

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 79-1103
	:	
of	:	<u>January 24, 1980</u>
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SUBJECT: STATE EMPLOYEES RETIREMENT SYSTEM BENEFITS—
Government Code section 21451, by its use of the word “may” or for any other reason,
does not permit the Board of Administration of the Public Employees Retirement System
to adopt a uniform policy of waiving its claim to subrogation for benefits to be provided to
an injured member, but rather, is obligated to recover all such benefits to the extent feasible.

The Honorable Daniel E. Boatwright, Assemblyman, tenth Assembly District,
requests an opinion on a question that we have rephrased as follows:

Does Government Code section 21451, by its use of the word “may,” permit the
Board of Administration of the Public Employees’ Retirement System to adopt a uniform
policy of waiving its claim to subrogation for benefits it has paid to an injured member in
those situations where the injured member or his or her survivors obtains an award of
damages from a third-person tort-feasor?

CONCLUSION

Government Code section 21451, by its use of the word “may” or for any other reason, does not permit the Board of Administration of the Public Employees’ Retirement System to adopt a uniform policy of waiving its claim to subrogation for benefits to be provided to an injured member but rather the board is obligated to recover all such benefits to the extent feasible. It may waive or compromise such claims only on a claim by claim basis.

ANALYSIS

Where a member of the State Employees’ Retirement System (hereinafter P.E.R.S.) is entitled to benefits from P.E.R.S. because of his or her injury or death proximately caused by the act of a person other than his or her employer, Government Code¹ section 21451 provides that:

“ . . . the board [of administration of P.E.R.S.] *may* on behalf of this system [P.E.R.S.] recover from such person [proximately causing the injury or death] an amount which is the lesser of the following:

“(1) An amount which is equal to one-half of the actuarial equivalent of the benefits for which this system is liable because of such injury or death;
or

“(2) An amount which is equal to one-half of the remaining balance of the amount recovered after allowance of that amount which the employer or its insurance carrier have paid or become obligated to pay.” (Emphasis added.)

One of the means by which P.E.R.S. obtains recovery of such benefits is by means of subrogation in an action tiled by the injured employee or his or her survivors for damages against the tort-feasor. ‘Thus, if the employee or his or her survivors obtains an award in that action, the amount awarded in the court proceeding is subject to the lien of P.E.R.S., thus reducing the amount actually received by the employee or his or her survivors by the amount specified in section 21451. Another means by which P.E.R.S. may obtain recovery of such benefits is by the filing of an action against the third-party tort-feasor. (See § 21453.)

¹ All unidentified section references are to the Government Code.

The question presented by the requestor focuses only on the situation where P.E.R.S. seeks to be subrogated to any award received by the member, pursuant to the provisions of section 21451, i.e., where the affected member has filed the lawsuit rather than where P.E.R.S. has filed the lawsuit.

The requestor thus seeks our opinion concerning whether the use by the Legislature of the word ‘may’ in section 21451 authorizes P.E.R.S. to elect as a general policy *not* to obtain recovery of any benefits paid to such a member even though the member obtains an award in a court proceeding with respect to which award P.E.R.S. has a right of subrogation.

As we shall demonstrate, the history of section 21451 requires the conclusion that it is the duty of P.E.R.S. to obtain recovery of all such benefits *to the extent feasible*.

In 1962, section 21451 read differently than it does now. In essence, former section 21451 provided that “the board may on behalf of this system recover from such person an amount which is the actuarial equivalent of the benefits which are provided by contributions . . . and for which this system is liable because of such injury or death.”

During such time as section 21451 read thusly, a State Highway Patrolman, injured in the line of duty, commenced an action against a negligent tort-feasor and recovered a judgment of \$62,271.11. The State Compensation Insurance Fund and the State Employees’ Retirement System (now denominated P.E.R.S.) filed liens claiming a right to a total sum of \$70,146.57 with the State Employees’ Retirement System’s portion of that sum calculated to be \$52,476.06 the actuarial equivalent of the benefits for which it became obligated to pay because of plaintiff’s disability retirement.

On appeal, plaintiff attacked the claim of the State Employees’ Retirement System on various statutory and constitutional grounds. The Supreme Court determined that former section 21451 required the court to award to the State Employees’ Retirement System the full amount of its lien, calculated in terms of the statutory formula, i.e., the actuarial equivalent of the benefits that the system was obligated to pay because of plaintiff’s disability retirement. (*Bilyeu v. State Employees’ Retirement System* (1962) 58 Cal. 2d 618.)

Former Justice Peters, however, wrote a separate concurring opinion, *id.*, at page 629, in which he stated:

“Under existing law the main opinion is sound. The Legislature has spoken, and, under the facts, the determination is conclusive. But I feel impelled to call to the attention of the Legislature that the policy it has

adopted may lead, and in the instant case has led, to inequitable results.

“This plaintiff, a state employee, was injured in the course of his employment as a result of the negligence of a third person. He suffered serious and permanent injuries, and also suffered a substantial amount of pain and suffering. He brought a tort action against the third person, and, purely as a result of his efforts, recovered a \$62,000 judgment for such injuries, including, presumably, a substantial award for pain and suffering. He received workmen’s compensation and was compelled to retire because of his disability. He received and will receive retirement benefits. Because of the provisions of the Government Code referred to in the main opinion, the liens of the compensation carrier and of the State Employees’ Retirement System will entirely consume the \$62,000 judgment. As a result, plaintiff will receive no benefit at all from his tort action against the tort-feasor. He will receive not one penny for his pain and suffering. So far as he is concerned, he should never have filed the tort action. In the future, there will be no inducement for state employees in the position of plaintiff to file such actions. This result would not seem to be in accord with sound public policy. But it is what the Legislature has now provided. I suggest that the problem involved requires further legislative study in order to determine whether or not the obvious injustices of the present law should be alleviated by proper legislative action.”

In *Dauenbauer v. Sullivan* (1963) 215 Cal. App. 2d 215, (hg. by Supreme Ct denied) involving another injured California Highway Patrolman, defendant tort-feasor contended that the State Employees’ Retirement System was compelled to “set off” from its lien certain amounts received by the injured highway patrol man from defendant. The Court disposed of this contention, stating:

“Actually, the system could not have set off its claim against [its member who was injured]. As said in *Bilyeu, supra*, 58 Cal. 2d at page 627, “[I]t is expressly provided in section 21451 of the Government Code that the ‘retirement system is to recover “an amount which is the actuarial equivalent of the benefits” for which the system becomes liable,’ and ‘the Legislature intended that the lien of the retirement system extend to the full amount of the judgment nor otherwise allocated to proper and stated purposes.’” (*Dauenbauer v. Sullivan, supra*, 215 Cal. App. 2d at p. 231.)

The Legislature thereafter amended section 21451 (Stats. 1965, ch. 1340, § 3) to read as set forth herein, so as to provide that the board may recover the lesser of an amount equal to one-half of the actuarial equivalent or “an amount which is equal to one-half of

the remaining balance of the amount recovered after . . .” (emphasis added) deducting for the allowance to the employer or its insurance carrier for workmen’s compensation.

Thus, in 1965 the Legislature, presumably in response to former Justice Peters’ remarks concerning the “obvious injustices of the present law,” revised the statutory formula determining the amount to be recovered by P.E.R.S. when an injured member succeeds in obtaining an award for injuries or for death, consequent to which injuries or deaths P.E.R.S. was obligated to pay benefits.

The Legislature has thereby established the public policy that is binding upon the board with respect to the question of whether P.E.R.S. should seek to recover from an award of an injured member benefits it is obligated to provide to the member because of that injury or death.

The fact that the Legislature has used the word “may” in section 21451 does not compel a contrary conclusion. Section 21451 establishes a public duty on the part of the board of administration of P.E.R.S. That issue was addressed in a slightly different context by the Supreme Court in *Mass v. Board of Education* (1964) 61 Cal. 2d 612, 623, wherein it stated:

“Finally, the board [of Education] contends that although section 13516.5 [of the Education Code] permits it to compensate petitioner, the statute does not require it to do so. Although the word ‘may’ customarily implies permissiveness (Ed. Code, § 36), words must be construed in their textual context. (Ed. Code, § 10.) The word ‘may’ here occurs in a statute defining a public duty. ‘Words permissive in form, when a public duty is involved, are considered mandatory.’” (*Harless v. Carter* (1954) 42 Cal. 2d 352, 356.) (Emphasis in original.)

For provisions of the Government Code that are comparable to those in the Education Code, see sections 5.14

Further, section 21453 provides, in relevant part, that

The state fund [under contract with P.E.R.S.] or the Attorney General, as the case may be, may compromise claims before or after commencement of suit or entry of judgment for such amount as may be approved by a person duly authorized by the board for such purpose.

The Legislature has provided express statutory authority to the board to

compromise² claims on a claim by claim basis. The clear inference is that no such authority has been granted to the board to establish a general policy of waiver of its claims without regard to the particular circumstances attendant upon a specific claim.

Accordingly, it is concluded that section 21451, by its use of the word “may” or for any other reason, does not permit the Board of Administration of P.E.R.S. to adopt a uniform policy waving its claim to subrogation for benefits to be provided to an injured member but rather the board is obligated to recover all such benefits to the extent feasible. It may waive or compromise claims only on a claim by claim basis.

² We assume that the authority of the board to compromise individual claims extends so liens filed in actions commenced by its members, as well as to suits brought in its name.