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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 {The Honorable Mitchell L. Beckloff} **PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO STAY ALL PROCEEDINGS AND DISCOVERY PENDING THE OUTCOME OF THE CIVIL SERVICE COMMISSION APPEALS; DECLARATION OF ELIZABETH J. GIBBONS IN SUPPORT THEREOF** Date: January 14, 2022 Time: 9:30 a.m. Place: Dept. 86

TABLE OF CONTENTS

page(s)

TABLE OF AUTHORITIES

State Cases — **page(s)**

///

///

///

TABLE OF AUTHORITIES, continued

Miscellaneous **page(s)**

INTRODUCTION

Respondents base their present Motion to Stay all proceedings in this Court on a fundamental misunderstanding, or perhaps intentional misstatement, of Petitioner's position in this litigation. Petitioner has at all times sought injunctive relief in order to preserve the status quo and the ability of the Civil Service Commission to issue an effective remedy in the pending appeals by Petitioner's members. Contrary to Respondents' claims in its current motion, Petitioner is not at this time seeking writ relief on the same basis as is sought before the Civil Service Commission. This litigation presently only seeks an injunction preventing the District Attorney from continuing unabated in his ongoing hiring of Public Defenders for Deputy District Attorney promotional positions while the underlying Civil Service appeals are being pursued.

Conspicuously absent from Respondents' description of the events at issue in this case are the District Attorney's actions during the litigation which have to date effectively diminished or destroyed the Commission's ability to issue a meaningful remedy in the administrative proceeding. This is significant as the Commission, by its own admission, has no authority to issue the injunctive relief sought by Petitioners in this court. See, Gibbons Dec, Ex. "B", Transcript of Commission's December 1, 2021 Agenda meeting, p.4, lns.2-4. The injunctive relief sought herein, therefore, is not similar to or the same as the remedies sought before the Commission. For these reasons, as set forth in more detail hereinafter, the Court should deny the stay order sought by Respondents herein.

PROCEDURAL AND FACTUAL BACKGROUND

In early 2021, Respondent Gascón hired three career members of the Los Angeles County Public Defenders' Office: Alicia Blair, Tiffiny Blacknell, and Shalen Joseph, as Grade III and Grade IV Deputy District Attorneys. These are promotional positions within the District Attorneys Office which, pursuant to Civil Service Rules and consistent past practice, have always been filled by experienced DDAs based on a promotional testing process which was negotiated and agreed upon between the DA's Office and the ADDA.

In response to these unlawful appointments to DDA promotional positions, two ADDA members, a present Grade II and a present Grade III, filed appeals with the Civil Service

Commission ("CSC") in March, 2021. These appeals asserted Rule 25 violations as well as violations of the CSC rules which apply to promotions within the County service.

The Commission considered and granted DDA III Mr. Sidall's appeal in July, 2021. The Commission did not consider the DDA II's appeal until October, 2021, 7 months after it was filed. During that intervening 7 months, and despite the Commissioners' statements in July, 2021 when Mr. Sidall's appeal was granted, denouncing the DA's action of filling vacant promotional positions with persons who were not eligible to take, and had not taken, the required promotional examination, the District Attorney continued his efforts and offered DDA promotional positions to three additional Deputy Public Defenders: John Perroni, III, Greg Apt[1], and Nancy Theberge.

Also during that intervening 7 month period, the DA promoted 15 DDAs to Grade IV positions. In response, 9 additional ADDA members filed appeals with the Commission contesting their failure to be promoted due to the unlawful assignment of Blacknell and Joseph to DDA Grade IV positions. The Commission considered these 9 requests for appeal hearings at its December 1, 2021 agenda meeting.

In response to information obtained by the ADDA concerning employment offers made by the DA to DPDs Perroni, Apt, and Theberge, Petitioner filed the instant action on October 12, 2021, seeking a Temporary Restraining Order, Preliminary and Permanent Injunctions, as well as a writ of mandate pursuant to CCP section 1085, preventing the District Attorney from hiring or transferring any person not qualified pursuant to the negotiated promotional process into any promotional position within the DA's Office. See, Petitioner's Ex Parte Application for TRO and OSC.

The District Attorney, on October 14, 2021, within hours of being served with ADDA's ex parte application for a temporary restraining order preventing the DA from, among other things, expiring the existing promotional lists of eligible Grade III and IV promotional candidates, did exactly that: he promoted more than 50 candidates on the Grade III promotional list and thereby

1 Mr. Apt was a career Deputy Alternate Public Defender. For ease of reference, Mr. Apt, along with Mr. Perroni and Ms. Thebarger will collectively be referred to herein as "DPDs."

effectively expired that list of promotional candidates. By taking this action, which the DA knew was the subject of a pending ex parte application to prevent, the DA intentionally destroyed the promotional list required under Civil Service Rules from which the CSC could order the promotions sought by the DDAs who had appeals pending before the Commission. In addition, based on the promotion within this mass promotion of the DDA II who had previously filed an appeal with the CSC, the District Attorney moved to dismiss that appeal as moot.

The Superior Court heard Petitioner's ex parte application for a TRO on October 15, 2021. The Court specifically stated that it did not agree with Respondents' exhaustion argument because the TRO was designed to preserve the remedies available to the Commission in the pending appeals and not to stop or usurp that administrative proceeding. The Court denied the requested TRO but issued an OSC requiring the Respondents to show cause why a preliminary injunction should not issue.

On November 10, 2021, this Court heard and decided the OSC re Preliminary Injunction. The Court determined that Petitioner had not made a sufficient showing of the inadequacy of the remedies available to the CSC in the pending appeal cases. See, Tentative Decision, at p.1. At oral argument on the OSC, the Court specifically stated that Petitioner was entitled to conduct discovery with regard to this issue. The Court reiterated this position during the December 3, 2021 Status Conference, in response to Respondents' counsel's statement of intent to file the instant motion.

Within a week following the Court's denial of the preliminary injunction on November 10, 2021, the DA hired DPDs Perroni, Apt, and Theberge for open Grade III and IV promotional positions.

At the CSC's agenda meeting on December 1, 2021, the Commission granted the remaining nine appeals, which had been amended to contest the hiring of Perroni, Apt, and Theberge. The Commission ordered the last nine appeals to be "coordinated with" the previously granted appeal and directed that the hearings be scheduled on an expedited basis. As set forth in the Declaration of Elizabeth Gibbons filed concurrently herewith, those coordinated hearings have not yet been scheduled.

ARGUMENT

THE COMMISSION DOES NOT HAVE THE AUTHORITY TO ISSUE THE RELIEF SOUGHT BY PETITIONER FROM THIS COURT

Respondents begin their argument by copying word-for-word from this Court's December 13, 2021 minute order in the case *Los Angeles Police Protective League v. City of Los Angeles* Superior Court Case No. 21 STCV39987, regarding the applicable law regarding the exhaustion of administrative remedies. Selectively omitted from Respondents' copying was the Court's controlling definition of the exceptions to the exhaustion rule:

> *" ' The doctrine requiring exhaustion of administrative remedies is subject to exceptions.'* (*Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, 1274.) *The exceptions are flexible. (Ibid.) One such exception is when " 'when the administrative agency cannot provide an adequate remedy." ' " LAPPL, supra*, Tentative Decision[2] at p.14.

In ignoring this exception to the exhaustion rule, Respondents assert that the issues in the present proceeding and those presently pending before the Commission are "identical." This is not accurate.

While ultimately, the merits of Petitioner's position concerning the interpretation and application of the Civil Service Rules ("CSRs") in each case may be the same, the only issue presently pending before the Court is Petitioner's request for injunctive relief pending a hearing on the merits of those claims. In ruling on the OSC issued by Judge Strobel, this Court determined only that Petitioner has not yet, on the evidence solely in Petitioner's possession, made a sufficient showing that the remedies available to the Commission are inadequate to remediate the injuries to Petitioner's members caused by Respondents' hiring or transfer of DPDs into DDA promotional positions. This issue is not presently pending before the Commission and is an issue properly decided by a court, particularly in light of the restricted jurisdiction of the CSC.

Specifically, Respondents assert *"Thus, the Civil Service Commission is the final arbiter of claims by County employees alleging failure to promote."* (Motion, p.4) Based upon arguments

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2 This Court adopted its Tentative Decision as its final decision in the *LAPPL* case. A copy of the Tentative Decision is attached to the Declaration of Elizabeth Gibbons as Exhibit "A," for the Court's convenience.

advanced by the same Respondents as in the present case, however, the Court of Appeal determined almost 10 years ago that the Civil Service Commission has no jurisdiction at all to determine employee appeals alleging failure to promote:

> *"Section 35(4) of the charter requires the Commission to adopt rules (approved by the board of supervisors) to provide for "Procedures for appeal of allegations of political discrimination and of discrimination based on race, sex, color, national origin, religious opinions or affiliations or handicap made by County employees, regardless of status, and by applicants for employment." Section 35(6) of the charter requires that the rules provide for "Civil Service Commission hearings on appeals of discharges and reductions of permanent employees."* ***Appeal from a denial of promotion on grounds other than merit falls into neither category****."* [Emphasis added.] *Hunter v. L.A. County Civil Service Commission* (2002) 102 Cal.App.4th 191, 195.

Since the decision in *Hunter*, Respondent County of Los Angeles has consistently, and successfully, argued that the Commission's jurisdiction is strictly limited to only appeals of discharges and reductions of permanent employees, and appeals of allegations of political discrimination or discrimination based on race, sex, color, national origin, religious opinions or affiliations or handicap made by County employees and by applicants for employment, as specifically mentioned in the Charter. See, *Zuniga v. Los Angeles County Civil Service Commission* (2006) 137 Cal.App.4th 1255, 1259 (CSC lacks jurisdiction to hold hearing on appeal from a suspension after employee retires); *Berumen v. Los Angeles County Dept. of Health Services* (2007) 152 Cal.App.4th 372, 378 (*"appellant's claim that she has suffered a 'de facto' or 'constructive' demotion because she has lost many of her job responsibilities, is simply not authorized by the civil service rules. Consequently, the Commission had no jurisdiction to adjudicate appellant's claim."*); *County of Los Angeles Dept. of Health Services v. Civil Service Com. of County of Los Angeles [Latham]* (2009) 180 Cal.App.4th 391, 401 (Commission lacks jurisdiction over appeal where appealing employee retired, after starting the hearing but before final Commission decision); *Monsivaiz v. Los Angeles County Civil Service Comm.* (2015) 236 Cal.App.4th 236, 240 (Commission lacks jurisdiction where appealing employee died during pendency of writ proceeding to contest his discharge); *Deiro v. L.A. Cty. Civil Serv. Com.* (2020) 56 Cal.App.5th 925, 929-30 (Commission lacks jurisdiction over appeal of discharged employee who was granted disability retirement by LACERA).

As recently as 2020, the Court of Appeal held that the Commission lacks jurisdiction over

disputes concerning the interpretation of the CSRs. *Trejo v. County of L.A.* (2020) 50 Cal.App.5th 129, 139 (*"The Commission only has the jurisdiction it is explicitly given by the County Charter and the Rules,* ***and neither confers jurisdiction over interpretive disputes involving the Rules****."*) As the *Trejo* court noted:

> *"Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies. [Citation.]" (Cal. Drive-in Restaurant Assn. v. Clark (1943) 22 Cal.2d 287, 292 [140 P.2d 657].)* ***Thus, "the interpretation of civil service rules is purely a question of law."*** *(American Federation of State etc. Employees v. County of Los Angeles* (1983) 146 Cal.App.3d 879, 884 [194 Cal. Rptr. 540].) [Emphasis added.] *Trejo, supra*, 50 Cal.App.5th at p.140.

The fundamental issue involved in this case is the interpretation of Civil Service Rules 6, 7, 11, 15, and 25. The interpretation of civil service rules is a question of law to be determined by a Court, not an administrative agency. *Trejo, supra; Reno v. Baird* (1998) 18 Cal.4th 640, 660 (Ultimately, the interpretation of a statute is a legal question for the courts to decide, and an administrative agency's interpretation is not binding.) Thus, quite contrary to Respondents' position, the CSC has no jurisdiction to decide the present appeals by Petitioner's members if those are deemed appeals from the failure to be promoted, as stated by Respondents.

Likewise, the Commission has no jurisdiction to issue a binding decision interpreting the meaning and application of Rules 6, 7, 11, 15, and 25 as is required to determine the merits of the present dispute. More directly, however, there can be no question that the Commission lacks jurisdiction or authority to issue the relief actually sought by Petitioners from this court at this time: an injunction preventing the Respondents from hiring or appointing or "transferring" additional DPDs into DDA promotional positions while that dispute is being litigated. See, Charter sections 34, 35(4) and 35(6); Civil Service Rules 1-25; Ex. "B" to Gibbons Declaration, at p. 4)

The injunctive relief sought in this action is specifically designed to maintain the *status quo ante*, in order to preserve the ability of the CSC to issue a meaningful remedial order in the appeal cases pending before it. The Writ of Mandate cause of action is included in the present petition in the event the Commission determines that it does not have jurisdiction to issue a remedy in those appeals. See, *Trejo, supra*, 50 Cal.App.5th at p.140. The issues presently before

this Court and those presently before the Commission are not at this point identical.

The issue presently before the Court is the issuance of a permanent injunction to prevent the DA from hiring or transferring additional DPDs to fill open DDA promotional positions while the litigation concerning that issue is pending. The Commission clearly, by its own admission, has no jurisdiction to issue such relief. (Ex. "B" to Gibbons Decl., at p.4) As such, and contrary to Respondents' arguments, there is no administrative remedy available to Petitioners to obtain the relief presently sought from this Court.

Respondents also argue that exhaustion of administrative remedies cannot be excused in this case as the Commission has the authority to issue an effective remedy in the cases pending before it. This argument misses the point that the Commission does not have the authority to issue any type of restraining order preventing the DA from continuing to hire DPDs in derogation of the Commission's ability to issue a meaningful remedial order in the pending appeals. More oddly, Respondents attempt to support their position with the Court of Appeal's decision in *Hudson v. County of Los Angeles* (2014) 232 Cal.App.4th 392. The circumstances in *Hudson* could not be more different than those at issue in the present case.

Primarily, *Hudson* involved the discharge of a deputy sheriff and, therefore implicates only the Commission's remedial authority in discipline cases, not cases involving failure to promote and not cases involving Rule 25 violations alleging discrimination. Specifically, CSC Rule 18.02(C) authorizes the Commission to *"determine whether or not the discharge or reduction is justified."* Rule 18.04 allows the Commission, in certain circumstances, to make that decision without the necessity of a hearing. These rules clearly do not apply to the remedies in cases other than disciplinary appeals.

In addition, the *Hudson* case involved a deputy sheriff who was fired, appealed her discharge to the Commission and her appeal resulted in a final decision by the Commission finding her discharge unjustified and requiring the department to restore her employment. The Sheriff's Department neither appealed the Commission's final decision nor complied with it; instead it notified Deputy Hudson that she was being "medically released" from her position as a deputy sheriff. After Hudson filed a second appeal with the Commission, contending the

medical release was retaliatory, the Sheriff's Department entered into a written settlement agreement with Hudson, promising to reinstate her as a deputy or as a civilian custody assistant based upon a medical reevaluation by LACERA. When the Sheriff's Department subsequently refused to do either of these things, after having returned Deputy Hudson to work as a custody assistant while awaiting LACERA's medical reevaluation, Hudson sued.

It was not until the case found itself before the Court of Appeal that the Sheriff's Department ever asserted that the Commission lacked jurisdiction to issue the initial reinstatement order, which the Department had ignored. The Court of Appeal rejected the Department's argument, which was based on the *Zuniga, supra*, and *Latham, supra*, decisions. As the Court of Appeal in *Deiro v. L.A. Cty. Civil Serv. Com., supra* explained the *Hudson* court's ruling:

> *"It is not surprising, given the Hudson facts, that the court refused to apply the "bright-line" rule of Zuniga and Latham "under the circumstances of this case." (Hudson, supra, 232 Cal.App.4th at p. 413.) The court did so by contrasting the "voluntary" resignation and retirement in those cases with the conduct of the Hudson plaintiff—who fought tooth and nail not only to be restored to her job with backpay, but also to force LACERA to reevaluate her injury so that she could return to her job."* 56 Cal.App.5th 925, 932-33.

To call the circumstances to which the *Hudson* court limited its ruling a *"unique, and somewhat tortured, factual chronology,"* as did the Court of Appeal in *Monsivaiz, supra*, 236 Cal.App.4th at p. 242, is indeed an understatement. The *Hudson* court dealt with complicated facts and legal issues. None of those facts or legal issues however, remotely touched on the CSC's jurisdiction to issue remedies in Rule 25 violation cases such as the appeals in this case.

CSC Rule 4.13, upon which Respondents again attempt to rely in support of their broad and conclusory claim that the Commission has the *"discretion to fashion remedies to appeals within its discretion,"* likewise offers no help for Respondents. As this Court has already noted in its ruling on the OSC wherein this same argument by Respondent was rejected, *"While the notion may be implicit in CSR Rule 4.13, the nature of the remedies available to the Commission is not specified."* (Tentative Decision, fn.10)

CSR 4.13 describes only the procedures the Commission must follow once a hearing officer

has completed an appeal hearing and issued a recommendation to the commission. The Rule does not address, let alone define, the scope of the Commission's authority to issue remedies where a Rule 25 violation has been found. CSR 4.13 nowhere state that the Commission has the authority, as claimed here by Respondents, to issue *"remedies ... include[ing] reinstatement, suspension, or discharge of a County officer or employee."* (Motion, p. 9)

CSR 4.14, which is also cited by Respondents as authorizing the Commission to fashion remedies including *"reinstatement, suspension, or discharge of a County officer or employee"* (*Id*.) does not remotely relate to the notion of remedial authority of the Commission. This Rule provides, in its entirety:

> *"4.14 - Petitioner for judicial review.*
>
> *"A. The provisions of Section 1094.6 of the California Code of Civil Procedure shall be applicable to any petition for judicial review of a decision of the commission suspending, reducing or discharging an officer or employee.*
>
> *"B. Any such petition for judicial review shall be filed no later than the 90th day following the date the decision becomes final."*

Finally, and most directly, neither the *Hudson* decision nor the CSRs cited by Respondent in any manner authorize the Commission to issue the injunctive relief sought herein. In the absence of the jurisdiction to issue the relief actually sought in this court, there is no available administrative remedy for Petitioner to exhaust. *Williams & Fickett, supra*; see also, *Hill RHF Housing Partners, L.P. v. City of L.A.* (Dec. 20, 2021) No. S263734, 2021 Cal. LEXIS 8665, at *25 (*"A court may regard a given extrajudicial procedure as insufficient to justify application of the exhaustion rule in a particular case, or class of cases, without going further and determining whether the process can ever be regarded as an administrative remedy."*)

Respondents argue that the "futility" exception to the exhaustion rule only applies when *"the [agency] has declared what it's ruling will be on a particular case."* (Motion, p.7) In addition to being an overly strict interpretation of the exhaustion exceptions applicable to this case, it should be noted that the Commission has stated that it lacks jurisdiction to issue the injunctive relief sought from this Court:

> "*Commissioner Tevrizian: ... The Civil Service Commission does not have jurisdiction or power to issue an injunction but the Superior Court does."* (Transcript

of December 1, 2021 Agenda Meeting, Ex. B to Gibbons Dec. at p. 4)

The only issue pending before the Court at this time is Petitioner's application for a permanent injunction. The CSC does not have the authority to issue such relief. As such, there is no administrative remedy available for Petitioner to pursue.

As the Court has previously noted, Petitioner is authorized to engage in discovery to obtain the factual information which is solely in Respondents' possession and which is necessary to establish the factual basis necessary to establish its entitlement to the injunctive relief sought herein. See, e.g., *County of San Diego v. Superior Court* (1986) 176 Cal.App.3d 1009, 1024-1025. There is no justification to issue the stay order requested by Respondents herein.

CONCLUSION

In light of the Commission's stated lack of jurisdiction to issue the injunctive relief sought by Petitioner herein, there is no available administrative remedy for Petitioner to exhaust. Petitioner is entitled to conduct discovery to obtain evidence necessary to establish the necessary factual basis for the injunctive relief sought. As such, there is no basis for the issuance of the stay order requested herein.

Petitioner respectfully requests that the Court deny, in its entirety, the Stay order sought by Respondents and, in addition, set a hearing date on Petitioner's application for a permanent injunction at the Court's earliest convenience.

Dated: January 3, 2022

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)

DECLARATION OF ELIZABETH J. GIBBONS

I, Elizabeth J. Gibbons, hereby declare as follows:

1. I am an attorney at law, duly licensed to practice before all State and Federal Courts in the State of California. I am the attorney of record for Petitioner herein, the Association for Deputy District Attorneys of Los Angeles County ("ADDA") and have represented Petitioner at all times in respect to this case.

2. On December 8, 2021, this Court issued a tentative decision in the case entitled *Los Angeles Police Protective League v. City of Los Angeles*, Los Angeles County Superior Court Case No. 21STCV39987. After oral argument and on December 13, 2021, the Court adopted the tentative decision as its final decision in that matter. A copy of the Court's published tentative decision in the *LAPPL* case is attached hereto and marked as Exhibit "A."

3. On December 1, 2021, the Los Angeles County Civil Service Commission ("CSC") considered the application for hearings on the appeals by 9 members of Petitioner ADDA in the present case, at its regular Agenda meeting.

4. During the course of that agenda meeting item, Commissioner Tevrizin stated *"The Commission does not have jurisdiction or the power to issue an injunction but the Superior Court does."* A copy of the transcribed complete discussion by the Commission of Agenda items 7 through 15 on December 1, 2021 is attached hereto and marked as Exhibit "B."

5. I was present at and participated in the CSC Agenda Meeting on December 1, 2021, via Microsoft Teams virtual meeting. I have personally reviewed the transcript and compared it to the audio recording of the Agenda item, and the attached transcript is a true and correct transcription of the discussion of that Agenda item on December 1, 2021.

6. At the time the Commission granted the coordinated but not consolidated hearings on December 1, 2021, the Commission also directed that the hearing be scheduled on an expedited basis.

7. The Commission's Executive Director provided the parties with a Hearing Officer strike list on December 30, 2021. No dates for the hearing have yet been scheduled.

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I declare under penalty of perjury under the laws of the State of California is true and correct to the best of my knowledge.

Executed this 3rd day of January, 2022 at Los Angeles, California.

Elizabeth J. Gibbons

Elizabeth J. Gibbons

Exhibit “A”

LOS ANGELES POLICE PROTECTIVE LEAGUE v. CITY OF LOS ANGELES
Case No. 21STCV39987
Hearing Date: December 8, 2021

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, Los Angeles Police Protective League, seeks a preliminary injunction enjoining Defendant, City of Los Angeles, and its agents, employees and representatives from:

- Refusing to reopen negotiations between the Plaintiff and the City on all issues relating to mandatory Covid-19 testing of unvaccinated League represented employees and provide Plaintiff all relevant and necessary information during the meet and confer process regarding the City's exclusive Covid-19 testing contractor and scope of services;

- Implementing Ordinance No. 187134 without exhaustion of statutory collective bargaining impasse procedures, including refraining from mandating the Covid-19 testing of unvaccinated League employees at their own expense; and

- Enforcement of the Defendants' Notice of Mandatory COVID-19 Vaccination Policy Requirements While Awaiting Exemption/Appeal Determination required by the Defendants to be signed by unvaccinated LAPPL represented employees.[1]

The City opposes the motion.

The motion is DENIED.

FACTUAL BACKGROUND

On March 4, 2020, the City's Mayor declared "conditions of disaster or of extreme peril to the safety of persons and property have arisen both internationally and within the United States as a result of the introduction of the novel coronavirus (COVID-19) . . . ." (Girard Decl., ¶ 2, Ex. 1.)

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[1] Plaintiff originally included a request the City be enjoined from issuing a notice of impasse regarding meet and confer negotiations between Plaintiff and the City on the effects of the conditions of employment by the adoption of Mandatory Reporting and Vaccination Policy Ordinance No. 187134. As the City filed a notice of impasse with the Employee Relations Board (ERB) on October 28, 2021, the request is moot. (Girard Decl., ¶ 15.) Plaintiff appears to recognize as much as it lodged a proposed order with the court on December 1, 2021 eliminating the previously requested relief.

Two days later, on March 6, 2020, the Los Angeles City Council ratified the Mayor's declaration of emergency. (Girard Decl., ¶ 2.)

Consistent with section 8.27 of the Los Angeles Administrative Code (LAAC),[2] the City Council has reviewed and considered the need for continuing the City's state of emergency every 30 days. The City Council has repeatedly found a "local emergency continues to persist" within the City and the continuance of the Mayor's declaration of local emergency is necessary. (Girard Decl., ¶ 2, Ex. 1.) The City Council most recently did so on November 10, 2021. (Girard Decl., ¶ 2, Ex. 1.)

On August 18, 2021, the City Council adopted Ordinance No. 187134 (the Ordinance). (Girard Decl., ¶ 6.) The Ordinance "require[s] [a] COVID-19 vaccination for all current and future city employees." (Lee Decl., ¶ 4, Ex. A.) More specifically, the Ordinance provides:

> "To protect the City's workforce and the public that it serves, all employees must be fully vaccinated for COVID-19, or request an exemption, and report their vaccination status in accordance with the City's Workplace Safety Standards, no later than October 19, 2021.
>
> As of October 20, 2021, the COVID-19 vaccination and reporting requirements are conditions of City employment and a minimum requirement for all employees, unless approved for an exemption from the COVID-19 vaccination requirement as

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[2] LACC section 8.27 provides:

> "The Mayor is hereby empowered to declare the existence of a local emergency or disaster when he finds that any of the circumstances described in Section 8.22 hereof exist, or at any time a disaster or local emergency is declared by the President of the United States or the Governor of California. Said declaration by the Mayor shall be in writing and shall take effect immediately upon its issuance. The Mayor shall cause widespread publicity and notice to be given of such declaration through the most feasible and adequate means of disseminating such notice throughout the City.
>
> Whenever a local emergency is declared by the Mayor, the General Manager of the Emergency Management Department shall prepare, with the assistance of the City Attorney, a resolution ratifying the existence of a local emergency and the need for continuing the state of local emergency. The resolution shall be submitted by the Mayor to the City Clerk for presentation to the Council. The Council shall approve or disapprove the resolution within seven days from the date of the original declaration by the Mayor and at least every ten regular Council meeting days, but no longer than 30 calendar days, thereafter unless the state of local emergency is terminated sooner."

> a reasonable accommodation for a medical condition or restriction or sincerely held religious beliefs. Any employee that has been approved for an exemption must still report their vaccination status." (LACC § 4.701, subds. (a) and (b).)

Thus, the City adopted a policy requiring a COVID-19 vaccinated workforce by October 20, 2021. The City's policy exempts employees with medical conditions and restrictions and/or sincerely held religious beliefs from the vaccine requirement.[3]

In August 2021 and throughout October 2021, Plaintiff and the City negotiated the effects of and implementation procedures for the City's decision to adopt the Ordinance. (Lee Decl., ¶ 5.) The parties' negotiations included the consequences for noncompliance. (Lee Decl., ¶ 5.) The parties ultimately participated in 15 one-hour meet and confer sessions. (Lee Decl., ¶ 5; Girard Decl., ¶ 15, Ex. 10.)

The parties dispute their discussions in negotiations surrounding the COVID-19 testing vendor.[4] According to Plaintiff, its representatives "repeatedly sought information from the City bargaining representatives regarding details concerning the Covid-19 testing company and the scope of services of such private contractor . . . ." (Lee Decl., ¶ 6.) Plaintiff learned "Bluestone" would serve as the City's testing vendor sometime just before negotiations concluded. (Lee Decl., ¶ 7.) Plaintiff "subsequently discovered[5] through its own efforts that the name of the actual entity contracted with the City was PPS Health LLC dba Bluestone." (Lee Decl., ¶ 7.)

The City suggests Plaintiff's issues surrounding testing concerned who would bear the cost of such testing. The City supports its characterization of Plaintiff's concerns with Plaintiff's written proposals during negotiations. For example, as late in the negotiations as October 12, 2021, Plaintiff's proposal accepted twice weekly testing on the employee's own time, using the "vendor of [the City's] choosing," with the employee paying for the cost of such testing. (Girard Decl., ¶ 8, Ex. 3.)

On October 14, 2021, the City issued its last, best and final offer (the LBFO) concerning the consequences of an employee's failure to comply with the Ordinance. (Girard Decl., ¶ 9, Ex. 4.) The LBFO specifies those employees who have not complied with the vaccine mandate or applied for an exemption by October 20, 2021 will be issued a notice with an extension until December 18, 2021 if the employee agrees to become fully vaccinated or to apply for an

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[3] LACC section 4.702 provides that employees who are granted exemptions from the vaccine requirement are subject to weekly testing paid for by the City during working hours.

[4] The testing requirement is relevant in two ways. First, until the City considers an employee's exemption request, the employee would be subject to testing. Second, assuming the City grants an employee's exemption request, the City would be subject to testing through his or her employment with the City.

[5] Plaintiff does not specify when it learned the "actual entity" for testing. Thus, the court cannot determine whether it was before or after negotiations concluded.

exemption.[6] The LBFO also requires an employee who receives the notice to sign the notice "and to comply with its terms" as specified in the LBFO. (Girard Decl., ¶ 10, Ex. 4 p. 2.) Finally, the LBFO requires an employee to submit to COVID-19 testing pending any exemption decision by the City for that employee. (Girard Decl., ¶ 10.)

On the date the City issued its LBFO, October 14, 2021, Plaintiff and the City executed a letter of agreement specifying "the parties engaged in the meet and confer process over the impacts of the Ordinance and the implementing procedures" and "agree that they have concluded the meet and confer process in good faith." (Lee Decl., ¶ 9, Ex. B.) The agreement acknowledged the City would be "implement[ing] the terms and conditions set forth in [the LBFO] provided on October 14, 2021." (Lee Decl., ¶ 9, Ex. B.)

On October 15, 2021, Plaintiff's counsel sent an email to Paul Girard, the City's Senior Labor Relations Specialist in the Office of the City Administrative Officer, thanking the City "for the on-going good faith negotiations regarding the vaccine mandate." (Girard Decl., ¶ 12, Ex. 6.) The email does not make any reference to Bluestone, the testing vendor disclosed just before negotiations concluded. (Girard Decl., ¶ 12, Ex. 6; Lee Decl., ¶ 7.)

On October 18, 2021, the parties signed a letter of intent. The letter indicated the parties agreed that the meet and confer process had concluded "and the City plans to impose its [LBFO] which shall be subject to exhaustion of available impasse procedures." (Lee Decl., ¶ 9, Ex. C.)

On October 21, 2021, Plaintiff inquired of the City by email: "Just to confirm that the twice weekly testing will consist of a saliva test conducted by Bluestone and employees must not eat, drink or smoke one hour prior to the test. Right?" (Girard Decl., ¶ 13, Ex. 7.) The City confirmed Plaintiff's understanding nine minutes later. (Girard Decl., ¶ 13, Ex. 7.)

On October 22, 2021, Plaintiff's President sent a letter to the City expressing appreciation for "the continued dialogue and good faith negotiations over the impacts of the ordinance . . . ." (Girard Decl., ¶ 13, Ex. 8.) Plaintiff's President also reported the financial obligation for testing was a significant financial burden. (Girard Decl., ¶ 13, Ex. 8.) Plaintiff's President concluded his letter "reiterat[ing] [Plaintiff's] position that all testing requirements contained within the City's LBFO be SARS-CoV-2 Saliva Tests and that the City pay for those tests." (Girard Decl., ¶ 13, Ex. 8.) Plaintiff's President's letter did not mention Bluestone.

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[6] Where an employee does not sign the notice or comply with its terms and conditions, including the testing requirement, the employee:

> "will be immediately placed off duty without pay pending pre-separation due process procedures, served with a written notice of proposed separation from City employment for failing to meet a condition of employment, and subject to disciplinary Board of Rights facing termination." (Rico Decl., ¶ 4.)

On October 26, 2021, the City Council adopted its resolution implementing consequences for non-compliance with the requirements of Ordinance No. 187134. (Lee Decl., ¶ 10, Ex. D.) The resolution:

- Declared the existence of an emergency pursuant to Government Code section 3504.5 and LACC section 4.850, subdivision (b) such that the resolution became effective immediately;[7]
- Declared a stalemate in negotiations on the consequence for non-compliance with the mandatory vaccine requirement condition of employment (Ordinance 187134);
- Instructed that the City file a notice of impasse with the City's ERB;
- Found the City could not "wait for exhaustion of collective bargaining impasse procedures (which take up to a year to complete) to address the imminent threat to public safety and workplace safety posed by allowing unvaccinated City employees to remain in the workplace and to continue to interact with the public and other City employees;"
- The COVID-19 pandemic "has created a catastrophic public health emergency beyond the City's control sufficient to excuse the City from its normal duty to complete the meet and confer process prior to acting on its decision to impose consequences for non-compliance" with the mandatory vaccine requirement conditions of employment as set forth in the City's LBFO;
- A compelling need exists to take unilateral action to protect the public "especially with regard to the City's unvaccinated first responders who regularly interact with vulnerable members of the public while performing their duties;" and
- Instructing that the terms and conditions of the LBFO regarding consequences of non-compliance with the vaccine mandate be implemented immediately. (Lee Decl., ¶ 10, Ex. D.)

On October 28, 2021, the City filed a notice of impasse with its ERB. (Girard Decl., ¶ 15, Ex. 10.)

On that same date, Plaintiff sent a letter to the City demanding the City "refrain from issuing a Notice of Impasse . . . ." (Girard Decl., ¶ 15, Ex. 11; Lee Decl., ¶ 15.) Plaintiff wrote:

> ". . . [Plaintiff] has recently received information regarding the City's exclusive Covid-19 testing contractor Bluestone, and what appears to involve issues of

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[7] LACC section 4.850, subdivision (b) provides:

> "In cases of emergency, when such an ordinance, rule, resolution or regulation must be adopted immediately without prior notice to qualified employee organizations effected, notice shall be given by the appropriate determining body or official, and an opportunity to consult shall be given to each organization subject to the restrictions on the right to consultation contained in Section 4.830(b) at the earliest practical time following the adoption of such ordinance, rule, resolution or regulation."

> conflicts of interests at best, and at worst—criminal or unethical conduct involving City officials. Based on such newly discovered information[8] acquired subsequent to [Plaintiff's] execution of the Letter of Agreement regarding the City's [LBFO], it has become clear that the City of Los Angeles failed to negotiate in good faith regarding the City-contracted Covid-19 testing company which would be the City's sole authorized vendor to administer the mandatory Covid-19 testing of unvaccinated [Plaintiff's] represented employees at their own expense." (Girard Decl., ¶ 15, Ex. 11; Lee Decl., ¶ 12.)[9]

In its October 28, 2021 letter, Plaintiff also demanded the City:

> "cease and desist from unilaterally implement[ing] Ordinance No. 187134 without the exhaustion of statutory collective bargaining impasse procedures where, in light of the facts, it cannot demonstrate the existence of any 'emergency' within the meaning of Government Code section 3504.5 (b) and/or Los Angeles Administrative Code Section 4.850(b)." (Girard Decl., ¶ 15, Ex. 11.)

On November 8, 2021, Plaintiff filed its unfair employee relations practice claim against the City with the City's ERB. (Girard Decl., ¶ 15, Ex. 11.) Among other things, the claim alleges the City withheld "relevant and necessary information during the meet and confer process regarding the City's exclusive Covid-19 testing contractor." (Girard Decl., ¶ 15, Ex. 11.)

This action ensued.

LEGAL STANDARD

The standards governing a preliminary injunction are well known. "[A] court will deny a preliminary injunction unless there is a reasonable probability that the plaintiff will be successful on the merits, but the granting of a preliminary injunction does not amount to an adjudication of the merits." (*Beehan v. Lido Isle Community Assn.* (1977) 70 Cal.App.3d 858, 866.) "The function of a preliminary injunction is the preservation of the status quo until a final determination of the merits." (*Ibid.*)

As the parties recognize, "Trial courts traditionally consider and weigh two factors in determining whether to issue a preliminary injunction. They are (1) how likely it is that the

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[8] Corina Lee, a member of the Board of Directors for Plaintiff, attests Plaintiff "discovered" its concerns about Bluestone on October 26, 2021. (Lee Decl., ¶ 12.) The issues raised by Plaintiff concern Bluestone's ownership by a Los Angeles Fire and Police Pension Commissioner and his brother. (Lee Decl., ¶ 12.) Lee attests both owners of Bluestone "made political contributions to various City Councilpersons and City Attorney Mike Feuer during 2020-2021." (Lee Decl., ¶ 12.)

[9] As to Bluestone, the letter does not allege the City failed to provide the identity of the testing vendor.

moving party will prevail on the merits, and (2) the relative harm the parties will suffer in the interim due to the issuance or nonissuance of the injunction." (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1420.) "[T]he greater the . . . showing on one, the less must be shown on the other to support an injunction." (*Ibid.* [quoting *Butt v. State of California*, (1992) 4 Cal.4th 668, 678].) The burden of proof is on the plaintiff as the moving party "to show all elements necessary to support issuance of a preliminary injunction." (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481.)

Preliminary injunctive relief requires the use of competent evidence to create a sufficient factual showing on the grounds for relief. (*See e.g., Ancora-Citronelle Corp. v. Green* (1974) 41 Cal.App.3d 146, 150.) A plaintiff seeking injunctive relief must also show the absence of adequate damages remedy at law. (Code Civ. Proc. § 526, subd. (a)(4).)

A preliminary injunction ordinarily cannot take effect unless and until the plaintiff provides an undertaking for damages which the enjoined defendant may sustain by reason of the injunction if the court finally decides that the plaintiff was not entitled to the injunction. (*See* Code Civ. Proc. § 529, subd. (a); *City of South San Francisco v. Cypress Lawn Cemetery Assn.* (1992) 11 Cal. App. 4th 916, 920.)

ANALYSIS

Likelihood of Success on the Merits

Plaintiff makes three related arguments to support its position it is entitled to a preliminary injunction. First, Plaintiff contends the City violated the Meyers-Milias-Brown Act (the Act), Government Code section 3500 *et seq.*, by bargaining in bad faith regarding the effects of implementing the consequence of an employee's failure to comply with the Ordinance. Second, the City had an obligation to exhaust applicable impasse procedures and violated the Act when it did not do so. Finally, Plaintiff argues no bona fide emergency exists relieving the City of its obligation to exhaust statutorily required impasse procedures.[10]

The court addresses the issues raised by Plaintiff in reverse order.

[10] Plaintiff's Verified Complaint for Declaratory and Injunctive Relief; Petition for Writ of Mandate is similar. In addition, it alleges Labor Code section 2802 dictates that the City pay for any required COVID-19 testing. (See Complaint ¶¶ 27, 31, 36.) The City has not yet resolved whether the testing expense is reimbursable pursuant to Labor Code section 2802. (Girard Decl., ¶ 10.) The City represented during argument for those employees who have an approved exemption, the City will ultimately be responsible for the costs of testing.

Plaintiff Has Not Demonstrated the City Abused its Discretion With its Declaration of Emergency

Plaintiff argues, "The City cannot show, however, that Government Code section 3504.5 is applicable in light of the circumstances of this case, nor can determine in advance the duration of the impasse resolution process." (Motion 17:24-26.) Plaintiff contends no emergency exists in the City because (1) the City's declaration of emergency is stale as it was issued nearly one-and-a-half years ago; (2) the City waited until August 2021 to take steps to develop a vaccination policy and meet with labor unions; (3) the City allowed its compliance deadline to be extended from October 2021 to December 2021; and (4) unvaccinated and masked peace officers have been interacting with the public and other City employees for nearly one-and-a-half years creating no imminent threat to public health and safety or workplace safety. (Motion 18:11-21.) Plaintiff's argument, however, ignores the applicable standard of review.

Judicial review of a City's declaration of an emergency "is one of pronounced deference to the legislative decision." (*Sonoma County Organization of Public/Private Employees, Local 707, SEIU, AFL-CIO v. County of Sonoma* (1991) 1 Cal.App.4th 267, 276 [*Sonoma County*].) The challenger bears the burden of demonstrating the City abused its discretion when it declared an emergency. "This reflects the long-standing rule that '[i]n passing on the validity of an ordinance . . . it will be presumed that it is valid. He who would claim that it is invalid must assume the burden of showing its invalidity.' " (*Id.* at 275.)

Recitals of emergency contained in an ordinance constitute "prima facie evidence of the fact of the emergency." (*Id.* at 276.) Moreover:

> " ' "In the absence of evidence to the contrary it will be assumed that a municipal legislative body in enacting an emergency ordinance acted on sufficient inquiry as to whether an emergency existed. Its declaration is prima facie evidence of the fact. Where the facts constituting the emergency . . . are recited in the ordinance and are such that they may reasonably be held to constitute an emergency, the courts will not interfere, and they will not undertake to determine the truth of the recited facts." (Citation.) ' " (*Id.* at 275-276 quoting *Northgate Partnership v. City of Sacramento* (1984) 155 Cal.App.3d 65, 69.)

The City's resolution declaring an emergency and implementing consequences for the failure of an employee to comply with Ordinance sets forth more than three pages of recitals. The recitals state in part:

- The Mayor declared an emergency based on COVID-19 on March 6, 2020 and the City Council has "repeatedly renewed the Mayor's March 4, 2020 Declaration of Local Emergency, most recently on September 21, 2021;"
- "the COVID-19 pandemic continues to change and evolve, and as such emergency orders and directives will continue to be necessary;"

- "compulsory immunization has long been recognized as the gold standard for preventing the spread of contagious diseases;"
- "vaccination is the most effective way to prevent the spread of COVID-19 and to limit COVID-19 hospitalizations and deaths;" and
- As of October 18, 2021, of the City's 53,168 employees, 1,250 employees have reported they are partially vaccinated, 4,872 employees have reported they are not vaccinated and 7,683 employees have failed to disclose their vaccination status. (Lee Decl., Ex. D.)

Plaintiff has failed to establish the City abused its discretion when it declared an emergency in the resolution implementing consequences for an employee's failure to comply with the Ordinance. Plaintiff has presented no evidence to support its claim that an emergency related to COVID-19 does not exist. Plaintiff's arguments based on the length of the pandemic and original declaration of emergency as well as the alleged delay by the City to take action on a vaccine mandate are unpersuasive.

Plaintiff's first claim: The City's declaration of emergency is stale as it was issued nearly one-and-a-half years ago.

While it is accurate the Mayor first declared an emergency on March 4, 2020 and that the City Council ratified that declaration on March 6, 2020, the City Council has *continuously and repeatedly* renewed the Mayor's March 4, 2020 declaration of emergency every 30 days as it is required do to by law. (LACC § 8.27.) (Girard Decl., ¶ 2.) Each time the City Council has considered the declaration of emergency, it has found a "local emergency continues to persist within the City . . . ." (Girard Decl., ¶ 2, Ex. 1.) The City Council most recently considered and found an emergency exists in the City on November 10, 2021, less than 30 days ago. (Girard Decl., ¶ 2, Ex. 1.) Thus, it is simply inaccurate to characterize the City's declaration of emergency having been made over one-and-a-half years ago and that no *current* emergency exists.

Plaintiff's second claim: The City waited until August 2021 to take steps to develop a vaccination policy and meet with labor unions.

Presumably, Plaintiff's argument is the City's alleged delay in developing a vaccine mandate policy demonstrates no emergency exists. That is, the City delayed from March 6, 2020 when it ratified the Mayor's declaration of emergency until August 2021 to formulate its vaccine policy after consultation with labor representatives. (See Girard Decl., ¶ 5.) Plaintiff's argument suggests had there been a bona fide emergency the City would not have waited 17 months from the declared emergency to formulate the policy.

The City reports several factors informed on the timing of its action. First, and perhaps most importantly, COVID-19 vaccines were even not available to all adults in California until April 1, 2021. (Opposition 12 fn. 4 [Governor's press release].) Until that time vaccine supply available to the general public had been limited. (Opposition 12 fn. 4 [Governor's press release].) On July 26, 2021, the state issued a public health order mandating vaccines for unvaccinated workers in

high-risk congregate settings. (Girard Decl., ¶ 4, Ex. 2.) Just two days later, the City acted (through the Mayor) by issuing a directive that the personnel department develop a vaccination program for all City employees after consulting with the City's labor partners. (Girard Decl., ¶ 5.)

Given the circumstances and the relevant timeline, the court is unpersuaded the City's actions were unreasonable and belie its finding of emergency.[11]

Plaintiff's third claim: The City allowed its compliance deadline to be extended from October 2021 to December 2021.[12]

Plaintiff again implies the City's actions belie its finding and declaration of emergency. Plaintiff suggests if a bona fide emergency existed, it would be unreasonable for the City to extend the compliance deadline for employees.

The City argues its October 20, 2021 compliance date never changed. (Girard Decl., ¶ 10.) Instead, those employees who had not complied with the Ordinance were given a notice to comply. Once the City provided the notice, Plaintiff's members who received the notice were required to sign and return the notice—with their promise to become fully vaccinated by December 18, 2021 or apply for an exemption by that time—within 48 hours to their commanding officers. (Motion 7:21-22.)

The City knew as of October 18, 2021—prior to the Ordinance compliance date—it had 4,872 employees who were not vaccinated, 1,250 employees who were partially vaccinated, 1,839 employees who had declined to provide the City with their vaccination status and 7,683

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[11] Plaintiff's reliance on *BST Holdings, L.L.C. v. Occupational Safety and Health Administration, United States Department of Labor,* 17 F.4th 604 (5th Cir. 2021) [*BST Holdings*] is unavailing. The authority is inapposite. First, unlike here, the plaintiffs raised a constitutional challenge to the authority of the Occupational Safety and Health Administration (OSHA) to issue a vaccine mandate for all employers of more than 100 employees. Second, OSHA previously determined in June 2020 an emergency temporary standard was unnecessary to protect working people from infectious disease, including COVID-19. Thus, OSHA's about face was inconsistent with and belied a claim of emergency 17-months later. Plaintiff does not suggest how *BST Holdings* informs on this court's standard of review as enunciated in *Sonoma County*.

[12] Plaintiff raises a new argument about delay in its reply. Plaintiff reports "the City delayed the mandatory Covid-19 testing of unvaccinated employees to the week of November 22, 2021." (Reply 14:5-6.) As the fact arose after Plaintiff filed its moving papers, the court may properly consider the issue. In the court's view, a two-week delay in mandatory testing does not undermine the City's declaration of emergency. This is especially true given the size of the City's workforce (53,168) with nearly 10 percent of the City's workforce having applied for an exemption from the vaccine requirement and the obvious logistics of testing. Indeed, Plaintiff reports the first day of testing was "riddled with administrative confusion . . . ." (Lee Supp. Decl., ¶ 9.)

employees who had failed to report their vaccination status. (Lee Decl., Ex. D, p. 2.) Thus, just before the Ordinance's compliance deadline, the City knew 29.4 percent of its workforce were not fully vaccinated and subject to "corrective action, i.e., involuntary separation from City employment for failure to meet a condition of employment."[13] (Girard Decl., ¶ 10.)

The City's deadline extension required an employee to commit to becoming fully vaccinated or to submitting an exemption request. The manner in which the City provided employees additional time to comply did not require the City to wait and see whether employees would comply. Instead, the City extended the compliance deadline only for those employees who represented they would comply. That the City balanced its own workforce needs (and an attempt to maintain its workforce) in an effort to obtain employees' compliance with the Ordinance was not unreasonable.

Plaintiff's fourth claim: Unvaccinated and masked peace officers have been interacting with the public and other City employees for nearly one-and-a-half years creating no imminent threat to public health and safety or workplace safety.[14]

Plaintiff posits COVID-19 does not present a health and safety risk to the community or the workplace because unvaccinated peace officers wear masks. Plaintiff seemingly contends—without any evidentiary showing—the use of masks provides safety similar to that provided by vaccines such that the use of masks negates the COVID-19 emergency. Plaintiff's position also appears to suggest unvaccinated peace officers have not raised any safety issues to the community or workplace since March 6, 2020.

The court notes the evidence before the court undermines Plaintiff's position about masking and safety. Since March 2020, despite the use of masks, COVID-19 has impacted the police department workplace. For example, ten police department employees (seven sworn and three civilian) have died from COVID-19 exposure. (Taft Decl., ¶ 8.) Another 3,244 police department employees (2,659 sworn and 585 civilian) reported positive COVID-19 test results. (Taft Decl., ¶ 5.) Finally, 63 police department employees (56 sworn and 7 civilian) have not reported to work during some period and have remained at home in self-quarantine or recovering from COVID-19 symptoms. (Taft Decl., ¶ 6.)

Additionally, the expert evidence before the court indicates vaccines play "a crucial role in limiting spread of the virus and minimizing severe disease." (Gregg Decl., Ex. 2 [CDC guidance], p. 2.) Vaccination provides the best protection against the disease. (Gregg Decl., Ex. 2 [CDC guidance], p. 2.) The Center for Disease Control and Prevention recommends "layered prevention strategies, including wearing masks" even where an individual has been vaccinated

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[13] Another 10 percent of the City's workforce had or intended to file a request for an exemption. (Lee Decl., Ex. D, p. 2.)

[14] Plaintiff may have abandoned this argument as it is not addressed in its reply. (Reply 13:24-14:6.)

if that person is in "an area of substantial or high transmission." (Gregg Decl., Ex. 2 [CDC guidance], p. 2, Ex. 8 [CDC guidance], p. 2.)

Based on the foregoing, the court finds Plaintiff has no likelihood of success on the merits of its claim the City's declaration of emergency constitutes an abuse of discretion. Plaintiff arguments do not meet its burden.

The City's Declaration of Emergency Excused Completion of the Meet and Confer Process

There is no dispute the Act allows the City to implement its resolution concerning the consequences of an employee's failure to comply with the Ordinance without completing the meet and confer process. Government Code section 3504.5, subdivision (b) provides:

> "In cases of emergency when the governing body . . . determine[s] that an ordinance, . . . [or] resolution, . . . must be adopted immediately without prior notice or meeting with a recognized employee organization, the governing body . . . . shall provide notice and opportunity to meet at the earliest practicable time following the adoption of the ordinance, . . . [or] resolution, ..."

(See also *Sonoma County, supra,* 1 Cal.App.4th at 274 [whether County's "noncompliance was excused by an emergency as expressly contemplated" by the Act]; LACC 4.850, subd. (b).)[15]

As Plaintiff has not demonstrated a likelihood of success of meeting its burden of demonstrating the City's declaration of emergency was an abuse of discretion, the Act allows the City to immediately implement the resolution without completing the Act's impasse procedures.

Whether the City Failed to Bargain in Good Faith in Violation of the Act

Plaintiff contends the City violated the Act and the LACC and engaged in bad faith bargaining. Plaintiff reports the City withheld "relevant and necessary information during the meet and confer process regarding the City's exclusive Covid-19 testing contractor . . . ." (Motion 14:9-11.) The City withheld the relevant information, according to Plaintiff, "while inflexibly insisting that the vaccination mandated policy inclusive of Covid-19 testing of unvaccinated employees must be at the employees expense." (Motion 14:11-13.)

Plaintiff provides evidence its negotiators specifically requested information from the City about the "identity of the City's exclusive private provider of Covid-19 testing." (Lee Supp. Decl., ¶ 5.) Plaintiff's negotiators also asked for a "copy of the contract between the testing vendor and the City setting forth the terms and conditions of such services." (Lee Supp. Decl., ¶ 5.)

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[15] The City has also cited an August 25, 2011 ERB decision—No. U-214. No party, however, has provided the court with a copy of the decision, and the court has no access to it.

The City initially argues Plaintiff has failed to exhaust its administrative remedies before the ERB. Only after the ERB has considered the matter, according to the City, may Plaintiff seek judicial review. (Opposition 6:26-7:3.) The City labels Plaintiff's action premature because Plaintiff filed its unfair practice charge with the ERB on November 11, 2021 and the matter is pending before the ERB.

The court will first address the City's exhaustion argument.

The City is correct concerning the ERB's authority; the ERB has the "power and responsibility to take actions on . . . all unfair practices, and to issue determinations and orders as the [ERB] deem[s] necessary, consistent with and pursuant to the policies" of the Act. (Gov. Code § 3509, subd. (d).) The ERB has "exclusive initial jurisdiction over complaints alleging unfair labor practices" under the Act. (*See County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 916.)

"Generally, 'a party must exhaust administrative remedies before resorting to the courts . . . .' " (*Hill RHF Housing Partners, L.P. v. City of Los Angeles* (2020) 51 Cal.App.4th 621, 631 [citation omitted][rev. granted Sept. 16, 2020].) " 'The exhaustion doctrine is principally grounded on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary).' " (*Id.* at 632 [quoting *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 391].)

The exhaustion inquiry looks not just at the concreteness of the controversy, but at whether the parties have proceeded "through the full administrative process 'to a final decision on the merits.' " (*California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1489 [citation omitted].) "Under California law, exhaustion of administrative remedies is not a matter of judicial discretion but is a *jurisdictional* rule of procedure that forecloses judicial review until it is satisfied." (*Public Employees' Retirement System v. Santa Clara Valley Transportation Authority* (2018) 23 Cal.App.5th 1040, 1046.)

As noted, "[t]he principal purposes of exhaustion requirements include avoidance of premature interruption of administrative processes, allowing an agency to develop the necessary factual background of the case; letting the agency apply its expertise and exercise its statutory discretion, and administrative efficiency and judicial economy." (*California Water Impact Network v. Newhall County Water Dist., supra,* 161 Cal.App.4th at 1489.)

"[A]n order of an administrative agency attains administrative finality when the agency has exhausted its jurisdiction and possesses no further power to reconsider or rehear the claim." (*Lomeli v. Department of Corrections* (2003) 108 Cal.App.4th 788, 795.)

" 'The doctrine requiring exhaustion of administrative remedies is subject to exceptions.' " (*Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, 1274.) The exceptions are flexible. (*Ibid.*) One such exception is " 'when the administrative agency cannot provide an adequate remedy.' " (*Ibid.*)

Plaintiff provides evidence the ERB does not have the authority to issue an immediate restraining order or injunctive relief. (Levine Decl., ¶ 4. [ERB Executive Director's statement: "The ERB Ordinance and Rules do not provide a method for the Board to provide an immediate restraining order/injunctive relief. The Board meets once a month, and the staff has no independent authority or capability to grant such relief."]) Thus, based on the City's findings, Plaintiff will unable to exhaust its administrative remedies before the ERB for up to one year. (See Lee Decl., Ex. D, p. 4.)

The court finds Plaintiff's failure to exhaust its administrative remedies is excused for purposes of its request for a preliminary injunction. The ERB has no ability to provide Plaintiff with immediate relief. Plaintiff's alleged harm—reputational harm and weakened support for the union—is ongoing and will be compounded over time. Given the length of time necessary to resolve Plaintiff's claims before the ERB, Plaintiff is not required to wait before it can attempt to obtain relief to eliminate its alleged ongoing harm.

At argument, the City's attorney disclosed that on November 29, 2021, ERB instructed the parties to engage in mediation. Consequently, the parties are currently in the process of initiating mediation to address the impasse.

Having addressed exhaustion, the court now addresses the merits of the Plaintiff's substantive argument.

In response to Plaintiff's evidence supporting its bad faith bargaining allegation, the City provides contrary evidence. The City contends it responded to all of Plaintiff's inquiries concerning the testing requirement. The City also notes Plaintiff never alleged in any contemporaneous writing that the City failed to provide Plaintiff with the identity of the testing vendor—even after it discovered Bluestone's ownership information. (Girard Decl., Ex. 11.) In fact, the City provides evidence Plaintiff's questions concerning testing throughout negotiations concerned only the testing method (saliva) and cost.

The City also contends it is not required to bargain under the Act about its selection of a testing vendor. Plaintiff may be able to demonstrate otherwise at trial. The testing vendor logically informs on costs that may ultimately be borne by Plaintiff's members. Certainly, the financial consequences of the Ordinance relates to "wages, hours, and other terms and conditions of employment . . . ." (Gov. Code § 3505.)

Depending upon the resolution of disputed facts, Plaintiff may have some ability of prevailing on the merits of its unfair practices claim. Plaintiff's evidence (albeit submitted in reply) specifically states Plaintiff's negotiators specifically requested the identity of the City's testing

vendor. (Lee Supp. Decl., ¶ 5.) In response to the request, the City typically responded "that it was unaware of such information."[16] (Lee Supp. Decl., ¶ 5.) The evidence reflects, however, the City knew the vendor's identity at some point in the negotiations because the City had entered into a contract with Bluestone on or about September 27, 2021. (Lee Decl., Ex. F.)

After considering all of Plaintiff's substantive claims and the evidence provided, the court finds Plaintiff has demonstrated at least some likelihood of success on its claim the City violated the Act by withholding requested information during the bargaining process. As to the balance of the claims raised by Plaintiff (the City's emergency declaration and failure to comply with impasse resolution requirements), the court finds no likelihood of success on the merits based on Plaintiff's evidentiary showing.

Balance of Harms

The second part of the preliminary injunction analysis requires the court to evaluate the harm the plaintiff is likely to sustain if the preliminary injunction is denied compared to the harm the defendant is likely to suffer if the injunction is issued. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70.) "However, '[a] trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim.' " (*Law School Admission Council, Inc. v. State of California* (2014) 222 Cal.App.4th 1265, 1280 [quoting *Butt v. State of California* (1992) 4 Cal.4th at 678].)

Additionally, "public policy considerations also come into play" where the defendant is a public agency and the plaintiff "seeks to restrain [it] in the performance of [its] duties." (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471.) "There is a general rule against enjoining public officers or agencies from performing their duties. . . . This rule would not preclude a court from enjoining unconstitutional or void acts, but to support a request for such relief the plaintiff must make a significant showing of irreparable injury." (*Ibid.*)

Plaintiff identifies the harm it will suffer if the injunction is not granted as "irreparable harm to [its] collective bargaining rights that cannot be subsequently remedied."[17] (Motion 8:2-3.) It notes the court's failure to enjoin the City's actions will deprive Plaintiff of its "statutory rights

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[16] The City has not introduced any evidence otherwise that matches the specificity of that provided by Plaintiff. Of course, as noted, Plaintiff introduced the evidence in reply. During argument, the City suggested Girard's declaration did dispute the evidence on the issue introduced by Plaintiff. From the court's perspective, Lee's statement is more persuasive because she was more specific about the information Plaintiff requested during negotiations.

[17] During argument, Plaintiff suggested it had alleged irreparable harm to its members. Plaintiff's moving papers do not so allege. While it is correct that Plaintiff's General Counsel explained non-compliant employees would be subject to termination, the moving papers focused solely on reputational harm to Plaintiff. (Motion 8:1-6, 13:14-21, 19-20.)

to engage in good-faith bargaining, including the right to engage in impasse procedures prior to the implementation of changes to working conditions for its members . . . ." (Motion 13:17-19.) Finally, Plaintiff notes "[t]he 'failure to bargain in good faith[] has long been understood as causing an irreparable injury to union representation.' (*Frankl ex rel. NLRB v. HTH Corp.* (9th Cir. 2011) 650 F.3d 1334, 1362.)" (Motion 19:21-22. See also Lee Decl., ¶ 18.)[18]

The court recognizes a refusal to bargain in good faith generally erodes union representation and constitutes irreparable harm. (*Small v. Avanti Health Systems, LLC,* 661 F.3d 1180, 1191-1192 (9th Cir. 2011), *Frankl ex rel. NLRB v. HTH Corp., supra,* 650 F.3d at 1362.) As noted by the City, however, cases considering the issue have considered it in the context of a failure of an employer to *recognize or bargain with* a recognized employee organization.

The City argues Plaintiff's injury to union representation is not the "significant showing of irreparable injury" required. (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd., supra,* 23 Cal.App.4th at 1471.) The City argues the Ordinance and resolution are "matter[s] of significant public concern and provisional injunctive relief which would deter or delay [the City] in the performance of their duties would necessarily entail a significant risk of harm to the public interest." (*Id.* at 1473.) (See Opposition 14:3-12.)

Considering the evidence before the court and balancing competing harms, the court finds the balance of harms weighs in favor of the City.

According to the evidence, the proceedings before the ERB on the unfair labor practices claim are likely to take up to a year to complete. The ERB will have the authority to issue a proper and appropriate remedy if it finds the City engaged in an unfair labor practice.

As noted earlier, according to the City's attorney, on November 29, 2021, the ERB instructed the parties to engage in mediation to address the impasse issue—thus, it appears the parties are already participating (or on the precipice of) participating in impasse procedures. Once those impasse procedures begin, the harm experienced by Plaintiff is eliminated because the City will be engaging in statutorily required statutory impasse procedures.

An order enjoining the City from implementing Ordinance 187134 and/or enforcement of the City's resolution for non-compliance with the Ordinance raises significant public safety issues about which there is no dispute in the evidence. The harm created by enjoining implementation of the Ordinance and resolution subjects City employees to the risk of substantial and irreparable physical harm in the workplace.[19] Moreover, given peace officer involvement in the

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[18] To the extent Plaintiff argues its members will suffer an economic harm because its members will have to bear the cost, such harm is not irreparable and presumably may be addressed and remedied by the ERB. (See Motion 20:4-8.)

[19] According to the expert evidence before the court:

> "As of October 5, 2021, there have been over 235,000,000 cases of COVID-19 and over 4,800,000 COVID-19 deaths reported worldwide. There have been over

community, the community would be subjected to similar risks. Such harm to the community and the City's workforce, in the court's view, substantially outweighs the reputational harm—which has now initially been addressed by the ERB with an instruction the parties engage in mediation—that will be suffered by Plaintiff pending resolution by the ERB.

CONCLUSION

Accordingly, the motion for a preliminary injunction is denied on the facts presented.

IT IS SO ORDERED.

December 13, 2021

Hon. Mitchell Beckloff
Judge of the Superior Court

2,000,000 cases of COVID-19 hospitalizations in the U.S., and nearly 700,000 deaths in the U.S., with the majority of those deaths having been in older adults. However, severe illnesses and deaths due to COVID-19 can occur in individuals of all ages, including previously healthy individuals." (Manoukian Decl., ¶ 8.)

Exhibit “B”

President Donner: Let's call the next item. I would just like to note that items 7 through 15 are all similar and I think to just, since the documents submitted on all the cases are similar, just for coordination purposes only, it might be good to just hear these all at one time rather than trying to break these down individually at the moment, because of the similarity in the letters and the positions by both parties. Is that okay with the other Commissioners?

Comm. Duran: I am going to have to recuse myself in the matters from 7 through 15 involving the District Attorneys in order to avoid any conflict of interest.

President Donner: Alright. Thank you. Commissioner Duran has recused himself from the items 7 through 15. Luz, why don't you call the items, please.

Comm. Staff
Luz Delgado: Okay. Request for hearing on their failure to promote, item 7 - Anya Artan, item 8 - Angela Brunson, item 9 - Angie Christides, item 10 - Kristiana Dietzel, item 11 - Maribel Estrela Bean, item 12 - Lauren Guber, item 13 - Daniel Kinney, item 14 - Kevin, I'm sorry, Keith Koyano, and item 15 Christina Young.

President Donner: Alright. Will the parties introduce themselves please?

Elizabeth Gibbons: Thank you Commissioner Duran. Good morning Commissioners. Elizabeth Gibbons on behalf of all of the Petitioners just named.

President Donner: For the Department?

Geoff Sheldon: Good morning Commissioners. Geoff Sheldon, Liebert Cassidy Whitmore on behalf of the District Attorney's Office.

President Donner: Alright, Ms. Gibbons your ... submitted this petition. We will start with you first, please.

Ms. Gibbons: Thank you President Duran.

President Donner: Donner.

Ms. Gibbons: Donner. I'm sorry.

President Donner: Like the reindeer.

Ms. Gibbons: I should know that by now. I apologize.

President Donner: No, no problem.

Ms. Gibbons: You've been called worse, right?

President Donner: Yeah, I have, but we won't go there.

Ms. Gibbons: Excellent. I did last week file amended petitions for each of these Petitioners based on the District Attorney's hiring of three additional public defenders in, on I believe it was November 18th they were hired, so we filed those petitions as soon as we found out about them. The only reason that we wanted to amend to add those people is because the problem that we're facing right now is that the District Attorney, despite this pending Civil Service proceeding and a proceeding in the Superior Court, continues to act to defeat any potential remedy for us in this case. By hiring three more public defenders, he has clearly shown that despite all of the remarks by this Commission, the District Attorney has no intention of stopping his program of hiring these unqualified public defenders and the more of them that he hires, the less opportunity there is for this Commission to have to issue any meaningful remedy in the case. We are also requesting as I mentioned in the amended petitions that these, that this hearing be scheduled as soon as possible. The first of these hearings was granted back in July and according to the Commission's rules, the hearing was supposed to take place within 45 days. The Commission's Executive Director, who I would submit has not acted impartially in this matter since he took sides with the, with the District Attorney in the Superior Court litigation, has just failed to send out a hearing officer list or make any effort to set this for hearing, and ...

President Donner: Can I just interrupt first and apologize for the, for the delay, but let me explain that an error was made by staff. There was no conspiracy here. The ... it went from the agenda people to the assign a hearing officer people and it fell through the cracks so I apologize for that and I understand that the names have been now forwarded since to the parties. Secondly, I did read the, I did read the statements from our Executive Director and I found it very bland, all he was saying was this is what we do and did not take, I don't think, I did not see him taking sides in that document and at this point I don't see him recusing himself, just so we can get over that hurdle and address these additional cases you have filed with us. Okay?

Ms. Gibbons: Okay. I don't agree that he didn't take sides because the specific issue before the Superior Court was whether there would be any remedy before this Commission, and the Executive Director with essentially no basis in fact or no evidence to support it said there would be a remedy no matter what the District Attorney continued to do and I do believe that is taking sides. But, I understand your position and I'll move on. I think that these

petitions all raise the exact same issue that was raised in Mr. Siddall's appeal which has been granted. The, the District Attorney's Office's argument that these shouldn't be consolidated with Siddall is not very well taken. This case does not involve an issue of comparing the relative abilities or qualifications of the Petitioners. The case involves the hiring, the unlawful hiring of unqualified public defenders, so to say we need 11 different hearings, frankly after the District Attorney's Office already agreed to consolidate ... I'm sorry Mr. Tevrizian.

Comm. Tevrizian: Can I chime in here? I cannot speak for the Commission, I can only speak for myself, but the District Attorney is the duly elected official and his powers, you know, come from the State Constitution and the County Charter and he can implement his own policies but he cannot, I repeat, cannot run afoul of the Civil Service Rules. Now the DA's Office filed opposition which states that it consulted for the transfer of these Grade IV P.D.s to the D.A.'s Office and he consulted with DHR, the Department of Human Resources, and the CEO's Office and then the County Counsel and then the D.A. further alleged that the DHR approved the transfers pursuant to Civil Service Rules 15.03, determining that these Grade IV are the same rank and that there is no increase in grade and that the employee demonstrated the, and possesses the, same skills that are required. I disagree with that finding but, you know, that's the finding because when I was a state court judge from '72 to '82, whenever a P.D. or a D.A. moved from one department to another department, if they were Grade III or Grade IV or above, the transfer would be made and they would take, they would assume a Grade II position. But that was in the period of time 1972 to 1982. I'm old enough to give you some history here. But it appears that the Commission has no jurisdiction under Sec, under the County Charter Rule 35, or Civil Service Rule 6.02. However, the Petitioners have alleged a Civil Service Rule 25 violation. I think that's clear on its face - discrimination based upon political patronage which brings in Civil Service Rule 25, and also brings up Civil Service Rule 7.04, 10.01, 11.01, 15.01, 15.02, 15.03 and 15.04. Now, whenever you transfer inter-department, you create a morale, it's a morale buster to promote from without and not from within the department. But that in and of itself is not a Civil Service Rule violation. Now, I think that this matter, you know, deserves a hearing on all of these cases. I don't think you can consolidate the cases for hearing but you can coordinate the cases, because consolidation has individual implications with regard to each, each one of the applicants, but you can coordinate it so you don't get inconsistent rulings and have one hearing officer hear these all at the same, same time, but not on a consolidated basis, on a coordinated basis. Also, it seems that this issue is being rope-a-doped between the Civil Service Commission and the Superior Court and my suggestion is

that the Superior Court consider some type of injunctive relief pending the outcome of the hearings amid this what I think is a volatile issue. The Civil Service Commission does not have jurisdiction or the power to issue injunction but the Superior Court does. This is an issue that's going to come up again, continually, if there is going to be inter-department transfers. I think that the job of a D.A. is completely different from the job of a public defender. The training, the experience, the motivation are all different and I think the Superior Court should look into this.

Ms. Gibbons: Thank you, Mr. Tevrizian. If I could just ask for clarification on one point. When you said that the cases should be coordinated, by that do you mean one hearing officer hears all the cases together?

Comm. Tevrizian: Yes.

Ms. Gibbons: Okay. I have no problem with that. I just don't want this to be 11 different hearings. We are not asking for a comparison of the Petitioners' qualifications. The fundamental issue is the Rule 25 violation which encompasses the other Civil Service Rules and the District Attorney's violation of those rules. And also to respond to your issue about the Superior Court, we did specifically ask for an injunction to stop the District Attorney from continuing to hire public defenders while this case is pending. The Court felt that we needed to exhaust our administrative remedies but I agree with you the Commission does not have jurisdiction to issue an injunction of that nature. So, we are going back on Friday to Court to try to set a trial date which I hope will be as soon as possible to try to get that injunction to stop this so that we don't just continue down this road and have to keep filing these appeals. But thank you, we would agree to your suggestion of coordination rather than consolidation. Thank you.

President Donner: Ms. Gibbons, does that conclude your remarks? I'd like to give the Department, Mr. Sheldon, an opportunity to respond.

Ms. Gibbons: Yes, sir, it does.

President Donner: Alright, thank you. Mr. Sheldon for the Department?

Mr. Sheldon: Yes, thank you very much. I am somewhat confused by the position that Ms. Gibbons has taken. I would just like some clarification. And I will say that I do agree with many not all of the remarks of Judge Tevrizian with respect to, particularly with respect to the issue of jurisdiction, and the distinction between consolidation and coordination of these cases. There is one issue that is, that comes across all of these cases and that is

whether the District Attorney, and really framing it, we didn't get a chance to frame the issue, the Petitioners did but and they are framing it as hiring of public defenders. These are lateral transfers. These are lateral transfers not hirings, so that's the first thing to remember here. And under your own rules, under Rule 15 in particular, these transfers can only take place if the Director of Personnel approves them. That happened in each of these cases. So to the extent that you are looking at whether the D.A. can do these transfers, you really gotta' be looking at whether DHR is correct in it's interpretation of the rules. They are really the equivalent of the Senate parlia..., parliamentarian. They've interpreted these rules, they've in fact approved each of the transfers that the Appellants are challenging in this case. They're perfectly legal. And we, we would take that to a hearing if the Commission had jurisdiction to show why that is the case because this is not a situation where these positions can be filled only one way through the promotional process. They can be filled through interdepartmental transfer process. We all can have our viewpoints on whether that creates a morale issue, whether it was done a certain way for many many years and not another way. It doesn't matter. What does matter is, is it permissible within the rules, and it is, as indicated by the, by DHR, the Personnel Director's approval of each of these transfers.

President Donner: Could I ask a question, Mr. Sheldon?

Mr. Sheldon: Sure.

President Donner: When consent was sought from the DHR and to approve these transfers, was DHR informed that these people seeking a transfer were political contributors or political supporters of the District Attorney's Office, that the District Attorney wanted to bring over from the Public Defender's Office?

Mr. Sheldon: I do not know the answer to that question. That would be something for a hearing officer to look into. And that would go to the issue of a Rule 25 case, which as you aptly noted, if Plaintiffs have, if Appellants have stated a case here, it would under Rule 25, which I think does require separate hearings. They can be consolidated under one particular hearing officer, but when you get into Rule 25, you have to look at whether the central issue is going to be political patronage. What was their involvement in the D.A.'s campaign? From our perspective, what were the Appellants' involvements in the opposition's campaign or, you know, did they contribute to prior D.A.'s campaigns? Does that, does the mere fact that someone contributed to a campaign establish political patronage by itself? There's a lot of issues that are at play there. And then you have to, you know, it gets even more complicated that effective November 1,

52 people were promoted from District Attorney III to District Attorney IV. So are these Appellants more qualified than any of those people who got the job over them? It's complicated factually, needs to be decided in a hearing by hearing basis, because these inherently are ruled, the only matter that really can go to hearing here, unless you are going to rule that there is a question as to whether these transfers, lateral transfers are permissible under Rule 15, they're all Rule 25 hearings, they are individual in nature, and I have no objection to consol ... or coordinating them with one hearing officer, but we do believe that separate hearings are necessary. Otherwise this is going to be a very complicated hearing to put forward. It's in essence 12 different hearings.

Comm. Nightingale: So Mr. Sheldon, this is Commissioner Nightingale, I have a couple of questions just based on your responses so far.

Mr. Sheldon: Sure.

Comm. Nightingale: A lateral transfer is transferring from one classification to another classification of equal knowledge, skills and abilities. There are distinct differences between the deputy public defender and the deputy D.A. So they are not the same classification, even though the director of HR approved these. There, there is some question as has been spelled out in the documents of the distinctions in terms of level of difficulty, years of experience and so forth in the two different classifications, yet today you say that they are the same.

Mr. Sheldon: Well, first of all there's two different Civil Service rules where the transfers, or the by, or the end product of what occurred here could, could have happened. One would be under 15.02(A) which is the lateral transfer rule. There is also 15.03(A) which is called Change in Classifications. 15.02(A) states that the director of personnel may authorize the interdepartmental transfer, so this is a transfer between two departments, of an employee from one position to another similar position of the same class, or to any other position to which his or her appointment, transfer or change of classification would be authorized by these rules in another department. When we take a look at Rule 15.03, so you gotta' look at the text of your rules.

Comm. Nightingale: I have looked at the text but I'm ...

Mr. Sheldon: Right, right. And it says whenever it is found necessary to change the classification of an employee from a non supervisory class, supervisory class in a bargaining unit as certified by ERCOM, or managerial class in the Sheriff, Sheriff's Department to any other class, such change shall be

made administratively by the appointing power or powers provided both classes are of the same rank, there is no increase or decrease in grade, and the employee has demonstrated the possession of the skills and aptitudes required in the position to which the employee is to be changed. Such change of classification may be made only with the approval of the Director of Personnel. So again ...

Comm. Nightingale: So that brings me to my second question as well because there still are some discrepancies or things that need to be proven in what you just read in terms of the skills and abilities being equal, but does the Director of HR also approve these changes in classification and also denies the appeal on someone who challenges the changes in classification?

Mr. Sheldon: I believe the answer is yes as to the first part of your question. I am not aware of any appeals made to the Director of Personnel. Any appeal that I'm aware of was made directly to the Commission.

Comm. Nightingale: I am asking does the appeal, does the DHR have the appeal power if there is a protest or challenge to these changes.

Mr. Sheldon: That is not within my reading of the rules, no. My understanding is they approve, they make, inherently, they make one decision. Do, and they make a determination fundamentally on are the skills and aptitudes of the two positions similar or not. And in this case, they made the decision. There are some cases, we will show this with evidence, that DHR made a determination that this should not be a transfer because the standard was not met in some other cases. In these particular cases, they made a, looked at the individuals involved, and made a determination that they are similarly skilled as well.

Comm. Tevrizian: Yeah but let's, let's take a Grade IV. A Grade IV D.A. is qualified to try capital cases. A Grade IV P.D. is qualified to defend capital cases. I mean there is an inconsistency in the training for these positions. And that's what causes problems. I mean, you know, the public defenders are coming over here are being trained completely differently than the district attorneys. So for you to say that, you know, they're similarly situated I don't think is an accurate statement and that's what the hearing officer should find out when, you know, in reference to Commissioner Nightingale's questions that she had. She asked two very pertinent questions.

Comm. Nightingale: And I would like to have those included in the motion as well, as we ask for an appeal, I mean as we ask for a hearing in the matter.

Comm. Tevrizian: Well, I am prepared to make a motion that we grant a hearing on all of these cases, it's items I think 7 through 15, on the basis of a Rule 25 issue, as well as whether or not the transfers are for similarly situated classifications and training.

Comm. Nightingale: I second that motion.

President Donner: Alright. We have a first and second, a motion and a second. Luz, would you call the roll please?

Comm. Staff
Luz Delgado: Publicly poll the Commissioners for a vote. Commissioner Tevrizian?

Comm. Tevrizian: Aye.

Mr. Delgado: Commissioner Nightingale?

Comm. Nightingale: Aye.

Mr. Delgado: Commissioner Duran?

Comm. Duran: Recused.

President Donner: He recused himself.

Mr. Delgado: Oh, I'm sorry. Correct. And President Donner?

President Donner: Yes.

Mr. Delgado: The motion carried with a vote of 3-0-1.

Comm. Nightingale: And for my clarification, those will all be coordinated or consolidated with the Siddall case, correct?

President Donner: We used the word coordinate.

Comm. Nightingale: Coordinate. With the same hearing officer. Okay. And then, so its been set out.

Comm. Tevrizian: On an expedited basis.

Comm. Nightingale: Thank you.

County Counsel

Craig Hoetger: I just, excuse me, this is Craig, I just want to make sure that we're all on the same page on this. So the hearings will be not done as one, but the same hearing officer will hear each case individually? Is that what we mean by consolidated?

President Donner: Not consolidated.

Comm. Tevrizian: Coordinated.

President Donner: Coordinated.

County Counsel
Craig Hoetger: No, I know. I'm sorry.

Comm. Tevrizian: That's up to the hearing officer. For example, there's going to be testimony that will apply to all of these across the board and that can come in either by stipulation or ... the hearing officer can take care of the evidentiary issues. But as to each individual party, that has to be individual inquiry made by the hearing, hearing officer.

Mr. Hoetger: Okay, so the, the, the discretion will be left with whatever, whoever the individual hearing officer is on all of these cases.

Comm. Tevrizian: On how to handle the coordination.

Mr. Hoetger: Correct. Alright, great. Thank you.

President Donner: Alright, Luz, would you call the roll please?

Mr. Delgado: I believe I did.

Comm. Nightingale: Yeah, I think we did that already.

President Donner: We did? Oh that's right, I'm sorry. You know, I'm having too much fun.

END OF RECORDING

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
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 OPPOSITION TO RESPONDENTS' MOTION TO STAY ALL PROCEEDINGS AND DISCOVERY PENDING THE OUTCOME OF THE CIVIL SERVICE COMMISSION APPEALS; DECLARATION OF ELIZABETH J. GIBBONS IN SUPPORT THEREOF
Association of Deputy District Attorneys for Los Angeles County (ADDA) v. George Gascón, Los Angeles County District Attorney, et al.
LASC Case No. 21STCP03412

on the interested parties in said action as follows:

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[X] **BY MAIL:** I am readily familiar with the firm's practice of collection and processing correspondence by mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage fully prepared at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 3, 2022 at Los Angeles, California.

Peggy L. Madsen
Peggy Madsen