance that rezoned the property on which the plaintiff had intended to build its project in such a way that the plaintiff could not obtain a permit. The plaintiff did not seek a variance prior to filing suit, and the city argued the plaintiff had failed to exhaust administrative remedies. The Court of Appeal applied the futility exception on the ground that it was clear the city council would not have granted the plaintiff a variance. The futility of the administrative remedy was clear there for the simple, albeit extreme, reason that the city council had rezoned that area in order to prevent the plaintiff from constructing that very same project. (*Id.* at p. 834.) Trillo's statements provided no such clarity here.

In summary, we conclude that plaintiffs had an administrative remedy that they failed to exhaust. Judgment for

defendant on that basis was therefore correctly entered. Because plaintiffs' "failure to exhaust an administrative remedy is an independently sufficient ground to affirm the summary judgment," (e.g., *Richards*, *supra*, 139 Cal.App.4th at p. 316), we need not address the rest of the parties' arguments.

DISPOSITION

The judgment is affirmed. Defendant shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J. DUNNING, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.