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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS FOR LOS ANGELES COUNTY (ADDA), Petitioner, v. GEORGE GASCÓN, LOS ANGELES COUNTY DISTRICT ATTORNEY; LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE; COUNTY OF LOS ANGELES; DOES 1 through 50, inclusive, Respondents.	Case No. 21STCP03412 **PETITIONER'S POINTS AND AUTHORITIES IN REPLY TO RESPONDENT'S OPPOSITION TO OSC RE: PRELIMINARY INJUNCTION** Date: November 10, 2021 Time: 9:30 a.m. Place: Dept. 86

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INTRODUCTION

The County asserts the District Attorney ("DA"), as an elected official, has essentially unfettered ability to hire, fire, transfer, or appoint anyone he wants to any position he wants within his office. In fact, the mandate of the County Charter, guaranteeing a workforce based on merit and not political affiliation, significantly limits the DA's power and precludes the meritless political appointments at issue here.

By conflating two separate Civil Service Rules, one defining when and how an inter-departmental transfer may occur and a separate rule defining when a re-classification can occur, the DA urges the Court to ignore the political affiliations of each of the contested appointees and support his claimed authority to hire anyone he wants during a County wide hard hiring freeze. The law, however, does not support this position.

ARGUMENT

I.

THE CIVIL SERVICE RULES DO NOT AUTHORIZE THE APPOINTMENTS AT ISSUE HEREIN

Civil Service Rules 15.02 and 15.03 define two very different processes: 15.02 defines interdepartmental transfers, 15.03 defines the re-classification of employees. Respondents urge the Court to ratify their merging the two rules into one, and allow the lateral transfers of Blacknell, Blair, and Joseph on the basis of the criteria for a re-classification rather than the criteria required for a lateral transfer.

As Petitioner argued in its Supplemental Points and Authorities in Support of the present OSC, the conflation of these two separate rules violates one of the primary rules of statutory construction, *i.e.*, that each word, phrase, and clause of a rule or statute must be given its plain meaning and not ignored or read out of the statutory scheme. See, *Department of Health Services v. Civil Service Com.* (1993) 17 Cal.App.4th 487, 494-495; accord, *Dobbins v. San Diego County Civil Service Com.* (1999) 75 Cal.App.4th 125, 129; *Amezcua v. L.A. Cty. Civil Serv. Com.* (2019) 44 Cal.App.5th 391, 397. Respondents ignore this cannon of interpretation and instead

rely on the claim that the Director of Personnel authorized the transfers so everything is okay. There are a number of reasons why this assertion must fail.

The declaration of Rodney Collins is not sufficient to establish the Director of Personnel actually reviewed or authorized the transfers at issue. In purely conclusory fashion, with no foundation to establish any personal knowledge of the facts, Collins states the Director of Personnel, Lisa Garrett, agreed with his recommendation to allow the transfers.

The Director of Personnel is a County employee, one exclusively under the control of the County, an appearing Respondent in this case. There is no explanation offered for the failure of the County to produce a declaration from the only person with actual personal knowledge of the facts related to these transfers: County employee Lisa Garrett. "[W]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." [Internal quotation marks and citations omitted.] *Underwriters Laboratories Inc. v. National Labor Relations Board* (9th Cir. 1998) 147 F.3d 1048, 1054; see also, *Gerawan Farming, Inc. v. Agricultural Labor Relations Board* (2018) 23 Cal.App.5th 1129, 1183. Garrett, as Director of Personnel[1], is the only person with actual, non-hearsay knowledge of how, if, and on what basis she authorized the lateral transfers at issue. The County's failure to produce any evidence directly from Garrett, who is presently a very high ranking employee of the County who may reasonably be assumed to be favorably disposed to the County, allows the Court to draw the negative inference that Garrett did not in fact authorize the transfers at issue herein.

Further, the declaration of Collins makes clear he relied on some of the criteria necessary under the Civil Service Rules to authorize a *change in classification* under Rule 15.03, not the criteria required to authorize a *lateral transfer* under Rule **15.02**. Significantly, a lateral transfer to another department is not allowed under Rule 15.02(A)(1) when the transfer would require a change in classification: "the director of personnel may authorize the interdepartmental transfer of an employee from one position to another similar position **of the same class**."

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1 The Civil Service Rules identify the position held by Garrett as Director of Personnel. Collins refers to Garrett's position as Director of Human Resources. (Collins Decl. ¶ 9) Although the terms appear to be interchangeable, the position identified in the Civil Service Rules, Director of Personnel, will be referenced hereinafter.

Rule 15.02(A)(1) only allows appointments, transfers and changes of classification to positions in another Department when the "appointment, transfer or change of classification would be authorized by these Rules." Collins's declaration significantly glosses over the requirement of Rule 15.03(A) that "the employee has demonstrated the possession of the skills and aptitudes required in the position to which the employee is to be changed."

While Collins notes in his memo to Garrett that the positions of DDA III and IV **differ** from that of DPD III and IV, (Collins Decl., Ex.1, p.9) in that the DDA position requires prior experience as a Los Angeles County District Attorney, Collins completely ignores this job requirement and asserts, in conclusory terms, that prior experience as a DPD in some manner establishes that Blacknell, Blair, and Joseph possess "the skills and aptitudes required in the position" of DDA. (Collins Decl., ¶¶ 4, 8, 12)

The job requirement of prior experience specifically as a **Los Angeles County Deputy District Attorney** is one created by the County when that position was added to the classified service of Los Angeles County, or was added as a the result of a re-classification study conducted by the County in response to a request from the DAO. Rule 5.01(A) ("The Chief Executive Officer shall classify all positions in the classified and unclassified service of the County, maintain a schematic list of all classes in the classification plan, and prepare and maintain specifications for each class."); and Rule 5.03(B) ("The appointing power shall initiate requests to the Chief Executive Officer for classification studies of positions under its jurisdiction whenever they have significantly changed in duties, responsibilities, or work assignments.") This is not a job requirement which may be skipped or waived by the DA or by Collins.

There is no question in this case that Blacknell, Blair, and Joseph do not meet the requirements to hold, and have never demonstrated the skills and aptitudes required to perform, the position of DDA III or IV. They do not meet the minimum requirements established by the published job classification bulletin because none has any prior experience as a Los Angeles County DDA.

As the declarations of former LA County District Attorneys Jacquelyn Lacey and Stephen

Cooley establish, filed concurrently herewith, contrary to the conclusory statements by Stanley Yen[2] in his declaration, lateral transfers of LA County employed attorneys into the District Attorney's Office have not happened for at least the past 20 years. (Lacey Decl. ¶ 5; Cooley Decl. ¶ 4) This is not, as Respondents insinuate, because the prior DAs did not want to hire public defenders. Attorneys employed by the LA County Public Defender's Office, County Counsel's Office, and the Fire Department have in fact been hired by the DAO over at least the past 16 years. (Cooley Decl. ¶¶ 5-6; Lacey Decl. ¶¶ 6-7; Hanisee Decl. ¶ 12, Ex.A) Unlike the transfers at issue here, those attorneys who did not have the requisite experience as LA County Deputy District Attorneys were new hires, not transfers, hired at Grade I, not transferred to the grade they held in their prior employment.

As noted in the declarations of former LA County DAs Lacey and Cooley, and as supported in the GOMs[3] (Ex. "A" to Decl. of Michele Hanisee), public defenders and prosecutors are not interchangeable. (See also, Siddall Decl., ¶¶ 5-20) The GOMs reflect new hires with a variety of pedigrees; law clerks for Federal Court District Judges, as well as law clerks for the District Courts of Appeal. In addition, there were several new hires with years of experience as public defenders in other jurisdictions, as well as several who were prosecutors in other jurisdictions; all were hired as DDA Grade I's regardless of their prior accomplishments or prior tenure as prosecutors or public defenders in other jurisdictions. The lateral transfers at issue are fundamentally different.

Blacknell, Blair, and Joseph have likewise never demonstrated the skills and aptitude to perform the duties of a DDA. The manner in which skills and aptitudes to perform the duties of any position within the classified service in LA County is established is by passing a competitive examination. See, Rule 7.04 ("Except as provided in Rule 8, all examinations shall be

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2 Yen stated in his Declaration that he has been the Personnel Officer for the DAO for 16 months. In contrast to that minimal experience, Lacey was responsible for overseeing all personnel matters within the District Attorney's Office for over 16 years.

3 A General Office Memorandum, or "GOM" is a memorandum issued by the LADA's office. A GOM can be on nearly any topic, but is distinguished from a memorandum called a Special Directive. A Special Directive is a change in legal policy which must be followed. All other office-wide announcements are typically made through a GOM. Hanisee Decl., ¶¶ 10, 11, 12.

competitive. An examination shall be deemed to be competitive when applicants are tested and grouped as to their relative qualifications and abilities, or when a single applicant is scored against a fixed standard.") These examinations can be entry level exams or promotional exams.

Blacknell, Blair, and Joseph have never taken or passed any competitive examination for the positions of DDA I, II, II, or IV. As such, they have never "demonstrated the possession of the skills and aptitudes required in the position to which the employee is to be changed," as required by Rule 15.03(A). The other attorney new hires in the DAO with experience as attorneys in other County departments, offices and jurisdictions, have been required to demonstrate their skill and aptitude as a DDA by taking and passing all required testing and examinations before attaining the ranks of DDA III or IV. (Lacey Decl., ¶¶ 6-7; Cooley Decl., ¶¶ 5-6; Siddall Decl., ¶¶ 6-9)

Respondents claim competitive examinations for the transfers from DPD to DDA are not required since both positions are of the same rank and degree of difficulty. As set forth in the declarations of Siddall, Hanisee, Cooley and Lacey, this assertion is not accurate. The positions of DDA and DPD are simply not interchangeable, as Respondents claim. (Siddall Decl., ¶¶ 5-20; Lacey Decl., ¶¶ 5-7; Cooley Decl., ¶¶ 5-6; Hanisee Decl., ¶¶ 12-14)

The opinions of Yen, Collins, Craig Hoetger, and Sheila Williams, as offered in their declarations, in addition to being inadmissible lay opinions, are not subject to any deference by this Court. Yen, Collins, Hoetger, and Williams are employees of the County who are bound by and required to comply with the Civil Service Rules; they have no role in interpreting or applying those rules. Their interpretation of the rules for their own needs is not entitled to any deference by this Court. *Trejo v. County of L.A.*(2020) 50 Cal.App.5th 129, 147 ("the Department is not entitled to any deference in the interpretation of County personnel rules.") So too is the DA just a Department Head required to abide by the Civil Service Rules, and whose preferred interpretation of those rules is entitled to no deference by this Court. *Trejo, Id*.

Respondents also argue that the distinction recognized in the County Charter between positions in the DAO which must be filled from within and those which may be filled from outside County agencies is not controlling because, according to Respondents, the Civil Service Rules trump the Charter and the Charter's list of authorized positions is not exhaustive. Both of

these statements are legally incorrect.

Article XI, Section 3(a) of the California Constitution makes municipal charters paramount over general laws in municipal affairs. Art. XI § 3(a) ("For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question. The charter is effective when filed with the Secretary of State. A charter may be amended, revised, or repealed in the same manner. ... County charters adopted pursuant to this section shall supersede any existing charter and all laws inconsistent therewith. The provisions of a charter are the law of the State and have the force and effect of legislative enactments.") By definition, the Charter is paramount to rules which are created under authority granted by the Charter.

Similarly, the doctrine of *expressio unius est exclusio alterius* (by saying the one thing you necessarily exclude the other) has been applied to municipal charters by California courts for more than 166 years. See, *e.g.*, *People ex rel. McMinn v. Haskell* (1855) 5 Cal. 357, 359; *Malone v. Los Angeles* (1954) 126 Cal.App.2d 447, 450; *McKinney v. Superior Court* (2004) 124 Cal.App.4th 951, 958 n.9. As such, the Charter's enumeration of the specific positions in the DAO which may be filled from outside the Office is, in fact, exhaustive. The DA is not free to modify, change, or ignore the listed positions without first creating a charter amendment which is then ratified by the vote of the county electors. Art. XI § 3(a). This he has not done.

Finally, Respondents' reliance on the alleged approval of the Blacknell, Blair, and Joseph transfers by the Director of Personnel is unpersuasive in light of the lack of any evidence that the DA advised the Director of Personnel of his political affiliation with these three employees. Civil Service Rule 25 specifically precludes the hiring of County employees on the basis of, or as a reward for, their political affiliation with and campaign support for any elected official. Yet this is exactly the basis upon which Blacknell, Blair, and Joseph were chosen for these unlawful lateral transfers. Respondents not only fail to establish any basis other than their political affiliation with and election campaign support for Gascón to justify the assignments of Blacknell, Blair, and Joseph to the DDA III and IV positions at issue, Respondents ignore the issue completely. This case is not about the lateral transfer of three random DPDs. It is about the appointment of three very publicly active campaign supporters, policy advisors, and campaign

contributors to the Gascón election campaign to promotional positions in Gascón's office as a public display of reward for their campaign support and activities.

Respondent Gascón's blatant disregard of the Civil Service protections of his existing employees in order to favor and advance the careers of his campaign supporters sends a loud and clear message to his employees that if they have any hope for success in their chosen professions, they better get on board with his political machine. This is the exact conduct which Rule 25 is designed to prevent. As such, the alleged lateral transfers here do not comply with the Civil Service Rules, as required by Rule 15.03.

As the foregoing establishes, Petitioner herein has established a substantial likelihood of success on the merits in this case.

II.

RESPONDENT GASCÓN'S CONDUCT HAS DEPRIVED THE COMMISSION OF ANY MEANINGFUL REMEDY

Contrary to Respondents' various mis-statements in its opposition brief, the matter before the Court is not a noticed motion for a preliminary injunction; it is an Order to Show Cause why a preliminary injunction should not be entered. The Order to Show Cause was issued by Judge Strobel based upon her ruling that Petitioner had made a showing of likelihood of success on the merits and the need for an immediate hearing in order to prevent the further extinction of available remedies before the Civil Service Commission. The matter is likewise not an administrative mandate proceeding pursuant to C.C.P. § 1094.5; the action is a traditional writ of mandate proceeding pursuant to C.C.P. § 1085. As such, Petitioner is not seeking this Court's review of any action by the Civil Service Commission. Again, Petitioner is attempting to preserve the remedies available to be issued by the Commission once the pending appeals get to hearing, or in the alternative for this Court to issue in the underlying 1085 writ proceeding.

The injunction sought here is designed to maintain the *status quo* until either the Civil Service Commission or this Court rules on the merits of Petitioner's claim in order to ensure an appropriate and effective remedy exists at that time. The need for immediate injunctive relief is established by the actions taken to date by Respondent Gascón to eliminate those remedies.

Within hours of receiving Petitioner's Ex Parte application seeking a TRO prohibiting the DA from taking any action to expire or extinguish any existing promotional list, Respondent Gascón did exactly that by promoting enough people on the Grade III list to effectively extinguish that eligible list. (Ghobadi Decl., ¶¶ 7-10) Respondent Gascón, two days after Petitioner's supplemental papers in support of the OSC were filed, requested the Commission dismiss DDA Ghobadi's appeal as moot. (Gibbons Decl., ¶ 7, Ex. B)

Contrary to the baseless and over-broad declaration statement by Hoetger, the Civil Service Commission, on October 27, 2021, when it considered DDA Ghobadi's request for a hearing on her appeal, specifically stated that Respondent Gascón's promotion of Ghobadi rendered her appeal moot. (Ex. C, pp.4-6) Respondent Gascón's attempt to dismiss DDA Ghobadi's appeal was intended to eliminate the only appeal contesting the validity of the Blair appointment as a DDA III. (Gibbons Decl., ¶ 8) The only reason the Commission did not, on October 27, 2021, dismiss the Ghobadi appeal as moot is because it wanted to further investigate the "shenanigans" by the District Attorney in connection with the Blacknell, Blair, and Joseph assignments. (Gibbons Decl., Ex. C, pp.6, 9-10)

In addition, when directly requested to consider the remedy of ordering the unlawfully assigned DPDs to be removed from those DDA positions and returned to the Public Defender's Office, Commissioner Tevrizian specifically stated that "I'm not so sure we have the authority to do that .... I wouldn't make that motion myself," and no other Commissioner disagreed with him. (Gibbons Decl., Ex. C, p.12) This is a direct statement by the Commission that it will not issue a make-whole remedy which will actually stop and reverse the unlawful actions of Respondents.

Respondent Gascón claims his unprecedented promotion of 53 Grade III candidates from Bands 1 and 2 on October 14, 2021 was coincidentally in response to the County lifting a hard hiring freeze which had been imposed on March 31, 2020. According to the declaration of Yen, that freeze was lifted on October 5, 2021, 9 days before the wholesale promotions were made. It is simply not believable that the promotions of nearly everyone on the list were announced on October 14th in response to the end of the hiring freeze 9 days before, rather than in response to Gascón's receipt of the ex parte application seeking to prevent that exact conduct just hours

earlier that same day. (See, Ghobadi Decl. ¶¶ 8-10)

The lack of credibility of Respondent Gascón's claim is further underscored by the actual hiring of Blacknell, Blair, and Joseph during the existence of the hard hiring freeze. Yen stated in his declaration that "Transfers and promotions were two ways to fill a vacant position (absent an exception to the freeze) within these departments during the hard hiring freeze." (Yen Decl., ¶ 3) Yen goes on to document that, despite this lack of need for an exception from the hiring freeze, Blacknell, Blair, and Joseph were hired after the CEO approved an exception to the hiring freeze for each of them. (Yen Decl., ¶¶ 8, 9, 10) The CEO then denied the request for exceptions to promote 15 more DDAs to Grade IV, after filling two open positions with Blacknell and Joseph.

These "shenanigans" by the DA have now eliminated any meaningful relief by the Civil Service Commission. In the face of these actions, Respondent Gascón argues Petitioner has not exhausted its administrative remedies. It is, however, well settled that where the administrative agency is without jurisdiction or authority to issue a meaningful remedy, that administrative remedy need not be exhausted. *Edgren v. Regents of University of California* (1984) 158 Cal.App.3d 515, 521 (Exhaustion of administrative remedies may be excused when a party claims that "the agency lacks authority, statutory or otherwise, to resolve the underlying dispute between the parties."); see also, *County of Alpine v. County of Tuolumne* (1958) 49 Cal.2d 787, 798; *City of Lodi v. Randtron* (2004) 118 Cal.App.4th 337, 360; *Buckley v. California Coastal Com.* (1998) 68 Cal.App.4th 178, 191; *People ex rel. Dept. of Conservation v. Triplett* (1996) 48 Cal.App.4th 233, 258. Respondent Gascón's unclean hands must prevent his reliance on his own misconduct to defeat the Commission's jurisdiction.

Likewise, Respondents' contention that Petitioner delayed in seeking judicial relief is not well taken. Contrary to Respondents' deceptive claim that the only evidence of impending additional appointments of DPDs to DDA III and IV positions was the hearsay declaration of Siddall, Petitioner submitted the proper declaration of Sean Carney, who was a personal participant in the conversation in which DPD Perroni admitted he was being assigned to a DDA III or IV position. Further, the Siddall declaration was offered for the non-hearsay purpose of

establishing the need for immediate judicial intervention as the Perroni assignment was scheduled to become effective November 1, 2021. That impending assignment date for Perroni and potentially three other DPDs and APDs as DDA IIIs and IVs was the danger of significant and immediate harm which prompted the filing of the instant action.

That threat of immediate and substantial injury was not present in March 2021, when the Civil Service appeals were initially filed. Respondent Gascón's continuation of his plan to hire additional campaign supporters to fill vacant DDA promotional positions, undeterred by the Civil Service Commission's direct statements of disapproval of that conduct, increased the urgency of the need for immediate judicial intervention. And Respondent Gascón's immediate reaction to the request for judicial relief was to eliminate the possibility of the relief being ordered by extinguishing one of the existing lists of candidates eligible for promotion.

The evidence of Respondents' intentional efforts to undermine the authority of the Commission and this Court to issue any effective or meaningful remedy itself establishes the need for immediate judicial intervention and issuance of the requested injunctive relief.

In light of Respondent Gascón's actions, Petitioner has lodged herewith a revised Preliminary Injunction, clarifying the relief sought.

CONCLUSION

To suggest a magic wand can transmogrify lead into gold, or rock into water, is an illusion, a calculated deception only a bureaucracy would seek to entertain. Collins and Hoetger skim over the details in their declarations for the purpose of obfuscation. That one plays football does not mean one is qualified to be the quarterback. The differences between DDAs and DPDs are profound. They are different in scope of ethical obligations and in practice, as Justice White noted in *U.S. v. Wade* (1967) 388 U.S. 218, 256-258. (Siddall Decl., ¶ 20)

Both prosecutors and public defenders are essential to the fair application of justice, both are essential parts of a whole system. However, the aberrancy of the District Attorney who seeks to ignore the obvious and lump them together as fungible commodities to avoid the carefully constructed merit system serves only to undermine the balance that the administration of justice requires.

Petitioners respectfully request that the Preliminary Injunction, as modified, be issued by this Court.

Dated: November 3, 2021

Respectfully submitted,

THE GIBBONS FIRM, PC

By: Elizabeth J. Gibbons
Elizabeth J. Gibbons
Attorneys for Petitioner, Association of Deputy District Attorneys for Los Angeles County (ADDA)

PROOF OF SERVICE

STATE OF CALIFORNIA)
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COUNTY OF LOS ANGELES)

I am a citizen of the United States; I am over the age of eighteen years and not a party to the within action; my business address is 811 Wilshire Boulevard, 17th Floor, Los Angeles, California 90017.

On the date written below, I served the within:

PETITIONER'S POINTS AND AUTHORITIES IN REPLY TO RESPONDENT'S OPPOSITION TO OSC RE: PRELIMINARY INJUNCTION
Association of Deputy District Attorneys for Los Angeles County (ADDA) v. George Gascón, Los Angeles County District Attorney, et al.
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Executed on November 3, 2021 at Los Angeles, California.

Peggy L. Madsen
Peggy Madsen