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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

WILLIAM MARKOV, Plaintiff and Respondent, v. STEVE LIPSON et al., Defendants and Appellants.	2d Civil No. B234138 (Super. Ct. No. 56-2010-00383044-CU-WM-VTA) (Ventura County)

Appellants Ventura County Public Defender Steve Lipson and County of Ventura appeal from a peremptory writ of mandate ordering the Ventura County Civil Service Commission (Commission) to determine whether to grant William Markov a hearing to rescind a pay reduction imposed when he was removed from the position of Senior Attorney Public Defender.[1] (Code Civ. Proc., § 1085.) We affirm.

William Markov has worked 26 years at the Ventura County Public Defender Office. In 2002, he was elevated to the position of Senior Attorney with a significant pay increase.

On February 2, 2010, appellants notified Markov that his Senior Attorney designation was being removed and his compensation reduced 12 percent.

[1] Commission did not make an appearance in the writ proceeding. Appellants, acting as real parties in interest, filed opposition on behalf of Commission (Code Civ. Proc., § 1107) and appeal from the peremptory writ.

The office memorandum included an "Attorney Evaluation Form" stating, among other things, that Markov had "sloppy work habits and a deficient trial record." The memorandum contained no warning or advisement that Markov could seek reconsideration or administrative review before Commission.

Ventura County Civil Service Rules

Article 21 of the Ventura County Civil Services Rules, entitled "DISCIPLINARY ACTION," provides that any "employee may be dismissed, demoted, suspended, reduced in pay, or demoted and suspended for cause" by the "appointing authority" (i.e., appellants) who "shall serve upon the employee a Notice of Proposed Disciplinary Action" setting forth the effective date, the reasons for the proposed disciplinary action, "and a statement advising the employee that he has a right to respond to the charges." (Section 2102 A.)[2]

Section 2102 B provides that the employee may, within five calendar days from receipt of the Notice of Proposed Disciplinary Action, respond to the proposed action.

Section 2102 C provides that the appointing authority shall review the employee's response and make a determination whether to dismiss, amend or sustain the proposed disciplinary action. "If the appointing authority decides to amend or sustain the proposed action, the employee will be served with Notice of Disciplinary Action again setting forth in writing the reasons for disciplinary action and offering a statement of the charges upon which the action is based. [¶] The Notice of Disciplinary Action shall also advise the employee that the action being taken is final, and apprise him of his right to appeal that action to the Civil Service Commission within 10 calendar days."

First Writ Petition – Markov I

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[2] The Ventura County Civil Service Rules erroneously list Section 2102 as "Sec. 2101." This appears to be a typographical error. "Sec. 2101" precedes Section 2102 and states: "**Purpose**: To create an equitable and uniform method for initiating and administering disciplinary actions."

The February 2, 2010 memorandum reduced Markov's pay but failed to advise him of his right to appeal the decision within 10 days. Markov sought a writ of mandate to rescind the reduction in pay, but the trial court sustained appellants' demurrer without leave to amend on the ground that Markov had not exhausted his administrative remedies. (*Markov v. Lipson et al.*, Sup. Ct. Ventura County, Case No. 56-2010-00372397-CU-JR-VTA (*Markov I*).)

In August 2010, Markov requested that Commission rescind the reduction in pay until appellants afforded him "the procedural due process safeguards set forth in Article 21 of the Ventura County Personnel Rules and Regulations." In the alternative, Markov asked Commission to review the merits of the reduction-in-pay decision without requiring the parties to follow the procedures set out in Article 21.

Appellants opposed the hearing request on the ground that Article 21, section 2103 required that the administrative appeal be filed within 10 days of the employment decision. Appellants claimed that the February 2, 2010 memorandum triggered the 10-day rule and that Markov's request for hearing was "six months too late."

On August 26, 2010, Commission voted on whether Markov was entitled to a hearing "absent the 10 day rule set forth in the Personnel Rules and Regulations." Commission, by a 3-2 vote, denied the request for hearing "as being untimely."

Second Writ Petition – Markov II

Markov filed the instant writ petition (1) directing appellants to rescind the reduction in pay until Markov was afforded the procedures set out in Article 21 (first cause of action); or (2), in the alternative, directing Commission to decide "without regard to the ten day appeal period" whether to grant Markov's request for a determination rescinding the pay reduction until the procedures set out in Article 21 were followed (second cause of action).

Appellants again argued that Markov had not exhausted his administrative remedies. Appellants' opposition papers stated: "The proceeding before the Commission was not on the merits of [Markov's] claims but to determine

whether such a hearing should even be set. Only if the Commission had found his appeal timely would a hearing on the merits of his claims have been held."

The trial court sustained a demurrer without leave to amend on the first cause of action but overruled the demurrer on the second cause of action against Commission.

Markov filed a motion for peremptory writ of mandate and declaration stating; "I was never served with a Notice of Disciplinary Action (a) setting forth in writing the reasons for disciplinary action, (b) offering a statement of the charges upon which the action is based and (c) Notifying me of any right or requirement to appeal that action within 10-days or any other prescribed time period, as required by Section 210[2] C of the Personnel Rules."

Appellants argued that Section 2102 did not apply and, even if it did, the February 2, 2010 memorandum satisfied Article 21 and triggered the 10-day rule for appeal.

The trial court rejected the argument on several grounds. "First, Article 21 does apply to this employment decision because it resulted in a substantial reduction in [Markov's] pay. Second, the interpretation advanced by the Commission – that the short limitations period can be triggered in the absence of an express statement that it has commenced – would produce an absurd result and a trap for unwary employees. [¶] Because [Markov] was not provided a 'final notice of disciplinary action' the ten-day period never commenced and had not, therefore, expired by the time of the Commission's August 26, 2010 vote."

Commission's August 26, 2010 minute order states that it voted on "whether [Markov] was entitled to a hearing absent the 10 day rule." The trial court found: "The phrase 'absent the 10 day rule' is ambiguous . . . It could mean the issue considered was whether [Markov] was entitled to a hearing where the request was made after the ten-day period had expired. This would be consistent with the framing of the issue suggested by the County Counsel [and appellants]."

"This interpretation is the only one consistent with the Commission's finding that the appeal was 'untimely.' Had the Commission voted on the issue as framed by [Markov], it could not have found – as apparently it did – that the ten-day appeal period had lapsed because the premise underlying [Markov's] request was that the period had never commenced. The Commission abused its discretion by failing to address the issue raised by [Markov]. . . ."

The trial court issued a peremptory writ directing Commission to vacate its August 26, 2010 minute order and to "determine whether to grant [Markov] a hearing on his request that the Commission rescind the reduction in pay until the Public Defender 'affords him the procedural due process safeguards set forth in Article 21 of the Ventura County Personnel Rules and Regulations,' provided, however, that any determination the Commission may make shall not be based on a finding that [Markov's] appeal is rendered untimely by operation of the ten-day limitations period described in Article 21, Section 2013."

Traditional Writ of Mandate

Appellants argue that the trial court erred in not deferring to Commission's August 26, 2010 decision. Although mandate does not lie to control the exercise of discretion in a particular way, it will issue to correct an abuse of discretion, in this instance Commission's failure to determine whether Markov was entitled to a hearing on his request as framed.[3] (Cal. Civil Writ Practice, Con'd.Ed.Bar (4th ed. 2011) § 2.9, p. 15; *Morris v. Harper* (2001) 94 Cal.App.4th 52, 58.) A traditional writ of mandate will lie when there is no plain, speedy, and adequate alternative remedy; the respondent has a duty to perform; and the petitioner has a clear and beneficial right

[3] The issue presented was whether the reduction in pay should be rescinded until appellants comply with Article 21. Resolution of the issue did not entail a hearing on the merits of the pay reduction. By framing the issue in this manner, Markov was not challenging the removal of the Senior Attorney position (a position that appellants say is discretionary and at-will), but only the reduction of pay.

to performance. (Code Civ. Proc., § 1086; *Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578, 583-584.)

Non-Disciplinary Demotion

Appellants argue that the pay reduction is not a disciplinary action because the Senior Attorney position is a discretionary at-will position. (Section 1802.)[4] The argument has a certain Alice in Wonderland quality because appellants also claim that Markov's request for hearing to rescind the pay reduction is barred by the 10-day rule. Appellants cannot have it both ways.

Article 21 applies to any written order in which a permanent employee is "dismissed, *demoted*, suspended, *reduced in pay*, or demoted and suspended for cause . . . ." (Section 2102, emphasis added.) The phrase "demotion, suspended, reduced in pay, or demoted and suspended for cause" uses a comma followed by the word "or." "Such use of the word 'or' in a statute indicates an intention to use it disjunctively so as to designate alternative or separate categories. [Citations.]" (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680 [reassignment of officer to lower-paying position based on alleged deficient performance was per se disciplinary].)

Appellants assert that Markov's removal as Senior Attorney is not a demotion. Article 21, however, defines "Demotion" as "[a] change of status of an employee from one classification to another classification that has a lower salary range." (Section 218.)

In *Head v. Civil Service Com.* (1996) 50 Cal.App.4th 240 (*Head*), a deputy marshal was assigned the position of field training officer and paid a $30 premium over his regular salary each pay period. County removed the deputy marshal from the position due to deficient performance, resulting in the loss of the $30 pay

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[4] Section 1802 states in pertinent part: "Designation as Senior Attorney shall be at the discretion of the department head, who, among other things, shall consider the excellence of professional performance of the individual attorney and the need of the County for retention. A designation as a Senior Attorney shall be for a period of six months and may be renewed by the Department Head."

premium. Like Ventura County, the San Diego County civil service rules afforded certain due process rights to permanent employees subject to a reduction in pay. The rules did not limit reduction in pay appeals to just disciplinary pay reductions. (*Id*., at p. 244.) The San Diego County Civil Service Commission denied the deputy marshal's appeal request because his standard compensation remained the same. The Court of Appeal held that the deputy marshal was entitled to appeal the employment decision because he was "both 'removed' and 'reduced in compensation' " under the plain meaning of the civil service rules. (*Id*., at p. 245.)[5]

The same principle applies here. "[W]hile a governing body may elect not to confer a property interest in public employment, it may not constitutionally authorize the deprivation of such interest, once conferred, without appropriate procedural safeguards. [Citation.]" (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 170.)

10-Day Clock

Section 1802 provides that the Senior Attorney position is an at-will designation but conflicts with section 2102 which requires that Markov be advised of the 10-day rule if he is removed from the position with a pay reduction. Appellants argue that this "glitch" in the rules could wreak havoc in the civil service system. The problem can be easily corrected and, until it is corrected, we take the rules as we find them. We do not sit as a "super legislature," at liberty to do what it thinks is best in any given situation. (*Unzuetta v. Ocean View School Dist.* (1992) 6 Cal.App.4th 1689, 1699.)

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[5] Appellant's reliance on *Dobbins v. San Diego County Civil Service Com.* (1999) 75 Cal.App.4th 125 is misplaced. There, deputy sheriffs were transferred and assigned to different work shifts and assignments. The reassignments "were not cast in disciplinary language" or "result in removal of the Officers from their positions." (*Id*., at p. 131.) Although the transfers restricted the officers' ability to accrue overtime pay, the court held there was "[n]o reduction in compensation of the sort that will trigger a disciplinary hearing" or make it "an appealable reduction in compensation." (*Id*., at p. 131, fn. 5.)

If appellants want the benefit of the 10-day rule, they bear the burden of advising Markov that the 10-day rule applies. (Civ. Code, § 3521 ["He who takes the benefit must bear the burden."].) In order to start the 10 day clock, appellants must first give Markov written notice of the 10-day rule. (Sections 2102, 2103.) An interoffice "memorandum" may not be used to sidestep Article 21 procedural protections which were enacted to "create an equitable and uniform method for initiating and administering disciplinary actions." (Section 2101.)

Skelly Hearing

These rules are consistent with federal and state due process standards which require that permanent civil service employees receive certain procedural protections before termination of employment. (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 206, 215 (*Skelly*); *Cleveland Bd. of Educ. v. Ludermill* (1985) 470 U.S. 532, 546 [84 L.Ed.2d 494, 506].) Simply stated, the tenured public employee is entitled to a hearing "to present his side of the story. [Citations.]" (*Ibid.*; [84 L.Ed.2d at p. 506].)

S*kelly* procedural due process protections also apply to demotions (*Campbell v. State Personnel Bd.* (1997) 57 Cal.App.4th 281, 293, fn. 7; *Ng v. State Personnel Bd.* (1977) 68 Cal.App.3d 600, 606) and involuntary reassignments to a lower pay grade position (*Brown v. City of Los Angeles, supra*, 102 Cal.App.4th at pp. 170-171). Tenured public employees have a property interest in their pay grade and bonus position and may not deprived of that property interest without due process of law. (*Los Angeles Police Protective League v. City of Los Angeles* (2002) 102 Cal.App.4th 85, 93.)

Conclusion

The trial court did not err in directing Commission to determine whether to grant Markov a hearing on his request to rescind the reduction in pay. Consistent with the Ventura County Civil Service Rules, the peremptory writ states "that any determination the Commission may make shall not be based on a finding that

[Markov's request for hearing] is rendered untimely by operation of the ten-day limitations period described in Article 21, Section 2103."

The judgment is affirmed. Markov is awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Mark S. Borrell, Judge

Superior Court County of Ventura

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Leroy Smith, County Counsel, County of Ventura and Winnie Cai, assistant County Counsel, for Appellants.

Stephen H. Silver; Silver, Hadden, Silver, Wexler & Levine, for Respondent.