Supreme Court Case Number S215300

Court of Appeal Case No. G047850
Consolidated with G047691

# In the Supreme Court of the State of California



STEVE POOLE, ORANGE COUNTY PROFESSIONAL FIREFIGHTERS' ASSOCIATION,

*Appellants and Plaintiffs,*

vs.

ORANGE COUNTY FIRE AUTHORITY,

*Respondent and Defendant.*

AFTER DECISION OF THE COURT OF APPEAL G047850 Consolidated with G047691

## ORANGE COUNTY FIRE AUTHORITY'S OPENING BRIEF ON THE MERITS

**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 Raileaunu (Bar No. 206197)
555 Anton Boulevard, Suite 1200
Costa Mesa, California 92626
Telephone: (714) 558-7000
Facsimile: (714) 835-7787
email: BRaileanu@wss-law.com

*Attorneys for Respondent and Defendant*
*ORANGE COUNTY FIRE AUTHORITY*

## TOPICAL INDEX

**Page**

**Page**

## TABLE OF AUTHORITIES CITED

**Page(s)**

**Cases**

**Page(s)**



**Statutes**

**Page(s)**

# In the Supreme Court of the State of California

STEVE POOLE, ORANGE COUNTY PROFESSIONAL FIREFIGHTERS' ASSOCIATION,

*Appellants and Plaintiffs,*

vs.

ORANGE COUNTY FIRE AUTHORITY,

*Respondent and Defendant.*

---

**ORANGE COUNTY FIRE AUTHORITY'S OPENING BRIEF ON THE MERITS**

---

**ORANGE COUNTY FIRE AUTHORITY'S OPENING BRIEF ON THE MERITS**

**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 and Respondent, Orange County Fire Authority ("OCFA") respectfully submits this opening brief to address the following issues:

(1) Does the Firefighters' Procedural Bill of Rights Act, *Government Code* Sections 3250-3262 (Stats. 2007 Ch. 59, AB 220)

("FFBOR"), apply to a Fire Captain, when his informal written notes include adverse comments about a firefighter, but those notes: (1) were used solely to refresh the Captain's memory at the time he might prepare a formal written evaluation; (2) were not entered into the firefighter's personnel file; (3) were not entered into any other file required to be created or maintained in the ordinary course of business by the employer fire authority; (4) were neither shown to the fire authority or any of its supervisors nor kept in any location where the fire authority or any of its supervisors could obtain access; and, (5) could not become part of any file that could generate any employment consequence for the firefighter, including promotion, additional compensation, termination or other disciplinary action, unless and until, if ever, the notes were subsequently entered into the firefighter's official personnel file?

(2) Does application of the "substantial evidence" standard of review, the "conflicting evidence" and "conflicting inferences" doctrines, and the failure of an Appellant to challenge the findings of the trial court on appeal prevent a Court of Appeal from reversing a trial court's decision based on factual findings opposite that of the trial court?

## INTRODUCTION

Reversal of the Court of Appeal's decision is warranted for a number of very important reasons. First, it should be reversed in furtherance of this Court's role as the "institutional overseer" of the subordinate courts. The substantial evidence standard of review of a trial court's factual findings is one of the most important standards of appellate review. Its correct application is fundamental to the administration of justice. Failure to correctly apply it and its corollary doctrines, the conflicting evidence and conflicting inference doctrines, disregards the different roles of trial and appellate courts and subjects affected parties to a serious deprivation of due process.

As shall be shown herein, the court of appeal below appears to have reversed the trial court's judgment in favor of OCFA based upon its own unsupported factual findings that were 100% opposite those upon which the trial court founded its decision. Since the trial court's findings were supported by ample substantial evidence, were neither challenged by Appellants in the court of appeal nor the subject of any substantial evidence analysis or review by the court of appeal on its own, application of the above standard of review and doctrines required the court of appeal to affirm the trial court's judgment.

Reversal should also be ordered to interpret a key provision of the Firefighter's Procedural Bill of Rights, *Government Code*, §§ 3250-3262 (Stats. 2007 Ch. 59, AB 220), in the manner intended by the Legislature. The question whether FFBOR applies to informal daily notes of firefighters' performance, prepared by Fire Captain for the sole purpose of later refreshing his recollection prior to preparing formal reports, without entry into any file accessible to or used by the employer fire authority to determine employment status or discipline, can only be answered in the negative.[1]

In interpreting that FFBOR applies to private informal notes, Appellants and the court of appeal ignored FFBOR's express language that requires that adverse comments be "entered" into a file created, maintained by or accessible to the employer, that is used for determination of employment status or discipline, *i.e.*, a file that is used for "personnel purposes by his or her employer." Until adverse comments are entered into such a file, they are like a ship on the sea that may never reach port — as long as notes are not entered into any file to which the employer fire

---

[1] Because of the similarities of legislation applicable to other public agencies and institutions, the effect of the court of appeal's decision will be widespread. If affirmed, it will likely affect employment relationships arising in the provision of police, education and other public services.

authority or its supervisors had access, there can be no employment consequences to the firefighter. In doing so, the court of appeal disregarded multiple rules of statutory interpretation.

The resulting rule created by the court of appeal creates logically inconsistent and absurd results. Under it, even a draft of a performance evaluation containing adverse comments or of a disciplinary notice will be required to be shown to firefighters, since such documents contain adverse comments used for "personnel purposes," even though they are never to be entered into an official file accessible by others at the fire authority and would be destroyed once the final evaluation is completed. Further, verbal conversations between Fire Captains and Battalion Chiefs about the performance of their fire personnel could be argued to be subject to full disclosure to the firefighters, if either had merely jotted down a written note prior to or regarding the conversation, despite the fact that they may never have any impact on future employment decisions.

The court of appeal's decision also yields illogical and disparate results for situations in that some Fire Captains have perfect recall and need no notes from which to prepare performance evaluations, while others have 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.

There is no precedential support for the interpretation sought by Appellants and decided by the court of appeal. The cases relied upon to base a rule that FFBOR should apply to informal notes are all profoundly distinguishable from the situation at bench and thus inapplicable. Unlike the files in those cases, Captain Culp's informal notes were not statutorily required to be created, maintained, or to be material from which employment determinations could be made and the employer had no access. In those cases relied upon by Appellants and the court of appeal, adverse comments were entered into official files that the employer public agency was required by law to create and maintain and to which it had access, thereby having the potential effect of influencing the opinions held by other supervisors regarding the performance of a firefighter without the benefit of that firefighter's comments on the subject.

The court of appeal's decision creates an unnecessary, disruptive and time-consuming review process for both firefighters and their supervisors that is directly contrary to FFBOR's stated purpose. Fire Captains and other

supervisors should be permitted to continue the reasonable practice of employing informal note taking in the performance of their duties, without having to go through the formal review process at every juncture. A formal review process for informal notes would be disruptive to employment relationships. Because firefighters already have the right to review performance evaluations, to review all documents included in their personnel files, to submit comments on those documents for inclusion into the files, to grieve adverse evaluations, and to pursue the grievance process through arbitration, providing further disclosure rights to informal notes not entered in any file to which the employer has access is unnecessary. The time and energy to be dedicated to this massive expansion of the grievance process would take firefighters and resources away from the provision of fire prevention and protection of life and property.

The immediate effect of the court of appeal decision will 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. With possible penalties including $25,000 for each infraction, public agency coffers dedicated to fire prevention and protection will flow into the pockets of those firefighters who were the subject of

notes never entered into any file that could affect their employment, whether or not the adverse comments were 100% accurate. It will likely 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.[2]

Thus, reversal should be ordered by this Court to clearly establish that supervisors of public employees may employ informal note taking solely for their own use when preparing a firefighter's performance evaluation, 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 actually affect on

---

[2] Requiring 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 adverse 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 Mr. Poole's penchant to file a grievance to virtually any interaction with his supervisors during the entire course of his employment.

the employment status of public employees must be shown to them for review and comment.

## STATEMENT OF FACTS

### 1. Captain Culp's Daily Log Notes.

Captain Culp was Firefighter Poole's (hereinafter "Mr. Poole") direct supervisor. He created notes for each employee he supervised, which he referred to as a "daily log." They reflected factual events and observations from the shifts he supervised. In creating notes, Captain Culp intended to provide a reference source solely for himself, from which 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 desk drawer at the fire station. They were never placed in any official OCFA department file and were never accessible by OCFA. [CT 1017–1018.]

### 2. Official OCFA Personnel Files Maintained at OCFA Headquarters.

OCFA personnel files are only maintained by OCFA at its headquarters in Irvine, California and are not maintained at individual fire stations. The Irvine headquarters personnel files are the only files used by OCFA to determine employment consequences, including promotion and discipline. [CT 1013.]

### 3. Mr. Poole's 2008-2009 "Sub-Standard" Performance Evaluation.

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

### 4. Mr. Poole's Subsequent "Sub-Standard" Evaluations.

On or around May 5, 2010, Mr. 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 Mr. Poole himself who specifically who asked OCFA to be placed on the PIP, i.e., it did not result from any impermissible sharing of Captain Culp's daily log notes.**[3] [CT 1014] While on the PIP, Mr. 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, he was

---

[3] Inexplicably, absent any basis in the record (and opposite undisputed evidence presented therein), the Court of Appeal found that the PIP resulted from Captain Culp impermissibly sharing his daily log notes and that OCFA did not share adverse comments in Mr. Poole's interim performance reviews with him (that they were provided to Mr. Poole was also undisputed.)

given the opportunity to review and sign this interim evaluation before it was entered in his personnel file, and again in response, Mr. Poole filed a grievance. [CT 1019.]

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

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

### 6. Union-Prepared Letter Asserting That Captain Culp's Daily Log Had Violated the FFBOR.

The letter was addressed to Zenovy Jakymiw, OCFA's Director of Human Resources. It 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. [Ed.] [CT 1008.]

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

On September 23, 2010, Mr. Jakymiw sent a letter advising Mr. Poole that the Act was inapplicable to Captain Culp's notes, because the notes were neither part of Mr. 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 Mr. Poole's performance, he had the opportunity to review, comment, and sign his performance evaluations before they were entered into his personnel file.

**8. Mr. Poole's Claim for Damages.**

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

**9. Appellants' Petition for Writ of Mandate.**

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

OCFA 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.*

OCFA presented abundant evidence that Mr. 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 Mr. Poole had first been given an opportunity to review, comment upon and sign, if and when made part of his performance review or interim performance review process. [CT1013-1020]

Mr. Poole presented no factual evidence with which he even attempted to rebut the evidence presented by OCFA 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 OCFA 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 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 his official performance evaluations;

4. **"No one but Captain Culp has access to [his] notes."** [Emphasis supplied]

5. "***Captain Culp never divulged his notes to anyone***, except to Poole;" [Emphasis supplied]

6. The OCFA maintains a ***personnel file that is used as a basis for all personnel decisions affecting Poole.***" [Emphasis supplied]

7. ***"Culp's notes are not used by the employer (OCFA) to make personnel decisions***—at best, they are used by Culp in making a written evaluation of Poole, which is then placed in his personnel file at OCFA where it is subsequently used to make employment decisions."[Emphasis supplied]

8. ***"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;"***[Emphasis supplied]

9. 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;

10. 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. [CT 1633-1634]

**11. Appellants' Notice of Appeal.**

Appellants' Notice of Appeal was filed timely.

**12. Appellants' Opening Brief and Reply.**

Appellants' Opening Brief asserted that the trial court's decision was a question of law subject to independent review, as "application of a statute to undisputed facts." [AOB, p.7] Because of this position, Appellants did not dispute any of the factual findings made by the trial court by way of substantial evidence standard analysis or otherwise. They neither presented any of the evidence supporting the trial court's findings in favor of OCFA

nor the evidence purporting to support contrary factual findings that they wished to argue. [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 emphasized that the factual findings made by the trial court on the evidence, which were the facts to which the trial court applied the statute, must be reviewed on a substantial evidence basis.[4] OCFA pointed out that Appellants had erroneously ignored the effect of the trial judge's specific findings of fact, which had directly supported the trial court's judgment. [RB, pp. 2, 13-17]

OCFA also argued that the cases cited by Appellants interpreting parallel provisions of the "POBOR" were inapplicable because they all involved either official personnel files or other files that were statutorily required to be created and used for personnel purposes **by those agencies, where the employer, and not just an individual supervisor, would have**

---

[4] The factual findings were based upon, *inter alia*, Captain Culp's evidence regarding the limited purpose and private use of his notes, the fact that those notes were not entered into any OCFA personnel file or other file from which employment decisions were to be made, the fact that OCFA did not have access to his file, and that any and all adverse comments that were entered into his personnel file, whether at an interim or annual review, were disclosed to Mr. Poole pursuant to FFBOR.

**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 to create or maintain and to which no person or entity other than Captain Culp, including OCFA, as the employer, had access. [RB, pp. 17-45]

### 14. Published Decision Reversing Trial Judgment.

On November 4, 2013, the Court of Appeal filed its decision, reversing the trial court's judgment.

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] Because it found that the record reflected that OCFA had admitted that the logs were intended to be used for personnel purposes, it concluded that the daily log notes "are subject to provisions of FFBOR." [Opinion, p. 3]

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. It also expressly acknowledged, however, that, "to the extent it would review the

trial court's resolution of disputed facts," it would use "the deferential evidence standard."[5] [Opinion, p.6]

Without undertaking any substantial evidence review of the record, the court made factual findings that were inconsistent with those made by the trial judge. For example, the court's opinion reflects that it 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

---

[5] Notwithstanding this acknowledgement, the court of appeal failed to provide any deference to (or even any mention of) many of the trial judge's factual findings upon which the trial court's decision was based. *Instead, it made its own findings, some of which were contrary to the trial judge's findings to arrive at an entirely opposite result!* It did not conduct a substantial evidence review of the record.

daily logs were used to place Poole on an improvement plan." [Opinion, p. 13]

In summation, the court of appeal stated, "[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 personnel purposes — Poole was entitled to respond to adverse comments contained therein. Accordingly, we reverse..." [Opinion, p.13]

**15. OCFA's Petition for Rehearing.**

On November 19, 2013, OCFA filed a petition for rehearing, which was denied by the Court of Appeal.

**16. OCFA's Petition for Review**

On December 17, 2014, OCFA filed its petition for review with this Court, to which Appellants filed an answer. On February 26, 2014, this Court graciously granted the petition.

## STANDARD OF REVIEW

Where the facts involve the resolution of questions of law, the reviewing court makes its own determination regarding a trial court's ruling on a petition for a writ of mandate. (*McMahon v. City of Los Angeles* (2009) 172 Cal.App.4th 1324, 1331 (*McMahon*); *Seligsohn v. Day* (2004) 121 Cal.App.4th 518, 522.) This appeal involves important questions of law, specifically, the interpretation and application of provisions of the

Firefighters' Procedural Bill of Rights Act (§ 3250 et seq.). The interpretation of a statute is a question of law to be determined by the reviewing court *de novo*. (*McMahon*, *supra*, at p. 1331.)

Where however, as here, the foundational facts necessary to the application of a statute have been the subject of extrinsic evidence and specific factual findings arise from consideration of the evidence by the trier of fact, those findings are governed by the "substantial evidence" standard of review. Under the "substantial evidence" rule, the trial court's resolution of factual issues must be affirmed, so long as it is supported by "substantial evidence." *Winograd v. America Broadcasting Company,* (1998) 68 Cal.App.4th 624, 632; *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188. So long as the judgment below was supported by substantial evidence, any evidentiary conflict must be resolved in favor of the prevailing party, and any reasonable construction by the trial court will be upheld. *Marriage of Fonstein* (1976) 17 Cal.3d 738, 746-747; *Parsons v. Bristol Develop. Co.* (1965) 62 Cal.2d 861, 865-866; *Kuhn v. Dept. of General Services* (1994) 22 Cal.App.4th 1627, 1632-33 ("Conflicting Inference Rule"); *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479 ("Conflicting Evidence Rule").

## ARGUMENT

### I.
### In the Absence of a Substantial Evidence Review of the Entire Trial Record Sought by Appellant or Actually Undertaken, Courts of Appeal May Not Reverse a Trial Court's Judgment Based Upon Its Own Factual Findings Inconsistent From 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. These roles were disregarded at bench. Notwithstanding that Appellants failed to challenge the trial court's judgment for lack of substantial evidence and the court of appeal did not itself undertake a substantial evidence analysis or review, the court of appeal's reversal impermissibly was founded, in large part, if not entirely, on factual findings it made that were contrary to key findings on which the trial court's judgment was based!

In arriving at judgment for OCFA, the trial judge had considered and weighed all of the evidence presented at trial and made a factual finding that Captain Culp's notes were neither intended to be used nor were actually used by OCFA to make any determinations that could affect Mr. Poole's employment status or discipline. He also specifically found that all decisions affecting firefighters' employment status at OCFA are based upon the official personnel file maintained solely at OCFA headquarters, that no one but Captain Culp had access to the subject notes, that Captain Culp never divulged or showed his notes to anyone except Mr. Poole, and that

Captain Culp did not use his notes for any purpose other than to refresh his recollection at the time of providing a performance review. The trial court also considered the purported "admission" in the letter authored by OCFA's Human Resources Director, Mr. Zenovy Jakymiw, that Captain Culp's notes were intended to for "personnel purposes." Furthermore, he weighed abundant evidence that there were no adverse employment actions taken against Mr. Poole based on the content of Captain Culp's notes or any other writing by him that was not first shown to Mr. Poole, including the reviews undertaken during Mr. Poole's self-requested PIP,[6] which indisputably complied with the FFBOR disclosure requirements.[7]

The trial court performed its duty to weigh all of the evidence and 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 purported conflicting evidence (Mr. Jakymiw's letter), if that letter could

---

[6] The trial record indisputably reflected that Mr. Poole approached OCFA and voluntarily requested the PIP [CT 1014], completely contrary to the court of appeal's summary finding that the PIP arose from OCFAA actions.

[7] Very troubling indeed, some of the factual bases used by the Court of Appeal did not even reflect evidence in the trial record itself, but may have been assumed merely from argument (not evidence) by Appellants, without citation to evidence in the record.

even be considered admissible evidence, which is contested.[8] 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

---

[8] The so-called admission in Mr. Jakymiw's letter that Captain Culp's notes were intended for "personnel purposes," so heavily relied upon by Appellants and the court of appeal, was not a party admission and should not have been admissible evidence at all. First, it is a hearsay statement wholly without personal knowledge — a statement made by someone other than the person whose personal intent in creating or maintaining the notes was an issue.

Second, the term "personal purposes" itself is a legal conclusion. Only the percipient facts regarding the limited purpose for which Captain Culp had created and maintained the notes were relevant to the determination of the purpose.

Lastly, the trial court considered and weighed the statement of Mr. Jakymiw's letter against the evidence from Captain Culp and others, which had explained in great and precise detail his intent and limitations on use, the absence of accessibility by OCFA, that he never gave or shared the notes with anyone at OCFA, that OCFA complied with FFBOR's disclosure requirements at every one of Mr. Poole's reviews, and that OCFA makes all of its employment status and disciplinary decisions based on the official personnel files and not from informal notes to which it never had access. As trier of fact, the trial court's conclusion was entitled to full deference.

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. This is especially so where Appellants themselves never sought review of the trial court's factual findings and therefore never complied with the required identification of and citation to evidence presented at trial on each side for their to be a challenge to the factual findings.

Appellants' failure to challenge any of the factual findings of the trial court in their appeal waived any argument that Captain Culp's notes were used for any personnel purposes or that they did or could have adversely impacted Poole's employment status. *People v. Louis* (1986) 42 Cal.3d 969, 984-987. Under this standard, an 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. An 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 an 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 & Clark Corp. v. Fallon (1971), supra*, 3 Cal.3d 875 at p. 881; *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 52-53.

At bench, not only did Appellants fail to set forth the evidence on both sides of each of the factual findings made by the trial court, they failed to even mention the existence of trial court factual findings or assert that they were erroneously made, on grounds that they were unsupported by substantial evidence or otherwise. Instead, they merely stridently argued to the court of appeal that Captain Culp's notes caused Mr. Poole's employment status to be negatively affected, including requiring him to participate in the PIP. Appellants boldly failed to present any type of

record on which the court of appeal could validly have chosen to disregard the trial court's findings or displace them with its own.

Thus, for all of the reasons above, the court of appeal committed reversible error when it based its decision on numerous findings of fact contrary to those found by the trial court.

## II.
## The Plain Language of FFBOR Provides That a Fire Captain's Notes About a Firefighter Are Not Subject to FFBOR Unless and Until, If Ever, Adverse Comments Contained Therein Are To Be Entered Into the Firefighter's Personnel File or Other File To Which the Employer Fire Authority or Any of Its Supervisors Have Access

Appellants' theory that notes should be subject to FFBOR requires this Court to disregard the law's express requirement that an adverse comment be "entered" into a personnel file or other file that is also used to determine employment consequences affecting the firefighter "by the employer." Appellants' theory, accepted by the court of appeal below, incorrectly merges the initial act of writing informal notes with the later action of entering any adverse comments from them into a file used by OCFA to determine employment consequences. Appellants' theory fails to acknowledge that the simple act of writing down mental notes that are not

shared with the employer does not trigger the rights of firefighters to review the notes. Rather, it's the accessibility to and potential influence on the employer that triggers the right of review. Only the action in entering the comments into the type of file used by the employer to generate employment consequences triggers the disclosure and other requirements of FFBOR.[9]

Appellants seek to apply FFBOR to require disclosure of the mere existence of a written adverse comment about a firefighter, whether or not it will ever be entered into his or her personnel file or other file accessible to the employer and capable of creating adverse employment consequences. However, *Government Code*, sections 3255 *et seq,* makes it abundantly clear that the Legislature did not subject the mere act of note-taking to the disclosure and other requirements of FFBOR. Official entry into a specific type file is required.

---

[9] Interestingly, even if it were determined that Captain Culp's notes were intended to be used for a personnel purpose, if personnel purpose is incorrectly defined to include use only in refreshing one's recollection to assist when deciding whether to include adverse incidents or comments into an annual performance review, OCFA should still not be held liable. The mere act of privately keeping notes, even if for a personnel purpose does not trigger the protections of FFBOR, unless and until the adverse comments are to be entered into a file, which file is used for personnel purposes by the employer.

Had the Legislature wished to make preliminary, informal notes, that are maintained outside the employer fire authority's access, subject to the provisions of FFBOR, it could have done so quite easily. Without any difficulty, it could have expressed that FFBOR would apply to any written adverse comment. But it did not. Instead, it specified that the right to review an adverse comment is only triggered in connection with the comment being entered into a personnel file and not simply its mere writing or existence. It specified that that the file must be used for personnel purposes "by the employer" in order to trigger the rights as opposed to simply ending the clause with the phrase "personnel purposes." Had the Legislature omitted the specific language within FFBOR that requires entry into the personnel file or other file from which adverse employment consequences could occur, only then would it have included within FFBOR's reach notes, wherever located, and without regard to whether they would or could ever be used a part of the universe of information from which adverse employment determinations could be made by the fire authority employer as interpreted by the court of appeal. The statute itself makes it perfectly clear that it did not do so.

Case law has consistently recognized that where the Legislature could easily have added or subtracted language to a statute to support a

meaning or application, but had not done so, is a solid basis for concluding that the Legislature did not intend a result or application inconsistent with its plain language. See e.g., *Shirk v. Vista Unified School District* (2007) 42 Cal.4th 201, 212-214 (where Plaintiff's interpretation of a statute was inconsistent with specific language contained therein, this Court noted that, "[h]ad the Legislature intended [the argued result], it could have easily said so."); *County of Los Angeles v. Superior Court* (2005) 127 Cal.App.4th 1263, 1269 ("If the Legislature had intended [a different result], it would have said so.")

In contrast to Appellants' position, however, FFBOR represents a legislative scheme consisting of multiple subdivisions, all of which expressly apply to only adverse comments that are to be entered into a firefighter's personnel or other file, from which adverse employment consequences could be determined. FFBOR's complementary provisions are directed only at files from which employment determinations are made. Section 3255[10] describes the disclosure required to be made by a fire

---

[10] California *Government Code* §3255 provides, in pertinent part:

**"3255 Requirements for entry of adverse comment in firefighter's personnel file**

*Footnote continued on next page.*

supervisor **before he or she may enter his or her written adverse comments into a personnel or other file that can adversely affect the firefighter's employment status**. Section 3256[11] controls the firefighter's right to respond to any adverse comment by filing his or her own written **response into his or her personnel file**. It does not direct that a response be affixed to transitory notes containing adverse comments, prior to any review, wherever they may be found.[12] Section 3256.5,[13] provides for a

---

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 purpose 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]

[11] California *Government Code* §3265 provides:

**"3256. Written response to adverse comment**

A firefighter shall have 30 days within which to ***file a written response to any adverse comment entered in his or her personnel file***. The written response shall be attached to, and shall accompany, the adverse comment."[Emphasis supplied]

[12] A file of notes, by its very nature, is not permanent or to be maintained over the entire term of a firefighter's career. As the trial court specifically found, was intended to be used until and if the notes, or some of them, were used to refresh Captain Culp's memory when preparing annual performance evaluations.

[13] **"3256.5 Right to inspect personnel file; Request for correction or deletion**

*Footnote continued on next page.*

firefighter's right of inspection of his files that may affect his employment status. It **also refers only to personnel files**, showing, once again, that the Legislature viewed a firefighter's personnel file as the file that analysis/use/review could generate employment consequences.

It is a rule of statutory construction that courts, "should, if possible, give meaning to every word and phase in a statute," and preclude a construction that renders a part of a statute meaningless or inoperative. See

---

**(a)** Every employer shall, at reasonable times and at reasonable intervals, upon the request of a firefighter, during usual business hours, with no loss of compensation to the firefighter, permit ***the firefighter to inspect 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.***" [Emphasis supplied]

**(b)** Each employer ***shall keep each firefighter's personnel file*** 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.

**(c)** ***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....A statement submitted pursuant to this subdivision ***shall become part of the personnel file of the firefighter.***

**(d)** Within 30 calendar days of receipt of a request made pursuant to subdivision (c), the employer shall either grant the firefighter's request or notify the officer of the decision to refuse the request. If the employer refuses to grant the request, in whole or in part, the employer shall state in writing the reasons for refusing the request, and ***that written statement shall become part of the personnel file of the firefighter.***"

*e.g.*, *Adams v. Murakami* (1991) 54 Cal.3d 105, 123 (court is not to presume that Legislature engages in idle acts); *California Teachers Assn v. Governing Bd. Of Rialto School Dist.* (1997) 14 Cal.4th 627, 632-633; *Copley Press v. Superior Court* (2006) 39 Cal.4th 1272, 1284-1285. Appellants clearly seek to persuade this Court to disregard the term "enter" and the phrase "other file used for personnel purposes by the employer." "It is a settled principle of statutory interpretation that where more than one statutory construction is arguably possible, our "policy has long been to favor the construction that leads to the more reasonable result. [Citation.] (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal. 278, 290)

Another long recognized rule of statutory interpretation is that "words in a statute should, unless otherwise clearly indicated, be given their usual, ordinary, commonplace meaning." *Crawford v. Metropolitan Gov't* (2009) 555 U.S. 271, 129 S. Ct. 846, 850; *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal. 3d 245, 268.

In rendering its decision, the Court of Appeal disregarded the following rules of statutory construction: (1) that meaning should be given to every word and phrase in a statute; (2) that words in a statute should, unless otherwise clearly indicated, be given their ordinary, commonplace

meaning; (3) that a statute should be construed to preclude a construction that renders a statute meaningless or inoperative; and, (4) the rule that a construction should not yield absurd results.

As noted, the court of appeal's analysis and incorrect conclusion disregarded the express statutory requirement that rights of review are only triggered prior to an adverse comment being "***entered into his or her personnel file***," present in both sections 3255 and 3256. Indisputably, at issue were Captain Culp's notes, not adverse comments entered into Mr. Poole's personnel file. Appellants treat the statutes as if the term entered is not present anywhere in the statute. Legislature did not wish it to be given its usual meaning, it could have easily excluded the phrase from the statutory language, and merely provided merely that any written adverse comment about a firefighter's job performance must be shown to the firefighter before the comment is written down.

The court of appeal failed to recognize FFBOR's temporal requirement, *i.e.*, for FFBOR to apply to adverse comments, the supervisor must first write the adverse comment and thereafter perform the second action by "entering" that written comment into a file that can actually have

employment consequences once the comment has been signed.[14] The only consequence of not allowing a firefighter to review such adverse comments in that it may not then be entered into a file for personal purposes by the employer. Here, the comments were never entered into such a file.

Further, the court of appeal also incorrectly ignored the phrase "entered into…., or any ***other files used for any personnel purposes by his or her employer***," present in section 3255. The term entering directly connotes an action separate from and more formal than the mere act of writing down, or recording contemporaneous notes, *which may or may not be later entered or placed into a file* that may have an effect on a firefighter's employment status.

Even if an adverse comment were somehow deemed to have been ***entered*** into a file other than a "personnel file," FFBOR requires that it must have been entered into it for "personnel purposes" in order to trigger its disclosure and other requirements. Reference to the plain meaning of "purposes" indicates that for the action of entering an adverse comment

---

[14] If the statutory need for a separate action (entering into a file that actually bears possible employment consequences) were not part of the statutory framework, then the statute would be legislating (requiring disclosure) of a *supervisor's thoughts* about creating a writing an adverse comment.

about a firefighter into a file to be for "personnel purposes," it must be entered for "an end," for a goal or objective to be obtained. *Webster's Third New International Dictionary (Unabridged)* (1986), p.1847 defines "purposes" as..."**1 a :** something that one sets before himself as an object to be attained: an end or aim to be kept in view in any plan, measure, extension, or operation:...b RESOLUTION, DETERMINATION...**2 a:** an object, effect , or result, aimed at, intended, or attained..."

In stark contrast to Captain Culp's being created for "personnel purposes" at bench, however, his notes were not jotted down with any aim or goal to be attained, i.e., they were not jotted down with any "end" to be accomplished in mind — Captain Culp created them solely to permit his review to refresh his memory at a later time when he would decide whether the comments would or would not be entered into Mr. Poole's official personnel file. Only at this later time would Captain Culp determine whether the adverse comments contained in his notes would be used for "personnel purposes." They were, in essence, a draft of a possible performance evaluation which, only when final, would Mr. Poole then have the right to review and respond.

Furthermore, the phrase "used for personnel purposes" has a specific meaning can be gleaned from a review of FFBOR. Section 3265.5

specifically provides that firefighters may "inspect 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.**"[Emphasis supplied]

The most reasonable interpretation of the phrase "used for personnel purposes" throughout FFBOR, especially in the context of the phrase "other files used for personnel purposes" in section 3255, is to rely upon the list provided in section 3265.5. When adverse comments entered in files that are used to determine a firefighter's qualifications for employment, promotion, additional compensation, termination or other disciplinary action, they are used to determine an employment consequence. In stark contrast, when adverse comments are merely notes that may or may not ever be entered into a file used for determination of employment consequences, they cannot reasonably be considered part of a "file used for personnel purposes."

Review of this case clearly shows that Captain Culp's notes were never used for any personnel purposes — they were still inchoate and might have never been utilized or have the possibility of causing any adverse employment consequence. His notes were as if they were a ship that sailed but might never reach any port. Until and if they were entered into a file

that could give rise to those consequences, **a file to which OCFA had access and could consider and for employment action**, they would not trigger the disclosure/inspection rights of FFBOR.

## III.
## As Distinct from the Situation at Bench Involving Informal Notes of a Fire Captain, Kept for His Eyes Only and Not Accessible by the Employer or Any Other Personnel, the Cases Relied Upon by Appellants and the Court of Appeal 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.

### *A. 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,[15] 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 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.*)

---

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

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.App.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,[16] 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

---

[16] 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.)

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 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.[17]

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.

---

[17] Indeed, the situation at bar is more analogous to that in *McMahon v. City of Los Angeles (2009)* 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.)

To argue that mental notes which take written form are subject to review is the same as arguing that FFBOR requires a supervisor to share all of his mental notes about a firefighter with the firefighter prior to including such comments in a performance evaluation. The purpose of Section 3255 is to afford a firefighter the right to review comments which might have the ability to influence others in the organization regarding the performance if the firefighter without having given the firefighter an opportunity to respond. Such an ability to influence others can only occur if the comments are entered into a personnel file accessible by others in the organization, as opposed to for the author's sole use.

Further, 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 in future preparation of a performance evaluation. 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. There is nothing in FFBOR that prevents supervisors from discussing the performance of a firefighter with each other or that required allowing the firefighter to listen to such conversations. The notes could not be used to influence OCFA's personnel in future matters relating to Mr. Poole since they were not accessible to such personnel. Further, the notes were not kept in an official department file that another company officer would have any legitimate reason to review. 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.]

*B. 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 1031.1, 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, because such an evaluation would be accessible by others and would have the effect of influencing others' opinions of Mr. Poole's performance. 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, Mr. Poole had the opportunity to respond to it. Before any adverse comments were placed in Mr. 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 Mr. Poole's personnel file*, which was the only file that could affect employment. That Mr. 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 FFBOR cannot be read to afford firefighters whose Captains have taken written notes more rights than those firefighters whose Captains have only written an evaluation based on memory.

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 Respondent and Defendant*
*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 opening brief on the merits was produced with a computer. It is proportionately spaced in 13 point Times Roman typeface. The brief contains 10,291 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 May 13, 2014, at Los Angeles, California.

_____

Jules S. Zeman

## PROOF OF SERVICE

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

Case Name: STEVE POOLE, ORANGE COUNTY PROFESSIONAL FIREFIGHTERS' ASSOCIATION v. ORANGE COUNTY FIRE AUTHORITY
Case No.: Supreme Court No. S215300

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 May 13, 2014, I served the within ORANGE COUNTY FIRE AUTHORITY'S OPENING BRIEF ON THE MERITS 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 plus 13 copies)*

Barbara Raileaunu
Woodruff, Spradlin & Smart
555 Anton Boulevard, Suite 1200
Costa Mesa, California 92626
Telephone: (714) 558-7000
Facsimile: (714) 835-7787
*Attorneys for Respondent and Defendant ORANGE COUNTY FIRE AUTHORITY*

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

Richard A. Levine
Silver Hadden Silver Wexler & Levine
1428 Second Street, Suite 200
P.O. Box 2161
Santa Monica, California 90407-2161
Telephone: (310) 393-1486
Facsimile: (310) 395-5801
*Attorneys for Plaintiffs and Appellants*

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

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 May 13, 2014, at Los Angeles, California.

Julie Dekhtyar

*(Original Signed)*