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Superior Court of California,
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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
15 COUNCIL OF THE CITY OF
16 FULLERTON,

Respondents.

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

**VERIFIED PETITION FOR WRIT OF
ADMINISTRATIVE AND TRADITIONAL
MANDATE**

Judge Theodore Howard

[CCP §§ 1094.5, 1085]

17
18 Petitioner Jay Cicinelli ("Petitioner") seeks a Writ of Administrative Mandate pursuant to Code
19 of Civil Procedure section 1094.5 and a Writ of Traditional Mandate pursuant to Code of Civil
20 Procedure section 1085, directed to the City of Fullerton ("City") and the Fullerton City Council ("City
21 Council") (collectively "Respondents") compelling and commanding them to set aside their
22 administrative decision to terminate Petitioner's employment as a corporal with the Fullerton Police
23 Department ("Department") and to reinstate Petitioner to his former position with back-pay and
24 interest.

25 Petitioner alleges as follows:

26 **PARTIES**

27 1. Petitioner was formerly employed by the Department as a sworn peace officer holding
28 the rank of corporal. Petitioner was terminated from his position on July 19, 2012. Petitioner was a

permanent status non-probationary employee at the time of his termination.

2. The City was and is a political subdivision of the State of California, operating pursuant to the laws of the State of California as a “general law” city. The City was the employer of Petitioner prior to his termination.

3. The City Council is the elected governing body of the City. The City Council is comprised of five elected council members. The City Council is authorized to make final decisions on administrative appeals by City employees challenging disciplinary actions, including termination. The City Council made the final administrative decision to terminate Petitioner.

BACKGROUND FACTS

4. Petitioner was a peace officer for the Department for approximately 13 years. Prior to being hired by the Department, Petitioner was employed as a peace officer by the Los Angeles Police Department ("LAPD"). A mere two weeks after he began his employment with the LAPD, Petitioner was ambushed and attacked while on duty, suffering six gunshot wounds and permanently losing his left eye.

5. Petitioner worked his way back from his injuries and was hired by the Department in July of 1998. Throughout his time as a peace officer for the Department, Petitioner was routinely regarded as “meeting” or “exceeding” performance standards. Indeed, even after the incident giving rise to his termination, Chief of Police Danny Hughes amended Petitioner’s annual performance review to increase Petitioner’s rating in the area of “decision making” from “meets” to “exceeding expectations,” with an explanation that Petitioner is “able to identify problems and come up with a reasonable solution to the problem without any difficulties. [Petitioner] continues to make good sound decisions in the field.” During that same evaluation period, it was noted that Petitioner was “able to step in as a Sergeant....”

6. On or about July 5, 2011, while working a routine patrol assignment, Petitioner monitored radio traffic from fellow police officers concerning their contact with an individual suspected of being in possession of stolen property. Petitioner then heard a "Code 3" call for assistance from the officers on scene and was quickly dispatched to assist.

7. While Petitioner was en route, a second “Code 3” call for assistance was broadcast by

1 the officers on scene, causing Petitioner to believe the officers were engaged in a fight and involved in
2 a very dangerous and threatening situation.

3 8. When Petitioner arrived on scene, he found fellow police officers Manuel Ramos and
4 Joseph Wolfe on the ground in a physical struggle with the suspect (later identified as Mr. Kelly
5 Thomas). Upon observing the situation, Petitioner was greatly concerned for his fellow officers
6 because, in his experience, it was very unusual for two officers to remain unable to gain physical
7 control over a resisting individual after a protracted struggle.

8 9. Petitioner immediately exited his patrol vehicle and ran to assist his fellow officers.
9 Petitioner employed two quick “distraction strikes” to Mr. Thomas’ head, the only available place on
10 Mr. Thomas’ body to employ force to quickly effectuate his arrest. Petitioner delivered the strikes with
11 his knee, while using his arms in an effort to restrain the resisting Mr. Thomas. The strikes were
12 delivered with minimal force, with the foot of Petitioner’s striking knee having never left the ground.
13 Petitioner’s intent was to inflict pain that would cause Mr. Thomas to stop resisting, if only for a
14 moment, and allow the officers to apply adequate restraints.

15 10. Petitioner’s distraction strikes did not work – Mr. Thomas continued to resist without
16 pause, preventing the officers from gaining control over him. Petitioner thereafter employed another
17 measured tactic, the use of his “Taser” in “drive stun” mode, a pain compliance technique intended to
18 induce Mr. Thomas to stop resisting. This too did not work. Mr. Thomas kept resisting and increased
19 his resistance by kicking at the officers.

20 11. Petitioner also attempted to deploy his Taser in “dart” mode in an effort to deliver an
21 electronic pulse through two projectiles. If effective, the pulse temporarily physically incapacitates the
22 subject so as to cause an immediate halt to physical resistance. Unfortunately, only one of the two
23 projectiles successfully contacted Mr. Thomas, and Petitioner’s attempted use of his Taser in “dart”
24 mode was similarly ineffective.

25 12. Based on Mr. Thomas’ seemingly enhanced physical strength and ability to resist
26 multiple officers for an unusually long period of time, as well as Mr. Thomas’ seemingly greater
27 tolerance for pain, Petitioner believed Mr. Thomas was under the influence of a drug, possibly PCP.
28 Petitioner also observed his fellow officers to be extremely fatigued and exhausted, appearing simply

1 to “hang on” as long as they could in an effort to overcome Mr. Thomas’ resistance. Indeed, Officer
2 Ramos had disengaged from Mr. Thomas and moved aside to leave Petitioner and Officer Wolfe as the
3 only two officers remaining in the struggle.

4 13. Mr. Thomas suddenly reached up and grabbed ahold of Petitioner’s Taser, which
5 Petitioner was still holding after unsuccessfully attempting to deploy the device in “dart” mode.
6 Petitioner believed Mr. Thomas was trying to wrest control of his weapon away from him. This action
7 by Mr. Thomas was of immense concern to Petitioner, and would be to any peace officer in
8 Petitioner’s position. Petitioner was trained to regard weapon retention as a matter of life or death.
9 Indeed, when the Department issued and trained him to use a Taser, Petitioner was told to shoot any
10 suspect who gained control of his Taser because the weapon could be used to incapacitate an officer,
11 thereby allowing potential access to the officer’s firearm. For these and other reasons, Petitioner could
12 not relinquish control of his Taser and allow the suspect to gain possession of it. Due to the exigent
13 circumstances, Petitioner also was unable to properly holster his Taser.

14 14. Fearing that Mr. Thomas would disarm him of his Taser, Petitioner used it to strike Mr.
15 Thomas’s hands as Mr. Thomas continued to grab for the weapon. This did not deter Mr. Thomas,
16 however, as he again tried to grab Petitioner’s Taser. In response to this second attempt, Petitioner
17 delivered two strikes to Mr. Thomas’ face with the Taser in order to retain possession of his weapon
18 and overcome the ongoing resistance.

19 15. Petitioner’s strikes were not employed with an intent, nor in a manner, to cause great
20 bodily injury or death. Petitioner’s strikes were consistent with his training to use improvised impact
21 weapons in a reasonable manner to overcome resistance to lawful orders. The strikes did not cause Mr.
22 Thomas to stop resisting.

23 16. Shortly after the strikes were delivered, a Department Sergeant arrived on scene.
24 Petitioner pleaded with the Sergeant to help the officers gain control of Mr. Thomas. Eventually more
25 officers came to assist and were able to control Mr. Thomas and take him into custody, which required
26 placing Mr. Thomas in a hobble restraint device.

27 17. As soon as reasonably practical after Mr. Thomas was safely restrained, Petitioner
28 immediately called for medical assistance to attend to Mr. Thomas.

1 18. Tragically, Mr. Thomas died five days later on or about July 10, 2011.

2 19. Mr. Thomas' death sparked wide-spread public discontent, ultimately dominating City
3 politics and culminating in drastic political consequences for three City Council members.

4 20. On or about August 2, 2011, hundreds of City residents who were upset by Mr.
5 Thomas' death, attended a City Council meeting. For approximately three and a half hours, many of
6 the citizens in attendance berated the City Council members and then Chief of Police Michael Sellers
7 about the incident.

8 21. In particular, community organizer Tony Bushula, who ran the "Friends for Fullerton's
9 Future" website, announced that he would be circulating a petition to recall three sitting City Council
10 members who refused to immediately denounce the actions of the involved police officers, including
11 Petitioner. Mr. Bushula did, in fact, circulate and file a recall petition with the required number of
12 voter signatures. Accordingly, a special recall election was held on or about June 5, 2012.

13 22. The recall election, including the various candidates' campaign statements and
14 statements by other City Council members not facing recall, focused almost exclusively on Mr.
15 Thomas' tragic death, including ultimate fate and employment status of the involved officers,
16 including Petitioner.

17 23. For instance, in an "open letter to Fullerton residents" dated May 9, 2012, City Council
18 member Bruce Whitaker stated that the video capturing the incident was "inhumane," "clearly
19 captured" most of the "brutal beating," and assured his constituents that he "agreed" with the District
20 Attorney's stated beliefs that "the actions of the officers involved were 'reckless' and 'in conscious
21 disregard for human life.'"

22 24. During publicly broadcast interviews in or around October of 2011, City Council
23 member Whitaker stated he was "angered" that he and the City Council had been "lied to" by the
24 involved police officers, whose written reports of the incident, in his judgment, were "very
25 misleading," "fictionalized," and may have included "intentional misrepresentations" of the facts
26 because some of the officers' recollections "proved not to be true" based on what he "believes to be the
27 facts." This caused him to suspect the reports were in fact "false," were intended as a "cover-up" of the
28 incident, and resulted in his inability to rely on the officers' statements.

1 25. City Council member Whitaker also expressed his view that “consequences” must
2 befall Department employees responsible for “inaccurate or false reports,” which in his mind were “not
3 true at all or provably false,” later adding he has “a vested interest in sending a message that” “there
4 are consequences for that.”

5 26. City Council member Whitaker further explained that he came to believe the officers’
6 recollections were “provably false” and untrustworthy because of information he personally obtained
7 from website blogs, emails he received, eyewitness accounts of the incident, and other facts he “had
8 pieced together from the outside.” Such information, according to City Council member Whitaker, was
9 “much more accurate” than the officers’ recollections of the incident.

10 27. City Council member Whitaker expressed his disappointment that “nobody had claimed
11 responsibility” for the tragic and unfortunate death of Mr. Thomas.

12 28. Doug Chaffee, a candidate for one of the targeted recall City Council seats, publicly
13 described the incident as “an absolutely murderous beating,” and openly advocated for the City
14 Council to “stand up and issue an apology” for what had occurred.

15 29. Other City Council members and candidates publicly expressed personal views similar
16 to those of City Council member Whitaker and candidate Chaffee, disparaging the police officers
17 involved, demonstrating a prejudgment of what actually occurred, and generally expressing their belief
18 that the involved police officers had engaged in wrongful and punishable conduct.

19 30. Proponents of the recall election successfully ousted the three targeted City Council
20 members and replaced them with two new members, Chaffee and Greg Sebourn, who ultimately voted
21 to terminate Petitioner.

22 31. On or about May 21, 2012, then Chief of Police Dan Hughes notified Petitioner of his
23 preliminary decision to terminate Petitioner’s employment in a memorandum entitled “Notice of
24 Proposed Dismissal.” Chief Hughes’ preliminary decision was based on allegations that Petitioner
25 violated Department policy by: using unreasonable and unlawful force during the incident with Mr.
26 Thomas – specifically identified as Petitioner’s use of the initial distraction strikes and the subsequent
27 strikes with his Taser, dishonestly reporting his recollection of the incident, making statements
28 immediately following the incident which reflected unfavorably upon the Department, and failing to

1 activate his digital audio recorder. Chief Hughes made clear that his preliminary decision to terminate
2 Petitioner was “not dependent upon the cause of death. That is, even if Mr. Thomas had survived the
3 incident, [Chief Hughes believed] that [Petitioner’s] conduct would still warrant termination....”

4 32. On or about July 10, 2012, Petitioner and his counsel, Michael D. Schwartz,
5 participated in a pre-deprivation due process hearing or “*Skelly* meeting” where they responded to the
6 allegations contained in the Notice of Proposed Dismissal.

7 33. On or about July 19, 2012, Petitioner was notified of Chief Hughes’ final decision to
8 terminate his employment by memorandum entitled “Notice of Dismissal.” Chief Hughes’ final
9 determination was based on the same allegations contained in the Notice of Proposed Dismissal except
10 for the allegation that Petitioner dishonestly reported his recollection of the incident. Upon further
11 review, Chief Hughes concluded that the charge was unwarranted. Chief Hughes made clear that his
12 final decision to terminate Petitioner was “not dependent upon the cause of death. That is, even if Mr.
13 Thomas had survived the incident, [Chief Hughes believed] that [Petitioner’s] conduct would still
14 warrant termination....”

15 34. Petitioner timely appealed his termination pursuant to Article 45 of the 2011-2014
16 Memorandum of Understanding between Respondent City and the Fullerton Police Officers’
17 Association for the Police Safety Unit (“MOU”). Article 45 affords the City’s police officers with the
18 opportunity for an evidentiary hearing before a neutral hearing officer, to make factual findings and
19 written recommendations to the City Manager, and ultimately to the City Council upon a timely
20 request by either party.

21 35. Article 45 of the MOU states in pertinent part:

22
23 (7) The arbitrator, after hearing all pertinent evidence and testimony,
24 shall make written recommendations to the City Manager and the
25 parties involved. Then, if either party is still in disagreement, it may
26 request that the City Council decide the matter. Such requests must
27 be filed in writing with the Human Resources Director within 30
28 calendar days from the date of the arbitrator's recommendations.
Failure to do so will bar Council consideration of the arbitrator’s
recommendations.

The arbitrator shall limit his/her findings and recommendations

1 strictly to the interpretation or application of this [MOU] or of Rules
2 and Regulations governing personnel practices or working
3 conditions, or the practicable consequences of a City rights decision
4 on wages, hours and other terms and conditions of employment, and
5 shall make no recommendation:

6 (a) Contrary or inconsistent with or modifying or varying in any
7 way the provisions of the Employer-Employee Relations
8 Resolution.

9 (b) Inconsistent with the City's duties, responsibilities, or
10 obligations as provided by law.

11 (c) Recommending any wage increase or decrease.

12 (d) Recommending the payment of back wages for more than 14
13 calendar days prior to the date the aggrieved employee knew,
14 or by reasonable diligence could have known, of the
15 occurrence of the act or omission on which the grievance is
16 based.

17 The arbitrator shall make no recommendation reversing, overruling,
18 or otherwise modifying any City decision or omission except after
19 finding (1) the City decision violated some express provision of the
20 Resolution, or (2) the City decision or omission was, under the
21 circumstances, arbitrary, capricious, discriminatory or otherwise
22 unreasonable.

23 (8) The City Council shall be guided by the arbitrator's recommendations
24 in reaching its decision. The Council shall act upon the arbitrator's
25 recommendations within 60 calendar days of the Director of Human
26 Resource's receipt of a request for it to do so. The City shall notify
27 the employee of the Council's action by first class mail. Such notice
28 shall be postmarked no later than three calendar days after the
Council action.

36. Petitioner's appeal was stayed pending resolution of criminal charges filed against him
as a result of the incident with Mr. Thomas – one count each of excessive or unreasonable force and
involuntary manslaughter. Following a jury trial, a unanimous jury acquitted Petitioner of all charges
on or about January 13, 2014.

37. Immediately following Petitioner's acquittal, hundreds of people protested at the
Fullerton City Hall demanding that Petitioner and his fellow officers never be reinstated to their
positions as a peace officers with the City.

1 38. Petitioner's appeal of his termination subsequently proceeded to an evidentiary hearing
2 before Hearing Officer Michael Prihar ("Prihar"). The eight-day hearing was conducted during March,
3 July, and December of 2015.

4 39. The parties stipulated to two ultimate issues for the appeal: (1) "Did the City's decision
5 to terminate [Petitioner] violate some express provision of the Employer-Employee Relations
6 Resolution?" and (2) "Was the City's decision to terminate Appellant under the circumstances
7 arbitrary, capricious, discriminatory, or otherwise unreasonable?"

8 40. In recognizing that the decision to terminate Petitioner was based solely on Petitioner's
9 alleged conduct, and not dependent upon the cause or manner of Mr. Thomas' death, the parties
10 stipulated and agreed that "cause of death and manner of death are not at issue" for the evidentiary
11 hearing.

12 41. During the pendency of the evidentiary hearing, in an open City Council meeting,
13 Council member Whitaker described the conduct of the involved officers as a "violent encounter" and
14 a "beating" which caused injuries to Mr. Thomas that "were not incidental, accidental or unavoidable."
15 He also rejected the description of the encounter as a "struggle" – in his opinion a "weak description []
16 of an encounter which shattered facial bones, left [Thomas] choking on his own blood, pinned to the
17 pavement with crushing pressure on his thorax, unable to breathe, resulting in death."

18 42. At this same City Council meeting, Council member Whitaker expressed his opinion
19 that settling the civil case, which arose out of the incident, would "defeat[] and bur[y] accountability,"
20 "deny even the smallest measure of responsibility and accountability," which in his view was simply
21 "a way to pay for a mistake, but not admit to wrongdoing" by the involved officers, including
22 Petitioner, culminating in a "defeat for...decency." Council member Whitaker further stated that
23 accountability could only be achieved by allowing the civil case to go to trial, which would offer
24 another opportunity to "account for what occurred," since "[w]e did not receive a full airing of all the
25 issues in the criminal trial."

26 43. Following the evidentiary appeal hearing, and after consideration of the evidence,
27 Prihar issued his Findings and Recommendations on or about October 30, 2016. Prihar found that
28 Petitioner's termination was unreasonable, and recommended Petitioner be reinstated to his former

1 position with full back-pay and benefits, adjusted to reflect a recommended thirty-day disciplinary
2 suspension without pay in lieu of termination.

3 44. Specifically, Prihar found that Petitioner's use of force – the two distraction strikes
4 upon Petitioner's arrival at the chaotic scene and the subsequent strikes with the Taser employed to
5 retain control of his weapon and overcome Mr. Thomas' resistance – was not excessive or
6 unreasonable and therefore did not violate Department policy. Among other findings, Prihar
7 determined that Petitioner's distraction strikes were not inconsistent with Department training, were
8 applied with limited force, did not constitute deadly force, were not intended to inflict serious injury or
9 death, and that Petitioner could not have reasonably anticipated as such. Overall, Prihar found that
10 Petitioner's distraction strikes were reasonable and within Department policy under the circumstances.

11 45. Prihar also found that Petitioner's strikes with the Taser were within Department policy.
12 This followed from his findings that, among others findings, Petitioner deployed the strikes in response
13 to a credible threat that Mr. Thomas was attempting to obtain his weapon and that Petitioner's response
14 comported with his training to retain weapons at all costs so as to prevent their use against the officers
15 or other citizens, and that Petitioner's actions were taken in an effort to abate Mr. Thomas' continuing
16 resistance under exigent circumstances that required immediate resolution. Additionally, Prihar
17 determined there was no evidence the strikes were delivered with lethal intent, and that they were
18 otherwise not inconsistent with Petitioner's training or clear Department policy on the proper use of
19 impact weapons.

20 46. Prihar did find sufficient evidence to sustain one of the alleged charges – that Petitioner
21 violated Department policy by making certain unprofessional statements following the incident with
22 Mr. Thomas. However, Prihar found that this single violation, made after an adrenaline-inducing
23 situation and no evidence that Petitioner previously engaged in similar conduct, was unlikely to occur
24 again in the future. Consequently, Prihar concluded that termination was unreasonable and
25 unwarranted for this single violation of Department policy.

26 47. The City appealed Prihar's Findings and Recommendations to the City Council via
27 email correspondence to the City's Human Resources Director on or about November 28, 2016.

28 48. In a letter dated December 2, 2016, Petitioner's counsel filed a motion to recuse the

1 City Council from deciding the matter based on the City Council members' publicly-expressed
2 prejudgment of the facts before the evidentiary appeal hearing before Prihar, their publicly-expressed
3 bias against Petitioner, and their public advocacy for a pre-determined result to his appeal – upholding
4 termination – all for overt political purposes. In short, the motion put the City Council on notice that it
5 could not act as the competent and impartial tribunal to which Petitioner was legally entitled as a
6 matter of due process.

7 49. The City Council heard the City's appeal of Prihar's Findings and Recommendations on
8 or about February 7, 2017. The City Council was provided a copy of the administrative record
9 developed during the eight-day evidentiary hearing before Prihar and written briefs submitted by each
10 party. During the hearing before the City Council, each party was afforded fifteen minutes of oral
11 argument, from which Petitioner was required to reserve a portion for rebuttal. At the hearing, the City
12 Council denied Petitioner's motion for recusal.

13 50. On or about, March 7, 2017, the City Council adopted its Findings, Determination, and
14 Order ("Order") rejecting Prihar's Findings and Recommendations and upholding Petitioner's
15 termination based on a de novo review. City Council members Whitaker, Chaffee, and Sebourn were
16 among those voting to terminate Petitioner.

17 51. The City Council rejected Prihar's finding that Petitioner did not use excessive force in
18 violation of Department policy. The City Council determined that Prihar abused his discretion because,
19 in the City Council's words, he "supplanted his own determination as to whether the use of force was
20 reasonable under the circumstances, rather than determining whether [the Chief of Police's] finding of
21 excessive force was arbitrary, capricious, discriminatory or otherwise unreasonable under the
22 circumstances." In making this determination, the City Council unlawfully shifted the City's burden of
23 proving its alleged charges to Petitioner and applied an unlawful standard of review.

24 52. The City Council separately found fault with Prihar's determination that Petitioner used
25 reasonable and not excessive force on factual grounds, stating that Prihar "exceeded the scope of
26 evidence to justify what in essence, was deadly force," when he found that Petitioner delivered
27 distraction strikes to overcome Mr. Thomas' active resistance in accordance with accepted peace
28 officer training, and "use[d] facts not in evidence" when finding that it was not unreasonable for

1 Petitioner to have acted immediately upon arrival at the scene to assist Officers Ramos and Wolfe
2 without waiting for the arrival or more officers. The City Council's determinations that Prihar
3 "exceeded the scope of evidence" and "use[d] facts not in evidence" are demonstrably false, ignore the
4 evidence supporting Prihar's findings, and are contrary to the overwhelming weight of the evidence.

5 53. The City Council's findings are also improper because they are entirely based on its
6 assumption that Petitioner's force was the cause of Mr. Thomas' death – a matter the parties stipulated
7 was not at issue in Petitioner's appeal because the decision to terminate Petitioner was not dependent
8 upon it. Specifically, the City Council found that: "[m]edically," Petitioner's distraction strikes
9 "contributed to Thomas' death," "the objective medical evidence supports excessive force" due to
10 injuries "leading to the death of Thomas," Hearing Officer Prihar "flat[ly] deni[ed] [] overwhelming
11 medical evidence as to the cause of Thomas' death," and its conclusory finding that "[t]he simple fact
12 of the matter is that" Mr. Thomas "was beaten to death by officers who used excessive force,
13 particularly by [Petitioner] who administered lethal blows...." In this regard, the City Council's
14 rejection of Prihar's Findings and Recommendations was based almost entirely on its assumption
15 about factual matters that were not at issue, not proven, and not part of the administrative record of the
16 evidentiary hearing.

17 54. The City Council also improperly rejected Prihar's findings that the Department's
18 digital audio recording policy was ambiguous and his recommendation that terminating Petitioner
19 based on his unprofessional comments after the incident was unreasonable.

20 55. The procedures culminating in the City Council's decision were required by law.

21 56. The City Council's decision was a final administrative decision.

22 57. Petitioner has exhausted all administrative remedies required by law.

23 58. On or about May 10, 2017, Petitioner through counsel delivered a written request to the
24 Fullerton City Clerk to prepare and deliver a copy of the administrative record pursuant to Code of
25 Civil Procedure section 1094.6(c). As of the filing of this Petition, the City has not responded to the
26 request to prepare the administrative record.

27 59. On or about May 10, 2017, Petitioner through counsel presented the City a claim for
28 damages pursuant to the Government Tort Claims Act, Government Code section 810 *et seq.* On or

1 about May 31, 2017, the City rejected Petitioner's claim for damages.

2 60. Additional facts exist not specifically identified above which demonstrate the City
3 Council members' bias towards Petitioner and their lack of impartiality concerning Petitioner's appeal
4 and employment status in violation of his right to due process. Such facts could not have been elicited
5 and presented to the City Council prior to it hearing the City's appeal of Prihar's Findings and
6 Recommendations in the exercise of reasonable diligence. Accordingly, Petitioner intends to elicit such
7 facts and present to the court in support of this Petition, whether by augmenting the administrative
8 record or otherwise.

9 **FIRST CAUSE OF ACTION**

10 **(Code of Civil Procedure § 1094.5 – Administrative Mandate)**

11 61. Petitioner realleges and incorporates paragraphs 1 through 60 as though fully set forth
12 herein.

13 62. The City Council's decision is invalid and should be reversed because the City Council
14 acted without or in excess of its jurisdiction, including:

15 a) The City Council failed to act timely on the City's appeal of Prihar's Findings
16 and Recommendations. The MOU states that the City Council "shall act upon the arbitrator's
17 recommendations within 60 calendar days of the Director of Human Resource's receipt of a request for
18 it to do so." Here, the Director of Human Resources received the City's request on November 28,
19 2016. The City Council failed to act upon the City's request within the required time period. The City
20 Council did not act upon the City's request until March 7, 2017, one-hundred days after the City's
21 appeal. Accordingly, the City Council was without jurisdiction to act upon the City's request, and
22 therefore the Findings and Recommendations of Prihar must stand.

23 63. The City Council's decision is invalid and should be reversed because the City Council
24 did not afford Petitioner a fair hearing, including:

25 a) The City Council was not a competent nor impartial tribunal to hear Petitioner's
26 case, and therefore Petitioner was denied his right to a fair hearing as required by due process. The
27 City Council members pre-judged the facts prior to reviewing the administrative record generated by
28 the proceedings before Prihar and publicly expressed that pre-judgment, publicly expressed their bias

1 towards Petitioner and their perceptions and assumptions about his actions during the incident with Mr.
2 Thomas, publicly expressed their support for criminal charges against Petitioner, publicly expressed
3 their disappointment when Petitioner was unanimously acquitted of those criminal charges, and
4 publicly expressed their intent to ensure Petitioner would not remain employed as a peace officer with
5 the City. In making such public statements and publicly taking positions adverse to Petitioner's
6 interests, City Council members became personally embroiled in a pre-determined outcome for
7 Petitioner's appeal. Despite being presented with clear evidence of the City Council's bias and lack of
8 impartiality, the City Council members refused to recuse themselves. Simply stated, the City Council
9 members insisted on placing themselves in a position to make good on their publicly-expressed
10 statements and ensure Petitioner's termination.

11 b) The City Council relied almost exclusively on its own unsupported factual
12 assumption that Petitioner's alleged conduct caused Mr. Thomas' death. However, the parties
13 stipulated that the cause and manner of Mr. Thomas' death was not at issue in Petitioner's appeal in
14 recognition of the fact that the Chief of Police's decision to terminate Petitioner was based solely on
15 Petitioner's alleged conduct and not dependent upon the cause and manner of Mr. Thomas' death. The
16 City Council's reliance on assumed facts that are not part the administrative record of the appeal
17 hearing formed the basis for the City Council's decision to reject Prihar's Findings and
18 Recommendations.

19 c) The City Council did not employ the proper standard of review. The City
20 Council unlawfully shifted the burden to Petitioner, as the accused, to disprove the allegations against
21 him. The City has the burden of proving its allegations of misconduct, which it must do by a
22 preponderance of the evidence and failed to do in the hearing before Prihar.

23 64. The City Council prejudicially abused its discretion because it failed to proceed in the
24 manner required by law, including:

25 a) The City Council was not a competent nor impartial tribunal to decide
26 Petitioner's case, and therefore Petitioner was denied his right to a fair hearing as required by due
27 process. City Council members pre-judged the facts prior to reviewing the administrative record
28 generated by the proceedings before Prihar and publicly expressed that pre-judgment, publicly

1 expressed their bias towards Petitioner and their perceptions about his actions during the incident with
2 Mr. Thomas, publicly expressed their support for criminal charges against Petitioner, publicly
3 expressed their disappointment when Petitioner was unanimously acquitted of those criminal charges,
4 and publicly expressed their intent to ensure Petitioner would not remain employed as a peace officer
5 with the City. In making such public statements and publicly taking positions adverse to Petitioner's
6 interests, City Council members became personally embroiled in a pre-determined outcome for
7 Petitioner's appeal. Despite being presented with clear evidence of the City Council's bias and lack of
8 impartiality, the City Council members refused to recuse themselves. Simply stated, the City Council
9 members insisted on placing themselves in a position to make good on their publicly-expressed
10 statements and ensure Petitioner's termination.

11 b) The City Council did not employ the proper standard of review. The City
12 Council unlawfully shifted the burden to Petitioner, as the accused, to disprove the allegations against
13 him. The City has the burden of proving its allegations of misconduct, which it must demonstrate by a
14 preponderance of the evidence and failed to do so in the evidentiary hearing before Prihar.

15 65. The City Council prejudicially abused its discretion because its findings are not
16 supported by the evidence, including:

17 a) The City Council's finding that Petitioner used excessive or unreasonable force
18 in violation of Department policy is not supported by the evidence, as demonstrated by Prihar's
19 findings that Petitioner's force was within Department policy, in compliance with training, and
20 otherwise reasonable under the circumstances.

21 b) The City Council's finding that Petitioner violated the Department's digital
22 audio recording policy is not supported by the evidence.

23 c) The City Council's almost exclusive reliance on its assumption that Petitioner's
24 force caused Mr. Thomas' death is not supported by the evidence, as the parties stipulated that the
25 cause and manner of Mr. Thomas' death was not at issue and thus was not proven, not argued, and not
26 considered during the evidentiary hearing.

27 d) The City Council's determination that Petitioner's alleged unprofessional
28 comments warranted termination under the circumstances is not supported by the evidence.

1 66. The decision to terminate Petitioner constitutes a prejudicial abuse of discretion in that
2 it is disproportionate to the proven misconduct.

3 **SECOND CAUSE OF ACTION**

4 **(Code of Civil Procedure § 1085 – Traditional Mandate)**

5 67. Petitioner realleges and incorporates paragraphs 1 through 66 as though fully set forth
6 herein.

7 68. The Constitution of the State of California states that “[a] person may not be deprived
8 of life, liberty, or property without due process of law.” (Cal. Const., art. I, § 7.) The Fifth and
9 Fourteenth Amendments to the Constitution of the United States similarly state that “No person
10 shall...be deprived of life, liberty, or property, without due process of law,” “nor shall any State
11 deprive any person of life, liberty, or property, without due process of law.” (U.S. Const. amends. V,
12 XIV § 1.)

13 69. Prior to his termination, Petitioner was a full-time, non-probationary employee of the
14 City who attained regular or “permanent” employment status. Accordingly, Petitioner had a property
15 interest in his continued employment with the City protected by due process. Therefore, Petitioner was
16 entitled to due process prior to being permanently deprived of his property interest.

17 70. Due process requires a fair hearing, which in turn requires a competent and impartial
18 tribunal. The City Council was not a competent nor impartial tribunal and thus was precluded from
19 sitting as the adjudicative body to decide Petitioner’s case. Therefore, Petitioner was denied his right to
20 a fair hearing as required by due process.

21 71. City Council members pre-judged the facts prior to reviewing the administrative record
22 generated by the proceedings before Prihar and publicly expressed that pre-judgment, publicly
23 expressed their bias towards Petitioner and their perceptions about his actions during the incident with
24 Mr. Thomas, publicly expressed their support for criminal charges against Petitioner, publicly
25 expressed their disappointment when Petitioner was unanimously acquitted of those criminal charges,
26 and publicly expressed their intent to ensure Petitioner would not remain employed as a peace officer
27 with the City.

1 72. City Council members were also subject to overt and substantial political pressure to
2 arrive at a pre-determined result – Petitioner’s termination from employment.

3 73. In making public statements and publicly taking positions adverse to Petitioner’s
4 specific interests in the matter before them, City Council members became personally embroiled in a
5 pre-determined outcome for Petitioner’s appeal.

6 74. Despite being presented with clear evidence of the City Council’s bias and lack of
7 impartiality, the City Council members refused to recuse themselves. The City Council members
8 insisted on placing themselves in a position to make good on their publicly-expressed statements and
9 ensure Petitioner’s termination.

10 75. Respondents have a clear, present and ministerial duty to comply with the due process
11 clauses of the Constitutions of the State of California and United States. Respondents are presently
12 able to comply with the requirements imposed by the due process clauses of the Constitutions of the
13 State of California and United States, by setting aside the determination to terminate Petitioner and
14 adopting Prihar’s Findings and Recommendations reinstating Petitioner to his former position with
15 back-pay and interest.

16 76. Petitioner has requested Respondents to comply with their obligations under the due
17 process clauses of the Constitutions of the State of California and the United States. Despite these
18 requests, Respondents have failed and refused, and continue to fail and refuse, to comply fully with
19 these obligations.

20 77. Petitioner has suffered, and will continue to suffer, great and irreparable harm as a result
21 of Respondents’ failure and refusal to perform the duties described above.

22 78. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law,
23 other than the relief requested herein.

24 79. Petitioner has a beneficial interest in the issuance of the writ of mandate in order to
25 obtain Respondents’ compliance with the due process clauses of the Constitutions of the State of
26 California and the United States, in that such compliance will effectuate an adherence to Petitioner’s
27 constitutional right to due process of law.

28 //

1 PRAYER

2 Petitioner requests that the Court enter judgment in his favor and against Respondents, their
3 agents, employees and anyone acting on their behalf as follows:

4 1. Issue a writ of administrative mandate pursuant to Code of Civil Procedure
5 section 1094.5 directed to Respondents and compelling them to:

- 6 (a) Set aside their administrative decision to terminate Petitioner;
7 (b) Reinstate Petitioner to his former position with full back-pay and interest
8 retroactive to the date Petitioner was terminated;
9 (c) Restore to Petitioner all benefits and other emoluments of employment he would
10 have earned or accrued if Respondents had not terminated his employment; and,
11 (d) Remove all records relating to Petitioner's termination from his official
12 personnel file and any other files used for personnel purposes.

13 2. Issue a writ of traditional mandate pursuant to Code of Civil Procedure section 1085
14 directed to Respondents and commanding them to:

- 15 (a) Set aside their administrative decision to terminate Petitioner;
16 (b) Adopt the Findings and Recommendations of Prihar, thereby reinstating
17 Petitioner to his former position with full back-pay and interest retroactive to the date Petitioner was
18 terminated, adjusted to reflect a thirty-day suspension;
19 (c) Restore to Petitioner all benefits and other emoluments of employment he would
20 have earned or accrued if Respondents had not terminated his employment, adjusted to reflect a thirty-
21 day suspension; and
22 (d) Remove all records relating to Petitioner's termination from his official
23 personnel file and any other files used for personnel purposes.

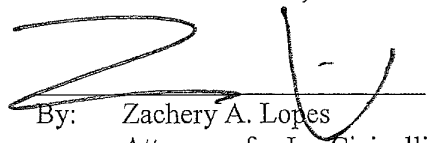
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- 1 2. For an award of costs of suit incurred in this action;
2 3. For an award of attorney's fees; and
3 4. For such other and further relief as the court deems appropriate.
4

5 Dated: June 2, 2017

Respectfully submitted,

6 **RAINS LUCIA STERN**
7 **ST. PHALLE & SILVER, PC**

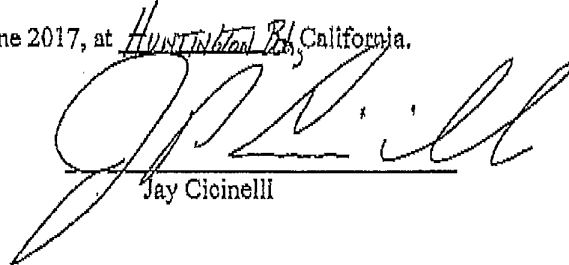
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9 By: Zachery A. Lopes
10 Attorneys for Jay Cicinelli

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VERIFICATION

I, Jay Cicinelli, am the Petitioner in the above-captioned matter. I have read the foregoing Verified Petition for Writ of Administrative and Traditional Mandate (the "Petition") and know its contents. The matters stated in the Petition are true of my own knowledge and belief except as to those matters stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct. Executed this 2ND day of June 2017, at Huntington Bk, California.



Jay Cicinelli