

ELECTRONICALLY FILED

Superior Court of California,
County of Orange

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Clerk of the Superior Court

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FULLERTON
8

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF ORANGE

11 JAY CICINELLI,
12 Petitioner,
13 v.
14 CITY OF FULLERTON and CITY
COUNCIL OF THE CITY OF
15 FULLERTON,
16 Respondents.

Case No.: 30-2017-00923829-CU-WM-CJC

[ASSIGNED FOR ALL PURPOSES TO
THEODORE HOWARD, DEPT. C18]

Complaint Filed: June 2, 2017

**RESPONDENT CITY OF FULLERTON'S
ANSWER TO PETITIONER JAY
CICINELLI'S VERIFIED PETITION FOR
WRIT OF ADMINISTRATIVE AND
TRADITIONAL MANDATE**

(*Exempt from filing fees pursuant to Gov.
Code, § 6103.)

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21 Respondent/ Real Party in Interest CITY OF FULLERTON ("City" or "Respondent/Real
22 Party in In Interest") hereby answers Petitioner Jay Cicinelli's Verified Petition for Writ of
23 Administrative and Traditional Mandate (CCP §§ 1094.5, 1085), and admits, denies, and
24 affirmatively alleges as follows:

- 25 1. In response to Paragraph 1, City admits the allegations contained therein.
26 2. In response to Paragraph 2, City admits the allegations contained therein.
27 3. In response to Paragraph 3, City admits the allegations contained therein.
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1 4. In response to Paragraph 4, City admits Petitioner was a peace officer for the
2 Fullerton Police Department for approximately 13 years. City admits petitioner was previously
3 employed by the Los Angeles Police Department. City is informed and believes, and on that
4 basis admits, that petitioner suffered gunshot wounds during his employment with the Los
5 Angeles Police Department. Except as expressly admitted herein, City denies each and every
6 allegation contained in Paragraph 4.

7 5. In response to Paragraph 5, City is without sufficient information sufficient to
8 admit or deny the allegation “Petitioner worked his way back from his injuries,” and on that basis
9 denies that allegation. City admits the remaining allegations of Paragraph 5.

10 6. In response to Paragraph 6, City admits the allegations contained therein.

11 7. In response to Paragraph 7, City is without sufficient information to admit or deny
12 the allegation that “Petitioner [believed] the officers were engaged in a fight and involved in a
13 very dangerous and threatening situation,” and therefore the allegation is denied. City admits the
14 remaining allegations of Paragraph 7.

15 8. In response to Paragraph 8, City is without sufficient information to admit or deny
16 the allegation that “Upon observing the situation, Petitioner was greatly concerned for his fellow
17 officers because, in his experience, it was very unusual for two officers to remain unable to gain
18 physical control over a resisting individual after a protracted struggle,” and therefore that
19 allegation is denied. City admits the remaining allegations of Paragraph 8.

20 9. In response to Paragraph 9, City admits that Petitioner, shortly after exiting his car,
21 struck Mr. Kelly Thomas twice in the head with his knee. Except as expressly admitted herein,
22 City denies each and every allegation contained in Paragraph 9.

23 10. In response to Paragraph 10, City admits that Petitioner used his Taser in “drive
24 stun mode,” a pain compliance technique, on Mr. Thomas. Except as expressly admitted herein,
25 City denies each and every allegation contained in Paragraph 10.

26 11. In response to Paragraph 11, City admits the allegations contained therein.

27 12. In response to Paragraph 12, City denies, generally and specifically, each and

1 every allegation contained therein.

2 13. In response to Paragraph 13, City denies, generally and specifically, each and
3 every allegation contained therein.

4 14. In response to Paragraph 14, City denies, generally and specifically, each and
5 every allegation contained therein.

6 15. In response to Paragraph 15, City denies, generally and specifically, each and
7 every allegation contained therein.

8 16. In response to Paragraph 16, City denies, generally and specifically, each and
9 every allegation contained therein.

10 17. In response to Paragraph 17, City admits the allegations contained therein.

11 18. In response to Paragraph 18, City admits the allegations contained therein.

12 19. In response to Paragraph 19, City is without sufficient information to admit or
13 deny the allegations therein, and therefore those allegations are denied.

14 20. In response to Paragraph 20, City is without sufficient information to admit or
15 deny the allegations that City residents were “upset by Thomas’ death” or that citizens “berated
16 the City Council members and then Chief of Police Michael Sellers about the incident,” and
17 therefore the allegation is denied. City admits the remaining allegations of Paragraph 20.

18 21. In response to Paragraph 21, City admits the allegations contained therein.

19 22. In response to Paragraph 22, City is without sufficient information to admit or
20 deny the allegations therein, and therefore those allegations are denied.

21 23. In response to Paragraph 23, City admits the allegations contained therein.

22 24. In response to Paragraph 24, City is without sufficient information to admit or
23 deny the allegations therein, and therefore those allegations are denied.

24 25. In response to Paragraph 25, City is without sufficient information to admit or
25 deny the allegations therein, and therefore those allegations are denied.

26 26. In response to Paragraph 26, City is without sufficient information to admit or
27 deny the allegations therein, and therefore those allegations are denied.

1 27. In response to Paragraph 27, City is without sufficient information to admit or
2 deny the allegations therein, and therefore those allegations are denied.

3 28. In response to Paragraph 28, City is without sufficient information to admit or
4 deny the allegations therein, and therefore those allegations are denied.

5 29. In response to Paragraph 29, City is without sufficient information to admit or
6 deny the allegations therein, and therefore those allegations are denied.

7 30. In response to Paragraph 30, City admits that Doug Chaffee and Greg Sebourn
8 were elected to City Council in the recall election. The allegations of Paragraph 30 are otherwise
9 denied.

10 31. In response to Paragraph 31, City denies the allegation that any strikes employed
11 by Petitioner were “distraction strikes.” The allegations of Paragraph 31 are otherwise admitted.

12 32. In response to Paragraph 32, City admits the allegations contained therein.

13 33. In response to Paragraph 33, City admits the allegations contained therein.

14 34. In response to Paragraph 34, City admits the allegations contained therein.

15 35. In response to Paragraph 35, City admits the allegations contained therein.

16 36. In response to Paragraph 36, City admits the allegations contained therein.

17 37. In response to Paragraph 37, City is without sufficient information to admit or
18 deny the allegations therein, and therefore those allegations are denied.

19 38. In response to Paragraph 38, City admits the allegations contained therein.

20 39. In response to Paragraph 39, City admits the allegations contained therein.

21 40. In response to Paragraph 40, City admits the allegations contained therein.

22 41. In response to Paragraph 41, City is without sufficient information to admit or
23 deny the allegations therein, and therefore those allegations are denied.

24 42. In response to Paragraph 42, City is without sufficient information to admit or
25 deny the allegations therein, and therefore those allegations are denied.

26 43. In response to Paragraph 43, City admits the allegations contained therein.

27 44. In response to Paragraph 44, City denies allegation that any strikes administered

1 by Petitioner were “distraction strikes” and that any strikes were “employed to retain control of
2 his weapon.” City admits the remaining allegations of Paragraph 44.

3 45. In response to Paragraph 45, City admits the allegations contained therein.

4 46. In response to Paragraph 46, City admits the allegations contained therein.

5 47. In response to Paragraph 47, City admits the allegations contained therein.

6 48. In response to Paragraph 48, to the extent Paragraph 64 is legal argument and/or
7 legal assertions, the City is not required to answer Paragraph 48. City admits that Petitioner’s
8 counsel, by letter dated December 2, 2016, filed a motion to recuse City Council from deciding
9 the matter. To the extent that any other facts are alleged in Paragraph 48, the City denies,
10 generally and specifically, each of those allegations.

11 49. In response to Paragraph 49, City denies the allegation that Petitioner was
12 “required to reserve a portion [of his allotted argument time] for rebuttal.” The allegations of
13 Paragraph 49 are otherwise admitted.

14 50. In response to Paragraph 50, City admits the allegations contained therein.

15 51. In response to Paragraph 51, to the extent Paragraph 51 is legal argument and/or
16 legal assertions, City is not required to answer Paragraph 51. City denies the allegation that “In
17 making this determination, the City Council unlawfully shifted the City’s burden of proving its
18 alleged charges to petitioner and applied an unlawful standard of review.” The allegations of
19 Paragraph 50 are otherwise admitted.

20 52. In response to Paragraph 52, to the extent Paragraph 52 is legal argument and/or
21 legal assertions, the City is not required to answer Paragraph 52. City denies that the City
22 Council’s determinations as to the hearing officer’s advisory decision were false, ignored
23 evidence, or were contrary to the weight of the evidence. The allegations of Paragraph 52 are
24 otherwise admitted.

25 53. In response to Paragraph 53, City denies, generally and specifically, each and
26 every allegation contained therein.

27 54. In response to Paragraph 54, City denies, generally and specifically, each and

1 every allegation contained therein.

2 55. In response to Paragraph 55, City admits the allegations contained therein.

3 56. In response to Paragraph 56, City admits the allegations contained therein.

4 57. In response to Paragraph 57, City admits the allegations contained therein.

5 58. In response to Paragraph 58, City admits the allegations contained therein.

6 59. In response to Paragraph 59, City admits the allegations contained therein.

7 60. In response to Paragraph 60, City is without sufficient information to admit or

8 deny the allegations therein, and therefore those allegations are denied.

9 61. In response to Paragraph 61, to the extent Paragraph 61 is legal argument and/or

10 legal assertions, City is not required to answer Paragraph 61. To the extent any facts are alleged

11 in Paragraph 61, City denies each and every allegation contained in Paragraph 61.

12 62. In response to Paragraph 62, to the extent Paragraph 62 is legal argument and/or

13 legal assertions, City is not required to answer Paragraph 62. City admits that the MOU states

14 that the City Council “shall act upon the arbitrator’s recommendations within 60 calendar days of

15 the Director of Human Resource’s receipt of a request for it to do so.” Except as expressly

16 admitted herein, City denies each and every allegation contained in Paragraph 62.

17 63. In response to Paragraph 63, to the extent Paragraph 63 is legal argument and/or

18 legal assertions, City is not required to answer Paragraph 63. To the extent any facts are alleged

19 in Paragraph 63, City denies each and every allegation contained in Paragraph 63.

20 64. In response to Paragraph 64, to the extent Paragraph 64 is legal argument and/or

21 legal assertions, City is not required to answer Paragraph 64. To the extent any facts are alleged

22 in Paragraph 64, City denies each and every allegation contained in Paragraph 64.

23 65. In response to Paragraph 65, to the extent Paragraph 65 is legal argument and/or

24 legal assertions, City is not required to answer Paragraph 65. To the extent any facts are alleged

25 in Paragraph 65, the City denies each and every allegation contained in Paragraph 65.

26 66. In response to Paragraph 66, to the extent Paragraph 66 is legal argument and/or

27 legal assertions, City is not required to answer Paragraph 66. To the extent any facts are alleged

1 in Paragraph 66, the City denies each and every allegation contained in Paragraph 66.

2 67. In response to Paragraph 67, to the extent Paragraph 67 is legal argument and/or
3 legal assertions, City is not required to answer Paragraph 67. To the extent any facts are alleged
4 in Paragraph 67, City denies each and every allegation contained in Paragraph 67.

5 68. In response to Paragraph 68, Paragraph 68 is legal argument and/or legal
6 assertions, and City is not required to answer Paragraph 68.

7 69. In response to Paragraph 69, to the extent Paragraph 69 is legal argument and/or
8 legal assertions, City is not required to answer Paragraph 69. City admits that, prior to his
9 termination, petitioner was a full-time non-probationary employee of the City.

10 70. In response to Paragraph 70, to the extent Paragraph 70 is legal argument and/or
11 legal assertions, City is not required to answer Paragraph 70. To the extent any facts are alleged
12 in Paragraph 70, City denies each and every allegation contained in Paragraph 70.

13 71. In response to Paragraph 71, to the extent Paragraph 71 is legal argument and/or
14 legal assertions, City is not required to answer Paragraph 71. To the extent any facts are alleged
15 in Paragraph 71, City denies each and every allegation contained in Paragraph 71.

16 72. In response to Paragraph 72, to the extent Paragraph 72 is legal argument and/or
17 legal assertions, City is not required to answer Paragraph 72. To the extent any facts are alleged
18 in Paragraph 72, City denies each and every allegation contained in Paragraph 72.

19 73. In response to Paragraph 73, to the extent Paragraph 73 is legal argument and/or
20 legal assertions, City is not required to answer Paragraph 73. To the extent any facts are alleged
21 in Paragraph 73, City denies each and every allegation contained in Paragraph 73.

22 74. In response to Paragraph 74, to the extent Paragraph 74 is legal argument and/or
23 legal assertions, City is not required to answer Paragraph 74. To the extent any facts are alleged
24 in Paragraph 74, City denies each and every allegation contained in Paragraph 74.

25 75. In response to Paragraph 75, to the extent Paragraph 75 is legal argument and/or
26 legal assertions, City is not required to answer Paragraph 75. To the extent any facts are alleged
27 in Paragraph 75, City denies each and every allegation contained in Paragraph 75.

1 76. In response to Paragraph 76, to the extent Paragraph 76 is legal argument and/or
2 legal assertions, City is not required to answer Paragraph 76. To the extent any facts are alleged
3 in Paragraph 76, City denies each and every allegation contained in Paragraph 76.

4 77. In response to Paragraph 77, to the extent Paragraph 77 is legal argument and/or
5 legal assertions, City is not required to answer Paragraph 77. To the extent any facts are alleged
6 in Paragraph 77, City denies each and every allegation contained in Paragraph 77.

7 78. In response to Paragraph 78, to the extent Paragraph 78 is legal argument and/or
8 legal assertions, City is not required to answer Paragraph 78. To the extent any facts are alleged
9 in Paragraph 78, City denies each and every allegation contained in Paragraph 78.

10 79. In response to Paragraph 79, to the extent Paragraph 79 is legal argument and/or
11 legal assertions, City is not required to answer Paragraph 79. To the extent any facts are alleged
12 in Paragraph 79, City denies each and every allegation contained in Paragraph 79.

13 **AFFIRMATIVE DEFENSES**

14 **FIRST AFFIRMATIVE DEFENSE**

15 **(Failure to State a Claim)**

16 80. City alleges the Petition fails to state sufficient facts to constitute grounds for
17 issuance of a writ of administrative mandate pursuant to Code of Civil Procedure section 1094.5
18 or a writ of traditional mandate under Code of Civil Procedure section 1085.

19 **SECOND AFFIRMATIVE DEFENSE**

20 **(Lawful Acts)**

21 81. City alleges that at all times mentioned the Petition, the City acted within its lawful
22 discretion and in conformity with all applicable laws, regulations, rules and policies.

23 **THIRD AFFIRMATIVE DEFENSE**

24 **(Waiver)**

25 82. City alleges, upon information and belief, Petitioner may have waived any and all
26 claims he may have had or have against Respondent arising from the transactions and occurrences
27 set forth in the petition. Further, Petitioner may have or has waived any and all rights he may

1 have relative to the matters alleged in the Petition by failing, refusing or neglecting to properly
2 perform his obligations thereunder and by undertaking other conduct, the exact nature of which
3 will be inserted herein by amendment or proved at the time of trial.

4 **FOURTH AFFIRMATIVE DEFENSE**

5 **(Unclean Hands)**

6 83. City alleges, upon information and belief, the Petition, and each and every
7 allegations therein, is barred in that Petitioner is guilty of wrongful misconduct and/or omissions
8 in connection with the claims that form the basis of this litigation, including but not limited to the
9 facts concerning Petitioner's conduct that formed the basis for the discipline, and therefore each
10 and every claim should be barred from all legal or equitable relief requested in the Petition or
11 otherwise by reason of unclean hands. Petitioner's own wrongful conduct caused or contributed
12 to the allegations set forth in the Petition, which would allow City to assert the equitable remedy
13 of unclean hands at the time of trial.

14 **FIFTH AFFIRMATIVE DEFENSE**

15 **(Consent)**

16 84. City alleges, upon information and belief, Petitioner, at all relevant times, gave his
17 consent, express or implied, to the alleged acts, omissions, and conduct of City. Petitioner
18 engaged in conduct that would establish consent to the conduct alleged in the Petition, which
19 would allow City to assert the equitable remedy of consent at the time of trial.

20 **SIXTH AFFIRMATIVE DEFENSE**

21 **(MOU Timelines Not Mandatory)**

22 85. City alleges that the timelines in the Memorandum of Understanding between City
23 and the Fullerton Police Officers' Association- Safety are directory and not mandatory, and that a
24 violation of those timelines would not deprive the City Council of jurisdiction to hear and decide
25 the appeal of the decision to terminate Petitioner's employment.

26 **SEVENTH AFFIRMATIVE DEFENSE**

27 **(Writ would Violate Duty of Public Officer)**

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FOURTEENTH AFFIRMATIVE DEFENSE

(No Attorney's Fees)

93. City, upon information and belief, alleges that as to each and every cause of action alleged in the Petition, Petitioner fails to allege sufficient facts to support an award of attorney's fees and costs against Respondents.

PRAYER

WHEREFORE, City prays for judgment in its favor and against Petitioner as follows:

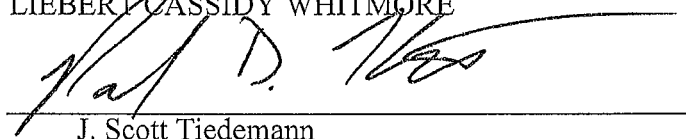
1. That the Petition be denied and dismissed with prejudice;
2. That Petitioner takes nothing by reason of this Petition;
3. That City be awarded its attorneys' fees, costs and expense of suit and other available penalties or remedies in accordance with applicable law; and
4. For such other and further relief as the Court may deem just and proper.

Dated: July 7, 2017

Respectfully submitted,

LIEBERT CASSIDY WHITMORE

By:



J. Scott Tiedemann
Paul D. Knothe
Attorneys for Respondent/ Real Party in Interest
CITY OF FULLERTON

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: **6033 West Century Boulevard, 5th Floor, Los Angeles, California 90045.**

On **July 7, 2017**, I served the foregoing document(s) described as **RESPONDENT CITY OF FULLERTON'S ANSWER TO PETITIONER JAY CICINELLI'S VERIFIED PETITION FOR WRIT OF ADMINISTRATIVE AND TRADITIONAL MANDATE** in the manner checked below on all interested parties in this action addressed as follows:

Michael D. Schwartz
Rains Lucia Stern PC
3401 Centre Lake Drive, Suite 440
Ontario, CA 91761

James R. Touchstone
Jones & Mayer
3777 North Harbor Blvd.
Fullerton, CA 92835

- (BY U.S. MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid 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.
- (BY FACSIMILE)** I am personally and readily familiar with the business practice of Liebert Cassidy Whitmore for collection and processing of document(s) to be transmitted by facsimile. I arranged for the above-entitled document(s) to be sent by facsimile from facsimile number 310.337.0837 to the facsimile number(s) listed above. The facsimile machine I used complied with the applicable rules of court. Pursuant to the applicable rules, I caused the machine to print a transmission record of the transmission, to the above facsimile number(s) and no error was reported by the machine. A copy of this transmission is attached hereto.
- (BY OVERNIGHT MAIL)** By overnight courier, I arranged for the above-referenced document(s) to be delivered to an authorized overnight courier service, FedEx, for delivery to the addressee(s) above, in an envelope or package designated by the overnight courier service with delivery fees paid or provided for.
- (BY ELECTRONIC SERVICE)** By electronically mailing a true and correct copy through Liebert Cassidy Whitmore's electronic mail system from ltarrin@lcwlegal.com to the email address(es) set forth above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- (BY PERSONAL DELIVERY)** I delivered the above document(s) by hand to the addressee listed above.

Liebert Cassidy Whitmore
A Professional Law Corporation
6033 West Century Boulevard, 5th Floor
Los Angeles, California 90045

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Executed on **July 7, 2017**, at Los Angeles, California.

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



Linda Tarrin