



LEGAL DEFENSE TRUST TRAINING BULLETIN

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RETIREMENT WITH A DISCIPLINARY APPEAL PENDING MAY RENDER THE APPEAL MOOT

A Survey of Recent Cases Reveals Tension Between Courts of Appeal

by
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A recent Ninth Circuit decision, *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles*, No. 08-56283 (Aug. 12, 2011), held that two deputies who were summarily suspended when felony charges were filed against them and later terminated, and who retired while their Civil Service Commission hearings were pending, were still entitled to post-suspension hearings.

To put the *ALADS* case in context and fully understand the extent of its holding, it is necessary to look first at *Zuniga v. Los Angeles County Civil Service Commission* (2006) 137 Cal. App. 4th 1255, which held that the Civil Service Commission lacked jurisdiction to hear civil service disciplinary appeals by a County employee who retired while his hearing was still pending. *Zuniga* reasoned that the Civil Service Commission had a limited jurisdiction, which did not include hearing what now amounted to a claim for backpay by a former civil servant.

Zuniga, who was in the process of challenging a suspension when he retired, voluntarily ended his employment and could no longer contest the disciplinary action.

A later case, *County of Los Angeles Department of Health Services v. Civil Service Commission of the County of Los Angeles* (2009) 180 Cal. App. 4th 391, reached the same conclusion and stated that “*Zuniga* stands for the bright-line proposition that, where an employee retires during the pendency of a civil service appeal, her future status as an employee is no longer at issue... [A] person who retires is no longer a member of the civil service.” 180 Cal. App. 4th at 401.

Zuniga and *County of Los Angeles* were decided in the Second Appellate District for the California Court of Appeal. Interestingly, a recent case out of the Fifth Appellate District, *Hall-Villareal v. Fresno* (2011) 196 Cal. App. 4th 24, which dealt with a terminated

employee who retired pending her civil service hearing, distinguished *Zuniga* and *County of Los Angeles* and appears to have created a split in the districts on this issue.

The *Hall-Villareal* Court distinguished *Zuniga* on the basis that *Zuniga* involved an employee who was still employed when he appealed his disciplinary action to the Commission, and it was his act of voluntarily resigning that ended his employment and divested the Commission of jurisdiction. But where, as in *Hall-Villareal*'s situation, "a former employee has been terminated, seeking retirement benefits would not result in a voluntary resignation from employment - the former employee has already been separated from employment." 196 Cal. App. 4th at 33.

The *Hall-Villareal* Court then reasoned that the holding in *County of Los Angeles* did not apply either, because the language in the Fresno Municipal Code (FMC) and City Charter did not require the same result: "[T]he FMC contemplates that a person may leave City of Fresno employment, receive retirement benefits, and later return to work with the City..." and it also "provides a procedure for 're-employment of retired persons.'" 196 Cal. App. 4th at 33. The Court noted the record indicated that *Hall-Villareal*, who was 60 years old when she was fired, applied for retirement benefits so she could have a source of income, and that she intended to apply for reinstatement from retirement if her administrative appeal was successful.

Hall-Villareal therefore distinguished *County of Los Angeles* on the basis that "there may be some basis in the specific language of the Los Angeles County civil service rules for the holding in *County of Los Angeles*, but the City has not demonstrated that the Fresno City

Charter or municipal rules require the same result." 196 Cal. App. 4th at 33. However, *County of Los Angeles* did not base its holding on any particular language in the civil service rules that supports this distinction - it was based on the proposition, from *Zuniga*, that a civil service agency has no authority to hear a disciplinary appeal after the employee decides to voluntarily remove himself from the civil service. As a result, *Hall-Villareal* created a tension between the Second and Fifth Appellate Districts on this point.

The recent Ninth Circuit decision in the *ALADS* case has further distinguished *Zuniga*. In *ALADS*, four deputy sheriffs were suspended without pay when felony charges were filed against them. When the charges were dropped, the deputies were reinstated and returned to paid status, but continued to demand hearings before the Civil Service Commission to contest the suspensions. While those hearings were still pending, the deputies were discharged, at least partially based on allegations underlying the criminal charges. The deputies all requested hearings on their discharges.

While the hearings on their suspensions and discharges were pending, two of the deputies were granted disability retirement, effectively converting them from discharged employees to retired employees. The Commission issued final decisions stating that it no longer had jurisdiction over their civil service appeals.

The *ALADS* case dealt with a number of other issues, including those dealing with the two deputies who did not retire, but here we only address that part of the holding dealing with the deputies who retired pending their civil service hearings. All four deputies sued in federal district court, alleging violations of

their Fourteenth Amendment due process rights. The district court granted summary judgment against the deputies, and the deputies appealed to the Ninth Circuit.

The Ninth Circuit's holding as to the deputies who retired is based on the fact that the deputies were summarily suspended as a result of the filing of felony charges, and that they received only limited pre-suspension procedures. Citing *Gilbert v. Homar* (1997) 520 U.S. 924, and *FDIC v. Mallen* (1988) 486 U.S. 230, the Court acknowledged that peace officers may be temporarily suspended without any pre-suspension due process if felony charges are filed against them, due to the fact that they "occupy positions of great public trust and high public visibility." However, where as here the employee is deprived of pre-suspension due process out of necessity or impracticability, due process can only be satisfied by the availability of meaningful post-suspension procedures, or else the suspensions are unconstitutional.

In this case, the deputies were not denied pre-suspension hearings altogether, as was the case in *Gilbert* and *Mallen*, but the Court determined that the level of pre-suspension due process was not substantial because the inquiry only consisted of a confirmation that felony charges had indeed been filed, and did not extend to the actual merits of those charges. The Court therefore found that the deputies in this case were in the same position as the employees in *Gilbert* and *Mallen*, who received no pre-suspension procedures at all.

The Court concluded that because these deputies were denied substantial pre-suspension procedures, they must be granted post-suspension hearings, despite the fact that they retired while their hearings were pending.

Without post-suspension due process, the suspensions are not constitutional. Noting that *Zuniga* held the Civil Service Commission is divested of jurisdiction to hear civil service appeals in this situation, the *ALADS* case did not actually dispute the idea that the Commission was divested of jurisdiction - rather, it held that while the Civil Service Commission was precluded from hearing the appeals, the County still had a constitutional obligation to provide *some form* of post-suspension hearing. The Court did not specify how or by whom those hearings must be conducted.

Zuniga and *County of Los Angeles* are still good law, but time will tell how far the *ALADS* holding may be extended and what effect it will have on *Zuniga*. Arguably, the *ALADS* holding could be extended to any employee who retires while his or her administrative disciplinary appeal is still pending - due process concerns still exist even where an employee has been granted pre-disciplinary procedures. The *Public Safety Officers Procedural Bill of Rights Act* specifically provides for an administrative appeal of disciplinary action. It also remains to be seen how the apparent conflict between *Zuniga* and *Hall-Villareal* will be resolved. We hope that, in light of the recent *Hall-Villareal* and *ALADS* cases, the state Supreme Court will have to step in eventually and clarify what, if any, post-disciplinary procedures are demanded by due process even where a public employee has resigned or retired while his or her administrative appeal is still pending.

The *ALADS* deputies were represented by Elizabeth Gibbons of the law offices of Green & Shinee of Encino, California. The case is of interest, especially in the larger departments

like LASD and LAPD where the same issues arise more frequently than elsewhere. The lesson is this: a retirement occurring at a point in time during the pendency of an appeal of disciplinary action may mean that the administrative body, commission or tribunal no longer has jurisdiction to hear the appeal because the retiree is no longer an employee.

STAY SAFE!

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