NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

INTERNAL SERVICES DEPARTMENT OF THE COUNTY OF LOS ANGELES,

Appellant,

v.

CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES,

Respondent;

CHERYL IVORY,

Real Party in Interest.

B139976

(Super. Ct. No. BS060327)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dzintra Janavs, Judge. Reversed.

Law Offices of Hausman & Sosa, Jeffrey M. Hausman, and Larry D. Stratton for Appellant.

No appearance by Respondent.

Peter M. Appleton Law Corporation and Peter M. Appleton for Real Party in Interest.

The trial court sustained without leave to amend respondent and real party in interest Cheryl Ivory's demurrer to a petition for writ of mandate filed by appellant Internal Service Department of the County of Los Angeles (Department). We reverse.

RELEVANT PROCEDURAL HISTORY

On November 12, 1999, the Department filed its writ petition in superior court, seeking relief from a decision of the Civil Service Commission of the County of Los Angeles (Commission) regarding Ivory. On January 5, 2000, Ivory demurred to the petition, contending that it was time-barred under the doctrine of laches and under the 90-day statute of limitations in Code of Civil Procedure section 1094.6.[1] On February 17, 2000, the trial court sustained Ivory's demurrer without leave to amend, concluding, inter alia, that the petition was untimely pursuant to the 90-day limitations period. An order of dismissal was entered on February 29, 2000.

FACTS

The following facts are alleged in the petition and attached exhibits or are subject to judicial notice.[2]

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1 All further statutory citations are to the Code of Civil Procedure, unless otherwise indicated.

2 Our recitation of these allegations follows established principles concerning the review of a demurrer. First, we disregard pleaded contentions and legal conclusions. (*B & P Development Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 953.)

On April 12, 1994, Ivory filed a request for a hearing before the Commission, contending that she had experienced racial discrimination in the workplace in violation of rule 25.01 of the Los Angeles County Code, appendix to title 5, otherwise known as Los Angeles Civil Service Rules (Civil Service Rules). Her request alleged that prior to the creation of the Department and consolidation of her former department into the Department, she had served in a managerial position, and that the Department had reduced her responsibilities and workload until she had no work to do, despite her experience and diligent efforts to secure meaningful work. The complaint further alleged that she had been effectively demoted without proper notice, and that paying her salary for little or no work was a criminal "gift of public funds."

Subsequently, Ivory filed a second request for a hearing on July 6, 1994. The second request alleged that she had been improperly rated on her application for a managerial position as a result of "her filing of claims of discrimination, defacto [*sic*] demotion and 'whistle blowing' regarding the misuse and fraudulent use of County funds."

Following contested evidentiary hearings, the hearing officer issued reports on Ivory's requests on September 11, 1996. The hearing officer noted that although Ivory's supervisors generally rated her as a good and competent employee and she had repeatedly asked for suitable work, she had often found herself reading magazines and books in her office. According to the hearing

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Second, we allow specific factual allegations to modify and limit inconsistent general statements. (See *ibid.*) Third, the petition incorporates by reference a number of documents pertaining to the events alleged in the petition. To the extent that these documents are the foundation of the first amended petition, we view the statements in them as allegations essential to the claims for relief. (See 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 392, p. 488.) Finally, we read the petition as "containing the judicially noticeable facts, 'even when the pleading contains an express allegation to the contrary.'" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877.)

officer, this situation was known to her supervisor, who brought her material to read.

The hearing officer found, inter alia, that the evidence supported Ivory's claim that she had been "de facto demoted in violation of Civil Service rules," and that the exam given Ivory "was not an appropriate vehicle for evaluating [her] promotability." Furthermore, the hearing officer recommended that the Commission should "fashion a remedy intended to make Ivory whole," including ordering the Department to find or develop a position for Ivory commensurate with her skills, experience, and salary.

On February 19, 1997, the Commission entered a final order adopting the hearing officer's findings and recommendations. The Department did not immediately file a writ petition following this decision, even though it believed that the decision was clearly factually and legally erroneous, because the Department fully intended to comply with the Commission's order. The Department agreed that Ivory should be reassigned and acknowledged that as a result of restructuring processes with the Department, other county departments had been merged into the Department, and thus a number of employees, including Ivory, had assignments that may not have been consistent with their experience and background.

Without conceding the enforceability or correctness of the Commission's order, the Department attempted to comply with the order by offering Ivory three positions in accordance with it. Ivory did not accept any of the positions, and on September 26, 1997, she filed a civil action in superior court based on her claims. That action was eventually removed to federal court. The Department was nonetheless hopeful that the matter could be resolved before the three-year limitations period that it believed was applicable expired. When a settlement conference and extensive private mediation failed, the Department decided to file its petition for writ of mandate.

DISCUSSION

The Department contends that the trial court erred in concluding that the petition is untimely. We agree.

A. *Standard of Review*

The trial court's ruling on the demurrer to the petition is reviewed under the standards applicable to a demurrer to a complaint. (*Stanton v. Dumke* (1966) 64 Cal.2d 199, 201.) "Because a demurrer both tests the legal sufficiency of the complaint and involves the trial court's discretion, an appellate court employs two separate standards of review on appeal. [Citation.] . . . . [Citation.] Appellate courts first review the complaint de novo to determine whether or not the . . . complaint alleges facts sufficient to state a cause of action under any legal theory [citation], or in other words, to determine whether or not the trial court erroneously sustained the demurrer as a matter of law. [Citation.]" (*Cantu v. Resolution Trust Corp., supra*, 4 Cal.App.4th at p. 879.)

"When [so] reviewing a demurrer on appeal, appellate courts generally assume that all facts pleaded in the complaint are true. [Citation.] In addition, in the interests of justice, on demurrer, a court will also consider judicially noticeable facts, even if such facts are not set forth in the complaint. [Citation.]" (*Cantu v. Resolution Trust Corp., supra,* 4 Cal.App.4th at p. 877, fn. omitted.) "If another proper ground for sustaining the demurrer exists, this court will still affirm the demurrers even if the trial court relied on an improper ground, whether or not the defendants asserted the proper ground in the trial court. [Citation.]" (See *id.* at p. 880, fn. 10.)

"Second, if a trial court sustains a demurrer without leave to amend, appellate courts determine whether or not the plaintiff could amend the complaint to state a cause of action. [Citation.]" (*Cantu v. Resolution Trust Corp., supra,* 4

Cal.App.4th at p. 879, fn. 9.) The appellate court reviews the denial of leave to amend for abuse of discretion. (See *id.* at p. 889.)

B. *Section 1094.6 Limitations Period*

The main issue presented is whether the petition is time-barred under the 90-day limitations period in section 1094.6.[3]

The resolution of this issue depends on the proper classification of the petition, which seeks relief under sections 1085 (ordinary mandamus) and 1094.5 (administrative mandamus). Generally, a pleading seeking mandamus will survive a demurrer if it alleges an adequate basis for relief, even if the form of mandamus sought is misidentified. (*Haller v. Burbank Community Hospital Foundation* (1983) 149 Cal.App.3d 650, 655.)

Ordinary mandamus under section 1085 is subject to three- or four-year limitations periods, depending on the nature of the underlying right or obligation at issue. (3 Witkin, Cal. Procedure, *supra*, Actions, § 624, pp. 802-804.) Thus, the petition, which was filed within three years of the Commission's final order, is timely if it seeks ordinary mandamus.

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3 The parties apparently agree that the demurrer cannot be sustained on the alternative bases found in the trial court's minute order.

The trial court concluded that principles of finality and res judicata barred the petition, relying on a now nonciteable case, *Balasubramaniam v. County of Los Angeles* (Jan. 25, 2000, B123069) review granted April 12, 2000, S086385, review dismissed and case remanded January 10, 2001. Ivory concedes that this case may not be cited, and she offers no other authority for the trial court's determination on finality and res judicata. The trial court also determined that the petition was time-barred under the 30-day limitations period in Government Code section 11523, which does not apply to the Department. (See 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 624, at p. 803; *Boctor v. Los Angeles County Metropolitan Transit Authority* (1996) 48 Cal.App.4th 560, 571.) Ivory agrees that this 30-day limitations period is inapplicable here.

By contrast, in the case of administrative mandamus, "[j]udicial review of any decision . . . of any commission, board, officer or agent thereof, may be had pursuant to Section 1094.5 . . . only if the petition for writ of mandate pursuant to such section is filed" (§ 1094.6, subd. (a)) "not later than the 90th day following the date on which the decision becomes final." (§ 1094.6, subd. (b).) Here, the term "decision" includes "a decision subject to review pursuant to Section 1094.5 suspending, demoting, or dismissing an officer or employee . . . ." (§ 1094.6, subd. (e).) Thus, the petition is untimely if it seeks administrative mandamus.

In determining whether an administrative decision is subject to ordinary mandamus, rather than administrative mandamus, courts examine whether the decision was the result of a mandatory hearing. As the court explained in *Weary v. Civil Service Com.* (1983) 140 Cal.App.3d 189, 194-195, "[j]udicial review of administrative decisions is available pursuant to section 1094.5 only if the decisions resulted from a 'proceeding in which *by law*: 1) *a hearing is required to be given*, 2) evidence is required to be taken, and 3) discretion in the determination of facts is vested in the agency. [Citations.]'" (Quoting *Taylor v. State Personnel Bd.* (1980) 101 Cal.App.3d 498, 502.)

In *Weary*, a Los Angeles County employee received an "improvement needed" evaluation on her work performance. (140 Cal.App.3d at p. 191.) Shortly after she filed an appeal of this evaluation with the Commission, she was laid off due an employment reduction, and the evaluation prevented her from being considered for reemployment. (*Id.* at p. 192.) The Commission granted her a hearing on the evaluation and affirmed the evaluation and lay off. (*Id.* at pp. 192-193.) When the employee petitioned for a writ of mandate, the trial court concluded that the Commission's decision was subject to administrative mandamus, and reversed the decision. (*Ibid.*) The court in *Weary* concluded that administrative mandamus was unavailable to review the decision, reasoning that

under the Civil Service Rules, the Commission was not required to grant a hearing on the evaluation. (*Id.* at pp. 194-196.)

Under *Weary*, the petition is time-barred under section 1096.6 only if the Civil Service Rules required the Commission to grant Ivory's requests for a hearing. We therefore examine whether these requests mandated a hearing under the Civil Service Rules.[4] In this inquiry, we "apply the same general rules that are used for statutes to the construction and interpretation of rules and regulations of administrative agencies. [Citation.] . . . [¶] Like any other statutory scheme, the rules should be read as a whole, to give meaning to the words as used in context. [Citation.]" (*Dobbins v. San Diego County Civil Service Com.* (1999) 75 Cal.App.4th 125, 128-129.)

We begin by observing that Ivory's request alleges a violation of rule 25.01, which provides that "[n]o person in the classified service . . . shall be . . . reduced, or in any way favored or discriminated against in employment or opportunity for employment because of race . . . ." When, as here, an employee alleges discriminatory employment treatment under rule 25, rule 4.01 permits the employee to petition for a hearing before the Commission. Furthermore, rule 4.03 provides in pertinent part: "A. In cases of *discharge* or *reduction* of a permanent employee . . . a timely petition for hearing *shall* be granted if *it states sufficient specific facts and reasons in support of the employee's appeal as provided in Rule 18.02*. The petition shall be denied if such facts and reasons are not stated. [¶] B. *In all other cases provided for in Rule 4.01*, the commission may, *at its discretion*, grant a hearing or make its decision on the merits based on a review of written materials submitted by the parties concerned." (Italics added.)

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4 We hereby take judicial notice of these rules. (*Olson v. County of Sacramento* (1974) 38 Cal.App.3d 958, 964; Evid. Code, §§ 451, subd. (a), 459.)

Under the plain language of rules 4.03A and 4.03B, Ivory was entitled to a mandatory hearing only if she had suffered a discharge or reduction, and her requests for a hearing stated a sufficient basis "as provided in Rule 18.02." However, the terms "reduction" and "demotion" have technical meanings within the Civil Service Rules. (Rule 2.00.) Under the definitions found in the Civil Service Rules, "reduction" and "demotion" are synonymous, and that, absent qualifications irrelevant here, "demotion" means "a lowering in rank or grade." (Rule 2.17.) In turn, the term "grade" refers to a salary schedule or range found in the County's salary ordinance or the County Code (rule 2.27), and the term "rank" means "the level of difficulty and responsibility of a class" (rule 2.46), where "class" refers to "a position or group of positions bearing the same title" (rule 2.11).

Furthermore, rule 18.02A provides that before a permanent employee may be reduced in rank or compensation, "the employee shall receive a written notice" of the reduction, accompanied with "specific grounds and particular facts," and shall be permitted a reasonable time to respond. Furthermore, when a permanent employee is reduced, rule 18.02B accords the employee a 15-day period following the service of the notice of reduction in which to request a hearing before the Commission. Finally, rule 18.02C limits the Commission's consideration of the notice of reduction to the information and charges contained in the letter of reduction.

In view of these definitions and rule 18.02, an employee alleging a demotion is entitled to a mandatory hearing only when the employee suffers a loss in salary, or there is a formal change in his or her position or in the description of this position's responsibilities. Accordingly, the key issue is whether Ivory had suffered such a demotion or reduction.

Here, Ivory's requests contended that she had suffered an "effective" or "de facto" demotion, but they do not allege a loss of salary or a diminution of Ivory's position or its formal responsibilities. Instead, the requests allege that she did not receive assignments commensurate with her salary level and formal position, and that she had been denied a promotion due to her "whistleblowing." The hearing officer found that since Ivory had been promoted to her current position in 1988, she had not received assignments appropriate for her position, and concluded that she had been "de facto demoted." However, nothing in the hearing officer's findings suggests that Ivory had lost salary or that there had been a formal change in her position or its responsibilities.

We therefore conclude that the hearings at issue were discretionary, rather than mandatory. Accordingly, the petition is properly classified as seeking ordinary mandamus under section 1085, rather than administrative mandamus under section 1094.5, and it is not subject to the 90-day limitations period in section 1094.6. For this reason, the demurrer cannot be sustained on the basis that the petition is untimely under section 1094.6.

C. *Laches*

As an alternative basis for sustaining the demurrer, Ivory contends that laches bars the Department's petition.

"The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." (*Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 359, fns. omitted.) "Generally speaking, the existence of laches is a question of fact to be determined by the [fact finder] in light of all of the applicable circumstances . . . . [Citations.]" (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624.) Nonetheless, "[l]aches may be raised by demurrer, but only if

the complaint shows on its face unreasonable delay *plus* prejudice or acquiescence. [Citations.] In the absence of prejudice or acquiescence delay does not establish a defense . . . ." (*Conti v. Board of Civil Service Commissioners*, *supra*, 1 Cal.3d at p. 362.)

Here, the allegations in the petition show a pattern of delay by the Department. The Department was dilatory in assigning suitable responsibilities and work to Ivory, thereby precipitating the underlying action, and slow to challenge the Commission's final order. Nonetheless, the allegations in the petition do not establish that the Department acted unreasonably after the Commission issued its order, that the Department acquiesced in the order, or that Ivory has suffered prejudice through the delayed filing of the petition. The petition alleges that: (1) although the Department disagreed with the Commission's order, it tried to comply with the order and settle the matter; (2) the Department offered Ivory three positions meeting the standards of the Commission's decision, which she refused; (3) Ivory filed a civil action to pursue her claims against the Department; and (4) the Department filed its petition only after settlement discussions and private mediation failed.

Here, the trial court concluded that these allegations precluded the application of laches on demurrer. In our view, the trial court did not err on this matter. Ivory disagrees, citing *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61. However, this case is factually distinguishable.

In *Johnson*, the assistant city manager of Loma Linda was laid off and his position was eliminated, ostensibly due to budgetary cutbacks. (24 Cal.4th at p. 66.) Following administrative proceedings on his grievance, the city council affirmed the propriety of his termination in December 1993. The assistant city manager filed a discrimination action and a petition for writ of mandate in superior court in July 1995, but no hearing on his petition occurred prior to January 1997, when the trial court granted summary judgment in favor of Linda Loma. (*Id.* at

p. 67.) The trial court concluded that the doctrine of laches barred the petition of writ of mandate, and accordingly, the assistant city manager was bound by the administrative findings concerning his termination. (*Ibid.*) The court in *Johnson* agreed that laches barred the petition, reasoning that the assistant city manager had no explanation for the 18-month delay in filing his petition, and that procedural delays in his discrimination action did not explain his failure to pursue his petition for 18 months after it was filed. (*Id.* at p. 69.)

Unlike the situation in *Johnson*, the Department has alleged facts that adequately explain its delay in filing its petition. In view of these allegations, we do not discern a basis for laches on the face of the petition.

D. *Judicial Estoppel*

For the first time on appeal, Ivory contends that the doctrine of judicial estoppel bars the petition. We disagree.

The equitable doctrine of judicial estoppel is aimed at preventing fraud on the courts. (*In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 850.) It "should apply when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. [Citations.]" (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.)

Ivory directs our attention to the Department's motion for summary judgment in her civil action in federal district court.[5] In this motion, which is

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5 We hereby take judicial notice of this motion. (1 Witkin, Cal. Evidence (4th ed. 2000) § 23, pp. 117-118; Evid. Code, §§ 452, subd. (d), 459.)

dated September 3, 1998, the Department stated that it had not appealed the Commission's decision, and that it "sought to comply and did comply with" the decision by offering Ivory three positions in accordance with the decision. In our view, these statements are not "totally inconsistent" (*Jackson v. County of Los Angeles*, *supra*, 60 Cal.App.4th at p. 183) with the allegations in the Department's petition, and, in any event, there is no showing that the federal district court accepted them. Accordingly, judicial estoppel is not applicable on the face of the petition.

DISPOSITION

The judgment is reversed, and the matter is remanded for further proceedings in accordance with this opinion. Appellant is awarded its costs.

NOT TO BE PUBLISHED

CURRY, J.

We concur:

EPSTEIN, Acting P. J.

HASTINGS, J.

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