

**SUBMITTAL TO THE BOARD OF SUPERVISORS
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA**

117



FROM: Human Resources Department

SUBMITTAL DATE:
November 21, 2011

SUBJECT: Action on an advisory arbitration opinion pursuant to the Memorandum of Understanding for the Law Enforcement Unit between the County of Riverside and the Riverside Sheriffs' Association.

RECOMMENDED MOTION: That the Board of Supervisors act on the advisory arbitration opinion and accept without further factual testimony the opinion of Jan Stiglitz dated October 4, 2011.

BACKGROUND: The 2005-2007 Memorandum of Understand (MOU) between the Riverside Sheriff's Association (RSA) contains a clause that provides for advisory arbitration as part of the grievance resolution procedure. After receipt of an advisory arbitration opinion the Board is empowered to accept, reject, or accept part of a decision and reject the rest, without further testimony from either party. In the event the Board rejects in whole or in part the advisory opinion of the arbitrator it must state the reasons for so acting.

and Departmental Concurrence



Barbara A. Olivier
Asst. County Executive Officer/HR Director

FINANCIAL DATA	Current F.Y. Total Cost:	\$0	In Current Year Budget:	No
	Current F.Y. Net County Cost:	\$0	Budget Adjustment:	No
	Annual Net County Cost:	\$0	For Fiscal Year:	2011/12

SOURCE OF FUNDS:	Positions To Be Deleted Per A-30	<input type="checkbox"/>
	Requires 4/5 Vote	<input type="checkbox"/>

C.E.O. RECOMMENDATION: APPROVE

County Executive Office Signature BY:  Elizabeth J. Olson

- Consent
- Policy
- Consent
- Policy

Dept't Recomm.:
Per Exec. Ofc.:

Prev. Agn. Ref.: **District: All** **Agenda Number:** 3.18

BACKGROUND (continued):

The purpose of the advisory arbitration process is to safeguard the Board's authority to determine its financial and contractual obligations and/or to ensure that the advice received from the arbitrator is in accordance with current legal requirements.

Occasionally, in addressing a particular dispute, an arbitrator will issue an advisory opinion that exceeds, in whole or in part, his or her authority under the MOU. For example, such an advisory opinion may require the County to spend funds that it has not agreed to spend or impose a contractual requirement that the County did not agree to when it adopted the MOU. An opinion of this nature is no longer a determination of the rights of the parties under the MOU but becomes an interest arbitration in which the arbitrator is usurping the constitutional authority of the Board. Legislative attempts to impose involuntary interest arbitration upon local government bodies have repeatedly failed for similar reasons and preserving the final say in the advisory arbitration process permits the Board to protect its jurisdiction.

It is important to keep in mind that if a registered employee organization is dissatisfied with the final decision of the Board it has the option of seeking review of that decision in the Superior Court. So while the decision by the Board is the final step in the County's administrative process it is not necessarily the final word with respect to the particular dispute.

However, if the Board refuses to act one way or the other on an advisory opinion the Court of Appeal has determined that the decision is not final under the County's administrative procedures. This inaction would frustrate the attempts of the registered employee organization to seek review by the Courts of the advisory arbitration opinion.

RECOMMENDATION

We respectfully recommend that the Board of Supervisors act on the advisory arbitration opinion and accept without further factual testimony the opinion of Jan Stiglitz dated October 4, 2011. A copy of the County's arguments in favor of the recommendation (Attachment A) along with the advisory opinion (Attachment B) is attached.

Human Resources Department Recommendation

Before you is consideration of the Advisory Opinion of arbitrator, Jan Stiglitz, on the grievance petition filed by Riverside Sheriffs' Association (RSA) and certain employees represented by RSA, Grievance No. R0708-025. The opinion of the arbitrator is to deny RSA's grievance in its entirety. It is my recommendation that the Board of Supervisors accept the decision of the arbitrator in its entirety.

PROCEDURAL HISTORY & DECISION OF THE ARBITRATOR

RSA filed the Grievance under the 2005-2007 LEU MOU alleging that the MOU afforded RSA employees the right to "transparency to the promotional process" and the right to challenge all scores received during the 2007 promotional process for sergeant, investigator and corporal. After proceeding through the steps of the grievance process under the 2005-2007 MOU, the matter proceeded to arbitration before arbitrator Jan Stiglitz on July 26, 2011.

Following the arbitration hearing, on October 4, 2011, Mr. Stiglitz issued an Advisory Opinion denying RSA's grievance in its entirety. Specifically, Mr. Stiglitz found that neither the 2005-2007 LEU MOU nor the County's Salary Ordinance No. 440 afforded LEU members the right to review their scored promotional exams or scoring sheets following the sergeant, investigator, or corporal promotional process or the right to challenge the scores received by way of an evidentiary administrative hearing.

The decision of Mr. Stiglitz was premised on the following findings:

1. The clear terms of the 2005-2007 MOU "makes no provision for viewing the questions given, the answers, or the scores given on any section of the exam. Nor does the LEU MOU provide any exam review process." (Adv. Op. at p.21.)
2. The Salary Ordinance No. 440 "provides for no hearing and no right of review." (Adv. Op. at p. 23.)
3. Since at least 1997, there has never been a past practice between the County and RSA that an LEU member may challenge his or her promotional scores by way of evidentiary hearing. "...[T]he only review process allowed has been an employee's ability to meet with a captain and an individual's ability to suggest a problem to HR and ask for a review." (Adv. Op. at p. 23.)
4. Similarly, the past practice of the County and the RSA has not shown that, "[t]he County has never revealed questions, score sheets from the oral portion of the

exam, or any scoring documents from the promotability portion of the exam. That practice has never been challenged. Instead, there has been tacit manual 'acquiescence or acceptance' of the practice." (Adv. Op. at p. 23.)

5. Mr. Stiglitz' decision also disagreed with RSA's argument that the Public Safety Officers Procedural Bill of Rights ("POBR"; Gov. Code §§3300 *et. seq.*) or the Meyers-Milius-Brown Act ("MMBA"; Gov. Code §3500 *et. seq.*) provided access to scored promotional exams and scoring sheets or provided a right to an evidentiary administrative appeal of the scores received in the promotional process. (Adv. Op. at pp. 23-24.)

THE BOARD OF SUPERVISORS' CHOICE OF ACTION

Because this Grievance arose under the 2005-2007 LEU MOU, that MOU governs the Board of Supervisors choice of action following the advisory opinion of the arbitrator. The relevant MOU provisions provide:

The Board of Supervisors shall either accept or reject the arbitrator's decision, or accept part of the decision and reject the rest, without further testimony from either party. If the Board rejects all or part of the arbitrator's decision, the Board shall state its reasons for rejection. The decision of the Board of Supervisors shall be final. (Art. XI, Sec. 13.)

RECOMMENDED ACTION:

It is my recommendation that the Board of Supervisors accept the Advisory Opinion of the arbitrator in its entirety.

RSA argued that Government Code section 3304(b)¹ somehow afforded employees the right to a full evidentiary hearing in which to challenge the scores they received in the promotional exam process. As Mr. Stiglitz correctly noted "the record here contains no evidence or even a good faith suggestion that the promotional decisions made by the County were based on anything other than the merit system employed by the County. The County's merit system may not be perfect. But I find that the promotional decisions here were based on a good faith attempt to evaluate the merit of each candidate." RSA otherwise failed to cite any legal authority

¹Government Code section 3304(b) is part of the Public Safety Officers Procedural Bill of Rights(POBR) and provides in pertinent part that, "no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required by his or her employing agency without providing the public safety officer with an opportunity for administrative appeal."

to suggest that this Government Code section afforded employees the right to a full evidentiary hearing in order to challenge the scores they received in the promotional exams. (Adv. Op.¹ at p. 20.)

RSA also argued that employees have a right to review their scored exams and scoring sheets to determine whether or not their promotion was based on merit because the 2005-2007 LEU MOU and the Salary Ordinance No. 440 state that promotions are to be based on merit. However, Mr. Stiglitz correctly noted that the record contained no evidence or even good faith suggestion that the promotional decisions were based on anything other than merit. Mr. Stiglitz also correctly noted that neither the express language of the 2005-2007 LEU MOU nor the Salary Ordinance No. 440 indicates an express promise or agreement to afford employees the right to review their scored examinations. Mr. Stiglitz also further found that the evidence presented at the hearing showed a long-standing and binding past practice between the County and RSA that promotional candidates were *not* permitted to review their scored examinations.

RSA further argued that it must be afforded the right to review employees' scored exams in order to be able to fully represent its members in an appeal of their promotional scores in a full evidentiary hearing. The fallacy in RSA's argument is that it must first show that employees even has the right to challenge the promotional scores by way of a full evidentiary hearing. Mr. Stiglitz found that no such right exists under the terms of the 2005-2007 LEU MOU, Salary Ordinance No. 440 or even under the law.

RSA also argued that employees must be granted access to their scored promotional exams under Government Code section 3306.5(a).² However, as Mr. Stiglitz correctly noted, "[t]here is no evidence here that access to a personnel file has been denied. Nor is there any authority cited for a claim that exam questions, answers, or score sheets maintained by HR pursuant to an examination, constitute a part of a police officer's 'personnel file.'" (Adv. Op. at 24.)

Finally, RSA argued that it had a right to the scored promotional exams pursuant to Government Code section 3505 (of the Meyers-Milias-Brown Act)³ because they are allegedly information necessary and relevant to the discharge of RSA's duty to represent unit employees when meeting and conferring on wages, hours and other terms and conditions of employment. Mr. Stiglitz correctly noted that, "I do not believe that Government Code section 3505 requires

² Government Code section 3306.5(a), which is part of the POBR, states in relevant part, "Every employer shall...upon the request of a public safety officer, during usual business hours...permit that officer to inspect personnel files that are used or have been used to determine that officer's qualifications for employment, promotion...or other disciplinary action."

³ Government Code section 3505 provides in relevant part, "The governing body of a public agency...shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations... 'Meet and confer in good faith' means that a public agency,...shall have the mutual obligation personally to...exchange freely information...on matters within the scope of representation..."

the exam materials requested be provided in order for the RSA to discharge its duty to represent employees.” (Adv. Op. at p. 24.) Indeed, RSA was not seeking to meet and confer with the County on any aspect of the promotional process. RSA failed to articulate what exactly RSA and the County are meeting and conferring on and why the scored promotional exams were necessary for such bargaining.

present. (T. 6.¹) Both sides were afforded the opportunity to examine witnesses and introduce evidence. The matter was taken under submission on September 16, 2011, after the submission of the parties' post-hearing briefs.

ISSUES

The parties generally agreed upon several issues for resolution. The Union proposed the following issues:

1. Do Articles 6 and/or 17 of the 2005-2007 Law Enforcement Unit Memorandum of Understanding ("LEU MOU") and/or the Salary Ordinance require the County to make available specific information and/or documents to the Riverside Sheriffs' Association and/or an employee who has tested for promotion to corporal, sergeant and/or investigator? If so, what documents and/or information must be made available to the Riverside Sheriffs' Association and/or an employee who has tested for promotion to corporal², sergeant and/or investigator?
2. Do Articles 6 and/or 17 of the LEU MOU and/or the Salary Ordinance allow the Riverside Sheriffs' Association and/or an employee who has tested for promotion to corporal, sergeant and/or investigator to challenge his or her test score?
3. Whether the scores received by grievants were improper and if improper, then what were the proper scores? (T. 7-8; RSA Exh. 14.)

The County did not agree that either Article 6 of the LEU MOU or the Salary Ordinance is at issue because the original grievance filed by the RSA cited only LEU

¹ References are to the stenographic record of the hearing produced by Jennifer D. Barker, CSR No. 12168.

² No separate evidence was offered regarding the corporal's exam. However, everything decided here regarding the sergeant's and investigator's exams will be applicable to the corporal's exam.

MOU Article 17, section 2. (T. 9.³)

The parties agreed to bifurcate the hearing and now seek only a resolution of issues 1 and 2. An additional hearing will be scheduled only if I conclude that the RSA and/or the individual grievants have a right to see the test materials (including score sheets and comments) and a right to challenge the test results.

GRIEVANCE HISTORY

On January 24, 2008, the RSA filed a grievance on behalf of several named individuals and others claiming a violation of Article XVII of the LEU MOU. Specifically, the RSA sought to challenge the scores that members received on the investigator's and sergeant's exam ("especially those reflecting individual promotability"), to review the testing process, and to contest any individual score before an impartial arbitrator. (RSA Exh. 5.) In response, the County claimed that the grievance was not arbitrable.

Pursuant to the LEU MOU, the arbitrability question was heard by arbitrator Michael Prihar on March 11, 2010. (RSA Exh. 7.) On August 26, 2010, Prihar concluded that the grievance, as framed, was arbitrable. (RSA Exh. 10.)

On July 25, 2011, after the parties selected this arbitrator to conduct the hearing on this matter, the RSA notified the County that it intended to rely on Article VI of the LEU

³ Counsel for the County cited Article 16. However, after looking at the grievance (RSA Exh. 5) and the 2005-2007 LEU MOU (RSA Exh. 1), it appears counsel misspoke.

MOU, as well as the Salary Ordinance, to support its position. (RSA Exh. 14.)

FACTS

Most of the underlying facts are not in dispute. At the beginning of the hearing, the parties stipulated to the following facts:

1. The RSA and the County were parties to the 2005-2007 LEU MOU.
2. RSA is the exclusive employee organization for employees in the LEU.
3. In 2007, Reynalda Bodnar ("Bodnar") tested for Investigator as part of the 2007 Investigator Promotional Process pursuant to Article XVII, Section 2 of the LEU MOU.
4. Bodnar's weighted scores for the 2007 Investigator Promotional Process were as follows: 37 out of 50 on the written exam; 9 out of 20 on the oral exam; and 20 out of 30 on promotability. The combined score was 66.
5. In 2007, Bodnar tested for Sergeant as part of the 2007 Sergeant Promotional Process pursuant to Article XVII, Section 2 of the LEU MOU.
6. Bodnar's weighted scores for the 2007 Sergeant Promotional Process were as follows: 38 out of 50 on the written exam; 4 out of 20 on the oral exam; and 17 out of 30 on promotability. The combined score was 59.
7. On January 24, 2008, RSA, Bodnar, and others filed a grievance petition, number R0708-025 ("grievance").
8. The County challenged arbitrability, and on March 11, 2010, the arbitrability hearing occurred before Hearing Officer Michael Prihar.⁴
9. By way of decision dated August 26, 2010, Hearing Officer Prihar found that the grievance was arbitrable. (T. 11; Jt. Exh. 1.)

⁴ Under the LEU MOU, designated neutrals are referred to as both Hearing Officer and arbitrator.

This stipulation was followed by the testimony of a number of witnesses.

Reynalda Bodnar testified that she was hired as a Deputy Sheriff in December of 1985. (T. 17.) She became a corporal in 2002 and currently holds that rank. (T. 18.)

Bodnar took the sergeant's exam in 2007. (T. 18.) The written portion of the exam consisted of 100 multiple choice questions. (T. 18.) The oral portion was conducted by a panel of three individuals, who asked her to respond to three or four scenarios. (T. 19.)

According to Bodnar, the promotability portion of the exam is referred to by deputies as the "likability" portion. (T. 20.) Bodnar testified that deputies believe if those in the "good old boy" system like a candidate, that candidate will be pushed up for promotion. (T. 20.) Her understanding of the process was that a group of sergeants would review a candidate's evaluations and make comments about the candidate. Bodnar believed: "It had nothing to do with work. It was more of a personality spectrum." (T. 21.)

Bodnar received her scores on the sergeant's exam by letter from the County. (T. 21.) She was not provided with any opportunity to have her scores raised. (T. 21.) She was not allowed to see her answers and compare them with the answer key. As a result, she could not determine whether her exam had been graded correctly. (T. 22.) Nor did she ever see the rating sheets from the oral portion of the exam or any materials generated during the promotability portion of the exam. (T. 22-23.)

Bodnar testified that she spoke with the sergeant who “presented her” during the promotability portion of the exam. According to Bodnar, that sergeant told her that she did not score well because one person had a problem with her and that person’s “clique” outnumbered the presenter. (T. 25.)

Bodnar did have the opportunity to speak with her captain about that portion of the exam. (T. 26.) However, Bodnar chose not to speak with the captain. Bodner testified she was told by a sergeant that the process was secretive, that she would not find out what comments had been made, and that the scores would not be adjusted. (T. 26-27, 33.)

The parties stipulated that Bodnar had taken the 2007 investigator’s exam as well, that the investigator’s exam was conducted in the same fashion as the sergeant’s exam, and that she was similarly unable to see her exam results and determine whether her exam had been scored correctly. (T. 23.)

Human Resources (“HR”) Analyst Ryan Schulte testified that the promotional process begins with a “departmental memo” from the Sheriff’s Department (the “Department”) that explains the scoring, tests dates, locations, discusses study materials, and contains an application. (T. 36; Co. Exh. 1.) Interested deputies can then apply to take the designated exam. (T. 37.)

After the applicants are qualified by the Department, they are given a “hurdle” exam which has 70 questions covering very basic information. (T. 38.) Those who pass the hurdle exam can move on to take the exam for sergeant and/or investigator. (T. 38.)

The written exam given to candidates is prepared by a panel of subject matter experts (eight Riverside Sheriff's Department lieutenants and four sergeants) with the assistance of HR staff. (T. 39.) Each exam has some questions from prior exams and some newly developed questions. (T. 40.) Candidates can prepare for the written exam by reading the study materials listed in the departmental memo. (T. 40.)

The oral exam is administered by panels selected from the subject matter experts who created the questions. Each panel is to have two lieutenants and one sergeant. (T. 41.) Each panel will interview 55-60 candidates, asking them to respond to four scenarios (which they are given five minutes to read and consider). (T. 41-42.) Each scenario is graded and worth up to 7 points. (T. 41.)

The results of all of the portions of the exam are sent to HR as are the notes taken during the promotability process. (T. 44.) The exam parts are not equally weighted and have to be scaled by HR in order to arrive at a final score. (T. 45.) HR then compiles a complete list of candidates, grouped by scores, and sends out individual exam score letters to the candidates. (T. 47; Co. Exh. 2.)

Candidates are not allowed to see their actual scored exams, or the rating sheets filled out by the oral interviewers. (T. 49.) Schulte acknowledged that scoring errors are possible. (T. 49-50.)

Chief Rick Hall testified that he was familiar with the promotional process, having gone through the ranks as a candidate, and having participated as a rater and scorer for

multiple exams. (T. 53-54.)

Chief Hall started with the Department in 1985. (T. 52.) He was promoted to sergeant in 1994. (T. 55.) Chief Hall estimated that he has participated in eight or nine cycles of promotional exams for investigator and sergeant. (T. 54.) Chief Hall testified that over the years, he has participated in the promotability process as a sergeant, lieutenant, captain, and chief. (T. 54.)

Chief Hall testified that the promotability part of an examination looks at a candidate's work history and rates candidates based on a list of "dimensions." (T. 54.) Those dimensions are used to determine how the employee would perform in the position being sought. (T. 55.) In the 2007 exam, employees were reviewed for their use of sick leave, any discipline, and any education or special training that they pursued. (T. 55, 63.)

For the sergeant's exam, each candidate will have a rating sheet filled out by a sergeant (if possible one of the employee's supervisors). (T. 56.) There will then be a "station meeting" attended by the station captain, and as many lieutenants and sergeants as are available. (T. 56.) Candidates are ultimately scored by the Chief Deputy. (T. 58.)

Chief Hall testified that promotions are made by the Sheriff and are not based simply on final scores. Promotion decisions may be based on where the Department has openings and where candidates have indicated a willingness to work. (T. 59.) Promotion decisions also are based on the skill set possessed by an employee and the skill set needed for the position (e.g., being bilingual or having a great deal of experience with narcotics

arrests). (T. 60.)

Chief Hall testified that candidates have the opportunity to speak with the captain who sat in at the promotability meeting. These captains, who were note takers during the process, will be able to explain to each candidate where he or she did well and where he or she needs to improve. (T. 61.) Sergeants, however, are given a directive not to discuss what went on during the promotability portion of the exam. (T. 69-70.)

Candidates are not and have never been permitted to see the actual rating sheets, or view the score sheets from the written or oral portions of the exams. (T. 49, 65.) According to Chief Hall, to do so would make it difficult to reuse questions. (T. 66.)

Chief Hall testified that in the past, when deputies expressed concerns about the accuracy of their scores, the Department did check and, in one case, adjusted a score after the review revealed an error. (T. 67.) He also testified that the promotability process changed in 2009, with regard to the dimensions, as a result of the instant grievance and concerns raised by several employees. (T. 63.) He also testified that the Sheriff has indicated a willingness to make changes in the process but has not yet done so. (T. 63.) Chief Hall believed that budget issues here interfered. (T. 64.)

Lieutenant Dean Wright testified that he was an interviewer during the oral portion of the 2007 sergeant's exam. (T. 77.) Wright testified that he interviewed approximately 50-60 candidates for that exam. (T. 77.) During that process, he wrote notes and scores on each candidate's score sheet. (T. 78.) He testified that he understood that his notes

and scores would be confidential and that if the score sheets were going to be open to review, it would have had an impact on his ability to score the candidates. (T. 79.) Specifically, Wright testified that he would not have been able to be as objective. (T. 79.)

POSITIONS OF THE PARTIES

The RSA's Position

Grievants Have a Right to Challenge Scores at an Evidentiary Hearing

The RSA argues that the merit system is designed to eliminate the "spoils system" and that the competitive examination process is the "cornerstone" of the merit system. Citing *Almassy v. L.A. County Civil Service Com.* (1949) 34 Cal.2d 387, the RSA argues that promotional examinations must provide for fair competition.

The RSA argues that under Government Code section 3304(b), a part of the Public Safety Officers Procedural Bill of Rights Act ("POBR"), no employee may be denied a promotion "on grounds other than merit" without giving that employee an administrative appeal. Under Government Code section 3304.5, such administrative appeal shall be conducted "in conformance with rules and procedures adopted by the local agency." Citing *Giuffre v. Sparks* (1999) 76 Cal.App.4th 1322, the RSA argues that an administrative hearing must be before a third party neutral. Citing *Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, the RSA argues that officers are entitled to procedural due process, including disclosure of evidence, the right to present and confront witnesses, an impartial decision maker, and a written decision.

According to the RSA, the LEU MOU and the Salary Ordinance provide for a merit system. According to both, promotions shall be based entirely on merit.

The RSA argues that if a member receives an exam score that is not based on merit, it violates the LEU MOU and the Salary Ordinance. According to the RSA, except in four situations not here applicable, violations of the LEU MOU are addressed through the grievance process in the LEU MOU, which provides for a full evidentiary hearing before an impartial arbitrator.

The RSA argues that its interpretation of Articles XI (“Grievance Procedure”) and XII (“Discipline, Dismissal, and Review”) is consistent with the POBR, which requires an administrative appeal if an individual is denied a promotion on grounds other than merit. If a contractual provision is susceptible of two interpretations, an arbitrator should avoid an interpretation that would make the agreement invalid. (*How Arbitration Works*, Elkouri & Elkouri (6th Ed. 2003), p. 497.)

The RSA argues that a meeting with a captain is not an adequate substitute for a full evidentiary hearing. Neither the LEU MOU nor the Salary Ordinance provides for a merit system violation to be addressed in that fashion and the requirements of Articles XI and XII “trump” any actions which are contrary to those articles. Similarly, an informal meeting with a captain does not meet the requirements in the POBR.

The RSA argues that it has never waived its right under the LEU MOU. There has never been a “clear and unmistakable relinquishment” of the right to a full evidentiary

hearing for a violation of the merit system guaranteed by the LEU MOU and the POBR. The express contractual provisions do not provide a waiver. Nor is there any evidence that the subject matter was “fully discussed or consciously explored and that the Union consciously yielded its interest in the matter.”

The RSA argues that I should consider the violations of Article VI and the Salary Ordinance notwithstanding any suggestion that these claims are untimely. The RSA’s “amendments” to the grievance only changed the legal theory of the grievance and the claims, as amended, do not arise out of different facts. As such, the new bases asserted should relate back. In addition, the County has failed to indicate how it was prejudiced by any delay in the presentation of these new arguments. In addition, because the failure to promote has pay implications, any claims asserted here are continuing violations.

grievants Have a Right to Review All Exam Materials

The RSA argues that the right to a merit system is established by the LEU MOU, the Salary Ordinance, the POBR and the Meyers-Milias-Brown Act (“MMBA”). In order to determine if there has been a violation of this right, an aggrieved member needs access to the documents. Without such access, the County would be able to hide any violation. In addition, since Articles XI and XII provide for a full evidentiary hearing (to vindicate rights under the POBR), they also give rise to a right to the documents. When a statute confers power or duties in general terms, powers and duties needed to make such legislation effective must be included by implication. In the absence of access to such

documents, the right to an administrative appeal is a “sham.”

The RSA also argues that under the MMBA, there is an obligation for the County to meet and confer on wages, hours, and other conditions of employment. That gives rise to an obligation to provide necessary information to the RSA so that it can meet its duty to represent the employees. Citing *Stockton Unified School Dist.* (1990) PERB Dec. No. 143, this necessary information includes information related to a mandatory subject of bargaining, unless that information is plainly irrelevant. Citing *NLRB v. Pfizer, Inc.* (7th Cir. 1985) 763 F.2d 877, the RSA argues that the duty to provide relevant information extends to information needed to evaluate and process grievances. (See, also, *Chesapeake & Potomac Telephone Co. v. NLRB* (1982) 687 F.2d 633.) Here, RSA, as the exclusive representative of the unit members, is entitled to this information and needs it in order to evaluate and process grievances.

The RSA argues that the authority cited by the County in its initial opposition to the RSA’s request is inapplicable. The limit on access under the California Public Records Act (“CPRA”) is irrelevant since the request here is not being made under the CPRA.

The RSA argues that *Brutsch v. City of Los Angeles* (1992) 3 Cal.App.4th 354 is not applicable because the right asserted there was predicated on Labor Code section 1198.5 and Labor Code section 1198.5 is inapplicable to LEU members who have rights under the POBR. While the court in *Brutsch* did discuss Government Code section 3305,

that is not the section of the POBR that RSA is relying upon in this grievance.

The RSA further argues that while *Brutsch* did speak to the privacy rights of the interviewers, *Brutsch* did not involve employees who had a contractual right to the information, and the court in *Brutsch* did not deal with Government Code section 3304(b), relied upon here. In addition, the RSA argues that the interviewers here did not have an expectation of privacy because they were aware that a grievance filed might require their comments to be revealed. Finally, even if there are privacy rights, they can be protected by only giving grievants access to a summary of the comments.

The RSA argues that the decision in *Johnson v. Winter* (1982) 127 Cal.App.3d 435, is inapplicable for similar reasons. In *Johnson*, the papers were sought under the CPRA, and the court never addressed the question of whether access might be required under Government Code sections 3305, 3304(b), 3304.5 or 3306.5, or when there was a claim of a contractual right.⁵

The County's Position

The County Has No Obligation to Make the Documents Sought Available

The County first argues that examination records are not public records under the CPRA and may be withheld from public inspection under Government Code §6254(g). No greater privilege is afforded to public employees. Citing *Brutsch v. City of Los*

⁵ The RSA also distinguishes the decision in *Board of Trustees v. Superior Court of Santa Clara County* (1981) 119 Cal.App.3d 516. However, the County has not cited or relied upon that case in its post-hearing brief.

Angeles, supra, 3 Cal.App.4th 354, 359, and *Johnson v. Winter, supra*, 127 Cal.App.3d 435, the County argues that a public employer has a legitimate interest in protecting the privacy of those who rate candidates and cannot be required to give employees access to their specific examinations or comments made by interviewers.

The County next argues that Article XVII of the LEU MOU gives candidates for an exam the right to source or reference information from which questions and answers may be derived and notification of the results of the exam. The LEU MOU is silent on the disclosure of other information and thus reflects no intention to provide candidates access to their scored exams or promotability scoring sheets. Citing *City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, the County argues that the plain language of the LEU MOU applies and that if the parties intended there to be access to the scored examinations, it would have been provided expressly.

Citing *Marysville United Teachers Assoc. v Marysville Joint Unified School Dist.* (1983) PERB Dec. No. 314, the County argues that if an agreement is silent on an issue, parole evidence of past practice can be used. Here, Chief Hall testified that for 26 years, the County has consistently refused to permit a deputy to have access to his or her scored exams, oral exam rating sheets, or the promotability worksheets.

The County argues that the RSA should be estopped from relying upon the County's Salary Ordinance since it failed to identify that ordinance in the original grievance. Even if the Ordinance is to be considered, it does not contain any language

giving promotional candidates the right to review their exams or any scoring sheets. Nor is such a right given by law. Instead, the County has a legitimate interest in being able to reuse questions (which would be impossible if candidates could see them) and that requiring the County to develop new questions each year would be a severe financial burden. In addition, the interviewers have a legitimate right to privacy which would be impacted by the review being sought by the RSA.

Employees Have No Right to an Evidentiary Hearing to Challenge Test Scores

Citing *Nunez v. City of Los Angeles* (9th Cir. 1998) 147 F.3d 867, the County argues that the terms and conditions of public employment are set by statute, not contract and that public employees have no constitutionally recognized property interest in a promotion. Thus, absent a statute which provides for a right to challenge the score received for a promotional exam, there is no right to such a challenge. (*Fuchs v. Los Angeles County Civil Service Com.* (1973) 34 Cal.App.3d 709, 715.)

Here, the LEU MOU contains no language which would suggest that employees have a right to challenge their scores, much less the right to an evidentiary hearing. Similarly, the Salary Ordinance fails to give any such rights.

By practice, candidates may raise scoring issues with management and management will take steps it deems appropriate to address the issue. In the past, that has resulted in successful appeals.

In addition, the County argues that the burden of granting such hearings would be

more harmful than any benefit received by the candidates. Given the number of candidates for the exams, which are given every two years, allowing evidentiary hearings would cost hundreds of thousands of dollars and likely result in fewer promotions. According to the County, only the County has the power to authorize such an expenditure.

RELEVANT STATUTES, ORDINANCES AND CONTRACT PROVISIONS

2005-2007 LEU MOU

Article VI:

Section 6. VETERANS PREFERENCE

The Human Resources Administration under Section 3.B. of Ordinance #440 is designated a merit system. Appointments, promotions, demotions, transfers and dismissals shall be made on the basis of merit and ability. Each officer shall appoint all necessary employees allowed for their department by this ordinance only from among persons certified to them by the Human Resources Director as eligible for the respective positions. The Human Resources Director shall determine the methods of evaluating the qualifications of applicants. The methods shall be practical in nature and may involve any combination of written test, oral test, performance test, rating of education, training and experience and shall take into consideration a system of veterans preference as may be adopted by the Board of Supervisors, by resolution. The veterans preference program shall be administered by the Human Resources Director.

(RSA Exh. 1, p. 28.)

Article XVII:

Section 2. SHERIFF'S INVESTIGATOR AND SERGEANT PROMOTIONAL PROCEDURES EXAMINATION PROCESS

A. The examination process for the class of Sheriff's Investigator and for the class of Sheriff's Sergeant shall include a written examination administered by the Human Resources Department with a weight of 50%,

an oral examination conducted by the Sheriff's Department with a weight of 20%, and an evaluation of promotability conducted by the Sheriff's Department with a weight of 30%. Candidates must attain a passing score on the written examination in order to compete in the oral examination and promotability evaluation portions of the examination process.

B. The Human Resources Department will compute the final combined, weighted score for the examination process for each candidate, based upon the three elements of the process described above.

C. The County shall make every effort with respect to the written promotional examination to provide specific source or reference material from which questions and answers have been derived and shall communicate it to the candidates at the time of the examination announcement.

Examination Process Results

A. The Human Resources Department will notify all candidates by mail of their individual examination results including the score received on each examination and the final combined, weighted score.

B. The Human Resources Department shall provide the Sheriff's department with a list of eligible candidates in descending order, based upon the combined, weighted scores. The list shall not contain actual scores, but will indicate those candidates having received tied scores who therefore occupy the same position on the list. The Sheriff's department shall post copies of the above list on each bureau and station bulletin board.

Selection

The first selection for each position to be filled shall be made from either the top ten percent of those candidates available for the assignment, or the top six candidates (including all persons tied for the sixth position) of those available for the assignment, whichever is greater.

Availability

A. Candidates shall state their availability for promotional positions at particular station locations at the time of the oral examination.

B. Amendments to a candidate's statement of availability must be made in writing on forms provided by the Sheriff's department. Not more than three amendments will be allowed during the period for which the eligible list has been established.

Candidate's Right to Waive. Candidates may waive no more than two offers of promotion. Waiver of a third offer of promotion shall result in the candidate's name being removed from the eligible list for the duration of the list.

(RSA Exh.1, pp. 67-68.)

SALARY ORDINANCE

Ordinance No. 440 Narrative

Section 6. EMPLOYMENT PROCEDURES:

a. The personnel administration under this ordinance is designated a merit system. Appointments and promotions shall be made on the basis of merit and ability.

(RSA Exh. 2, p. 8.)

GOVERNMENT CODE

§ 3304. Protection of procedural rights

(b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required by his or her employing agency without providing the public safety officer with an opportunity for administrative appeal.

§ 3304.5. Procedure for administrative appeal

An administrative appeal instituted by a public safety officer under this chapter shall be conducted in conformance with rules and procedures adopted by the local public agency.

§ 3306.5. Inspection of personnel files or officer

(a) Every employer shall, at reasonable times and at reasonable intervals, upon the request of a public safety officer, during usual business hours, with no loss of compensation to the officer, permit that officer to inspect personnel files that are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.

(b) Each employer shall keep each public safety officer's personnel file or a true and correct copy thereof, and shall make the file or copy thereof available within a reasonable period of time after a request therefor by the officer.

DISCUSSION

The starting point for analysis in this case is the basic proposition that in a contract case, the grieving party has the burden of proof. Here, the RSA is seeking information not provided by the County and a right to an evidentiary hearing. Accordingly, it has the burden of showing an entitlement to that information and to the hearing.

With regard to the evidentiary hearing, the RSA relies, initially, on Government Code section 3304(b), which provides for "an administrative appeal" whenever there has been a "denial of promotion on grounds other than merit." However, the record here contains no evidence or even a good faith suggestion that the promotional decisions made by the County were based on anything other than the merit system employed by the County. The County's merit system may not be perfect. But I find that the promotional decisions here were based on a good faith attempt to evaluate the merit of each candidate.

The RSA may rightly claim that the County's system is not transparent. The RSA may also claim that the lack of transparency may result in errors or mistakes. However, it

takes too great a leap to claim that the possibility of an error in the implementation of a merit system can invoke a right to a hearing under section 3304(b).

The RSA also relies upon the grievance mechanism under Article XI of the LEU MOU, which has a broad definition of grievance. That broad definition has, per arbitrator Prihar, given the RSA an opportunity to present its case before me. However, unless I conclude that there has been a violation of the LEU MOU, it does not give every candidate for every promotional exam an individual right to a hearing to determine if the exam was properly scored.

The more relevant section the MOU is Article XVII and I conclude that the language in that section, coupled with past practice, undercuts the claimed rights under Article XI.

As correctly argued by the County, Article XVII, Section 2, deals with the examination process. It specifically provides for a written exam administered by HR, an oral exam administered by the Department, and an evaluation of promotability administered by the Department. That same section of the LEU MOU provides that HR will “compute the final combined weighted score” and “make every effort . . . to provide source material.” Finally, it provides that HR will notify candidates of scores and provide the Department with a list of candidates in rank order. Significantly, the LEU MOU makes no provision for viewing the questions given, the answers, or the scores given on any section of the exam. Nor does the LEU MOU provide for any exam review process.

It is well understood that past practice may rise to the level of binding conditions of

employment. (See, *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 807, 818: “The court, in *International Assn. of Fire Fighters Union v. City of Pleasanton*, *supra*, 56 Cal.App.3d 959, 972, held that “an existing and acknowledged practice” affecting conditions of employment has the same dignity as “an existing agreement or rule.”)

As was stated by the U.S. Supreme Court in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*:

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. The collective agreement covers the whole employment relationship. It calls into being a new common law -- the common law of a particular industry or of a particular plant. (363 U.S. 574, 579. Citations omitted.)

That principle is well-accepted by arbitrators: “It is generally accepted that certain, but not all clear and long-standing practices can establish conditions of employment as binding as any written provision of the agreement.” (*Alpena Gen. Hosp.*, 50 LA 48, 51 (Jones, 1967).)

The elements of past practice are all well known to the parties since they were enunciated in *Riverside Sheriffs' Association v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291:

In the absence of other authority we look to the definition applied by the California Public Employment Relations Board, which has adopted the rule that “to be binding a past practice: [¶] ... must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. [Citation.] The [California Public Employment Relations]

Board has . . . described a valid past practice as one that is 'regular and consistent' or 'historic and accepted.' ..." (California State Employees Association, SEIU Local 1000 (2002) PERB Dec. No. SA-CO-237-S [26 PERC ¶ 33058, p. 18].)

It has also been held that "mutual acquiescence or acceptance" of a practice may be "tacit and may arise by inference from the circumstances." (*Formica Corp.* 44 LA 467, 468 (Schmidt, 1965).)

Here, I am satisfied, based on the testimony of Chief Hall, that all of the elements of a binding past practice have been met. Hall has been involved in the kinds of promotional exams at issue here since 1994. In that ensuing 17-year period, the only review process allowed has been an employee's ability to meet with a captain and an individual's ability to suggest a problem to HR and ask for a review.

Recourse to the Salary Ordinance is also unavailing. The Ordinance provides for no hearing and no right of review. To the extent that it is enforceable by virtue of being incorporated into the LEU MOU, it is subject to the same burdens (i.e., past practice) as any other section of the MOU.

To the extent that the RSA's claimed entitlement to exam materials is also based on the LEU MOU, past practice provides the same answer. The County has never revealed questions, score sheets from the oral portion of the exam, or any scoring documents from the promotability portion of the exam. That practice has never been challenged. Instead, there has been tacit mutual "acquiescence or acceptance" of the practice.

The RSA also cites Government Code section 3306.5(a) which provides access to “personnel files that . . . have been used to determine that officer’s qualifications for . . . promotion” There is no evidence here that access to a personnel file has been denied. Nor is there any authority cited for a claim that exam questions, answers, or score sheets maintained by HR pursuant to an examination, constitute a part of a police officer’s “personnel file.”

Similarly, I do not believe that Government Code section 3505 requires the exam materials requested be provided in order for the RSA to discharge its duty to represent employees. Since I have concluded that there is no right under the LEU MOU to challenge individual scores at a hearing, there is no need for information relevant to support an individual claim of error.

If, instead, the RSA wants to negotiate more transparency in the exam process and a procedural mechanism for challenging individual exam scores, it is unclear that any additional information is required. RSA is well aware of the process used.

Personally, I am sympathetic to the RSA and the exam takers. I have had first hand experience with the review of civil service examinations in Los Angeles County, including multiple choice tests, oral examinations, and promotability reviews. In some of those cases I found flawed questions. In one or two cases, I also found promotability reviews that were not supported by the candidates’ records.

However, there is a cost to such a process. In addition to the fiscal cost, there may be situations when scrutiny will be counterproductive. As indicated by the testimony of

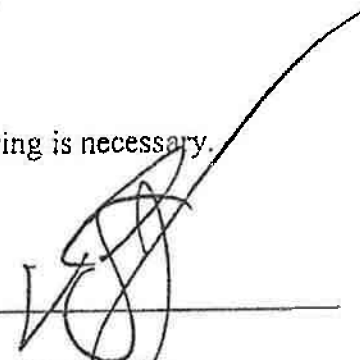
Chief Hall and Lieutenant Wright, those involved in the process may well be *more* objective when their scores and comments are *not* subject to public scrutiny.

My decision here will require the parties to negotiate any change to the existing system. While I have reached that conclusion based on the facts presented and my analysis of the law, I also believe that it is the correct solution. The parties are in a far better position to negotiate a solution than I am to impose one.

AWARD

The grievance is denied. As a result, no additional hearing is necessary.

Date: October 4, 2011



Jan Stiglitz