Supreme Court Case Number S215300

Court of Appeal Case No. G047850
Consolidated with G047691

In the Supreme Court of the State of California

SUPREME COURT
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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 REPLY BRIEF ON THE MERITS

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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 Reply Brief to address those matters set forth in Plaintiffs and Appellants Answer Brief on the Merits.

SUMMARY OF ARGUMENT

Nothing within Appellants' Answer Brief militates towards affirming the Court of Appeal's decision. Appellants fail to address or refute Respondent's arguments regarding fundamental appellate doctrines that are critical to the correct resolution of this appeal.

Appellants' implication that this Court may affirm the Court of Appeal's decision by disregarding the trial court's findings of fact that supported Respondent's judgment, as the Court of Appeal erroneously had done, is plainly incorrect. Recognizing the applicable rules of appellate jurisprudence, the issue before this Court may be framed, as follows:

> Does the disclosure provision of FFBOR apply to informal contemporaneous written notes reflecting a Fire Captain's observations of a firefighter's performance, such that the firefighter must be shown any adverse written comment, where the notes, including all adverse comments, (1) are not accessible to the employer fire authority or anyone else; (2) are not used by the employer fire authority to make personnel decisions affecting the firefighter's employment status, including promotions and discipline; and, (3) where all personnel decisions by the employer fire authority that might affect the firefighter's employment status are based solely upon matters that are documented in the firefighter's official personnel file maintained exclusively by the employer fire authority, which the firefighter is entitled to review and respond?

This is an accurate characterization of the issue on appeal, giving effect to the trial court's findings. Much of Appellants' Answer Brief misleadingly argues that a reviewing Court may infer from other trial evidence, in contrast to the trial judge's specific findings, that Captain Culp's notes *could be* accessible to other supervisors or OCFA and that Poole *could have incurred* consequences to his employment status arising from the notes. California rules of appellate practice, however, preclude an appellate court from making

inferences and findings contrary to those made by the trial judge, after he or she had weighed the totality of all evidence presented at trial, unless its findings are determined not to have been based on substantial evidence.

In order to avoid the substantial evidence inquiry, Appellants casually and summarily argue that the trial court made incorrect "legal conclusions." (Answer Brief on the Merits, p.17) However, review of the findings indicate that they were, in fact, completely factual in nature. Whether any of Captain Culp's notes were accessible by OCFA or other Captains, whether Captain Culp's notes were usable to effect changes to Poole's employment status, whether only material contained in Poole's formal personnel file was used as a basis for all personnel decisions affecting Poole, and whether Captain Culp's notes were not used by the employer fire authority to make personnel decisions, among other findings, are all factual. They are not legal conclusions.[1]

Based on the arguments and authorities set forth here and in Respondent's Opening Brief on the Merits, Respondent Orange County Fire Authority respectfully contends that the decision by the Court of Appeal should be reversed and judgment reinstated for it. It would be a great service to all California governmental agencies if this Court would clearly establish that Fire Captains and other supervisors of public employees may utilize informal note taking procedures solely for their own use to aid in later preparing an employee's performance evaluation, without being required to incur the substantial time and expense of disclosing every adverse observation or comments therein to their employees as they are created. In this way, this Court can clarify that only adverse comments that are entered into files to which the employer agency has access and can actually affect the employment status

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[1] Whether, under the facts presented and found, the notes were for "personnel purposes" is a legal conclusion.

of public employees must be shown to them for review and comment at the time they are to be entered.

I.
Appellants Fail to Address or Refute Respondent's Argument That Application of the Substantial Evidence Standard of Review and Corollary Doctrines Require Reversal of the Court of Appeal's Decision.

Appellants fail to directly address OCFA's argument and authorities that application of the substantial evidence standard of review and the corollary doctrines of conflicting evidence and conflicting inferences require the Court of Appeal decision be reversed. Instead, they appear to undertake a clever, but improper, tactic of citing to certain individual pieces of trial evidence that they characterize as "undisputed," although they were not chosen by the trial court as support for its findings and judgment and were, in some cases, totally inconsistent therewith. In this way, Appellants attempt to impermissibly circumvent the substantial evidence standard of review, which they never addressed or attacked in the Court of Appeal. Through such tactic, Appellants thereby incorrectly call upon this Court to affirm the Court of Appeals' decision, based on this "other evidence," which would require that this Court ignore and override the trial judge's findings.

Appellants fail to acknowledge that the other items of trial evidence upon which they rely are merely "other evidence," that had been presented to, considered and weighed by the trial judge within the trial court's process in arriving at his ultimate different findings of fact and judgment in favor of Respondent. That such other evidence may not have been controverted at trial does not mean that the findings of fact reached by the trial court are not based on substantial evidence. Thus, it does not mean that the trial court's findings of fact can be disregarded and its judgment reversed. Even if other evidence might have been argued to support a different judgment had the trial

judge weighed the entirety of the evidence differently, as Appellants argue here, it does not compel a reversal where the trial court's judgment is based on substantial evidence. The Court of Appeal's reversal was unwarranted and erroneous.

Every trial presents many facts to be weighed by the trier of fact. When a case is decided upon findings of fact by a trial court, appellate courts must affirm the judgment where it is supported by substantial evidence. Especially where, as here, Appellants waived any substantial evidence review[2] by not raising it in the Court of Appeal or complying with its procedural requirements, they may not seek the highest Court in the State to reverse a trial court judgment based upon reweighing of trial evidence that had been originally weighed and decided by the trial judge. To affirm the trial court's judgment, all that is necessary is that the judgment be based upon substantial evidence, which the trial court's judgment certainly was in this case. The Court of Appeal departed from its required review function in erroneously arriving at it decision below.

Binding findings made by the trial judge supporting judgment for Respondent included, but were not limited to, the following:

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

2. "No one but Captain Culp has access to [his]notes;[3]"

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[2] Had the Appellants sought and the Court of Appeal undertaken a substantial evidence review, they would have found the trial court judgment to be supported by substantial evidence.

[3] A prime example of Appellants' attempts to disregard express findings of the trial court include their implication and argument in the Answer Brief at pages 24 and

Footnote continued on next page.

3. "The OCFA maintains a personnel file that is used as a basis for all personnel decisions affecting Poole;"

4. "Culp's notes are not used by the employer (OCFA) to make personnel decision—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;"

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

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

These trial court findings served as the basis for his judgment that Captain Culp did not violate FFBOR by creating notes of his observations about the firefighters he supervised. Critically, the trial judge weighed the evidence and found that Captain Culp's notes themselves could not be used by OCFA in any personnel action and which could never have impacted Firefighter Poole's employment status, discipline, promotion, etc. The judgment was based on abundant and substantial evidence, including multiple declarations from OCFA witnesses, whose testimony was credited.

Throughout the Answer Brief, Appellants imply that use of Captain Culp's notes somehow could have or did affect Poole's employment status. A review of the actual

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31 that Fire Captains other than Captain Culp had access to his notes because the desk where he kept them was unlocked.

record, however, clearly shows that the "employment consequences" were based on written performance reviews that Firefighter Poole was permitted to review and to which he could respond. This includes reviews written while Poole underwent the Performance Improvement Plan that he had requested take place. Verbal discussions between Captain Culp and Battalion Chief—regarding Appellant Poole's performance do not fall under FFBOR, as they were not written and not entered into any record, whether Captain Culp's verbal discussions included subjects that were originally written in his notes or were purely from his memory.

In sum, after losing their case before the trial court, Appellants did not challenge the substantial evidence basis of those findings in the Court of Appeal, but rather hand-picked some of the individual pieces of evidence and argued that those pieces of evidence militated towards a different outcome, one in favor of Appellants. That is not the correct process or result within California appellate jurisprudence. The Court of Appeal bought Appellants' arguments while incorrectly departing from its role as a court of review. Based thereupon, it incorrectly reversed the trial court's judgment.

II.
Appellants and the Court of Appeal Incorrectly Interpreted a Fire Captain's Initial Act of Writing an Adverse Comment in Informal Notes Solely For His Personal Use to be the Statutory Trigger of "Entering" an Adverse Comment Into a File That Could Possibly Affect a Firefighter's Employment Status; Only the Latter Triggers the Disclosure Requirements of FFBOR's Statutory Scheme.

The Legislature's choice to trigger the application of FFBOR's disclosure requirements by "enter[ing]" an adverse comment in a firefighter's file that can have employment consequences rather than merely "writing" an adverse comment about a firefighter's performance should be given effect. It is cannot be reasonably disputed that merely "writing" an adverse comment is a far cry from "entering" an adverse comment

into a personnel file or other file that may have an actual effect on employment status. The word "entered" connotes a formal recording, a setting down formally in writing, such as, "to place anything before a court, or upon or among the records, in a formal and regular manner, and usually in writing, as to "enter an appearance," to "enter a judgment." In this sense, the word is nearly equivalent to setting formally in writing. [*See e.g.*, *Black's Law Dictionary*, *Abridged Fifth Edition*, definition of "enter."]

This Court and its professional staff members can all attest that a profound distinction between acts of writing and of entering is recognized in California's entire judicial system. Only well after research attorneys, trial court judges and appellate Justices write or otherwise create notes or memoranda reflecting their legal and factual analyses, tentative rulings, pre-hearing tentative opinions, hearing notes, post-hearing tentative opinions, will a Court's Order or decision be entered into the minutes, docket or register of actions of the Court.[4] In many instances, impressions, analyses, findings, opinions, and outcomes reflected in the initial writings may change substantially or completely in the ultimate writing that is entered. Such specific distinction or ones analogous to it applies to countless businesses and in varied employment contexts. It was true in the context of Captain Culp's notes, which may be seen as very similar to the circumstances that precede even the development of a court's tentative opinion. The trial court specifically found that Captain Culp's notes may never be used to generate or militate towards any possible employment consequence whatsoever, unless it is entered

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[4] Within the context of California's court system, one can only imagine the difficult burdens and costs associated with disclosing to possibly affected parties each of these tentative writings generated prior to the entering of the opinion or decision. This is very much akin to the burdens that will exist if the Legislature's intent regarding adverse comments is interpreted to require disclosure of informal notes created by Fire Captains (and other public employee supervisors).

into a file that can have employment consequences. Once again, similar to the notes, memoranda, and other written materials preliminary to a court's decision, where nothing is effective to alter the status quo, unless and until there is an order or judgment entered, Captain Culp's notes were not effective to alter Poole's employment status quo, unless and until the substance of any of his notes were entered into Poole's personnel file.

Appellants haven't pointed to any authority or logic that supports the notion that through FFROR, the Legislature intended to subject mere note-taking by government agency supervisors about their employees' performance to the disclosure provisions of FFBOR. [See OCFA's Opening Brief on the Merits, pp.27-38]..

Appellants' response to the distinction between "entering" and mere writing of an adverse comment in notes is ineffective. At pages 28-32 of their Answer Brief, Appellants completely avoid addressing Respondents' arguments distinguishing between an act of entering and the act of merely writing an adverse comment. Instead, Appellants merely note that some courts have used the term "entering" and "placing" or "placement" interchangeably. That response misses the key point, however, that whichever word is used, FFBOR requires a separate and formal act beyond mere writing. It is noteworthy that each of the decisions cited by Appellants that used the word "placing" or "placement" instead of "entering" also required a separate action (beyond the initial step of writing) to deliver the adverse comment into a personnel file or other file that could cause employment consequences to the employee. *See e.g., Aguilar v. Johnson* (1988) 202 Cal.App.3d 241, 249-250 (where the court referred to "*placement in an officer's personnel file*"); *Seligsohn v. Day* (2004) 1221 Cal.App.4th 518, 523 (where the court stated that "officers have the right to review any adverse comments *placed in their personnel files...*"); and *Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278, 292 (also expressly referring to comments *placed in an officers "personnel files"*). None of Appellants'

cases held that mere writings was required to be disclosed under FFBOR, absent a separate *formal* act of entering or placement into a specific type file.

III.

Appellants' Answer Brief Completely Fails to Respond To Many of the Arguments and Authorities Contained Respondent's Opening Brief and Inadequately Respond to Others.

As explained in Section II, supra, Appellants' response to Respondent's arguments regarding the statutory requirement of entering an adverse comment into a file that has the ability to affect a firefighter's employment status was ineffective to refute Respondent's analysis. Not surprisingly, there are other arguments within Respondent's Opening Brief that Appellants did not even attempt to refute in their Answer Brief.

Nowhere in the Answer brief do Appellants address/refute the argument that the phrase "personnel purposes" must be something more than an inchoate and temporary set of observations that are not yet (and may never be) entered into a file that can affect a firefighter's employment status.

Nowhere in the Answer Brief do the Appellants address/refute the argument that the Legislature could have easily enacted legislation triggering the application of disclosures under FFBOR on the mere writing of an adverse comment, but did not do so. There was no impediment that prevented the Legislature from enacting law that requires Fire Captains and/or other supervisors employed by public agencies to disclose adverse comments about a firefighter whenever and wherever written. Instead the

condition precedent that the adverse comment(s) be entered into a personnel file or other file used for personnel purposes.[5]

Nor do Appellants address/refute the argument that the effect of the fact that neither the employer OCFA nor any person other than Captain Culp had access to his notes dispositively distinguishes Captain Culp's informal note taking from situations where the employer or its staff do have access to the adverse comments at all times after they are entered into those subject files. The only manner in which Appellants address this argument in their Answer Brief is disingenuously to reargue against the trial court's finding that they were not accessible, without even acknowledging the trial court's finding against them. In other words, accepting the factual finding of the trial court, as they must, that no other person had access to the notes, as mere notes, Appellants Answer Brief did not refute that the fact that no other person had access to Captain Culp's notes makes an effect on Poole's employment status impossible (unless and until the adverse comments are entered into Appellant Poole's personnel file, to which he could see and respond.)

Further, neither have Appellants refuted the practical effect of Appellants' desired rule every supervisor's note containing an adverse comment about a firefighter must be shared with him before it is even, if ever, to be entered into the firefighter's personnel file. They do not refute that it will be extraordinarily time consuming if every adverse comment can be grieved and would create a powerful chilling effect on Captains who, on behalf of the public good, take contemporaneous notes about the performance of

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[5] The most reasonable interpretation of FFBOR is to interpret "other files used for personnel purposes " to mean "other files that are used as a personnel file," i.e., having the attributes of a personnel file in that they are able to generate consequences to the firefighter's employment status.

their firefighters throughout the year so that they can most accurately and fairly present performance reviews.

Lastly, Appellants' Answer Brief nowhere addressed or refuted Respondent's argument that Mr. Jakymiw's sentence in his letter to Firefighter Poole that Captain Culp's notes were intended for "personnel purposes," was not a party admission and should not have been admissible at all. Respondent had pointed out that Mr. Jakymiw's statement was hearsay, as he was not the person whose personal intent in creating the notes was an issue, and that the phrase "personnel purposes" was a legal conclusion and not a percipient fact. Perhaps most importantly, appellants pointed out that the trial court had the letter and Appellant's arguments about it before it at trial and weighed it against other evidence from Captain Culp and others, which explained in great detail the intent and limitations on use of his notes, that he never shared them with anyone at OCFA, that OCFA complied with FFBOR's disclosure requirements during Poole's PIP procedure and at performance reviews, and that OCFA makes all of its employment status and disciplinary decisions based on its official personnel file(s) and not form the informal notes on its Chiefs, to which it never had access. As such, Respondent argued that the trial court's conclusion(s) regarding whether the notes were entered into a file for personnel purposes deserved full deference as based on substantial evidence. Appellants did not address or refute any of these arguments in their Answer Brief.

IV.
Public Policy Weighs Heavily in Favor of Construing FFBOR to Exclude Application to Informal Notes.

Appellants' Answer Brief myopically characterizes Respondent's argument that affirming the Court of Appeal decision would result in disruptive administrative consequences as "speculation." [Answer Brief, p. 42] Nothing could be further from the truth. [*See e.g.*, City of Los Angeles' Amicus Letter in Support of Defendant's Petition for Review, dated February 4, 2014.] Simple logic and everyday experience dictate that

where opportunities are provided to contest and grieve adverse observations and comments made by supervising Fire Captains (and others supervising public employees who are subject to similar legislation), they will be used and used vigorously by public employees and their union representatives. Firefighter Poole's instant lawsuit is clearly indicative of that new world.

If the Court of Appeal decision becomes the decision of this Court, one inevitable result will be a complete and effective chilling effect on diligent supervisors writing observations about public employees between annual review preparation, with the concomitant effect of reducing the accuracy, thoroughness, fairness and utility of the annual review process. Where notes containing adverse observations or comments are prepared, there inevitably will be an increase in administrative disputes, with resultant great expense and enormous opportunity cost of lost time and focus of all participants being drawn away from the goal of the effective protection of property and the safety of the public. Where the procedures set out in the Court of Appeal decision are deemed to have been followed imprecisely, there will inevitably be expensive and time—consuming legal battles over the $25,000 civil penalty for each adverse comment or note. This will even more directly eliminate resources that could best be utilized to promote and achieve public safety. These results are not "speculative." They are certain to occur if the Court of Appeal decision is affirmed.

V.
Conclusion.

Based upon the arguments and authorities set forth in this Reply and the Appellant's Opening Brief on the Merits, Orange County Fire Authority respectfully requests that this Court reverse the decision on the Court of Appeal and order that the trial court's judgment in its favor to be reinstated.

Respectfully submitted,

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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 reply brief on the merits was produced with a computer. It is proportionately spaced in 13 point Times Roman typeface. The brief contains 3,624 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 August 18, 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 August 18, 2014, I served the within ORANGE COUNTY FIRE AUTHORITY'S REPLY 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:

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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 August 18, 2014, at Los Angeles, California.

Julie Dekhtyar ______________________ ______________________
(Original Signed)