Filed 6/28/10 Goodrich Corp. v. State Water Resources Control Bd. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GOODRICH CORPORATION et al., Plaintiffs and Appellants, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Respondents.	B215175 (Los Angeles County Super. Ct. No. BS115673)

APPEAL from a judgment of the Superior Court of Los Angeles County. James C. Chalfant, Judge. Affirmed.

Gibson, Dunn & Crutcher, Jeffrey D. Dintzer and Denise G. Fellers for Plaintiff and Appellant Goodrich Corporation.

Hunsucker Goodstein & Nelson and Brian L. Zagon for Plaintiff and Appellant Pyro Spectaculars, Inc.

Allen Matkins Leck Gamble Mallory & Natsis and James L. Meeder for Plaintiffs and Appellants Emhart Industries, Inc., Kwikset Locks, Inc., Kwikset Corporation and Black & Decker Inc.

Edmund G. Brown, Jr., Attorney General, and Carol A. Squire, Supervising Deputy Attorney General, for Defendants and Respondents.

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This appeal arises out of a regional water quality control board's issuance of a proposed cleanup and abatement order (CAO) alleging plaintiffs' liability for perchlorate contamination in the Rialto groundwater basin in violation of the California Water Code, and the assumption of jurisdiction over the CAO by the State Water Resources Control Board (State Board). In a series of petitions for writs of mandate, plaintiffs alleged that defendants, the State Board and its individual members, engaged in improper ex parte communications with the prosecutor of the CAO and with other interested third parties and that defendants failed to maintain a separation between their adjudicatory and prosecutorial functions. On that basis, plaintiffs sought to disqualify defendants from hearing and adjudicating the allegations in the CAO.

On February 19, 2009, the trial court denied those portions of plaintiffs' fourth petition for a writ of mandate, filed in 2008 (the 2008 petition) seeking to invalidate the State Board's June 3, 2008 order (Order WQ 2008-0004) assuming jurisdiction of the Rialto groundwater contamination matter on its own motion and deferring consideration of plaintiffs' motions for disqualification to the time of the adjudicatory hearing on the proposed CAO. The adjudicatory hearing on the CAO *had not yet occurred*.

Plaintiffs appeal from the February 19, 2009 judgment, contending that the court erred in invoking the exhaustion of administrative remedies doctrine and the doctrine of collateral estoppel to decline to review the disqualification allegations in the 2008 petition.

We affirm the judgment, holding that an interim or interlocutory action by the State Board or any of its members on the matter of their disqualification or recusal, even if based on due process or constitutional grounds, is not subject to traditional or administrative mandate until the administrative process has been completed and there is a final decision on the merits of the CAO. Because the 2008 petition sought to interrupt the administrative process before the State Board could reach a final decision on the merits of the CAO, the trial court properly declined to review the disqualification allegations in the 2008 petition due to plaintiffs' failure to exhaust administrative remedies.

BACKGROUND

A. Regulatory Framework

In 1969 our Legislature enacted the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.)[1] (the Act). The Act "establishes a statewide program of water quality control that is maintained through regional administration within the framework of statewide coordination and policy. For the purposes of the Act, the state is divided into nine regions, each of which is governed by a regional board. (§§ 13200, 13201.) Each regional board is charged with formulating and adopting water quality control plans for the areas within its region and, through those plans, establishing water quality objectives that will 'ensure the reasonable protection of beneficial uses [of waters of the state] and the prevention of nuisance . . . .' (§§ 13240, 13241.) [¶] Pursuant to the Act, a regional board may issue orders to enforce its water quality control plans and . . . may impose administrative penalties . . . ." (*Johnson v. State Water Resources Control Board* (2004) 123 Cal.App.4th 1107, 1112 (*Johnson*).)

"A party who is aggrieved by an order or decision of a regional board may seek administrative review of that order or decision by petition to the State Board. (§ 13320, subd. (a).) The State Board, which consists of five members appointed by the Governor (§ 175), has discretion to review such orders or decisions [citations] . . . ." (*Johnson*, *supra*, 123 Cal.App.4th at pp. 1112–1113.)

The State Board "may, on its own motion, at any time, review the regional board's action or failure to act . . . ." (§ 13320, subd. (a).) "Upon finding that the action of the regional board, or the failure of the regional board to act, was inappropriate or improper, the state board may direct that the appropriate action be taken by the regional board, refer the matter to any other state agency having jurisdiction, take the appropriate action itself, or take any combination of those actions. In taking any such action, the state board is vested with all the powers of the regional boards under this division." (§ 13320, subd. (c).)

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[1] Unspecified statutory references are to the Water Code.

With exceptions not pertinent here, a party aggrieved by a decision or order of the State Board "may file with the superior court a petition for a writ of mandate for review thereof." (§ 13330, subd. (a).) "Except as otherwise provided herein, Section 1094.5 of the Code of Civil Procedure shall govern proceedings for which petitions are filed pursuant to this section. For the purposes of subdivision (c) of Section 1094.5 of the Code of Civil Procedure, the court shall exercise its independent judgment on the evidence in any case involving the judicial review of a decision or order of the state board issued under Section 13320 . . . ." (§ 13330, subd. (d).)

"By itself, the combination of investigative, prosecutorial, and adjudicatory functions within a single administrative agency does not create an unacceptable risk of bias and thus does not violate the due process rights of individuals who are subjected to agency prosecutions. [Citations.] Thus, '[p]rocedural fairness does not mandate the dissolution of unitary agencies, but it does require some internal separation between advocates and decision makers to preserve neutrality.' [Citation.]" (*Morongo Band of Mission Indians v. State Water Resources Control Bd*. (2009) 45 Cal.4th 731, 737 (*Morongo Band*).)

The state Administrative Procedure Act (APA) (Gov. Code, § 11400 et seq.) "requires the internal separation of prosecutorial and advisory functions on a case-by-case basis only. [Citation.] The [APA] does not prohibit an agency employee who acts in a prosecutorial capacity in one case from concurrently acting in an advisory role in an unrelated case. We have summarized the [APA's] relevant restrictions this way: 'The agency head is free to speak with anyone in the agency and to solicit and receive advice from whomever he or she pleases — anyone except the personnel who served as adversaries *in a specific case*. [Citations.] Indeed, the agency head can even contact the prosecutor to discuss settlement or direct dismissal. [Citations.] Virtually the only contact that is forbidden is communication in the other direction: a prosecutor cannot communicate off the record with the agency decision maker or the decision maker's advisors *about the substance of the case*.' [Citation.]" (*Morongo Band*, *supra*, 45 Cal.4th at p. 738.) Thus, "[i]n the absence of financial or other personal interest, and

when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias." (*Id*. at p. 741.)

B. Proceedings Conducted by the Santa Ana Regional Water Quality Control Board (Regional Board)

In 2002, the Regional Board issued investigation orders to plaintiffs Goodrich Corporation, Pyro Spectaculars, Inc. (PSI), and Emhart Industries, Inc. (EI), regarding perchlorate contamination in the Rialto-Colton groundwater basin. In 2005, the executive officer of the Regional Board, defendant Gerard Thibeault, as the chief prosecutor on the "prosecution/advocacy team" of the Regional Board, issued a CAO against plaintiffs Black & Decker, Inc. (BD) and EI.

EI petitioned the State Board for review of the CAO and asked that the petitions be held in abeyance. A member of the State Board's hearing officer's advisory team agreed to hold the petitions in abeyance for two years. In October 2005, the Regional Board issued notice that it intended to conduct a hearing on the CAO in May 2006. In December 2005, Thibeault, as executive officer of the Regional Board, amended the CAO to include allegations against plaintiffs Kwikset Locks, Inc., Kwikset Corporation, and BD. EI again petitioned the State Board for review of the amended CAO, and the State Board agreed to hold the petitions in abeyance for two years. The May 2006 hearing before the Regional Board was continued to July 2006.

In May and June 2006, EI filed amended petitions with the State Board seeking to disqualify the Regional Board and its "prosecution/advocacy team," requesting a hearing before the State Board on the merits of the CAO, and requesting confirmation that the State Board was maintaining a separation of prosecutorial and advisory functions. In July 2006, the Regional Board sent plaintiffs a notice canceling the hearing on the CAO and informing plaintiffs that the Regional Board had requested the State Board to hold a hearing on the merits of the CAO.

The State Board put plaintiffs' petitions in abeyance for two years in September 2006. In October 2006, the Regional Board passed a resolution granting Thibeault authority to appoint a deputy to act as an ad hoc hearing officer and Thibeault appointed a retired State Board executive director, Walter Pettit, as the ad hoc hearing officer for the Regional Board. Thibeault thereafter issued a draft amended 2005 CAO (the 2005 CAO) adding allegations against Goodrich and PSI.

In November 2006, Goodrich, EI, and PSI each filed petitions with the State Board for review of the 2005 CAO and an immediate stay. In January 2007, Hearing Officer Pettit issued an order setting an evidentiary hearing for March 2007. Later in January 2007, the State Board sent a letter to plaintiffs stating that the State Board refused to review the petitions and finding that the petitions were not ripe because the Regional Board had not taken final action on the 2005 CAO. The next day, Pettit resigned his ad hoc appointment as the Regional Board hearing officer.

C. Proceedings Conducted by the State Board

The acting executive director of the State Board, Tom Howard, issued a notice in February 2007 informing plaintiffs that the State Board, on its own motion, intended to hold an evidentiary hearing on the 2005 CAO at the earliest possible date. Defendant Tam Doduc, the State Board's chair, convened a prehearing conference and announced that she would be acting as the hearing officer in the State Board proceeding (State Board Proceeding A-1824) and that the State Board would be reviewing the entire matter of the perchlorate contamination in the Rialto area groundwater on its own motion. Doduc thereafter appointed a "prosecution/advocacy team" to prosecute the 2005 CAO before the State Board, and an "advisory team" consisting of four attorneys from the State Board's Office of Chief Counsel, two engineers, and three executives of the State Board. In late February 2007, the State Board issued a notice of public hearing on the 2005 CAO for dates in March and April 2007.

In March 2007, Goodrich filed a motion to designate the proceeding as a formal proceeding under the APA, which would have required the assignment of an administrative law judge to hear the matter. The motion was denied. Plaintiffs also filed

a motion in March 2007 demanding a determination of whether Doduc and the State Board's advisory team had complied with the separation of prosecutorial and adjudicatory functions and the prohibition on ex parte communications. By letter of March 28, 2007, Doduc denied the motion but granted the request for an investigation concerning ex parte communications. Doduc's letter disclosed nine instances of previously undisclosed communications between the summer of 2006 and March 22, 2007, but claimed that the contacts were not prohibited because they were not made in this adjudicative proceeding or they did not concern a matter in this proceeding.

In May 2007, in response to federal subpoenas obtained by EI, plaintiffs obtained more documents which they claimed evidenced improper ex parte communications, including a November 2, 2005 presentation to the State Board by Thibeault (the executive officer of the Regional Board and the chief prosecutor for the Regional Board). Plaintiffs alleged that Thibeault's presentation, although made at a publicly noticed workshop, addressed the substantive merits of the claims against plaintiffs in the 2005 CAO. Plaintiffs also obtained correspondence about perchlorate contamination in the Rialto area between employees in the Governor's office and Doduc and State Board executive Tom Howard. Plaintiffs detailed other alleged instances of improper ex parte contact by the State Board from 2006 through August 2007.

Public hearings on the 2005 CAO were scheduled to begin before the State Board on August 21, 2007. Of the 50 hours set aside for the hearing, plaintiffs were afforded only five hours for their case, including direct and cross-examination, notwithstanding the amount in controversy was between $200 and $300 million and over 100 witnesses had been identified by the parties. Plaintiffs requested several times between April and August 11, 2007, that the State Board and the prosecutorial team disqualify themselves, but the requests were refused.

D. 2007 Petitions for Traditional and Administrative Mandate

In August 2007, Goodrich, PSI, and the remaining plaintiffs filed in the superior court three similar petitions for traditional and administrative mandate, seeking to stay the administrative proceedings and the issuance of a writ of mandate compelling recusal

or disqualification of the State Board and its members. (*Goodrich Corp. v. State Water Resources Control Bd. et al.* (Super. Ct. L.A. County, 2007, No. BS110389); *Emhart Industries, Inc., et al. v. State Water Resources Control Bd. et al.* (Super. Ct. L.A. County, 2007, No. BS110390); *Pyro Spectaculars, Inc. v. State Water Resources Control Bd. et al.* (Super. Ct. L.A. County, 2007, No. BS110391).) Plaintiffs also alleged that the State Board's hearing officer lacked jurisdiction to conduct the hearing on the 2005 CAO under section 13320, subdivision (a), because the full State Board never voted to delegate the authority to the hearing officer to make such a decision, as required by the statute.

On August 13, 2007, the trial court stayed proceedings before the State Board. The stay remained in effect until April 21, 2008, when the trial court lifted it for the limited purpose to permit the State Board to comply with section 13320, subdivision (a).

Meanwhile, the trial court consolidated plaintiffs' three petitions, and in February 2008 plaintiffs filed a consolidated second amended petition (the consolidated 2007 petition). Defendants demurred and moved to strike portions of the consolidated 2007 petition on the grounds of failure to exhaust administrative remedies, prematurity, and lack of ripeness. After a hearing on April 21, 2008, the trial court struck the disqualification allegations from the consolidated 2007 petition on the ground of failure to exhaust administrative remedies and set for trial the remaining allegations pertaining to violation of section 13320.[2] After the attorney for the State Board admitted that the full State Board must vote to delegate to the hearing officer the responsibility to conduct the adjudicative hearing, the trial court lifted the stay as to the underlying administrative

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[2] Section 13320, subdivision (a) provides: "Within 30 days of any action or failure to act by a regional board under subdivision (c) of Section 13225, Article 4 (commencing with Section 13260) of Chapter 4, Chapter 5 (commencing with Section 13300), Chapter 5.5 (commencing with Section 13370), Chapter 5.9 (commencing with Section 13399.25), or Chapter 7 (commencing with Section 13500), any aggrieved person may petition the state board to review that action or failure to act. In case of a failure to act, the 30-day period shall commence upon the refusal of the regional board to act, or 60 days after request has been made to the regional board to act. The state board may, on its own motion, at any time, review the regional board's action or failure to act and also any failure to act under Article 3 (commencing with Section 13240) of Chapter 4."

proceedings for the purpose of permitting the State Board to "address the [section] 13320 issue only."

E. State Board Proceedings After Lifting of Stay

In April 2008, the State Board sent notices of a public hearing scheduled for June 3, 2008, to consider a proposed draft order ratifying the February 5, 2007 decision of its acting executive director to initiate State Board review of the 2005 CAO on its own motion and ordering such review on its own motion. Plaintiffs submitted three motions for the State Board to consider at its June 3, 2008 meeting, including a motion to disqualify the entire State Board, its individual members, and its advisory team.

At its June 3, 2008 meeting, the State Board unanimously adopted Order WQ 2008-0004 (2008 Order) undertaking review of the actions of the Regional Board with respect to the 2005 CAO and ratifying the February 5, 2007 decision of the acting executive director to initiate review. The State Board refused to rule on plaintiffs' disqualification motions as not properly before it, and the 2008 Order provided that "[a]ppropriately filed motions are to be considered during the adjudicative proceeding."

F. 2008 Petition for Traditional and Administrative Mandate

In July 2008, plaintiffs filed a fourth petition for traditional and administrative mandate (*Goodrich Corp. et al. v. State Water Resources Control Bd. et al*. (Super. Ct. L.A. County, 2008, No. BS115673)) (the 2008 petition) seeking to rescind the State Board's 2008 Order and to compel the State Board and its hearing officer to recuse themselves from adjudicating the allegations in the 2005 CAO due to alleged improper ex parte communications. Plaintiffs also moved to consolidate the 2007 consolidated petition with the 2008 petition.

Defendants demurred to the 2008 petition on the ground that plaintiffs failed to exhaust their administrative remedies and that the matter was premature and not ripe for judicial review because there was no final administrative decision.

At the hearing on plaintiffs' motion to consolidate on July 31, 2008, the trial court stated that in order to maintain the existing trial date on the 2007 consolidated petition, which plaintiffs asserted would not be affected by their motion for consolidation, "the

petitioners would have to agree that all of the allegations in the new case [the 2008 petition], except for those concerning the June 2008 order by the State Board, are subject to the same order in the case [with the 2007 consolidated petition]." In response to Goodrich's argument that the State Board's 2008 Order constituted a final order and changed the exhaustion of administrative remedies issue, the trial court stated, "You made this argument before. This same argument. You argued to me that the State Water Board had made its decision with respect to the disqualification; it was a final decision and reviewable. I said, no, it's not ripe until you go through the hearing. I stand by that ruling. That is my ruling. I will not revisit the jurisdictional issue simply because they [the State Board] have purported now to take jurisdiction under the Water Code. [¶] . . . You have got two choices. Either I deny the consolidation . . . or we consolidate and we try the June 8th [State Board] order in the September trial . . . ."

After plaintiffs refused to elect one of the court's choices and the State Board refused to agree to advance the hearing on its demurrer to the 2008 petition, the court stated, "Why don't I sua sponte strike all allegations in the new petition [the 2008 petition] that are governed by collateral estoppel issues and consolidate? [¶] . . . I'm willing to consolidate because I do think it is in the interest of economy for all concerned, but . . . I don't want to face another demurrer on something I have now ruled on twice. [¶] So, all allegations that are identical to the allegations in the [2007 consolidated petition] . . . are stricken as collaterally estopped by the court's [prior] ruling . . . ."

The trial court further explained that there "has to be a final decision on the merits. Why? Because you might — even with a biased hearing officer and a tainted prosecution team you may still win, and I would never have to address these issues, and all of the interests of ripeness and the requirement of finality in the administrative hearing applies. [¶] That would apply to this decision to deny your renewed motions to disqualify in June of 2008; that same analysis would apply. Right or wrong, that's my ruling. We're not going to revisit that. [¶] So it is all stricken. [¶] The cases are consolidated for one issue only, which is: Does the [State] Board have jurisdiction? Either previous to June 2008 or does it have it as a result of its June 2008 decision?"

After defendants answered plaintiffs' 2008 petition, the consolidated petitions came on for hearing on January 15, 2009, when the trial court granted in part and denied in part the 2008 petition. According to the February 19, 2009 judgment, the petition was denied "insofar as it seeks to invalidate the decision on June 3, 2008, of the State Board set forth in Order WQ 2008-0004 to assume jurisdiction, on its own motion, pursuant to Water Code section 13320(a), to review the actions or failure to act of the [Regional Board], pertaining to groundwater contamination in connection with the 160 Acre Site in Rialto, California. On June 3, 2008, the State Board followed the proper procedure to initiate own motion review of the actions or failure to act of the [Regional Board] . . . ."

The judgment granted the 2008 petition "insofar as it seeks to invalidate: [¶] a. all actions to assume jurisdiction, to commence, and taken in State Board Proceeding A-1824 prior to June 3, 2008, including those actions taken by the Executive Director of the State Board and the Hearing Officer, Tam Doduc, . . . other than those actions related to scheduling and noticing Order WQ 2008-0004; all such actions are void *ab initio*; [¶] b. those portions of the decision on June 3, 2008, of the State Board set forth in Order WQ 2008-0004 that attempt to ratify nunc pro tunc [actions of the hearing officer taken prior to June 3, 2008]."

A peremptory writ of mandate was issued against defendants on March 12, 2009. In May 2009, defendants filed a return to the peremptory writ of mandate stating that on May 19, 2009, the State Board adopted Order WQ 2009-0004 to comply with the trial court's judgment.

Plaintiffs appealed from the judgment. The only question presented in their brief is whether the trial court erred "when it held that [plaintiffs] were precluded by the doctrine of exhaustion of administrative remedies from challenging Order WQ 2008-0004 on the ground that members of the State Board had participated in illegal ex parte communications prior to adopting that order?"[3]

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[3] The opening brief concedes that any trial court error as to the 2007 petitions "subsequently became moot when, on February 19, 2009, the Superior Court entered

DISCUSSION

"An appellate court employs a de novo standard of review when determining whether the exhaustion of remedies doctrine applies." (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536.) In reviewing questions of law, we are not bound by the trial court's stated reasons or rationales. (*Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 107 (*Kaiser*).) We review the trial court's ruling, not its rationale. (*Scott v. Common Council* (1996) 44 Cal.App.4th 684, 689.)

The same principles of finality and exhaustion of remedies applies whether relief is sought by a petition for a writ of traditional or administrative mandate. (*California Water Impact Network v. Newhall County Water Dist*. (2008) 161 Cal.App.4th 1464, 1485 (*Newhall County*).) The exhaustion doctrine applies even where the administrative remedy is couched in permissive statutory language. (*Id.* at p. 1489.)

"It is now firmly established in this state that a litigant must invoke and exhaust an administrative remedy provided by statute before he may resort to the courts. . . . [T]here is no substantial difference, insofar as the necessity for resort to administrative review is concerned, between an erroneous order and one which, it is claimed, is being executed in violation of statutory authority." (*United States v. Superior Court* (1941) 19 Cal.2d 189, 194.) "[I]t lies within the power of the administrative agency to determine in the first instance, and before judicial relief may be obtained, whether a given controversy falls within the statutory grant of jurisdiction. [Citations.] And even where the statute sought to be applied and enforced by the administrative agency is challenged upon constitutional grounds, completion of the administrative remedy has been held to be a prerequisite to equitable relief." (*Id*. at p. 195.)

"The general rule of exhaustion 'forbids a judicial action when administrative remedies have not been exhausted, even as to constitutional challenges . . . .' [Citation.]

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judgment voiding ab initio all actions taken by Chair Doduc, including her self-appointment as the Hearing Officer and the commencement of State Board Proceeding A-1824."

However, '. . . if the remedy provided does not itself square with the requirements of due process the exhaustion doctrine has no application.' [Citation.] Due process, though, 'does not require any particular form of notice or method of procedure. If the [administrative remedy] provides for reasonable notice and a reasonable opportunity to be heard, that is all that is required. [Citations.]' [Citation.]" (*Bockover v. Perko* (1994) 28 Cal.App.4th 479, 486 (*Bockover*).)

"'A decision attains the requisite administrative finality when the agency has exhausted its jurisdiction and possesses "no further power to reconsider or rehear the claim."' [Citation.] Finality may be defined either expressly in the statutes governing the administrative process or it may be determined from the framework in the statutory scheme. [Citation.] Until a public agency makes a 'final' decision, the matter is not ripe for judicial review." (*Newhall County*, *supra*, 161 Cal.App.4th at p. 1485.) "The doctrine of exhaustion of administrative remedies is a closely related concept to finality. The policy reasons behind the two doctrines are similar. The exhaustion doctrine precludes review of an intermediate or interlocutory action of an administrative agency. [Citation.] A party must proceed through the full administrative process 'to a final decision on the merits.' [Citation.] Each step in the administrative proceeding cannot be reviewed separately, any more than each ruling in the trial of a civil action may be separately reviewed by a separate appeal. Administrative proceedings should be completed before the issuance of a judicial writ. The rule is not a matter of discretion; compliance is a jurisdictional prerequisite to judicial review." (*Newhall County*, at p. 1489.)

"The principal purposes of exhaustion requirements include avoidance of premature interruption of administrative processes; allowing an agency to develop the necessary factual background of the case; letting the agency apply its expertise and exercise its statutory discretion; administrative efficiency and judicial economy." (*Newhall County*, *supra*, 161 Cal.App.4th at p. 1489.)

"The doctrine requiring exhaustion of administrative remedies is subject to exceptions. [Citation.]" (*Coachella Valley Mosquito & Vector Control Dist. v.*

California Public Employment Relations Bd. (2005) 35 Cal.4th 1072, 1080 (*Coachella Valley*).) Under one exception, "exhaustion of administrative remedies may be excused when a party claims that 'the agency lacks authority, statutory or otherwise, to resolve the underlying dispute between the parties.' [Citations.]" (*Id*. at pp. 1081–1082.) An exception related to the issue of agency jurisdiction is "where important questions of constitutional law or public policy governing agency authority are tendered." (*Public Employment Relations Bd. v. Superior Court* (1993) 13 Cal.App.4th 1816, 1827 [exception found not to apply; rather, exhaustion of administrative remedies doctrine was used to support agency's application to trial court enforcing subpoenas for witnesses to appear at an agency hearing and judicial deference was required to permit agency to resolve constitutional issues in the first instance].)

"In deciding whether to entertain a claim that an agency lacks jurisdiction before the agency proceedings have run their course, a court considers three factors: the injury or burden that exhaustion will impose, the strength of the legal argument that the agency lacks jurisdiction, and the extent to which administrative expertise may aid in resolving the jurisdictional issue." (*Coachella Valley*, *supra*, 35 Cal.4th at p. 1082.)

Under the foregoing authorities, we conclude that the trial court properly declined to review the allegations of the 2008 petition pertaining to the recusal or disqualification of defendants because plaintiffs failed to exhaust their administrative remedies.

The State Board's 2008 Order expressly provided that plaintiffs' "[a]ppropriately filed motions are to be considered during the adjudicative proceeding." Thus, the record shows that the State Board intends to address plaintiffs' motions seeking recusal and disqualification during the adjudicative proceeding. Plaintiffs do not establish that this remedy does not comport with principles of due process under *Bockover*, *supra*, 28 Cal.App.4th at page 486, requiring that the administrative remedy provide reasonable notice and an opportunity to be heard.

And it has been held that a doctor whose privileges were suspended and employment terminated by a hospital must exhaust administrative remedies even when there is a claim that the administrative decision makers are biased and had a substantial

financial interest in the outcome of the administrative proceeding: "The question here, however, is whether a physician can avoid the peer review process and proceed with an immediate action in the superior court for damages and other relief based on the claim that the administrative process does not afford her an unbiased decision maker, when the process itself includes a method for challenging the decision maker which the physician has not exhausted. We conclude the answer to that question is no." (*Kaiser*, *supra*, 128 Cal.App.4th at p. 108.)

Plaintiffs also fail to show that they come within the exception to the exhaustion doctrine based on the lack of agency authority or jurisdiction because they have not established the three factors under *Coachella Valley*: (1) the injury or burden of exhaustion, (2) the strength of the argument that the agency lacks jurisdiction, and (3) the extent to which administrative expertise may aid in resolving the jurisdictional issue. Plaintiffs do not show that they would suffer any unusual or irreparable injury if they were required to obtain an administrative ruling on their request for disqualification of the State Board. There is no injury or burden within the meaning of *Coachella Valley* merely because additional time and effort would be consumed by pursuing the matter before the administrative agency. (*Coachella Valley*, *supra*, 35 Cal.4th at p. 1082.)

Nor is there a significant public interest in obtaining a definitive judicial resolution of the question of disqualification before the State Board entertains the issue. The law with respect to disqualification is set out in *Morongo Band*. Thus, the question of disqualification here presents predominantly a factual analysis of whether the State Board members engaged in the types of ex parte communications which would disqualify them under the principles in *Morongo Band*. At this point, several years have elapsed after the conduct of which plaintiffs complain, and our record does not indicate whether the State Board is comprised of the same individuals of whom plaintiffs complain and whether the adjudicatory proceeding will be conducted by those individuals. Similarly, because the matter entails a detailed factual analysis and the factual record has not been fully developed, judicial intervention at this stage will deny us the benefit of the State Board's

administrative expertise. For all of the foregoing reasons, plaintiffs have not persuaded us that this matter falls within any exception to the exhaustion of remedies doctrine.

Assuming the trial court erroneously invoked the doctrine of collateral estoppel in making its ruling, it is of no consequence because we review the ruling and not the trial court's rationale. The record shows that the trial court and all of the parties were aware that the ground for the trial court's refusal to address the disqualification allegations in the 2008 petition was plaintiffs' failure to exhaust administrative remedies. Plaintiffs argued the exhaustion doctrine in the trial court, and in their briefs on appeal plaintiffs do not assert that the trial court's reference to the collateral estoppel doctrine caused them any prejudice.

DISPOSITION

The February 19, 2009 judgment is affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.