

1 COREY W. GLAVE (State Bar No. 164746  
2 GOLDWASSER & GLAVE, LLP  
3 5858 Wilshire Boulevard, Suite 205  
4 Los Angeles, CA 90036  
5 Phone: (323) 964-7100  
6 Fax: (310) 379-0456

7 Attorneys for Plaintiffs  
8 San Bernardino City Professional Firefighters  
9 Union, Local 891 and Richard Lewis

10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA

12 SAN BERNARDINO CITY  
13 PROFESSIONAL FIREFIGHTERS  
14 UNION, LOCAL 891, and RICHARD  
15 LEWIS

16 Plaintiffs,

17 vs.

18 LARRY PITZER, Fire Chief, City of San  
19 Bernardino, in his official and individual  
20 capacity; CITY OF SAN BERNARDINO  
21 FIRE DEPARTMENT, a Municipal  
22 Agency; CITY OF SAN BERNARDINO,  
23 a Municipal Corporation; DOES I-X,  
24 inclusive

25 Defendants.

Case No. EDCV 05-473-VAP (SGLx)

NOTICE OF MOTION AND MOTION  
FOR A WRIT OF MANDATE  
PURSUANT TO CALIFORNIA  
GOVERNMENT CODE §3500, ET  
SEQ., AND §3300, ET SEQ.;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF

[Filed and served concurrent with  
Plaintiff Separate Statement of  
Undisputed; Declaration and Exhibits]

DATE: May 16, 2006  
TIME: 10:00 a.m.  
PLACE: Courtroom 2

26 TO DEFENDANTS LARRY PITZER, CITY OF SAN BERNARDINO FIRE  
27 DEPARTMENT, and CITY OF SAN BERNARDINO, AND THEIR COUNSEL OF  
28 RECORD:

PLEASE TAKE NOTICE THAT on May 16, 2005, at 10:00 a.m., or as soon  
thereafter as the matte may be heard in Courtroom 2 of the above-captioned Court,  
Plaintiffs San Bernardino Professional Firefighters Union, Local 891 And Richard Lewis,

FILED  
MAY 16 2006  
U.S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

1 by and through their Counsel of Record, will move and hereby do move for a Writ of  
2 Mandate commanding Defendants, and each of them, to immediately promote Richard  
3 Lewis to the position of Battalion Chief with the San Bernardino City Fire Department,  
4 with said promotion being effective October 1, 2004, and/or prior to the effective date of  
5 Dennis Moon's promotion to the same position. Said promotion of Richard Lewis shall  
6 also include payment of all salary, wages, benefits, and seniority rights that Lewis would  
7 have enjoyed and been entitled to upon his promotion.<sup>1</sup>

8 This motion is brought pursuant to California Code of Civil Procedure §1085,  
9 California Government Code §3500, et seq., and California Government Code §3300,  
10 et seq. , and on the following grounds:

- 11 1. Plaintiff San Bernardino City Professional Firefighters Union, Local 891's  
12 motion for a Writ of Mandate is granted pursuant to California Code of  
13 Civil Procedure §1085 and Government Code §3506 as Defendants', and  
14 each of them, have acted in a manner that interfered with, intimidated,  
15 restrained, coerced and/or discriminated against the Union and its  
16 membership's rights under California Government Code Section 3502;
- 17 2. Plaintiff Richard Lewis' motion for a Writ of Mandate is granted pursuant  
18 to California Code of Civil Procedure §1085 and Government Code §3506  
19 as Defendants', and each of them, have acted in a manner that interfered  
20 with, intimidated, restrained, coerced and/or discriminated against Richard  
21 Lewis' rights under California Government Code Section 3502;
- 22 3. Plaintiff Richard Lewis' motion for a Writ of Mandate is granted pursuant  
23 to California Code of Civil Procedure §1085 and Government Code  
24 §3502.1 as Defendants', and each of them, have acted in a manner that  
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26 <sup>1</sup>To the extent that the San Bernardino City Professional Firefighters Union,  
27 Local 891 and/or Richard Lewis suffered and/or are entitled to any damages and/or  
28 statutory penalties for said violations; these matters will be heard at the time of the trial  
on the merits of Plaintiffs' remaining claims for damages and injunctive relief.

1 denied him a promotion based on the exercise of lawful action as an  
2 elected, appointed, or recognized representative of any employee  
3 bargaining unit;

4 4. Plaintiff Richard Lewis' motion for a Writ of Mandate is granted pursuant  
5 to California Code of Civil Procedure §1085 and Government Code §3304  
6 as Defendants', and each of them, denied Richard Lewis a promotion  
7 because of the lawful exercise of the rights granted under this chapter,  
8 and/or the exercise of any rights under existing administrative grievance  
9 procedures of the City of San Bernardino;

10 5. Plaintiff Richard Lewis' motion for a Writ of Mandate is granted pursuant  
11 to California Code of Civil Procedure §1085 and Government Code §3304  
12 as Defendants', and each of them, denied Richard Lewis a promotion on  
13 grounds other than merit, and/or without providing Richard Lewis with an  
14 opportunity for an administrative appeal.

15 6. Plaintiff Richard Lewis' motion for a Writ of Mandate is granted pursuant  
16 to California Code of Civil Procedure §1085 and Government Code §3304  
17 as Defendants', and each of them, denied Richard Lewis a promotion  
18 based on acts, omissions, or other allegations of misconduct that occurred  
19 more than one year after the defendants' discovery by a person  
20 authorized to initiate an investigation of the allegation of an act, omission,  
21 or other misconduct and said acts, omissions or other misconduct on or  
22 after January 1, 1998.

23 This motion is and will be based on this notice of motion and motion, the  
24 attached memorandum of points and authorities, the declaration, with attached exhibits,  
25 of Corey W. Glave, and such additional facts and arguments that will be presented at  
26 the hearing.

1 Dated: April 26, 2006

GOLDWASSER & GLAVE, LLP

2 By



3 COREY W. GLAVE  
4 Attorney for All Plaintiffs

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2  
3 **I. INTRODUCTION**

4 This portion of this litigation<sup>2</sup> involves a classic case of a public servant who  
5 dedicated his life to both public service and to the protection of his fellow employees'  
6 rights suffering retribution and retaliation for engaging in protective activity.

7 Richard Lewis, a Fire Captain for thirteen years and a twenty three (23) year  
8 veteran of the San Bernardino City Fire Department was denied a promotion to the  
9 position of Battalion Chief, at a time that he sat first on the promotion list, based on  
10 actions he took as an elected member of the Board of Directors for the San Bernardino  
11 City Professional Firefighters Union, Local 891.

12 Not only did Defendants pass Lewis over for promotion, but in order to do so  
13 they had to deviated from a long time establish policy of promoting in accordance with  
14 the numerically ranked promotional list and had to create a never-used-before extra  
15 review process that is not provided for in any of the formal testing procedures of the  
16 City of San Bernardino or San Bernardino City Fire Department. Additionally, when this  
17 extra review system was used, not only did the evaluator rated Lewis lower because of  
18 actions he took in his union capacity, but they gave Lewis low markings based on  
19 conjecture, rumor, hearsay and matter that are prohibited from consideration by state  
20 law.

21 As Defendants have admitted to most of the actions giving rise to this motion,  
22 the Court will simply have to determine the what the appropriate remedy should be to  
23 cure the violations and to prevent future violations of a similar nature.

24  
25 \_\_\_\_\_  
26 <sup>2</sup>This motion involves only Plaintiffs claims for mandamus relief. Plaintiff claims  
27 for damages, statutory penalties and injunctive relief based on the violations of certain  
28 statutes including, but not limited to, whistle blower statutes, Peace Officer Bill of Rights  
Act (statutory penalties and injunctive relief), MMBA (damages) and violation of civil  
rights under 42 USC §1983, are set for trial in June.



1 **II. STATEMENT OF LAW**

2 Plaintiffs hereby request that this Court issue its Writ of Mandate directing  
3 Defendants, and each of them, to promote Plaintiff Richard Lewis to the position of  
4 Battalion Chief. This request is based on Defendants having unlawfully denied him that  
5 promotion because of the exercise of his rights under the Meyers-Milias-Brown Act,  
6 "MMBA," (California Government Code 3500 et. seq.). Defendants have also denied  
7 him promotion on grounds other than merit because of the lawful exercise by him of the  
8 rights granted under the Peace Officers Bill of Rights (California Government Code  
9 3300 et. seq.) and the City of San Bernardino administrative grievance procedure.  
10 They have failed to provide him with the administrative appeal that he is due under  
11 Government Code Section 3304 when denied promotion on grounds other than merit,  
12 and they have used conduct occurring more than a year prior to the denial of promotion  
13 to justify the failure to promote, in violation of Government Code Section 3304(d).

14 Plaintiffs ask the Court to issue its writ directing Defendants to refrain from taking  
15 any action that interferes with, restrains, coerces or discriminates against members of  
16 the San Bernardino Professional Firefighters Union, Local 891, for the exercise of their  
17 rights under California Government Code Section 3502; and to refrain from denying a  
18 promotion to, or threatening any such treatment to, members of the San Bernardino  
19 Professional Firefighters Union, Local 891 for the exercise of lawful acts as elected,  
20 appointed, or recognized representatives of any employee bargaining unit (California  
21 Government Code §§3502, 3502.1, 3506).

22 California Code of Civil Procedure Section 1085 provides that "A writ of mandate  
23 may be issued by any court to any inferior tribunal, corporation, board, or person, to  
24 compel the performance of an act which the law specially enjoins, as a duty resulting  
25 from an office, trust, or station, or to compel the admission of a party to the use and  
26 enjoyment of a right or office to which the party is entitled, and from which the party is  
27 unlawfully precluded by such inferior tribunal, corporation, board, or person." Plaintiffs  
28

1 contend that Defendants have a ministerial duty to comply with all provisions of  
2 California Government Code §3500, et seq., and Government Code §3300, et seq.

3 A writ of mandate lies for an employee association to challenge a public  
4 employer's breach of its duty under the MMBA. See *Vernon Fire Fighters v. City of*  
5 *Vernon* (1980) 107 Cal.App.3d 802, 810; see also *San Francisco Fire Fighters Local*  
6 *798 v. Board of Supervisors* (1992) 3 Cal.App.4th 1482; *Public Employees of Riverside*  
7 *County, Inc. v. County of Riverside* (1977) 75 Cal.App.3d 882; *San Leandro Police*  
8 *Officers Ass'n v. City of San Leandro* (1976) 55 Cal.App.3d 553 (Where city council  
9 discriminated against city employees for exercising their rights under the  
10 Meyers-Miliias-Brown Act, it was proper to compel, by means of a writ of mandate,  
11 action to correct the existing unlawful practice).

12 Similarly, Government Code Section 3309.5(c) sets out the court's duty to  
13 enforce the Peace Officers Bill of Rights Act:

14 "(c) In any case where the superior court finds that a local public safety  
15 department has violated any of the provisions of this chapter, the  
16 court shall render appropriate injunctive or other *extraordinary relief*  
17 *to remedy the violation and to prevent future violations of a like or*  
18 *similar nature*, including, but not limited to, the granting of a  
19 temporary restraining order, preliminary, or permanent injunction  
20 prohibiting the local public safety department from taking any  
21 punitive action against the local public safety officer." (Italics  
22 added.)

23 See *Henneberque v. City of Culver City*, (1985) 172 Cal.App.3d 837, 843. Moreover,  
24 writs of mandate, like injunctions are a form of equitable relief and it is readily apparent  
25 writs of mandate fall within the express language of 3309.5(c) which directs the court to  
26 "render appropriate injunctive or other extraordinary relief to remedy the violation...."  
27 (Id.)

1 **III. STATEMENT OF FACTS**

2 Plaintiff, San Bernardino City Professional Firefighters Union, Local 891  
3 ("Union"), was and is the recognized employee organization for all sworn employees,  
4 holding the rank of Captain or lower. Plaintiff San Bernardino City Fire Department  
5 Captain Richard Lewis ("Lewis") was and is a sworn employee of the City of San  
6 Bernardino Fire Department and a member of the Union. (SSF 1 and 2)<sup>3</sup>

7 Lewis' performance evaluations for the five years proceeding this action rated  
8 him as meeting or exceeding standards in all areas rated and noted no performance  
9 deficiencies. (SSF, 10) Lewis had no record of discipline as a fire captain. (SSF 9)  
10 Lewis, on a number of occasions, was assigned as an acting Battalion Chief. At the  
11 time of those assignments, there were no concerns raised about Lewis' ability to  
12 function in that capacity. (SSF 12-13) In fact, Fire Chief Pitzer (Pitzer) is not aware of  
13 anything that would make Lewis ineligible for the promotion to the position of Battalion  
14 Chief. (SSF 14)

15 In the years that Lewis had been on the Board of Directors of the Union, he had  
16 been the lead negotiator on all meaningful negotiations between the Fire Department  
17 and the Union. He had actively participated in the Union's political activities and the  
18 defense of its members' rights. The Union had been involved in on-going  
19 disagreements, legally, politically, and administratively with the Fire Chief and the Fire  
20 Administration for the last several years. The Union would act lawfully and Pitzer and  
21 Fire Administration would actively assume an adversarial position. Examples of these  
22 disagreements include: (a) legal action to enforce employees' rights under Government  
23 Code §3300, et seq., and Government Code §3500, et seq. after the same were  
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25 <sup>3</sup>The City of San Bernardino (City) and San Bernardino Fire Department  
26 (Department) via resolution, policy and past practice, has made all sworn fire  
27 department employee (hold the rank of Captain and below) peace officers and thereby  
28 affords them the same rights as afforded to sworn peace officers under Government  
Code §3300, et seq. (SSF, 3)

1 violated by the department; (b) filing of Unfair Employment Relations Practices with a  
2 state agency to contest unlawful employment practices; (c) Civil Service Commission  
3 challenges to disciplinary actions wrongfully imposed; (d) Union challenges to attempts  
4 to unilaterally implement policies adverse to its membership's interests; (e) publically  
5 advising City Administration about possible fraud and increased civil liability in, and  
6 opposing, the "Fire Academy;" (f) taking a position during the meet and confer process  
7 in 2004 regarding the construction and staffing of a new fire station and training  
8 expenditures, which position was eventually accepted by the City over the Pitzer's; and  
9 (g) conducting a "Union Survey of Fire Administrator's Performance" which resulted in  
10 findings adverse to the Fire Administration. (SSF, 11) Lewis had been actively involved  
11 on the Board of Directors of the Union for approximately ten (10) years. Prior to his  
12 being passed over for promotion, he was the President of the Union for two years. (SSF  
13 2, 4, 11, 28-53)

14 On September 6, 2002, the Fire Department submitted a "Request for  
15 Recruitment" for Battalion Chief. The testing process would include a written portion,  
16 oral portion, performance portion and an Assessment Lab. (SSF 54, 55, 56) Richard  
17 Lewis submitted an application and on November 7, 2002, was certified by the Fire  
18 Department as meeting the minimum qualifications to participate in the Battalion Chief  
19 testing process. (SSF 5, 6, 57, 58)

20 The Battalion Chief testing process included a civil service written examination; a  
21 performance or assessment portion; a Department Evaluation; and a Chief's Interview.  
22 (SSF 59-80) The performance or assessment portion of the testing process included an  
23 oral interview, an impromptu presentation, a written/essay exam and a tactical portion  
24 made up of four (4) simulation exercises (Wildfire, Light structure fire, HazMat and  
25 Earthquake)(SSF 59)). Each section of the testing process was scored and then the  
26  
27  
28

1 Fire Chief put the candidates in a rank order listing for promotion. (SSF 60)<sup>4</sup> Once the  
2 exams were given and the numerical ranking made, the testing process was considered  
3 complete. (SSF 81)

4 Richard Lewis finished first on the civil service written examination (scoring a 94)  
5 (SSF 61) and the assessment center (Exhibit 12; SSF 63).<sup>5</sup> He finished second, behind  
6 Kulikoff, in the Chief's Interview (SSF 69), and finished last in the Departmental  
7 Evaluation (SSF 69). One rater admitted that he rated Lewis lower during the  
8 department evaluation portion Lewis based on his prior interaction with Lewis when  
9 Lewis was acting in his Union capacity (SSF 66). Moon finished lower than Lewis in all  
10 testing areas with the exception of the department evaluation portion.

11 After the numerical list was distributed, Pitzer, as he has done for all promotions  
12 made during his twelve year term as Fire Chief, strictly followed the list, and did not  
13 deviate from the ranked order when he made the first promotion from the list. (SSF 84-  
14 85)<sup>6</sup> Kulikoff, who ranked number one on the list, was promoted to Battalion Chief in  
15 April 2003. Kulikoff's promotion left Lewis in the first position on the list, ahead of  
16 Moon.

17 At the time of the testing process, Lewis had been a fire captain for 12 years and  
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19 <sup>4</sup>The San Bernardino City Civil Service rules does not recognize the "Rule of 3"  
20 (SSF 82)

21 <sup>5</sup>According to the testimony in this case, both Kulikoff and Moon actually failed  
22 the tactical portion of the assessment center as Kulikoff failed the structural fire portion  
23 and Moon failed the wildfire portion. (SSF 72-80). Pitzer, however, conveniently  
24 ordered that all of the score sheets for Battalion Chief testing process be purged. (SSF  
25 83)

26 <sup>6</sup>The only other time (other in this case with Lewis) that Pitzer deviated from the  
27 rank order list when making a promotional decision, was when he chose to pass over  
28 Brian Crowell for promotion to Captain. Brian Crowell was ultimately promoted to  
Captain, retroactively, based on an agreed upon resolution to the Union's and Crowell's  
Civil Service Appeal and PERB Complaint wherein it was alleged that Crowell was  
passed over for promotion due to his engaging in protective activity. (SSF 85-86, 94-95;  
Exhibit 35)



1 had 23 years of total time on the Fire Department; Moon had been a captain for 8 years  
2 and had 21 years total time on. (SSF 7) Richard Lewis lived within the San Bernardino  
3 City Limits, Dennis Moon did not. (SSF 15)<sup>7</sup>.

4 After Kulikoff's promotion, but before any other promotion, Lewis discovered that  
5 Kulikoff had been engaged in misconduct both on and off duty which could be  
6 considered criminal in nature. Lewis reported this behavior to the City Attorney's office  
7 and Chief Pitzer. Pitzer was reluctant to take any action against the Kulikoff until  
8 ordered to do so by the City Attorney's office. Pitzer initiated an investigation of Lewis  
9 for "conducting an unauthorized personnel investigation." (SSF, 18-27).

10 After Kulikoff was promoted the Union remained very aggressive in its dealings  
11 with Fire Administration. Pitzer acknowledged that the Union and management were  
12 adversarial at times and described the relationship with the Union as "having a lot of  
13 turmoil and issues within the organization including labor attacking all of the Fire  
14 Department's Chief Officers (Preciado, Fratus, Alder, Bennett, Campos and Simpson)."  
15 (SSF, 28-31) Included in this time of turmoil, which Pitzer identified as being while  
16 Lewis was the Union President, were attacks by the union regarding the expenditure of  
17 training money, the building of fire stations, challenging Pitzer's Fire Academy, and the  
18 Union conducting a performance survey of the fire administration. (SSF 28-39). In  
19 October, 2003, the Union obtained a judgment against the Fire Department, Chief  
20 Pitzer, Deputy Chief Preciado and Division Chief Fratus for violating a Fire Captain's  
21 rights under Government Code §3300, et seq. The judgment ordered the City to pay  
22 the Union's attorney fees. (SSF 43, 44)<sup>8</sup>

23 In October, 2004, Kulikoff was granted an industrial disability retirement causing  
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25 <sup>7</sup>The City of San Bernardino provides a preference for residents of the City and  
26 for candidates that have more seniority (Exhibit 3, p. 9)

27 <sup>8</sup>The Fire Administration was upset by the judgment and the City started  
28 advocating the removal of peace officer status and elimination of Bill of Rights  
protections for all union members. (SSF 43)

1 an open Battalion Chief position. Pitzer, however, did not follow his established policy  
2 of honoring the numerical promotion list. In an effort to avoid promoting Lewis, Pitzer  
3 created an additional review process. He used that process to defend his decision not  
4 to promote Lewis, but, instead, to promote Moon.

5 Pitzer deviated from the established testing process by ordering a "round-table  
6 discussion"<sup>9</sup> and creating an evaluation form to decide who to promote. (SSF 87, 88,  
7 90) Deputy Chief Preciado, Training Chief Fratus, Fire Marshall Dupree and 4 of the 6  
8 Battalion Chiefs (Bennett, Alder, Simpson, and Campos) filled out the forms in  
9 September, 2004. (SSF 89) Pitzer told the raters that the form was created to evaluate  
10 the person as to who they were at "that point in time" and that they were to judge the  
11 person strictly on the criteria that Chief Pitzer set forth in the forms. (SSF 91-92)  
12 According to Pitzer, the evaluation for Lewis was to include consideration of Lewis'  
13 behavior as a union representative. Pitzer acknowledged that Lewis was more vocal on  
14 behalf of the union, at the forefront of challenges to the Fire Administration's policies  
15 and procedures, involved in the filing of grievances, appeals, and lawsuits, and  
16 representing labor during labor-management meetings. (SSF 93)

17 Pitzer claims that during this added evaluation process, concerns were raised  
18 about Lewis' purported "sporadic problems with command presence" and that he was  
19 viewed as not "being a team player." (SSF 96) Pitzer later admitted that he could not  
20 identify any specific dates, times or incidents where Lewis showed the "sporadic  
21 problem with command." Pitzer also indicated that, although a problem like issues with  
22 fire command should be noted in an employee's evaluation, he was not aware of any  
23 performance evaluation of Lewis from 2000 to present in which such a deficiency is  
24 noted. (SSF 97-99) Pitzer further admitted that he could not give any example of Lewis

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25  
26 <sup>9</sup>The only other time, besides with Lewis in this case, that the roundtable  
27 discussion process was used in any promotional process in the San Bernardino Fire  
28 Department, was when the department wanted to skip over Brian Crowell to the position  
of Fire Captain (referenced above) (SSF 94-95)



1 demonstrating an "I/Me" mentality or giving the impression of not being a team player  
2 other than when Lewis was acting in his Union capacity. (SSF 100-101)

3 When the Chief Officers were questioned about their rating of Lewis during this  
4 extra review process they acknowledged rating Lewis lower than Moon in a number of  
5 areas in which they had never observed his performance (SSF 108-111, 113), where  
6 they had no personal knowledge (SSF 122-124) and based on observations of Lewis  
7 that were made 10 to 15 years earlier. (SSF 121, 127, 129) More importantly, the  
8 raters acknowledged rating Lewis lower than Moon based on negative interactions with  
9 Lewis while Lewis was acting in his Union capacity. (SSF 107, 112, 114, 115; 119-120,  
10 130)

11 In October, 2004, Lewis was passed over for promotion to the position of  
12 Battalion Chief (SSF 17) and Moon was promoted instead. (SSF 143)

13 Lewis immediately filed appeals with the San Bernardino City Council and the  
14 San Bernardino Civil Service Board (SSF 144-148; Exhibit 34), but never received any  
15 response from the City Council or the Civil Service Board. Mike Newbry, the Chief  
16 Examiner for the Civil Service Board, indicated that there are no mechanisms in the City  
17 to appeal or challenge any portion of the promotional process. (SSF 147)

#### 18 19 **IV. ARGUMENT**

##### 20 **A. Defendants Violated Government Code §3500, et seq.**

21 The MMBA ensures a public employee the right to "engage in a wide range of  
22 union-related activities without fear of sanction...." (*Social Workers' Union, Local 535 v.*  
23 *Alameda County Welfare Dept.* (1974) 11 Cal.3d 382, 388). Public employers may not  
24 discriminate against their employees on the basis of membership or participation in  
25 union activities. See *Campbell Municipal Employees Ass'n v. City of Campbell* (1982)  
26 131 Cal.App.3d 416; *Public Employees Ass'n v. Board of Supervisors* (1985) 167  
27 Cal.App.3d 797, 806, 807; *Santa Clara County Counsel Attys. Assn. v. Woodside,*

1 (1994) 7 Cal.4th 525, 556.

2 Specifically, Government Code §3502 provides that public employees shall have  
3 the right to form, join, and participate in the activities of employee organizations of their  
4 own choosing for the purpose of representation on all matters of employer-employee  
5 relations. Government Code § 3506 mandates that an employer shall not interfere with,  
6 intimidate, restrain, coerce or discriminate against public employees because of their  
7 exercise of their rights under Section 3502. Government Code § 3502.1 further  
8 provides that no public employee shall be subject to punitive action or denied  
9 promotion, or threatened with any such treatment, for the exercise of lawful action as an  
10 elected, appointed, or recognized representative of any employee bargaining unit.

11 This freedom from sanction obviously includes the right not to be subject to  
12 negative job action, like being denied a promotion, for lawful union activity. The right to  
13 participate in employee self-organization and collective bargaining would be  
14 meaningless if an employee could be denied promotional opportunities simply for  
15 engaging in such lawful activity. See *Santa Clara County Counsel Attys. Assn.*, supra;  
16 *Portland Willamette Co. v. N.L.R.B.* (9th Cir.1976) 534 F.2d 1331, 1334 [discharge of  
17 employee engaged in union activity "inherently destructive" of union activity and  
18 therefore presumed to be discriminatory]. Because of the similarity between state and  
19 federal employment discrimination laws, California courts may look to federal precedent  
20 in determining employment discrimination claims. (E.g., *Guz v. Bechtel National, Inc.*  
21 (2000) 24 Cal.4th 317, 354; *Reno v. Baird* (1998) 18 Cal.4th 640, 647 648; *Janken v.*  
22 *GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 66; *Mogilefsky v. Superior Court*  
23 (1993) 20 Cal.App.4th 1409, 1416, fn. 5)

24 Discrimination against employees for union activity is also contrary to both  
25 federal and state law. See *National Labor Relations Act*, 29 U.S.C. § 158(a)(3) (NLRA);  
26 *Gov.Code*, §§ 3502, 3502.1, 3506; *Sure-Tan, Inc. v. N.L.R.B.* (1984) 467 U.S. 883,  
27 894; *N.L.R.B. v. Transportation Management Corp.* (1983) 462 U.S. 393, 394,

1 disapproved on another point in *Director, Office of Workers' Compensation Programs v.*  
2 *Greenwich Collieries* (1994) 512 U.S. 267, 276-278; *Santa Clara County Counsel Attys.*  
3 *Assn. v. Woodside* (1994) 7 Cal.4th 525, 555-556. In California, the MMBA prohibits a  
4 public employer from discriminating against a public employee for exercising his or her  
5 right to join a union or to participate in worker activities. *Santa Clara County Counsel*  
6 *Attys. Assn. v. Woodside*, supra, 7 Cal.4th at pp. 555-556. The MMBA parallels the  
7 National Labor Relations Act, "NLRA" (*City of El Cajon v. El Cajon Police Officers' Assn.*  
8 (1996) 49 Cal.App.4th 64, 72, fn. 3; *Public Employees Assn. v. Board of Supervisors*  
9 (1985) 167 Cal.App.3d 797, 806-807.) The NLRA prohibits discrimination in  
10 employment "to encourage or discourage membership in any labor organization[.]" (29  
11 U.S.C. § 158(a)(3).)

12 The federal courts have held that a prima facie case of unlawfully discriminatory  
13 failure to promote is made by showing, inter alia, a reasonable expectation of  
14 promotion. "We ... hold that a prima facie case of failure to promote ... is made by  
15 showing ... that [the employee] was qualified for promotion and might have reasonably  
16 expected selection for promotion under the defendant's on-going competitive promotion  
17 system." (*Pettit v. United States* (1973) 203 Ct.Cl. 207, 488 F.2d 1026, 1033,  
18 disapproved on another point in *United States v. Testan* (1976) 424 U.S. 392, 405;  
19 *Haire v. Calloway* (8th Cir.1978) 572 F.2d 632, 634; *Hagans v. Andrus* (9th Cir.1981)  
20 651 F.2d 622, 625-626 [sex discrimination].) Stated differently, the test is as follows:  
21 "To establish a prima facie case of illegal denial of promotion ..., the plaintiff must show  
22 ... that he applied for and was denied a promotion for which he was technically eligible  
23 and of which he had a reasonable expectation." (*Bundy v. Jackson* (D.C.Cir.1981) 641  
24 F.2d 934, 953; *Fair Employment Practice Com. v. State Personnel Bd.* (1981) 117  
25 Cal.App.3d 322, 333-334 (substantial evidence the employee had ranked first on the  
26 promotion list "and, accordingly, could reasonably expect promotion....")).

27 To establish that an employer unlawfully interfered with an employee's or a union's  
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1 right under these sections, plaintiffs are not required to prove that the employer  
2 intended to interfere with the employee's or union's right or that the employer was  
3 motivated by antiunion animus. The only proof required is a showing that the employee  
4 was engaged in protected activity, that the employer engaged in conduct which tended  
5 to interfere with, restrain or coerce employees in exercise of those activities, and that  
6 employer's conduct was not justified by legitimate business reasons. *Public Employees*  
7 *Ass'n of Tulare County, Inc. v. Board of Sup'rs of Tulare County* (1985) 167 Cal.App.3d  
8 797; *Fun Striders, Inc. v. N.L.R.B.* (9th Cir.1981) 686 F.2d 659, 663. Once a violation  
9 has been established, then a writ of mandate will be available to remedy the violation<sup>10</sup>.

10 In this case, the undisputed evidence shows that Richard Lewis applied for and  
11 was qualified for the position of Battalion Chief. He successfully completed all of the  
12 competitive testing required by the City of San Bernardino and the San Bernardino City  
13 Fire Department. He was, at the time he was passed over for promotion, ranked  
14 number one on the promotional list and the Fire Department has a practice of making  
15 promotions according to the numerical rankings of the list. In fact, the only other time,  
16 in at least the last 12 years, that there was any deviation from the list occurred when the  
17 Fire Department passed over another employee who had engaged in protected activity.  
18 That employee made a claim of retaliation and was subsequently promoted, with a  
19 retroactive effective date, as part of a settlement of his claim.

20 Clearly, Richard Lewis was qualified for promotion and reasonably expected  
21 selection for promotion under the defendant's on-going competitive promotion system.  
22 It is undisputed that Lewis was actively engaged in protected activity on behalf of the  
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24 <sup>10</sup>Code of Civil Procedure section 1085 declares that a writ may be issued "by  
25 any court ... to any inferior tribunal, corporation, board or person, to compel the  
26 performance of an act which the law specially enjoins, as a duty resulting from an  
27 office, trust, or station...." The availability of writ relief to compel a public agency to  
28 perform an act prescribed by law has long been recognized. (See, e.g., *Berkeley*  
*Unified Sch. Dist. v. City of Berkeley* (1956) 141 Cal.App.2d 841, 849.)

1 Union and its membership. It is also undisputed that the employer, in order to validate  
2 its decision, went outside its normal testing process and chose to re-evaluate the two  
3 remaining candidates based on criteria that were not part of the formal testing process.  
4 Finally, it undisputed that when this extra evaluation system was used, the raters  
5 inappropriately rated Lewis lower than the other candidate based on his Union  
6 activities. Denial of promotion due to Union activity interferes with, restrains and  
7 coerces employees in exercise of those activities<sup>11</sup>. Defendants' conduct violates the  
8 prohibitions set forth in Government Code §3502.1 and §3506.

9  
10 B. Defendants Violated Government Code Section 3300 et seq.

11 California Government Code Section 3300, et. seq., ("Peace Officers Bill of  
12 Rights") specifies the "basic rights and protections which must be afforded all public  
13 safety officers by the public entities which employ them and is a catalogue of the  
14 minimum rights to protect employees from abuse or arbitrary treatment. *Pasadena*  
15 *Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564; *Baggett v. Gates*,  
16 (1982) 32 Cal.3d 128; *White v. County of Sacramento* (1982) 31 Cal.3d 676.

17 In interpreting the public safety officer's rights under the Act, the general rule of  
18 statutory construction requires a liberal construction in favor of those persons whom a  
19 statute was designed to protect. *Connolly Development, Inc. v. Superior Court* (1976)

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21 <sup>11</sup>Direct evidence of an antiunion motive in discharge cases is rare and, for that  
22 reason, reliance on circumstantial evidence, and reasonable inferences deriving  
23 therefrom, is appropriate and often necessary. *Laro Maintenance Corp. v. NLRB*, 56  
24 F.3d 224, 229 (D.C. Cir. 1995); *NLRB v. Warren L. Rose Castings, Inc.*, 587 F.2d 1005,  
25 1008 (9th Cir. 1978); *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 75-76 (8th Cir. 1969).  
26 Thus, "Illegal motive has been held supported by a combination of factors, such as  
27 'coincidence in union activity and discharge' . . . 'general bias or hostility toward the  
28 union' . . . 'variance from the employer's normal employment routine' . . . and 'an  
implausible explanation used by the employer for its action'" . . . " *McGraw-Edison Co.*,  
above at 75. Furthermore, an unlawful motive will be presumed if the employer's action  
could naturally and foreseeably have an adverse effect on employee rights, either at  
that time or in the future. *Radio Officers v. NLRB (A.H. Bull Steamship Co.)*, 347 U.S.  
17, 48-52 (1954).

1 17 Cal.3d 803, 826-827. Consequently, in the matter at hand, the construction of  
2 Government Code §3300, and its subparts should be liberally construed to protect the  
3 employee's rights as the Act is remedial, and case law calls for a liberal construction of  
4 the rights guaranteed by the Act. *Baggett* (supra); *White* (supra); *Lybarger v. Los*  
5 *Angeles*, (1985) 40 Cal.3d 822.

6 Government Code §3304, provides that "No public safety officer shall be  
7 subjected to punitive action, or denied promotion, or be threatened with any such  
8 treatment, because of the lawful exercise of the rights granted under this chapter, or the  
9 exercise of any rights under any existing administrative grievance procedure." (CA Gov't  
10 Code §3304(a)). It further provides that "No punitive action, nor denial of promotion on  
11 grounds other than merit, shall be undertaken by any public agency against any public  
12 safety officer who has successfully completed the probationary period that may be  
13 required by his or her employing agency without providing the public safety officer with  
14 an opportunity for administrative appeal." (CA Gov't Code §3304(b))

15 Finally, California Government Code §3304(d) states that, except as provided in  
16 this subdivision and subdivision (g), no punitive action, nor denial of promotion on  
17 grounds other than merit, shall be undertaken for any act, omission, or other allegation  
18 of misconduct if the investigation of the allegation is not completed and the employee is  
19 notified of any proposed disciplinary action within one year of the public agency's  
20 discovery by a person authorized to initiate an investigation of the allegation of an act,  
21 omission, or other misconduct.

22 The undisputed facts show that Plaintiff Richard Lewis was denied a promotion  
23 based on his exercise, on behalf of the Union, of the rights granted members of the  
24 Union under the Peace Officers Bill of Rights. He also, on behalf of the Union and its  
25 members, exercised the rights granted under the City of San Bernardino administrative  
26 grievance procedure, and for that lawful conduct was denied promotion. Lewis, as a  
27 representative of the Union and on behalf of its membership, invoke rights afforded  
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1 under Government Code §3300, et seq., in both disciplinary cases and in litigation.

2 When Lewis was denied the promotion, he requested an administrative hearing,  
3 thus invoking his right under Government Code Section 3304(b). Defendants refused  
4 to provide him with the hearing that was due under Section 3304(b). The evidence is  
5 uncontroverted that the denial of promotion was based on grounds other than merit.

6 Finally, it is undisputed that part of the reason for denying Lewis his promotion  
7 was conduct that is alleged to have occurred more than a year prior to the time of the  
8 decision not to promote him. Some of the conduct that was said to be the basis of the  
9 decision not to promote Lewis occurred as long ago as the 1990's. Defendants have  
10 denied Lewis a promotion on grounds other than merit, for acts alleged to have  
11 occurred over a year before the denial, in violation of Government Code Section  
12 3304(d).

13 As there can be no explanation for the above violations, Defendants should be  
14 found to have violated the provisions of Government Code §3300, et seq., and to have  
15 done so maliciously and with the intent to cause harm to Richard Lewis.

16  
17 **V. CONCLUSION**

18 The evidence in this case, much of which constitutes admissions by the  
19 Defendants and their agents, proves that Defendants pass Lewis over for promotion in  
20 order to discriminate and retaliated for Lewis' actions taken on behalf of the Union and  
21 its membership. Defendants knowingly and intentionally deviated from a long time  
22 establish policy of promoting in strict accordance with the numerically ranked  
23 promotional list and in an effort to justify their actions the had to create a never-used-  
24 before extra review process. During this extra review process, not only did the  
25 evaluators rated Lewis lower because of actions he took in his union capacity, but they  
26 gave Lewis low markings based on conjecture, rumor, hearsay and matter that are  
27 prohibited from consideration by state law.


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As Defendants have admitted to most of the actions giving rise to this motion, the Court now must determine what the appropriate remedy should be to cure the violations and to prevent future violations of a similar nature.

For the foregoing reasons, Plaintiffs respectfully request this Court issue an Order granting the Writ of Mandate requested.

Dated: April 26, 2006

GOLDWASSER & GLAVE, LLP

By   
\_\_\_\_\_  
COREY W. GLAVE  
Attorney for All Plaintiffs