SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE Central Justice Center 700 W. Civic Center Drive Santa Ana, CA 92702	
SHORT TITLE: Cicinelli vs. City of Fullerton	
CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE	CASE NUMBER: **30-2017-00923829-CU-WM-CJC**

I certify that I am not a party to this cause. I certify that the following document(s), Minute Order dated 09/14/18, have been transmitted electronically by Orange County Superior Court at Santa Ana, CA. The transmission originated from Orange County Superior Court email address on September 14, 2018, at 11:46:27 AM PDT. The electronically transmitted document(s) is in accordance with rule 2.251 of the California Rules of Court, addressed as shown above. The list of electronically served recipients are listed below:

JONES & MAYER
GSK@JONES-MAYER.COM

JONES & MAYER
JRT@JONES-MAYER.COM

JONES & MAYER
KMJ@JONES-MAYER.COM

LIEBERT CASSIDY WHITMORE
PKNOTHE@LCWLEGAL.COM

LIEBERT CASSIDY WHITMORE
STEIDEMANN@LCWLEGAL.COM

RAINS LUCIA STERN ST. PHALLE & SILVER, PC
MSCHWARTZ@RLSLAWYERS.COM

RAINS LUCIA STERN ST. PHALLE & SILVER, PC
ZLOPES@RLSLAWYERS.COM

Clerk of the Court, by: _____, Deputy

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

DATE: 09/14/2018 TIME: 11:11:00 AM DEPT: C20

JUDICIAL OFFICER PRESIDING: David Chaffee
CLERK: Cora Bolisay
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: Vicky Huang

CASE NO: **30-2017-00923829-CU-WM-CJC** CASE INIT.DATE: 06/02/2017
CASE TITLE: **Cicinelli vs. City of Fullerton**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT ID/DOCUMENT ID: 72890774

EVENT TYPE: Under Submission Ruling

APPEARANCES

There are no appearances by any party.

Re: Application for Writ of Mandate re Bias

The Court, having taken the above-entitled matter under submission on 6/22/2018 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

This is an administrative writ proceeding involving an alleged due process violation in removing Petitioner (a peace officer) from his position with the Fullerton PD after he participated in the well-known Kelly Thomas arrest incident. Before the Court this day is the bifurcated proceeding on the limited issue of decision-maker bias.

Pertinent Background Relating to Bias Claim

On 07/05/11, Fullerton PD officers Ramos and Wolfe answered a relatively innocuous call that would be forever etched in history. The details of that call are not directly relevant for today's bifurcated proceeding, but this much should be said: a homeless and mentally compromised individual by the name of Kelly Thomas was detained on suspicion of possessing stolen property (mail) and trying to break into parked cars; he later died from injuries suffered when officers converted that detention into an arrest. One of those officers joining in the effort, Jay Cicinelli (Petitioner here), lost his job over the incident.

The incident gained immediate, and widespread, publicity. In addition to public outcry, activists in and around the City of Fullerton rallied behind a special election to recall certain members of Fullerton's City

Council perceived to be soft on the incident.

On 07/11/11, Fullerton City Councilmember Bruce Whitaker ("Whitaker") authored and posted *An Open Letter to Fullerton Residents* in which he "insist[ed] that related evidence, including video and audio recordings be made public." The letter was written on official Fullerton Council letterhead, even though there is no evidence of any agendized matter before the City Council at that time.

On or about 10/07/11, Whitaker gave a televised interview, which appeared on the show *Full Disclosure*. Whitaker appeared in his capacity as a Councilmember, rather than a mere member of the public. During the interview, Whitaker made a number of comments reflecting his belief that it was his duty as a Councilmember to uncover and publicize the facts surrounding the incident. He also disclosed, then rejected, some legal advice he received in his capacity as Councilmember. Whitaker made clear he had a "vested interest in sending a message," that he had "pieced together" facts on his own which varied from "official" reports, and that even though he was "one of five on Council, [he] can be a pretty persistent one." Again, there is no evidence of any agendized matter before the City Council at that time, and no need for the Council to be investigating the incident.

On or about 10/10/11, Whitaker gave another televised interview – this time for *Inside Orange County - PBS SoCal*. Whitaker appeared in his capacity as a Councilmember, rather than a mere member of the public. During the interview, Whitaker made a number of comments in which he intimated a government cover-up, and that the official police reports of the incident were false, misleading, and unreliable. Again, there is no evidence of any agendized matter before the City Council at that time, and no need for the Council to be investigating the incident.

On or about 12/21/11, Whitaker gave another recorded interview, this time for a local Fullerton advocacy group. Whitaker appeared in his capacity as a Councilmember, rather than a mere member of the public. During that interview, Whitaker advised that he would respectfully decline to toe the line as advised, and would "do the right thing" by continuing to demand access to evidence and publish everything for the public's consumption. Whitaker went so far as to suggest those advising him had their own conflicts of interest. Again, there is no evidence of any agendized matter before the City Council at that time, and no need for the Council to be investigating the incident.

On or about 02/07/12, Whitaker caused to be agendized a demand to the Fullerton PD and city manager to release a copy of the surveillance video. This led to a restraining order served on Whitaker to cease and desist in those unwarranted efforts. There was no matter before the City Council at that time requiring Councilmembers to view evidence or otherwise investigate the incident.

On 05/09/12, Whitaker authored and posted another *Open Letter to Fullerton Residents*. In this letter, Whitaker describes what he saw on a video of the incident as "inhumane" and "brutal." Whitaker further opined that efforts to clear Thomas' name (ie, find he did nothing wrong) "are within reach." The letter was written on official Fullerton Council letterhead. There is no evidence of any agendized matter before the City Council at that time, but official letterhead was still used.

On 06/05/12, the citizenry of Fullerton voted in favor of the recall effort, and ousted Councilmembers James, McKinley and Bankhead. In their place, the citizenry elected Kiger, Chaffee (as we have noted before, no relation to Judge David Chaffee), and Sebourn. Although the recall effort was bolstered by a number of different community concerns, there was an undeniable fervor to remove the three Councilmembers (James, McKinley, Bankhead) who resisted the temptation to publicly denounce the officers.

On 07/19/12, Petitioner was fired.

On 01/13/14, a unanimous jury acquitted Petitioner of criminal charges filed against him (excessive force and involuntary manslaughter).

On 11/25/15, the Fullerton City Council (Sebourn, Whitaker, Chaffee, Fitzgerald – with Flory absent) announced in open session that the wrongful death civil action filed by Thomas' father had been settled for $4.9 million. Each Councilmember took the opportunity to express an opinion on the settlement and its ripple effect. While the others showed restraint, Whitaker and then-Mayor Sebourn were less deferential:

- Whitaker: "Four years and four months have passed since Kelly Thomas died. The injuries he sustained that night in July 2011 were not incidental, accidental or unavoidable … Since Kelly's death, I, along with nine other council members over the four-plus years – five of us still on the council – received legal advice and presided over litigation strategies intended to obscure and distort information, attack victims, punish protesters and deny even the smallest measure of responsibility and accountability. At every stage, my efforts at ensuring clarity, accuracy, transparency and even-handedness were stymied – to the extreme of my being presented a restraining order to desist in my demands to audit city property in my capacity as a councilmember … Claims that the settlement limits possible monetary damage are answered with the reality that it fixes and maximizes the costs. It defeats and buries accountability. It even allows more room for wrongful termination lawsuits to perhaps be successful against this city … It has been the most difficult time in my tenure as a councilman to be suppressed and repressed in my ability to obtain information and fulfill the need of the public's right to know … This has been a defeat for transparency, openness and decency."

- Sebourn: "I am of the opinion that justice would be best served through a civil trial. Evidence would be evaluated, witnesses would be examined and cross-examined. Twelve men and women would have had an opportunity to deliberate on the facts of the case, most of which have been shielded from this City Council due to the employment status of three co-defendants. This frustrates me to no end. This Council's hands are tied, our eyes are blind-folded, our ears plugged, and our mouths gagged by numerous laws that place greater importance on the employment status of an individual than the rights of the public for which they serve. Until POBAR is repealed or substantially reformed, this Council and all of those in California will continue to make decisions in a vacuum behind closed doors and the public may never know why certain decisions were made or what facts we were allowed to consider. This is perhaps the greatest dis-service to the people of California. Many are glad to see this ugly chapter in Fullerton's history closed. While some of this is behind us, this Council and future councils will still have to deal with the fallout stemming from Kelly Thomas's untimely death."

On 12/04/15, Whitaker authored and caused to be published in the Orange County Register an op-ed piece. The article was almost a verbatim recitation of Whitaker's comments at the 11/25/15 open session. This was done, presumably, to ensure that Whitaker's opinions reached more readers than those who might have been present for the Council meeting. The article reads as if it was penned in Whitaker's capacity as a Councilmember, not a Fullerton resident. There is no evidence of any agendized matter before the City Council at that time, or any need for Councilmembers to be making additional public statements on the topic.

On 10/30/16, ALJ hearing officer Michael Prihar issued his long-awaited decision. In it, he found grounds for discipline based on Petitioner's post-arrest commentary – which demonstrated a lack of

professionalism. For this, Prihar felt a 30-day suspension was warranted. Prihar disagreed with the Department's conclusion that knee strikes to the head and taser strikes to the face constituted excessive force.

On 11/28/16, counsel for Respondents requested an appeal to the City Council. A few days later, in response thereto, counsel for Petitioner objected to the City Council hearing any appeal on the grounds of bias. Although counsel only called out three of the five councilmembers for actual bias, counsel made it clear he believed the entire Council had to be recused. The claim of bias was anchored by reference to pre-hearing public statements made by Councilmembers Whitaker and Sebourn reflecting a certain degree of disdain for the incident and the ensuing investigations.

On 02/07/17, the hearing before the City Council took place. Even though the Council described this as a "de novo" review, the hearing lasted a mere 40 minutes and consisted entirely of attorney argument. The transcript from the hearing reveals virtually no involvement at all by the Councilmembers, no questioning, no give and take. Fullerton's MOU does not provide any particulars regarding this process, but from any objective perspective this was little more than oral argument on a motion already effectively ruled upon. What is notably absent from the transcript of the hearing is any debate or ruling on Petitioner's objection to the constitution of the panel based on bias. Counsel opened the hearing with his bias objection, which led to three Councilmembers offering self-serving exculpatory elocutions. All three – Whitaker, Sebourn, and Chaffee – offered similar promises to be fair. Although Petitioner had called out all five Councilmembers for bias (actual or perceived), Flory and Silva sat silent.

On 03/09/17, the Council served its written decision rejecting the ALJ's findings and recommendations. The Council sided with the Department and concluded that Petitioner had indeed used excessive force in effectuating the arrest, and that his post-arrest commentary was alone enough to warrant termination. The Council further found that Petitioner violated Department policy by not activating his DAR – another terminable offense. Despite their obligation to be "guided by the arbitrator's recommendation," the Council found against Petitioner on every ground available. There was no reference in the decision to a ruling on Petitioner's bias objection.

Remand to City Council

As was the case with the related Wolfe Petition, both sides missed something rather glaring here, and that is this: the City Council, as final arbitrer, never made any *ruling* on Petitioner's objection for bias. Petitioner raised the issue in a letter brief to the City prior to the hearing, and again at the actual hearing on the record. Counsel did enough to preserve the issue (see *Attard v. Board of Supervisors of Contra Costa County* (2017) 14 Cal.App.5th 1066, 1083-1084), and was entitled to a ruling on that objection. Even if one treats the three Councilmember's self-professed neutrality at the hearing as a denial of Petitioner's motion to disqualify those three, there were still two others who remained silent in the face of bias accusations. They did not speak at the hearing, and there was no reference at all to the issue in the Council's final decision. It is as if Petitioner's bias objection was swept aside. This was a serious issue, and deserved a formal response from the Council or at least the City Attorney. On this basis alone, the matter must be remanded back to the Council to at least rule on the objection – a ruling this Court expects to carry some associated analysis.

To assist the Council in honoring Petitioner's due process right to a fair hearing, this Court respectfully reminds Respondent of the legal standards applicable to claims of bias involving pecuniary vs. personal interests. As explained by our Supreme Court in *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 215-219, in pertinent part:

"When, as here, an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal. A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party … due process is violated whenever a decision maker has a financial interest that would offer a possible temptation to the average person as judge not to hold the balance nice, clear and true. Conclusive proof of actual bias is not required; an objective, intolerably high risk of actual bias will suffice … Absent a financial interest, adjudicators are presumed impartial. To show nonfinancial bias sufficient to violate due process, a party must demonstrate actual bias or circumstances in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. The test is an objective one."

In *Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, the Court of Appeal held that a Councilmember's public pre-hearing opposition to a commercial use permit disqualified him from later voting on the issue when it was before the Council. Although the evidence of bias was limited to a single proclamation, it was enough to meet the bias test. The Court explained the application this way (*id* at 1021-1022):

"The generally accepted linguistic formation of the rule against bias has been framed in terms of probabilities, not certainties. The law does not require the disappointed applicant to prove actual bias. Rather, there must not be an unacceptable probability of actual bias on the part of the municipal decision maker. Thus bias – either actual or an unacceptable probability of it – alone is enough on the part of a municipal decision maker is to show a violation of the due process right to fair procedure."

In *Sabey v. City of Pomona* (2013) 215 Cal.App.4th 489, the Court of Appeal held that the City Council had to start over in its consideration of a fired police officer's application for reinstatement because there existed an *appearance* of bias. This case involved the lawyer advising the Council. The Court held in pertinent part as follows (at 497):

"the risk of Brown providing the City Council with biased advice and thereby tainting its decisionmaking process was too high to be acceptable under constitutional principles. By so holding, we do not suggest that Brown intentionally skewed his advice to promote the position Bray advocated at the arbitration. Rather, we acknowledge that bias can be unwitting. We also acknowledge that whenever a person serves two masters who have potentially conflicting interests, it is impossible to peer into the depths of that person's soul to determine the purity of his or her words and actions. Thus, Brown's role in presenting to the City Council on the Sabey matter had the unavoidable consequence of destroying the appearance of a fair proceeding."

Similar decisions were rendered in *Nasha LLC v. City of Los Angeles* (2004) 125 Cal.App.4th 470 [planning commissioner who spoke out against project in anonymous newspaper article and at neighborhood association meeting was disqualified for bias], and *Mennig v. City Council* (1978) 86 Cal.App.3d 341 [entire city council found biased because they were personally embroiled in battle with police chief and motivated to vindicate themselves].

It is also important for the Council, when considering Petitioner's bias claim, to properly allocate the burden of proof. Generally speaking, Evidence Code §500 allocates the burden of proof to Petitioner. However, the burden of proof is sometimes allocated in a manner that is at variance with the general rule. In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof

of the particular fact, and the probability of the existence or nonexistence of the fact. *Samuels v. Mix* (1999) 22 Cal.4th 1, 19. The burden of proof regarding a particular, concrete fact can be reallocated to a defendant under *Samuels*, as is often the case when the opposing party has all the information regarding their own state of mind.

Petition for writ of mandamus is GRANTED in part. The matter is remanded to the Fullerton City Council to fairly consider and rule upon Petitioner's objection based on bias. Councilmembers may wish to ask themselves, *were I in Petitioner's shoes would I feel good about submitting this matter given what Whitaker and Sebourn have already said publicly?* Upon issuance of that ruling, if the objection is overruled, the matter will be returned to this Department for further proceedings. Petitioner's separate request to augment the record is moot and reserved should the matter return to here another day. Petitioner is free to request before the Council the opportunity to augment the record with material relevant to the issue of bias.

Finally, the Court would make the observation that with the impending election there is the very likely probability that the composition of the city council will dramatically change when the new council is seated. While in no way binding, the Court is of the view that it would be in the best interests of both petitioner and respondent to delay consideration of this matter until the new council is seated.

Court orders Clerk to give notice.