

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

DATE/TIME	: 11:00 a.m. 2/2/07	DEPT. NO	: 20
JUDGE	: HON. JACK SAPUNOR	CLERK	: TEMMERMAN
KAREN MATUS, individually and in various representative capacities as Trustee, Executor, and Personal Representative, ALEXANDER FAMILY TRUST, et al., Petitioners and Plaintiffs,		Case No.: 06CS01759	
VS.			
BOARD OF ADMINISTRATION OF CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM; CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM itself and as administrator of LEGISLATORS RETIREMENT SYSTEM, Respondents and Defendants.			
Nature of Proceedings:		MOTION AND APPLICATION FOR TEMPORARY STAY UNDER C.C.P. § 1094.5(g), (h)(1); MOTION AND APPLICATION FOR LEAVE TO FILE SECOND AMENDED AND SUPPLEMENTAL PETITION; RULING ON SUBMITTED MATTERS	

The following two matters are before the Court: (1) Petitioners' application for a temporary stay (the "Stay Application "); and (2) Petitioners' application for leave to file a second amended and supplemental petition (the "Application for Leave to Amend").

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County of Sacramento

BY: F. TEMMERMAN,
 Deputy Clerk

The Application for Leave to Amend seeks an order granting Petitioners leave to amend their First Amended Petition and file a proposed Second Amended and Supplemental Petition.¹ The apparent purpose of the proposed Second Amended and Supplemental Petition is to name Legislators Retirement System as a party and to allege certain additional facts occurring after the First Amended Petition was filed, namely, service upon Petitioners of CalPERS' "Notice of Hearing" dated January 10, 2007, and "Order Extending Time to Issue a Decision for an Additional 30 Days" dated December 20, 2006. The Application for Leave to Amend is brought pursuant to Code of Civil Procedure §§ 464, 469-472, 473, 475, and 576, and is based on the application, the accompanying supporting papers, and the incorporated prior motion to amend or correct (and its supporting papers).

The Stay Application seeks an order staying (i) the hearing in the Matter of the Calculation of Benefits Payable Upon the Death of Clarence Alexander to Frances Alexander (Case No. 6594; OAH Number 2005040366) before the Board of Administration of CalPERS, scheduled for February 22, 2007; (ii) the February 5, 2007, deadline for Petitioners to file and serve an "Argument" for consideration by the Board at the February 22 hearing; and (iii) CalPERS' "Order Extending Time to Issue a Decision for an Additional 30 Days," dated December 20, 2006. The Stay Application is brought under Code of Civil Procedure § 1094.5(g)-(h)(1) on the grounds that a stay will not harm the public interest and that Respondents are unlikely to prevail on the merits. The Stay Application is based on the application, the accompanying supporting papers, and the incorporated prior motion for stay (and its supporting papers).

After consideration of the points and authorities submitted by the parties, arguments of counsel, and all other matters presented to this Court, the Court concludes that the Stay Application should be GRANTED.

The Court is persuaded that Petitioners are likely to prevail on the merits of the petition because Respondent Board failed to issue a final decision or to order the transcript within 100 days after rejection of the proposed decision. (Gov. Code § 11517(c)(2)(E)(iv).) Respondents are correct that where an agency orders a transcript of the proceedings before the ALJ, subdivision (c)(2)(E)(iv) provides the agency is not required to issue its final decision until 100 days after receipt of the transcript. However, if the first sentence in subdivision (c)(2)(E)(iv) is to have any meaning, it logically follows that the transcript must be ordered "not later than 100 days after rejection of the proposed decision."

In this case, the undisputed evidence shows that the Board voted to reject the ALJ's proposed decision and decide the case itself at its monthly meeting on June 21, 2006. (Response, p. 8, lines 13-14.) This means that the last day to issue a final decision and/or order the transcript

¹ Petitioners previously filed a Notice of Motion and Motion to Amend or Correct for the purpose of amending the original Petition in this proceeding. Although the motion refers to Code of Civil Procedure § 576, it appears that Petitioners filed the amendment as a matter of right pursuant to Code of Civil Procedure § 472.

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was September 29, 2006. Although Petitioners in this case ordered the transcript in May 2006, and received it in June 2006, CalPERS did not even attempt to order the transcript until October 6, 2006, and it did not actually order the transcript until November 6, 2006. This appears to have been the result of an intentional -- though perhaps innocent -- effort to delay receiving the transcript so as to delay triggering the 100-day rule. Whatever the reason for the delay, the Court is convinced that the Board violated the 100-day requirement of subdivision (c)(2)(E)(iv).

The only remaining question is whether there is a penalty for violating the 100-day rule of Government Code § 11517(c)(2)(E)(iv). This depends on whether that rule is mandatory or directory. There is a split of authority in California on this issue.

In *Chrysler Corp. v. New Motor Vehicle Bd.* (1993) 12 Cal.App.4th 621, the Fourth Appellate District ruled, under former § 11517(d), that an agency's failure to comply with the 100-day rule did not result in an ALJ's proposed decision being deemed approved. The Court relied on the "general rule" that statutory time limits in administrative proceedings are directory, rather than mandatory, unless a contrary intent is clearly expressed. (*Id.* at p. 629 [citing *Edwards v. Steele* (1979) 25 Cal.3d 406, 410]; see also *Anserv Ins. Service v. Kelso* (2000) 83 Cal.App.4th 197, 207 [finding that § 11517(c)(1) is directory, not mandatory, because it does not specify any penalty for an ALJ's failure to issue a proposed decision within the specified time]; *Outdoor Resorts / Palm Springs Owners' Assn. v. Alcoholic Beverage Control Appeals Bd.* (1990) 224 Cal.App.3d 696, 702-703 [finding that the 30-day limitation mentioned in former § 11517(b) was directory because it did not mention any penalty for an agency's failure to act within the specified time].)

However, a more recent appellate court decision held the opposite is true. In *St. Francis Medical Center v. Shewry* (2005) 134 Cal.App.4th 1556, the Third Appellate District held that the 100-day rule is mandatory. It concluded that a proposed decision of an ALJ was "deemed adopted" when the Department of Health Services rejected the ALJ's proposed decision within 100 days of its receipt, but failed to issue a final decision within 100 days after the rejection. (*Id.* at pp. 1559-1561.)

This Court follows the holding in *St. Francis Medical Center* and therefore concludes, for purposes of this ruling, that the Board's failure to comply with the 100-day rule means that the ALJ's proposed decision is "deemed adopted" as a matter of law.

The remaining issue is whether a stay would be against the public interest. To determine whether or not a court should decide a question of administrative jurisdiction without requiring exhaustion of administrative remedies, a court must consider the extent of injury from pursuit of administrative remedy, the degree of apparent clarity or doubt about administrative jurisdiction, and any involvement of specialized administrative understanding in the question of jurisdiction. (*Public Employment Relations Bd. v. Superior Court* (1993) 13 Cal.App.4th 1816, 1831-1832.) When the administrative proceeding involves no unusual expense and the agency's specialized

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understanding may contribute to a proper determination, a requirement of exhaustion may be desirable. (*Id.*) When pursuing the administrative remedy will cause irreparable injury and the lack of agency jurisdiction clearly appears from considerations that are not within the agency's specialized understanding, exhaustion should not be required. (*Id.*) This case falls somewhere between these two extremes but, on balance, the Court finds that this case is closer to the latter situation, and therefore concludes that exhaustion should not be required.

Respondents' contention that Petitioners may not seek relief under Code of Civil Procedure § 1094.5(g)-(h)(1) is similarly unavailing. The Court reaches the same result even if it construes Petitioners' Stay Application as an application for preliminary injunctive relief. (*Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1251-1252.)

For the foregoing reasons, it is hereby ORDERED that Petitioners' Stay Application is GRANTED. The Court also GRANTS (i) Petitioners' Application for Leave to Amend; (ii) Petitioners' unopposed requests for introduction of evidence and exhibits and for judicial notice; and (iii) Respondents' motion to strike. Petitioners are directed to prepare a formal order, incorporating the Court's ruling herein verbatim or attaching it as an Exhibit; submit them to opposing counsel for approval as to form; and thereafter submit them to the Court in accordance with Rule of Court 391.

Date: FEB - 2, 2007

JACK V. SAPUNOR

Jack Sapunor
Judge of the Superior Court of California
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CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

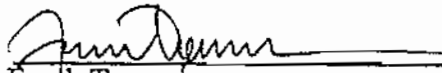
I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the Court's Ruling on Submitted Matter in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

**JOHN JENSEN, ESQ.
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Dated: February 5, 2007

Superior Court of California,
County of Sacramento

By: 
Frank Temmerman,
Deputy Clerk

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