S215300

#16
17

Supreme Court Case Number S_____ Court of Appeal Fourth District Case No. G047850
Consolidated with G047691

In the Supreme Court of the State of California

ORANGE COUNTY FIRE AUTHORITY,

Petitioner,

vs.

STEVE POOLE, ORANGE COUNTY PROFESSIONAL FIREFIGHTERS' ASSOCIATION,

Respondents.

REVIEW SOUGHT OF THE DECISION RENDERED BY THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE

PETITION FOR REVIEW

HAIGHT BROWN & BONESTEEL LLP
Jules S. Zeman (Bar No. 106693),
Kevin M. Osterberg (Bar No. 138760), and
Blythe Golay (Bar No. 285389)
555 South Flower Street, Forty-Fifth Floor
Los Angeles, California 90071
Telephone: (213) 542-8000
Facsimile: (213) 542-8100
e-mail: jzeman@hbblaw.com

WOODRUFF, SPRADLIN & SMART
Barbara Raileanu (Bar No. 206197)
555 Anton Boulevard, Suite 1200
Costa Mesa, California 92626
Telephone: (714) 558-7000
Facsimile: (714) 835-7787
e-mail: BRaileanu@wss-law.com

Attorneys for Petitioner
ORANGE COUNTY FIRE AUTHORITY

TOPICAL INDEX

Page

TABLE OF AUTHORITIES CITED

Page(s)

Cases

Page(s)

Statutes

In the Supreme Court of the State of California

ORANGE COUNTY FIRE AUTHORITY,

Petitioner,

vs.

STEVE POOLE, ORANGE COUNTY PROFESSIONAL FIREFIGHTERS' ASSOCIATION,

Respondents.

PETITION FOR REVIEW

To the Honorable Tani G. Cantil-Sakauye, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Defendant Orange County Fire Authority ("Petitioner" or "OCFA") respectfully seeks review of the decision filed on November 4, 2013 by the Fourth Appellate District, Division Three, which reversed a judgment in favor of Petitioner following a bench trial.

ISSUES PRESENTED

1. Does application of the "substantial evidence" standard of review and the corollary doctrines of "conflicting evidence" and "conflicting inference" prevent an appellate court from reversing a trial court's judgment in a bench trial based upon factual findings contrary to those

made by the trial court, where the Appellants failed to challenge the trial court's findings in their appeal and the appellate court failed to undertake a substantial evidence review of the trial record?

2. Does the Firefighters' Bill of Rights Act, *Government Code* Sections 3250-3262 (Stats. 2007 Ch. 59, AB 220) ("FFBOR"), Which Requires That Adverse Comments About a Firefighter Be Read and Signed By the Firefighter Prior to Being Entered Into a Personnel File or Other File Used for Personnel Purposes by the Employer, Apply Where the Trier of Fact Found That the Notes Containing Adverse Comments: (1) Were Akin to "Post-Its" Merely to Refresh the Memory of the Authoring Captain at the Later Time of Official Review Preparation; (2) Were Not Entered Into Any Official Personnel File or Any Other File Required to Be Created or Maintained in the Ordinary Course of Business by the Fire Authority; (3) Were Not Shown to the Employer Fire Authority or Kept in Any Location Where It Could Have Access; (4) Could Not Become Part of a File That Could Generate an Employment Consequence, Unless the Notes Were Subsequently Entered Into an Official Personnel File After Compliance With the FFBOR; and, (5) Had Not Actually Caused Any Adverse Employment Consequence to the Firefighter?

WHY REVIEW SHOULD BE GRANTED

Review of this decision should be granted for a number of important reasons. First, the decision should be reviewed in furtherance of this Court's role as the "institutional overseer" of the Superior Courts and Courts of Appeal. Application of the substantial evidence standard of review for a trial court's factual findings involves one of the most frequently applied and most important standards of appellate review. Its

correct application is fundamental to the administration of justice by California courts. The failure to correctly apply it and its corollary doctrines, the conflicting evidence and conflicting inference rules, ignores the recognition of the different roles of trial and appellate courts and subjects affected parties to serious deprivation of due process.

Review of this decision should also be granted to secure uniformity of decision and to settle an important question of law dealing with the interpretation and application of a key provision of the Firefighter's Bill of Rights, *Government Code*, §§ 3250-3262 (Stats. 2007 Ch. 59, AB 220). Specifically, the question is whether informal daily logs of firefighters' performance, maintained by a Fire Captain for the purpose of refreshing his recollection at the time that he might later prepare an official personnel review, are subject to the "read, sign and comment" requirements for adverse comments entered into the employer's personnel file or any other file used for personnel purposes by the employer. Because of the similarities of legislation applicable to other public agencies and institutions, the effect of the court of appeals' decision will be very widespread and may likely affect employment relationships arising in the provision of police, education and other public services by public agencies.

The immediate effect of the decision would be to open the floodgates of litigation by any and every peace officer, firefighter, and educational employee who is subject to identical or similar legislation, with the tremendous cost in time and attorneys fees and costs to public agencies and institutions. It may also bring an end to the helpful use of informal note-taking by conscientious supervisors of public employees, who wish to have the tools to prepare accurate and fair formal personnel reviews for all

of their employees, while avoiding the time and energy of facing grievance procedures by employees for each and every informal adverse comment that may be noted between the time of an observed action and the preparation of formal reviews that are to be entered into official employer files.[1]

The rule created by the court of appeal also creates logically inconsistent and absurd results in practice — under the new decision, a draft of a performance evaluation or of a disciplinary notice will have to be shown to firefighters, if they contain adverse comments, even though they are never to be entered into an official file and will be destroyed once the final evaluation is completed. Further, now verbal conversations between Fire Captains and Battalion Chiefs about the performance of their fire personnel may be subject to full disclosure to the firefighters, if either of them had merely jotted down a written note prior to the conversation taking place.

The opinion also provides for unnecessary and illogical different results for situations where some Fire Captains have perfect recall and need no notes from which to prepare performance evaluations, while others have

---

[1] Required disclosures of inchoate comments about a firefighter's performance, never entered into an official personnel file as part of a performance review, lends itself to the reality that there may be a grievance filed by the firefighter as to every single comment written, which would greatly impede the provision of fire protection services by the fire agencies — this itself is not a remote consequence as shown by Poole's penchant to file a grievance as to virtually any interaction with his supervisors during the entire course of his employment.

lesser memories and do need to use notes. The purpose of the Act, to provide a firefighter the right to respond to a performance evaluation entered into his or her personnel file, is not frustrated whether a Fire Captain has prepared it using informal notes or purely from memory. In both cases, the firefighter has a chance to review and refute the only entry, the formal one, which will be accessible to his or her employer, the fire agency.

Review should be undertaken by this Court to clearly establish that supervisors of public employees may still employ informal note taking in the performance of their duties, without having to go through laborious and time consuming process at every turn, i.e., to establish that only adverse comments entered into official files that can used by employer agencies to have an actual effect on the employment status of public employees must be shown to them for review and comment.

SUMMARY OF FACTUAL AND PROCEDURAL POSTURE

1. Fire Captain Culp's Daily Log Notes Maintained at Station 46.

Captain Culp was Poole's direct supervisor. He created a document, which he referred to as a "Daily Log," for each employee he supervised, wherein he recorded factual events from the work shifts he supervised. His intent was to provide a reference source solely for himself, so that he could later prepare accurate performance evaluations. He stored the Daily Log on a removable flash drive and maintained a hard copy in a separate folder in his drawer. They were never placed in an official OCFA department file. [CT 1017–1018.]

2. Official OCFA Personnel Files Maintained at OCFA Headquarters.

Official OCFA personnel files are maintained by OCFA at its headquarters in Irvine, California. No official personnel files are maintained at individual fire stations. The official personnel files are the only files used by the employer for promotional and disciplinary purposes. [CT 1013.]

3. Poole Receives an Official "Sub-Standard" Performance Evaluation.

Captain Culp completed a performance evaluation for Poole for the rating period of September 28, 2008 through September 28, 2009. Poole earned an overall rating of "sub-standard" for that time period. He was given the opportunity to review and sign the performance evaluation, before it was entered into his personnel file. Poole filed a grievance as to this evaluation. [CT 1018–1019.]

4. Poole's Subsequent Official "Sub-Standard" Performance Evaluation.

On or around May 5, 2010, Poole was placed on a Performance Improvement Plan (PIP) for a period of ninety days in order to address and correct the areas of his sub-standard performance. It was Poole himself who specifically who asked OCFA to be placed on the PIP, i.e., contrary to the Court of Appeal finding, it did not result from any impermissible sharing of Captain Culp's daily log notes. [CT 1014] While on the PIP, Poole earned a "sub-standard" rating for the periodic interim evaluations that Captain Culp prepared for the period of May 5, 2010 to July 31, 2010. Again, Poole was given the opportunity to review and sign the evaluation before it was

entered in his personnel file, and again, Poole filed a grievance as to this interim evaluation. [CT 1019.]

5. Union Representative Bob James' Unannounced Demand for Documentation Regarding Poole.

On or around August 9, 2010, James arrived, unannounced as planned, at Station 46 and demanded that Culp provide James with the "station file" for Poole. In response, Captain Culp retrieved the Daily Log folder labeled "Steve Poole" and handed it to James. [CT 1019, 1058.]

6. Union Prepared Letter Asserting That Captain Culp's Daily Log Had Violated the Firefighter's Procedural Bill of Rights Act.

The letter was addressed to Zenovy Jakymiw, Director of Human Resources at OCFA and requested that "all negative comments not signed by me be removed from my personnel file located at Fire Station 46," and that OCFA make "all other personnel files available for inspection by me" at a prearranged date and time. [CT 1008.]

7. OCFA's Response to Union's Letter.

On September 23, 2010, Mr. Jakymiw sent a letter advising Poole that the Act was inapplicable to the notes kept by Captain Culp, because the notes were not part of Poole's personnel file, nor were they ever entered into his personnel file. The letter also stated that to the extent that Captain Culp's notes were ever used to evaluate Poole's performance, Poole had the opportunity to review, comment, and sign his performance evaluations before they were entered into his personnel file.

8. Poole's Claim for Damages.

Unsatisfied with this response, on November 1, 2010, Poole filed a Claim for Damages that was rejected. [CT 20, 25–26.]

9. Poole's Petition for Writ of Mandate.

On April 5, 2011, Poole filed a Petition for Writ of Mandate, concurrently with a Complaint for Declaratory and Injunctive Relief. [CT 16–30.]

Petitioner filed a Verified Answer. [CT 31–44.]

10. Trial.

A. Evidence Presented by the Parties Regarding the Limited Purpose and Use of Captain Culp's Contemporaneous Notes.

Petitioner presented abundant evidence that Poole had not had any comments from Captain Culp's notes log entered into any personnel file or into any other file having an effect on personnel matters relating to him, except those which Poole had first been given an opportunity to review, comment upon and sign, if and when made part of his performance review process. [CT1013-1020]

Poole presented no factual evidence with which he even attempted to rebut the evidence presented by Petitioner regarding the narrow purpose and limited use of Captain Culp's notes. [CT-646-961; 1074-1097]

B. Trial Court's Order Denying Poole's Petition for Writ of Mandate and Judgment in Favor of OCFA.

On September 28, 2012, the trial court issued an Order denying the Petition for Writ of Mandate, stating "personal notes used to compile

evaluations and for no other purpose are not subject to disclosure or comment under the firefighters' Bill of Rights." [CT 1100.] The court declared that Petitioner was not in violation of the Act. [CT 1099.]

C. *Trial Court's Finding of Facts Supporting Its Order Denying Poole's Petition for Writ of Mandate.*

The trial court's factual findings included the following:

1. The Orange County Fire Authority (OCFA) maintains an official personnel file at OCFA headquarters;

2. All personnel decisions, including promotions and discipline, are based upon the official personnel file only;

3. Captain Culp's notes are not used for any purpose beyond possibly being included in official performance evaluations;

4. Captain Culp never divulged his notes to anyone, except to Poole;

5. The employment decisions regarding Poole by the OCFA were based upon the matters documented in his personnel file and not on Captain Culp's notes;

6. If Captain Culp made a negative note about Poole in his notes, but did not address it in Poole's yearly evaluation, it does not exist, at least for personnel purposes;

7. Captain Culp's notes were nothing more that "Post It" notes to aid captain Culp's memory when it came time to undertake an evaluation, which ensured a fair and accurate evaluation. [CT1633-1634]

11. Poole's Notice of Appeal.

Poole filed a timely Notice of Appeal

12. Poole's Opening Brief.

Appellants' Opening Brief asserted that the trial court's decision was a question of law subject to independent review by the Court of Appeal, as "application of a statute to undisputed facts." [AOB, p.7] Because of this view, Poole did not dispute any of the factual findings made by the trial court by way of substantial evidence standard analysis or otherwise. He neither set forward any of the evidence supporting the trial court's findings in favor of OCFA nor the evidence purporting to support contrary factual findings. [AOB, pp. 8-35]

13. OCFA's Respondent's Brief.

While OCFA acknowledged that the standard of review for interpretation of a statute is de novo, it also emphasized that the factual findings made by the trial judge on the evidence, to determine how the statute is applied, must be reviewed on a substantial evidence basis. OCFA noted that Appellants had incorrectly analyzed the standard of review and had completely ignored the effect of the trial judge's specific findings of fact, which directly supported the trial court judgment. [RB, pp. 2, 13-17]

OCFA also argued that the cases cited by Appellants interpreting parallel provisions of the "POBRA" all involved either actual personnel files or other files that were statutorily required to be created and formally kept and used for personnel purposes **by those agencies, where the employer, and not just an individual supervisor**, would have access to the contents for personnel purposes. OCFA contrasted those situations from

the informal notes kept by Captain Culp, which were never entered into any formal file the OCFA was required or chose to maintain and to which no other person, including OCFA, as the employer, had access other than Captain Culp. [RB, pp. 17-45]

14. Poole's Reply Brief.

Appellants filed a reply brief.

15. Published Decision Reversing Trial Judgment.

On November 4, 2013, the Court of Appeal filed its decision, reversing the trial court's judgment. [Opinion, attached as Exhibit "A" to this Petition]

The Court framed the issue as "whether the daily logs maintained on firefighters and used to prepare evaluations qualify either as a personnel file or a file used for personnel purposes." [Opinion, p. 6] It found that the record reflected that OCFA had admitted that the logs were intended to be used for personnel purposes. Therefore, it concluded that the daily log notes "are subject to provisions of FFBOR." [Opinion, p. 3]

In addition to reciting that statutory construction is a question of law requiring independent review, the court stated that *since the case involved "the application of a statute to undisputed facts*," independent review and not a substantial evidence review of the trial court's findings would be required. However, it also expressly acknowledged that, "to the extent it

would review the trial court's resolution of disputed facts," it would use "the deferential evidence standard."[2] [Opinion, p.6]

However, without any substantial evidence review of the record, the court made findings that were inconsistent with those made by the trial judge. For example, the court determined that, "it is evident the daily logs affected Poole's job status;" "[t]he daily logs kept in Poole's file at the fire station were used for personnel decisions;" "[h]is substandard performance evaluation was admittedly based on adverse comments contained in the daily logs;" "[l]ike the situation in *Miller,* information *not* contained in Poole's main personnel file was presented to his employer prior to an adverse employment action by the employer;" "[a]s in *Miller*. Revealing the contents of the daily logs to Battalion Chief Phillips denied Poole the opportunity to respond to the adverse comments made known to the employer;" "OCFA admits the daily logs were kept for personnel purposes;" [Opinion, p. 12] , and, that "the daily logs were used to place Poole on an improvement plan." [Opinion, p. 13]

The court summarized its holding as, "[B]ecause the daily logs on Poole's activities at work and kept in a file with his name on it were used for personnel purposes and were disclosed to superiors — again for

---

[2] Notwithstanding this acknowledgement, the Court of Appeal failed to provide any deference to (or even mention of) many of the findings of the trial judge critical to the trial court's decision. Instead, it made its own findings contrary to the trial judge's findings and failed to apply the substantial evidence review of the record.

personnel purposes — Poole was entitled to respond to adverse comments contained therein. Accordingly, we reverse..." [Opinion, p.13]

LEGAL ARGUMENT

I.
In the Absence of a Substantial Evidence Review of the Entire Trial Record Sought by Appellant or Actually Undertaken by the Court of Appeal, Courts of Appeal May Not Base Reversal of a Trial Court's Decision Upon Factual Findings Inconsistent With Those Made by the Trial Court

Appeals that explicitly or implicitly challenge factual findings made by a jury or trial court are guided and restricted by the "substantial evidence" rule, the rule that the trial court's resolution of disputed factual issues must be affirmed so long as supported by "substantial evidence." *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.

"When a trial court's factual determination is attacked..., the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination." *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-4 ("*Bowers*"). So long as there is "substantial evidence," the appellate court must affirm, even if the reviewing justices personally would have ruled differently had they presided over the proceedings below, and even if other substantial evidence would have supported a different result.

One of the primary reasons for the "substantial evidence rule," is that appellate court deference to the trial court's resolution of fact issues is warranted by jurisdictional considerations and recognition of the distinctive roles of trial and appellate courts. *Tupman v. Haberkern* (1929) 208 Cal. 256, 262-3.

At bench, the trial court had considered all of the evidence from the trial before it and still made factual findings that Captain Culp notes were not used for personnel purposes and that they did not have any adverse impact upon Poole's employment status. This included the asserted (hearsay) "admission" by OCFA's Human Resources Director that Captain Culp's notes were intended to for "personnel purposes," upon which the court of appeal appeared to heavily rely. However, also weighed by the trial court, but not mentioned in the court's Opinion, were many pieces of evidence, including declarations by Captain Culp and others, that clearly indicated that none of Captain Culp's notes were intended to be used for personnel purposes, and that the notes were solely used to refresh Captain Culp's memory, for later annual performance reviews of the firefighters. There was also abundant evidence that there were literally no adverse employment actions taken against Poole based on Captain Culp's notes or any writing by him that was not first shown to Poole.

The trial court performed its duty to weigh all of the evidence before it and it drew reasonable inferences therefrom. The trial court's finding that Captain Culp's notes were not used for "personnel purposes" was based on substantial evidence and entitled to deference, notwithstanding the presence of conflicting evidence (the letter by OCFA Human Resources Dept). Under the "conflicting evidence" rule, the appellate court must resolve all evidentiary conflicts — whether presented by oral testimony or written declarations — in favor of respondent, and affirm so long as the evidence favoring respondent is sufficient to support the judgment. The appellate court is not empowered to reweigh the evidence. *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479.

Furthermore, under the "conflicting inference" rule, appellate courts are required to indulge all reasonable inferences that may be deduced from the facts in support of the party who prevailed in the proceedings below. *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632-1633. Even where the facts were admitted or uncontradicted, the appellate court must not substitute its deductions for the inferences actually or presumptively drawn by the trial court. *Mah See v. North American Acc. Ins. Co.* (1923) 190 Cal. 421, 426.

The court of appeal's departure from the required standards of review calls into play this Court's role as institutional overseer of the lower courts. If courts of appeal disregard the limited roles and functions of trial courts and their own jurisdiction, the provision of justice contemplated by California's Constitution and Legislature would fail to be delivered. This is especially so where Appellants themselves never sought review of the trial court's factual findings and therefore never complied with the traditionally required showing of evidence presented at trial on each side for their to be a challenge to the factual findings.

The appellants' failure to challenge any of the factual findings of the trial court in their appeal waived their argument that Captain Culp's notes were used for any personnel purposes that adversely impacted Poole's employment status. *People v. Louis* (1986) 42 Cal.3d 969, 984-987. Under this standard, the appellant must demonstrate that no reasonable inference supporting the challenged ruling can be drawn from the evidence presented. *McRae v. Sept. of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 389. The appellant has the burden to identify and establish deficiencies in the evidence. A recitation of only appellant's evidence in his brief does

not satisfy the requirements. *Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218.

Where the appellant seeks to challenge a particular finding of fact or facts, appellant must set forth in its brief all material evidence on the point and not merely its own evidence. Unless this is done, any claimed error is deemed waived. *Foreman, supra*, 3 Cal.3d at p. 881; *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 52-53.

At bench, not only did Poole fail to set forth the evidence on both sides of each of the factual findings made by the trial court, he failed to even mention the existence of the factual findings made by the trial court or assert that they were erroneously made, as unsupported by substantial evidence. Instead, Poole merely stridently argued to the Court of Appeal that Captain Culp's notes caused Poole's employment status to be negatively affected, including a required participation in a PIP. He did not present the evidence on which the trial judge based his findings. He boldly failed to present any type of record on which the Court of Appeal could validly choose to disregard the trial court's findings or displace them with its own.

II.

The Requirement in FFBOR (and Other Statutes) That Governs When an Adverse Written Comment About a Public Employee Must Be Disclosed Prior to Being Entered Into a Fire Authority's (or Other Public Agency's) Personnel Files, or Other Files Used by the Employer for Personnel Purposes, Does Not Apply to Informal Notes Kept by a Supervisor Used to Later Refresh His Recollection, Where the Notes Were Never Entered Into an Employee's Personnel File or Any Other File Used by the Employer for Personnel Purposes, Were Not Required to be Created or Kept by any Statute and Were Not Accessible to the Employer or Anyone Else at Any Time.

A. The Court of Appeal incorrectly framed the legal issue interpreting the FFBOR, inter alia, by failing to give any meaning or effect to the express statutory requirement that adverse comments be entered into a personnel file or other file that similarly could have an effect on a firefighter's employment status.

The legal issue framed by the Court of Appeal in its opinion, is "whether the daily logs maintained on firefighters and used to prepare evaluations qualify either as a personnel file or a file used for personnel purposes."[3] In essence, the Court of Appeal thereby appeared to have

---

[3] *Government Code* § 3255 provides: "A firefighter shall not have any comment adverse to his or her interest ***entered into his or her personnel file or any other files used for any personnel purposes by his or her employer***, without the firefighter having first read and signed the instrument containing the adverse comment indicating he or she is aware of the comment..." [Emphasis supplied.]

analyzed whether the content of the daily logs (inclusive of comments adverse to Poole) was itself, in essence, a personnel file or other file used for personnel purposes. That focus, however, is incorrect and ignores certain key terms from the statute itself. First, it omits from consideration the express statutory requirement that adverse comments, if written down, **must be shown to the firefighter before they are "entered"** into a personnel file or other file of that effect. Just because there are a group of multiple loose notes that contain adverse comments about an employee will not fall within the ambit of section 3255 unless and until those **comments are actually entered** into a file that may have personnel employment effect, i.e., a personnel file, or other file, which by its design and definition, may have an actual effect on employment status.

In other words, the mere writing down of the adverse comments, even if for personnel purposes, does not trigger the obligation to show the comments to the firefighter. If that is what the Legislature intended, it simply would have provided that all adverse comments about a firefighter, once merely written down, must be shown to the firefighter. Instead, the Legislature expressly required that the adverse comment be entered into the specific files, prior to there being any obligation to show them.

Thus, by framing the issue in the manner that it did, the Court of Appeal failed to apply key conditions for application of the statute. Informal notes, that are unseen and inaccessible by the employer or anyone other than its draftsman, unlike official personnel files or other files that are statutorily required to be created and maintained by the employer, and that are not used unless and until they are to be made part of an official performance review, cannot be used for "personnel purposes by the

employer." "By the employer" necessarily means that the file is an official file kept by the employer and not by just an individual supervisor.

The court of appeal's construction of the notes themselves constituting a personnel file, or other file used for personnel purposes, ignores the statutory trigger of "entry into a file." If the adverse comments themselves were personnel or like files, to comply with the statute, Captains would have to tell firefighters about them before they are written. However, the Government Code provides that the obligation to show the firefighter the adverse comments only arises prior to the comments being entered into such a file. Therefore, if the adverse comments are written down (as in note-taking), but are never entered into a personnel file or a file actually used for personnel purposes (not hypothetical personnel purposes), the obligation to show the comments to the firefighter does not arise. The right to inspect adverse comments is triggered by the statute only once they are to be "entered" into a relevant file. So, the question is not whether the notes are used for personnel purposes, but whether the file into which they are entered is used for personnel purposes! At bench, there was literally no evidence that the notes were ever into any file used by the employer for personnel purposes.

The Legislature's selection of the term "entry," rather than placement or other unofficial word, is critical to the analysis and should be recognized by our courts. "Entry" into a file used "by the employer" both emphasize the official nature of the file in the context of a formal process which has an official purpose in the employment relationship. As will be set out in a subsequent section hereto, the cases in the Peace Officers Bill of Rights upon which the court of appeal so heavily relied all involved files

that were required to be created and kept by the agencies involved, and critically were, at all times, accessible by others in the department, i.e., the adverse comments were possessed of a finality that would allow them to impact future employment decisions about the employee. In stark contrast, the notes written by Captain Culp were solely for his eyes unless and until he later chose to include them in an official performance review, which would then have triggered the read, sign and comment provisions of the FFBOR. There was no access to OCFA, as employer, nor to anyone else within the agency.

B. The FFBOR expressly provides a right for firefighters to respond solely to adverse comments entered into personnel files.

Government Code §3256 provides a right to a firefighter to file a written response to adverse comments that are entered into his or her personnel file.[4] There is no such right to respond to written comments made in notes, post-its, drafts, or other informal writings. The legislative scheme was to address writings made within official employer-agency files that could have a consequence on employment status of firefighters, and not inchoate drafts, notes, ideas, that would never make their way into files that could be used or accessed by the employer.

---

[4]*Government Code* § 3256 provides: "A firefighter shall have 30 days within which to file a written response to any adverse comment entered into his or her personnel file."

C. *As distinct from the situation at bench involving informal notes of a Fire Captain, kept for his eyes solely and not accessible by the employer or any other personnel, the cases relied upon in the Court of Appeal's opinion all involved "other files" which were required to be created and maintained by law and were accessible by the employer.*

The Court of Appeal erroneously relied upon cases that are profoundly distinguishable from the circumstances presented at bench. (See *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793 ("*Riverside*"); *Aguilar v. Johnson* (1988) 202 Cal.App.3d 241 ("*Aguilar*"); *Miller v. Chico Unified School District* (1979) 24 Cal.3d 703; and *Sacramento Police Officers Association v. Venegas* (2002) 101 Cal.App.4th 916 ("*Venegas*"). All of those cases, involved formal documents that were required by statute to be created and maintained, unlike Captain Culp's daily logs, which were not required by statute or even official OCFA policy to be created, but which were created for the sole purpose of memorializing mental notes for Captain Culp alone.

In *Aguilar*, section 832.5 of the Penal Code required the police department to establish a procedure to investigate complaints by members of the public against peace officer employees, and keep the complaints and any reports pertaining to the complaints for at least five years.

Venegas also dealt with section 832.5 of the Penal Code. The police department adopted a procedure that required its internal affairs department to maintain all complaints (by citizen or other peace officer) in separate files, which by statute were defined as "personnel records."

In *Riverside*, Penal Code section 1031(d) required the police department to conduct a thorough background investigation before hiring.

1. The Daily Log Is Not Akin to a Citizens' Complaint Required by Statute to be Formally Investigated and Is Otherwise Distinguishable from Situations Requiring Disclosure of Adverse Comments.

The first decision to interpret POBRA's provision requiring disclosure of an adverse comment pursuant to section 3305 was *Aguilar*. There, a police officer filed a petition for writ of mandate against the chief of the police department directing him to: obey POBRA, fulfill the requirements of the department's own manual concerning citizen complaints, and destroy the citizen's complaint filed in the officer's file. (*Aguilar*, *supra*, 202 Cal.App.3d 241, 245.) A citizen had filed a complaint charging the officer with conspiracy to commit police brutality. (*Ibid.*) The department was required, pursuant to section 832.5 of the Penal Code,[5] to adopt a written policy for the handling of citizens' complaints. (*Id.* at p. 247 & n.3.) The department's written policy required, in relevant part, that the assigned investigator thoroughly investigate the case and submit a complete report. (*Id.* at p. 247.)

The complaint against the officer was placed in a confidential investigation file, separate from the officer's personnel file. (*Id.* at p. 245.) During a criminal action involving the citizen complainant, however, the complaint was taken from the confidential file and placed in the officer's personnel file and revealed through a "Pitchess Motion." (*Ibid.*) The

---

[5] Subdivisions (b) and (c) of section 832.5 of the Penal Code provide required that complaints and reports be retained.

officer did not learn of the complaint until nearly a year later, however, when he was then given the opportunity to comment on the complaint. (*Id.* at p. 246.) Ultimately, the complaint was removed from the officer's personnel file, and it was agreed that in the future, all complaints would be kept in a file separate from personnel files. (*Ibid.*)

In holding that the chief of police had violated POBRA by not affording the officer an opportunity to comment on the citizen's complaint, the court had to deal with the Chief's assertion that he did not violate POBRA because he agreed to place complaints in a separate "confidential citizens' complaint file." (*Id.* at pp. 250, 251.) In rejecting this assertion, the court summarily relied on the California Supreme Court's holding in *Miller v. Chico Unified School District* (1979) 24 Cal.3d 703 (*Miller*), that discussed analogous provisions of the Education Code. (*Aguilar*, *supra*, at p. 251.)

In *Miller*, a school board notified a principal, by letter, of his reassignment to a teaching position and enclosed a memorandum recommending reassignment, along with an attachment documenting criticism of the principal's conduct. (*Miller*, *supra*, at p. 709.) In recommending reassignment, a superintendent had specifically prepared confidential memoranda *for the school board's use* in evaluating the principal. (*Id.* at p. 711.)

The *Miller* Court rejected the board's argument that because the memoranda were never placed in the personnel file, compliance with the Education Code was not a prerequisite to reassigning the principal. The *Miller* Court reasoned that the school district could not "insulate itself by simply neglecting to file material which the statute contemplates will be

brought to the employee's notice." (*Miller*, *supra*, at p. 713.) The Court deemed this a "process of labeling [to] prevent the administrator from reviewing and commenting upon allegations directed against him." (*Id.* at p. 707.) Likewise, in reliance on *Miller*, the court in *Aguilar* was not convinced that keeping the complaints in a separate "confidential citizens' complaint file" was sufficient to eliminate the requirements of POBRA. Indeed, the statute itself required that exonerated citizen's complaints be kept not in the general personnel file, but in a separate file defined, by statute, "a personnel record" for purposes of disclosure. (Pen. Code § 832.5(c).)

In a case critical of *Miller* and analogous to the case at bar, the court in *Cockburn v. Santa Monica Community College District* (1985) 161 Cal.App1.3d 734 (*Cockburn*) held that the *Miller* decision did not require a community college to give a specific written notice detailing prior derogatory remarks or misconduct that might have been used in the aid of a specific charge against a teacher.

In *Cockburn*, a college instructor was terminated for sexual harassing a student assistant. (*Cockburn*, *supra*, at p. 737.) The instructor alleged that the board had relied not on the sexual harassment charge, but also on documents or complaints with which he should have been but was not confronted as required by statute. (*Id.* At p. 741.) The statute at issue Educ. Code, § 87031) required that unless the school district notified the employee of derogatory material within a reasonable time of ascertaining the material, so that the employee could gather pertinent information in his defense, the district could not rely on the material in reaching any decision affecting the employee's employment status. (*Id.* At p. 738, citing *Miller.*)

The instructor alleged that the school violated the statute by omitting derogatory remarks consisting of an inter-office letter and two unsigned complaints. The court held that the teacher had notice within reasonable and ample time as required of any and all prior misconduct or derogatory statements: "We find nothing to show the use before the Board of any prior derogatory statements and/or prior misconduct of which respondent did not have prior notice and knowledge. There is nothing in *Miller* . . . or in the Education Code . . . which requires appellants to give a specific written notice detailing prior derogatory remarks or misconduct which may be used in aid of a specific charge . . . ." (*Id.* at p. 745.)

The same rationale applies here. It would be duplicative to require Captain Culp to provide his personal notes for Poole's review, in addition to the official personnel file. Poole had knowledge of and an opportunity to respond to the adverse comments that might have been entered in his official file, just as the instructor in *Cockburn* has notice of prior derogatory statements prior to the specific charge.

More than a decade after *Aguilar* came *Venegas*, which arose out of facts almost identical to those of *Aguilar*. *Venegas* dealt with a police officer who was investigated when a complaint charged him with neglect of duty after a take-home city-owned vehicle entrusted to him was stolen from his possession. *Venegas*, *supra*, 101 Cal.App.4th 916, 920.) During the investigation, the employee was removed from his position with the bomb squad, but was ultimately allowed to return. (*Ibid.*) The employee filed a writ of mandate contending that he was entitled to read and respond to information maintained in the city department's internal affairs section regarding the allegation of neglect of duty. (*Id.* at p. 919.) The department

had an internal affairs section, which maintained an index card for each officer that listed all complaints made against the officer, whether founded or unfounded. (*Id.* at p. 921.) Pursuant to section 832.5 of the Penal Code, the department would investigate all complaints, log them in the internal affairs section on an index card, and retain the complaints for five years. (*Ibid.*)

The Court of Appeal reversed the trial court's denial of the employee's petition for writ of mandate, and held that the department was required to disclose any adverse information maintained on the index cards. (*Venegas*, *supra*, at p. 930.)

The court rejected the department's argument that the index cards were not personnel files or used for any personnel purpose. (*Id.* at pp. 926–27.) The court began its analysis by noting that pursuant to the Penal Code, the department had a duty to handle all complaints about its employees by following its own procedure to investigate the complaint. (*Id.* at p. 927.) The department's own procedure was to keep all complaints (by peace officers or citizens) in a file that, by statute, was expressly defined as "a personnel record." (*Id.* at p. 928, citing Pen. Code, § 832.5, subd. (c).) Regardless, the court noted, common sense dictated that the department's internal affairs investigation of an adverse comment against one of its peace officer employees was a personnel matter: "Indeed, the function of a police agency's internal affairs section is to 'police the police' by investigating complaints and incidents to determine an officer's fitness to continue to serve . . . ." (*Ibid.*) Further, the department had conceded that if a complaint was made against the employee, the internal affairs investigator would read the index card and the charge of neglect of duty, which could

color the investigator's view of the employee and affect investigation of a new complaint. (*Id.* at p. 929.) Last, the court also rejected the department's argument that disclosure was not required because only internal affairs personnel had access to the files. (*Ibid.*) The court noted that pursuant to the Penal Code, management also had access. (*Ibid.*) The court concluded that the index card entered in the employee's internal affairs file (not his official personnel file) was subject to inspection.

For a multitude of reasons, the holdings of *Aguilar* and *Venegas* are inapplicable to the facts here. First, and most importantly, there is no statutory requirement that Culp create and maintain a Daily Log. Both *Aguilar* and *Venegas* specifically dealt with complaints against a peace officer. Section 832.5 of the Penal Code requires departments employing peace officers to establish a procedure to investigate complaints by members of the public,[6] and to retain complaints for a period of at least five years. The police departments in those cases required that complaints be thoroughly investigated and summarized in a written report, or be listed on an index card. Moreover, the statute itself states that any complaint that is unfounded or exonerated shall be retained in a separate folder, apart from an officer's general personnel folder, but deemed "a personnel record." (Pen. Code, § 832.5, subd. (c).) In other words, the complaints were kept in a file that was *statutorily defined to be a personnel record* for purposes of disclosure. (*Venegas*, *supra*, at p. 928.) Here, there was no statute that

---

[6] The department in *Venegas* applied the statute without distinguishing between complaints by the public and by fellow peace officers. (*Venegas*, *supra*, at p. 927 & n.3.)

required Captain Culp to maintain preliminary mental notes on a subordinate employee. While the notes clearly aided his drafting of evaluations, they were not required — either by statute or by OCFA's own policy.[7]

Second, Captain Culp's purpose and intent behind the creation of the Daily Log is entirely different from the purpose behind the written investigation of formal complaints in *Aguilar* and *Venegas*. The Daily Logs are akin to mental notes, rather than formal complaints filed. In *Aguilar* and *Venegas*, the purpose behind the documents was to thoroughly document and investigate complaints against officers, and in *Miller*, the purpose behind the memoranda was to disseminate a superintendant's message to the school board to demote a principal. Here, Captain Culp created the document solely for his own benefit. No other employee besides Captain Culp saw or received a copy of the Daily Log. He never provided the Daily Log to any superior officer. Although Captain Culp did verbally discuss with Battalion Chief David Phillips some of the comments that Captain Culp wrote in the Daily Log for Poole, he never provided him with a copy of the Daily Log. The notes could not be used to influence

---

[7] Indeed, the situation at bar is more analogous to that in *McMahon*, *supra*, 172 Cal.App.4th 1324, 1327, where the police department provided the employee with the opportunity to review all citizen complaints, but denied review of *additional* materials from underlying investigations, such as interview tapes and transcripts. The employee sought review of audiotapes and transcripts of witness interviews, surveillance notes, case notes, chronological files, summaries, and memoranda. (*Id.* at p. 1330.) The court held that the department did not have to disclose those additional documents, reasoning "this was not a case in which adverse personnel complaints were withheld from the officer." (*Id.* at p. 1334.)

OCFA's personnel in future matters relating to Poole. Further, the notes were not kept in an official department file that another company officer would have any legitimate reason to review. The notes in the Daily Log could not be used to influence OCFA personnel in future matters relating to Poole, and the only person who would use the notes to prepare a performance evaluation was Culp. [CT 1018.]

Finally, Captain Culp's notes were not kept in an official file created by OCFA, unlike in *Aguilar*, where the citizens' complaints were kept in a separate, but officially designated, "confidential citizens' complaint file" apart from the personnel file, or like in *Venegas*, where the complaints were logged on index cards maintained in the department's internal affairs section in files deemed, by statute, "personnel records" for purposes of disclosure. OCFA maintains all employee personnel files at OCFA headquarters located in Irvine. There are no official personnel files maintained at individual fire stations. [CT 1013, 1017.]

2. The Daily Log is Not Akin to Documents Prepared by Former Employers in Response to a Formal Employment Background Investigation Report Required by Statute to be Conducted.

Riverside, in which the California Supreme Court relied heavily on *Aguilar*, is also of no import for many of the above stated reasons. The issue in *Riverside* was "whether and under what circumstances a law enforcement agency must disclose to a probationary employee who is a peace officer confidential documents obtained or prepared in the course of a routine background investigation of that officer, conducted pursuant to *Government Code* section 1031, subdivision (d)." (*Riverside*, *supra*, 27 Cal.4th 793, 795.) The defendant county gave the employee a conditional

offer of employment, which was conditioned based on successful completion of a background investigation. (*Id.* at p. 797.) The employee started work on a probationary basis, but was then dismissed while still on probation. (*Id.* at pp. 797, 800.) When the employee attempted to find subsequent employment with other law enforcement agencies to no avail, he suspected that his background investigation revealed a complaint that he allegedly had engaged in illegal conduct, and he brought an action against the county seeking disclosure of the background investigation file pursuant to POBRA. (*Ibid.*) The lower court ordered the county, which objected to a subpoena seeking the files, to provide the employee with the memorandum summarizing findings of the investigator who conducted the background investigation. (*Id.* at p. 798.) The county resisted turning over the file on the basis that the records were not "personnel files" because the records reflected adverse comments entered into the employee's *former* personnel file, which was maintained by the city, not the county, for the employee's former job. (*Id.* at p. 800–01 ["In other words, the County would limit the scope of the Bill of Rights Act to personnel matters that arise in the course of an officer's employment in a particular position and affect that position."].)

This Court disagreed and "reject[ed] the assertion that a law enforcement agency's background investigation of a peace officer during probationary employment is somehow not a personnel matter subject to the Bill of Rights Act." (*Riverside*, *supra*, at p. 802.) Addressing the county's attempt to distinguish personnel matters that occurred prior to employment and those that occurred during employment, the Court noted, "The label placed on the investigation file is irrelevant." (*Ibid.*) Instead, the relevant inquiry is whether "[t]he materials in the file unquestionably 'may serve as

a basis for *affecting the status of the employee's employment.*'" (*Ibid.*, italics added (quoting *Aguilar*, *supra*, 202 Cal.App.3d 241, 247).) The Court concluded that the "very purpose" of the background investigation was to determine whether the employee would remain employed by the county. (*Id.* at pp. 803 ("[T]he adverse comments arise out of an investigation, the very purpose of which was to assess the employee's qualifications for continued employment . . . .").) Simply put, continuing employment was conditioned upon the employee's successful completion of the background investigation. The Court also noted that the county had a separate duty under section 1031.1 to provide employment information to other law enforcement agencies, i.e., those agencies with which the employee could not subsequently obtain employment, which included information in connection with job applications, such as the background investigation file. (*Id.* at pp. 802–03.)

Again, *Riverside* is inapplicable. There, the county had a separate statutory duty, pursuant to subdivision (d) of section 1031, to conduct a thorough background investigation, which entailed gathering the employee's employment information, defined by subdivision (c) of section 1031.1 to include written information used for various personnel purposes. Then, after failing to hire the employee, the county had a duty under subdivision (a) of section 1031.1 to turn over that file to the employee's prospective employers for their review of his qualifications — clearly a personnel purpose. Here, however, there was no separate statutory duty for Culp to create his Daily Log or disseminate it.

Indeed, the test created by Riverside mandates such a finding. To determine if a document is a personnel file, the test is whether the materials

unquestionably serve as a basis for affecting the status of the employee's employment. (*Riverside*, *supra*, at p. 802.) Here, the Daily Log, on its own serves no such basis. The *only* documents that could have affected the status of Poole's employment (i.e., promotional recruitment or disciplinary action) were those in his personnel file, which was kept at OCFA headquarters. [CT 1013.] This is because the Log was not accessible by others and could not influence a formal decision made by the employer regarding Poole's employment status. It is only if the comments are incorporated into a performance evaluation that the firefighter then has an opportunity to review and respond. To apply the requirement of Section 3255 to a Daily Log of mental notes is tantamount to applying this standard to actual mental notes not written down. Actual mental notes were used for the same purposes of writing performance evaluations — using the Court of Appeal's logic, they should therefore be shared with a firefighter prior to including into an evaluation. The simple act of writing down the mental notes and not sharing them with anyone else in the organization is not what triggers the rights of a firefighter to review the notes. Rather it is the accessibility and possible influence on others that those notes can have that triggers that right. It is for this reason that entering of the notes into a file that the employer uses is what must occur for Section 3255 to apply.

Moreover, even assuming that the Daily Log could somehow be considered not a document on its own, but rather, a document incorporated into the personnel file, Poole had the opportunity to respond to it. Before any adverse comments were placed in Poole's personnel file, he had the opportunity to review and sign them. [CT 1013.] In fact, Poole took advantage of this opportunity and prepared a response to his evaluations. *Thereafter, the performance evaluation was entered into Poole's personnel*

file, which was the only file that could affect employment. That Poole had not first seen Captain Culp's preliminary Daily Log in no way compromised his ability to respond to his performance evaluation in any manner.

The Daily Log did not serve the purpose of affecting the status of Poole's employment, unlike how the background investigation in *Riverside* had the precise and intended purpose of determining the status of the employee's employment. The purpose here of the Daily Log was to memorialize Culp's mental notes in preparation for later preparing an accurate employee evaluation. The very purpose of the logs was not, as in *Riverside*, to determine whether the employee would remain employed.

Respectfully submitted,

HAIGHT BROWN & BONESTEEL LLP,
Jules S. Zeman,
Kevin M. Osterberg, and
Blythe Golay

Attorneys for Petitioner
ORANGE COUNTY FIRE AUTHORITY

CERTIFICATE OF COMPLIANCE WITH RULE 8.204(C)(1)

I, the undersigned, Jules S. Zeman, declare that:

I am an attorney in the law firm of Haight Brown & Bonesteel, which represent Attorneys for Defendant and Respondent Orange County Fire Authority.

This certificate of Compliance is submitted in accordance with Rule 8.204(c)(1) of the California *Rules of Court.*

This petition for review was produced with a computer. It is proportionately spaced in 13 point Times Roman typeface. The brief contains 8,157 words, including footnotes.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 16, 2013, at Los Angeles, California.

_____

Jules S. Zeman

EXHIBIT

Filed 11/4/13

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

STEVE POOLE et al.,	
Plaintiffs and Appellants,	G047691, G047850,
v.	(Super. Ct. No. 30-2011-00463651)
ORANGE COUNTY FIRE AUTHORITY,	O P I N I O N
Defendant and Respondent.	

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Reversed and remanded.

Silver, Hadden, Silver, Wexler & Levine and Richard A. Levine for Plaintiffs and Appellants.

Haight Brown & Bonesteel, Jules S. Zeman, Kevin M. Osterberg and Blythe Golay for Defendant and Respondent.

* * *

The FireFighters Procedural Bill of Rights (FFBOR) provides: "A firefighter shall not have any comment adverse to his or her interest entered in his or her personnel file, *or any other file used for any personnel purposes* by his or her employer, without the firefighter having first read and signed the instrument containing the adverse comment indicating he or she is aware of the comment. . . ." (Gov. Code, § 3255, italics added; all undesignated statutory references are to the Government Code unless otherwise stated.) Steve Poole is a firefighter with the Orange County Fire Authority (OCFA) and a member of the Orange County Professional Firefighters Association, an employee organization for firefighters, fire apparatus engineers, and fire captains. Although OCFA's official personnel files are kept in Irvine, at OCFA's headquarters, Poole's fire captain kept a separate file at the fire station on each of the firefighters he supervised. The captain maintained in those files what he characterized as daily logs documenting the activities of the firefighters. The files were kept solely for a personnel purpose; for the captain's use in preparing yearly evaluations (or evaluations required by a performance improvement plan).

Poole did not know about any adverse comments in the file maintained by the captain until the captain gave him his yearly evaluation. Even then, not all the adverse comments in the daily logs were included in Poole's evaluation. The daily logs themselves were not seen by Poole until a representative from his employee organization demanded them. When Poole requested all adverse comments be deleted from the daily logs pursuant to section 3256.5, subdivision (c),[1] OCFA refused, claiming the daily logs

[1] "If, after examination of the firefighter's personnel file, the firefighter believes that any portion of the material is mistakenly or unlawfully placed in the file, the firefighter may request, in writing, that the mistaken or unlawful portion be corrected or deleted. Any request made pursuant to this subdivision shall include a statement by the firefighter describing the corrections or deletions from the personnel file requested and the reasons supporting those corrections or deletions. A statement submitted pursuant to this subdivision shall become part of the personnel file of the firefighter." (§ 3256.5, subd. (c).)

were not subject to FFBOR, in part because "while the notes *were intended to be used for personnel purposes*, they were never 'entered' into any file." (Italics added.)

The issue presented in this appeal is whether the files containing the daily logs are within the ambit of section 3255. Likely many supervisors keep some sort of notes to prepare accurate annual employee reviews, but most supervisors are not operating under a statutory scheme similar to the one we have here, which requires that no adverse comment be entered in to any file used for personnel purposes "without the firefighter having first read and signed the instrument." Here OCFA admits the daily logs were intended to be used for personnel purposes. Because the daily logs on firefighters are used for personnel purposes, we conclude they are subject to provisions of FFBOR. We therefore reverse the judgment entered in favor OCFA and remand the matter to the superior court for further proceedings consistent with this decision.

I

FACTS

Since becoming a fire captain, Brett Culp has made handwritten and computerized notes, referred to by the parties throughout these proceedings as daily logs, on the performance of each of the employees he supervised. Culp included in his daily logs "[a]ny factual occurrence or occurrences that would aid . . . in writing a thorough and fair annual review." The logs document the efficiency of the firefighters under Culp's supervision, including whether firefighters complied with instructions and adhered to rules. Culp kept the electronic entries on a flash drive containing a separate file on each employee he supervised. He also maintained a hard copy in a manila folder he kept in his desk with the employee's name on it.

Poole has been a firefighter with OCFA since 1984. Culp supervised Poole from December 2008 to October 2010 at station No. 46 and prepared an OCFA performance evaluation on Poole for the period of September 28, 2008, to September 28,

2009. He gave Poole an overall rating of substandard. Specifically, Culp found Poole's work habits, personal relations, adaptability, and progress were unsatisfactory. Poole was subsequently placed on a performance improvement plan. Prior to imposition of the performance improvement plan, Culp told his superior, Battalion Chief Dave Phillips, of the contents of the file he kept on Poole. Culp notified Phillips because he felt the daily logs contained incidents indicating concern and Phillips should know about them. In all, Culp prepared two annual reviews and three evaluations of Poole's progress on the performance improvement plan.

After he received his first substandard evaluation, Poole went to see Bob James, his representative with Orange County Professional Firefighters Association. James noted the specific details in the evaluation and asked Poole whether Culp had a file on him. Poole said he did not know of any.

On August 9, 2010, James appeared at station No. 46 and demanded Poole's "station file." Culp gave James the daily logs he kept on Poole. The daily logs contained more than 100 entries. Culp had noted numerous areas where he thought Poole needed to improve, including Poole's failure to be prepared in a timely fashion, leaving his shift before passing his pager to his replacement,[2] failing to remove his gear from the OCFA unit before leaving for the day, failing to take responsibility for hitting another crew member with a pike pole, failing to perform cleanup duties, and the fact that Poole apparently panicked during a training exercise.

On September 8, 2010, Poole wrote a letter to OCFA requesting the removal of all adverse comments in his "personnel file" located at the station house. Fifteen days later, OCFA responded, stating that "while the notes were intended for personnel purposes, they were never 'entered' into any file" as required by section 3255.

---

[2] A pager is one of the ways a firefighter is alerted an alarm has been sounded.

OCFA further stated the notes were not part of Poole's personnel file and to the extent any of the comments in Culp's notes made it into Poole's personnel file via a performance evaluation, Poole had the opportunity to review and sign the evaluation, as well as respond to any adverse comments in the evaluation prior to the evaluation placed in his personnel file.

Poole and the Orange County Professional Firefighters Association filed a petition and verified complaint in the superior court seeking a writ of mandate directing OCFA to include adverse comments in Poole's files only after complying with section 3255, declaratory relief, injunctive relief, civil penalties, and damages. In the trial court, counsel for OCFA and Poole conceded that if Culp had written the evaluation from his memory there would have been no lawsuit.

At the conclusion of the trial, the court entered an order denying relief. The court concluded the daily logs Culp kept in order to aid him in preparing employee evaluations were not part of Poole's personnel file and are not subject to section 3255's requirement that adverse comments not be entered into a personnel file until such time as the firefighter has read and signed the instrument containing the adverse comments. The court analogized Culp's notes to Post-it notes he used to remind himself of something. Poole and the Orange County Professional Firefighters Association filed a notice of appeal (G047691) from the minute order denying relief on the petition for a writ of mandate and the complaint. Once judgment was entered in OCFA's favor, appellants filed a second notice of appeal. The two appeals were consolidated.[3]

---

[3] We dismiss the appeal in G047691 because the minute order denying relief is not an appealable order. There is no need to treat that notice of appeal as premature but valid, because a timely notice of appeal (G047850) was filed after the judgment was entered. (*Vienna v. California Horse Racing Bd.* (1982) 133 Cal.App.3d 387, 389, fn. 2.) Even if the notice of appeal in G047691 were valid, the resolution of the issues in G047850 would render it moot.

II

DISCUSSION

The issue presented is whether the daily logs maintained on firefighters and used to prepare evaluations qualify either as a personnel file or a file used for personnel purposes. Poole contends to the extent the notes contained comments adverse to him, he was entitled to review the daily logs in his file and to file a written response to each adverse comment. We conclude the files were used for personnel purposes and are subject to the protective procedures instituted in FFBOR.

Standard of Review

"Ordinarily, '[o]n appeal following a trial court's decision on a petition for a writ of mandate, the reviewing court "'need only review the record to determine whether the trial court's findings are supported by substantial evidence.'" [Citation.] However, we review questions of law independently. [Citation.]' (*Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 129.) Where, as here, an appeal involves the application of a statute to undisputed facts, our review is de novo. (*Southern California Edison Co. v. State Board of Equalization* (1972) 7 Cal.3d 652, 659, fn. 8; *Alliance for a Better Downtown Millbrae v. Wade*, *supra*, at p. 129.) Additionally, statutory construction is a question of law requiring our independent review. (*Botello v. Shell Oil Co.* (1991) 229 Cal.App.3d 1130, 1134.)" (*San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167, 1175.) However, to the extent we review the trial court's resolution of disputed facts, we use the deferential evidence standard. (*People v. Gonzales and Solis* (2011) 52 Cal.4th 254, 284.)

FFBOR and Related Legislation

FFBOR (§ 3250 et seq.) was enacted in 2007, and became effective on January 1, 2008. (Stats. 2007, ch. 591, § 2.) It provides firefighters with certain due process rights concerning their employment. Employers of firefighters must "keep each firefighter's personnel file or a true and correct copy thereof, and shall make the file or copy thereof available within a reasonable period of time after a request therefor by the firefighter." (§ 3256.5, subd. (b).) A firefighter may view his or her "personnel files that are used or have been used to determine that firefighter's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action." (§ 3256.5, subd. (a).) Additionally, "[a] firefighter shall not have any comment adverse to his or her interest entered in his or her personnel file, *or any other file used for any personnel purposes by his or her employer*, without the firefighter having first read and signed the instrument containing the adverse comment indicating he or she is aware of the comment. However, the entry may be made if after reading the instrument the firefighter refuses to sign it. That fact shall be noted on that document, and signed or initialed by the firefighter." (§ 3255, italics added.) When an adverse comment is entered into a firefighter's personnel file, the firefighter has 30 days to file a written response. The written response is then attached to the adverse comment. (§ 3256.) Poole contends the file kept by Culp qualified as a file used for personnel purposes and adverse comments contained in the file were improperly included in violation of sections 3255 and 3256.

FFBOR was intended to mirror the earlier bill of rights enacted to protect police officers, the Public Safety Officers Bill of Rights Act (POBOR). (Sen. Rules Com. Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 220 (2007-2008 Reg. Sess.) as amended July 2, 2007, p. 2.) Section 3305 of POBOR provides: "No public safety officer shall have any comment adverse to his interest entered in his

personnel file, or any other file used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment indicating he is aware of such comment, except that such entry may be made if after reading such instrument the public safety officer refuses to sign it. Should a public safety officer refuse to sign, that fact shall be noted on that document, and signed or initialed by such officer." Just as section 3256 gives firefighters 30 days in which "to file a written response to any adverse comment entered into his . . . personnel file," section 3306 gives public safety officers the same right.

We also note the Legislature previously granted teachers similar rights. (Stats. 1976, ch. 1010, § 2, operative April 30, 1977.)[4] Section 44031 of the Education Code provides teachers a right to review their personnel files (Ed. Code, § 44031, subd. (a)) and further provides that no information "of a derogatory nature" may be placed in a teacher's personnel file "until the employee is given an opportunity to review and comment on that information. The employee shall have the right to enter, and have attached to any derogatory statement, his or her own comments." (Ed. Code, § 44031, subd. (b)(1).)

Analysis

Because FFBOR is of recent origin, it has not been the subject of published appellate court decisions on the issue presented. As FFBOR mirrors POBOR, we look to prior decisions dealing with comparable provisions of POBOR. Sections 3305 and 3306 of POBOR were intended to protect peace officers from unfair attacks on their character. Like sections 3255 and 3256 of FFBOR, sections 3305 and 3306 "give[] officers a

---

[4] Education Code section 44031 was repealed and replaced with a similar provision by Statutes 2000, chapter 866, section 1.

chance to respond to allegations of wrongdoing." (*County of Riverside v. Superior Court* (2002) 27 Cal.4th 793, 799.)

Complaints by members of the public must be investigated by the law enforcement agency. (Pen. Code, § 832.5, subd. (a)(1).) While these complaints may be kept in an officer's general personnel file, they are often kept in a file separate and apart from the general personnel file of the officer. (Pen. Code, § 832.5, subds. (b), (c).) The courts have found POBOR applies to citizen complaints, even when the complaint is not kept in the officer's personnel file, because the "very purpose" of the investigation requirement of Penal Code section 832.5 is "to assess the [officer's] qualifications for continued employment." (*County of Riverside v. Superior Court*, 27 Cal.4th at p. 803.) Culp's daily logs appear to have the same design, given they are kept for evaluation purposes.

Recognizing the existence of a citizen's complaint in an officer's personnel file may very well adversely affect the officer's employment, the Legislature requires law enforcement agencies to remove from an officer's personnel file any complaint found to be frivolous or unfounded. Still, those complaints must be maintained in a separate file the Legislature also deems to be "personnel records" for purposes of the California Public Records Act and Evidence Code section 1043, the statutory authority for what are commonly called *Pitchess*[5] motions. (Pen. Code, § 832.5, subd. (c);[6] *McMahon v. City of*

---

[5] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

[6] "(c) Complaints by members of the public that are determined by the peace or custodial officer's employing agency to be frivolous, as defined in Section 128.5 of the Code of Civil Procedure, or unfounded or exonerated, or any portion of a complaint that is determined to be frivolous, unfounded, or exonerated, shall not be maintained in that officer's general personnel file. However, *these complaints shall be retained in other, separate files that shall be deemed personnel records* for purposes of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) and Section 1043 of the Evidence Code." (Pen. Code, § 832.5, subd. (c), italics added.)

Los Angeles (2009) 172 Cal.App.4th 1324, 1332-1333.)

In *McMahon v. City of Los Angeles*, *supra*, 172 Cal.App.4th 1324, McMahon, a law enforcement officer with the Los Angeles Police Department, had approximately 20 citizen complaints filed against him. Each was determined to be meritless. Although the department permitted McMahon to review each of the complaints and "various related documents," McMahon demanded to view other materials made in connection with the investigation of the complaints, such as tapes of the interviews conducted during the investigations. When the department refused, McMahon sought a writ of mandate requiring disclosure. (*Id.* at p. 1327.)

Acknowledging the complaints had been found wanting and as a result there were no adverse comments in McMahon's personnel file (*McMahon v. City of Los Angeles*, *supra*, 172 Cal.App.4th at p. 1330) and the police department could not consider unsustained citizen complaints in making personnel decisions (*id.* at p. 1335), the *McMahon* court concluded "it would be unreasonable and contrary to legislative intent to read . . . section 3306.5, subdivision (c), as requiring the Department to disclose internal investigative materials that the Department is not authorized to use in making personnel determinations." (*Ibid.*) Just as the right to inspect personnel files found in POBOR (§ 3306.5) is intended to effectuate the right of law enforcement officers to read and sign an instrument containing an adverse comment prior to placement in his or her personnel file or other file used for personnel purposes by the employer (§ 3305; *McMahon v. City of Los Angeles*, *supra*, 172 Cal.App.4th at p. 1332), section 3256.5 is intended to give firefighters the same rights. Therefore, the general purpose of the provision granting a firefighter the right to review his or her personnel file and to comment on any adverse comment "is to facilitate the [firefighter's] ability to respond to adverse comments potentially affecting the [firefighter's] employment status. [Citation.]" (*McMahon v. City of Los Angeles*, *supra*, 172 Cal.App.4th at p. 1332.)

Aguilar v. Johnson (1988) 202 Cal.App.3d 241, also involved a citizen complaint filed against a police officer and the officer's right to comment on the complaint. Because a citizen complaint carries a "potential adverse impact on the officer, the complaint is an 'adverse comment' within the meaning of [POBOR]." (*Id.* at p. 250.) The *Aguilar* court discussed the Supreme Court's earlier decision in *Miller v. Chico Unified School Dist.* (1979) 24 Cal.3d 703 (*Miller*). *Miller* involved a school principal who was removed from his administrative position and placed back in a classroom. (*Id.* at p. 706.) Similar to POBOR, Education Code section 44031, originally enacted in 1976 (Stats. 1976, ch. 1010, § 2), gives teachers the right to inspect their personnel files and further provides information of a "derogatory nature" may not be included in an educator's personnel file until such time as he or she is given notice and an opportunity to comment on the information. (Ed. Code, § 44031, subd. (b)(1).) In *Miller*, the Chino Unified School District Board of Education reassigned Miller to a teaching position (*Miller*, *supra*, 24 Cal.3d at p. 706) based on 20 confidential memoranda prepared by Associate Superintendent Don Cloud and submitted to the superintendent. (*Id.* at p. 709.) Miller contended the school district violated Education Code section 44031 by failing to give him notice of the existence of the 20 confidential memoranda. (*Ibid.*)

The Supreme Court agreed and found the school district violated Education Code section 44031 by failing to enter the confidential memoranda into Miller's personnel file, thereby denying him the opportunity to comment on the contents of the memoranda. (*Miller*, *supra*, 24 Cal.3d at p. 711.) The memoranda were prepared by the associate superintendent "'from his personal notes and calendar, a summary of various meetings, contacts, occurrences, and events'" involving Miller. (*Ibid.*) The *Miller* court found substantial evidence supported the trial court's conclusion the memoranda contained derogatory comments concerning Miller. (*Ibid.*) The school district argued Education Code section 44031 did not apply because the memoranda had not been

entered into Miller's personnel file. (*Miller*, *supra*, 24 Cal.3d at p. 712.) However, "[t]he Legislature enacted [Education Code] section 44031 in order to minimize the risk of employment decisions that were arbitrary or prejudicial, and to this end established a procedure whereby employees could correct or rebut incomplete or inaccurate information in the hands of their employers which might affect their employment status." (*Id.* at p. 713.) By using the memoranda to affect Miller's employment status without providing him an opportunity to correct inaccurate information contained in the memoranda, the school board violated Education Code section 44031. (*Miller*, *supra*, 24 Cal.3d at p. 714.)

Applying *Miller* to the present facts, it is evident the daily logs affected Poole's job status. The daily logs kept in Poole's file at the fire station were used for personnel decisions. His substandard performance evaluation was admittedly based on adverse comments contained in the daily logs. Like the situation in *Miller*, information *not* contained in Poole's main personnel file was presented to his employer prior an adverse employment action by the employer. As in *Miller*, revealing the contents of the daily logs to Battalion Chief Phillips denied Poole the opportunity to respond to the adverse comments made known to the employer, contrary to the intent of the protective statutory enactment.

The evidence does not provide any reason to believe Poole was provided an opportunity to respond to the oral disclosure Culp made to the battalion chief of adverse comments contained in the file Culp maintained on Poole at the fire station. Indeed, there is no indication Poole was informed of the disclosure, much less of the information disclosed. The purpose in disclosing the contents of the daily logs was personnel related. After all, Culp made the disclosure so Battalion Chief Phillips would be aware of facts affecting Poole's employment.

FFBOR's purpose of providing firefighters a right to meaningfully respond to adverse comments that may affect personnel decisions concerning the firefighter (cf. *Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal.App.4th 916, 926) is frustrated when the firefighter's supervisor maintains a daily log containing adverse comments that may reach as far back as the day after the firefighter's last yearly evaluation and the adverse comments are not revealed to the firefighter until the next yearly review, at which point the firefighter may respond to adverse comments in that review.

Culp kept the logs to help him remember events when preparing personnel evaluations at the end of the year. Poole could not be expected to remember the details of the same events months and months later when he was finally made aware of the adverse comments in the course of a yearly performance review. For example, Culp found fault in Poole's failure to perform certain cleanup duties on a particular occasion. Hypothetically, had Poole agreed with another firefighter to switch cleanup duties on that day it would be unreasonable to expect he would remember the details of the arrangement months later, and be able correct what would otherwise have been an inaccurate or incomplete statement in his yearly performance review.

As stated above, OCFA admits the daily logs were kept for personnel purposes. In addition, the daily logs were used to place Poole on an improvement plan. Because the daily logs on Poole's activities at work and kept in a file with his name on it were used for personnel purposes and were disclosed to superiors—again for personnel purposes—Poole was entitled to respond to adverse comments contained therein. Accordingly, we reverse the judgment of the superior court and remand the matter for further proceedings not inconsistent with this opinion.

III

DISPOSITION

The judgment is reversed and the matter remanded for further proceedings consistent with this opinion. Appellants shall recover their costs on appeal in case No. G047850.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.:
COUNTY OF LOS ANGELES)

Case Name: STEVE POOLE; ORANGE COUNTY PROFESSIONAL FIREFIGHTER'S ASSOCIATION v. ORANGE COUNTY FIRE AUTHORITY
Case No.: Fourth Civil Numbers: G047850 consolidated with G047691

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, California, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 555 South Flower Street, Forty-Fifth Floor, Los Angeles, California 90071; that on December 16, 2013, I served the within PETITION FOR REVIEW in said action or proceeding by depositing a true copy thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, California Supreme Court
350 McAllister Street
San Francisco, California 94102-7303
(*Via Federal Express -Original and 13 Copies*)

Richard A. Levine
SILVER HADDEN SILVER WEXLER & LEVINE
1428 Second Street, Suite 200
P.O. Box 2161
Santa Monica, CA 90407-2161

Telephone: 310.393.1486
Facsimile: 310.395.5801
Attorneys for Plaintiffs and Appellants

Clerk, California Court of Appeal
Fourth Appellate District
Division Three
601 W. Santa Ana Boulevard
Santa Ana, California 92701
(*One Copy)*

Clerk, Orange County Superior Court
Honorable Geoffrey T. Glass, Judge
700 Civic Center Drive West
Santa Ana, CA 92701
(*One Copy*)

Barbara Raileaunu
WOODRUFF, SPRADLIN & SMART
555 Anton Boulevard, Suite 1200
Costa Mesa, California 92626

Telephone: (714) 558-7000
Facsimile: (714) 835-7787
Attorneys for Petitioner
Orange County Fire Authority

I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles,

California, in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 16, 2013, at Los Angeles, California.

Julie Dekhtyar

(Original Signed)