

In the Supreme Court of the State of California

JANIS S. MCLEAN,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA, ET AL.,

Defendants and Respondents.

Case No. S221554

**SUPREME COURT
FILED**

APR - 3 2015

Frank A. McGuire Clerk
Deputy

Court of Appeal, Third Appellate District, Case No. C074515
Superior Court of California, County of Sacramento,
Case No. 34-2012-00119161-CU-OE-GDS
Honorable Raymond M. Cadei

**PLAINTIFF'S MOTION FOR JUDICIAL NOTICE;
MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT THEREOF**

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TABLE OF CONTENTS

	Page
MOTION FOR JUDICIAL NOTICE.....	1
MEMORANDUM OF POINTS AND AUTHORITIES.....	2
I. INTRODUCTION	2
II. REQUIREMENTS FOR JUDICIAL NOTICE BY A REVIEWING COURT	3
III. ARGUMENT.....	3
A. The Matters To Be Judicially Notice Are Directly Relevant to the “State Employer” Issue.....	3
B. The Issue of Whether the State of California Is the Employer Was Not the Subject of Plaintiff’s Appeal	5
C. The Documents Are Properly the Subject of Judicial Notice.....	9
D. The Matters To Be Noticed Do Not Relate to Proceedings Occurring after the Order That Is the Subject of the Appeal.....	12
IV. CONCLUSION	12

TABLE OF AUTHORITIES

CASES

	Page(s)
<i>Brosterhous v. State Bar</i> (1995) 12 Cal.4th 315 [48 Cal.Rptr.2d 87, 906 P.2d 1242]	6
<i>Brown v. City of Los Angeles</i> (2002) 102 Cal.App.4th 155 [125 Cal.Rptr.2d 474].....	10
<i>Curcini v. County of Alameda</i> (2008) 164 Cal.App.4th 629 [79 Cal.Rptr.3d 383].....	5,10
<i>Deveny v. Entropin, Inc.</i> (2006) 139 Cal.App.4th 408 [42 Cal.Rptr.3d 807].....	6
<i>Hernandez v. County of Los Angeles</i> (2008) 167 Cal.App.4th 12 [84 Cal.Rptr.3d 10].....	6
<i>Kilker v. Stillman</i> (2015) 233 Cal.App.4th 320 [182 Cal.Rptr.3d 712].....	10
<i>People v. Hardy</i> (1992) 2 Cal.4th 86 [5 Cal.Rptr.2d 796, 825 P.2d 781]	5,6
<i>People ex rel. Lockyer v. Shamrock Foods Co.</i> (2000) 24 Cal.4th 415 [101 Cal.Rptr.2d 200, 11 P.3d 956]	3,4,5
<i>Nguyen v. Western Digital Corp.</i> (2014) 229 Cal.App.4th 1522 [178 Cal.Rptr.3d 897].....	11
<i>Rialto Police Benefit Assn. v. City of Rialto</i> (2007) 155 Cal.App.4th 1295 [66 Cal.Rptr.3d 714].....	10
<i>Walt Rankin & Associates, Inc. v. City of Murrieta</i> (2000) 84 Cal.App.4th 605 [101 Cal.Rptr.2d 48].....	10

STATUTES

California Evidence Code	
Section 451	3
Section 452	<i>passim</i>

TABLE OF AUTHORITIES, Cont.

	Page(s)
Section 453	3
Section 459	<i>passim</i>
California Government Code, Section 3512 et seq.	10
California Labor Code	
Section 202	7,8
Section 203	<i>passim</i>
Section 220	7
California Rules of Court	
Rule 8.252(a)	1,3
Rule 8.520(g)	1,3

MOTION FOR JUDICIAL NOTICE

Pursuant to California Rules of Court, rules 8.520(g) and 8.252(a), and sections 452 and 459 of the California Evidence Code, Plaintiff-Appellant Janis S. McLean hereby moves this Court for an order taking judicial notice of the following documents:

1. Articles 1, 3 and 5 of the Agreement between State of California and California Attorneys, Administrative Law Judges and Hearing Officers In State Employment (CASE) covering Bargaining Unit 2 Attorneys and Hearing Officers, Effective July 1, 2005 through June 30, 2007; and
2. Form W-2 Wage and Tax Statement for Janis S. McLean (2010).

This motion is based on the following Memorandum of Points and Authorities and Declaration of Ian J. Barlow filed herewith, and on the grounds that the documents presented are proper subjects of judicial notice and directly relevant to the issues and arguments raised by Defendant and Respondent State of California in its Opening Brief on the Merits.

Dated: April 2, 2015.

Respectfully submitted,

KERSHAW, CUTTER & RATINOFF, LLP

By: 

IAN J. BARLOW

Counsel for Plaintiff and Appellant, Janis S. McLean

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff-Appellant Janis S. McLean (“Plaintiff” or “McLean”) moves this Court for an order taking judicial notice of: 1) Articles 1, 3 and 5 of the Agreement between State of California and California Attorneys, Administrative Law Judges and Hearing Officers In State Employment (CASE) covering Bargaining Unit 2 Attorneys and Hearing Officers, Effective July 1, 2005 through June 30, 2007 (“State-CASE MOU”); and 2) Form W-2 Wage and Tax Statement for McLean (“McLean W-2 Form”).

The matters for which Plaintiff is seeking judicial notice directly relate to the issue of whether the State of California is the employer of State of California civil service employees. This issue has emerged as the primary issue in the Defendant State of California’s (“Defendant” or the “State”) petition for review to this Court and the proceedings before this Court.

Although the State raised the “State employer” issue in its demurrer below, the issue was not addressed by the trial court’s order granting Defendant’s demurrer, nor was it the subject of any previous requests for judicial notice. Judicial notice of these documents is now appropriate to provide Plaintiff and the Court with an opportunity to more completely consider the issue after review was granted by this Court.

The State and federal documents that are the subject of this Motion

may be judicially noticed under Evidence Code sections 452 and 459 and the matters for which Plaintiff seeks judicial notice do not relate to proceedings that occurred after the order upon which the appeal is based. For the reasons described below, Plaintiff's motion for judicial notice should be granted.

II. REQUIREMENTS FOR JUDICIAL NOTICE BY A REVIEWING COURT

Pursuant to California Rules of Court, rules 8.520(g) and 8.252 (a), and Evidence Code section 459, a party seeking judicial notice must state, in relevant part:

- (A) Why the matter to be noticed is relevant to the appeal;
- (B) Whether the matter to be noticed was presented to the trial court and, if so, whether judicial notice was taken by that court;
- (C) If judicial notice of the matter was not taken by the trial court, why the matter is subject to judicial notice under Evidence Code section 451, 452, or 453; and
- (D) Whether the matter to be noticed relates to proceedings occurring after the order or judgment that is the subject of the appeal.

(Cal. Rules of Court, rule 8.252(a)(2).)

III. ARGUMENT

A. The Matters To Be Judicially Noticed Are Directly Relevant to the "State Employer" Issue.

This request for judicial notice readily satisfies the relevancy requirement. (See, e.g., *People ex rel. Lockyer v. Shamrock Foods Co.*

(2000) 24 Cal.4th 415, 422, fn. 2 [101 Cal.Rptr.2d 200, 11 P.3d 956] [there is “a precondition to the taking of judicial notice in either its mandatory or permissive form—any matter to be judicially noticed must be relevant to a material issue”].) Each of the documents for which the Plaintiff seeks judicial notice directly relates to the first issue the State presented for the Court’s consideration: “Whether, in a putative class action to recover penalties against an ‘employer’ under Section 203 of the Labor Code, a former state employee may sue the ‘State of California’ instead of the specific agency for which the employee previously worked.” (“State employer” issue). (Opening Brief on the Merits (“Opening Br.”) at p. 1.) The State argues that the specific agency at which an employee worked, and not the State of California, is the “employer” for purposes of analyzing Labor Code section 203. (See, e.g., Opening Br. at pp. 12-31.)

Judicial notice of 1) Articles 1, 3 and 5 of the State-CASE MOU and 2) the McLean W-2 Form is necessary and appropriate for a full consideration of the “State employer” issue. To duly address this issue, Plaintiff must discuss how State civil service employment is represented to the employee as well as how the State and its civil service employees manage, administer and understand their employer-employee relationship. The two documents for which Plaintiff seeks judicial notice are important to this analysis.

For example, under Article 1 of the State-CASE MOU, the “State of

California” is an express party to the MOU. In addition, Article 3 of the MOU sets forth the rights of the State of California under the employment agreement and Article 5 describes its potential liability for “payroll errors or delays.” (Declaration of Ian J. Barlow in Support of Plaintiff’s Motion for Judicial Notice (“Barlow Decl.”), Ex. A (State-CASE MOU) at pp. A-02 to A-03, A-11 [art. 1, sec. 1.1, subd. (A), art. 3, sec. 3.1, subd. (B), and art. 5, sec. 5.8, subd. (B)].) Finally, the McLean W-2 Form lists the “State of California” as her employer. (*Id.*, Ex. B (McLean W-2 Form).)

Therefore, the proposed documents satisfy the relevancy requirement.

B. The Issue of Whether the State of California Is the Employer Was Not the Subject of Plaintiff’s Appeal.

The Evidence Code provides special rules for situations where a party seeks judicial notice of information that was not received in open court or included in the record and contemplates circumstances where “a reviewing court will grant judicial notice even when the information was not presented to the trial court.” (*People v. Hardy* (1992) 2 Cal.4th 86, 134 [5 Cal.Rptr.2d 796, 825 P.2d 781]; Evid. Code, § 459, subd. (d));¹ see also *Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 647, fn. 13 [79

¹ Under Evidence Code section 459, subdivision (d), “if the reviewing court resorts to any source of information not received in open court or not included in the record of the action, . . . the reviewing court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.”

Cal.Rptr.3d 383] [taking judicial notice of matters that were not presented to the trial court].) However, courts have refused to take judicial notice of matters not presented to the trial court where such matters, for example, have no relevance to the issues on appeal² or where the movant has offered “no reason” for failing to seek judicial notice in the trial court or appellate court.³

Here, as described above, the documents for which Plaintiff seeks judicial notice are directly relevant to the issue of whether the State of California is the “employer” for purposes of analyzing Labor Code section 203. This “State employer” issue was the lead issue on the State’s petition for review and is the primary issue presented in the State’s Opening Brief to this Court. The State employment agreement provisions and standardized W-2 form that are the subject of this request for judicial notice specifically address and will be important for analyzing the employment

² (See, e.g., *Hernandez v. County of Los Angeles* (2008) 167 Cal.App.4th 12, 18, fn. 4 [84 Cal.Rptr.3d 10] [denying request for judicial notice of documents that were not presented to the trial court because they were “not relevant or necessary to the issues decided on this appeal”]; see also *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 418 [42 Cal.Rptr.3d 807] [“This court may take judicial notice of court records outside the record on appeal, including unpublished orders and decisions in a related federal proceeding. [Citations.] However, a litigant must demonstrate that the matter as to which judicial notice is sought is both relevant to and helpful toward resolving the matters before this court”].)

³ (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325 [48 Cal.Rptr.2d 87, 906 P.2d 1242] [defendant “puts forth no reason for its failure to request the trial court and Court of Appeal to take judicial notice of the eight cartons of materials . . . it now asks this court to review”].)

relationship between the State of California and its civil service employees.

Plaintiff did not previously seek judicial notice of these documents because the issue to which these documents pertain was raised on a demurrer, and Plaintiff had expressly pled that the Plaintiff and putative class members were employed by the State. The issue of whether the State of California is the employer of civil service employees for purposes of Labor Code section 203—on demurrer—was not subject to a factual determination; it was argued and analyzed as a matter of pleading and law. Accordingly, in addition to unambiguously pleading that the State of California employed the Plaintiff and putative class members, Plaintiff cited to statutory language in Labor Code sections 202 and 220 and case law to demonstrate this point.

This “State employer” issue was not the primary issue before the trial court, and it was never decided by the trial court. (See, e.g., AA000111 [“The court does not address the other arguments in support of and in opposition to the demurrer”].) As a result, Plaintiff did not raise this issue—nor seek judicial notice of any matters relating to it—when she appealed the trial court’s decision to the Third District Court of Appeal.

Plaintiff’s opening brief to the Court of Appeal made no mention of the “State employer” issue; it focused squarely on the issue determined by the trial court in entering final judgment against her. Review was sought as to “[w]hether the trial court erred by construing California prompt pay law

(and in particular Labor code sections 202 and 203) to exclude retirees from the protections given to all other employees who are discharged or who quit.” (“Prompt pay” issue). (App. Br. at p. 6.)⁴ Because the retiree defense to her prompt pay claim was the only issue decided by the trial court, it was the only issue that Plaintiff raised on appeal.

The “State employer” issue was only presented to the Court of Appeal through the State’s responding brief. It was a secondary issue. Neither party sought judicial notice. While the Court of Appeal considered the “State employer” issue, and ruled on that issue in Plaintiff’s favor, it was not the primary issue analyzed as part of the Court of Appeal’s opinion. The primary issue on appeal involved “prompt pay” to State retirees under Labor Code sections 202 and 203.

It was not until the State filed its petition for review in this Court that the “State employer” issue came first. Meanwhile, the “prompt pay” issue—previously the only issue decided by the trial court and included in Plaintiff’s appeal—was designated by the State as the second issue for review. (Petn. for Review at p. 1.)

In light of these circumstances, Plaintiff did not previously seek judicial notice of these documents. Given the late prominence of the “State employer” issue, and now confronted with factual assertions in the State’s

⁴ “App. Br.” refers to the Brief of Appellant Janis S. McLean, filed on November 27, 2013 in *McLean v. State of California*, Case No. C074515.

brief concerning the employment of State civil service employees, it is reasonable for Plaintiff to seek judicial notice of the subject documents and important that she be afforded an opportunity to respond to these factual assertions. (See, e.g., Opening Br. at p. 3 [the State argues that under common law the primary factor for determining the identity of an employer is “the authority to exercise direction and control over the employee’s work. In state government, only the appointing power—not a unitary entity denominated ‘the State’—is able to direct and control an employee’s work”]; see also *id.* at sec. I.C. [“Interpreting a Section 203 ‘Employer’ as an Individual State Agency Is Also Consistent with the Common-Law Understanding of an ‘Employer’”].) In addition, at this decisive juncture in the case it is important that Plaintiff and this Court have the benefit of these documents to be able to more fully consider the issue presented and to properly resolve the “State employer” issue.

In sum, the circumstances warrant taking judicial notice of Articles 1, 3 and 5 of the State-CASE MOU and the McLean W-2 Form.

C. The Documents Are Properly the Subject of Judicial Notice.

Articles 1, 3 and 5 of the State-CASE MOU are subject to judicial notice under Evidence Code sections 452, subdivisions (c) and (h), and 459, subdivision (a). The agreement was entered into by and between CASE and the State, and was negotiated, created and is subject to the specific

requirements set forth in the Ralph C. Dills Act, Government Code section 3512 et seq. Such public entity employment agreements are judicially noticeable. (See, e.g., *Rialto Police Benefit Assn. v. City of Rialto* (2007) 155 Cal.App.4th 1295, 1299, fn. 1 [66 Cal.Rptr.3d 714] [taking judicial notice of MOU between the City of Rialto and Rialto Police Benefits Association]; *Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 172, fn. 10 [125 Cal.Rptr.2d 474] [taking judicial notice of “article 9 of the 2000 to 2003 Memorandum of Understanding (MOU) between the [Los Angeles Police Protective] League and City of Los Angeles”]; *Curcini v. County of Alameda, supra*, 164 Cal.App.4th at p. 647, fn. 13 [taking judicial notice of the MOU between the “Deputy Sheriffs’ Association of Alameda County and the County of Alameda” pursuant to Evidence Code sections 452 and 459].)

In addition, the entirety of the State-CASE MOU is publically available for viewing and download on the official website for the State of California Department of Human Resources at <<http://www.calhr.ca.gov/state-hr-professionals/pages/bargaining-contracts.aspx>> or <<http://www.calhr.ca.gov/Documents/bu02-20050701-20070630-mou.pdf>>. (See, e.g., *Kilker v. Stillman* (2015) 233 Cal.App.4th 320, 328, 331, fn. 6 [182 Cal.Rptr.3d 712] [taking judicial notice of “pages from the official Web site of the Social Security Administration”]; *Walt Rankin & Associates, Inc. v. City of Murrieta* (2000) 84 Cal.App.4th 605,

624, fn. 12 [101 Cal.Rptr.2d 48] [granting judicial notice of the Insurance Commissioner of the State of California's "official Web site"]; *Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522, 1550, fn. 11 [178 Cal.Rptr.3d 897] [taking judicial notice of materials available on the official California legislative information Web site on the Court's own motion].)

Plaintiff's W-2 Form may also be judicially noticed as an official standardized tax form from the Internal Revenue Service and as a form transmitted to State civil service employees as part of an official act by the California State Controller ("State Controller"). According to the California State Controller's official website, if an individual receives a W-2 form from the California State Controller, he or she received wages and/or had withholdings or other information that were required to be reported "while employed with the State of California" (<http://www.sco.ca.gov/ppsd_empinfo_form_w2.html> [as of Mar. 30, 2015].) The State Controller's official website also states that

[t]he State Controller is the chief fiscal officer for California government and is responsible for mailing all W-2 forms to civil service and California State University employees paid by the state's Uniform State Payroll System. The federal Internal Revenue Service (IRS) requires employers to report employees' wage and salary information on W-2 forms.

(*Ibid.*) As a result, Plaintiff's W-2 Form is subject to judicial notice under Evidence Code sections 452, subdivisions (c) and (h), and 459, subdivision

(a).

For the above reasons, Articles 1, 3 and 5 of the State-CASE MOU and the McLean W-2 Form should be judicially noticed.

D. The Matters To Be Noticed Do Not Relate to Proceedings Occurring after the Order That Is the Subject of the Appeal.

The documents for which Plaintiff requests judicial notice do not relate to proceedings that occurred after the order underlying the appeal.

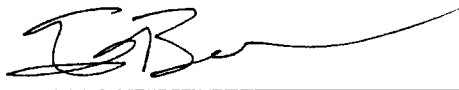
IV. CONCLUSION

For the reasons described above, Plaintiff's motion for judicial notice should be granted.

Dated: April 2, 2015.

Respectfully submitted,

KERSHAW, CUTTER & RATINOFF, LLP

By: 

IAN J. BARLOW
*Counsel for Plaintiff and
Appellant, Janis S. McLean*

DECLARATION OF SERVICE BY MAIL

Janis S. McLean v. State of California, etc.

Sacramento Superior Court Case No. 34-2012-00119161-CU-OE-GDS

Third Appellate District Court of Appeal Case No. C074515

SUPREME COURT OF THE STATE OF CALIFORNIA, Case No. S221554

I, Lisa C. Anderson, declare as follows:

At the time of service, I was at least 18 years of age and not a party to this legal action. My business address is 401 Watt Avenue, Sacramento, California 95864.

On April 2, 2015, I served the **PLAINTIFF'S MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES** by overnight courier as follows: I enclosed a copy in separate envelopes, addressed to each individual addressee named below, and I deposited each sealed envelope with **FEDERAL EXPRESS** in Sacramento, California, for delivery as follows:

State of California
Department Of Justice
Attorney General of California
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William T. Darden
1515 Clay Street, 20th Floor
Oakland, CA 94612
Telephone: (510) 622-2196
Counsel for Petitioner
State of California

Sacramento Superior Court
The Honorable Raymond Cadei
720 Ninth Street
Sacramento, CA 95814

Clerk – Court Of Appeals
Third Appellate District
914 Capital Mall
Sacramento, CA 95814

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

Date: 4/2/15.



Lisa C. Anderson

In the Supreme Court of the State of California

JANIS S. MCLEAN,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA, ET AL.,

Defendants and Respondents.

Case No. S221554

**SUPREME COURT
FILED**

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Frank A. McGuire Clerk

Deputy

Court of Appeal, Third Appellate District, Case No. C074515
Superior Court of California, County of Sacramento,
Case No. 34-2012-00119161-CU-OE-GDS
Honorable Raymond M. Cadei

**DECLARATION OF IAN J. BARLOW IN SUPPORT OF
PLAINTIFF'S MOTION FOR JUDICIAL NOTICE**

KERSHAW, CUTTER & RATINOFF, LLP
William A. Kershaw (State Bar No. 057486)
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*Counsel for Plaintiff and Appellant,
Janis S. McLean*

I, Ian J. Barlow, declare as follows:

1. I am an attorney at law licensed to practice before all courts in the State of California and am one of the attorneys of record for the plaintiff and putative class in the above-entitled action. I have personal knowledge of the matters stated in this declaration and, if asked to do so, I could competently testify to those matters.

2. Attached hereto as Exhibit A is a true and correct copy of Articles 1, 3 and 5 of the Agreement between the State of California and California Attorneys, Administrative Law Judges and Hearing Officers In State Employment (CASE) covering Bargaining Unit 2 Attorneys and Hearing Officers, Effective July 1, 2005 through June 30, 2007 ("State-CASE MOU"). A copy of the State-CASE MOU is also available on the official State of California Department of Human Resources website at <http://www.calhr.ca.gov/Documents/bu02-20050701-20070630-mou.pdf>. I personally printed a true and correct copy of the State-CASE MOU from the above-referenced web link located on the official State of California Department of Human Resources website, which is readily accessible by the public.

3. Attached hereto as Exhibit B is a true and correct copy of the Form W-2 Wage and Tax Statement for Janis S. McLean (2010) ("McLean

W-2 Form”). A copy of the McLean W-2 Form was obtained directly from Plaintiff-Appellant Janis S. McLean.

I declare under penalty of perjury under the laws of the state of California that the forgoing is true and correct and that this declaration was executed on April 2, 2015, in Sacramento, California.

By: 

IAN J. BARLOW



**Agreement between
State of California**

and

**California Attorneys, Administrative Law Judges and Hearing Officers
In State Employment (CASE)**

covering

**BARGAINING UNIT 2
ATTORNEYS AND HEARING
OFFICERS**

Effective

July 1, 2005, through June 30, 2007

ARTICLE 1 – RECOGNITION AND PURPOSE

1.1 Recognition and Purpose

- A. This Memorandum of Understanding (hereinafter "MOU" or "Agreement") is entered into by and between the State of California (hereinafter "State" or "State employer") and the California Association of Administrative Law Judges, Attorneys, and Hearing Officers in State employment, (hereinafter "CASE"), pursuant to the Ralph C. Dills Act, Government Code Section 3512 et seq.
- B. Its purpose is to improve employer-employee relations between the parties by establishing wages, hours, and other terms and conditions of employment.
- C. Pursuant to the Dills Act and PERB certification No. S-SR-2, the State recognizes CASE as the exclusive representative of all employees in the Attorney and Hearing Officer Unit, Unit 2 (hereinafter "bargaining unit").
- D. Pursuant to Government Code section 3517, CASE recognizes the Director of the Department of Personnel Administration (DPA) or his/her designee, as the designated representative of the Governor for the purposes of negotiating this MOU.

ARTICLE 2 – CASE RIGHTS

2.1 CASE Representation

A. Representational Activity

The State recognizes and agrees to deal with CASE representatives on all matters relating to bargaining unit grievances and claims and appeals to the State Personnel Board (SPB). An employee and a CASE representative shall be authorized a reasonable amount of time off during work hours without loss of compensation (consistent with workload requirements) to prepare and present grievances and claims and appeals before SPB. CASE employee representatives may be required to notify their immediate supervisors and obtain approval regarding the time of day for conducting such activities.

B. CASE Representatives

A written list of CASE representatives at each work location shall be furnished to the State immediately after their designation, and CASE shall notify the State promptly of any changes of such representatives. CASE officers or representatives shall not be recognized by the State until such lists or changes thereto are received.

C. Organizational Activity Release Time

1. Nine (9) CASE Board members shall each be released without loss of compensation from work for up to and including one (1) day per month for organizational (board-level) activity, subject to the following:
 - a. Release time will be dependent on departmental operational needs.

2.8 Safety Committee

Upon request by CASE, appointing authorities for Unit 2 employees shall establish at least one safety committee, with at least one (1) Unit 2 employee representative and at least one (1) representative from management. Where safety committees (or like forums) already exist or are established for purposes of addressing safety matters of concern to more than just Unit 2 employees, then at least one (1) Unit 2 employee representative may instead be permitted to join that committee. The safety committee(s) may be constituted for purposes of addressing issues at one, or more than one work site.

2.9 New Employee Orientation

Upon initial appointment of an employee in a Bargaining Unit 2 classification, the appointing authority shall, within a reasonable period of time, inform the employee that CASE is the exclusive representative for his/her bargaining unit. The appointing authority shall also present the employee with a copy of this memorandum of understanding and a packet of information pertaining to representation by CASE, if supplied to that appointing authority in advance by CASE.

ARTICLE 3 – STATE RIGHTS

3.1 State Rights

- A. All State rights and functions, except those which are expressly abridged by this MOU, shall remain vested with the State.
- B. To the extent consistent with law and this MOU, the rights of the State include, but are not limited to, the exclusive right to determine the mission of its constituent departments, commissions, and boards; set standards of service; train, direct, schedule, assign, promote, and transfer its employees; initiate disciplinary action; relieve its employees from duty because of lack of work, lack of funds, or for other legitimate reasons; maintain the efficiency of State operations; determine the methods, means and personnel by which State operations are to be conducted; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. The State has the right to make reasonable rules and regulations pertaining to employees consistent with this MOU provided that any such rule shall be uniformly applied to all affected employees who are similarly situated.
- C. This MOU is not intended to, nor may it be construed to, contravene the spirit or intent of the merit principle in State employment, nor to limit the entitlements of State civil service employees provided by Article VII of the State Constitution or by-laws and rules enacted thereto.

22. Incompatible Activities

19990 Requires each appointing power to determine activities which are incompatible, in conflict with, or inimical to their employees' duties; provides for identification of and prohibits such activities.

23. Use of State Time

19991 Provides State time for taking civil service examinations including employment interviews for eligibles on employment lists, or attending a meeting of DPA or SPB on certain matters.

24. Training

19995.2 Provides for counseling and training programs for employees whose positions are to be eliminated by automation, technological or management-initiated changes.

19995.3 Provides for Department of Rehabilitation to retrain and refer disabled State employees to positions in State service.

ARTICLE 5 – SALARIES

5.1 Salaries

- A. Upon ratification of the agreement by the union and approval by the Legislature, all Unit 2 classifications shall receive a general salary increase of two and one half percent (2.5%) retroactive to July 1, 2005. The increase shall be calculated by multiplying the base salary by 1.025. The parties recognize that the actual salary increase for each classification may vary slightly due to rounding.
- B. Effective July 1, 2006 the State agrees to provide a cost of living adjustment, to all Unit 2 classifications as follows:
 - 1. The salary increase shall be equal to the total percentage change in the Consumer Price Index (CPI) for the twelve month period from April 2005 through March 2006. The specific amount of the cost of living adjustment shall be determined by the increase in the cost of living for the year using the Consumer Price Index, U.S. Department of Labor, Index CPI-W West Urban – All Urban Consumers (Not Seasonally Adjusted), Series CUUR0400SA0, United States.
 - 2. The cost of living adjustment shall not be less than 2.0% or more than 4.0%.

eg: If the cost of living for the year, as determined in #1 above, is less than 2.0%, the cost of living adjustment for the year shall be established at 2.0%. If the cost of living for the year is greater than 4.0%, for the specified period, the cost of living adjustment for the year shall be established at 4.0%. If the cost of living for the year increases by an amount between 2.0% and 4.0%, employees shall receive the specific cost of living increase rounded to the nearest tenth.

3. The parties recognize that the actual salary increase for each classification may vary slightly due to rounding.
4. The following illustrates the specific method of computation to be used in calculating the salary increase, using fictional data for illustration purposes only.

EXAMPLE for 2006 Increase (as described in #1)

CPI for March 2006 (EXAMPLE ONLY)	202.4	
Less CPI for March 2005	197.1	
Index Point Change	5.2	
Divided by Previous CPI (March 2005)	197.1	
Equals	.02637	
Result multiplied by 100 (100 x .02637)	2.6	
Cost of Living Adjustment for 2006	2.6%	
Salary adjustment effective July 1, 2006 (EXAMPLE ONLY)		2.6%

5.2 Salary Range Changes

A. Entry Level Attorney Classes – New Salary Rate for Range A

Effective July 1, 2005, Range A of the following classes shall be changed to the rate of \$4410.

Schem Code	Class Code	Classification
0A93	5539	Real Estate Counsel I
0C65	5730	Deputy Attorney General
0A72	5778	Staff Counsel
0047	5779	Deputy Attorney, CalTrans
0A70	5798	Legal Counsel
0I65	6110	Fair Employment and Housing Counsel
0N60	6185	Fair Political Practices Commission Counsel
0N65	6186	Fair Political Practices Commission Counsel-Enforcement

0K70	6187	Corporations Counsel
0A94	6272	Board Counsel I, ALRB
0A75	6728	Tax Counsel

B. 5% Minimum and Maximum Increase – Attorney III Level Classes

Effective July 1, 2006, the following classes shall be adjusted by increasing the minimum and the maximum of the salary range by 5%. Employees whose salary rate is less than the minimum of the new salary range shall move to the new minimum and retain their salary anniversary date (MSA).

Employees who have been at the old maximum salary rate for a minimum of twelve (12) qualifying pay periods shall receive a 5% increase. Employees at the old maximum salary rate for less than twelve (12) qualifying pay periods shall receive a new salary anniversary date based on qualifying service at the old maximum salary rate. Qualifying service towards the twelve (12) qualifying pay periods shall be in accordance with DPA Rules 599.682 (b) and 599.687.

All other employees shall retain their salary and their salary anniversary date (MSA).

Schem Code	Class Code	Classification
0A91	5537	Real Estate Counsel III (Specialist)
0C60	5706	Deputy Attorney General III
0D50	5763	Deputy State Public Defender
0040	5789	Deputy Attorney III, CalTrans
0A82	5795	Staff Counsel III (Specialist)
0J20	5812	Public Utilities Counsel III, PUC
0I55	6115	Senior Fair Employment and Housing Counsel (Specialist)
0I15	6180	Industrial Relations Counsel III (Specialist)
0K80	6188	Senior Corporations Counsel (Specialist)
0A97	6204	Senior Commission Counsel (Specialist), FPPC
0A96	6274	Senior Board Counsel, ALRB
0A76	6733	Tax Counsel III (Specialist)

C. 5% Minimum and Maximum Increase – Attorney IV Level Classes

Effective July 1, 2006, the following classes shall be adjusted by increasing the minimum and the maximum of the salary range by 5%. Employees whose salary rate is less than the minimum of the new salary range shall move to the new minimum and retain their salary anniversary date (MSA).

Employees who have been at the old maximum salary rate for a minimum of twelve (12) qualifying pay periods shall receive a 5% increase. Employees at the old maximum salary rate for less than twelve (12) qualifying pay periods shall receive a new salary anniversary date based on qualifying service at the old maximum salary rate. Qualifying service towards the twelve (12) qualifying pay periods shall be in accordance with DPA Rules 599.682 (b) and 599.687.

All other employees shall retain their salary and their salary anniversary date (MSA).

Schem Code	Class Code	Classification
0J50	5699	Public Utilities Counsel IV, PUC
0C50	5705	Deputy Attorney General IV
0D10	5772	Sr. Deputy State Public Defender (Range A only)
0A80	5780	Staff Counsel IV
0035	5788	Deputy Attorney IV, CalTrans
0I10	5981	Industrial Relations Counsel IV
0A78	6722	Tax Counsel IV, Franchise Tax Board

5.3 Merit Salary Adjustments

- A. Employees shall receive annual merit salary adjustments (MSA) in accordance with Government Code Section 19832 and applicable Department of Personnel Administration rules.
- B. The employee shall be informed in writing of denial ten (10) working days prior to the proposed effective date of the merit salary adjustment.
- C. Denial of the MSA shall be subject to the grievance and arbitration procedure.

5.4 Range Changes

Employees shall receive upon movement to an alternate range the salary and MSA provided in the Alternate Range Criteria for the class. If there are no specific salary regulations provided in the Alternate Range Criteria, the employee shall receive the salary and MSA as provided in DPA Rule 599.681. Employees, at their discretion, who are eligible for a range change may defer their range change up to six (6) qualifying pay periods in order to coincide the range change with the effective date of their MSA. Said request by employee shall be in writing and submitted no less than thirty (30) days prior to the employee's anniversary date for purposes of the range change.

5.5 Bilingual Differential Pay

Bilingual Differential Pay applies to those positions designated by the Department of Personnel Administration as eligible to receive bilingual pay according to the following standards:

A. Definition of bilingual positions for Bilingual Differential Pay

1. A bilingual position for salary differential purposes requires the use of a bilingual skill on a continuing basis averaging ten percent (10%) of the time. Anyone using their bilingual skills ten percent (10%) or more of the time will be eligible whether they are using them in a conversational, interpretation, or translation setting. In order to receive bilingual differential pay, the position/employee must be certified by the using department and approved by the Department of Personnel Administration. (Time should be an average of the time spent on bilingual activities during a given fiscal year.)
2. The position must be in a work setting that requires the use of bilingual skills to meet the needs of the public in either:
 - a. A direct public contact position;
 - b. A hospital or institutional setting dealing with patient or inmate needs;
 - c. A position utilized to perform interpretation, translation, or specialized bilingual activities for the department and its clients.
3. Position(s) must be in a setting where there is a demonstrated client or correspondence flow where bilingual skills are clearly needed.
4. Where organizationally feasible, departments should ensure that positions clearly meet the standards by centralizing the bilingual responsibility in as few positions as possible.
5. Actual time spent conversing or interpreting in a second language and closely related activities performed directly in conjunction with the specific bilingual transaction will count toward the ten percent (10%) standard.

B. Rate

1. An employee meeting the bilingual differential pay criteria during the entire monthly pay period would receive a maximum one hundred dollars (\$100) per monthly pay period, including holidays.
2. A monthly employee meeting the bilingual differential pay criteria less than the entire pay period would receive the differential on a pro rata basis.
3. A fractional month employee meeting the bilingual differential pay criteria would receive the differential on a pro rata basis.
4. An employee paid by the hour meeting the bilingual differential pay criteria would receive a differential of fifty-eight cents (\$.58) per hour.
5. An employee paid by the day meeting the bilingual differential pay criteria would receive a differential of four dollars and sixty-one cents (\$4.61) per day.

- C. Employees, regardless of the time base or tenure, who use their bilingual skills more than ten percent (10%) of the time on a continuing basis and are approved by the Department of Personnel Administration will receive the bilingual differential pay on a regular basis.
- D. Bilingual differential payments will become earnings and subject to contributions to the California Public Employees' Retirement System (CalPERS), OASDI, levies, garnishments, Federal and State taxes.
- E. Employees working in positions which qualify for regular bilingual differential pay as authorized by the Department of Personnel Administration may receive the appropriate pay during periods of paid time off and absences (e.g., sick leave, vacation, holidays, etc.).
- F. Employees will be eligible to receive the bilingual differential payments on the date the Department of Personnel Administration approves the departmental pay request. The effective date shall be retroactive to the date of appointment, not to exceed one (1) year, and may be retroactive up to two (2) years, to a position requiring bilingual skills when the appointment documentation has been delayed. The effective date for bilingual pay differential shall coincide with the date qualified employees begin using their bilingual skills on a continuing basis averaging ten percent (10%) of the time, consistent with the other provisions of this section.
- G. Bilingual salary payments will be included in the calculation of lump sum vacation, sick leave and extra hour payments to employees terminating their State service appointment while on bilingual status.
- H. Qualifying employees in Work Week Group 2 shall receive bilingual salary compensation for overtime hours worked.
- I. Employees receiving regular bilingual differential pay will have their transfer rights determined from the maximum step of the salary range for their class. Incumbents receiving bilingual pay will have the same transfer opportunities that other class incumbents are provided.
- J. The bilingual differential pay shall be included in the rate used to calculate temporary disability, industrial disability and non-industrial disability leave benefits.

5.6 Overpayments/Payroll Errors

Overpayments/payroll errors shall be administered in accordance with Government Code Section 19838.

5.7 Late Docks

- A. Notwithstanding Section 5.5 (Overpayments and Payroll Errors) and Section 5.7 (Timely Payment of Wages), departments may elect to proceed as follows as it pertains to "late docks".
 - 1. Whenever an employee is charged with a "late dock" as defined by the State Controller's Office (SCO) for the purpose of issuing salary through the negative payroll system, departments may issue the employee's paycheck for that period as if no late dock occurred. This means that:

- a. The employee will receive a regular pay warrant on pay day (unless it would have been withheld for purposes other than the late dock);
 - b. The employee will be overpaid, since the dock time will not have been deducted from the employee's pay check; and,
 - c. The employee's pay will be adjusted for any dock time occurring before the SCO cut off date, since late docks occur on or after the cut off date established by SCO.
2. Employees who are overpaid because of paragraph 1 above, will repay the State for their overpayment by an automatic payroll deduction of the total amount from their next month's pay check/warrant (or successive warrants where needed to satisfy the debt). Departments shall notify employees about the overpayment and the automatic payroll deduction in writing at the time the determination is made. The absence of said notification will not preclude the department from automatically deducting overpayments as otherwise permitted by this section.
 3. Departments that elect to proceed under this section may do so on an employee-by-employee basis thereby reserving the right to issue salary advances in lieu of a regular paycheck in order to avoid an overpayment due to a late dock as the department deems prudent.
 4. If an employee separates or retires from State service before satisfying late dock overpayments as a result of this section, the State shall deduct the total amount due from any other pay owing the employee at the time of his/her separation or retirement.

5.8 Timely Payment of Wages

- A. When a permanent full-time employee receives no pay warrant on payday, the State agrees to issue a salary advance, consistent with departmental policy and under the following conditions:
 1. When there are errors or delays in processing the payroll documents and the delay is through no fault of the employee, a salary advance will normally be issued within two (2) work days after payday for an amount close to the actual net pay (gross salary less deductions) in accordance with departmental policy.
 2. When a regular paycheck is late for reasons other than (1) above (e.g., AWOL, late dock), a salary advance of no less than fifty percent (50%) of the employee's actual net pay will normally be issued within five (5) work days after payday. No more than two (2) salary advances per calendar year may be issued under these circumstances.
 3. The difference between the employee's net pay and the salary advance shall not be paid until after receipt of the Controller's warrant for the pay period.
 4. The circumstances listed in (1), (2) and (3) are not applicable in remote areas where difficulties in the payroll process would not allow these timelines to be met. In these areas, the State agrees to attempt to expeditiously correct payroll errors and issue salary advances.

- B. It will be the responsibility of the employee to make sure voluntary deductions (e.g., credit union deductions, union dues, etc.) are paid. Nothing in this subsection shall be construed as a waiver of any individual right an employee may have apart from this agreement, to bring a personal action against the State as the result of payroll errors or delays. Said actions shall not be the subject of the grievance and arbitration procedure contained in this agreement.
- C. This provision does not apply to those employees who have direct deposit. This provision does not preclude advances if they are provided for under any other rules or policies where direct deposit is involved.

5.9 Recruitment and Retention, State Prisons

- A. Effective July 1, 1998, Unit 2 employees who are employed at Avenal, Ironwood, Calipatria or Chuckawalla Valley State Prisons, Department of Corrections, for twelve (12) consecutive qualifying pay periods, shall be eligible for a recruitment and retention bonus of \$2,400, payable thirty (30) days following the completion of the twelve (12) consecutive qualifying pay periods.
- B. If an employee voluntarily terminates, transfers, or is discharged prior to completing twelve (12) consecutive pay periods at Avenal, Ironwood, Calipatria or Chuckawalla Valley State Prisons, there will be no pro rata payment for those months at either facility.
- C. If an employee is mandatorily transferred by the Department, he/she shall be eligible for a pro rata share for those months served.
- D. If an employee promotes to a different facility, or department other than Avenal, Ironwood, Calipatria or Chuckawalla Valley State Prisons prior to completion of the twelve (12) consecutive qualifying pay periods, there shall be no pro rata of this recruitment and retention bonus. After completing the twelve (12) consecutive qualifying pay periods, an employee who promotes within the Department will be entitled to a pro rata share of the existing retention bonus.
- E. Part-time and intermittent employees shall receive a pro rata share of the annual recruitment and retention differential based on the total number of hours worked excluding overtime during the twelve (12) consecutive qualifying pay periods.
- F. Annual recruitment and retention payments shall not be considered as compensation for purposes of retirement contributions.
- G. Employees on IDL shall continue to receive this stipend.
- H. If an employee is granted a leave of absence, the employee will not accure time towards the twelve (12) qualifying pay periods, but the employee shall not be required to start the calculation of the twelve (12) qualifying pay periods all over. For example, if an employee has worked four (4) months at qualifying institution and then takes six (6) months' maternity leave, the employee will have only eight (8) additional qualifying pay periods before receiving the initial payment of \$2,400.

5.10 Out-of-State Differential Pay

Unit 2 employees who are headquartered out-of-State or who are on permanent assignment to travel at least fifty percent (50%) of the time out-of-State shall receive a pay differential of three hundred and fifty dollars (\$350) per month.

5.11 National Judicial College Differential

- A. Employees in classes enumerated in Section E (below) who complete an equivalent judicial education curriculum shall receive a monthly differential of five percent (5%) of their salary. The differential shall be considered compensation for purposes of retirement.
- B. "Equivalent judicial education curriculum" means either a certificate issued by the National Judicial College (NJC) in courses related to administrative law adjudication or twenty (20) hours of judicial education or certification as approved by the department. Equivalency shall be determined by the Department of Personnel Administration based on recommendations from the employee's department.
- C. Employees already receiving the differential at the time this agreement is ratified by the Legislature and CASE's membership shall continue to receive the differential.
- D. Employees not receiving the differential at the time this agreement is ratified by the Legislature and CASE's membership who complete a qualified judicial education curriculum after July 1, 2000, may begin receiving the differential no earlier than the beginning of the pay period following the month in which the curriculum was completed and not later than the month following ratification of this agreement by both CASE and the Legislature.

CASE recognizes that attendance at department provided training may be postponed for a reasonable period of time to coincide with training offered for other employees.

- E. The State agrees to reimburse employees in Administrative Law Judge and Hearing Officer classifications; including Fair Hearing Specialists; Office of Administrative Hearings, Hearing Advisers (OAH); California Energy Commission, Hearing Advisers (CEC); and Workers' Compensation Conference Judges for necessary and reasonable expenses incurred (e.g., tuition and travel expenses) and to provide time off during normal work hours without loss of compensation, upon request, consistent with operational needs, to attend a qualified judicial education curriculum as defined above.
- F. Reimbursement for the above expenses shall be in accordance with the Business and Travel Expense provision of this MOU.

5.12 Recruitment and Retention Differential

- A. Upon approval by the Department of Personnel Administration, departments may provide Unit 2 employees a recruitment and retention differential for specific positions, classifications, facilities, or geographic locations.
- B. Less than full-time permanent employees shall receive the recruitment and retention differential on a pro rata basis.

- C. Permanent intermittents shall receive a pro rated recruitment and retention differential based on the hours worked in the pay period.
- D. Recruitment and retention payments shall not be considered as compensation for purposes of retirement contributions.
- E. The department may withdraw any recruitment and retention differential for a specific position(s), classifications, facilities or geographic locations for new hires with a 30-day notice to CASE.
- F. It is understood by CASE that the decision to implement or not implement recruitment and retention payments or to withdraw authorization for such payments or differential, and the amount of such payments or differentials rest solely with the State and that such decision is not grievable or arbitrable.

ARTICLE 6 – HOURS OF WORK

6.1 Overtime

A. Travel Time

Notwithstanding any other contract provision, departmental policy or practice, the travel time of employees who are covered by FLSA shall only be considered as time worked if it meets the definitions and requirements of travel time in Sections 785.34 through 785.41 of Title 29 of the Code of Federal Regulations.

B. Paid Leave Counted As Time Worked – WWG 2

Time during which a Unit 2 employee assigned to Work Week Group (WWG) 2 is excused from work on paid leave (e.g., sick leave, vacation, annual leave) shall be counted as hours worked within the workweek for purposes of determining if overtime has been earned.

C. Overtime Compensation – WWG 2

Employees in classes assigned to Work Week Group 2 shall be compensated at time and one-half in cash or compensating time off at the discretion of each department head or his/her designee for ordered/authorized overtime of at least one-quarter (1/4) hour at any one time.

Employees shall obtain authorization to work overtime. Employees will only be compensated for overtime ordered or authorized by a supervisor.

The employee's preference will be considered when determining whether overtime will be compensated by cash or CTO except as otherwise provided by this agreement.

Overtime will be credited on a one-quarter (1/4) hour basis with a full quarter of an hour credit granted if half or more of the period is worked. Smaller fractional units will not be accumulated.

Department of the Treasury—Internal Revenue Service

d Control number	1 Wages, tips, other compensation [REDACTED]	2 Federal income tax withheld [REDACTED]
OMB NO. 1545-0008	3 Social security wages [REDACTED]	4 Social security tax withheld [REDACTED]
	5 Medicare wages and tips [REDACTED]	6 Medicare tax withheld [REDACTED]

c Employer's name, address and ZIP code
STATE OF CALIFORNIA
JOHN CHIANG, CALIFORNIA STATE CONTROLLER
P.O. BOX 942850
SACRAMENTO, CA 94250-5878

7 Social security tips	8 Allocated tips	9 Advance EIC payment
10 Dependent care benefits	11 Nonqualified plans	12a See instructions for box 12 D [REDACTED]
12b G [REDACTED]	12c	12d

b Employer identification number (EIN) [REDACTED] Employee's social security number [REDACTED]

13 Statutory employee	Retirement plan	Third-party sick pay	14 Other
	<input checked="" type="checkbox"/>		

e Employee's name, address and ZIP code
J S MCLEAN
[REDACTED]

2010 15 State Employee's withholding
CA [REDACTED]

W-2 Wage and Tax Statement
Copy C - For EMPLOYEE'S RECORDS
(See Notice to Employee on the back of Copy B.)

B - 14

DECLARATION OF SERVICE BY MAIL

Janis S. McLean v. State of California, etc.

Sacramento Superior Court Case No. 34-2012-00119161-CU-OE-GDS

Third Appellate District Court of Appeal Case No. C074515

SUPREME COURT OF THE STATE OF CALIFORNIA, Case No. S221554

I, Lisa C. Anderson, declare as follows:

At the time of service, I was at least 18 years of age and not a party to this legal action. My business address is 401 Watt Avenue, Sacramento, California 95864.

On April 2, 2015, I served the **DECLARATION OF IAN J. BARLOW IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDICIAL NOTICE** by overnight courier as follows: I enclosed a copy in separate envelopes, addressed to each individual addressee named below, and I deposited each sealed envelope with **FEDERAL EXPRESS** in Sacramento, California, for delivery as follows:

State of California
Department Of Justice
Attorney General of California
Kamala D. Harris
William T. Darden
1515 Clay Street, 20th Floor
Oakland, CA 94612
Telephone: (510) 622-2196
Counsel for Petitioner
State of California

Sacramento Superior Court
The Honorable Raymond Cadei
720 Ninth Street
Sacramento, CA 95814

Clerk – Court Of Appeals
Third Appellate District
914 Capital Mall
Sacramento, CA 95814

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

Date: 4/2/15.



Lisa C. Anderson