Supreme Court Case Number S215300

Court of Appeal Case No. G047850
Consolidated with G047691

In the Supreme Court of the State of California

STEVE POOLE, ORANGE COUNTY PROFESSIONAL FIREFIGHTERS' ASSOCATION,

Appellants and Plaintiffs,

vs.

ORANGE COUNTY FIRE AUTHORITY,

Respondent and Defendant.

AFTER DECSION OF THE COURT OF APPEAL G047850 CONSOLIDATED WITH G047691

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATIONS OF COUNTIES TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF ORANGE COUNTY FIRE AUTHORTY

MICHAEL N. FEUER, City Attorney, State Bar No. 111529
JANIS LEVART BARQUIST, Deputy City Attorney, State Bar No. 133664
BLITHE SMITH BOCK, Deputy City Attorney State Bar No. 163567
Certified Appellate Specialist, California State Bar
200 North Main Street, Sixth Floor
Los Angeles, California 90012
Telephone: (213) 978-6936
Facsimile No.: (213) 978-0763
Blithe.bock@ lacity.org
Attorney for *Amicus Curiae*
LEAGUE OF CALIFORNIA CITIES and CALIFORNIA STATE ASSOCIATION OF COUNTIES

Pursuant to Rule 8.520, subdivision (f) of the California Rules of Court, the League of California Cities and the California State Association of Counties (collectively, "Amici") respectfully apply for permission to file the attached Proposed Amicus Curiae Brief in support of Respondent Orange County Fire Authority ("OCFA"). This application is timely made within 30 days after the filing of the final reply brief on the merits.

INTEREST OF *AMICI*

A. The Amici Curiae.

The League of California Cities is an association of 473 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California State Association of Counties is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels

throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

B. Interest of Amici Curiae.

The issues present in this case are common and relevant issues to all California cities and counties.

The Court of Appeal Opinion under review expands the scope of a firefighting (and police) agency's duties under Government Code sections 3255 and 3256 to a breaking point. Cities and counties have a great and significant interest in presenting to the Court the impact of this interpretation to local entities across the state.

Before the Court of Appeal's decision on review, firefighting and police agencies were required to disclose to employees, and allow employees to file written responses to, documents that were entered into personnel files. A reasonable reading of Sections 3255 and 3256 meant that the disclosed documents were those that could result in personnel action, or became permanent parts of the file, such as complaints, comments and personnel evaluations. (Sections 3255 and 3256; *see also,* Cal. Govt. Code sections 3305 and 3306, the police agency analogues.)

But the Second District Court of Appeal has now expanded the scope of Section 3255 so that a Department must also disclose virtually any writing

bearing the employee's name, including a supervisor's personal notes that were never shared with anyone else, but which must now be shared with the employee; and that never resulted in any personnel action beyond the supervisor's preparation of personnel evaluations or other documents that are disclosed to the employee. Specifically, the Court below applied Section 3255 to compel disclosure of a supervisor's personal notes that he maintained to assist his memory when he prepared the firefighters' evaluations, even though these notes were never intended to nor were they ever actually shared with anyone else.

This expansion of the Firefighters Procedural Bill of Rights Act affects the employment relationships within all firefighting and police agencies because it will clog the internal grievance and arbitration system with numerous proceedings over minor daily observations. Rather than bundle all the daily notes into one performance evaluation with the opportunity for one post-evaluation grievance, this decision will result in the splintering of the yearly evaluation into numerous proceedings over each individual daily note. The disciplinary system, along with the grievance appeals and arbitrations, will grind to a halt under the weight of the newly imposed obligations.

This Court has found that the "consequences that will flow" from a particular statutory interpretation should be considered when this Court

assesses that interpretation. (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 290.) The consequences that would flow from the Court of Appeal's interpretation of Sections 3255 and 3256 are extraordinary. As associations made entirely of California local governmental entities, both the League and CSAC are in a unique position to assist this Court in recognizing such consequences.

DISCLOSURES PURSUANT TO RULE 8.520

Pursuant to California Rules of Court, Rule 8.520(f)(4) (A) & (B), the League of California Cities and the Association of California County states the following:

Authorship of the Brief: The Brief was authored by Los Angeles Deputy City Attorneys Blithe Smith Bock and Janis Barquist; Koreen Kelleher, Assistant General Counsel, League of California Cities; and Janet Herbstman, Associate Counsel, County Counsel's Association.

Monetary contribution: No party nor counsel for a party made a monetary contribution to fund the preparation or submission of the proposed brief.

CONCLUSION

Accordingly, the League and CSAC respectfully request that this Court grant this application and accept the accompanying proposed *amicus curiae* brief for filing in this matter.

DATED: September 18, 2014

MIKE N. FEUER, City Attorney
JANIS LEVART BARQUIST, Deputy City Attorney

By: _____
BLITHE S. BOCK
Deputy City Attorney
Attorneys for Amicus Curiae
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CALIFORNIA STATE ASSOCIATION OF COUNTIES

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MICHAEL N. FEUER, State Bar No. 111529x
JANIS LEVART BARQUIST, Deputy City Attorney, State Bar No. 133664
BLITHE SMITH BOCK, Deputy City Attorney State Bar No. 163567
Certified Appellate Specialist, California State Bar
200 North Main Street, Sixth Floor
Los Angeles, California 90012
Telephone: (213) 978-6936
Facsimile No.: (213) 978-0763
Blithe.bock@ lacity.org

Attorney for *Amicus Curiae* LEAGUE OF CALIFORNIA CITIES and CALIFORNIA STATE ASSOCIATION OF COUNTIES

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INTRODUCTION

In the Opinion under review here, the Court of Appeal found that Government Code sections 3255 and 3256 ("section 3255" and "section 3256") – the provisions of the Firefighter's Procedural Bill of Rights Act ("FFBOR") that allow a firefighter to review and comment upon adverse comments within his or her personnel file – also allow a firefighter to review and comment upon a supervisor's undisclosed and tentative notes. Even if these notes are never publicized to any other individual, even if they never end up in the firefighter's personnel file, and even if they never result in any employment consequences to the firefighter, *Poole* mandates that the supervisor's notes be provided to the firefighter for review and comment.

Firefighter Steve Poole was employed with the Orange County Fire Authority ("OCFA"). His supervisor, Captain Brett Culp, maintained his own notes on Poole and the other employees within his unit, tracking both the positive and negative conduct he observed, to assist when drafting comprehensive and detailed personnel evaluations at the end of each term. The Captain also used his notes to prepare Performance Improvement Plans ("PIPs") for Poole, who had demonstrated performance problems and was therefore being closely monitored. Crucially, these notes were never shared with anyone, and their function was solely to refresh the Captain's recollection as he prepared personnel reviews and Poole's PIPs. In effect,

the notes served as the Captain's workplace diary and partial drafts of personnel reviews and PIPs, most of which ended up being cut and not used in the final documents. Once the personnel reviews and similar documents were final, though, Poole (and the other employees) were provided with a copy of the final documents and given an opportunity to file a written response and union grievances, which Poole exercised.

Section 3255 provides, "A firefighter shall not have any comment adverse to his or her interest entered in his or her personnel file, or any other file used for any personnel purposes by his employer, without the firefighter having first read and signed [the comment]." The Court of Appeal held the Captain's workplace log had a "personnel purpose" of assisting the Captain to prepare personnel evaluations. Thus, each comment within it had to be presented to Poole before it could be "entered" into the Captain's file, and Poole should have been allowed to file a written response to each daily note. (Opinion, p. 6.)

With this *Amicus* Brief, the League of California Cities and California State Association of Counties (collectively, "Amici") urge this Court to reverse the Court of Appeal's Opinion.

Aside from the Court's disregard and misreading of the FFBOR, Amici hereby advise this Court of the true impact of this Opinion on cities and counties across our state. That statewide impact should inform this

Court's decision, as "the consequences that will flow from a particular interpretation" of a statute are relevant considerations in any statutory analysis. (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 290.) Where those consequences are "unreasonable, impractical, or arbitrary," the Court should "favor the construction that leads to the more reasonable result." (*Ibid.*)

Here, the consequences of the Court of Appeal's interpretation of section 3255 are unworkable and will devastate local firefighting and police agencies throughout California. The Court of Appeal's holding places a virtual stranglehold on public entity management. The process it creates, in which employees review and comment upon every note a supervisor takes. would divert much-needed public resources without serving any of the goals that motivated the Legislature to enact the FFBOR in the first instance. The Opinion should not stand.

First, while the FFBOR was enacted to stabilize relations between firefighters and the employing agency, the lower court's interpretation of section 3255 will cause great imbalance and unnecessary strife within the public workplace. In the wake of *Poole,* public employees would be entitled to review and comment upon literally every piece of paper or notation that a supervisor generates bearing the employee's name, since any such writing arguably falls under the broad umbrella of the Opinion. In fact, under

Poole, employees could review and comment upon notes that never even make it into the personnel evaluation or personnel file, and were never seen by anyone beyond the authoring supervisor. The Court openly acknowledged that "not all the adverse comments in the daily logs were included in Poole's evaluation," yet it also found that Poole had the right to respond to each and every comment. (Opinion, p. 2.) That means that a firefighter-employee is empowered to file a written response to every comment by a supervisor, no matter how trivial, no matter if the comment lives only in the Supervisor's notes – and no matter if the comment has been superseded by a personnel evaluation that does not include it. Certainly the Legislature never contemplated that section 3255 could usher in a glut of written responses and possibly union grievances over every minor note and or moot or transitory supervisory comment when it enacted the FBOR to stabilize, not disrupt, relations between firefighters and their supervisors.

Second, the plain language of section 3255 reveals that it was never intended to apply to personal and undisclosed notes of a supervisor. The Court of Appeal found that section 3255's reference to a "file used for personnel purposes" includes a supervisor's personal notes, since the notes are used for the "personnel purpose" of preparing personnel evaluations. But this interpretation ignores key language in 3255 – a taboo of statutory interpretation – since section 3255, in full, refers to a "file used for personnel

purposes *by his or her employer.*" Indeed, Poole himself entirely omits this "by his or her employer" language from various quotations of 3255 within his Answering Brief on the Merits, leaving only the "file used for personnel purposes" language. (Answering Brief, p. 9, 23.)

This limiting language is key: it is not just any file with a personnel purpose that 3255 covers; it is a file used for a personnel purposes *by the employer* – here, OCFA – to which it pertains. This limitation is reasonable and consistent with the legislative purpose of providing an employee with in essence quasi-due process rights to respond to any adverse comments within his personnel file while still maintaining the stability of employee relations within the workplace.

An employee should be entitled to review and respond to a file that has a personnel purpose *by the employer*, such as a file that contains personnel evaluations and similar documents publicized within the workplace. Such *publicized and permanent* documents would follow the employee throughout his or her career and serve as his or her personnel history for any future promotions, demotions, discipline and the like. So it makes sense that an employee would be entitled to clear the record in that file. On the other hand, there is no justification for allowing an employee to respond to notes that only arguably have a "personnel purpose" *for the supervisor.* It is unreasonable, impractical and arbitrary to empower an employee to view and respond to

notes that are maintained only by the authoring supervisor, viewed only by the authoring supervisor, and never have any employment consequence beyond the personnel evaluation that the authoring supervisor prepares. Requiring disclosure of such notes or commentary engenders nothing but discord within the workplace, without any due process benefit to the employee – who would be clearing his or her name to no one. As OCFA points out in its Brief, the purpose of 3255 was to allow firefighters to review and respond to comments that might influence *others* in the organization. (Opening Brief, p. 48.) It is not a ticket to squabbling over a supervisor's initial, tentative thoughts that are jotted down for future use.

Indeed, as a final point, the tentative nature of the Captain's notes illustrates that the application of the Opinion in the day-to-day life of public entity management is unworkable and would be an absurd result not intended by the Legislature. Petitioner OCFA cogently argues that, just as a court's tentative rulings and opinions are not final until they are entered into the Court's minutes as a final order or opinion, the Captain's tentative notes were not final unless they manifested in his personnel evaluations, so there was no purpose in allowing a written response to such intermediate comments. (Reply Brief, p. 8.) Likewise, Amici submit that the Captain's tentative notes can be further analogized to yet another category of documents that are exempt from disclosure precisely because of their tentative nature:

documents covered by the deliberative process privilege. (Govt. Code § 6254, subd. (a); *Times Mirror Company v. Superior Court* (1991) 53 Cal.3d 1325, 1342.)

Pursuant to this privilege, a public agency's tentative or draft notes and memos reflecting the entity's decision making process may be withheld from disclosure to the public, since such disclosure undermines candor and "the flow of information" within a public agency during the decision-making process. (*Times Mirror, supra,* 53 Cal.3d at 1343.) Although this deliberative process privilege applies to the disclosure of an agency's file to the public, the same public governance concerns weigh heavily in favor of exempting a supervisor's tentative and non-final notes from disclosure to an employee. To ensure the best public service, public supervisors must be able to carefully monitor public employees without concern for premature disclosure and unnecessary disputes over their tentative, non-final and undisclosed thoughts and opinions.

For each of these reasons, Amici urge this Court to reverse the Opinion and hold that sections 3255 and 3256 do not apply to the undisclosed and non-final notes and daily log of a supervisor. Rather, sections 3255 and 3256 only apply to documents contained within the employee's personnel file or other file containing documents that have been publicized and that could result in an employment consequence by the employer.

STATEMENT OF FACTS

Amici adopt the statement of facts in the Opening Brief of the OCFA, and supplement those facts with a summary of some of the procedures that are already in place to implement 3255 and 3256 in the City of Los Angeles and other cities in California. These other cities' procedures, set forth in the Union-Management Memorandums of Understanding ("MOUs"), illustrate the great difficulties that a typical city or county would face in the wake of the Court of Appeal's *Poole* Opinion.

Sample MOU provisions regarding Section 3255 and 3256

Each of the sample MOUs generally track the requirements of 3255 and 3256, allowing employees to review documents placed in their personnel files.

The MOU between the City of Los Angeles and its union of firefighters, for example, expressly provides that an employee "shall be entitled to review the contents of his/her department personnel folder." (Request for Judicial Notice, page 6 (hereinafter "Judicial Notice 6").) The Los Angeles Police Department ("LAPD") MOU implements Government Code sections 3305 and 3306 (the police agency analogues to 3255 and 3256) by requiring LAPD management to provide its police employees copies of any documents, free of charge, before they are included in the departmental

personnel folder. (Judicial Notice 8.) (MOU 3.0(B)(2).) The LAPD employee shall sign, or may notate "refused" to sign, each document. (*Ibid.*)

A City of La Mesa firefighter may review his or her personnel and/or administrative file by making an appointment to do so with reasonable notice. (Judicial Notice 34.)

The City of Santa Cruz Firefighters MOU expressly states that the city and the union agree to adopt and comply with the FBOR. (Judicial Notice 43.) The MOU expressly provides:

> "There shall only be one official personnel file which shall be maintained in the City's Human Resources Department. Employees shall have the right to review their personnel files or authorize, in writing, review by their representatives. No adverse material will be placed in an employee's personnel file without prior notice and a copy given to the employee. Employees may, within thirty (30) days of receipt of these, cause to be placed in their personnel files responses to adverse material inserted therein." (Judicial Notice 38.)

Santa Cruz firefighters receive annual written performance evaluations, and probationary employees receive evaluations every 3 months in their first year of service. (Judicial Notice 37.) The supervisor also meets with the employee to discuss job progress and plans for the future. (Judicial Notice 37.) Disputes regarding performance reviews are not part of the grievance process. (*Ibid.*)

A Santa Cruz firefighter may also receive a written reprimand, which is placed in the employee's personnel file. (Judicial Notice 43.) The

employee has the right to submit a written response to the reprimand, which is placed in his or her personnel file. (*Ibid.*)

Related grievance procedures

Virtually every sample MOU defines a grievance as a dispute concerning the interpretation or application of a department's personnel practices or working conditions. (Judicial Notice 2, 13, 31, 39.) Arguably, then, if a new duty is placed on firefighting and police agencies, such as that created by *Poole*, a department's fulfillment of that duty could be grievable.

The procedures for a union grievance generally involve numerous steps, each of which entails 15 to 30 day response time periods, which can be extended even further. Adding an entirely new category of grievances subject to these procedures would be overwhelming to public agencies.

The Los Angeles Firefighters Grievance Procedure, for example, involves 4 separate steps, each of which takes 30 days, for a total of 120 days, followed by arbitration, which has no deadline for decision. (Judicial Notice 3-5.)

LAPD Grievances also proceed in four steps, each of which takes 40 days, for a total of 160 days, which also can be extended. (Judicial Notice 15-17.) The final step is also arbitration, which can be completed any time. (Judicial Notice 18-20.)

The La Mesa grievance procedure involves five separate steps totaling 102 days, and each step may be extended. (Judicial Notice 32.)

In Santa Cruz, the Grievance Procedure entails 4 separate steps, spanning 100 days, plus an unspecified time to complete arbitration. (Judicial Notice 39-41.)

In light of these time-consuming and complex grievance procedures, it would be virtually impossible for any public agency, including a large one like Los Angeles or a smaller one like La Mesa, to handle the written responses and grievances that would arise if every supervisory note triggered sections 3255 and 3256 as *Poole* held. Public entities simply could not bear the weight of such a backlog of written responses and grievances. Valuable public employee time and effort would be spent resolving disputes over even minor and transitory comments, instead of the public duties to which they are entrusted.

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ARGUMENT

I. THE COURT OF APPEAL'S BROAD READING OF 3255 AND 3256 IGNORES KEY LANGUAGE IN THE STATUTE AND UNDERMINES THE LEGISLATIVE PURPOSE OF THE FBOR.

1. Statutory interpretation that leads to absurd consequences inconsistent with the legislative purpose underlying the statute is disfavored.

This Court has explained:

> "It is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in ***absurd consequences*** which the Legislature did not intend.' [*Citations.*] 'To the extent this examination of the statutory language leaves uncertainty, it is appropriate to consider '***the consequences that will flow*** from a particular interpretation.' [*Citations.*] Where more than one statutory construction is arguably possible, our 'policy has long been to favor the construction that leads to ***the more reasonable result.***' [*Citations.*] This policy derives largely from the presumption that the Legislature intends ***reasonable results*** consistent with its apparent purpose. [*Citation.*] Thus, our task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to ***unreasonable, impractical, or arbitrary results***." (*Commission on Peace Officer Standards and Testing v Superior Court* (2007) 42 Cal.App.4th 278, 291 (emphasis added).

By focusing only on the "file used for personnel purposes" language, and ignoring the "by the employer" language, the Court of Appeal's holding would impose absurd results on public entities throughout California. Instead, that "by the employer" language should be considered, and 3255

should reasonably be read to refer to documents within a personnel file maintained for the *employers'* – not just a supervisor's -- personnel purposes. That is, it should not include just any file with any personnel purpose, such as a file with undisclosed documents that could result in no personnel consequence whatsoever. Instead, it refers to documents that have been disclosed and that risk some type of personnel action.

The difference between files used by the employer and those used by the supervisor is key. An employer-maintained file effectively amounts to the employee's permanent employment record, used for future promotional, disciplinary and similar decisions. Thus the employee should be allowed to correct that record by responding to adverse comments within it. But a supervisor-maintained file, which is not disclosed to anyone else, presents no such risk.

Here, for example, the Captain's notes were maintained only by the Captain, and they were not shared with anyone else within or outside of the OCFA. While the Captain shared the *contents* of his notes with the Batallion Chief – *i.e.*, Poole's various mis-steps at work – he never shared the actual notes with the Chief or anyone else. The Captain's notes would not be included in any production of Poole's personnel file in litigation, nor would they have been reviewed in future personnel decisions relating to Poole. Simply put, while they arguably served a personnel purpose of assisting the

Captain, they had no personnel purpose whatsoever for the OCFA. The only documents that had such a purpose for the OCFA were Poole's Personnel Evaluations and PIPs, which were indisputably shared. The Captain's file, in other words, was maintained only for the personnel purposes *of the individual supervisor, Captain Culp, not the OCFA*. This distinction should take it outside of 3255 or 3256.

2. The Court of Appeal's interpretation would lead to unintended consequences.

Necessarily, a public entity supervisor has endless thoughts, impressions and opinions regarding an employee's performance, which may be memorialized in informal notes such as the Captain's log. A supervisor works with the employee to improve areas of performance and, ideally, the employee demonstrates improvement in those areas so that the supervisor's initially negative thoughts, impressions and opinions ultimately become areas in which the employee has demonstrated improvement.

And yet, under the Court of Appeal decision, Poole would have the right to file a written response and even arguably a union grievance regarding each tentatively-negative comment, including those that became a positive comment with only positive employment consequences for Poole.

Even a cursory glance at the MOU provisions submitted with this Brief demonstrates the tsunami of unnecessary paperwork and waste of

public employee resources if 3255 could trigger an employee's right to review and comment on every supervisory note. Union grievances consume numerous steps, generally more than 100 days and the time and effort of management and low-level employees, not to mention arbitrators and union officials. Virtually every sample MOU, however, openly states that management follows the FBOR, and that an employee has 3255 and 3256 rights regarding documents placed in a personnel file.

Clogging public entity management with employee written responses and grievances over potentially adverse-but-tentative comments that are mooted by subsequent personnel evaluations greatly undermines the legislative goal of stabilizing employer-employee relations.

II. *McMAHON v. CITY OF LOS ANGELES* ILLUSTRATES THAT ONLY A FILE USED FOR PERSONNEL PURPOSES BY THE EMPLOYER TRIGGERS THE FIREFIGHTERS' PROCEDURAL BILL OF RIGHTS.

This case greatly resembles *McMahon v. City of Los Angeles* (2009) 172 Cal.App.4th 1324, in which the Court of Appeal examined Government Code section 3306.5, a provision within the Public Safety Officers Bill of Rights Act ("PSOBOR"). Section 3306.5 requires a police agency to disclose documents resulting in certain personnel actions (promotion, termination etc.), and *McMahon* found that it did not apply to an undisclosed and separately maintained file regarding citizen complaints against an officer. Although the LAPD had given the officer copies of the complaints

themselvers, it withheld the investigative materials. The investigative materials, however, were maintained in such a way that they would not be used to make personnel decisions relating to the officer, and they had not, in fact, been used for purposes beyond adjudicating the complaints, which were provided to the officer. Therefore, the Court found, the agency could properly withhold the investigative materials. (*McMahon, id.*, 172 Cal.App.4th at 1327.)

McMahon is strikingly analogous to our case, and illustrates why a supervisor's undisclosed file does not trigger 3255 response rights. Like the investigative materials in *McMahon,* a supervisor's personal file is not used "for personnel purposes *by the employer*" beyond the personnel evaluation that results from it, which evaluation is provided to the officer. Like the undisclosed investigative materials, the agency should be allowed to withhold the supervisor's file.

1. The McMahon Opinion confirms that a file that is separately maintained and undisclosed for purposes of any personnel actions need not be disclosed to an employee.

In *McMahon, supra,* Officer McMahon was assigned to an LAPD anti-gang unit. (172 Cal.App.4th at 1328.) Because he was so effective, residents in the area he patrolled embarked on a "concerted effort to discredit [him]" by filing a series of personnel complaints against him, all of which

were deemed to be unfounded. (172 Cal.App.4th at 1329.) The LAPD concluded that the complaints against McMahon were all "spurious, having been undertaken to drive Officer McMahon out of the assignment where he had been so effective." (*Ibid.*)

Pursuant to Penal Code section 832.5, which requires a police agency to maintain such unfounded citizen complaints in a file separate from the officer's personnel file, these unfounded complaints were not kept in Officer McMahon's "general personnel file," but were instead maintained separately in the LAPD's internal affairs files. (172 Cal.App.4th 1333.) When the LAPD provided McMahon with copies of the complaints, but not the underlying investigation. McMahon petitioned for writ of mandate to compel disclosure of all the materials. (172 Cal.App.4th at 1327.)

The Court of Appeal held that the LAPD properly refused to disclose these investigative materials to Officer McMahon, where it had provided him with copies of the complaints themselves, and given him an opportunity to respond to those charges. The underlying investigative materials had been "excised" from the police agency's use in "making personnel decisions" regarding McMahon, so it need not be given to the officer. (172 Cal.App.4th at 1332.)

The Court found it was "obvious" that Section 3306.5 of the PSOBOR, which grants officers the right to inspect personnel files "that are

used or have been used" for various specified personnel purposes had been added to help effectuate the related concerns of Government Code sections 3305 and 3306, the PSOBOR counterparts to 3255 and 3256. (42 Cal.App.4th at 1332.) "[T]he general purpose of *all three* provisions is to facilitate the officer's ability to respond to adverse comments *potentially affecting the officer's employment status.*" (172 Cal.App.4th at 1332 (emphasis added).)

The Court then found that the unfounded citizen complaints could not affect an officer's employment status because they were maintained, per Penal Code section 832.5, in a wholly separate file that would not impact any future personnel decisions. (172 Cal.App.4th at 1333.) Because the investigative materials had not been "used" for any personnel purpose by the LAPD, they were exempt from disclosure under 3306.5. (*Ibid.*) "Officer McMahon offered no evidence to dispute the Department's showing that the undisclosed materials were separately maintained by the internal affairs division and *not* kept in the personnel files that the Department was entitled to use for making the personnel decisions listed in Government Code section 3306.5." (172 Cal.App.4th 1324.)

The Court finally concluded that it would be "unreasonable and contrary to legislative intent" to find that 3306.5 required a police agency to disclose "internal investigative materials that the Department is not

authorized to use in making the enumerated personnel determinations." (172 Cal.App.4th at 1335.) Unlike the prior published cases in which a police agency had not disclosed the contents of a separately-maintained file to the officer, the LAPD had disclosed the citizen complaints to Officer McMahon, so the officer was given the opportunity to respond to the claims within them. (172 Cal.App.4th at 1336.) This was enough to fulfill its 3305 and 3306 obligations. (*Ibid.*)

In the cases finding that a public employer maintained a separate file that should have been disclosed to the employee, the separate file at issue had uniformly resulted in personnel action. (*See, e.g., Miller v. Chico Unified School District* (1979) 24 Cal.3d 703, 709 (school district violated similar Education Code requirements when it ***transferred a school principal to a teaching position*** on the basis of confidential and derogatory memoranda that had not been disclosed to the principal); *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793, 803 (where probationary officer was ***terminated*** based upon a background investigation that uncovered a citizen complaint at his former employing agency that had never been disclosed to the officer, the PSOBOR required disclosure to officer); *Aguilar v Johnson* (1988) 202 Cal.App.3d 241, (the placement of an un-investigated citizen complaint of brutality against a police officer "could potentially lead to not only ***adverse personnel decisions*** but could also result in a ***more severe penalty*** being

imposed in a subsequent disciplinary proceedings;" thus it was an "adverse comment" that had to first be disclosed to the officer).

Here, in contrast, nothing within the Captain's undisclosed notes resulted nor could result in any personnel action beyond the personnel evaluations, which were disclosed. Not a single comment gave rise to a punitive transfer like *Miller,* a termination like *Riverside,* or any potential adverse decisions like *Aguilar.* Because they never served any personnel purpose "by the employer," the notes should remain as confidential as they began, in the Captain's own personal daily log.

2. As in *McMahon*, the Captain's separately-maintained file had no personnel consequences upon Poole, and nothing in the record suggests that any "adverse comment" within the Captain's file led to any personnel action beyond Poole's fully-disclosed personnel file and PIP.

Although *McMahon* focused upon 3306.5, its principles equally pertain here, and should lead to the interpretation of 3255 and 3256 presented by the OCFA and supported by Amici.

As in *McMahon,* the file Poole seeks to disclose is a separately-maintained file that can have no personnel consequence upon Poole. As in *McMahon,* Poole never identified a single "adverse comment" within the Captain's log that resulted in any personnel action that was not fully disclosed to Poole. That is, the only "adverse comments" that possibly

affected Poole's employment were those comments that ended up in his personnel reviews; no comments within the notes that independently resulted in other personnel action. Just as the LAPD fulfilled its 3305 and 3306 duties in *McMahon* by turning over the citizen complaints (172 Cal.App.4th at 1334), the OCFA fulfilled its 3255 and 3256 duties by turning over the personnel evaluations. As in *McMahon,* nothing in the record suggests that any comment lurking within the Captain's notes resulted in any negative personnel action. (172 Cal.App.4th at 1334.) McMahon thus had the opportunity to file written responses to these complaints per 3305, just as Poole had the opportunity – and did – file written responses and union grievances regarding his personnel evaluations.

It is difficult to imagine the impact on public entities in California if *Poole* stands, and any written comment by a supervisor relating to an employee would trigger 3255. Hypothetically, if Captain Culp had kept a private journal at his home for the purpose of personal reflection, and he had made a single entry describing his emotions in dealing with Poole on a particular occasion, Poole would have access to this private journal on the ground that it ultimately "affected Poole's job status." Similarly, if the Captain had sent a text message to a friend to express a minor frustration in working with Poole, Poole would have access to the text message on the same ground. The severity of these intrusions are not reasonable, and do not serve

the legislative aims of the FBOR. A supervisor's thoughts and impressions are not transmuted into "adverse comments" once they include an employee's name. Such writings are typical and necessary for effective management, particularly with the large workforce found in a public firefighting agency.

Instead, it is more reasonable for a firefighter to have the opportunity to confront only the exact materials upon which management relies and consults to make its adverse decision.

3. The Court of Appeal's implication that the contents of the Captain's file had to be disclosed once he committed them to paper presents an unworkable position for public entities that again undermines legislative intent.

While the Court of Appeal implies that the Captain's log caused Poole's Battalion Chief to put Poole on a performance improvement plan, in fact it was not the log itself but rather *the contents* of it – *i.e.*, Poole's mis-steps at work – that led to the PIP:

> "Prior to imposition of the performance improvement plan, Culp told his superior, Battalion Chief Dave Phillips, of **the contents of the file** he kept on Poole. Culp notified Phillips because he felt the daily logs **contained incidents** indicating concern and Phillips should know about them." (Opinion, p. 4.)

What is striking about this (and related passages in the facts) is that the Court of Appeal seems to be saying that *the contents* of the Captain's files – *i.e.*, Poole's work performance problems – became the subject of a 3255

disclosure the moment that Culp commited them to paper. The Court of Appeal never found, because it could not, that the Captain shared his file with the Battalion Chief or anyone else. Instead, he simply shared the contents of it, meaning, his own observations and thoughts as a supervisor regarding Poole's performance. That is what managers do, and need to continue to do, to fully serve their public mission of ensuring effective and essential government operations and services.

Ironically, if the incidents described in the Captain's notes had never been committed to writing, but he discussed these same events with the Battalion Chief based on his memory of the events, their discussion would not violate 3255 even under the Court of Appeal's reasoning. Their discussions would simply amount to a garden variety management-level discussion of an employee. But discussing the exact same events somehow violates the 3255 and 3256 under *Poole* simply because the events were also recorded in the Captain's workplace diary. This anomaly does not make sense. Public entity management simply cannot be restrained in this way.

The statutory interpretation within *Commission on Peace Officer Standards*, 42 Cal.4th 278, illustrates why this Court should not endorse the Court of Appeal's finding that a supervisor's transitory thoughts must be disclosed as soon as they are committed to paper. In *Commission,* the Court found that while Penal Code sections 832.7 and 832.8 technically stated that

any document in a police officer personnel file was confidential, it would be "unreasonable" and "lead to arbitrary and anomalous results" if any document – such as "a newspaper article praising or criticizing the particular act of an officer" – could be deemed "confidential" once it is placed in the personnel file. (42 Cal.4th at 290.) Likewise, the Court of Appeal seems to suggest that the contents of the Captain's file, *i.e.*, Poole's workplace conduct, somehow triggered 3255's disclosure requirements once the Captain committed it to paper. As in *Commission*, it would be unreasonable and lead to arbitrary and anomalous results if such an outlier interpretation of 3255 were approved by this Court.

If *Poole* means that a supervisor like Captain Culp has to first notify an employee of every observation he makes before he discusses it with another supervisor or manager, a virtual stranglehold would exist on public entity management. Effectively, employees would be notified of, and then empowered to file written responses and grievances regarding, every thought, impression and opinion of a supervisor before the supervisor could even discuss the thought, impression or opinion with management, regardless of whether those thoughts, impressions or opinions ever result in employment consequences. Captain Culp, for example, would apparently be obligated to email his daily log to Poole and all of his employees before saving each entry

on his computer. This is unworkable for any public entity, and it destroys management's right and duty to properly supervise its workforce.

III. JUST AS THE DELIBERATIVE PROCESS PRIVILEGE EXEMPTS FROM DISCLOSURE A PUBLIC AGENCY'S TENTATIVE AND NONFINAL DECISIONMAKING PROCESS, A SUPERVISOR'S TENTATIVE AND NONFINAL NOTES SHOULD BE SIMILARLY EXEMPT FROM DISCLOSURE.

The deliberative process privilege is well-established under both California and Federal law, in which a public agency's non-final documents are not generally disclosable either in litigation discovery or pursuant to the California Public Records Act. The principles underlying this privilege weigh just as strongly, if not more strongly, in favor of recognizing the need to exempt a supervisor's undisclosed, non-final and tentative notes from disclosure under 3255.

1. The deliberative process privilege.

The deliberative process privilege exempts from public disclosure materials reflecting the deliberative or decision-making processes of government officials. (*Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136, 1142.) This privilege authorizes a public entity to withhold from disclosure "not only the mental processes by which a given decision was reached, but the substance of conversations, discussions, debates, deliberations and like material reflecting advice, opinions, and recommendations by which

government policy is processed and formulated." (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 305.)

In *Times Mirror Co. v. Superior Court, supra,* 53 Cal. 3d 1325, this Court recognized that courts have been particularly solicitous of the pre-decisional deliberative process, saying "[t]o prevent injury to the quality of executive decisions, the courts have been particularly vigilant to protect communications to the decision maker *before the decision is made*." (*Id* at 1341 (emphasis added).) The deliberative process privilege thus applies to pre-decisional materials that reflect deliberative, policymaking, and/or decision-making processes, so long as the agency asserting the privilege shows that the public interest in nondisclosure outweighs the public interest in disclosure. (See *Times Mirror Co. v. Superior Court, supra*, 53 Cal. 3d at 1338, 1341; *Wilson v. Superior Court*, (1997) 51 Cal. App. 4th 1136, 1142, *California First Amendment Coalition v. Superior Court* (1998) 67 Cal. App. 4th 159, petition for review denied (December 22, 1998).)

This Court further noted that the privilege helps ensure that persons having pre-decisional input will speak with candor knowing that not every written word will be subject to public scrutiny or ridicule. "Candor is less likely to be forthcoming if the [writer] knows the facts will be disclosed regardless of the outcome." (*California First Amendment Coalition, supra,* 67 Cal. App. 4th at 172.)

Under the Federal precedents, governmental agencies may withhold from disclosure documents that reflect advisory opinions, recommendations, and deliberations comprising the process by which its decisions and policies are formulated. (*NLRB v. Sears*, (1975) 421 U.S. 132, 150; North *Pacifica, LLC v. City of Pacifica*, (N.D.Cal. 2003) 274 F. Supp.2d 1118, 1120-21 (citing *FTC v. Warner Commc'ns,* 742 F.2d 1156, 1161 (9th Cir. 1984)).) While some Federal Courts make a distinction between purely factual material and material "containing opinions, recommendations, or advice," the Courts also recognize that in many cases "the factual material . . .is so interwoven with the deliberative material that it is not severable." *Coastal States*, 617 F.2d at 866. Here, while Captain Culp's notes catalogued factual material, his thoughts and opinions were so completely immersed into those facts that it would be virtually impossible to (and certainly unwieldy) to sever the facts and opinions.

While the "ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions" (*NLRB v. Sears*, 421 U.S. at 151), there are three specific policy reasons underlying the privilege, each of which is germane here.

- First, it ensures "'creative debate and candid consideration of alternatives,'" thus improving the quality of the agency decisions. (*California First Amendment Coalition, supra,* 67 Cal.App.4th at 170.) "[W]ithout the

assurances of confidentiality . . . the flow of information . . . might be sharply curtailed, and the deliberative processes and efficiency of the agency greatly hindered (internal quotations and citations omitted)." (*Times Mirror, supra,* 53 Cal. 3d at 1343.) The privilege thus encourages agency subordinates to share their views freely with superiors. (*See Warner Commc'ns, supra* 742 F.2d at 1161; *Coastal States Gas Corp. v. Dep't of Energy* (D.C. Cir. 1980) 617 F.2d 854, 866.)

Likewise, maintaining the confidentiality of a supervisor's undisclosed and tentative notes is necessary to ensure the best public entity management. No fire or police department supervisor, no matter how conscientious, will subject him or herself to constant daily scrutiny and grievance oversight of daily log entries. Immediate supervisors, like Captain Culp, cannot be subjected to constant public scrutiny over every note or thought written down before preparing a written interim personnel evaluation or final personnel review. The quality of resulting decisions, supervision, and performance evaluations will thereafter suffer. Moreover, management must also be allowed to engage in candid discussions about employees, as Captain Culp and the Battalion Chief did here, without first notifying the employee, much less giving the employee 30 days to respond. Such candid discourse among supervisors and managers forms the essence of effective public entity management.

- Second, the deliberative process privilege protects against the "confusion" arising from "premature disclosure" of a final decision about a policy. (*California First Amendment Coalition, supra,* 67 Cal.App.4th at 170; *Warner Commc'ns*, 742 F.2d at 1161.) The set-up created by *Poole* promises such endless confusion, as supervisors would be forced to prematurely disclose discussions and thoughts about employees before any final decision is made, and even allow employees to file written responses and arguably union grievances even if the final decision – *i.e.,* the personnel review – does not ultimately contain such discussions or thoughts about an employee.

- Third, protecting against disclosure of agency deliberations "protects the integrity of the decision-making process itself" by ensuring that public officials are only "judged" by their decisions, not their considerations before making a decision. (*Ibid.*) That is, the privilege protects against "confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." (*Coastal States Gas Corp. v. Dep't of Energy, supra,* 617 F.2d at 866.)

Likewise, the decision-making process within public entity management requires that individual supervisors are free to explore all considerations before making a final decision about an employee. Such a

decision is manifested in documents within the employee's personnel file, such as personnel evaluations, which are fully disclosed to the employee. No public purpose is served by forcing a supervisor to share with an employee the initial thoughts and alternative options considered before a final employment decision is made.

Here, all of those policy considerations are implicated by the premature and mandatory disclosure of every note taken by the Captain. As shown above, not every note the Captain wrote was incorporated into the final performance evaluations. Many of the errors the Captain initially observed were improved and corrected by the time he wrote his reports. Secondly, the Captain lacked the authority to issue a performance evaluation without higher level review. Because his draft performance reviews were not shared with Poole until reviewed and approved by his own supervisor, all such documents were subject to revision. Not all of the Captain's observations were of earth shattering importance, as shown by their exclusion from the final reports. Accordingly, premature disclosure could lead Poole, or any other subordinate, to the wrong conclusions.

The policy considerations underlying the deliberative process privilege, as interpreted by both the Federal Courts and this Court, should be applied to lead this Court to hold that the undisclosed, non-final notes of a supervisor do not trigger a firefighter's rights under 3255.

2. The exemption for preliminary drafts and notes from Public Records Act disclosures.

Government Code section 6254(a) provides that a public agency need not disclose the following documents in response to a Public Records Act request:

> "Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure."

Further, section 6255 of the CPRA provides a "catchall" public interest exemption that "permits the government agency to withhold a record if it can demonstrate that 'on the facts of a particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.'" (*Times Mirror*, *supra,* 53 Cal. 3d at 1338 quoting Gov't Code Sec. 6255). The California Supreme Court has found section 6255 to encompass the "deliberative process privilege." (*Id.* at 1339.)

In *Times Mirror*, this Court found the Governor's appointment calendars and schedules to be exempt from disclosure under the CPRA, because "[d]isclosing the identity of persons with whom the Governor has met and consulted is the functional equivalent of revealing the substance or direction of the Governor's judgment and mental processes; such information would indicate which interests or individuals he deemed to be of significance with respect to critical issues of the moment. The intrusion into the

deliberative process is patent." (*Times Mirror*, *supra*, 53 Cal. 3d at 1343; *see* also *California First Amendment Coalition*, *supra*, 67 Cal. App. 4th at 171 (finding job applications submitted for vacant seat on local board of supervisors to be subject to the deliberative process privilege and thus exempt from disclosure under the CPRA).)

Ultimately, according to this Court's holdings in *Times Mirror*, "[t]he key question in every case is whether the disclosure of materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." (*Times Mirror*, 53 Cal. 3d at 1342, (citations and internal quotations omitted).)

Here, daily disclosure of the Captain's daily log impressions and thoughts would diminish his ability to be an effective supervisor or an effective leader and trainer of subordinate employees. If supervisors are discouraged from effective supervision and training of subordinates, the quality of the public agency's work will diminish.

These principles should guide this Court in analyzing the preliminary and non-final daily log entries at issue here.

CONCLUSION

For at least three reasons, Amici urge this Court to reverse the Court of Appeal.

First, the holding that a firefighter's rights to review and respond to adverse comments within an undisclosed workplace diary maintained by the supervisor, and never disclosed to anyone else nor resulting in any personnel action, is unworkable for local public agency employers and contrary to the legislative intent underlying the FBOR.

Second, the plain language of 3255 indicates that it was intended to apply only to personnel files maintained for the personnel purposes *of the employer*, and do not apply to a file maintained for the personnel purpose *of the individual supervisor* to prepare performance reviews.

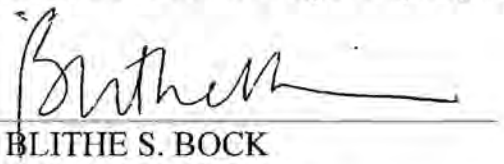
Third, just as a public agency is exempt from disclosing to the public preliminary notes and drafts reflecting its deliberative process in making policy decisions, those same motivating principles should lead this Court to find that public entity management is exempt from disclosing to an employee the preliminary notes and drafts reflecting management's tentative but non-final thoughts and impressions of that employee's performance.

Amici urge this Court to hold that an employee's 3255 rights are triggered only by the entry of documents within an employee's personnel file

that are disclosed to management and maintained in such a manner that the documents could have employment consequences to the employee.

DATED: September 18, 2014

MIKE N. FEUER, City Attorney
JANIS LEVART BARQUIST, Deputy City Attorney

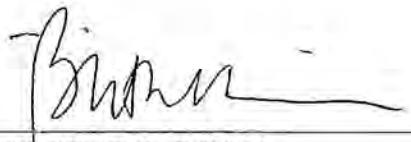
By: 

BLITHE S. BOCK
Deputy City Attorney
Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES and
CALIFORNIA STATE ASSOCIATION OF COUNTIES

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionally double-spaced 13-point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word software used to prepare this brief, this brief contains 7,291 words, including footnotes.

I declare under penalty of perjury under the laws of the State of California that this Certificate of Compliance is true and correct and that this declaration was executed on the 18th day of September 2014 at Los Angeles, California.

By: 

BLITHE S. BOCK
Deputy City Attorney
Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES and
CALIFORNIA STATE ASSOCIATION OF COUNTIES