

Reinstating Retired Annuitants is Risky

By Holly O. Whatley

The Court of Appeal's recent decision in *Byrd v. State Personnel Board* outlines the boundaries of permissible settlements involving involuntarily terminated employees who retire but who later are ordered reinstated following a successful appeal of the termination decision. In that case, the State Personnel Board (SPB) initially approved an employee's settlement with her employer, but CalPERS refused to reinstate her in the retirement system as the settlement provided. She sued CalPERS. The trial court ruled for CalPERS, and the employee appealed.

Byrd filed paperwork with CalPERS to retire as an Administrative Analyst/Specialist following her termination. She also appealed her dismissal. The parties settled her suit and, among other terms, the University that had employed her agreed to: 1) Reinstatement Byrd to a higher classification than she had previously held; 2) pay back pay and benefits based on that classification; and 3) place her on administrative leave while Byrd sought a medical retirement from CalPERS. The SPB approved the settlement and Byrd and the University implemented it.

CalPERS, however, refused to reinstate Byrd in the pension system at the higher classification. It cited Government Code section 21198 to argue that involuntarily terminated employees cannot be reinstated to a higher classification. The Court of Appeal agreed that "reinstatement" as used in

section 21198 generally limits reinstatement to the employee's previous classification. The Court did not adopt CalPERS' argument that an involuntarily terminated employee can **never** be reinstated to a higher classification. If the higher classification was connected to the underlying dispute, such as reinstatement following the successful appeal of a failure-to-promote claim, CalPERS could implement the higher classification upon reinstatement consistently with section 21198.

It is common for public agencies to settle employee discipline appeals with a suite of benefits to the employee. *Byrd* teaches that, even if both sides agree to deal terms, those terms must still comply with the limits under the Public Employees' Retirement Law. In short, you can't settle your employment cases with CalPERS' money.

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employment cases with CalPERS' money.

Agencies should carefully examine the implications of reinstating a formerly terminated employee only to immediately place her on administrative leave. Although the Court did not reach the issue, CalPERS argued that pay for such time is not "compensation earnable." The lesson is not that this can never be done, but rather the parties must account for CalPERS' rules to ensure their assumptions about the effect settlements have on retirement benefits will withstand CalPERS' review.

For more information, please contact Holly at (213) 542-5704 or HWhatley@chwlaw.us.

Colantuono, Highsmith & Whatley is a law firm with offices in Pasadena and Grass Valley in the Sierra Foothills that represents public agencies throughout California. Its municipal law practice includes public revenues, land use, housing, CEQA, LAFCO matters and associated appeals and trial court litigation. We are committed to providing advice that is helpful, understandable, and fairly priced.

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Southern California

790 E. Colorado Blvd., Suite 850
Pasadena, CA 91101-2109
Phone: (213) 542-5700

Northern California

420 Sierra College Drive, Suite 140
Grass Valley, CA 95945-5091
Phone: (530) 432-7357

www.chwlaw.us