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NO. SCWC-30469

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

RICHARD BLAISDELL, Petitioner/Plaintiff-Appellant,

vs.

DEPARTMENT OF PUBLIC SAFETY, Respondent/Defendant-Appellee.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 30469; CIV. NO. 04-1-1455)

DISSENT BY ACOBA, J.

I would grant the application for certiorari filed by Petitioner/Defendant-Appellant Richard Blaisdell (Petitioner) on November 10, 2011.

I.

Petitioner is a prison inmate who has a job in prison and earns a salary. Pursuant to the policies of the Department of Public Safety (Respondent), Petitioner's earnings are maintained in inmate accounts. Petitioner claims, inter alia,

that Respondent has unconstitutionally deprived him of interest due on his inmate accounts.

In Blaisdell v. Dep't of Pub. Safety, 119 Hawai'i 275, 280, 196 P.3d 277, 282 (2008) (Blaisdell II), this court reviewed Petitioner's claim in light of Respondent's Corrections Policy (COR). At the time, it was established that Respondent divided inmates' earnings into "spendable" and "restricted" accounts. See 119 Hawaii at 283 n.14, 196 P.3d at 285 n.14. This court held:

> Respondent's COR.14.02 § 4.0.11 does require that interest accrued on the restricted, i.e., mandated, savings account, must be paid to Petitioner. In this regard, the ICA's determination that "[Respondent] produced no admissible evidence that interest was in fact paid or that interest was not required to be paid on [Petitioner's] inmate accounts[,]" Blaisdell, 2008 Haw. App. LEXIS 392, 2008 WL 2815552, at *3 (emphasis added), appears partially wrong, in light of Respondent's COR.14.02 § 4.0.11. However, Respondent did not apply for certiorari from the ICA's determination. In any event, whatever dispute there was as to what interest was actually paid, if any, and on which accounts, for the reasons stated above, interest due must be awarded on Petitioner's accounts and may be determined on remand.

Id. at 285-86, 196 P.3d at 287-88. (Emphases added.)
This court also held that it was improper for Respondent to divide Petitioner's inmate account into a "restricted" account and a "spendable" account because there was only statutory authorization for the creation of "an individual trust account." Blaisdell II, 119 Hawai'i at 284-85, 196 P.3d at 284-85.

The case was remanded to the circuit court of the first circuit (the court) with instructions (1) to vacate the August 29, 2007 order granting Respondent's cross-motion for summary judgment and denying Petitioner's motion for summary judgment and the August 2007 judgment thereon; (2) to enter judgment declaring

the "restricted" account violative of HRS § 353-20 and to order such relief to Petitioner as may be appropriate as a result of such declaration; and (3) to order interest to the extent due but not yet credited, to be paid on Petitioner's accounts.[1] Id.

II.

Following remand, the court entered an order granting Petitioner's Motion for Summary Judgment (Order). The court determined that (1) Respondent's establishment of a "restricted account" violated HRS § 353-20, which authorized only the creation of "'an individual trust account[,]'" (emphasis in original); and (2) policies and procedures of Respondent permitting the non-payment of interest to inmates for funds held in the inmates' "spendable account" were unlawful inasmuch as Petitioner "has a constitutionally protected right to accrued interest" under his Fifth Amendment right to just compensation for the "taking" of his interest and a Fourteenth Amendment "due process right prohibiting prison officials from confiscating accrued net interest without statutory authorization and process." On May 22, 2009, the court entered judgment for Petitioner and ordered Respondent to (1) implement policies and procedures "which comply with [HRS §] 353-20" and (2) "pay [Petitioner] any interest, if any is owing, to the extent due but not yet credited to [Petitioner's] accounts."

[1] Petitioner also asserted a claim that Respondent's medical co-payment deductions were unlawful. That claim was resolved against Petitioner by the court and is not addressed here.

On May 26, 2009, Act 75 became effective and amended HRS § 353-20[2] to provide that (1) "[a]ll sums collected under this chapter and any other authorized sources shall be deposited by the department into one or more accounts with one or more financial institutions opened by the department for the specific purpose of maintaining committed persons' funds[;]" (2) "[a]ccounts maintained by the department for committed persons shall not bear interest[;]" and (3) "[n]o interest of any kind shall be paid to a committed person on any account maintained by the department for the committed person." Act 75 provided that it "shall apply to all committed persons' accounts established before and after the effective date of [Act 75]."

On June 22, 2009, Respondent filed a Motion to Vacate, inter alia, the Order. Therein, Respondent argued that the Order must be vacated because in light of the legislature's recent amendment to the law regarding inmate trust accounts (1) some of the issues addressed by the court's Order are moot; and (2) Petitioner's claim to accrued interest "necessarily fails." In its Motion to Vacate, Respondent argued that the Order was moot insofar as it required Respondent to implement policies and procedures that comply with HRS § 353-20, since "[Respondent's] existing policies and procedures regarding the establishment of a 'restricted account' are fully consistent with HRS § 353-20[,]" as amended by the legislature.

[2] Prior to the enactment of Act 75, HRS § 353-20 provided that "[a]ll sums collected under this chapter and any other authorized sources shall be deposited by the department into an individual trust account to the credit of the committed person."

Respondent next argued that this court remanded Petitioner's "interest" claim for a determination of what "just compensation, if any, is due to [Petitioner]." But, according to Respondent, Petitioner's "request for accrued interest necessarily fail[ed] because his funds have not accrued any interest." Respondent explained that Petitioner has not accrued interest because throughout the course of the entire case, Petitioner has been incarcerated by Corrections Corporation of America (CCA) and any funds of Petitioner have been held by CCA in non-interest bearing accounts.

Attached in support of its Motion to Vacate were the declarations of Shari Kimoto (Kimoto) and Brian Hammonds (Hammonds). In her declaration, Kimoto declared that (1) she was employed as the Mainland Branch Administrator of the Department of Public Safety, State of Hawai‘i (PSD); (2) she has the overall responsibility of ensuring that private prison vendors housing Hawai‘i inmates comply with their contracts with the State of Hawai‘i, including all financial requirements thereunder; (3) CCA is a private prison vendor housing Hawai‘i inmates out-of-state; (4) CCA maintains a single inmate trust account into which all Hawai‘i inmate funds are deposited; (5) the account maintained by CCA for Hawai‘i inmates is a non-interest bearing account; (6) Petitioner has been an inmate of CCA since July 29, 1998 until present; and (7) thus, Petitioner has not accrued any interest because all of his funds were held in non-interest bearing accounts. (Emphasis added.)

In Hammond's declaration, he averred that (1) he is the Assistant Controller for CCA and has the responsibility for the Inmate Trust Department; (2) the funds of all Hawai'i inmates incarcerated at CCA are held in a single pooled account; (3) as is the case for most inmate trust accounts, the account for Hawai'i inmates' funds is and has always been non-interest bearing; (4) Petitioner is and has been incarcerated at CCA, (5) throughout his incarceration at CCA, Petitioner's funds have been deposited in the non-interest bearing account; and (6) Petitioner's funds have not accrued any interest while his funds have been held by CCA. (Emphasis added.)

On March 11, 2010, the court entered an order granting Respondent's Motion to Vacate. The court concluded that "pursuant to [HRS] § 353-20, Respondent "is able to maintain one or more accounts for the specific purpose of maintaining committed person's funds" and "accounts maintained by [Respondent] for committed persons shall not bear interest."

III.

Petitioner appealed to the ICA. In an SDO, the ICA affirmed. Blaisdell v. Dep't of Pub. Safety, 2011 WL 3805765 (App. Aug. 29, 2011).

IV.

The relevant questions presented by Petitioner are:

> 1. Can the Legislature enact a new law, (Act 75), that is unconstitutional and ambiguous on its face? . . . .
>
> 3. Can the Legislature enact an unconstitutional law that says . . . accounts maintained by inmates "shall not bear interest" when the U.S. Supreme Court, Ninth Circuit Court of Appeals and this Court has ruled that inmate accounts that do not bear interest, violate the U.S. Constitution and the Hawai'i Constitution?

> 4. Can the Legislature enact an ex post facto law that applies before the effective date of the act, as to no interest being paid on inmate accounts, when this court has previously set a precedent ruling otherwise? . . . .
>
> 8. Can the new "Act 75" survive Judicial Scrutiny of this High Court when it is full of unconstitutional, ambiguous, and contradictory requirements?

V.

Petitioner argues, inter alia, that (1) he has a right to accrued interest dually protected by his Fifth Amendment right to just compensation for the taking of his interest and by his Fourteenth Amendment due process right which prohibits officials from confiscating his interest; and (2) Act 75 is unconstitutional on its face because it states that "accounts maintained by the Department for Committed persons shall not bear interest [and that] no interest of any kind shall be paid to a committed person." Contrary to any opposing contention, Petitioner claims that "it is unconstitutional not to pay interest on inmates' accounts." Petitioner also cited Schneider v. California, 151 F.3d 1194, 1199-1200 (9th Cir. 1998). In that case, the Ninth Circuit held that, under the Fifth and Fourteenth Amendment to the United States Constitution, inmates were entitled interest earned on their inmate accounts. Id. at 1201. Schneider also noted the possibility that under the "constructive interest" doctrine, interest may be imputed constructively in the event that no interest actually accrued on inmates' accounts. Id. at 1197, n.2.

VI.

This court should accept certiorari in this case for two reasons. First, it would be unconstitutional to apply Act 75

retroactively to Petitioner's claim for any interest earned or that should have been earned on his inmate account before the passage of Act 75. Second, there is a seeming unresolved dispute over whether Petitioner's inmate accounts earned interest or were entitled to earn interest.

VII.

As set forth supra, after remand of Blaisdell II, the court ruled in favor of Petitioner with regard to Petitioner's claim that he was entitled to interest on his inmate account. Respondent subsequently filed a Motion to Vacate, and the court ruled for Respondent, reasoning that Petitioner was no longer entitled to interest on his inmate account because Act 75 provides that "[n]o interest of any kind shall be paid to a committed person on any account maintained by the department for the committed person," HRS § 353-20. Petitioner contends that the court's retroactive application of the language of Act 75 to Petitioner's claim for interest would violate Petitioner's Fifth and Fourteenth Amendment rights, or article I, section 5, and article I, section 14 of the Hawai‘i constitution, as to any interest accrued or that should have accrued on his inmate account.

In Blaisdell II, this court held that Petitioner's right to accrued interest was protected via (1) his Fifth Amendment right to just compensation for the "taking" of his interest, and (2) his Fourteenth Amendment due process right, which prohibits prison officials from confiscating accrued net interest without statutory authorization and process. 119 Haw.

at 285, 196 P.3d at 288. Moreover, the Corrections Policy (COR) provided that interest could be earned on an individual account, if chosen at the inmate's option. See infra.

As a constitutional matter, thus, Petitioner is entitled to any interest accrued or that should have accrued on his inmate accounts. Blaisdell II, 119 Haw. at 285, 196 P.3d at 288. The court construed Act 75 to prohibit the award of any interest that accrued on Petitioner's accounts. Plainly, the court's construction of Act 75 would render Act 75 unconstitutional in violation of the Fifth and Fourteenth Amendments, or article I, section 5, and article I, section 14 of the Hawai‘i constitution, inasmuch as Act 75 would prohibit awarding Petitioner any interest earned or that should have been earned on an inmate account. See Blaisdell II, 119 Haw. at 285, 196 P.3d at 288. Thus, the court erred in concluding that the language in Act 75 prohibiting the award of interest to Petitioner defeated Petitioner's constitutional claim to interest earned or that should have been earned on his inmate account.

VIII.

Second, the petition should be granted because it is unclear whether Petitioner's inmate accounts accrued or should have accrued interest. It is significant that the affidavits of Kimoto and Hammond do not refer to the COR or application of the COR that were the subject and basis of Blaisdell II. At the time of Blaisdell II, Respondent's COR 02.12 § 3.0.2 divided the funds of an inmate into two accounts, a spendable account and a restricted account. Blaisdell II, 119 Hawai‘i at 277 n.3, 196

P.3d at 279 n.3. COR 02.12 § 4.0.1(b) provided that "'[i]nmates shall be notified of the option they may have of either a joint account, in which they receive no interest but have unlimited access, or an individual account in which they receive interest but access may be limited." See id. at 279, 196 P.3d at 281 (emphases added). In Blaisdell II, Respondent "took the position that [Respondent's] policy . . . places some of [Petitioner's] earnings into a restricted savings account." 119 Hawai'i at 284, 196 P.3d 286 (internal quotation marks omitted). Under Respondent's policies, it would appear that the restricted account should bear interest. See COR 02.12 § 4.0.1(b) ("inmates shall be notified of the option they may have of . . . an individual account in which they receive interest but access may be limited"). Further, pursuant to COR. 14.02 § 4.0.11, "money in inmates' restricted accounts, including any interest accrued[,] shall be paid in total to the inmate upon parole or discharge from the Department of Public Safety." See Blaisdell II, 119 Hawai'i at 279, 196 P.3d at 281 (internal quotation marks omitted) (emphasis in original).

In light of the COR, Blaisdell II proceeded under the premise that interest could accrue in inmates' accounts. See 119 Hawai'i at 283-84, 196 P.3d at 285-86 (explaining that "Respondent's COR 14.02 § 4.0.11 does require that interest accrued on the restricted, i.e., mandated, savings account, must be paid to petitioner"). However, on remand, and for the first time in its Motion to Vacate, Respondent contended that Petitioner's funds were held in a solitary non-interest bearing

account with other inmates. Respondent's newly asserted position via affidavits states that Petitioner had no funds in an account that could accrue interest, apparently despite the option expressly afforded inmates as set forth in the COR. Instead, according to Respondent there is and apparently has been only a single trust fund for all inmates that does not accrue any interest since at least 1998.

Respondent's new evidence raises fundamental questions about the accuracy of the matters presented in Blaisdell II to this court and the entirety of the record before the court. Respondent presented the COR in Blaisdell II indicating that inmates could have two accounts, but now claims that all along there has been but a single account for all inmates (rather than individual accounts) with a system of sub-accounting. Respondent's affidavits indicate that only a single account for inmates existed approximately five to six years before the case in Blaisdell II was filed. Yet, apparently these pre-existing facts were not presented to the court or this court in Blaisdell II, even though the nature of the accounts maintained for inmates was central to that case.

Respondent's new representations also raise questions regarding the application of the COR as it affects inmates. There is an obvious conflict between the COR as set forth in Blaisdell II and the affidavits submitted by Respondent concerning inmate accounts. As noted, COR 02.12 § 3.0.2 provides that, "the [inmate's] trust account shall consist of two portions or accounts, a spendable account and a restricted account." COR

02.12 § 4.0.1(b) provides that "'[i]nmates shall be notified of the option they may have" of one of two accounts, one of which bears interest. COR 02.12 § 4.0.1(b) would not be necessary if inmates were not given the option of having an interest bearing account, as Respondent now claims. Nor would it make sense to mandate that inmates be notified of two account options, see COR 02.12 § 4.0.1(b) ("Inmates shall be notified of the option . . . .") (emphasis added), if in reality there is only one account option. A reading of COR 02.12 § 4.0.1(b) that allows Respondent to provide only a single, non-interest bearing account would effectively nullify COR 02.12 § 4.0.1(b).

More fundamentally, there is a conflict in that, in Blaisdell II, Respondent admitted to the existence of restricted accounts,[3] which COR 02.12 § 4.0.1(b) suggests should bear interest, whereas Respondent now claims that there is a single non-interest bearing account with a system of sub-accounting. In Blasidell II, "Respondent admitted . . . [that] it established spendable and restricted accounts for inmates." See 119 Hawaii at 283 n.14, 196 P.3d at 285 n.14. Under COR 02.12 § 4.0.1(b) it would appear that restricted accounts should bear interest.[4] This construction is buttressed by COR 14.02 § 4.0.11, which provides that "money in inmates' restricted accounts,' including

[3] "Respondent admitted that pursuant to COR 02.12 § 3.0.2 it established two accounts for committed persons, 'a spendable account and a restricted account.'" Blaisdell II, 119 Hawai'i at 279, 196 P.3d at 281.

[4] Under the COR, a "spendable" account can be accessed by the inmate for any reason, but does not bear interest. See COR 02.12 § 4.0.1(b). A "restricted" account does not permit unfettered access, but should earn interest. See id. If, as Respondent now claims, the "restricted" account does not bear interest, there would be no incentive for inmates to choose it.

any interest accrued, shall be paid . . . to the inmate upon parole or discharge." Respondent's new claim that inmate accounts do not earn interest appears to be inconsistent with the COR.

On appeal from an order granting summary judgment, we will review the entire record to see whether any issues of material fact are present. Costa v. Able Distributors, Inc., 3 Haw. App. 486, 488, 653 P.2d 101, 104 (App. 1982) (Ottensmeyer v. Baskin, 2 Haw. App. 86, 625 P.2d 1069 (1981)). Moreover, a memorandum or brief in opposition to a motion for summary judgment and evidence presented in support thereof, which makes specific references to discrepancies in the movant's affidavit is sufficient to raise a genuine issue of material fact. Id.

Here, in his brief in reply to the declarations of Kimoto and Hammonds, Petitioner rebutted the critical facts raised therein by arguing that Kimoto's declarations "is full of lies and misleading information and omissions, sworn as being the truth." He stated that prior to incarceration at CCA, he accrued "thousands of dollars" and money paid to him did not include interest accrued. He averred that Kimoto intentionally left out information regarding interest accrued between 1990 and 1994, prior to his incarceration at CCA, "to try to mislead [the] court into believing that [he] never earned any money" during that period upon which he would have accrued interest. Inasmuch as Petitioner was proceeding pro se throughout the course of this action, his filings may be liberally construed as challenging the declarations of Kimoto and Hammonds. Cf. Dupree v. Hiraga, 121

Hawai‘i 297, 314, 219 P.3d 1084, 1101) (2009) ("Pleadings prepared by pro se litigants should be interpreted liberally.")

Furthermore, Respondent's timing in bringing forth its new evidence raises obvious questions about the reliance that can be placed on this record. There seems to be no apparent justification for Respondent's failure to submit the facts averred in the affidavits at the time of Blaisdell II. Those facts were at the heart of the issues presented in Blaisdell II given that the affidavits purport that a solitary non-interest bearing account for all inmates was in existence at least five to six years before the complaint in this case was filed in August 10, 2004. Yet Respondent inexplicably failed to assert such matters until June 22, 2009, after the court entered judgment in Petitioner's favor and some five years after Petitioner's complaint was filed. Rather, Respondent's affidavits go beyond providing mere details regarding accounting and aver new facts that appear to be inconsistent with presentation to this court in Blaisdell II[5] and that also appear contrary to the policies as set forth in the COR that were proffered to this court in Blaisdell II.

On the record as a whole, there is a material unresolved dispute as to whether Petitioner's accounts earned or should have earned interest. Given that there are apparent inconsistencies, as set forth supra, between Respondent's new affidavits and both the facts as described in Blaisdell II and

[5] "Respondent . . . conceded that pursuant to its policy, it 'place[d] some of [Petitioner's] earnings into a restricted savings account[.]'" Blaisdell II, 119 Hawai‘i at 279, 196 P.3d at 281.

the COR, a fair, credible, and cautious view of the record requires a trial be held.

IX.

The foregoing account is not complete without an understanding of the history of this case as presented by Petitioner, an unrepresented prisoner litigant. Originally, Petitioner's request to proceed in forma pauperis was denied, a ruling this court reversed in Blaisdell v. Dep't of Pub. Safety, 113 Hawai'i 315, 151 P.3d 796 (2007) (Blaisdell I) (allowing Petitioner to proceed in forma pauperis because the cost of the suit would be excessively burdensome so as to cause hardship).

Following proceedings in which the court granted Respondent's motion for summary judgment on August 29, 2007, Petitioner's claims were addressed by the ICA on July 18, 2009, and by this court in Blaisdell II on December 2, 2008.

Subsequently, on May 12, 2009 this court filed an order regarding a writ of mandamus filed by Petitioner. See 2009 Haw. LEXIS 111, at *1 (May 12, 2009). The order explained that Civil No. 04-1-1455 (Blaisdell II) "was remanded to the circuit court on December 2, 2008 with instructions to enter a declaratory judgment and certain orders, but such judgment and orders have not been entered to date." "Petitioner moved the circuit court on February 9, 2009 to expeditiously dispose of Civil No. 04-1-1455, but the circuit court further delayed disposition by reassigning the case on February 11, 2009 and again reassigning the case sometime after March 27, 2009." Id. at *1. The order concluded that "[a]ny further delay in disposing of Civil No.

04-1-1455 would be contrary to the circuit court's duty to promptly and efficiently dispose of the case." Id. at *1-2 (citing Kema v. Gaddis, 91 Hawai‘i 200, 204, 982 P.2d 334, 338 (1999)).

In light of the foregoing, this court granted Petitioner's writ of mandamus and instructed the court, by June 1, 2009, to "(1) enter a judgment in Civil No. 04-1-1455 declaring [Petitioner's] 'restricted' account violative of HRS § 353-20 and order such relief to [Petitioner] as may be appropriate as a result of such declaration, and (2) order interest to the extent due but not yet credited, to be paid on [Petitioner's] accounts." Judgment on remand was entered on May 22, 2009, four days before May 26, 2009, the effective date of Act 75. Subsequently, on June 22, 2009, Respondent introduced matter not previously presented, resulting in this petition for certiorari, as described supra.

X.

Finally, contrary to Respondent's contention that its affidavits demonstrate that Petitioner lacks standing, Petitioner continues to have standing to pursue his claim for interest. This court employs a three-part test to determine whether there is injury in fact: (1) has the plaintiff suffered an actual or threatened injury; (2) is the injury fairly traceable to the defendant's actions; and (3) would a favorable decision likely provide relief for plaintiff's injury. Mottl v. Miyahira, 95 Hawai‘i 381, 389, 23 P.3d 716, 724 (2001).

Petitioner is injured by the deprivation of any interest to which he is entitled.[6] See Blaisdell II, 119 Hawai‘i at 286, 196 P.3d at 288 (explaining that "interest due must be awarded on Petitioner's accounts"). Petitioner's injury is fairly traceable to Respondent's actions in denying him interest. Lastly, a favorable decision would provide relief to Petitioner because Respondent would be required to pay Petitioner any interest he is due. Petitioner thus has standing to pursue his claim that he is entitled to interest.

XI.

Consequently, Petitioner's claim was legally cognizable. In light of the above, I would accept the petition for certiorari.

/s/ Simeon R. Acoba, Jr.

[6] As explained, supra, there is still an unresolved question as to whether Petitioner's inmate accounts accrued or should have accrued interest, as it appears that the COR provides that restricted accounts should earn interest.