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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SAN BERNARDINO CITY PROFESSIONAL FIREFIGHTERS UNION, LOCAL 891; et al., Plaintiffs, v. LARRY PITZER; et al., Defendants.	CASE NO. EDCV 05-473 VAP(SGLx) DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT DATE: May 8, 2006 TIME: 10:00 a.m. COURTROOM:2

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on May 8, 2006 at 10:00 a.m., or as soon thereafter as counsel may be heard, at the United States Courthouse, 3470 Twelfth Street, Riverside, CA 92501, Courtroom 2, Defendants City of San Bernardino and Larry Pitzer will, and hereby do, move the above-entitled Court pursuant to Federal Rule of Civil

Procedure 56, for:

(1) Summary judgment in favor of Defendants City of San Bernardino and Larry Pitzer and against Plaintiffs on the ground that there is no genuine issue as to any material fact and Defendants are entitled to judgment as a matter of law; or

(2) if for any reason summary judgment cannot be granted on the case as a whole, for partial summary judgment against such of the claims of Plaintiffs as may be warranted; or

(3) alternatively, pursuant to Federal Rule of Civil Procedure 56(d), for an order specifying the each of the facts set forth in the proposed Statement of Uncontroverted Material Facts filed concurrently herewith is established without substantial controversy in favor of Defendants City of San Bernardino and Larry Pitzer and against Plaintiffs; that no further proof thereof shall be required at the trial of this action; and that any final judgment in this action shall, in addition to any matters determined at trial, be based upon the facts so established.

This motion will be based upon this Notice, upon the Memorandum of Points and Authorities, the Statement of Uncontroverted Material Facts and the declarations filed herewith, upon the pleadings herein, upon such further memoranda of points and authorities as may be filed, and upon such oral argument as may be made at the hearing

on the motion.

This motion is made following the conference of counsel pursuant to Local Rule 7-3 which took place on March 13, 2006.

DATED: April 10, 2006

JAMES A. ODLUM
MUNDELL, ODLUM & HAWS, LLP

By: _____
James A. Odlum
Attorneys for Defendants

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MEMORANDUM OF POINTS AND AUTHORITIES

I.
INTRODUCTION

This case involves an allegedly retaliatory failure to promote an employee of the San Bernardino Fire Department for engaging in pro-union activities. This is a garden variety unfair labor practice case which should have been brought with the California Public Employment Relations Board. Indeed, it is hard to understand why Plaintiffs try to circumvent the exclusive jurisdiction of PERB, given that Plaintiffs, and their attorney, are familiar with PERB since they have been involved in other PERB charges against the City. In any event, this is a classic case of preemption. Most of the case is subject to dismissal because of PERB's exclusive jurisdiction and Plaintiffs' failure to exhaust administrative remedies.

Plaintiffs also make the novel assertion that Lewis engaged in protected activity when he secretly tape recorded his wife and another employee, thereby confirming that his wife and the other employee were having an affair. Lewis's conduct was not legally protected. Indeed, it was just the opposite; it was an obvious violation of the California Penal Code, which outlaws such surreptitious tape-recording. In fact, when Plaintiff was questioned about this in his deposition, he refused to answer based on his Fifth Amendment right against self-incrimination.

Plaintiffs also sue under 42 U.S.C. section 1983. These claims fail because, as to defendant Larry Pitzer, Plaintiffs cannot raise a triable issue of fact that his stated reasons for not promoting

Plaintiff Lewis and for conducting an investigation of him were pretexts to hide retaliation. As to the City, the section 1983 action fails for the additional reason that, under Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) and its progeny, an employment decision by Chief Larry Pitzer does not impose municipal liability on the City.

II.
FACTS

A. Parties

Plaintiff Richard Lewis is employed as a captain with the San Bernardino Fire Department.

Plaintiff San Bernardino City Professional Firefighters Union, Local 891, ("Union") is a union representing employees of the Fire Department below the rank of Battalion Chief.

Defendant Larry Pitzer is the Fire Chief.

B. The Promotional Process

This case involves a decision to promote Dennis Moon to Battalion Chief instead of Plaintiff Lewis.

The first step of the promotional process to Battalion Chief is a written examination administered by the City's Civil Service Department. Applicants who pass that test then undergo a testing process administered by the Fire Department to prepare a list of candidates ranked according to their respective numerical scores. The Departmental testing process includes a written portion and assessments of candidates by panels of senior members of the Department and officials from other departments who judge the candidates in simulations. It also includes an evaluation of the

applicants' personnel files. The end result of this process is a list ranked according to numerical score.

When it comes time to make a promotion, the Fire Chief selects a candidate from the list, according to the ``Rule of Three". The Rule of Three, which is commonly used by public sector employers for promotions to management positions, allows the decision maker to choose a candidate from the top three names on the list.

C. The 2002-03 Testing

The testing process involved in this case began in the fall of 2002 with the Civil Service test. The Fire Department testing process was completed in March 2003.

The three candidates for the Battalion Chief promotion were Skip Kulikoff, Plaintiff Lewis and Dennis Moon. The final list, in ranked order, was Kulikoff (total score 83.8), Lewis (78.1) and Moon (71.5).

As of March 2003, Kulikoff was president of the Union. Lewis was the Union's vice president.

An opening for Battalion Chief arose in May 2003. Chief Pitzer picked Kulikoff for the promotion. This left two names on the list, Lewis and Moon.

Because the Battalion Chief is not a bargaining unit position, Kulikoff left his position as Union president, and was replaced as Union president by Lewis.

D. Lewis's Tenure as Union President

Lewis was Union president from May 2003 to December 2004.

During his tenure as Union president, the Union was involved in several successful civil service challenges to Department personnel

decisions. In addition, while Lewis was its vice-president, the Union was involved in an unfair labor practice complaint with the Public Employment Relations Board alleging that the Department violated the Meyers-Milias-Brown Act by not promoting Brain Crowell. The PERB charge was withdrawn as part of a settlement under which Crowell received the promotion effective May 13, 2002.

Plaintiff Lewis alleges in this case that he was active in requiring the Department to follow state law regarding the rights of police officers and asserting their rights in the political setting. Lewis testified that all such conduct was performed in his capacity as a Union official.

E. The Kulikoff-Lewis Affair

In November 2003, Plaintiff Lewis reported to City management that he had caught his best friend, Kulikoff, having an on-duty sexual affair with Lewis's wife. Lewis said he confirmed the existence of this affair by wiretapping his own home telephone and recording conversations between Kulikoff and Mrs. Lewis.

Chief Pitzer ordered an internal investigation of the conduct of both Kulikoff and Lewis. The investigation was performed by the San Bernardino Police Department's Internal Affairs (``IA'') Department.

In interviews with the IA Department, Lewis admitted that he tape-recorded telephone conversations without the knowledge of Kulikoff or Mrs. Lewis, and had not acted at the direction of any law enforcement official. Thus, this was a textbook violation of California Penal Code section 631, which prohibits surreptitious eavesdropping and wiretapping. (In his deposition, Lewis refused to

answer questions about the circumstances of his wiretapping, or even to confirm that it happened, invoking the Fifth Amendment.)

In light of the rather unique nature of this sordid matter, Chief Pitzer decided not to discipline Lewis for his illegal sleuthing. He so informed Lewis in a memo on June 7, 2004.

Kulikoff went on a leave of absence, then took a medical retirement and never returned to work at the Fire Department.

F. The Promotion of Dennis Moon

The next opening for a Battalion Chief arose in September 2004, due to Kulikoff's departure. At that time, two names remained on the list, Dennis Moon and Lewis.

By this time, it had been one and a half years since the Departmental evaluations for Battalion Chief. During that year and a half, Chief Pitzer had become increasingly impressed with the growing skills, leadership and professionalism of Dennis Moon. When it came time to pick a new Battalion Chief in the fall of 2004, Chief Pitzer favored Moon over Lewis. However, before making his final decision, Chief Pitzer solicited the input of his Battalion Chiefs and Deputy Chief concerning who they thought would be better. The consensus among the Command Staff was that Moon was the better candidate.

Chief Pitzer then made his decision to pick Moon, based on his judgment that, at that point in time, Moon showed better maturity and leadership on the fire scene and elsewhere, and had better management potential and interpersonal skills than Lewis.

G. Lewis Gets the List Extended

The 2002 promotional list was due to expire in November 2004.

Lewis petitioned the San Bernardino Civil Service Board to include his name on the list for another year. Although the request was opposed by the Union and management, the Civil Service Board granted Lewis's request.

However, no openings for a Battalion Chief arose in the ensuing year, so Lewis remained a captain.

H. The Departure of the Deputy Chief

In December 2004, the Deputy Chief, Brian Preciado, left to accept a position as fire chief in Vacaville, California.

Chief Pitzer offered the Deputy Chief position to Mat Fratus, the Department's Training Officer, but Fratus declined. Had Chief Pitzer promoted one of the other existing Battalion Chiefs to Deputy Chief, an opening would have been created for a new Battalion Chief. However, Chief Pitzer decided to fill the Deputy Chief position on an interim basis. He did not feel any of the existing Battalion Chiefs were yet suited for the opening, and wanted to take enough time to pick the best candidate possible. Therefore, he selected Dennis Reichardt, a former Deputy Chief who returned from retirement to fill the opening. Initially, Mr. Reichardt agreed to be the interim Deputy Chief for six months. His stint as interim Deputy Chief was later extended to a year. In December 2005, a new Deputy Chief, from outside the Department, was chosen.

III.
ARGUMENT

A. CALIFORNIA LAW ON LABOR PREEMPTION

1. Meyers-Milias-Brown Act

The Meyers-Milias-Brown Act (MMBA) is a California statute governing the rights of state and local public sector employees, including firefighters, to join and support labor unions. Government Code sections 3500-3510. The MMBA is patterned on the federal National Labor Relations Act. Accordingly, authority under the NLRA is considered persuasive in interpreting the MMBA. Los Angeles County v. Superior Court, 23 Cal.3d 55, 63, 151 Cal.Rptr. 547 (1978).

The Public Employee Relations Board (PERB) is the state administrative agency that oversees and enforces the MMBA. Like its federal counterpart (the National Labor Relations Board), PERB has exclusive jurisdiction over alleged violations of the labor statutes, including the MMBA, which it oversees. Government Code section 3509(b). PERB has broad authority to fashion remedies in cases of unfair employment practices. Government Code section 3509.

2. Preemption Under MMBA

The United States Supreme Court and other federal courts interpreting the NLRA have developed a rule of preemption known as the Garmon doctrine, named after the landmark decision of San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). Under the Garmon doctrine, a claim is preempted, and within the exclusive jurisdiction of the NLRB, if the activities alleged in the claim are arguably protected or prohibited by the NLRA. The Garmon doctrine has been applied in hundreds of cases to dismiss lawsuits concerning activities which arguably constitute unfair labor practices under the NLRA, including claims that an employee was retaliated against for pro-union activity. See e.g. Shane v. Greyhound Lines, 868 F.2d

1057 (9th Cir. 1989).

California law has a Garmon doctrine counterpart, under which claims involving conduct arguably protected or prohibited by MMBA are within the exclusive jurisdiction of PERB. A leading case is El Rancho Unified School District v. National Education Association, 33 Cal.3d 946, 192 Cal.Rptr. 123 (1983), in which the California Supreme Court held that a school district's lawsuit seeking damages for an allegedly illegal teacher strike was preempted and within the exclusive jurisdiction of PERB. In so holding, the court relied on Garmon and its progeny, finding that a court's jurisdiction is preempted if the conduct at issue is arguably protected or prohibited by one of the California labor statutes administered by PERB and the controversy presented to the court "may fairly be termed the same" as could be presented to PERB. 33 Cal.3d at 953-960.

3. Exhaustion of Remedies

A corollary of the preemption doctrine is that a plaintiff cannot sue on a preempted claim unless he has first exhausted his administrative remedies. Stated differently, because the administrative agency (here PERB) has exclusive primary jurisdiction, one cannot sue in court without first exhausting the available administrative remedies with PERB. Leek v. Washington Unified School District, 124 Cal.App.3d 43, 177 Cal.Rptr. 196 (1981).

B. THE FIRST CAUSE OF ACTION HAS NO MERIT

1. The First Cause of Action is Preempted and Lies Within PERB's Exclusive Jurisdiction

The first cause of action is by both Plaintiffs against both Defendants, and seeks a writ of mandate.

The first cause of action is brought expressly under the MMBA. It alleges that plaintiff Lewis was actively involved in his union (complaint paragraph 10), including acting as lead union negotiator in "continuous battles" with management. (Complaint paragraph 12). The first cause of action further alleges that plaintiff Lewis was retaliated against for these activities by being wrongfully denied a promotion and being subjected to an unjustified personnel investigation. (Complaint paragraphs 13, 16-20, 28-31).

The first cause of action seeks an order compelling Defendants to promote Lewis to battalion chief, retroactive to the day he was passed over, together with all back pay, benefits and seniority rights, and an award of other damages. (Complaint paragraphs 34 and 35).

One can hardly imagine a cause of action more clearly alleging activity arguably prohibited by the MMBA. A claim that an employee was retaliated against for engaging in union activities is a garden variety application of the Garmon doctrine. Shane v. Greyhound Lines, 868 F.2d 1057 (9th Cir. 1989). Accordingly, the first cause of action is preempted, and lies within the exclusive jurisdiction of PERB.1

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1 The fact that the first cause of action purports to seek mandamus relief does not change this conclusion. The preemption doctrine applies with equal force to actions for mandamus. Personnel Commission v. Barstow Unified School District, 43 Cal.App.4th 871,

C. THE SECOND CAUSE OF ACTION HAS NO MERIT

1. The Second Cause of Action is Preempted and Lies Within PERB's Exclusive Jurisdiction

The second cause of action is a claim by both Plaintiffs against both Defendants, seeking a writ of mandate under California Government Code section 3300 et seq.

The second cause of action is based on the same allegedly wrongful conduct as the first cause of action, namely Plaintiff being passed over for promotion and subjected to an unwarranted personnel investigation. (Complaint paragraphs 38, 43). The second cause of action alleges that Defendants' conduct violated the Public Safety Officers Procedural Bill of Rights Act (Government Code sections 3300 et seq.), a statute which grants special procedural protections to public safety officers in disciplinary situations.

PSOPBRA is not a statute entrusted to PERB for enforcement. Nevertheless, the second cause of action is preempted and within PERB's exclusive jurisdiction because PERB has exclusive primary jurisdiction to initially pass on the legality of the underlying conduct.

Garmon preemption applies with full force where, as here, the same conduct is alleged to have violated both the MMBA and another statute. In El Rancho Unified School District, supra, the school district alleged that the teachers union engaged in an illegal strike, in violation of the Education Employment Relations Act (EERA). The school district also alleged that the strike violated

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50 Cal.Rptr.2d 797 (1996).

the Education Code. The Education Code does not lie within PERB's jurisdiction. Nevertheless, the California Supreme Court held that the entire case fell within the exclusive jurisdiction of PERB. The court emphasized that "what matters is whether the underlying conduct on which the suit is based - however described in the complaint - may fall within PERB's exclusive jurisdiction.'' 33 Cal.3d at 954, footnote 13. See also Los Angeles Council v.L.A.U.S.D., 113 Cal.App.3d 666, 669, 672, 169 Cal.Rptr. 893 (1980) (action alleging violations of both EERA and Education Code preempted as within exclusive primary jurisdiction of PERB).

This rule was discussed at length in Personnel Commission v. Barstow Unified School District, supra. In Personnel Commission, the commission and the teachers union alleged that the school district violated the Education Code by laying off district bus drivers and contracting out the work. In a different proceeding, the union filed a PERB complaint alleging that the same conduct also violated EERA because it was retaliation for the exercise of protected rights and was implemented in violation of the duty to bargain. The court held that the Education Code allegations, as well as the EERA allegations, lay within the exclusive primary jurisdiction of PERB. In so holding, the court reasoned:

> ``Indeed, to hold otherwise would permit a party to avoid exhaustion merely by avoiding any express claim of unfair practice or other EERA violation in its complaint. In El Rancho, however, the Supreme Court stated that `what' matters is whether the underlying conduct on which the

suit is based -- however described in the complaint -- may fall within PERB's exclusive jurisdiction."

43 Cal.App.4th at 889 (emphasis in original).

Similarly, in Leek v. Washington Unified School District, 124 Cal.App.3d 43, 177 Cal.Rptr. 196 (1981), a group of school district employees who did not belong to the union brought an action challenging the requirement that they pay union fees, alleging that the requirement violated EERA and the state constitution. The court held that both claims were subject to dismissal based on PERB preemption. In so holding, the court stated:

"However, as we previously perceived, it is a reasonable probability that a ruling by PERB on the nonconstitutional issues would obviate the consideration of constitutional challenges. In any event, appellants are required to exhaust their administrative remedies despite the allegations of constitutional violations."

124 Cal.App.3d at 53. See also Link v. Antioch Unified, 142 Cal.App.3d 765, 191 Cal.Rptr. 264 (1983)(same, even though plaintiff avoided referring to EERA in complaint).

Where, as here, the same conduct is alleged to have violated MMBA and a statute not within PERB's exclusive jurisdiction, the proper course is for the court to dismiss the case based on the plaintiff's failure to exhaust administrative remedies. Leek, supra, 124 Cal.App.3d at 53-54; San Jose Teachers v. Superior Court, 38 Cal.3d 839, 863, 215 Cal.Rptr. 250,vacated on other grounds, 475

U.S. 1063 (1986). 2

Likewise, the second cause of action fails because all Plaintiffs' causes of action are based on the same allegedly unlawful activity, namely denying Lewis a promotion and conducting an unwarranted investigation. Since that conduct allegedly violated MMBA, all claims arising from that conduct lie within PERB's primary exclusive jurisdiction and must be dismissed. This conclusion is buttressed by the fact that Plaintiff Lewis testified that he carried out all his PSOPBRA-protected conduct in his capacity as a Union official.

D. THE THIRD CAUSE OF ACTION HAS NO MERIT

1. The Third Cause of Action is Preempted and Lies Within PERB's Exclusive Jurisdiction

The third cause of action is a claim by Plaintiff Lewis against both Defendants under California Labor Code section 1102.5, apparently on the theory that Lewis became a protected whistleblower when he told management that Kulikoff was having an on-duty sexual affair with Lewis's wife. The third cause of action adopts the operative allegations of the first and second causes of action, namely that the alleged retaliation consisted of Lewis being denied a promotion and unjustly investigated.

This cause of action fails for the same reasons as the second cause of action, namely that it lies within the exclusive primary jurisdiction of PERB. As explained above, since the retaliatory

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2 PERB will assert jurisdiction over cases involving conduct that may violate both MMBA and another non-labor statute. Fremont School District, PERB Dec. No.1240 (1997).

conduct allegedly violated MMBA, all claims arising from that conduct lie within PERB's exclusive primary jurisdiction and must be dismissed.

2. Lewis's ``Whistleblowing'' Was Not Protected Activity

In addition, the third cause of action has no merit because Plaintiff Lewis's conduct in connection with Kulikoff's affair was not ``protected activity'' sufficient to establish a prima facie case of retaliation.

One of the elements of a prima facie case of retaliation under California law is that the plaintiff engaged in ``protected activity.'' Flait v. North American Watch Co., 3 Cal.App.4th 467, 476, 4 Cal.Rptr.2d 522 (1992). To be protected activity, a plaintiff's conduct must have been lawful. As the court stated in Gonzalez v. Superior Court, 33 Cal.App.4th 1539,39 Cal.Rptr.2d 896 (1995):

> "Indeed, even where a statute protects a whistleblower from retaliation, the employee's action in opposition to discrimination must be lawful and reasonable. For example, employers may discipline or discharge an employee who copies the employer's confidential documents even though the copies are be used in opposing the employer's discriminatory practices. Employees' statutory rights to oppose discrimination or not to be construed as a general license to be insubordinate."

33 Cal.App.4th at 1550 (emphasis added). See also E.E.O.C. v. Crown

Zellerbach, 720 F.2d 1008, 1012 (9th Cir. 1983)(illegal acts not protected activity); Barrett v. Harrington, 130 F.3d 246, 263 (6th Cir. 1997)(``Obviously, if the conduct spills over into illegal activities . . . the First Amendment's protections end. . . .'').

Here, Lewis caught Kulikoff and his wife through wire taps and surveillance which violated California Penal Code section 631. The undisputed evidence is that Lewis eavesdropped on telephone conversations between Kulikoff and Mrs. Lewis, without their knowledge, and without authorization from law enforcement. This is a classic violation of California Penal Code section 631. Coulter v. Bank of America, 28 Cal.App.4th 923, 33 Cal.Rptr.2d 766 (1994). Indeed, Lewis, invoking the Fifth Amendment, refused to answer any questions in his deposition pertaining to how he learned the information which he later disclosed to management.

It is disingenuous, to say the least, for Lewis to now try to use his own illegal conduct to cloak himself in the protections afforded to whistleblowers. This Court should deny its imprimatur to this abuse of the law.

E. THE FOURTH CAUSE OF ACTION HAS NO MERIT

1. The Fourth Cause of Action is Preempted and Lies Within PERB's Exclusive Jurisdiction

The fourth cause of action attempts to allege a claim under California Labor Code sections 1101 and 1102, apparently on the theory that Plaintiff Lewis's union activities constituted protected political activity for which he was retaliated against by being denied a promotion and subjected to an unwarranted personnel

investigation.

This cause of action fails for the same reasons as the first, second and third causes of action, namely that it lies within the exclusive primary jurisdiction of PERB. As explained above, since the allegedly retaliatory conduct would, if true, violate the MMBA, all claims arising from that conduct lie within PERB's primary exclusive jurisdiction and must be dismissed for failure to exhaust administrative remedies.

F. THE FIFTH CAUSE OF ACTION HAS NO MERIT

1. Plaintiff Cannot Raise a Triable Issue of Pretext

The fifth cause of action is a claim under 42 U.S.C. section 1983 against Defendant Larry Pitzer. It alleges that Chief Pitzer retaliated against plaintiff Lewis. This claim fails because Plaintiff cannot raise a triable issue that the stated reasons for Chief Pitzer selecting Moon over Lewis were pretexts to hide unlawful discrimination.

In analyzing employment retaliation cases, courts use the three-stage burden-shifting formula established by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973). This framework applies in section 1983 claims. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993); White v. Washington Public Power, 692 F.2d 1286, 1288 (9th Cir. 1982).

Under McDonnell Douglas, the plaintiff has the initial burden of establishing a prima facie case, which raises only an ``inference'' of retaliation. Second, if the plaintiff establishes a prima facie case, the defendant must come forward with evidence of

a non-retaliatory reason for its decision. If the defendant produces such evidence, any inference of retaliation ``simply drops out of the picture.'' St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993). Third, the plaintiff bears the burden of proving that the defendant's stated reasons are ``pretexts'' for retaliation.

Here, Defendants will assume (for the sake of argument only) that Plaintiff can establish a prima facie case.

The non-retaliatory reason for the decision to promote Moon instead of Plaintiff was the Chief's assessment, shared by most of his command staff, that Moon had a better presence at the fire scene and would work better with the command staff than Plaintiff would. Thus, Chief Pitzer exercised his discretion under the Rule of Three to pick who he thought was the better of the two at that time. The ``Rule of Three'' is an accepted management prerogative throughout the country. See e.g. Conde v. Colorado, 872 P.2d 1381, 1388 (1994)(``A necessary ingredient of the `rule of three' is the appointing authority's right to select any of the highest three applicants.''); Local 518, S.E.I.U. v. Division of Motor Vehicles, 621 A,2d 549, 552 (N.J. Super. 1993) (``promotional decisions often involve a balancing of the interests of several employees, their supervisors and management policy. Management decisions on promotions in the context of the `rule of three' require the comparison of individual abilities, talents and other personality factors.")

Presumably, Plaintiff will argue that this explanation is a pretext because it is too subjective. However, the law recognizes

that decisions about the relative qualifications of candidates for a high level management position are inherently subjective, and that fact alone does not raise an issue of pretext.

Plaintiff probably also will argue that his credentials for Battalion Chief were better than Moon's. While Plaintiff may think so, no issue of pretext is raised in a promotion case unless the plaintiff's credentials ``are so superior to the credentials of the person selected for the job that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.'' Millbrook v. IBP, Inc., 280 F.3d 1169, 1180 (7th Cir. 2002). See also Price v. Federal Express Corp., 283 F.3d 715, 723 (2002) (``In order to establish pretext by showing the losing candidate has superior qualifications, the losing candidate's qualifications must leap from the record and cry out to all who would listen that he was vastly - or even clearly - more qualified for the subject job.'')

A closely analogous case is Denny v. City of Albany, 247 F.3d 1172 (11th Cir. 2001). In Denny, a group of white firefighters alleged they had been discriminated against when the fire chief selected two black candidates for promotion to lieutenant. All applicants had undergone a testing process to arrive at a pool of candidates the chief could pick from. The white plaintiffs had scored higher on the tests than the black candidates.

The chief selected the black candidates based on his judgment concerning "demonstrated leadership, maturity, interpersonal skills, and a willingness to support management and its policies." 247 F.3d at 1178-79. The chief also based his decisions on the

recommendations of other senior firefighters.

The plaintiffs argued that the stated reasons for selecting the black firefighters were pretexts for discrimination because the defendants' decisions were subjective and because the plaintiffs' qualifications were better than the promoted blacks. The court rejected both arguments, affirming summary judgment against the plaintiffs.

As to the subjectivity argument, the court stated:

> "A subjective reason can constitute a legally sufficient, legitimate, nondiscriminatory reason under the McDonnell Douglas/Burdine analysis. Indeed, subjective evaluations of a job candidate are often critical to the decision-making process, and if anything, are becoming more so in our increasingly service-oriented economy. Personal qualities factor heavily into employment decisions concerning supervisory or professional positions. Traits such as `common sense, good judgment, originality, ambition, loyalty, and tact' often must be assessed primarily in a subjective fashion.
>
> * * *
>
> [A]n employer's use of subjective criteria in making a hiring or promotion decision does not raise a red flag.''

247 F.3d at 1185-86 (emphasis added).

As to the plaintiffs' argument that they were better qualified than the black candidates who were promoted, the court stated:

> "The fact that Denny scored higher than Harris in two of

> the three stages of the qualifications exercise does not carry a great deal of weight in this case. Under the Department's promotion policy, qualification exercise scores mattered only for purposes of determining the pool of qualified candidates. After that, other criteria were determinative. Unless we were to find that the policy was itself irrational or motivated by discriminatory intent, an argument unsupported on this record, then Denny's relatively higher scores on the `objective' portion of the qualification exercise would not prove that he is more qualified, let alone substantially more qualified to be a lieutenant.''

247 F.3d at 1187.

Likewise, here there is no basis for saying that Chief Pitzer's stated reasons for selecting Moon over Lewis were pretexts to hide retaliation. As in Denney, the Chief based his decision on his subjective judgment concerning ``leadership, maturity, interpersonal skills, and a willingness to support management and its policies.'' As in Denney, the Chief solicited the input of other senior firefighters. And as in Denney, the fact that the unsuccessful candidate (here Lewis) scored higher on the scored departmental evaluation is insufficient to raise a triable issue of pretext.

G. THE SIXTH CAUSE OF ACTION HAS NO MERIT

The sixth cause of action (mislabeled as the fifth cause of action in the Complaint) is a claim by plaintiff Lewis against the

City of San Bernardino under 42 U.S.C. section 1983. It seeks to impose liability on the City based on Defendant Pitzer's refusal to promote Lewis to Battalion Chief. (Complaint paragraph 87).

A municipality such as the City cannot be held liable under section 1983 on a theory of respondeat superior. Monell v. Department of Social Services,436 U.S. 658 (1978). Rather, municipalities may be held liable only based on an established custom or official policy of the governmental entity. Id. at 694

Where a decision maker possesses final authority to establish municipal policy with respect to an employment action, municipal liability under section 1983 may be imposed based on a single decision by that official. Pembaur v. City of Cincinnati, 475 U.S. 469 (1986). However, the Pembaur rule does not apply where the public official's employment decision is subject to meaningful administrative review. Quinn v. Monroe County, 330 F.3d 1320 (11th Cir. 2003). And, as discussed below, the official's authority must be to establish general policy, not just the discretionary authority to make particular employment decisions. Whether a decision maker has sufficient final authority for Pembaur purposes is a question of law for the Court. Id. at 483; Collins v. City of San Diego, 841 F.2d 337 (9th Cir. 1988).

In Gillette v. Delmore, 979 F.2d 1342 (9th Cir. 1992), a firefighter alleged he was retaliated against by the fire chief for invoking his First Amendment rights. The fire chief did not have final authority on terminations because his decisions were subject to review by the city manager, although the plaintiff had not sought the city manager's intervention. The plaintiff argued that the city

manager's acquiescence was enough to establish liability under Monell. The district court ruled in favor of the plaintiff, but the Ninth Circuit reversed on the grounds that the fire chief's hire and fire decisions, which were subject to review by the city manager, did not provide a basis for liability under Pembaur:

> ``Here, Fire Chief Hall possessed the discretionary authority to hire and fire employees. This alone, however, is not sufficient to establish a basis for municipal liability. Municipal liability could be imposed on the basis of Hall's actions only if he was responsible for establishing the city's employment policy. In making this determination, a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it. The District Court held that the Eugene City Charter and ordinances grant authority to make city employment policy only to the City Manager and the City Council."

979 F.2d at 1350.

In Greensboro Professional Firefighters Association v. City of Greensboro, 64 F.3d 962 (4th Cir. 1995), a firefighter passed over by the Fire Chief for promotion alleged he had been retaliated against for his union activities in violation of his First Amendment rights. The Fourth Circuit affirmed summary judgment in favor of the city on the grounds that the Fire Chief was not the final authority on personnel issues for

Pembaur purposes:

> ``While it is true that Fire Chief Jones had the authority to select particular individuals for promotion and even to design the procedures governing promotions within his department, this authority did not include responsibility for establishing substantive personnel policy governing the exercise of his authority. His power to appoint and to establish procedures for making appointments was always subject to the parameters established by the City. Appellants confuse the authority to make final policy with the authority to make final implementing decisions.''

64 F.3d at 965-66 (emphasis in original). See also Hill v. Clifton, 74 F.3d 1150 (11th Cir. 1996)(termination by police chief insufficient to impose municipal liability under section 1983 because police chief did not have ``final policymaking authority'' since termination decisions were subject to review by city manager).

Here, Plaintiff's attempt to impose municipal liability on the City fails for at least two reasons. First, Chief Pitzer's decision to pass over Plaintiff for promotion was subject to review by the City Manager. The governing Memorandum of Understanding states that all personnel decisions, including promotions, are subject to review under the grievance procedure. Under the grievance procedure, the city manager is the final reviewer.

Second, Chief Pitzer does not have final authority over establishing the City's employment policies. The Fire Chief has the

authority to make hire and fire decisions for the Department. His decisions are subject to review by the Civil Service Board and, for members of the bargaining unit, review pursuant to the grievance procedure under the Memorandum of Understanding between the City and the Firefighters Union, Local 891. The Fire Chief does not have the authority to make decisions concerning overall personnel policies for the City. Responsibility for personnel policies rests with the City Council, subject to the provisions of the City Charter, the Civil Service Rules, the MOU with the Union and the requirements that the City meet and confer with the Union on wages, hours and working conditions.

As in Greensboro, the Chief's authority to appoint and make departmental decisions is not the same as final policymaking authority sufficient to impose liability under Pembaur.

IV.
CONCLUSION

For all of the foregoing reasons, Defendants respectfully request the Court to grant summary judgment in their favor.

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