Supreme Court No. S206350

SUPREME COURT OF CALIFORNIA

RIVERSIDE COUNTY SHERIFF'S DEPARTMENT
Respondent/Plaintiff
v.
JAN STIGLITZ
Defendant

KRISTY DRINKWATER
Real Party in Interest and Appellant

SUPREME COURT
FILED

MAR 25 2013

Frank A. McGuire Clerk

Deputy

RIVERSIDE COUNTY SHERIFF'S DEPARTMENT
Respondent/Plaintiff
v.
JAN STIGLITZ
Defendant
RIVERSIDE SHERIFFS' ASSOCIATION
Intervenor and Appellant

After Opinion of the Fourth Appellate District, Division 2, 4th Civ. EO52729,
On Appeal from the Superior Court of the County of Riverside
Case No. RIC 10004998
The Honorable Mac R. Fisher; Department 6

ANSWERING BRIEF OF REAL PARTY IN INTEREST AND APPELLANT KRISTY DRINKWATER

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

REAL PARTY IN INTEREST AND APPELLANT BELOW, KRISTY DRINKWATER (Drinkwater), hereby tenders her Answering Brief in the above-entitled matter now pending decision in this Court, following disposition by the Court of Appeal, Fourth Appellate District, Division Two, filed September 28, 2012, 2d Civ. No. E052729, previously published at 209 Cal. App. 4th 883 (2012).[1]

I.

STATEMENT OF THE ISSUE

Drinkwater acknowledges the Court granted the petition for review, limited to this question: *Does the hearing officer in an administrative appeal of the dismissal of a correctional officer employed by a county sheriff's department have the authority to grant a motion under Pitchess v. Superior Court (1974) 11 Cal. 3rd 531?*

Drinkwater further stipulates that although she was a sheriff's correctional deputy, and therefore not within the class of officers covered by the Public Safety Officers Procedural Bill of Rights Act (Act) at *Government*

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[1] For simplicity, Drinkwater refers to the text of the Court of Appeal Opinion by the Slip Opinion pages because all are aware the case is no longer published.

Code §3300, *et seq.* specified in §3301, she is protected by the Act's provisions as a matter of contract with her employer. *See:* Riverside Sheriffs' Association, Inc. And County Of Riverside Memorandum Of Understanding For The Law Enforcement Bargaining Unit, 2008-2011, at Article XII, §6:

> Correctional Deputies will be afforded the protection of *Government Code* 3300, and subsequent sections, commonly referred to as the Peace Officer's Bill of Rights (sic). (*See:* Slip Op. at 4.)

Drinkwater prays that the Court will view this controversy as arising under the Act, between a covered officer and her employing public safety agency, as if Drinkwater's classification were included in *Government Code* §3301.

II.

THE PROCEEDINGS BELOW

Drinkwater was discharged from her regularly-appointed correctional deputy position at Riverside County Sheriff's Department (RCSD) on April 7, 2009. The causes for the adverse action were alleged time card irregularities which resulted in unearned compensation to her. (*See:* Slip Op. at 3.) A key issue is whether the irregularities resulted from oversight, neglect or mistake, or from fraudulent intent for unjust monetary gain. In the context of this case, the defenses of uneven enforcement and disparate penalty will be critically

important. If, for example, the conduct did not amount to willful or intentional fraud, but rather simple negligence, inadvertent error, or even sloppy bookkeeping, discharge for a first-time offense of a tenured employee absent *scienter* would be excessive.

Anticipating RCSD's predictable fall-back position that even unjust enrichment resulting from simple carelessness should result in removal, other personnel actions based on a similar level of blameworthiness would come into focus. If Drinkwater knew or suspected that there were eleven Sheriff's employees who suffered similar findings and were not discharged, she would need to obtain supporting information from authoritative official records in order to present that defense. She would seek a hearing for the purpose of persuading the presiding officer that qualifying penalty information should at least be considered in review of the extreme penalty exacted in her case. So this is precisely what happened; that is, through counsel Drinkwater sought *redacted* record information regarding similar adverse actions to show that she was subjected to disparate treatment and punishment. (*See:* Slip Op. at 5.)

Initially, her moving papers did not identify persons whom she knew or suspected had "similar issues". RCSD objected because it claimed the burden of manually searching through individual files to recover the information was just too great an imposition. The presiding officer accepted this rationalization

from RCSD, and denied the motion without prejudice. (*See:* Slip Op. at 5.) Fortunately, some implicated personnel were cooperative with Drinkwater's counsel and permitted her to identify their names in a renewed motion. Of course, in doing so, Drinkwater's counsel well knew that she was playing into a trap, because identifying other employees by name has made it unnecessarily "personal," and permits RCSD to greatly overstate and exaggerate the potential for "annoyance, embarrassment or oppression" to "uninvolved" members and strangers to the dispute. *See: Evidence Code § 1045(d).* It has done so throughout its brief, as it did below.

After all, the spectre of having one's good name bandied about in Drinkwater's appeal in relation to prior discipline would make even the most courageous fellow employees reticent about "cooperating" with Drinkwater and her counsel. A public employer can make it very tough on its employees who cooperate with the defense in another employee's case. Just exactly *why* these fellow deputies cooperated with Drinkwater's counsel to whatever extent they did is speculative. We suppose they did so because "it was the right thing to do". But by application of common sense, we know this willingness to help is the exception, not the rule. Suffice to say, an employee in Drinkwater's shoes is in a demonstrably poor position to garner such support from others who would prefer not to have the Sheriff's spotlight upon them. The result is

an uneven playing field between the RCSD and its counsel, and the accused employee and her counsel. RCSD knows its own pattern of discipline in previous cases. Discovery is the only method by which the accused can compel production of the information she needs where it is not forthcoming otherwise.

RCSD says in its brief,

> *In other words, since a deputy seeking personnel files of completely unrelated deputies would in all cases be required to know the identities of such deputies, the deputy attempting to explore a defense of disparate treatment could simply ask the unrelated deputies if they had any objection to either release of their files or perhaps even testifying in the pending disciplinary appeal.* (*See:* Opening Brief, pg. 10.)

Well, respectfully, *that is no answer*, because in most cases the accused who has been terminated will not know the names of the other employees. Even if she did, she is no longer an employee. The picture of current employees voluntarily lining up to testify about their previous missteps in support of a former employee is just too fantastic to visualize.

But to be clear: the only information needed was (1) the approximate date of the events, (2) description of the charges, (3) the relevant findings; and

(4) the penalty; that is, only that minimal amount of information necessary to enable the parties and the presiding officer to determine whether the cases were sufficiently similar for comparison purposes. There was never an intent nor an effort to go wading through the actual personnel records of uninvolved personnel. Often the employers' custodians of records agree to provide this necessary information on a separate summary sheet, with no identifying information, other than "Doe Officer No. 1", for example. Some police employers recognize that disparate penalty is at times a validly-invoked defense that must be confronted by the parties and the presiding officer, and are therefore willing to look for ways to accommodate the need, and at the same time, protect individual officers and deputies from potential "annoyance, embarrassment and oppression" mentioned in *Evidence Code* § 1045(d). Put simply, there are tried and true ways of accommodating due process rights of some employees without any danger whatsoever of invading the privacy of other employees, or subjecting them to any untoward consequences. To pretend this is impossible to do under the present statutory framework is to exact form over substance to the degree that it becomes disingenuous.

Following the procedures set forth in MOU Article XII, Drinkwater duly gave notice of her appeal from discharge. Utilizing the MOU-required "Arbitrator Strike List" (Article XII, §14 A) the RCSD and Drinkwater

mutually selected, accepted and approved Law Professor Jan Stiglitz to preside over the hearing. (*See:* Slip Op. at 5.) Once the hearing convened, Drinkwater requested discovery of *redacted* penalty information on other employees who were accused of time card irregularities similarly to Drinkwater, but who were not discharged. At the *written insistence* of RCSD's counsel on October 22, 2009 at 10:17 am, Drinkwater's request for the information evolved into a "*Pitchess* motion," and a finding of "good cause" by Stiglitz, as conditions precedent to Stiglitz' "review of each and every file in an Evidence Code 915 hearing," *as specifically demanded by Mr. Hamilton,* RCSD's counsel. Stiglitz determined that "plausible justification" existed to require production of some record information for *his own in camera* review. Thus, before RCSD filed the petition under *Code of Civil Procedure* §1094.5 in superior court that ultimately brought us here, RCSD has insisted that the only way Drinkwater could seek production of the information within the confines of the appeal hearing, would be by way of a *Pitchess* motion, Stiglitz' finding of good cause, and Stiglitz' review of the produced records *in camera*, pursuant to *Evidence Code* § 915. Now, RCSD claims the procedures it insisted upon being followed, are against the law?

Astounding as it is, and solely as a consequence of misreading and misapplying the very limited holding of the *Brown v. Valverde* (2010), 183

Cal. App. 4th 1531, the RCSD's position in *this* Court is that Article XII hearing officers like Professor Stiglitz *have never had* the authority and jurisdiction to decide motions brought under *Evidence Code* § 1043. In so doing, RCSD has turned a blind eye to its own participation in many years of Article XII hearings where § 1043 motions were made and argued, and decided by the panel hearing officers selected and approved by RCSD, and where no challenge to their authority was ever made. *(See*: Joint Appendix (JA) 1525-1532 (Decl. Of Michael P. Stone in Support of Riverside Sheriffs' Association's Complaint in Intervention at pages 1-4).)

It is uncontroverted that Drinkwater never wanted nor sought disclosure of anything that would lead to or result in the identification of any employee whose information was found to be relevant. (*See:* Slip Op. at 6.)

III.

PREFATORY

Pitchess v. Superior Court, 11 Cal.3d 531 was decided in 1974, and laid the foundation for judicial review and consideration of "police personnel records" discovery in litigated cases in California. Assembly Bill 301 was introduced first in 1974, and later was signed into law by Governor Jerry Brown in 1976, effective January 1, 1977 as the California Public Safety Officers Procedural Bill of Rights Act ("the Act") at *Government Code*

§§3300, et. seq. From the beginning, the Act granted peace officers in California the right to "administrative appeal" of "punitive action" taken against them. *(See: Government Code* §3303 for the definition of punitive action[2]; *and see: Government Code* §3304(b) granting peace officers the right to administrative appeal.[3] *Government Code* §3304 is entitled, "Protection of Procedural Rights.")

Government Code §3304.5, added by Statutes 1998, Chapter 263, §1 (SB 1662), provides that the "administrative appeal" under this chapter "shall be conducted in conformance with *rules and procedures adopted by the local public agency.*" (Emphasis added.)

Returning to police personnel records, *Penal Code* §§832.7 and 832.8 were added by Statutes 1978, Chapter 630, §5 and §6 respectively. Together, these sections provided that peace officer personnel records are *confidential* and are subject to discovery only according to the requirements of *Evidence Code* §§1043 and 1045. The latter sections were also added as part of Statutes 1978, Chapter 630, §1 and §3. As discussed in detail *infra*, these statutes

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[2] *Government Code* §3303 reads in pertinent part: "...For purposes of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment."

[3] *Government Code* §3304(b) reads in pertinent part: "No punitive action . . . shall be undertaken by any public agency against any public safety officer . . . without providing the public safety officer with the opportunity for administrative appeal."

promulgated the procedural aspects of moving for discovery of peace officer personnel records in adversary proceedings and the procedures to be followed when entertaining the motions.

It is important to consider that the *Pitchess* decision itself was issued nearly forty years ago; and that the legislative enactments governing "*Pitchess* discovery" (SB 1436, 1978) became the law over thirty years ago; and finally, that public safety officers have been afforded the right to "administrative appeals of punitive actions" for the past thirty-five years under the Act. This being the case, we should wonder why the present controversy is the very first of its kind to find its way into a published appellate decision?

After all, the Courts of Appeal and this Court have somewhat frequently published decisions over the past thirty years that have concerned both "*Pitchess* discovery" and "administrative appeals" under the Act.

Truth be told, public safety officers have been exercising their rights to appeal under the Act since *Government Code* §3304(b) became effective on January 1, 1977, as the published decisions show, even before the decision in *Barnes v. Personnel Department of the City of El Cajon* (1978) 87 Cal. App. 3d 502 (procedural requirements of the Act apply to "without cause" police probationary dismissals; [however, §3304(b) was amended in 1998 to apply

to only public safety officers who have "successfully completed the probationary period that may be required by his or her employing agency"]).

Further, it is well-established that in appropriate cases, public safety officers appealing punitive actions taken against them, particularly dismissals, availed themselves of the so-called "disparate penalty" defense, by seeking to show that the personnel information of other similarly-situated officers would disclose evidence that although the misconduct was substantially similar, those other officers were not discharged. Inevitably, "administrative appeal" hearing officers would be tasked with reviewing produced information to determine whether good cause supported disclosure to appellants.

In like fashion, these same hearing officers necessarily determined whether such proffered evidence, after disclosure, was relevant and material to the defense, and therefore admissible. Then as the decisionmakers in the case, the same hearing officers would necessarily determine what weight, if any, to assign to this evidence if it was indeed admitted. No one would seriously question the clear obligation and duty of defense counsel to pursue the disparate penalty and discriminatory or retaliatory punishment defenses if there are facts to support the defenses or to mitigate the penalty.

Now if as RCSD argues, these hearing officers *never had any legitimate authority to entertain motions for discovery of personnel record information*,

we wonder why no appellate decision has ever been published that so provided? More to the point, why has RCSD never said so? If these 30-plus-years-old statutes have so clearly prohibited these motions during § 3304(b) appeals, why has RCSD and every other agency failed to object? The answer is clear: no affected public employer felt aggrieved or compelled to challenge a hearing officer's exercise of this authority in a way that would merit a published decision.

And this case was no different.

Jan Stiglitz was duly-selected and appointed by the parties and the Riverside County Human Resources Manager, and he presides over the *Drinkwater* appeal. Upon Drinkwater's timely motion therefor opposed by RCSD, Stiglitz ordered production of *redacted* personnel record information for his *in camera* review to determine relevancy according to well-defined standards.

RCSD promptly filed its petition for administrative mandamus under *Code of Civil Procedure* §1094.5, seeking a writ that would command Professor Stiglitz to reverse his decision, and to *deny* the motion. (*See:* Slip Op. at 6.)

The *sole* basis upon which RCSD relied was that Stiglitz erred when he found the motion was "supported by good cause." *Stiglitz' supposed lack*

of authority to entertain Drinkwater's motion and grant her relief was never even raised in the petition. The only reason that Stiglitz' authority to hear the motion became an issue was that while the petition was pending in the superior court, the First Appellate District published its decision in *Brown v. Valverde, supra.*

Hence, at the administrative appeal level before Stiglitz, RCSD's position was unambiguous: (1) Drinkwater needed to bring a properly noticed *Pitchess* motion before Stiglitz; (2) RCSD insisted on the full statutory notice period ("16 court days") within which it could file opposition; (3) Stiglitz needed to find that the motion was supported by "good cause;" and (4) Stiglitz had to conduct an *in camera* review of records he ordered to be produced, pursuant to *Evidence Code* § 915. (*See:* Joint Appendix (JA) 004-0011 (Pet. For Writ at paragraph 2); 0042-0057 (Pet. Opp. to Motion for Pretrial Discovery at page 14); 0085-0092 (Pet. Opp. to Renewed Motion for Discovery at pages 1-5; 0144-0149 (Pet. Reply to RPI's Preliminary Opp. To Pet. For Writ of Mandate at pages 4-6).)

Far from objecting to Stiglitz' authority, power, jurisdiction or qualifications to preside over this discovery matter, RCSD actually insisted that it proceed in precisely this fashion! Once Stiglitz decided that plausible justification supported production for his *in camera* review, then RCSD

headed off to superior court. But as the Court of Appeal noted, neither at the administrative appeal level, nor in the superior court petition, did RCSD *ever* challenge Stiglitz' jurisdiction to rule on the motion. (*See:* Slip Op. at 6.) *The argument that only judges can decide Pitchess motions arose only after the decision in Brown v. Valverde (2010) 183 Cal. App. 4th 1531 was erroneously cited to and misapplied by the superior court in this case.*

Although Drinkwater was terminated on April 7, 2009 and promptly filed her notice of appeal, Stiglitz has yet to begin actually taking evidence in the case. Meanwhile, Drinkwater languishes awaiting the first opportunity to present her defenses to the discharge taken against her four years ago.

One final introductory observation needs to be recalled. RCSD complains that under the Court of Appeal decision below, hearing officers selected by mutual agreement of the parties (in our case, the appellant and RCSD) *might not* be "qualified" to decide upon the relevancy and materiality and ultimate admissibility of personnel record information pertaining to unidentified employees of the same employing agency. This makes no sense, at all. First, a prospective hearing officer who is "unqualified" would never be selected to hear a *Government Code* §3304(b) administrative appeal in the RCSD, unless the RCSD itself approves the retention of an unfit or unqualified hearing officer in any given case, which is of course, preposterous. Second,

Article XII hearing officers *preside* over closed hearings required to be confidential *because of Penal Code* § 832.7. (*See: Copley Press, Inc. v. Superior Court* (2006) 39 Cal. 4th 1272.) The appellant's confidential personnel records constitute the subject matter of the hearing! But according to RCSD, the presiding officers are not competent to make reasoned decisions about the relevance of *redacted* personnel outcomes concerning unidentified personnel?

We must remember that the Act itself places the authority and responsibility for structuring and implementing the Act's appeal procedures squarely upon the public employer, in *Government Code* §3304.5. But clearly, the procedures must satisfy due process. (*See: Giuffre v. Sparks* (1999) 76 Cal. App. 4th 1322). A procedure that all but forecloses the disparate penalty defense denies due process, as the Court of Appeal noted at Slip Op. at 28.

At all times relevant, and for at least the past twenty years in the RCSD, the Department and the Riverside Sheriffs' Association (RSA) have conducted employment relations under the guidelines and requirements of a memorandum of understanding (MOU) which exists today in substantially the same form that

it has over all these years[4]. This is particularly true of MOU Article XII, Discipline, Dismissal And Review. Essentially, Article XII sets forth:

1. A statement of the causes for discipline (§2);
2. Inclusion of Correctional Deputies in classification of public safety officers for purposes of applicability of the Act (§6);
3. Procedures: Notice of Disciplinary Action (§8); Appeals (§10);
4. Hearing Procedures (§14):

   A. The parties shall maintain an "Arbitrator Strike List" which contains only the names of arbitrators who have been included by *mutual agreement* of the parties. Selection of a hearing officer shall be made only from the mutually-approved list;

   . . .

   D. Any County officer or employee shall appear and testify when requested by a party to do so in writing, or by the hearing officer, who may issue subpoenas; "The Employee Relations Division Manager . . . shall arrange for the production of any relevant county record.";

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[4] *Riverside Sheriffs' Association, Inc. And County Of Riverside Memorandum of Understanding For The Law Enforcement Bargaining Unit*, 2008-2011.

. . .

H. The decision of the hearing officer shall be final subject to the right of either party to seek judicial review under *Code of Civil Procedure* §1094.5. The hearing officer may sustain, rescind or modify any disciplinary suspension, demotion, reduction or discharge;

5. Evidence and Procedures For All Appeals (§ 15):

A. Technical rules of evidence do not apply; reliable, relevant evidence *shall be admitted*; (Emphasis added.)

B. Hearsay may be admissible if it is admissible over objection in a civil action. "*The rules of privilege shall apply to the same extent to which they are recognized in civil actions;*"

. . .

G. It is the intention of the parties that appeals "be adjudicated as efficiently and economically as possible."

The motion in this case, albeit frequently referred to as a "*Pitchess* motion", is really quite unlike the typical *Pitchess* motion in criminal and civil discovery:

1. Most obvious, the proceeding is administrative in nature as opposed to a criminal court or civil court trial;

2. The motion is made to an "administrative body" as expressly provided for in *Evidence Code* §1043(a), rather than "to the court";

3. In a true criminal or civil *Pitchess* motion, the *identification* of the officer whose records are sought *must be included. Id.* §1043(b)(1);

4. The identity of the officer is necessary because at a minimum, the officer must be in some way a *participant* in the events giving rise to the litigation; otherwise there would be no purpose served by obtaining discovery of the officer's personnel record information;

5. In this motion where the issues at stake are "disparate penalty", "uneven enforcement," "discriminatory treatment" or "retaliatory motive", the *identity* of the officers whose records are sought is unnecessary and irrelevant, and therefore the disclosed information should be *redacted* to remove all means of identifying the officer. For example, in the *Drinkwater* case, Drinkwater sought production only of records that had been

redacted to remove means of identification of uninvolved officers;

6. In the typical *Pitchess* motion the civil or criminal litigant will use the information to attack the officer's credibility, or to impeach the officer, or to undermine the officer's character for the truth, honesty and veracity, or to suggest the officer is prone to violence, excessive force, racism, dishonesty and other "bad" traits of character, or to demonstrate the employer's antecedent negligence in hiring, training, discipline, entrustment, control, supervision and retention of an unfit or incompetent officer;

7. In the *Drinkwater* motion, the records are needed only to show *similarity* of misconduct and *disparity* of penalty. There is little need, if any at all, to have appearances by non-party and uninvolved officers in the case. [5]

8. *Evidence Code* §1045(c) states:

In determining relevance where the issue in litigation concerns the policies or pattern of conduct of the employing agency, the

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[5] We do not mean to suggest that "disparate penalty" is the only defense theme that might justify a § 1043 motion seeking *redacted* information. It could well be, for example, that a broader motion would be required to discover traits of dishonesty in a testifying witness officer for impeachment purposes, which is more akin to the usual *Pitchess* motion.

court shall consider whether the *information sought* may be obtained from *other records* maintained by the employing agency in the regular course of agency business *which would not necessitate the disclosure of individual personnel records.* (Italics added.)

This is applicable to *Drinkwater*-type motions. Production of the individual personnel records is unnecessary. But RCSD seems to take certain delight in obfuscation and complicating this process as much as it can, by refusing to cooperate in producing redacted information in a non-invasive, confidential setting. RCSD insists that what Drinkwater proposes and wants is wholesale invasion of confidential personnel records. RCSD claims it has no alternative means of providing this limited information about unidentified employees or former employees. This must mean that RCSD does not compile regular reports for the Sheriff on the administration of discipline within RCSD, by time, nature of allegation, whether sustained or not, and penalty assigned without identifying any employee.[6]

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[6]This also fairly implies that if Sheriff Sniff were to want to know, "How many of our deputies and officers have we disciplined in the last five years for excessive force, and what is the range of penalties?" Imagine an Assistant Sheriff responding, "Gee, Sheriff, we don't keep track of that information. We would have to manually pull and search through all the individual personnel records one by one, to locate each one over five years. Then we would need to enter the necessary information, downloaded to a bank from which we could retrieve the information you want."

The law contemplates that non-judicial hearing officers will necessarily be called upon to make rulings on claims of privilege. *Evidence Code* §§ 1043 and 1045 are found within Division 8, "Privileges." In Chapter 1, *Evidence Code* §901 tells us that "Proceeding" includes "any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, *administrative agency, hearing officer, arbitrator*...) in which, pursuant to law, *testimony can be compelled* to be given." *Id.* (Italics added). A "civil proceeding" means any proceeding except a criminal proceeding. *Id.* §902. "Presiding officer" means the person *authorized to rule on a claim of privilege in the proceeding in which the claim is made.*

The Law Revision Commission Comments (1965) to § 902 note that a "Presiding officer" is defined so that reference may be made in Division 8 *to the person who makes rulings on a claim of privilege in non-judicial proceedings.*" *Id.* (Italics added). §910 makes the provisions of Division 8 "apply in all proceedings." *Id.* Here again, the Law Revision Commission Comments (LRCC) (1965) following §910 are instructive:

> If confidentiality is to be protected effectively by a privilege, the privilege *must be recognized in proceedings other than judicial proceedings*. The protection afforded by a privilege would be

insufficient if a court were the only place where the privilege could be invoked. *Id.* (Italics added).

Evidence Code §914(a) states:

> The *presiding officer* shall determine a claim of privilege in any proceeding *in the same manner as a court* determines such a claim under Article 2 (commencing with Section 400) of Chapter 4, Division 3.

Again, the LRCC (1965) following §914 are helpful:

> Subdivision (a) makes the general provisions concerning preliminary determinations on admissibility of evidence (Sections 400-406) applicable *when a presiding officer who is not a judge* is called upon to determine whether or not a privilege exists. *Subdivision (a) is necessary because* Sections 400-406), *by their terms, apply only to determinations by a court. Id.* (Italics added).

It is noted that the MOU, Article XII, at § 15 B provides, "The rules of privilege shall apply to the same extent to which they are recognized in civil actions." This makes it clear that Article XII hearing officers are expected to rule on claims of privilege. That being so, there is no logical basis to permit presiding officers to rule on claims of privilege relative to the attorney-client,

clergy-penitent, doctor-patient and other matters of privilege, but to prohibit them from ruling on disclosure or even redacted confidential personnel records information because they are "not qualified."

We are gladdened by the RCSD's admission that evidence of disparate penalty is relevant in Kristy Drinkwater's appeal: "Quite frankly, the Department (RCSD) does not disagree with the relevance of a disparate discipline defense in *any* administrative appeal." (*See:* pg. 7 Opening Brief; italics added). It follows then, that RCSD agrees that disparate punishment is an important defense issue that, when raised, ought to be resolved by the hearing officer. Neither reading nor hearing any objection to that principle, it seems equally obvious, as the Court of Appeal found, that constitutional due process would be violated by a *procedural limitation* that prohibited an appellant from carrying the burden to demonstrate disparate treatment by the production of evidence to establish that defense. (*See:* Slip Op. at 22, 23 and 28: "An interpretation of *Evidence Code* §§ 1043 and 1045 which precludes the use of *Pitchess* discovery in § 3304(b) hearings would therefore be unconstitutional.") Statutory construction which renders the statute in question constitutionally suspect is to be avoided. (*See*: *People v. Superior Court (Romero)* (1996) 13 Cal. 4th 497, 509: "The basis of this rule is a presumption

that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers." *Id.* 509.)

Since the RCSD claims it does not publish, even for restricted internal use, summaries of administrative discipline by type of misconduct and penalty ranges, appellants have no means of obtaining the evidence except for accessing redacted personnel record information directly. *See:* Footnote 6, *supra.* Considering the size of the Riverside Sheriff's Department, and its well-earned reputation for state-of-the-art personnel "best practices," the claim that it has not automated its disciplinary system, if *not true*, is laughable. If it *is true,* it is pathetic. This, in the era of "computerized tracking" of misconduct patterns and disciplinary trends in law enforcement agencies throughout the State? It is especially unconvincing when it is acknowledged that for many years, RCSD's administration of discipline has been based upon the Department's "Disciplinary Matrix," similar to that of the Los Angeles County Sheriff's Department, as revealed in the *Amicus Curiae* brief of Association of Los Angeles Deputy Sheriffs (ALADS) filed in the Court of Appeal in this case; *see:* "Guidelines For Discipline And Education-Based Alternatives" appended thereto.

Both RCSD and LASD have a strong interest in consistency and fairness in discipline. These goals cannot be adhered to without surveying the

administration of discipline within the RCSD regularly. Yet, we are told in the proceedings below that RCSD has no way of doing that, short of inspecting every personnel record.

IV.

ARGUMENT

A. WHY THE COURT OF APPEAL GOT IT RIGHT.

According to RSCD, the Court of Appeal Opinion " . . . could have avoided any conflict between the lower courts by simply reaching the same conclusion (as in *Brown v. Valverde*) and precluding non-judicial hearing officers from hearing *Pitchess* motions . . . ." Following an opinion (*Brown)* that is so clearly inapposite to the present case would be tantamount to "going along to get along."

1. *Brown v. Valverde Is Limited To Its Facts.*

So much has been written not only in the numerous briefs below, including three amicus curiae briefs filed in support of Drinkwater and RSA and in the Court of Appeal opinion itself, about why *Brown v. Valverde* has no application to this case, it is unnecessary to restate it here, except in conclusory fashion. The *Brown* court said:

> The issue before us is whether a *Pitchess* motion is available in a DMV "administrative per se" hearing. *See: Brown v. Valverde,* 183 Cal. App. 4th at 1535-1538.

"The court expressly addressed only that issue. (*Id.* at 1546)." (*See:* Slip Op. at 20.) Further, the *Brown* court did not "foreclose the use of *Pitchess* motions in all types of administrative proceedings." (*See:* Slip Op. at 20.)

2. *Brown v. Valverde Is Thoroughly Distinguishable From The Instant Case.*

Because *Brown* concerned only DMV administrative per se hearings and not § 3304(b) hearings, it resolved the question before it based upon *Vehicle Code* § 14104.7, which statute regulates what kind of evidence will be considered at the hearing, and which does not include peace officer personnel records. (*See*: Slip Op. at 21, fn. 9.) Thus, *Brown* did not and cannot contemplate what is admissible evidence in a § 3304(b) hearing. So, for that reason alone, it is distinguishable. But of course, there is more. Lack of relevancy of *Pitchess* record information to the DMV hearing issues, would be another reason *Brown* has no connection to *Drinkwater.* (*See:* Slip Op. at 22; *Brown* at 1556-1558.) Here, RCSD *admits* that the information sought is relevant to Drinkwater's defense. (*See:* Opening Brief, at 7.)

3. *DMV Hearings And § 3304 (b) Hearings Are So Different In Nature And Scope That No Meaningful Comparisons Can Be Made.*

The *Brown* court went to considerable effort to describe the narrow purpose, nature and limited scope of these DMV hearings. The reason it did so was to show that there was no connective tissue between the purposes of the DMV hearing on the one hand, and the potential benefit to the driver's license holder on the other, of the officer's personnel record. The *Brown* court emphasized the streamlined, readily-available review of the license suspension procedures citing such words and phrases as "expedited," "reduced delays," "swift and certain," and "more effective as a deterrent," to shed light on the summary nature of the hearings. *See: Brown* at 1536. The hearing officers "need not have any legal training whatever." *Id.* "Thus, hearings conducted by such hearing officers are in contrast to other proceedings arising under the Administrative Procedure Act, where the agencies employ administrative law judges to preside over the proceedings." *See: Brown* at 1537-38.

Suffice to say, there is no logical or reasonable way to compare the DMV hearings at issue in *Brown,* with the trial-type, evidentiary and adversarial due process hearings that are guaranteed to peace officers by §3304(b) and to Drinkwater by MOU Article XII, and come to the conclusion,

as RCSD and supporting *Amici* have done, that *Brown* forecloses § 1043 motions in Drinkwater's appeal.

4. *The Unavailability Of Pitchess Motions In DMV Hearings Does Not Implicate Due Process.*

Neither the *Drinkwater* court nor the *Brown* court, nor any party or *Amici* in the instant case has suggested that the limitations at issue in DMV hearings (not § 1043 motions) implicate any due process concern; again, because of the narrow and limited nature of the deprivation and stake in the outcome coupled with the available procedures. Not so with §3304(b) hearings; that is, at stake in the outcome in these hearings are liberty and property interests protected by due process. No one would suggest that the summary procedures used in DMV hearings would satisfy the due process mandates of the Fourteenth Amendment in § 3304(b) hearings. *See*: *Skelly v. State Personnel Board* (1975) 15 Cal. 3d 194. Indeed, the Court of Appeal wrote that precluding Drinkwater from seeking evidence in support of her disparate penalty defense in the manner done by the trial court is unconstitutional. (*See:* Slip. Op. at 28.)

5. *§ 3304(b) Hearings Must Permit Disparate Penalty Defenses In Order To Satisfy Due Process Requirements.*

To admit on the one hand that evidence of disparate penalty in Drinkwater's appeal is relevant as RCSD does at page 5 of its brief, but to deny her the means to establish that defense, on the other other, by erecting an impregnable wall around the evidence based upon §§ 1043 and 1045, stands due process on its head.

Since RCSD bears the burden of proof on the charges and burden of persuading the presiding officer that the penalty is appropriate, it is surely in RCSD's interest to demonstrate affirmatively that the penalty is proportionate, fair and consistent, at least where that issue is raised in the hearing! After all, fairness and consistency are two of the reasons for promulgating a disciplinary matrix or a "guide for discipline," so that like offenses deserve (and receive) like punishment.[7] These goals can be more readily achieved through the matrix device, coupled with comparing RCSD's history of discipline patterns with cases under consideration, to make sure penalties remain consistent and are *not disparate or uneven.* Doing so does not provoke wholesale invasion of confidential personnel records. There is no good purpose to be served by engaging accused and disciplined employees in "dog in the manger" or "hide the ball!"

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[7] We are mindful of the abundant authority that holds penalties need not be identical. *See*: *Talmo v. Civil Service Commission* (1991) 231 Cal. App. 3d 210, 230.

For purposes of this case, so long as Drinkwater could be assured of the completeness and accuracy of summaries, she would accept summarized and redacted information that would show each case where there was a sustained finding of time card inaccuracy that resulted in unearned compensation, the calendar year it occurred, the classification and tenure of the employee, and the penalty finally levied after any appeal. Again, the critical feature will be whether the conduct was willful and knowing or not. No identification of any employee is desired, nor relevant. Armed with just this much information, Drinkwater could identify comparable cases. There are always mitigating and aggravating factors considered, and these could be identified if necessary. And, especially or highly relevant dispositions arising from very close comparisons with Drinkwater's facts could result in more definitive information being provided in the closed hearing. This could all be done without the necessity of identifying any employee, and therefore zero or negligible opportunity for annoyance, embarrassment or oppression (*See: Evidence Code* § 1045(d).)

Evidence Code §1045(c) states:

> In determining relevance where the issue in litigation concerns the policies or pattern of conduct of the employing agency, the court shall consider whether the *information sought* may be

obtained from *other records* maintained by the employing agency in the regular course of agency business *which would not necessitate the disclosure of individual personnel records.* (Italics added.)

The reason this section was included in SB 1436 is obvious. It recognizes that occasionally, relevant evidence consists of information that illustrates agency policies, practices and patterns, and that disclosure of the information does *not* require "disclosure of individual personnel records."

The presiding officers would review the summarized information (*in camera* if necessary, although Drinkwater questions whether that formality is necessary in this context) and determine whether there are comparable cases. This approach would likely resolve this case and many others like it.

Due process requires a full and fair opportunity to present a meaningful defense. *Petrus v. Dept. of Motor Vehicles* (2011) 194 Cal. App. 4th 1240, 1244.

Due process rights arise from the 14th Amendment and California Constitution, which provides in pertinent part, "[a] person may not be deprived of life, liberty, or property without due process of law." *Cal. Const.*, Art. I, §7(a) (2013). Drinkwater's interest in her employment as a non-probationary civil servant is a vested property interest qualifying for protection under the

due process guarantee. *Coleman v. Dept. of Personnel Admin.* (1991) 52 Cal. 3d 1102, 1109 (citing *Skelly v. State Personnel Bd.* (1975) 15 Cal. 3d 194, 206). This Court recognized that the "due process safeguards required for protection of an individual's statutory interests must be analyzed in the context of the principle that freedom from arbitrary adjudicative procedures is a substantive element of one's liberty." *People v. Ramirez* (1979) 25 Cal. 3d 260, 268 (citation omitted).

The three-part test for determining appropriate due process regarding adjudicative action is presented in the following cases: *Matthews v. Eldridge* (1976) 424 U.S. 319, 335; *Coleman v. Dept. of Personnel Admin.* (1991) 52 Cal. 3d 1102, 1118; and *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal. 4th 371, 390-391. Those three parts are: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. In our case, Drinkwater's private interests that are impacted are of constitutional dimensions: liberty and property. Without the ability to present a meaningful defense, the risks of an erroneous deprivation are

intolerable, under the trial court's ruling. Applying the Court of Appeal decision to Drinkwater's appeal involves no appreciable increase in fiscal and administrative burdens to RCSD. RCSD has never argued to the contrary.

6. *The Reference To "Administrative Body" In § 1043 Is Not Limited To State APA Agencies.*

§ 3304(b) appeals of State-level public safety officers fall under the jurisdiction of the California State Personnel Board (SPB). SPB hearing officers are some of the administrative law judges referred in the Opening Brief at 13:

> *Once again mysteriously absent from the Slip Opinion, the Department offered a reasonable and rational interpretation for the Legislature's inclusion of "administrative body" in section 1043 during oral argument which would have reconciled all other references to the court exclusively handling all aspects of the Pitchess process. [RT:36-37]. Outside the normal context of "courts" there are administrative proceedings which are in fact presided by judicial officers such as administrative law judges, workers' compensation appeal board judges and even state Bar proceeding.*

This "reasonable and rational interpretation" doesn't go very far when it is realized that it creates a glaring and unacceptable anomaly. State public safety officers appealing discipline could bring *Pitchess* motions in SPB appeals because administrative law judges preside. Local public safety officers (county sheriff's deputies and city police officers) could not, because their appeals go before civil service hearing officers, arbitrators, personnel commissions, commanding officers, city managers, boards of supervisors, city councils and police commissions, to name some. Only a minority of California peace officers (those employed by the State) would have full-blown § 3304(b) appeals, while the majority of officers covered by the Act would have no §1043 motion rights to pursue their penalty defenses. There is no benefit to an interpretation that discriminates against local and special district police officers.

B. THE COURT OF APPEAL HARMONIZED §§ 1043 AND 1045.

1. *Finding That An Exception To The "Final Decision" Requirements For Administrative Mandamus Is Available To Review A Hearing Officer's Decision Before Records Are Produced Means Agencies Are Free To Seek Judicial Review.*

Drinkwater and RSA assailed the jurisdiction of the superior court, *inter alia*, on the basis that Stiglitz' discovery order was not reviewable under §1094.5 because it was not a "final order." But the Court of Appeal turned the argument back, finding that production of the records (even to Stiglitz only) could cause "irreparable injury" of the kind recognized as an exception to the "final decision or order" requirements of § 1094.5. (*See:* Slip Op. at 7-12.) If that holding is sound, and we believe it is for purposes of this discussion, then the safeguards inherent in § 1045 are preserved. If the agency is unhappy with the presiding officer's order to produce because it believes good cause is absent, it can petition as RCSD did. If the appellant is unhappy, he or she would have to await a final decision to pursue § 1094.5 relief because no exception applies. It is no different than any other discovery request disallowed by a hearing officer.

As part of its resolution of the agency's § 1094.5 petition, assuming it finds "good cause" against the agency's petition that good cause is lacking, the superior court could then proceed with an *in camera* review as contemplated in § 1045. This approach doesn't do much for speeding the administrative process along by not involving the courts in the procedural aspects of administrative law, which is another good reason to explore the "discipline summary sheet" method suggested above.

2. *The Court Of Appeal Opinion Is Consistent With The Rules Of Statutory Interpretation.*

Interpretation of the pertinent statutes indicates that the Legislature intended to allow hearing officers in administrative appeals to hear § 1043 motions. "The fundamental task of statutory construction is to 'ascertain legislative intent so as to effectuate the purpose of the law.' " *People v. Cruz* (1996) 13 Cal. 4th 764, 774-775 (quoting *People v. Pierters* (1991) 52 Cal. 3d 894, 898). "Whenever possible a construction must be adopted which will give effect to all provisions of the statute." *Parris v. Zolin* (1996) 12 Cal. 4th 839, 845 (citations omitted). " '[T]he objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in [the word's] interpretation . . .' " *Sierra Club v. City of Hayward* (1981) 28 Cal. 3d 840, 860-861 n.12 (quoting *People ex rel. S.F. Bay etc. Com. v. Town of Emeryville* (1968) 69 Cal. 2d 533, 543-544).

Statutory interpretation involves a three-step analysis: (1) the court examines the statute's actual language (*see also People v. Cruz, supra*, 13 Cal. 4th at 775); (2) if the meaning is not clear, then the court takes the second step and refers to extrinsic sources; and (3) when the first two steps fail to reveal a clear meaning, the final step is to apply reason, practicality, and common

sense to the language at hand. *Herman v. Los Angeles County Metropolitan Authority* (1999) 71 Cal. App. 4th 819, 823.

Regarding the first step, when statutory language is "clear and unambiguous there is no need for construction" and a court should not indulge in it. *People v. Jones* (1993) 5 Cal. 4th 1142, 1146 (citations omitted). Regarding the second step, "[a] statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable." *Hughes v. Bd. of Architectural Examiners* (1998) 17 Cal. 4th 763, 776. When the statute is deemed ambiguous the court refers to such extrinsic sources as "ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." *Hoechst Celanese Corp. v. Franchise Tax Bd.*(2001) 25 Cal. 4th 508, 519 (quoting *People v. Woodhead* (1987) 43 Cal. 3d 1002, 1008). Furthermore, when the statute is ambiguous, courts may examine "the statutory scheme of which the provision is a part, the history and background of the statute, the apparent purpose, and any considerations of constitutionality, 'in an attempt to ascertain the most reasonable interpretation of the measure.' " *Hughes v. Bd. of Architectural Examiners* (1998) 17 Cal. 4th 763, 776 (citations omitted).

Regarding the third step, "[t]o the extent that uncertainty remains in interpreting statutory language, 'consideration should be given to the consequences that will flow from a particular interpretation.' " *People v. Cruz* (1996) 13 Cal. 4th 764, 782 (quoting *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal. 3d 1379, 1387).

A few over-arching rules of statutory interpretation apply regardless of whether the statute is ambiguous or unambiguous. "That rule [of statutory construction] directs courts to avoid interpreting statutory language in a manner that would render some part of the statute surplusage." *People v. Cruz* (1996) 13 Cal. 4th 764, 782 (citations omitted). Furthermore, this Court has reasoned that "in interpreting a statute, '*[i]f possible*, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.' " *People v. Cruz* (1996) 13 Cal. 4th 764, 782 (quoting *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal. 4th 382, 388) (italics in original) (see also *Hughes v. Bd. of Architectural Examiners* (1998) 17 Cal. 4th 763, 775 (quoting *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal. 4th 627, 634).

"[A] statute must be interpreted in a manner, consistent with the statute's language and purpose, that eliminates doubts as to the statute's constitutionality." *Hughes v. Bd. of Architectural Examiners* (1998) 17 Cal.

4th 763, 776 (italics in original) (citations omitted). This point is supported by the decisional law that "[w]hen faced with a statute reasonably susceptible of two or more interpretations, of which at least one raises constitutional questions, [the court] should construe it in a manner that avoids *any* doubt about its validity." *Assoc. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal. 3d 384, 394 (citations omitted).

Construing §§ 1043 and 1045 as RCSD urges would raise serious constitutional questions as to whether Drinkwater's procedural due process rights were being violated, as was the case in *Assoc. for Retarded Citizens, supra.* RCSD's interpretation ignores that "this entire procedure [of compliance with §§ 1043 through 1047] is founded upon the constitutional limitation that our Supreme Court has found to arise from 'the prosecution's constitutional obligation to disclose to defendant material exculpatory evidence so as not to infringe the defendant's right to a fair trial. [Citations.]'" *Fletcher v. Superior Court (Oakland Police Department)* (2002) 100 Cal. App. 4th 386, 397-398 (quoting *People v. Mooc* (2001) 26 Cal. 4th 1216, 1225). "The same constitutional constraint applies to sections 832.7 and 832.8 of the Penal Code, enacted after *Pitchess,* as well as to the original privilege set forth in section 1040." *Fletcher v. Superior Court (Oakland Police Department)* (2002) 100 Cal. App. 4th 386, 398.

Furthermore, the courts " 'select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" *Day v. City of Fontana* (2001) 25 Cal. 4th 268, 272 (quoting *People v. Coronado* (1995) 12 Cal. 4th 145, 151 (other citations omitted).

Adhering to the rules of statutory construction, the Legislature intended to allow hearing officers in administrative appeals to hear § 1043 motions because: (1) such an interpretation gives effect to all provisions of the applicable statutes pursuant to *Parris, supra*; (2) causes the applicable statutes to be constitutional, as mandated in *Hughes, supra*, *Fletcher, supra*, and *Assoc. for Retarded Citizens, supra*; (3) would serve the general purpose of the applicable statutes while avoiding absurd consequences pursuant to *Day, supra*; and (4) would avoid rendering parts of the applicable statutes surplusage as addressed by *Cruz, supra*.

The Court of Appeal interpretation would give effect to all of the provisions of the applicable statutes because it would acknowledge the many times that administrative agencies are mentioned throughout Division 8 of the *Evidence Code*. As presented *supra*, "administrative agencies" or "administrative proceedings" are mentioned in *Evidence Code* §§ 901 and

910. Furthermore, as presented *supra*, "administrative agencies" or "administrative proceedings" are mentioned in Law Revision Comments to *Evidence Code* §§ 901, 910, and 915. These many references to "administrative agencies" or "administrative proceedings" were not accidental but intentional and display the legislative intent that administrative agencies take an active role in ruling on claims of privilege.

The Court of Appeal interpretation would render the applicable statutes constitutional by preserving Drinkwater's procedural due process rights, as presented *supra*.

The Court of Appeal interpretation would serve the general purpose of the applicable statutes, which is maintaining the litigant's compelling interest to all information pertinent to pending litigation. *Rosales v. City of Los Angeles* (2000) 82 Cal. App. 4th 419, 427 (citing *City of Santa Cruz v. Municipal Court (Kennedy)* (1989) 49 Cal. 3d. 74, 83) (other citation omitted).

The Court of Appeal interpretation would serve the general purpose of the applicable statutes while avoiding absurd consequences. The general purpose of the applicable statutes is protecting a litigant's compelling interest to all information pertinent to pending litigation.

The Court of Appeal's interpretation avoids rendering parts of the applicable statutes surplusage. For example, if hearing officers in

administrative appeals lack authority to rule on § 1043 motions, then the Law Revision Comments to *Evidence Code* § 905 which state "rulings on questions of privilege in nonjudicial proceeding" would be surplusage because no such ruling on questions of privilege would be made in a nonjudical proceeding. Furthermore, *Evidence Code* § 905, which addresses those who can rule on a claim of privilege, would be superfluous because only the court, as averred by RCSD, can make that decision.

Contrary to RCSD's claims, *Evidence Code* § 1047 should not end the inquiry in the present case. (*See:* Opening Brief at 8.). "The language of section 1047, read in light of the statutory framework, prohibits discovery where the request for discovery involves an issue concerning a particular incident. The particular incident is an arrest or the conduct between the arrest and booking, and discovery of personnel records of officers not involved in that arrest or conduct is prohibited. We have previously adhered to this view: in *Davis v. City of Sacramento* (1994) 24 Cal. App. 4th 393 [29 Cal. Rptr. 2d 232], we stated that 'section 1047 prohibits discovery of police department personnel records for officers not involved in the incident giving rise to particular litigation.' (24 Cal. App. 4th at p. 400.) Read in this manner, the discovery prohibition of section 1047 does not apply here because Alt is not requesting discovery based on his arrest or on any conduct between his arrest

and booking." *Alt v. Superior Court* (The People) (1999) 74 Cal. App. 4th 950, 957. Similarly, Drinkwater is not requesting discovery based upon her arrest or on any conduct between her arrest and booking because none of those events occurred. Thus, as the discovery prohibition of *Evidence Code* §1047 did not apply in *Alt supra*, likewise it does not apply in the present case.

C. THE RECORD BELOW SHOWS THAT § 1043 MOTIONS HISTORICALLY HAVE BEEN PRESENTED TO, ARGUED BEFORE AND RESOLVED BY ARTICLE XII HEARING OFFICERS WITHOUT EXCEPTION.

Although both of the courts below were asked to consider the unrebutted evidence in the record that § 1043 motions have been brought without objection in Article XII hearings (*See:* Joint Appendix (JA) 1525-1532 (Decl. Of Michael P. Stone in Support of Riverside Sheriffs' Association's Complaint in Intervention at pages 1-4), neither court embraced that evidence which was originally placed before the superior court to rebut the RCSD claim that the Drinkwater motion was something new or novel, and that to the contrary, the motions had become a well-established past practice between RCSD and RSA. Whether or not this Court finds the question of past practice to be a relevant consideration, it is important to recognize that in Riverside

County, as well as throughout the State, employees covered by the Act have been seeking information about other employees' disciplinary outcomes to support their own disparate penalty defenses for years.

V.

CONCLUSION

Kristy Drinkwater prays this Court will affirm the holding of the Court of Appeal in all respects.

Dated: March 22, 2013

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CERTIFICATE OF WORD COUNT COMPLIANCE

I, Michael P. Stone, certify that this Answering Brief of Real Party In Interest and Appellant Kristy Drinkwater complies with California Rules of Court, Rule 8.204 in that this brief contains 9,016 words.

This brief complies with the typeface requirements of California Rules of Court, Rule 8.204 and type style requirements as this brief has been prepared in proportionally spaced typeface using WordPerfect X5, Times New Roman 13 point font.

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Patricia Brady, employed in the aforesaid County, State of California; I am over the age of 18 years and not a party to the within action. My business address is 200 East Del Mar Boulevard, Pasadena, California 91105.

On March 22, 2013, served the **ANSWERING BRIEF OF REAL PARTY IN INTEREST AND APPELLANT KRISTY DRINKWATER** on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

SEE ATTACHED SERVICE LIST

XXX (By Mail) I placed such envelope with postage thereon fully paid to be placed in the United States mail at Pasadena, California.

XXX (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 22, 2013, at Pasadena, California.

Patricia Brady

Patricia Brady

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