

S215300

SUPREME COURT
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IN THE
Supreme Court
OF THE STATE OF CALIFORNIA

STEVE POOLE, et al.,
Plaintiffs and Appellants,

vs.

ORANGE COUNTY FIRE AUTHORITY,
Defendant and Respondent.

**ANSWER TO
PETITION FOR REVIEW**

AFTER A DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION THREE
[4th Civil Nos. G047691; G047850]

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I. INTRODUCTION

Plaintiffs and Appellants Steve Poole and the Orange County Professional Firefighter's Association (hereinafter "Appellants") hereby answer and oppose the Petition for Review filed by Defendant and Respondent Orange County Fire Authority (hereinafter "Respondent").

Respondent fails to meet its burden to establish sufficient grounds to warrant a review of this appeal. Respondent fails to satisfy any express ground upon which this Supreme Court may order review. For example, there are no appellate decisions that conflict with the Opinion in this case, as the decision is closely aligned with prior precedent. There is also no need to settle an important question of law because the Opinion complements the consistent and established body of law regarding the interpretation of both the Public Safety Officers' and Firefighters' Procedural Bill of Rights Acts. Finally, this decision will not open the "floodgates of litigation" predicted by Petitioner, but rather furthers the explicit purposes of the Act "to ensure that stable employment relations are continued throughout the state, and to further ensure that effective services are provided to all people of the state." (Cal. Gov. Code Tit. 1, Div. 4, Ch. 9.6 Note.)

Respondent also fails to identify any factual or legal basis which requires or supports further appellate review. Respondent repeatedly

mischaracterizes the legal conclusions of both the trial court and the Court of Appeal as factual conclusions. Respondent also fails to appreciate the clear holding of the Court of Appeal that daily logs, maintained in files which are then used to prepare a performance evaluation or a performance improvement plan, are, as a matter of law, files used for any personnel purposes.

Respondent also fails to identify any error, misstatement, or omission in the Court of Appeal's ruling that would warrant review. Respondent's contention that adverse comments were not *entered* into Poole's "*official*" personnel file does not vitiate Poole's statutory protection under Government Code Sections 3255 and 3256. The Court of Appeal also did not misstate the legal issue regarding the existence of a "file used for personnel purposes."

Furthermore, the Court of Appeal's legal conclusion that the station files containing daily logs were subject to the statutory protections of Section 3255 was based on undisputed evidence in the record, none of which Respondent challenges. Finally, the Court of Appeal's conclusion that the use of Culp's daily logs for personnel purposes triggered the protection of the Firefighters Procedural Bill of Rights Act (hereinafter "FFBRO") was consistent with case law, and therefore no review is

necessary or appropriate.

Respondent fails to appreciate the personnel purpose found by the Court of Appeal which was supported by the undisputed facts in the record. Instead, Respondent contends that, because the comments in the Daily Logs were later incorporated into an annual performance evaluation, the comments themselves were not used for personnel purposes. However, as stated by the Court of Appeals:

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.

(Opinion, p. 13.) Respondent does not clearly address this central legal conclusion. Instead, Respondent construes the legal conclusions of the trial court as factual conclusions, and argues for a different result than that mandated by the statutory language and precedential authority. However, the clear purpose of the FFBRO is furthered by the decision of the Court of Appeal, and as such no further appellate review is necessary.

Therefore, Petitioner respectfully requests that the California Supreme Court deny the Petition for Review.

II. RESPONDENT FAILS TO ESTABLISH SUFFICIENT GROUNDS WARRANTING REVIEW BY THIS SUPREME COURT

California Rules of Court Rule 8.500 provides in part:

(b) Grounds for review The Supreme Court may order review of a Court of Appeal decision:

(1) When necessary to secure uniformity of decision or to settle an important question of law;

(2) When the Court of Appeal lacked jurisdiction;

(3) When the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or

(4) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

Despite these clear grounds established in the Rules of Court, Petitioner fails to support any specific ground that would warrant review by this Court.

For example, Respondent states that review is necessary to secure uniformity of decision and settle an important question of law. However, Respondent does not cite a single decision by any other court that conflicts with the clear holding of the Court of Appeal. Respondent further fails to

identify any basis to suggest that the law in this area is unsettled. Even assuming *arguendo*, that an important question of law had been unsettled regarding the application of the statutory right to review and respond to adverse comments under Section 3255 and 3256, any such issue is now clearly settled by the Court of Appeal's Opinion in this case. There simply is no conflict among decisions that requires the review of the Supreme Court of the State of California to settle the law and secure uniformity.

Respondent also argues that the Opinion of the Court of Appeal will open the "floodgates of litigation" and create corresponding cost to public agencies. However, Respondent has failed to show why the reasoned decision of the of the Court of Appeal would increase litigation. For example, Respondent suggests that the ruling could lead to increased grievance procedures initiated by employees. However, Government Code Section 3256, which details the rights granted to a firefighter when an adverse comment is placed in his personnel file, only authorizes the filing of a written response by the employee, which would then be attached to and accompany the adverse comment. There is no statutory mandate in Sections 3255 or 3256 which would lead to increased grievances by employees, and consequently there would be no "floodgate of litigation" as the result of the Opinion.

Appellants submit that affording a firefighter the opportunity to file a written response to an adverse comment under the circumstances addressed in the Opinion, increases fairness to firefighter employees and further the stated goals of the FFBOR “to ensure that stable employment relations are continued throughout the state, and to further ensure that effective services are provided to all people of the state.” (Cal Gov Code Tit. 1, Div. 4, Ch. 9.6 Note.) As stated by the Court of Appeal:

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

(Opinion, at 8-9.) The purpose of the right to review and respond to adverse comments under the Act is not limited to providing the right to respond to only a performance evaluation, as asserted by Respondent. As noted by the Court of Appeal:

FFBOR’s purpose of providing firefighters a right to meaningfully respond to adverse comments that may affect personnel decisions concerning the firefighter [citation] 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.

(Opinion, at 13.) Rather than reducing fairness, as suggested by Respondent, the decision of the Court of Appeal would *increase* fairness by permitting a more detailed and complete record to be contained within a file that may be used for personnel purposes, whether that purpose be the drafting of a performance evaluation or otherwise. The purposes of the FFBOR are advanced by the decision, and any alleged administrative burden on public agencies (if at all) by the proper application of Sections 3255 and 3256 is outweighed by the basic principle of fairness to firefighters which, in turn, promotes stable labor relations and effective firefighting service.

Finally, the Opinion of the Court of Appeal will not lead to absurd results. Respondent warns that, “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 entered into an official file and will be destroyed once the final evaluation is complete.” (Petition, p. 4.) However, such a hypothetical is not consistent with the undisputed facts and holding of the Opinion. As established in the Opinion, Captain Culp kept a Station File, which contained the Daily Logs,

on each firefighter. The Daily Logs were not destroyed after the performance evaluations were drafted. Moreover, the contents of those logs were shared orally with the Battalion Chief. Finally, the Daily Logs were placed in a specific file that was used for a personnel purpose.

This is a simple case based on undisputed facts. Based on those undisputed facts, the Court of Appeal issued an Opinion recognizing and explaining the protections afforded by the FFBOR. Given the absence of any conflicting appellate decisions or statutory law and the benefits of the decision as discussed *supra*, there are no grounds that would support review of the Opinion by the California Supreme Court. As such, the Petition should be denied.

III. RESPONDENT FAILS TO IDENTIFY ANY ERROR OR FAILURE THAT WOULD WARRANT REVIEW

A. THE COURT OF APPEAL APPLIED THE PROPER STANDARD OF REVIEW IN REVERSING THE LOWER COURT'S JUDGMENT

In determining the scope of coverage under the Firefighters Procedural Bill of Rights Act (Gov. Code § 3250 et seq.), the Court of Appeal, as in cases under the Public Safety Officers Procedural Bill of

Rights Act (Gov. Code § 3300 et seq.), should independently determine the proper interpretation of the statute and is not bound by the lower Court's interpretation. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562; *Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1217.)

However, Respondent contends in its Petition for Review that a trial court's resolution of facts necessary for interpretation of a statute must be affirmed, so long as the ruling is supported by substantial evidence. In this case, however, the *undisputed facts* establish that the entry or placement of adverse comments by Captain Culp in Poole's Station File *were used for personnel purposes* and/or *could influence future personnel decisions*, and therefore did not comply with the statutory protections of the FFBOR, nor applicable case law.

The application of a statute to undisputed facts presents a question of law subject to independent appellate determination. As stated by the Court of Appeal in this case:

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* [(2003) 108 Cal.App.4th 123,] 129.)

(Opinion, p. 6; emphasis added.) Respondent argues that the facts are disputed, and that therefore the Court of Appeal should have used the

substantial evidence or deferential evidence standard. However, Respondent failed to establish that the fundamental facts on which the Court's Opinion relied were not undisputed. Therefore, the Court of Appeal was correct to review the decision of the trial court *de novo*.

Respondent's Petition for Review identifies certain alleged "factual" conclusions of the trial court. (See Petition, p. 9.) However, these "facts" comprise legal conclusions and undisputed facts. Rather than rely on the legal conclusions of the trial court, the Court of Appeal instead relied on numerous undisputed facts in reaching its own legal conclusions. The following facts have not been disputed by Respondent:

1. 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.
2. Culp included in his daily logs "[a]ny factual occurrence or occurrences that would aid... in writing a thorough and fair review."
3. The logs document the efficiency of the firefighters under Culp's supervision, including whether firefighters complied with instructions and adhered to rules.
4. 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.

5. 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.

6. Poole was subsequently placed on a performance improvement plan.

7. 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.

8. In all, Culp prepared two annual reviews and three evaluations of Poole's progress on the performance improvement plan.

9. The daily logs contained more than 100 entries.

10. 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. (Opinion, pgs. 3-4)

11. His [Poole's] substandard performance evaluation was admittedly based on adverse comments contained in the daily logs. (Opinion, pg.12)

Based on these *undisputed facts*, the Court of Appeal concluded that Station

File in which the Daily Logs were kept was a file used for personnel

purposes. As such, the Court of Appeal did not err in failing to apply the substantial evidence test because the fundamental facts as stated above are undisputed, and the application of those facts to the statute is subject to de novo review.

For the same reasons, Respondent fails to demonstrate how the Court of Appeal's recitation and incorporation of the undisputed facts in its Opinion was in error. Respondent contends that there was conflicting evidence concerning Respondent's intent, evidenced in the testimony of Captain Culp. However, these alleged "facts" do not remove the clear admission of the OCFA from the record, in which the OCFA admitted that "the notes were intended for personnel purposes." Moreover, the Court of Appeal's recitation of facts makes no reference to the intent of Culp in keeping the Daily Logs. Many of Respondent's "facts" which allegedly create a dispute are legal conclusions regarding the application of the undisputed facts to FFBOR concerning the placement of the Daily Logs in the station file. Because there are no disputed facts material to the application of the statute, the Court was correct in applying de novo review.

Respondent suggests that Petitioner failed to meet his burden to challenge the factual record in this case. (Petition, pgs. 16-17.) Because the fundamental facts in the record were undisputed, Appellant applied the

statute to the undisputed facts in the record and presented legal authority regarding the purpose and interpretation of the FFBRO and the POBRA. There was therefore no failure by Appellant to provide conflicting evidence because no conflicting evidence was necessary for the Court of Appeal to reach its legal conclusions.

Respondent repeatedly attempt to recharacterize legal conclusions, which are based on the application of undisputed facts to the case law and statute, as factual disputes. Consequently, Respondent has failed to demonstrate that a review in this appeal is warranted.

B. RESPONDENT'S CLAIM THAT ADVERSE COMMENTS WERE NOT *ENTERED* INTO POOLE'S "OFFICIAL" PERSONNEL FILE DOES NOT VITIATE POOLE'S STATUTORY PROTECTION UNDER GOVERNMENT CODE SECTIONS 3255 AND 3256

Government Code Section 3255 of the Firefighters Procedural Bill of Rights Act expressly prohibits the employer from entering "any comment adverse to [the firefighter's] interest" in the firefighter's "personnel file or any other file used for any personnel purposes." Despite the admission by the Respondent's Human Resources Director that Captain Culp's notes

were “intended to be used for personnel purposes” (CT 804), Respondent nonetheless contends that Culp’s comments were not subject to Sections 3255 or 3256 since they were not *entered* in an “official” personnel file.

Respondent’s first contention that the Court failed to address whether the comments were “entered” lacks merit. Both the legislative history of the FFBOR, as well as numerous published decisions construing parallel provisions of the POBRA, have used the words “entered” and “placed” interchangeably.

Specifically, in the Senate Judiciary Committee Report on AB 220 enacted as the Firefighters Procedural Bill of Rights Act, the Committee summarized the right of a firefighter to review and respond to adverse comments entered in personnel files [or files used for personnel purposes] as follows:

[T]he bill would mirror most, if not all, of the provisions in POBOR and make them applicable to firefighters, including those who are paramedics or emergency medical technicians. This bill would:

* * *

(m) prohibit the **placement** of any adverse comment into a firefighter’s personnel file without the firefighter reviewing and signing off on the comment and provide the firefighter 30 days to respond to an adverse comment **placed** in the file.

(Senate Judiciary Committee Report, CT 177-178, Case No. G047691; emphasis added.)

In addition, numerous published decisions construing the parallel provisions in the POBRA frequently refer to the entry of such comments as “placement” of such comments in personnel files. “[T]heir *placement* in an officer’s personnel file could potentially lead to not only adverse personnel decisions but could also result in a more severe penalty.” (*Aguilar v. Johnson* (1988) 202 Cal.App.3d 241, 249; emphasis added.) “[T]he Act guarantees public safety officers the right to view any adverse comment *placed* in their personnel files (§ 3305) and to file, within 30 days, a written response, which will be attached to the adverse comment. (§ 3306.)” (*Seligsohn v. Day* (2004) 121 Cal.App.4th 518, 523; emphasis added.) The Officers Bill of Rights Act “provides that such officers have the right to review any adverse comments *placed in their personnel files* and to submit a written response. (Gov. Code, §§ 3305, 3306.)” (*Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278, 292; emphasis added.)

Based upon the undisputed facts in this case, Captain Culp’s adverse comments on Poole were *entered or placed* in a personnel file or any other file used for any personnel purposes. As such, the Court of Appeal did not

misstate the legal issue in this case by failing to explicitly focus on the *entering* of the adverse comments into Captain Culp's daily log.

Moreover, the Court of Appeal did not err in determining that Captain Culp's daily log in the station file was used for "any personnel purposes" even though it was not an *official* personnel record. Respondent repeatedly attempts to shift focus to the presence or absence of an "official" file. (See, e.g., Petition, pgs. 2, 5, 6, 20, and 30.) However, similar contentions and defenses based on the labeling or location of such files have been previously raised by public agencies respecting identical safeguards under the POBRA, and have been uniformly rejected by appellate courts. "[T]hat the Chief has agreed to place complaints in a *separate file does not excuse compliance with Government Code sections 3305 and 3306.*" (*Aguilar v. Johnson, supra*, 202 Cal.App.3d at 251; emphasis added.) "[T]he *label placed on the investigation file is irrelevant.* The materials in the file unquestionably may serve as a basis for affecting the status of the employee's employment." (*County of Riverside v. Superior Court* (2002) 27 Cal.4th 793, 802; emphasis added. "[T]he language in the Bill of Rights Act should be construed broadly to include any document that 'may serve as a basis for affecting the status of [a peace officer's] employment,' *regardless of whether it is kept separate from the officer's*

general personnel file.” (*Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal.App.4th 916, 924-925; emphasis added.) “This conclusion is, of course, reinforced by the critical language in section 3305 which makes clear that the *mandates of that provision apply not only to a formal personnel file* but also to ‘any other file used for any personnel purposes by his employer. (§ 3305.)’” (*Seligsohn, supra*, 121 Cal.App.4th at 530; emphasis added.)

Consequently, Respondent’s claim that the adverse comments respecting Poole were not entered in his “official” personnel file does not vitiate Poole’s statutory protection under Government Code Sections 3255 and 3256 to review and respond to comments adverse to his interest.

Therefore, the Court of Appeal did not misstate the legal issue in this case, and Respondent has failed to demonstrate that review by the Supreme Court is warranted.

**C. THE COURT OF APPEAL OPINION DOES NOT
MISSTATE THE LEGAL ISSUE REGARDING THE
EXISTENCE OF A “FILE USED FOR ANY
PERSONNEL PURPOSE”**

Petitioner contends that the focus of the Court of Appeal “is incorrect and ignores certain key terms from the statute itself” by

“omit[ting] 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.” (Petition p. 19.) However, the Opinion properly characterizes the issue on appeal as follows: “The issue presented in this appeal is whether the *files containing the daily logs* are within the ambit of Section 3255.” (Opinion at p. 3; emphasis added.)

Moreover, throughout the Opinion, the Court of Appeal recognized that the daily logs were included *within file(s)* on the firefighters maintained at the fire station:

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). (Opinion at p. 2; emphasis added.)

The daily logs kept *in Poole’s file* at the fire station were used for personnel decisions. (Opinion at p. 12; emphasis added.)

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. (Opinion at p. 6; emphasis added.)

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. (Opinion at p. 13; emphasis added.)

As such, it is clear that the Court of Appeal properly recognized that the adverse comments were entered into a file kept for personnel purposes. Accordingly, the Court of Appeal did not misstate the legal dispute in this case, and no review is warranted.

D. THE COURT OF APPEAL OPINION PROPERLY REACHED ITS LEGAL CONCLUSION THAT THE STATION FILES CONTAINING DAILY LOGS WERE SUBJECT TO THE STATUTORY PROTECTIONS OF SECTION 3255 BASED ON UNDISPUTED EVIDENCE IN THE RECORD

Based on the undisputed evidence in the record, the Court of Appeal properly found that the station file maintained on Poole which contained the daily logs was used for personnel purposes:

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).*

(Opinion at p. 2; emphasis added.) Respondent expressly recognizes this personnel purpose, stating: “While the notes *clearly aided [Culp's] drafting of evaluations*, they were not required....” (Petition, p. 29; emphasis added.)

Respondent nevertheless repeatedly argues that the daily log was not used for personnel purposes as follows: “At bench, there was literally no evidence that the notes were ever into any file [sic] used by the employer for personnel purposes.” (Petition, p. 20.) “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.” (Petition, p. 33.)

However, as properly held by the Court of Appeal, because the daily log was placed in a file that was used in the preparation of performance evaluations, it fell within the protection of the Bill of Rights because it was “any other file used for any personnel purposes by his or her employer.” (Gov. Code, § 3255.) “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.*” (Opinion at p. 12; emphasis added.)

Throughout their Petition, Respondent fails to address this plain legal conclusion. Respondent never explains how a daily log, which contains numerous entries that were used to prepare a performance evaluation and were then kept after the performance review was completed, was not placed or entered into a file used for *any* personnel purpose. Respondent instead attempts to establish, without any authority or support, that the personnel purpose found by the Court of Appeal is insufficient for inclusion in the broad protections afforded by the FFBOR and the focus on *any personnel purpose*.

It is undisputed in this record that Culp testified that his daily logs would be used to prepare performance evaluations, performance improvement plans on employees and progress evaluations during the implementation of the performance improvement plans (CT 852, 853-854, 875-876). Disciplinary action could transpire in the event of repetition by an employee of certain conduct documented in the logs (CT 886), or failure to successfully complete a performance improvement plan (CT 860).

The adverse comments contained in the file or log created and maintained by Captain Culp on Poole resulted in Poole's substandard Performance Evaluation Reports for the rating periods of 2008/2009 and 2009-2010 (CT 711, 767-783). In accordance with the expansive language

in Section 3255, such procedural safeguard applies where adverse comments are entered in a file “used for *any* personnel purposes.”

Moreover, the precedential case law interpreting the parallel provisions of Section 3305 of the POBRA uniformly affords a broad interpretation to the application of such procedural right.

In *Sacramento Police Officers’ Association v. Venegas, supra*, 101 Cal.App.4th at 924-925, the Court of Appeal, (citing *County of Riverside, supra*, 27 Cal.4th at p. 802) stated that: “[T]he Supreme Court concluded that the language in the Bill of Rights Act *should be construed broadly to include any document that ‘may serve as a basis for affecting the status of [a peace officer’s] employment.’*” (Emphasis Added).

The Court of Appeal in *Sacramento Police Officers Association v. Venegas, supra*, also held that “[E]ven though an adverse comment does not directly result in a punitive action, *it has the potential of creating an adverse impression that could influence future personnel decisions concerning an officer, including decisions that do not constitute discipline and punitive action.*” (*Id.* at 926, citing *Caloca v. County San Diego, supra*, 72 Cal.App.4th at 1222; emphasis added).

In *Seligsohn v. Day, supra*, 121 Cal.App.4th 518, the Court found that, “The determinative factor is the potential relevance of the

materials in those files to *possible future action* affecting the status of the employee's employment." (*Id.* at 530; emphasis added.)

Based upon the foregoing, it must be concluded that Captain Culp's placement in Poole's Station File of over 100 written adverse comments alleging improper conduct and/or work deficiencies by Poole occurring from December 2008 to July 28, 2010 (CT 710, 873-874, 846-847) had both the potential of creating an adverse impression which could affect future personnel decisions, and actually did lead to the issuance of his substandard Performance Evaluation Reports, followed by the imposition of a Performance Improvement Plan; all of which must reasonably be characterized as used for "personnel purposes."

However, Respondent appears to argue that the comments in the daily log were not used for *any* personnel purpose because some of the comments were incorporated into the performance evaluation. However, the Court of Appeal properly rejected Respondent's contention that an opportunity to correct detailed inaccuracies of incidents incorporated into a performance evaluation at the end of a year can cure a violation of the FFBOR. Indeed such daily logs, kept without the timely opportunity to respond, frustrates the purpose of the statute:

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 to correct what would otherwise have been an inaccurate or incomplete statement in his yearly performance review.

(Opinion at p. 13.) Respondent fails to provide any argument or discussion as to why the Court's legal conclusions are incorrect. As stated by the Court of Appeals, a later opportunity to respond to performance evaluations is insufficient to cure the preexisting violations of the statute.

Instead, the Court of Appeal properly concluded that the station files

containing daily logs were subject to the statutory protections of Section 3255 based on the undisputed evidence in the record. As such, the Court should deny the Petition for Review.

**E. THE COURT OF APPEAL'S CONCLUSION THAT
THE USE OF CULP'S DAILY LOGS FOR
PERSONNEL PURPOSES TRIGGERED THE
PROTECTION OF THE BILL OF RIGHT'S ACT WAS
CONSISTENT WITH CASE LAW**

Finally, the Court of Appeal properly applied preexisting case law and the statutory language to the undisputed facts in this case to conclude that the station file containing daily logs kept by Captain Culp was a file used for personnel purposes. Poole's supervisor, Captain Culp, authored a multitude of adverse comments concerning the on-duty conduct of Poole from December 12, 2008 to July 28, 2010. (CT 710, 716-739.) Such a file on Poole was maintained by Captain Culp in a written "hard copy" form and inserted in a manila file bearing Poole's name. (CT 873-874, 846-847.) The file was stored in Culp's desk located in the company officer's office at Fire Station 46 (CT 847-848) where Culp utilized the Department computer to electronically create such comments. (CT 845-846.)

The adverse comments contained in the file created and maintained by

Captain Culp included the following criticism of Poole: failure to comply with supervisors' directives, delays in Fire Station engine departures, failure to participate in Station chores, lack of remorse for an accident involving Poole and a co-worker while on duty, chronic and excessive time spent on personal cell phone calls at the Station, deficiencies during search and rescue training drill, appearing for duty ungroomed, and not engaging in social discourse with fellow employees while at the Fire Station. (CT 711, 716-739.)

The adverse comments by Culp were never provided to Poole by the Authority prior their entry in Culp's Station file, nor was Poole ever provided the opportunity to sign an acknowledgment of receipt of such comments, nor previously provided any opportunity to file a written response to the adverse comments. (CT 710.)

In a September 23, 2010 letter from the Authority to Poole concerning Culp's file/log on Poole, the Human Resources Director stated that "[w]hile the notes *were intended to be used for personnel purposes*, they were never 'entered' into any file." (CT 672; emphasis added.) According to Culp's testimony, the information contained in his Station file or "logs" on employees under his supervision included information documenting employee noncompliance with rules of the Fire Department,

as well as events that could affect the ability of an employee to perform his job. (CT 850.)

Culp also testified that his daily logs would be used to prepare performance evaluations, performance improvement plans on employees, and progress evaluations during implementation of the performance improvement plans. (CT 852, 853-854, 875-876.) Disciplinary action could transpire in the event of repetition by an employee of certain conduct documented in the logs (CT 886), or if an employee did not successfully complete a performance improvement plan (CT 860).

In *County of Riverside v. Superior Court*, the California Supreme Court addressed the parallel provision in the POBRA and concluded:

[T]he Act applies to any adverse comment 'entered in [an officer's] personnel file, *or any other file used for any personnel purposes.*' (Section 3305, italics added). In *Aguilar, supra*, 202 Cal.App.3d 241, the Court of Appeal construed this language broadly to include *any document that 'may serve as a basis for affecting the status of the employee's employment' . . .*

(*County of Riverside, supra*, 27 Cal.4th at 802; second emphasis added.)

In *Sacramento Police Officers Assn.*, the Court held that broad statutory language within the parallel provisions in the POBRA applies where a comment has the potential of creating an adverse impression which could influence future personnel decisions affecting the employee, stating:

In its usual and ordinary import, the broad language employed by the Legislature in sections 3305 and 3306 does not limit their reach to comments that have resulted in, or will result in, punitive action against an officer. The Legislature appears to have been concerned with the potential unfairness that may result from an adverse comment that is not accompanied by punitive action and, thus, will escape the procedural protections available during administrative review of a punitive action. As we will explain, *even though an adverse comment does not directly result in a punitive action, it has the potential of creating an adverse impression that could influence future personnel decisions concerning an officer, including decisions that do not constitute discipline and punitive action.* (See *Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1222.) The legislative remedy was to ensure that an officer is made aware of a adverse comments and is given an opportunity to file written response, should he or she choose to do so.

(*Sacramento Police Officers Assn.*, *supra*, 101 Cal.App.4th at 926; emphasis added.)

Respondent attempts to distinguish the present case from the cases of *Aguilar v. Johnson*, *Sacramento Police Officers' Association v. Venegas*, *County of Riverside v. Superior Court*, and *Seligsohn v. Day*, *supra*, by arguing that since those cases involved documents related to files required to be created or maintained by other statutes, the Bill of Right safeguards to review and respond under Sections 3255 and 3256 would not

otherwise apply to other factual circumstances.

Such a contention that Section 3255 is limited to files whose creation is mandated by statute, is contrary to the clear and plain language of Section 3255 making its protections applicable to “any other file used for any personnel purposes.” Clearly, there is no qualifying requirement in Section 3255 that the phrase “any other file” is limited to only those files created pursuant to separate statutory authority. Indeed, Respondent’s interpretation of the statute would permit a fire department to keep a separate personnel file, admittedly used for personnel purposes, and not disclose the contents therein merely because no statute required the creation of the file or its contents. Such a distinction is wholly without legal basis or merit.

“In construing statutory provisions, a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language. The court is limited to the intention expressed.” (*Mares v. Baughman* (2001) 92 Cal.App.4th 672, 677 quoting *People v. One 1940 V-8 Coupe* (1950) 36 Cal.2d 471,475.)

Moreover, Respondent’s restrictive application of the statutory right to review and respond to adverse comments under the FFBOR is inconsistent with broad interpretation uniformly applied by appellate cases


(*supra*) construing parallel provisions of the POBRA.

As such, further appellate review by the California Supreme Court is unwarranted, and the Petition for Review should be denied.

III. CONCLUSION

For the above reason, Plaintiffs and Appellants Steve Poole and the Orange County Professional Firefighter's Association respectfully request that this Court deny the Petition for Review.

Dated: 12/30/13

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(d) of the California Rules of Court, the enclosed document has been produced using 13-point Roman type including footnotes and contains approximately 6,239 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 30, 2013

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PROOF OF SERVICE BY MAIL

In Re: ANSWER TO PETITION FOR REVIEW; No. S215300
Caption: Steve Poole; Orange Cty. Prof. Firefighters' Assoc. v. Orange County Fire Auth.
Filed: IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
(Constructively filed on this date pursuant to CRC R. 8.25(b)(3)(B).)

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

I am a citizen of the United States and a resident of or employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 200 Del Mar Blvd., Suite 216, Pasadena, California 91105. On this date, I served the persons interested in said action by placing one copy of the above-entitled document in sealed envelopes with first-class postage fully prepaid in the United States post office mailbox at Pasadena, California, addressed as follows:

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I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed on December 31, 2013, at Pasadena, California.



E. Gonzales