

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 BRIEF ON THE MERITS

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

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PROFESSIONAL FIREFIGHTERS' ASSOCIATION

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I. INTRODUCTION

Appellants Steve Poole (hereinafter referred to as “Poole”) and Orange County Professional Firefighters’ Association (hereinafter referred to as “Association”) hereby answer and oppose the Opening Brief on the Merits filed by Respondent Orange County Fire Authority.

The decision of the Court of Appeal should be affirmed where the undisputed evidence in the record demonstrated that daily logs created and maintained on Firefighter Poole by his Fire Captain over a duration of one and one-half years which contained in excess of 100 adverse comments respecting Poole’s performance and conduct were subject to statutory rights in Government Code Section 3255 of the Firefighters Procedural Bill of Rights Act (Government Code Section 3250 *et seq.*).

The adverse comments by Culp were never provided to Poole by the Authority prior their entry in the fire station file on Poole, nor was Poole ever provided the opportunity to sign an acknowledgment of receipt of such comments, nor provided any opportunity to file a written response to the adverse comments before their entry in the station file.

It was undisputed in the record that the daily logs were utilized by Culp in preparation of performance evaluations and performance improvement plans in which he rated Poole substandard. In addition, Culp

discussed the content of his daily logs with his Battalion Chief prior to Culp's formulation of performance evaluations and performance improvement plan on Poole, as well as discussed the content of such daily logs at meetings regarding Poole attended by the Respondent's Senior Human Resource Analyst, Battalion Chief, Office Chief and attorneys for the Fire Authority.

Appellants contend that the entry of such adverse comments in a file used for personnel purposes clearly did not comply with statutory requirements of the Act which prohibits the employer from entering any adverse comment in a firefighter's *personnel file or any other file used for any personnel purposes* without the firefighter having first read and signed the instrument containing the adverse comment. (Gov. Code Section 3255.) The entry of the adverse comments without Poole's knowledge also violated the Act's requirement that the employer provide the firefighter an opportunity within 30 days to file a written response to any adverse comment. (Government Code Section 3256.)

Despite Respondent's characterization of the daily logs as informal notes used solely to refresh Captain Culp's memory to prepare a written evaluation on Poole, the record demonstrates that the daily logs were 23 pages in length, systematically and regularly prepared by Captain Culp on

the fire station computer, and maintained as a record in the Company Officer's office in computerized and hard-copy form long after the evaluation periods.

Despite Respondent's contention that Captain Culp's detailed daily logs on Poole were not created or maintained for personnel purposes (i.e. "his notes were not jotted down with any aim or goal to be attained") Culp testified that the purpose for such logs was to memorialize "any factual occurrence or occurrences that would aid [him] in writing a thorough and fair annual review."

In addition, the Respondent's Director of Human Resources also admitted in correspondence to Poole that the daily logs were intended to be used for personnel purposes: "[w]hile the notes were intended for personnel purposes, they were never 'entered' into any file." Consequently, the Court of Appeal properly found that the daily logs were used for personnel purposes within the meaning of Government Code Section 3255.

The decision by the Court of Appeal which followed well-settled precedent interpreting identical provisions of the Officers Bill of Rights (Gov. Code Section 3300 *et seq.*) would not lead to untoward results as speculated by Respondent. Instead, the decision would implement basic protections afforded by the Firefighters Bill of Rights Act and in

furtherance of the public policy advanced by such Act.

Despite Respondent's claim that the decision of the Court of Appeal would create administrative disruption, there is no evidence that the timely presentation of the daily logs to Poole to review and sign would have resulted in any such disruption. Full and timely disclosure to employees of adverse comments concerning performance or conduct is conducive to timely improvement, or alternatively to timely correction of a factual misconception by supervisors. Moreover, timely disclosure would also prevent the inherent prejudice to an employee faced with adverse comments as to conduct occurring nearly a year before disclosure in an annual performance evaluation when there would be no meaningful and effective ability to respond to the details of such daily logs.

Lastly, contrary to Respondent's assertion, the decision of the Court of Appeal will not precipitate an "expansion of the grievance process" or "open the floodgate of litigation" because Government Code Sections 3255 and 3256 solely affords the firefighter the right to review, sign and respond to the adverse comment. Such procedural safeguards have existed for nearly 40 years under the Officers' Bill of Rights Act and do not impose grievance obligations on employers, nor otherwise subject them to exposure to damages, except in cases of malicious violation of the Act. (Gov. Code

Section 3260(d).)

Affirming the decision of the Court of Appeal would further the Legislature's declared finding and purpose of the Act that effective protection of property and safety of the public depends upon the maintenance of reasonable and consistent procedural protections for firefighters, as well as stable employment relations between firefighters and their employer. (Gov. Code Tit. 1, Div. 4, Ch. 9.6 Note, § I, Section 1; Note to Gov. Code Section 3250.)

II. STATEMENT OF FACTS

Appellant Steve Poole at all times mentioned herein was a Firefighter employed by Respondent Orange County Fire Authority (hereinafter referred to as "Authority"). (Clerk's Transcript hereinafter referred to as "CT" at p.709 prepared in Case No. G047850 unless otherwise noted.) Appellant Orange County Professional Firefighters Association is the recognized employee organization representing Firefighters (including Poole), Fire Apparatus Engineers and Fire Captains employed by the Authority with regard to all matters respecting wages, hours and other terms and conditions of employment. (CT 709.)

On or about August 9, 2010 Poole and his Association representative discovered the existence of a file maintained at Poole's assigned

Authority's Fire Station No. 46 which contained over 100 entries of adverse comments prepared by Poole's supervisor, Fire Captain Culp, documenting alleged improper conduct and/or work deficiencies by Poole purportedly occurring from December 12, 2008 to July 28, 2010. (CT 710; Culp Dec 1018,1022-1045.) The adverse comments were produced by Culp upon the Association representative requesting the "station file" which Culp understood was a "file to keep records." (Culp Dec. CT 1019; Culp Depo. CT 837-838.) Specifically, in response to such a demand, Culp retrieved the folder labeled "Steve Poole" from the desk in the Company Officer's office which contained the daily logs Culp had prepared on Poole. (Culp Dec CT 1019.)

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. (Culp Depo CT 873-874, 846-847, 873-874.) The file was stored in a desk located in the Company Officer's office at Fire Station 46 (Culp Depo CT 847-848) where Culp utilized the Department computer to electronically create such comments (Culp Depo CT 845-846). Culp created such files or "daily logs" for each employee under his supervision (Culp Depo CT 846) and maintained such documentation throughout his supervision of employees (Culp Dep CT 851).

According to Culp, the information contained in his Station file or logs 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. (Culp Depo CT 850.)

Culp testified that his daily logs would be used to prepare performance evaluations and reviews of performance improvement plans on employees, including the content for the narrative portion of those evaluations. (Culp Depo CT 852, 854.) Disciplinary action could transpire in the event of repetition by an employee of certain conduct documented in the logs (Culp Depo CT 886), or if an employee did not successfully complete a performance improvement plan (Culp Depo CT 860).

Culp discussed the content of his daily logs with Battalion Chief Phillips prior to Culp's formulation of performance evaluations and performance improvement plan on Poole (Culp Depo CT 855), as well as discussed such information to Senior Human Resource Analyst Laurie Reinhart (Culp Depo CT 875, 877) in connection with the performance improvement plan they were planning to implement on Poole. (Culp Depo 876.)

In addition, the content of the daily logs on Poole was discussed at meetings attended by Battalion Chief Phillips, Office Chief Camargo,

attorneys for the Fire Authority, and Human Resource Analyst Reinhart.
(Culp Depo CT 879-881.)

Captain Culp prepared a performance evaluation on Poole for the period of September 28, 2008, to September 28, 2009. (Culp Depo CT 1017-18.) He gave Poole an overall rating of substandard. (*Ibid.*) Specifically, Culp found Poole's work habits, personal relations, adaptability, and progress were unsatisfactory. (Culp Depo CT 767-774.) Culp also prepared Poole's 2009/2010 evaluation which he was rated substandard (Culp Depo 1014), as well as a rendered a substandard rating for Poole on an interim evaluation during a performance improvement plan. (Culp Depo CT 1019.)

The adverse comments by Culp were never provided to Poole prior to their entry in the station file manila folder maintained in the Fire Station Company Officer's office, nor was Poole ever provided the opportunity to review and sign an acknowledgment of receipt of such comments, nor previously provided any opportunity to file a written response to the adverse comments. (CT 710.)

On September 8, 2010, Poole wrote a letter to the Director of Human Resources for the Fire Authority requesting the removal of all negative comments in his personnel file located at the fire station on the basis that

such comments were entered without his knowledge or signature in violation of Government Code Section 3255. (CT 802; CT 1008.) On September 23, 2010 the Director of Human Resources responded, stating that “while the notes were intended for personnel purposes, they were never ‘entered’ into any file.” (CT 804; CT 1010.)

Appellants contend that the entry of adverse comments by Captain Culp in a file used for personnel purposes on Poole clearly did not comply with statutory requirements of the Firefighters Procedural Bill of Rights Act (Government Code Section 3250 *et seq.*) which prohibits the employer from entering any adverse comment in a firefighter’s “*personnel file, or any other file used for any personnel purposes*, without the firefighter having first read and signed the instrument containing the adverse comment.” (Gov. Code Section 3255.) The entry of adverse comments also violated the Act’s requirement that the employer provide the firefighter an opportunity within 30 days to file a written response to any adverse comment. (Gov. Code Section 3256.)

Moreover, the Authority refused to discharge its statutory duty under Section 3256.5 to delete the adverse comments after notification by Poole of its unlawful placement in a file used for personnel purposes. (CT 711, 802,804-805.)

In accordance with the statutory remedies set forth in Government Code Section 3260 of the Act, Appellants sought judicial relief in Superior Court to remedy the violations as to Poole, and to prevent future similar violations respecting other Association's represented employees.

In addition, pursuant to Government Code Section 3260, Poole sought civil and actual damages against the Authority for malicious violations of the Act, together with attorneys fees and costs which were also sought by the Association.

III. STATEMENT OF THE CASE

On April 5, 2011, Appellants filed a Petition for Writ of Mandate and other Extraordinary Relief together with a Complaint for Declaratory and Injunctive Relief (Code of Civil Procedure Section 1085 and Government Code Section 3260) arising out of violations of statutory rights under the Firefighters Procedural Bill of Rights Act. (CT 16-29.)

On August 20, 2012 the trial in the lower Court was conducted on Appellants' Petition/Complaint. The parties submitted written briefs, witnesses declarations, and documentary evidence, including deposition testimony, together with oral argument.

In a Minute Order dated September 28, 2012 (Clerk's Certificate of Service by Mail dated October 3, 2012), the lower Court denied the Petition

for Writ of Mandate and declared that “[p]ersonal notes used to compile evaluations and for no other purpose are not subject to disclosure or comment under the Firefighters Bill of Rights.” (CT 1118-1121.)

On November 21, 2012, Appellants filed a Notice of Appeal from the September 28, 2012 Minute Order denying the Petition for Writ of Mandate and Other Extraordinary Relief/Complaint for Declaratory and Injunctive Relief. (CT 1648-1650, Case No. G047691.)

On November 26, 2012 Judgment on the Petition/Complaint was entered in favor of the Authority and against Poole and the Association (CT 1115-1116) with Notice of Entry of Judgment filed on December 18, 2012 (CT 1127-1140).

On December 26, 2012, Appellants Poole and the Association filed a Notice of Appeal of the Entry of Judgment [Case No. G047850]. (CT 1141-1156.)

On January 22, 2013, the Appellate Court issued an Order, on its own Motion, consolidating Case Nos. G047691 and G047850 for all purposes, including briefing, oral argument, and decision on appeal.

On November 4, 2013, the Fourth Appellate District, Division Three issued its decision reversing and remanding the lower Court’s Judgment. Respondent then sought a rehearing, which was denied.

Following the filing of a Petition for Review by Respondent, this Court granted the Petition for Review.

III. STANDARD OF REVIEW

In determining the scope of coverage under the analogous provisions of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 *et seq.*), the reviewing Court independently determines 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. San Diego* (1999) 72 Cal.App.4th 1209, 1217.)

The application of a statute to undisputed facts presents a question of law subject to independent appellate determination. (*Grath Bros. Oldsmobile, Inc. v. Gallagher* (2002) 97 Cal.App.4th 60, 65; *Caloca v. San Diego, supra*, 72 Cal.App.4th at 1217.) Accordingly, in the instant case, the Court of Appeal concluded that, "*Where, as here, an appeal involves the application of a statute to undisputed facts, our review is de novo.*" (Opinion p.3; Emphasis Added.)

The Court of Appeal's legal determination that the daily logs maintained on Poole were subject to the Firefighters Bill of Rights Act (Gov. Code Section 3250 *et seq.*) was based on numerous facts which were undisputed in the record, including the following:

1. "Although OCFA's official personnel files are kept in Irvine, at OCFA's headquarters, Poole's fire captain kept a separate file at the fire station on each of the firefighters he supervised." (Opinion p.2) (See also: Culp Dec. CT 1017, Culp Depo CT 847)
2. "The captain maintained in those files what he characterized as daily logs documenting the activities of the firefighters" (Opinion p.2) (See also: Culp Dec. CT 1017, Culp Depo. CT 838-840)
3. "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" (Opinion p.3) (See also: Culp Dec. CT 1017, Culp Depo CT 846-847)
4. "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, p. 2) (See also: Culp Dec. CT 1017, Culp Depo. CT 851-852) .
5. "The logs document the efficiency of the firefighters under Culp's supervision, including whether firefighters complied with instructions and adhered to rules". (Opinion, p.3) (See also: Culp depo CT 850-852)

6. "Culp included in his daily logs any factual occurrence or occurrences that would aid in writing a thorough and fair annual review" (Opinion, p. 3) (See also: Culp Depo CT 848)

7. "The daily logs [respecting Poole] contained more than 100 entries. Culp had noted numerous areas where he thought Poole needed to improve, including Poole's failure to be prepared in a timely fashion, leaving his shift before passing his pager to his replacement, failing to remove his gear from the OCFA unit before leaving for the day, failing to take responsibility for hitting another crew member with a pike pole, failing to perform cleanup duties and the fact that Poole apparently panicked during a training exercise." (Opinion p. 4) (See also: Culp Dec CT 1018 and Exhibit A thereto CT 1021-1045, including CT 1022, 1024,1025,1027)

8. "The daily logs themselves were not seen by Poole until a representative from his employee organization demanded them." (Opinion p.2) (See also: Culp Dec.1018-1019, Culp Depo 867)

9. "He [Culp] gave Poole an overall rating of substandard. (Opinion, p. 4)(See also: Culp Dec. CT 1018). Poole was subsequently placed on a performance improvement plan." (Opinion, p. 4) (See also: Culp Dec. CT 1019)

10. "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." (Opinion p. 4) (See also: Culp Dec CT 1018, Culp Depo CT 855,857-858, 879-881; Culp Dec 1018)

11. "The purpose in disclosing [to Battalion Chief Phillips] the contents of the daily logs was personnel related" (Opinion, p. 12) (See also: Culp Depo CT 855,857-858, 879-881; Culp Dec 1018)

12. "In all, Culp prepared two annual reviews and three evaluations of Poole's progress on the performance improvement plan"(Opinion, p. 4) (Culp Dec. CT 1018-1019; Reinhart Dec CT 1014; Poole Dec CT 711, 767-800)

13. "His [Poole's] substandard evaluation was admittedly based on adverse comments contained in the daily logs" (Opinion, p. 12; (See also: Respondent's Attorney, Reporter's Transcript at Trial 8/20/12 p.20:16-18; Culp Dep CT 852,854; Culp Dec 1020)

14. "On September 8, 2010, Poole wrote a letter to OCFA requesting 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, p.4) (Dec of Zenovy Jakymiw, OCFA Director of Human Resources, CT 1005-1006 and Exhibit B thereto CT 1010)

Based on undisputed facts, including the foregoing, the Court of Appeal concluded that the daily logs were subject to the statutory protections of Government Code Sections 3255.

Respondent's Opening Brief does not dispute the standard of review in cases interpreting the Bill of Rights Act, and acknowledges the general principle that interpretation and application of a statute is a question of law to be determined by the reviewing Court *de novo*, citing *McMahon v. City of Los Angeles* (2009) 172 Cal.App.4th 1324, 1331.

Respondent nevertheless argues that review of the trial Court's findings should be governed by the "substantial evidence" standard citing inapplicable cases not involving determinations of law based on undisputed facts, as well as a case involving the rule of conflicting inferences; neither of which are applicable in this record. (*Winograd v. America Broadcasting Company* (1968) 68 Cal.App.4th 624, 632; *Wilson v County of Orange* (2009) 169 Cal.App.4th 1185, 1188.)

Respondent fails to demonstrate that the fundamental facts on which the Court's Opinion relied were not undisputed or that the application of those facts to the statute was not subject to *de novo* review. Moreover, in its

Opening Brief, many of Respondent's recital of "facts" by the trial court were actually erroneous conclusions on legal issues (i.e. "personnel file" or "personnel purposes" within the meaning of the Bill of Rights Act).

Lastly, contrary to Respondent's assertion, Appellants in their Opening Brief in the Court of Appeal did challenge several erroneous factual findings of the trial Court, including the nature and effect of Culp's daily logs on Poole's employment, and inadequacy of any opportunity to respond to daily logs after incorporated into performance evaluations.

IV. ARGUMENT

A. THE FIREFIGHTERS' BILL OF RIGHTS ACT, AS THE ANALOGOUS OFFICERS' BILL OF RIGHTS ACT, PROHIBITS THE ENTRY OF ADVERSE COMMENTS IN ANY FILE USED FOR ANY PERSONNEL PURPOSES UNLESS THE EMPLOYEE IS FIRST PROVIDED THE OPPORTUNITY TO REVIEW AND SUBMIT A WRITTEN RESPONSE

On January 1, 2008, the Firefighters Bill of Rights Act, Government Code Sections 3250-3262 (Stats. 2007 Ch.591, AB 220), became effective prescribing various rights and protections for firefighters in their employment relations with public agencies.

Government Code Section 3255 of the Firefighters Bill of Rights Act expressly prohibits the employer from entering *any* adverse comment in a firefighter's personnel file or *any* other file used for *any* personnel purposes as follows:

*“A firefighter shall not have any comment adverse to his or her interest entered in his or her personnel file, or any other file used for any personnel purposes by his or her employer, without the firefighter having first read and signed the instrument containing the adverse comment indicating he or she is aware of the comment. However, the entry may be made if after reading the instrument the firefighter refuses to sign it. That fact shall be noted on that document and signed or initialed by the firefighter.”*¹ (Emphasis Added.)

1

Government Code Section 3255 of the Firefighters Bill of Rights Act is virtually identical to Government Code Section 3305 of the Public Safety Officers Procedural Bill of Rights Act which provides that “[N]o public safety officer shall have any comment adverse to his interest entered in his personnel file, or any other file used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment indicating he is aware of such comment, except that such entry may be

The Act also contains a corresponding right under Government Code Section 3256 of a firefighter to file a written response to any such adverse comment as follows:

*“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.”*² (Emphasis Added.)

According to the legislative history of Assembly Bill 220 enacted as the Firefighters’ Bill of Rights Act, the purpose of the Act was as follows:

“[T]his bill creates the Firefighters Procedural Bill of Rights (FBPR), which *extends certain enhanced rights and due-process protections currently afforded to peace officers to firefighters* (including those functioning as paramedics and emergency medical

made if after reading such instrument the public safety officer refuses to sign it. Should a public safety officer refuse to sign, that fact shall be noted on that document, and signed or initialed by such officer.”

2

Government Code Section 3256 of the Firefighters Bill of Rights Act is substantively identical to Government Code Section 3306 of the Public Safety Officers Bill of Rights Act which provides that “A public safety officer shall have 30 days within which to file a written response to any adverse comment entered in his personnel file. Such written response shall be attached to, and shall accompany, the adverse comment.”

technicians)” (Assembly Committee on Appropriations Report CT 151, Case No. G047691; Emphasis Added.)

The Senate Judiciary Committee Report on Assembly Bill 220 found that the legislation would mirror the existing provisions of the Public Safety Officers Procedural Bill of Rights Act (“POBOR”, Gov. Code Section 3300, *et seq*) as set forth in pertinent portion 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 to Case No. G07691; emphasis added.)

Significantly, the Senate Judiciary Committee Report also observed:

“AB 220 would mirror most if not all the provisions currently in

POBOR, so there is no need to re-examine the policy behind the procedural safeguards that are build into the statutory scheme, and the penalties that could be imposed for violations of the interrogated officer's rights under the Act. Those have been vetted in past legislation and litigated over several decades at all levels of the state courts." (Senate Judiciary Committee Report CT 181, Case No. G047691.)

Consequently, based upon the lengthy period of judicial interpretation of identical provisions under the Public Safety Officers Procedural Bill of Rights Act, particularly the statutory provisions relevant in the instant matter, such precedential case law should have equal application to mirrored provisions of the Firefighters Bill of Rights Act. (See Gen: *International Association of Firefighters, Local Union 230 v. City of San Jose* (2011) 195 Cal App.4th 1179.)

**B. THE COURT OF APPEAL PROPERLY CONCLUDED
THAT FILES MAINTAINED AT THE FIRE STATION
WERE WITHIN THE AMBIT OF SECTION 3255**

The Court of Appeal concluded that Captain Culp's files maintained at the Fire Station which contained daily logs on the Firefighters he supervised were subject to the statutory rights in Government Code Section

3255. The Court of Appeal properly reached its conclusion based upon undisputed evidence that Poole's supervisor, Captain Culp, maintained a separate file at the fire station on each of the firefighters he supervised. (Opinion p.2.) The Captain maintained in those files handwritten and computerized daily logs on the performance of each of the employees he supervised. (Opinion p.3.) The logs documented the efficiency of the firefighters under Culp's supervision, including whether the firefighters complied with instructions and adhered to rules. (Opinion, p.3.) 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 p.2.) Poole's substandard performance evaluation was admittedly based on the adverse comments contained in the daily logs. (Opinion p.12.)

In addition to Poole not being provided the daily logs detailing Poole's performance over a period of 1 ½ years, nor the opportunity to provide a written response, Poole was not informed that the contents of such logs were disclosed to Battalion Chief Phillips, nor afforded an opportunity to respond. (Opinion p.12.)

Respondent contends that such daily logs would not be subject to the Act since they were "informal written notes... used solely to refresh the

Captain's memory at the time he might prepare a formal written evaluation." (Respondent Opening Brief p.2.) However, the record demonstrates that the daily logs created and maintained by Captain Culp on Poole were systematically and regularly prepared by Captain Culp (Culp Depo CT 846-848; Culp Dec. CT 1018 and Exhibit "A" CT 1022-1045), and maintained as a record in the Fire Captain's office long after the rendition of evaluations consistent with Culp's practice of maintaining such logs throughout his supervision of the employees. (Culp Depo CT 851.)

Moreover, contrary to Respondent's argument, the application of Section 3255 cannot be reasonably construed to differentiate between "informal" adverse comments and "formal" adverse comments. Rather, the statutory provisions of the right to review and respond to adverse comments broadly extends to "*any* comment adverse to a [firefighter's] interest entered in his or her personnel file or *any* other file used for *any* personnel purposes."

Despite Respondent's contention that Captain Culp's detailed daily logs on Poole were not created or maintained for personnel purposes (i.e. "his notes were not jotted down with any aim or goal to be attained") [Respondent's Opening Brief p. 36] Captain Culp testified that the purpose for such logs was to memorialize "any factual occurrence or occurrences

that would aid [him] in writing a thorough and fair annual review.” (Culp Depo CT 848.) In addition, the Respondent’s Director of Human Resources also admitted in correspondence to Poole that the daily logs were intended to be used for personnel purposes: “[w]hile the notes were intended for personnel purposes, they were never ‘entered’ into any file.” (CT 804, 1010.) Consequently, the lower Court properly found that the daily logs were used for personnel purposes within the meaning of Government Code Section 3255. (Opinion, p.2,3,6,12.)

Additionally, Respondent’s claim that content of the daily logs was not “accessible” to the Fire Authority nor any of its supervisors is belied by undisputed evidence that Captain Culp, vested with the responsibility of preparing performance evaluations, obviously had access to the detailed daily logs maintained in the Station file (Culp Depo 852, 854; Culp Dec CT 1017-1018), as would other Fire Captains using the unlocked desk in the Company Officer’s office where the daily logs were stored. (Culp Depo CT 847-848.)

Furthermore, Captain Culp testified that he shared the contents of his Poole daily logs with his supervisor Battalion Chief Phillips (Culp Depo CT 855), as well as relayed the content of such entries to Senior Human Resource Analyst Laurie Reinhart (Culp Depo CT 875-877, 877) by

telephone, and at meetings also attended by Battalion Chief Phillips, Office Chief Camargo, Fire Authority attorney Barbara Raileanu, and “a person who owns the firm” (Culp Depo CT 879-881).

1. The Rights under Sections 3255 and 3256 Are Not Restricted to Adverse Comments Placed in an “Official” or “Formal” Personnel File, but Rather Also Apply to Any Other File Used for Any Personnel Purposes

Government Code Section 3255 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.” (Emphasis added.) Despite the admission by 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 daily logs were not subject to Section 3255 since they were not entered in the “official” personnel file, or other file required by law or policy to be maintained.

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 (Gov. Code, § 3305) and other

similar statutory schemes, 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* (1988) 202 Cal.App.3d 241, 251).

“[T]he Act applies to any adverse comment ‘entered’ in [an officer’s] personnel file, *or any other file used for personnel purposes.* (§ 3305)... The 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’ Association v. Venegas* (2002) 101 Cal.App.4th 916, 924-925; Emphasis added.)

In *Seligsohn v. Day* (2004) 121 Cal.App.4th 518 the Court reiterated the principle in *Riverside* and *Aguilar* cases as follows:

“[T]he label placed on the investigation file is irrelevant. 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.’ ” (Riverside, supra, 27 Cal. 4th at p. 802, quoting Aguilar, supra, 202 Cal. App. 3d at p. 251.) 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 v. Day, supra, 121 Cal.App.4th at 530; emphasis added.)

“A school board cannot avoid the requirements of section 44031 by putting derogatory written material in another file not designated ‘personnel file’ and by such a process of labeling prevent the administrator from reviewing and commenting upon allegations directed against him.” (*Miller v. Chico Unified Sch. Dist. Bd. of Educ.* (1979) 24 Cal.3d 703, 707.)

Consequently, in the instant case, the existence of an “official personnel file” located at the Authority’s headquarters and on which certain personnel *decisions* are based does not foreclose the application of the statutory right under the Act to review and respond to adverse comments entered in *any other file used for any personnel purposes*, such as daily logs in the Fire Station file, which the Authority admits was “intended to be used

for personnel purposes (Culp Depo CT 804).³

Indeed, the utilization of the comments entered in such Station file/log was in fact used by the Authority for personnel *purposes*, such as evaluations and performance improvement plans (Culp Depo 852, 854), and could lead to future action affecting the status of employment such as disciplinary action in the event of continuation of the deficient or improper employee conduct. (Culp Depo CT 860, 886.)

2. The Daily Logs Were Entered in a File Used for A Personnel Purpose and Accessible by Supervisors of the Fire Authority

Respondent contends that the station file containing the daily logs was not subject to Sections 3255/3256 since the logs were not “entered” into a personnel file or a file used for any personnel purpose. However, 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.

³

According to the Declaration by Respondent’s Senior Human Resources Analyst Reinhart “There are no official personnel files maintained at individual fire stations” and with regard to promotional recruitments and any imposition of discipline, “only the employee’s *official* personnel file kept at OCFA headquarters is reviewed.” (Reinhart Dec CT 1013; Emphasis Added.) Significantly, Reinhart does not assert that records maintained at fire stations on personnel matters are not utilized for *any personnel purposes*.

Specifically, in Senate Judiciary Committee Report on AB 220, enacted as the Firefighters' 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:

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, supra*, 202 Cal.App.3d at 249-250; 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, supra, 121 Cal.App.4th at 523; emphasis added.)

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, the Court of Appeal correctly concluded Captain Culp's adverse comments on Poole were entered or placed in a personnel file or any other file used for any personnel purposes. The detailed daily logs (CT 1021-1045) were not mere "transitory" notes as asserted by Respondent. (Opening Brief, p. 31.) Rather, the daily logs created and maintained by Captain Culp on Poole were: a.) systematically and regularly prepared by Captain Culp (Culp Depo CT 846-848); b.) maintained in the station file as a record in the Fire Captain's office well after the rendition of evaluations pursuant to Culp's practice of maintaining such logs throughout his supervision of the employees (Culp Depo CT 851); and c.) created for the purpose to document "any factual occurrence or occurrences that would aid in writing a thorough and fair annual review." (Culp Depo CT 848.)

Respondent contends that Section 3255 has application only where

adverse comments are entered into a personnel file in which the Fire Authority or its supervisors have “access” and “potential influence” on the employer. (Opening Brief p.28.) However, as established *supra*, it is undisputed that Captain Culp was vested by the Fire Authority with the responsibility of rendering performance evaluations on Poole and firefighters. As discussed *supra*, Culp’s stated objective for the creation and maintenance of daily logs on subordinates was to document “any factual occurrence or occurrences that would aid [him] in writing a thorough and fair annual review.” (Depo Culp CT 848, 852.)

Therefore, not only did Culp have “access” to the daily logs maintained in the Fire Station (as well access by other Fire Captains sharing the unlocked desk in the Company Officer’s office [CT 847-848]) but also the content of such logs unquestionably had “influence” on the employer where the logs were in fact utilized in preparation of performance evaluations (Culp Dec. CT 1018-1019; Culp Depo CT 852) and review of performance improvement plans (Culp Depo CT 854). In the event the employee did not sufficiently improve in the specified areas pursuant to the performance improvement plan, the employee could be subject to disciplinary action. (Culp Depo CT 860, 886.)

Furthermore, the existence and content of Culp’s daily logs on Poole

were known to Culp's supervisor Battalion Chief Phillips (Culp Depo CT 854-855; Respondent's Opening Brief p.48). Captain Culp verbally shared the contents and entries in the Daily Log with Chief Phillips prior to the formulation of any performance review or improvement plan. (Culp Depo 854-855.)

Culp also testified that he also relayed information from the daily logs on Poole's performance to Senior Human Resource Analyst Laurie Reinhart (Culp Depo CT 875, 877-878) by telephone, and at meetings also attended by Battalion Chief Phillips, Office Chief Camargo, Fire Authority attorney Barbara Raileanu, and "a person who owns the firm" (Culp Depo CT 879-881).

3. Respondent's Contention Must Be Rejected that the Procedural Rights under Sections 3255 and 3256 Apply Only to Files Required to be Created by Other Statute or Policy

Respondent seeks to distinguish the present case from the cases of *Aguilar v. Johnson, supra*; *Sacramento Police Officers' Association v. Venegas, supra*; and *County of Riverside v. Superior Court, supra*, on the basis that such cases involved documents entered in files which were required to be created or maintained by statute or policy.

Such a contention that Section 3255 is limited to only 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 adverse comment to the affected employee merely because no statute required the creation such file. 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.’ (*People v. One 1940 V-8 Coupe* (1950) 36 Cal.2d 471, 475.)” (*Mares v. Baughman* (2001) 92 Cal.App.4th 672, 677.)

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

provisions of the POBRA. There is no statutory or case law that supports Respondent's contention that "any other file used for any personnel purposes" should be limited to only those files that were required to be created and maintained by law. As concluded by this Court in *County of Riverside v. Superior Court*, *supra*, 27 Cal.4th 793 respecting the parallel provision in the Officers' Bill of Rights Act:

"[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*, at p. 802; Emphasis Added.)

In an attempt to distinguish *Aguilar v. Johnson*, *supra*, 202 Cal.App.3d 241 from application to the present case, Respondent analyzes *Miller v. Chico Unified Sch. Dist. Bd. of Educ.* (1979) 24 Cal.3d 703 cited by *Aguilar*. Respondent argues that *Miller* is distinguishable and was subsequently criticized in *Cockburn v. Santa Monica Cmty. College Dist. Pers. Com.* (1984) 161 Cal.App.3d 734 which Respondent asserts is analogous to the instant case. However, *Cockburn* was neither critical of

Miller, nor analogous to the present case.

In *Cockburn, supra*, the (non-safety) employee argued that the District had relied not on the single charge against him, but also on documents or complaints with which he should have been confronted during disciplinary proceedings.

Cockburn therefore focused on the question of *use* of the derogatory information against Cockburn during the disciplinary proceedings. The focus on “use” stems from interpretation of Education Code section 87031, which the Court in *Cockburn* found had been construed to mean “[t]hat respondent had the right to know within a reasonable time any of the derogatory evidence, oral or written, *that would be used against him at the hearing* before the board or Commission.” (*Id.* at 742; emphasis added.) The Court in *Cockburn* stated that, “[W]e 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.” (*Id.* at 745; emphasis added.)

Far from criticizing *Miller*, the Court in *Cockburn* found that “[o]r perusal of the record convinces us that appellants complied in all respects with the Education Code and *Miller*. Respondent had notice within reasonable and ample time as required of any and all prior misconduct

and/or derogatory statements available to appellants and did actually avail himself of its use.” (*Id.* at 738.)

Therefore, the Opinion of the Court of Appeal in this case was consistent with the clear and plain language of Section 3255, and applied in the manner approved in precedential case law regarding analogous 3305 of the Officers’ Bill of Rights Act.

**4. Section 3255 Applies to Adverse Comments Entered
in Any File Used for Any Personnel Purposes**

Respondent attempts to limit the protections of Section 3255 to adverse comments entered in files that could lead to specific adverse employment consequences or for specific matters set forth in the right of inspection in Section 3256.5.

Section 3256.5 permits firefighters 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. Notably, no case has confined the disclosure protections of Sections 3305/3306 (analogous to Sections 3255/3256) to the separate statutory right of inspection in Section 3306.5 (analogous to Section 3256.5).

Indeed, Respondent’s statutory construction of Section 3255 would

eviscerate the unambiguous language of that provision which clearly extends such safeguard to “any comment adverse to [a firefighter’s] interest entered in [a firefighter’s] personnel file or any other file used for *any personnel purposes* by [the firefighter’s] employer.” (Emphasis Added.)

“Personnel purposes” is not limited to disciplinary or punitive action consequences. As stated by the Court of Appeal in *Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal.App.4th 916:

Consistent with the decision in *County of Riverside, supra*, 27 Cal. 4th 793, we must give appropriate consideration to the fact that the Legislature utilized broad language in enacting sections 3305 and 3306. The events that will trigger an officer’s rights under those statutes are *not limited to formal disciplinary actions, such as the issuance of letters of reproof or admonishment or specific findings of misconduct*. Rather, an officer’s rights are triggered by the entry of any adverse comment in a personnel file or any other file used for a personnel purpose. (See *County of Riverside, supra*, 27 Cal. 4th at pp. 802, 803.)

* * *

“[W]e conclude that *regardless of whether the employing agency contemplates or has rejected further action regarding an adverse comment made against the peace officer employee, the officer is entitled to disclosure of the comment* if it is entered in an agency file used for personnel purposes. (*Id.* at 926; Emphasis added.)

(*Sacramento Police Officers Assn. v. Venegas, supra*, 101 Cal.App.4th at

925-926.)

The Court of Appeal in *McMahon v. City of Los Angeles* (2009) 172 Cal.App.4th 1324 expressly recognized that the Sections 3305/3306 and Section 3306.5 possess different scope, and accordingly adverse comments that must be disclosed under Section 3305 might not need to be included in the right of inspection under Section 3306.5.

The mere fact that the complaints were favorably adjudicated and Officer McMahon was not disciplined did not absolve the Department of its disclosure requirements under POBRA. (See, e.g., *Seligsohn v. Day* (2004) 121 Cal.App.4th 518, 525–531 (*Seligsohn*) [police officers were entitled to a copy of the complaints filed against them, even though the investigation was closed without any action being taken against the officers and copies of the complaints were not placed in the officers' personnel files]; *Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal.App.4th 916, 925–926 (*Venegas*) [agency required to disclose to officer information contained in its internal affairs files that did not result in disciplinary action against the officer].) However, this was not a case in which adverse personnel complaints were withheld from the officer. Unlike the situation in *Seligsohn* and *Venegas*, the Department disclosed all the complaints along with related documents that detailed the criticisms leveled at Officer McMahon.

.... In sum, by disclosing the citizen complaints and related documents along with the Fact Sheet, the Department not only complied with its internal regulations, but comported with POBRA's "legislative remedy ... to ensure that an officer is made aware of adverse comments and is given an

opportunity to file a written response, should he or she choose to do so.” (*Venegas, supra*, 101 Cal.App.4th at p. 926.)

(*McMahon, supra*, 172 Cal.App.4th at 1334.) Nevertheless, the Court in *McMahon* still determined that, even though disclosure of the adverse citizen complaints was required by POBRA, POBRA did not require that the file containing those personnel complaints be made available for inspection under the separate provisions of Section 3306.5. (*Id.* at 1335-36.) Therefore, the limitations on the categories of inspection under Section 3256.5 (analogous to Section 3306.5) should not be imported to Section 3255, which affords broader protections.

5. The Decision of the Court of Appeal Would Further Important Public Policy Goals Established by the Legislature

In addition to closely following existing precedent interpreting similar provisions in the POBRA, the decision of the Court of Appeal would not lead to the untoward consequences speculated by Respondent. Instead, the decision would implement the protections afforded by the FFBOR and advance the public policy clearly established by the Legislature which declared:

(e) The effective protection of property and the safety of the public depends upon the

maintenance of reasonable and consistent procedural protections applicable to all employers with respect to the disciplinary process.

(f) It is necessary that this act be applicable to all firefighters, as define in subdivision (a) of Section 3251 of the Government Code, wherever situated within the State of California, in order 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.

(Gov. Code Tit. 1, Div. 4, Ch. 9.6 Note; Note to Gov. Code Section 3250.)

The right to review adverse comments before placed in a personnel file under the Bill of Rights Act is sufficiently strong that it will even overcome other strong interests and privileges that may be possessed by the employer. For example, in *Sacramento Police Officers Assn. v. Venegas*, *supra*, 101 Cal.App.4th 916, the Court of Appeal rejected the Department's argument that permitting the officer to review and respond to adverse comments contained in complaints would undermine public policy encouraging the reporting of misconduct.

Similarly, in *County of Riverside v. Superior Court* (2002) 27 Cal 4th 793, this Court upheld the public policy furthered by the POBRA over various competing statutory and common law privileges asserted by the employer. The Court held that "Assuming these privileges otherwise apply, which is not at all clear, we think the specific provisions of the Bill of

Rights Act, giving peace officers a right to view adverse comments in their personnel files, take precedence over the more general statutory and common law privileges on which the County relies.” (*Id* at p. 804.)

Respondent also argues that Appellant had an opportunity to respond to the adverse comments since he later had the opportunity to respond to the daily log adverse comments after they were incorporated in the annual performance evaluation. However, Respondent’s contention ignores the importance of a timely and meaningful written response to an adverse comment, and ignores the practical realities of this case in which the Battalion Chief and other command staff were made aware of the contents of the daily logs which had not been previously been disclosed to Poole.

The Firefighter’s Bill of Rights, as the Officer’s Bill of Rights, provides strict time limitations regarding the timing of disclosure of an adverse comment, as well as the time limitation within which a firefighter may file a written response to an adverse comment. Section 3255 specifies that the adverse comment *cannot be entered into any file* used for personnel purposes “without the firefighter *having first read and signed the instrument* containing the adverse comment indicating he or she is aware of the comment.” Section 3256 then specifies that, if the firefighter wishes to file a *written response* to an adverse comment, he or she must do so *within*

30 days. The requirement that the comment be disclosed before it is entered and the limitation on the time to respond both strongly indicate the importance of the timeliness of the response to adverse comments found by the Legislature.

The significance of timely disclosure and the ability to timely respond was correctly recognized by the Court of Appeal in this case:

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...

(Opinion at p. 13.)

Finally, affirming the decision of the Court of Appeal in this case will not result in disruptive administrative consequences as speculated by


Respondents. Full and timely disclosure to employees of adverse comments concerning performance or conduct is conducive to timely improvement, or alternatively, to timely correction of a factual misconception by supervisors. Moreover, timely disclosure would also prevent the inherent prejudice to an employee faced with adverse comments as to conduct occurring up to a year before disclosure in a performance evaluation where there would be no meaningful and effective ability to respond.

For all of the above reasons, affirming the decision of the Court of Appeal promotes the important public policy objective of the maintenance of reasonable procedural protections for firefighters, and is a reasonable application of statutory provisions of the Firefighters Bill of Rights Act and precedential case law interpreting the analogous Public Safety Officers Procedural Bill of Rights.

V. **CONCLUSION**

Appellants respectfully submit that the decision of the Court of Appeal be affirmed.

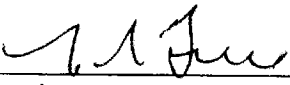
Dated: July 7, 2014

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed Answer Brief on the Merits is produced using 13-point Roman type including footnotes and contains approximately 8,761 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: July 7, 2014

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PROOF OF SERVICE BY MAIL

In Re: ANSWER BRIEF ON THE MERITS; No. S215300
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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 July 8, 2014, at Pasadena, California.



E. Gonzales