Civil No. B099918

STATE OF CALIFORNIA

COURT OF APPEAL

SECOND APPELLATE DISTRICT

DIVISION FOUR

EMILLE V. DeCUIR,

Plaintiff and Respondent,

vs.

COUNTY OF LOS ANGELES, et al.,

Defendants and Appellants.

Appeal From The Superior Court of Los Angeles County, Honorable John R. Stanton, Judge Presiding
Los Angeles Superior Court Case No. BC 052064

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITY

INTRODUCTION AND SUMMARY OF ARGUMENT

After a first-of-its-kind civil suit, plaintiff received a $380,000 jury verdict as lost future wages for a civil service job for which he never even completed the appointment process. This lawsuit is first of its kind for a reason — there shouldn't have been a civil suit, let alone a damage award. Plaintiff's exclusive form of judicial review was mandamus; the defendants are immune from damages; and plaintiff's causation argument fails as a matter of law.

Although the germane facts are straightforward, their legal repercussions momentously impact civil service systems everywhere.

Plaintiff *passed* a civil service exam for investigator in the Los Angeles County District Attorney's office ("D.A.'s office"), and was placed on an eligibility list. An oral interview, plus a veteran's credit, determined his score. Although interview scoring is inherently subjective, and his score was *only three points below* his score the prior year on the same exam, plaintiff decided it was unfair. After he protested, both the D.A.'s office and the County's Chief Administrative Office investigated and upheld his score. Plaintiff then appealed to the County Civil Service Commission, adding a complaint that the interviewers unfairly delayed his interview. The Commission denied his request for a full hearing on his unfair scoring practices claim, but ordered a reinterview. After initial confusion over the reinterview's format, plaintiff chose not to pursue any reinterview and instead unsuccessfully re-petitioned the Commission for a hearing. Without reinterviewing, retaking the exam (which he could do every six months) or seeking a writ of mandate, he then sued the County of Los Angeles (the "County") and his three interviewers for damages.

Basing damage liability on Government Code section 815.6, plaintiff told the jury the defendants had a mandatory duty under County Civil Service Rules to give a "fair and impartial" exam and they could award damages if any unfairness caused him not to get the job. He claimed his interview score was "unfair" because the interviewers

substantially delayed and then rushed his interview; his score was lower than the first time he took the exam; he deserved a higher education rating; the interviewers arbitrarily or inconsistently rated some applicants with less experience than plaintiff higher on certain subjective topics; and the D.A.'s office mathematically adjusted the raw scores on a qualifying written exam, which increased the oral interview pool.

The judgment must be reversed for multiple independent reasons.

First, plaintiff merely claimed arbitrary or unfair scoring violating County Civil Service Rules, not civil rights violations actionable under federal Title VII or California's Fair Employment and Housing Act. His exclusive form of judicial review therefore was mandamus and he first needed to show the Commission abused its discretion in only ordering a reinterview. Moreover, settled authority confirms that plaintiff had no due process right to a full evidentiary hearing on his unfair scoring practices claim. But even if due process required one, his remedy was to compel the Commission to hold one, not a civil trial. No authority allows a trial court or jury to supplant the expertise and discretion of the Commission, the Chief Administrative Office or the examining agency.

Second, the defendants are immune from damages. Not only is oral interview scoring inherently subjective, but the civil service rules vest broad discretion in the County and its departments on how to design and score civil service exams. By claiming unfair, arbitrary scoring practices, plaintiff merely alleged abuses of discretion immunized under the Government Code. He cannot circumvent this immunity with a mere *policy* goal of "fair and impartial" exams. Plaintiff failed to identify any enactment satisfying Government Code section 815.6.

Third, as a matter of law, plaintiff cannot prove causation. His claim that the D.A.'s office would have had to hire him is wholly speculative. Under each of plaintiff's causation theories, the D.A.'s office still would have had discretion not to do so.

Also, the judgment should be reversed on the grounds that plaintiff failed to mitigate damages by not accepting a reinterview, his theories at trial diverged from his government claim, and the trial court erroneously allowed a prejudicial document into evidence. But the most egregious aspects of this verdict involve the mandamus, immunity and causation issues because they direly threaten civil service systems everywhere. Plaintiff's theory gives disgruntled civil service applicants a full civil trial for scoring grievances, even where administrative experts have already ruled on their protest, and exposes examiners to damage liability based upon a jury's *ex post facto* subjective fairness assessments and second-guessing of subjective evaluations. Logic, policy and the law all mandate the judgment's reversal.

STATEMENT OF THE CASE

A. In March 1989, Plaintiff Scored A 90 On The D.A. Investigator Exam, Based On A Subjective Oral Interview Plus A Veteran's Credit.

In March 1989, for the first time ever, plaintiff Emille Decuir took the entry-level civil service exam for investigator in the Los Angeles County District Attorney's office ("D.A. investigator"). (SAT 75; TE#13.)[1] He passed a qualifying written exam, which let him

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[1] We refer to the Clerk's Transcript as "CT" followed by the applicable page number(s) and Trial Exhibits as "TE#." Due to two augmentations, the Reporter's Transcript consists of three separate sets of multiple volumes, which, unfortunately, are not consecutively paginated or in chronological order. To facilitate reference to the Reporter's Transcript, we respectfully suggest that the court mark the transcript volumes with the three acronyms we use herein. Those three acronyms are: "PT" (for the two volume "Electronic Recording Monitor's Partial Transcript on Appeal", dated January 8, 1997 and containing excerpts of proceedings on November 21 & 22, 1995, December 1, 4 & 5, 1995 and January 18, 1996); "FAT" (for the four volume "Electronic Recording Monitor's [First] Augmented Transcript

participate in an oral interview conducted by defendants Captain David Walters, Lieutenant Frederick Leonhardt and Assistant Chief Ronald Maus. (SAT 78.) Plaintiff received a final exam score of 90, based solely upon his oral interview score of 80 plus a 10 point credit for being a veteran. (TE#14; SAT 79-80.) This score placed him in Band 2 on a six-month eligibility list. (*Ibid.*)[2] During those six months, the County filled few D.A. investigator positions and plaintiff's eligibility expired without his selection. (SAT 163.) Plaintiff has never claimed his 1989 exam score was unfair. (SAT 81, 165.)

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on Appeal", dated June 1, 1997 and containing excerpts of proceedings on November 20 & 27-30, 1995 and December 1, 1995); and "SAT" (for the two volume "Electronic Recording Monitor's [Second] Augmented Transcript on Appeal", dated August 12, 1997 and containing excerpts of proceedings on November 21 & 22, 1995 and December 4 & 5, 1995.) All transcript references are to the applicable acronym followed by the page number(s) for that set.

[2] Under the County's civil service system, the County places passing applicants on an eligibility list in separate groups or bands using the following fixed scoring ranges, Band 1 for 95-100%, Band 2 for 89-94%, Band 3 for 83-88%, Band 4 for 77-82% and Band 5 for 70-76%. (Los Angeles County Civil Service Rules, rule 11.02, subd. C.) If a veteran scores above 100% after adding his veteran's credit, a sixth band is created. (*Id.* at subd. D.) When a position becomes available, the applicable department has the discretion to select any applicant from the highest ranking band remaining on the eligibility list. (*Id.* at subd. E; FAT 511-513.) When that highest remaining band contains less than five applicants, it expands to include the next highest band or bands so that the resulting appointment band will "include at least five persons." (*Ibid.*) For further explanation of this process, see Section III.A, *infra.* The Los Angeles County Civil Services Rules ("County Civil Service Rules") are at TE#200 and CT 44-77.

B. Except For An Essay, The D.A. Investigators Used The Same Subjective Grading System For Plaintiff's 1989 and 1990 Interviews.

Applicants may take the D.A. investigator exam every six months without any outer limit. (FAT 419, 573.) Plaintiff re-took the D.A. investigator exam in May 1990, which, as explained below, essentially followed the same format as his 1989 exam.

In both March 1989 and May 1990, applicants for D.A. investigator had to submit an application and then pass a qualifying written exam. (FAT 73-76, 248-249.) Passing the written exam entitled the applicant to an oral interview but had no bearing on the final exam score. (FAT 390; TE#18 at p. 1; TE#21; TE#3 at p. 2; TE#1 at p. 2.) Only the oral interview score, plus any applicable veteran's credit, determined an applicant's final score and eligibility band. (*Ibid.*)

Unlike 1989, applicants appearing for the May 1990 interviews first had to write a short essay. (FAT 396, 769.) Although used in the interview, the essay was advisory and never received a formal score. (FAT 472.) Other than that essay, the interviewers used the same subjective scoring system for the March 1989 and May 1990 interviews, as described below.[3]

Three interviewers, chosen from a group of five, conducted the interviews. (E.g., TE#207; TE#207B.) Each used an evaluation form prepared by the D.A.'s personnel office to rate each applicant in seven general categories: (1) "Education"; (2) "Experience"; (3) "Knowledge of Position Duties and Responsibilities"; (4) "Comprehension and Communication Skills"; (5) "Demonstrated Ability to Obtain Information

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[3] As discussed in Section II.C *infra*, the D.A.'s Office also apparently changed the objective standards for Education by re-defining a "Bachelor's Degree from an accredited college with specialization in administration of justice, criminology, or police science and administration" from "acceptable" in 1989 to "good" in 1990. (See TE#13 at p. 1; TE#12 at p. 1.)

From Others Including the Whereabouts of Witnesses or Suspects"; (6) "Demonstrated Ability to Prepare and Present Information for Court Testimony"; and (7) "Demonstrated Ability to Use Sound Judgment While Conducting Investigations and Serving Subpoenas and Warrants." (Compare TE#12 and TE#13; see TE#18.) They mostly used scripted questions from a Selection Plan for each exam, as well as "clarification or follow-up questions" depending on the applicant's responses. (TE#18; FAT 85-87, 115, 184.) They rated the "Education" and "Experience" categories as either "acceptable," "good" or "outstanding." (FAT 186.) For the other five categories, they used these same three ratings plus a lower rating of "limited." (FAT 194-195.)

After an interview ended, the interviewers discussed the applicant's responses in detail, along with tentative ratings for each category. (FAT 60, 185-186, 193.) All three interviewers had to agree on an applicant's rating for "Education" and "Experience," which were based upon objective standards compared to the other five categories. (See TE#217; TE#12 at p. 5; TE#13 at p. 5; FAT 145-146.) Occasionally the interviewers marked these two categories before the interview, but usually they left the forms entirely blank until the interview ended. (FAT 69-70, 113.) For the other five categories, the interviewers had to "generally agree" and their ratings had to "touch." (TE#217; FAT 61.) "Touch[ing]" meant, for example, that an applicant could not receive an "acceptable" and an "outstanding" on the same category, but could receive an "acceptable" and a "good." (FAT 61, 192.) After discussing the applicant's responses and tentative ratings, the interviewers completed the ratings and comment sections on the evaluation forms. (FAT 64.)

Based upon their overall ratings, each interviewer assigned a numerical score for the interview, using the following ranges: 90-100 for "all or a majority of outstanding ratings"; 80-89 for "mostly good and outstanding ratings"; 70-79 for "mostly acceptable and good ratings";

and 55-65 for "mostly limited and acceptable ratings." (TE#12 at p. 5; TE#13 at p. 5; FAT 152.) An applicant scoring less than 70 failed and was not placed on the eligibility list. (FAT 501.) If an applicant's rating in one or two categories was "significantly higher or lower" than the ratings in the other categories, the interviewers could mark the applicant "up or down one or more ranges to reflect the significance of his/her particular strengths or weakness." (TE#12 at p. 5; TE#13 at p. 5; FAT 153.) Their final numerical scores could "not [be] more than 5 points apart" but did not have to be identical. (TE#217; FAT 192-194.) They based their scoring within the particular range upon the applicant's overall strengths and weaknesses, which they usually discussed in an "Overall Comments" section. (See TE#12 at p. 5; TE#13 at p. 5.)

The fact an applicant may have taken the D.A. investigator exam previously was irrelevant to the ratings or the final scoring. (FAT 205, 692-693.) The interviewers were not told whether an applicant had tested before. (*Ibid.*) Even if the interviewers remembered an applicant from a prior interview, they had no prior scores before them. (*Ibid.*)

After the three interviewers completed the interview evaluation forms, the D.A.'s personnel office averaged the three numerical scores to calculate a final oral interview score and verified any claim of veteran status, if applicable. (FAT 228-229.) It then placed applicants in a Band on a six-month eligibility list based on the oral interview score and any veteran's credit. (*Ibid*; TE#20; TE#21.)

Applicants selected from the eligibility list still had to pass a background check and physical and psychological examinations to be appointable. (FAT 198.) If they passed and were appointed, they only became probationary employees. (FAT 198-199.)

C. <u>In May 1990, Plaintiff Scored Only Three Points Lower On The Same Exam But Concluded His Score Was Unfair.</u>

In May 1990, plaintiff passed the qualifying written exam and appeared for an oral interview. (SAT 85.) Before the interview, the

D.A.'s office, as it does for all applicants, gave him the opportunity to object to the assigned interviewers, who turned out to be the same three individuals who interviewed him previously. (SAT 167-168; FAT 200-201; TE#205.) Apparently satisfied with his prior interview, he consented. (*Ibid.*)

Plaintiff arrived at 2:30 p.m. for his scheduled interview, and was given 30 minutes to prepare the essay. (SAT 85-86; TE#210.) After completing it, which plaintiff claims took him 15 minutes, he waited in the hallway. (SAT 86.) Unfortunately, due to an emergency involving one of the interviewers, plaintiff's interview did not commence until 4:16 p.m.. (See TE#12 at p. 1; TE#16 at p. 3.) Plaintiff claimed no one told him during the delay what was happening. (SAT 87.) He also testified that the defendants then rushed his interview and kept checking their watches because it was late in the day. (SAT 87-89, 211.) However, the interview lasted 37 minutes, only 10 minutes less than plaintiff's 1989 interview. (SAT 157; compare TE#12 at p. 1 with TE#13 at p. 1.) The defendants also explained that although a one hour maximum is generally allocated for an interview, no set length exists and an applicant's responses dictate the interview's length. (FAT 49, 183-184, 196, 571.)

Plaintiff received a final oral interview score of 77, which became a final exam score of 87, after the D.A.'s personnel office added the veteran's credit. (TE#15; TE#12 at p. 5.) This score placed him in Band 3 on the six-month eligibility list. (TE#15.) Upon learning his score, plaintiff reviewed the evaluation forms for his interview and discovered erasure marks indicating the interviewers had changed his education rating from "good" to "acceptable." (SAT 24-26.) Relying solely on his own subjective belief, he assumed the apparent change was unfair, even though he had also received an "acceptable" on education in 1989 based on the same credentials. (See TE#13 at p. 1.)

D. Plaintiff Appealed To The County's Chief Administrative Office, Which Upheld His Score.

Under the County's Civil Service Rules, the County's Chief Administrative Office, which acts as the County's director of personnel, rules on any protests concerning exam scores by any County department, including the D.A.'s office. (SAT 141; FAT 252; County Civil Service Rule 7.20.) An applicant must protest in writing and "give specific facts and reasons to support the protest." (*Ibid.*)

Plaintiff filed a protest letter with the Chief Administrative Office, claiming generally that his ratings were "not consistent with [his] qualifications" and resulted in an unfair score. (TE#222.) Other than asserting he deserved a "good," not "acceptable," rating on education, he only vaguely claimed "too great a contrast. . . in several areas" between the comments and ratings on the evaluation forms. (*Ibid.*)

Both the Chief Administrative Office and the D.A.'s office investigated plaintiff's protest and determined his score was correct. (TE#206; TE#16; SAT 29-30; FAT 255-262.) The Chief Administrative Office explained to plaintiff that his associate of arts degree in police science and administration and bachelor's degree in public affairs only entitled him to an education score of "acceptable" — "good" applies only to a bachelor's degree with a specialization in either administration of justice, criminology or police science and administration. (TE#206.) It further stated that its "review of the interview rating sheets revealed no inconsistencies between the narrative and the ratings, and both are consistent with the numerical scores assigned by your interviewers." (*Id.* at p. 1.) Since plaintiff had "fail[ed] to identify any error in the determination of [his] score," the Chief Administrative Office denied his appeal. (*Id.* at p. 2.)

E. The Civil Service Commission Denied Plaintiff's Request For A Hearing On His Unfair Scoring Practices Claim, But Ordered A Reinterview.

The Chief Administrative Office notified plaintiff that he could appeal its ruling to the County Civil Service Commission, which he did. (TE#206 at p. 2; SAT 32-33.) The County's Civil Service Rules allow a Commission appeal on a scoring grievance, but expressly give the Commission discretion to deny a merits hearing. (County Civil Service Rules 4.03B & 7.20.)

Plaintiff's hearing request went well beyond his protest to the Chief Administrative Office. (TE#213; SAT 137, 142.) Claiming the Chief Administrative Office "misinterpreted the educational qualifications guidelines," he alleged that after the interviewers had calculated his score, they realized he would receive a ten point veteran's credit, so they reduced his score by ten points by changing his education rating. (*Id.* at pp. 2-3.) He further claimed entitlement to a higher rating in the "communication skills" category because the interviewers did not "consider [his] full breadth of experience." (*Id.* at p. 3.) He also alleged for the first time that his interview "was unduly delayed to his disadvantage" and that the interviewers rushed the interview, denying him the opportunity "to respond [to questions] in depth." (*Id.* at pp. 3-4.)

The Chief Administrative Office then explained to the Commission in writing that: (1) the education rating was non-discretionary and exam standards only allowed a score of "Acceptable" for plaintiff; the interviewers changed his education score after they realized they rated him incorrectly; (TE#16 at p. 2) (2) plaintiff "apparently misunderstands the interview process, as Interviewers based their ratings in 'Comprehension and Communication Skills,' not on skills relayed to them by the candidate, or on specific job assignments, but rather on the skills the candidate was able to demonstrate during the interview"; (TE#16 at pp. 2-3) and (3) although an emergency involving an

interviewer "admittedly delayed [the interview] well beyond the time it would normally have started," there is no evidence the interviewers precluded more detailed responses. (TE#16 at p. 3.)

At a September 5, 1990 meeting, the Commission determined plaintiff's hearing request. Plaintiff's counsel and a county representative gave oral argument. (See transcript, TE#38; SAT 32-33.) The Commission decided a reinterview was the most appropriate remedy under the circumstances, rather than a full hearing on plaintiff's unfair scoring practices claim. (See transcript, TE#38 at pp. 12, 14-15; TE#219, Civil Service Commission Order dated 9/5/90.)

F. Plaintiff Appeared For A Reinterview, But Refused To Proceed Once Told To Prepare An Essay.

The D.A.'s personnel office scheduled plaintiff's reinterview for the next round of D.A. investigator interviews, in mid-October 1990. (TE#207B; TE#214; FAT 767-769.) It selected three interviewers other than the defendants to conduct the reinterview. (FAT 767-768; TE#207B.)

When plaintiff appeared for the reinterview, the administrative lieutenant on duty (not one of the defendants) instructed him to prepare an essay. (SAT 40-42; FAT 769-771.)[4] Plaintiff refused since he had prepared one at his first interview and feared the interviewers might use a second essay to lower his score. (*Ibid.*) After checking with superiors, the lieutenant told plaintiff his interview could not proceed without the sample. (*Ibid.*)[5]

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[4] Four different essay topics were used for the writing samples (see TE#18 at p. 6), and thus the essay topics plaintiff received at his original interview and reinterview most likely differed.

[5] Plaintiff testified that the administrative lieutenant was "rude and abrupt" and said he "flunked." (SAT 41-42.) The lieutenant testified that he recalls their conversation as polite and business-like and that he merely told plaintiff he could not proceed without the essay so the

G. The D.A.'s Office Told Plaintiff He Could Reinterview Without A New Essay, But He Instead Unsuccessfully Re-Asked The Commission To Hear His Unfair Scoring Practices Claim.

On November 1, 1990, the D.A.'s personnel office told plaintiff and his attorney that it had clarified the essay issue and it would let plaintiff reinterview using his first essay. (TE#215 at p. 1; TE#213b at p. 2; FAT 400-401.) After plaintiff failed to provide a proposed time, the office notified him by letter that his reinterview was set for November 20, 1990 and he could review his original essay fifteen minutes beforehand. (TE#215 at p. 1; SAT 190; FAT 410-411.)

Plaintiff never accepted the offer. Instead, on November 7, 1990, he re-petitioned the Civil Service Commission. (TE#213b; SAT 145, 192-193.) Noting that "[a]fter conferring with counsel, appellant feels that it is not in his interest to attempt another reinterview as requested by the Investigator D.A. Bureau," plaintiff again requested a Commission hearing on his unfair scoring practices claim. (TE#213b at p. 2.) The Commission denied his request. (TE#219d.)

H. Without Reinterviewing, Retaking The Exam Or Seeking A Writ Of Mandate, Plaintiff Sued For Damages.

After the Commission denied his second hearing request, plaintiff never pursued any reinterview, took any subsequent D.A. investigator exams or sought any writ of administrative or traditional mandamus. (SAT 195-200; FAT 25, 424.) Instead, he filed a government claim for damages with the County (TE#220; CT 586; SAT 149-151) and a year later filed a "Complaint for Money Damages." (CT 1.) Defendants demurred on the grounds that plaintiff had not and could not state any statutory basis for damages, his exclusive civil service remedies did not

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interview was over. (FAT 770-772, 791-793.) It is unclear whether the lieutenant even knew this was a reinterview. (FAT 768-769, 773.)

include a civil damages suit, and his failure to seek a writ of mandamus precluded his lawsuit. (CT 13.) This commenced a flurry of rulings (CT 98, 167, 240, 294, 363), amended complaints (CT 99, 170, 241, 297) and new demurrers (CT 136, 195, 264, 321). The trial court eventually upheld plaintiff's Fourth Amended Complaint. (See CT 319, 363.) Defendants then filed a petition for writ of prohibition and/or mandate, which the Second Appellate District summarily denied. The trial court later denied defendants' motion for judgment on the pleadings. (CT 383, 478.)

I. Plaintiff's Theory At Trial Was That Defendants Breached A Mandatory Duty To Give A "Fair And Impartial" Exam.

Plaintiff presented a simple, but legally flawed, damage theory to the jury. Plaintiff's counsel told the jury that defendants had a mandatory duty under County Civil Service Rules to give a "fair and impartial" exam and therefore "[i]f you find one instance of unfairness in this process and that instance caused [plaintiff] to not receive this job and suffer damages, then plaintiff will have met his burden." (PT 265, see also, e.g., PT 158-162, 192, 204 [the issue is whether "it [is] more likely than not that [plaintiff] did not receive a fair and impartial test"].)

Under plaintiff's theory, the defendants' motives and intentions were irrelevant: "You won't be asked to determine why this type of impartiality and unfairness could occur. . . . [I]n this lawsuit you'll be asked whether it occurred, not why." (PT 166-167.)[6]

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[6] In fact, plaintiff's counsel expressly admonished the jury not to consider the defendants' motives or intentions: "This case is about whether ultimately this test was fair and impartial. Not why it wasn't. . . . [Y]ou are not charged with trying to determine that. And I hope, if that becomes a subject for deliberation in the jury box, that someone, one of you, will say 'wait a minute, that's not what had to be proven here. All that had to be proved is that the system of testing that these interviewers conducted and partook in, that the County of Los Angeles conducted, was not done so in accordance with Civil Service and [Chief

Instead, plaintiff attacked the examination process itself for allowing unfair, arbitrary results. (See, e.g., PT 193 ["[t]here was no fair and impartial exam process"]; PT 162 [the interviewers "have a list of criteria, including education, experience, things of that nature and they ask some questions. And we'll get into those . . . but primarily it's a subjective rating. On all of the questions they could rate the applicant acceptable, good or outstanding. And the evidence will show that they were arbitrary at best in their determination and their qualifications of these candidates"]; PT 166 ["the evidence will show that the raters. . . were arbitrary in determining who was going to receive an outstanding grade and who would receive an acceptable grade"]; PT 260-261 ["we cannot tolerate negligence repeated in a system that's designed for it, that allows it to happen, that creates an environment where it can happen."].)

Due to the absence of a fair exam process, plaintiff argued, the D.A.'s Bureau of Investigation "hired people who were not qualified to be hired and it didn't hire at least one person who was qualified to be hired under the Civil Service Rules, that being [plaintiff]." (PT 158, see also PT 161 [the "Civil Service Rules require that each applicant for any position. . . be treated in a fair and impartial manner. . . [but the D.A.'s office] hired, for reasons of their own, people who were not qualified [and] [t]hat cost [plaintiff] his position with them"].)

Plaintiff's arguments and "evidence" to the jury of purported "unfairness" and the purported hiring of unqualified applicants consisted entirely of the following:

a. *Plaintiff's interview was delayed and then purportedly rushed.* Plaintiff's counsel argued that these factors probably made plaintiff nervous and caused him to shorten his interview responses, thereby

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Administrative Office] rules, in particular the rule requiring fairness and impartiality amongst the examinees. No more, no less.'" (PT 208-209, 214 ["[Plaintiff] is qualified for the job. . . . Now I don't know the reasons, and we are not entitled, in this action, to speculate for the reasons why they didn't want him."])

lowering his score, which is "not fair." (PT 202-203; FAT 351.)

b. *The interviewers rated plaintiff "acceptable" on education, instead of "good."* Plaintiff has an associate of arts degree in police science and administration and a bachelor's degree in public affairs from the School of Public Administration at the University of Southern California ("U.S.C."). (SAT 64, 69; TE#5.) While at U.S.C., he also took several semesters of police science and administration of justice courses at U.S.C.'s Institute of Politics and Government. (SAT 72.) Plaintiff contended this entitled him to an education rating of "good," and that defendants either misapplied their rating standards or the standards were unfair. (PT 193-201; FAT 483.) However, defendants explained that they rate each applicant's education solely upon the actual university degree. (FAT 105-106, 267, 538, 632, 636.) "Good" applies only to a "Bachelor's Degree from an accredited college with specialization in administration of justice, criminology, or police science and administration." (TE#12 at p. 1; FAT 108-109.) Where, as in plaintiff's case, the bachelor's degree is not in a police science major, the fact the applicant also took police science courses does not impact the rating. (FAT 135-137, 265, 538, 636.)

c. *Comparisons between certain subjective ratings and comments on plaintiff's interview evaluation forms for 1989 and 1990.* The sole testimony of this type consisted of comments by plaintiff and defendant Captain Walters. Plaintiff testified generally that he received different ratings between 1989 and 1990 in some categories and he "noticed a difference in the comments." (SAT 28.) The only difference he specifically asserted was an "outstanding" in 1989 versus a "good" in 1990 for "Knowledge of position, duties and responsibilities." (SAT 29.) In truth, however, all three interviewers rated him "good" in this category in both 1989 and 1990. (See TE#13, TE#12.) The only "outstanding" rating plaintiff received in 1989 was for "Demonstrated ability to use sound judgment while conducting investigations and serving subpoenas and warrants." (See TE#13 at p. 4.)

Captain Walters confirmed at trial that he rated plaintiff "good" in 1989 versus "acceptable" in 1990 for "Demonstrated ability to prepare and present information for court testimony." (FAT 146-147.) He also acknowledged that he rated plaintiff "outstanding" in 1989 versus "good" in 1990 for "Demonstrated ability to use sound judgment while conducting investigations in serving subpoenas and warrants." (FAT 148-149.)[7]

d. *Comparisons between some of the subjective ratings that plaintiff and other specific applicants received in May 1990.* This testimony consisted solely of the following:

With respect to "Demonstrated ability to prepare and present information for court testimony," plaintiff's counsel "asked" Captain Walters how he could give an applicant named "John" the same rating of "good" he gave plaintiff, when Walters' written comments stated John had "limited experience." (FAT 159; see TE#37.) He also "asked" why another particular applicant with less experience than plaintiff received the same number of goods and acceptable. (FAT 169.)

Regarding "Demonstrated ability to use sound judgment while conducting investigations and serving subpoenas and warrants," plaintiff's counsel criticized defendants Leonhardt and Maus for rating "Catherine" "outstanding", versus "good" for plaintiff, where one of the interviewer's comments indicated Catherine initially was unfamiliar with the term "subpoena duces tecum." (FAT 575-576, 624-627.)

He similarly attacked their rating "Gregory" "outstanding" on the same subpoena question, where the third interviewer (not Walters) rated

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[7] Defendants Walters, Leonhardt and Maus have participated in hundreds of oral interviews over the years. (FAT 41, 531-532, 606.) Thus, because plaintiff's interview was over five years before trial and interviews blend together, they understandably had no specific recollection of plaintiff's interview or any other 1990 interviews, and at trial could only go by what was referenced on the interview evaluation forms. (E.g., FAT 45, 63, 113, 148, 626.)

him "good" and wrote Gregory was not initially familiar with subpoena duces tecums and search warrants. (FAT 674-676.)

Lastly, plaintiff's counsel criticized Maus for rating "Gregory" "outstanding" for "Demonstrated ability to prepare and present information for court testimony," where his comments indicated Gregory had never testified in court and had less than two years experience as a police officer. (FAT 701-705.)[8]

e. *Jennifer and John.* Plaintiff's counsel introduced evaluation forms for a "Jennifer" and a "John," who received oral interview scores of, respectively, 86 and 83, despite receiving only goods and acceptable. (See TE#36; TE#37.) Defendants admitted these scores appeared to be mistakes because they exceeded the range on the evaluation forms. (E.g., FAT 215-217, 342-344, 660-661.) Regardless, it is undisputed that neither Jennifer nor John placed in Bands 1 or 2 and neither was ever selected from the eligibility list. (See FAT 393-394, 457-458; TE#19.)

f. *The D.A.'s office mathematically adjusted raw scores on the qualifying written exam, which increased the oral interview pool.* The exam bulletin specified that only candidates scoring 70 percent or higher on the qualifying written exam could participate in interviews. (TE#3 at p. 2.) The written exam consisted of 100 questions. (See TE#18 at p. 1.) Because only a few applicants initially had raw scores above 70, the D.A.'s personnel office applied a mathematical conversion formula to create a 70 percent threshold that increased the oral interview pool. (FAT 320-324, 611, 679.) In adjusting the raw scores, the formula

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[8] Defendant Captain Walters did not participate in either the "Gregory" or "Catherine" interviews. (See TE#s 41, 42.) There were three different May 1990 interview boards, each consisting of defendants Maus and Leonhardt, and a rotating Captain. (TE#207.) Different Captains were the third interviewers for Gregory, Catherine and plaintiff. (See TE#41 [rater 4 for Gregory]; TE#42 [rater 3 for Catherine]; TE#12 [rater 5 (Walters) for plaintiff].)

considered the high and low raw scores, the mean and various other computations. (FAT 323.) The D.A.'s office has used the formula in numerous exams, including ones today. (FAT 389, 500.) Every applicant who passed the adjusted 70 percent threshold participated at the oral interview stage on an equal footing; the oral interviewers never participated in the written exam process and were never told an applicant's written exam score. (FAT 84-85, 613-614.) Ultimately, five applicants became D.A. investigators who scored higher on the oral interview than plaintiff, but had initial written exam scores below 70. (FAT 320-324.) Plaintiff's counsel asserted these five applicants therefore were not qualified to be D.A. investigators and it was "patently unfair" to let them participate in oral interviews since the exam bulletin specified a 70 percent threshold. (PT 194, accord PT 161, 210.)

g. *Trial Exhibit 17.* Exhibit 17 was a letter to the D.A.'s office from the County Department of Auditor-Controller, summarizing an audit of fifty examinations by the D.A.'s office between January 1990 and July 1991. (TE#17 at p. 3.) Based upon that limited review, which did not facially include any D.A. investigators exams, the auditor concluded the D.A.'s human resources department's exam system was "not operating effectively." (*Id.* at p. 1; FAT 381-387.) Defendants rightfully but unsuccessfully objected to this exhibit on hearsay, foundational and Evidence Code section 352 grounds. (FAT 289-294.)

Based upon plaintiff's "unfairness" theory, the jury awarded $380,000 in damages for plaintiff's purported lost future wages as a permanent D.A. investigator. (CT 526.)

J. The Trial Court Denied Defendants' Directed Verdict Motion And Post-Trial Motions.

The trial court denied defendants' motion for directed verdict. (FAT 809-811.) After the jury verdict, defendants filed various post-trial motions asserting, *inter alia*, that plaintiff lacked a statutory basis for damages, he never showed breach of a mandatory duty under Government Code Section 815.6, his exclusive civil service remedies did not include damages, his failure to seek administrative or traditional mandamus barred his lawsuit, plaintiff never proved causation, and his ultimate claims at trial diverged from his government claim. (CT 531, 543; PT 274-285.) The trial court denied the motions, but noted "the arguments pro and con are very persuasive. . . [and] th[is] case is ripe for appeal." (PT 285.)

STATEMENT OF APPEALABILITY

The court entered judgment on the jury verdict on December 5, 1995. (CT 527.) Defendants filed a timely notice of appeal on January 19, 1996. (CT 588.)

LEGAL DISCUSSION

I.

AFTER THE CIVIL SERVICE COMMISSION ALLOWED A REINTERVIEW BUT DENIED HIS HEARING REQUEST, PLAINTIFF'S SOLE JUDICIAL RECOURSE WAS MANDAMUS TO COMPEL FURTHER COMMISSION ACTION, NOT A JURY TRIAL.

The County's Civil Service Rules do not provide a full evidentiary hearing, let alone a civil trial, to any exam-taker with a scoring grievance. To the contrary, they mandate that the "appeal rights as set forth in these Rules" govern any scoring issues and they vest the County's director of personnel (the Chief Administrative Office) and Civil Service Commission with broad discretion to resolve scoring

grievances and determine remedies. (County Civil Service Rules 1.02, 3.01 & 4.) Their exercise of that discretion is subject to judicial review by mandamus, not a civil action. Plaintiff's failure to proceed in mandamus is grounds for reversal.

A. Plaintiff's Exclusive Civil Service Remedies Only Allow Mandamus Review, Not A Civil Suit.

Plaintiff had no right to a civil action. Generally, "[t]he proper method of obtaining judicial review of most public agency decisions is by instituting a proceeding for a writ of mandate." (*Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843, 848.) Moreover, "[t]he terms and conditions of civil service employment are fixed by statute and not by contract." (*Boren v. State Personnel Board* (1951) 37 Cal.2d 634, 641.)

Consequently, mandamus is the exclusive form of judicial review, where, as here, a civil service participant only claims a violation of civil service rules, as opposed to other independent causes of action, e.g., civil rights violations under federal Title VII or California's Fair Employment and Housing Act ("FEHA"). (*Id.* at p. 637 [only mandamus, not civil action, appropriate for State Personnel Board's dismissal of civil service employee]; *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1287-1288 [plaintiff could pursue civil claims under FEHA but not for breach of good faith and fair dealing duty because civil service system was exclusive remedy for that claim]; *Valenzuela v. State of California* (1987) 194 Cal.App.3d 916, 922 & fn. 7 [no civil action for State breaching civil service duty to act "fairly and in good faith" because plaintiff's "exclusive remedy as a State civil service employee" was the civil service system's administrative procedures plus mandamus]; *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1432-1433 [permanent civil service employee's wrongful discharge civil damage suit dismissed because employee limited to civil service commission's remedy].)

Since a permanent civil service employee claiming his employer breached its civil service duty to act "fairly and in good faith" cannot file a civil suit for damages, it is wholly illogical for plaintiff to contend he can do so. (See, e.g., *Valenzuela, supra,* 194 Cal.App.3d at p. 922.) In other words, if violating the civil service duty to act fairly cannot support civil suits for wrongful discharge, how can it possibly support a civil suit for wrongful failure to hire?

It is also telling that although civil service regimes throughout California and the United States require fair and impartial exams, our research has not disclosed a single case — in any jurisdiction — allowing a civil damages suit based solely on allegations that an exam violated civil service rules. Plaintiff is not the first person to seek judicial recourse for a purportedly unfair or arbitrary civil service exam score. But he appears to be the first to have a civil damage suit based merely on violations of civil service rules (as opposed to civil rights violations). California's appellate decisions concerning claims of unfair or arbitrary civil service exams, including those involving the County, all involve mandamus. (See, e.g., *Almassy v. L.A. County Civil Service Com.* (1949) 34 Cal.2d 387; *Fuchs v. Los Angeles County Civil Service Com.* (1973) 34 Cal.App.3d 709; *Wilson v. L.A. County Civil Service Com.* (1950) 97 Cal.App.2d 777; *Murphy v. Walsh* (1958) 158 Cal.App.2d 675.) No authority lets plaintiff circumvent mandamus review.

Like the plaintiff in *Bunnett v. Regents of University of California, supra,* 35 Cal.App.4th 843, plaintiff has "ma[de] no attempt to justify his invocation of civil remedies other than a lament that he was not afforded an evidentiary hearing." (*Id.* at p. 849.) But as the court recognized in *Bunnett*, "the absence of an evidentiary hearing does not make mandate inapplicable; it merely affects the form of mandate that must be involved." (*Ibid.*) Since plaintiff's "causes of action are no more than challenges to the administrative decision of a [governmental] agency," and the County's Civil Service Rules do not mandate an

evidentiary hearing, "plaintiff's remedy . . . was an action for ordinary mandate, not a civil action." (*Id.* at pp. 848-849.)

B. Disgruntled Civil Service Applicants Have No Due Process Right To A Full Evidentiary Hearing, Let Alone A Trial.

Since no statute authorizes one, plaintiff could only establish a right to a trial, or other form of evidentiary hearing, on his unfair scoring practices claim by showing due process required one. He did assert below a "fundamental due process right" to a full evidentiary hearing. (E.g., SAT 201.) But he has never cited any pertinent supporting legal authority. The reason for that is plain — none exists.

It is well-settled that civil service applicants have no vested entitlement to the job (they only have expectations) and therefore they have no due process right to hearings on grievances regarding exams or eligibility lists. (See, e.g., *Eistrat v. Board of Civil Service Commrs.* (1961) 190 Cal.App.2d 29, 32-33; ["there is no constitutional right to public employment"; therefore, "[w]hether a hearing might be considered advantageous or even necessary to a proper administration of civil service examinations is not relevant" where no statute requires one]; *Anderson v. City of Philadelphia* (3d Cir. 1988) 845 F.2d 1216, 1220-1221 [even where plaintiffs already "occupied high positions on the civil service eligibility lists for the type of employment they sought . . . [their] interest in the civil service positions they sought did not rise to the level of a property interest protected by the Constitution"]; *White v. Office of Personnel Management* (D.C. Cir. 1986) 787 F.2d 660, 663-665 ["government's relationship with an applicant for a particular job does not implicate the due process clause's protection"]; *Gillet v. King* (D.D.C. 1996) 931 F.Supp. 9, 13 [plaintiff alleging he should have received higher rating on eligibility roster had no interest protected by due process]; *Doe v. U.S. Dept. of Justice* (D.D.C. 1992) 790 F.Supp. 17, 22 [no hearing required because applicant had "no right or entitlement" to employment]; see also *Dawn v. State Personnel Board*

(1979) 91 Cal.App.3d 588, 592 ["Being on an eligible list affords no *right* to an appointment," emphasis in original]; *Graham v. Bryant* (1954) 123 Cal.App.2d 66, 70 ["The fact that [plaintiff] was placed on the eligible list did not give him any vested right in such office or any civil service status"].)[9]

Fuchs v. Los Angeles County Civil Service Com., *supra*, 34 Cal.App.3d 709, also refutes plaintiff's theory. In *Fuchs*, a deputy district attorney claimed entitlement to a hearing before the County's Civil Service Commission to "present his objections to the design, grading and conduct of [his] promotional examination," including his claim that "his oral interview was not conducted fairly." (*Id.* at p. 712.) As here, the Commission denied his hearing request and determined his appeal based upon written materials from the petitioner and the director of personnel. (*Ibid.*) The appellate court held that neither the civil service rules nor due process required a full evidentiary hearing. (*Id.* at p. 715.)

> "[Plaintiff's personal interest] must be weighed against the practical effects of a ruling which would require the Commission, and the employing unit as well, to prepare for and hold hearings in all cases where an employee in county service is dissatisfied with a promotional examination score. . . . We have concluded that the burden which would be placed on the agencies involved would result in a situation potentially more harmful than any harm from the deprivation of claimed rights to a hearing to the petitioner

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[9] Even probationary or non-tenured *employees* lack a due process right to hearings on their *discharge*. (See, e.g., *Dorr v. County of Butte* (9th Cir. 1986) 795 F.2d 875, 876; *Hinchliffe v. City of San Diego* (1985) 165 Cal.App.3d 722, 727; *McGill v. Regents of University of California* (1996) 44 Cal.App.4th 1776, 1785.) Only *permanent* civil service employees have a due process-protected interest in continued employment. (*Civil Service Com. v. Velez* (1993) 14 Cal.App.4th 115, 122.) As a result, the County Civil Service Rules only guarantee a Commission hearing to discharged, demoted or suspended permanent employees. (Rule 4.03.)

> and other employees similarly situated. [¶] The presently established procedures are constitutionally adequate with respect to employee promotions." (*Id.* at pp. 715-716.)

The same is equally true here. Giving exam-takers a civil trial on scoring grievances, despite the discretionary rulings of the applicable administrative appeal officers, would unduly burden all civil service regimes, as well as courts.

C. Plaintiff First Needed To Show Under Ordinary Mandamus Review That The Commission Abused Its Discretion In Only Allowing A Reinterview.

"Ordinary mandate is used to review adjudicatory actions or decisions when the agency was not required to hold an evidentiary hearing." (*Bunnett*, *supra*, 35 Cal.App.4th at p. 848.) Unquestionably, it was prejudicial error to allow plaintiff a full civil jury trial on his unfair scoring practices claim, instead of restricting him to ordinary mandamus. Ordinary mandamus review would not have even remotely resembled plaintiff's trial.

1. Ordinary Mandamus Review Fundamentally Differs From A Civil Jury Trial.

Both forms of mandamus fundamentally differ from a civil jury trial. "In general, when review is sought by means of ordinary mandate the inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support; when review is sought by means of administrative mandate the inquiry is directed to whether substantial evidence supports the decision." (*McGill v. Regents of University of California* (1996) 44 Cal.App.4th 1776, 1786.)

Under both forms of mandamus, except where the law authorizes the trial court to exercise independent judgment, "the trial court is not permitted to accept evidence in addition to the administrative record in a mandate proceeding concerning an adjudicatory decision." (*Bunnett,*

supra, 35 Cal.App.4th at p. 853 and fn. 8.)

> "*Whether or not a notice and hearing is required,* . . . [a plaintiff] *[i]s not entitled to a trial de novo* on the question [decided by] . . . a local administrative agency or officers [since] [t]he authority to decide the question was vested in those officers. *The trial court is limited to an examination of the matters considered and examined by the officers in arriving at their decision*; to an ascertainment whether such matters were sufficient to justify [the decision]." (*Fascination, Inc. v. Hoover* (1952) 39 Cal.2d 260, 264, emphasis added.)

The trial court's "function is not to decide facts *but rather to decide a question of law* using the applicable deferential rule of review." (*Bunnett, supra,* 35 Cal.App.4th at p. 853, emphasis added.) And the court must assume "any issues of fact . . . were implicitly resolved against plaintiff at the administrative level." (*Ibid.*)[10]

Although both forms of mandamus defer to administrative discretion, ordinary mandamus is particularly obeisant:

> "'In ordinary mandamus proceedings courts exercise very limited review 'out of deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority.' The court may not reweigh the evidence or substitute its judgment for that of the agency." (*McGill, supra,* 44 Cal.App.4th at p. 1786.)[11]

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[10] This principle comports with the County Civil Service Rules' mandate that the Commission *must* deny a hearing request if "in [its] opinion. . ., the specific facts and reasons stated [in the petition], if true, would not entitle the petitioner to any relief. . . [or] the petitioner is not likely to prevail on the merits of the petition." (County Civil Service Rule 4.03B.)

[11] Ordinary mandamus review is so deferential to administrative decisions that even the mistaken application of administrative mandamus review is grounds for reversal. (See, e.g., *McGill, supra,* 44 Cal.App.4th at pp. 1786-1788 [trial court granted writ of administrative

Plaintiffs often claim that courts must take "evidence on the issue decided by the officials" to determine whether the administrative actions were "arbitrary or capricious." (*Fascination, Inc.*, *supra*, 39 Cal.2d at p. 266.) But "[t]hat view is wholly out of harmony with [administrative review] principles. . . . If it were accepted there could be a trial de novo in every case." (*Ibid.*) "The trial court is to presume the decisions of the agency or public official which are subject to traditional mandamus review are correct." (*California Teachers Assn. v. Ingwerson* (1996) 46 Cal.App.4th 860, 865.)

That is a far cry from the jury trial plaintiff had here.

2. Plaintiff Would Have Had To, And Been Unable To, Prove That The Commission Abused Its Discretion In Only Allowing A Reinterview.

More importantly, plaintiff could have received a writ of mandate only by showing the Commission abused its discretion in only allowing a reinterview. "The decisions of a civil service commission have the force and effect of law provided that they are within the authority conferred by the legislative body." (*Cerini v. City of Cloverdale* (1987) 191 Cal.App.3d 1471, 1479.) Its actions are "beyond judicial control unless abuse of discretion is clearly shown." (*Allen v. McKinley* (1941) 18 Cal.2d 697, 705, citations omitted.) Although a court may compel the Commission to act by mandamus "it may not substitute its discretion for the discretion properly vested in the [Commission because] . . . '[c]ourts should let administrative boards and officers work out their problems with as little judicial interference as possible.'" (*Lindell Co. v. Board of Permit Appeals* (1943) 23 Cal.2d 303, 315, citation omitted.)

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mandamus to vacate denial of tenure, but court of appeal reversed after reviewing tenure decision under ordinary mandamus]; *Weary v. Civil Service Com.* (1983) 140 Cal.App.3d 189, 195 [judgment reversed where trial court applied administrative mandamus instead of ordinary mandamus to review employee's "Improvement Needed" evaluation].)

Plaintiff could never show that the Commission's decision on his appeal was "'so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law.'" (*California Teachers Assn. v. Ingwerson, supra,* 46 Cal.App.4th at p. 867, citations omitted]). Even if reasonable minds may differ on the propriety of only allowing a reinterview, that still "supports a finding the Commission acted within its discretion." (*Paulino v. Civil Service Com.* (1985) 175 Cal.App.3d 962, 970-971.)[12]

That is particularly true here since the issue involves the potential hiring of civil service employees. Neither a court nor jury has the right to act as a superexamining board to determine which civil service applicants should receive particular scores or be hired, but that is exactly what the jury was allowed to do here. (See, e.g., *Murphy v. Walsh, supra,* 158 Cal.App.2d at p. 682 ["It is not for a court to second guess the conductors or examiners on the accuracy of the answers"].)

Courts have recognized this in analogous contexts as well. For example, in *McGill, supra,* 44 Cal.App.4th 1776, the court of appeal recognized that since tenure decisions involve a subjective process that "is far beyond the expertise of this, or any, court to evaluate," courts cannot "interfere" with a university's tenure decision, even if it "show[ed] poor judgment. . . . [unless] the record suggests its decision was made for illegal or improper reasons." (*Id.* at pp. 1788-1789.)

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[12] Not only was the reinterview order well within the Commission's discretion, but plaintiff's refusal to accept any reinterview constituted a failure to avoid damages by reasonable effort. (Rest.2d Torts, § 918.) This principle precludes tort victims from recovering "for harm that would not have ensued if [they] had not unreasonably refused the offer of the tortfeasor, made in good faith, to prevent the harm." (*Id.*, Com. i.) Besides alleviating plaintiff's complaint that his first interview was unfairly delayed and then rushed, a reinterview might have placed plaintiff in Band 2, which is where he believes he belonged. *Whether characterized as a failure to mitigate damages or a failure to exhaust a remedy, plaintiff's refusal to reinterview further bars his lawsuit.*

Similarly, courts construing administrative denials of trade or professional license applications only analyze whether the agency abused its discretion in allowing a particular remedy or denying a hearing — if the agency did, the matter is remanded for further consideration since neither courts nor juries have the expertise to assess licensing qualifications and thus they cannot order a license's issuance by assessing an applicant's qualifications de novo. (E.g., *Jaffee v. Psychology Examining Com.* (1979) 92 Cal.App.3d 160, 168-169; *McDonough v. Garrison* (1945) 68 Cal.App.2d 318, 332-334, disapproved on another point in *Kowis v. Howard* (1992) 3 Cal.4th 888, 896-897.) *Jaffee* is particularly relevant here because the court held the administrative appeal board did not abuse its discretion in restricting an applicant claiming an unfair licensing exam to the remedy of taking a future exam. (92 Cal.App.3d at pp. 166-169.)

Plaintiff, like the license applicant in *Jaffee*, improperly sought to "have the discretion of the [Civil Service Commission, the Chief Administrative office and the examiners] displaced with that of the [jury]." (*Id.* at p. 169.) Neither logic nor the law allows that.

D. Even If The Commission Abused Its Discretion Or Due Process Required A Full Evidentiary Hearing, Plaintiff's Sole Judicial Recourse Was To Compel The Commission Or Chief Administrative Office To Hold A Hearing Or Take Other Action.

Even if plaintiff had shown in mandamus that the Commission abused its discretion in only allowing a reinterview, the trial court could not have held a trial on plaintiff's unfair scoring practices claim. "[I]t is settled that where determinative powers are vested in a local administrative agency and the court finds its decision lacks evidentiary basis, a hearing was denied or it was otherwise erroneous, it is proper procedure to remand the matter to the agency for further and proper proceedings *rather than for the court to decide the matter on the merits.*"

(*Fascination, Inc., supra*, 39 Cal.2d at p. 268, emphasis added; see also *LaPrade v. Department of Water & Power* (1945) 27 Cal.2d 47, 53 ["If a hearing has been denied or the evidence is insufficient to sustain the action of the [administrative] board . . . then the matter should be remanded to the board for further consideration *rather than having a trial de novo in the superior court and requiring that court to exercise independent judgment on the facts which should be determined by the board*," emphasis added]; *Jaffee, supra*, 92 Cal.App.3d at p. 169; *McDonough, supra*, 68 Cal.App.2d at pp. 333-334.) "The policy underlying such a rule is that the determination of the issues should first be made by the administrative agency." (*Steen v. City of Los Angeles* (1948) 31 Cal.2d 542, 546.)

These principles confirm that neither the trial court nor the jury had any right to hear plaintiff's unfair scoring practices claim. If plaintiff wanted a full evidentiary hearing, he needed by mandamus to compel the Commission to hold one.[13] Plaintiff argued below that he could not have done so because the Commission had discretion under the Civil Service Rules to deny his hearing request and mandate may not be used to control discretion. (E.g., CT 33, 425.) This misses the point.

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[13] See also *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 484 [requiring party to first seek mandamus review properly respects administrative process and provides "a uniform practice of judicial, rather than jury, review"]; *Briggs v. City of Rolling Hills Estates* (1995) 40 Cal.App.4th 637, 646 [damage actions barred by "failure to pursue the exclusive *judicial* remedy for reviewing administrative action"]; *City of Fresno v. Superior Court* (1987) 188 Cal.App.3d 1484, 1490-1491 [party filing "a complaint for damages premised on the assertion that an administrative body's decision is erroneous should first be required to set aside the administrative decision. Until the body's decision is overturned, it must be presumed to have resolved correctly the issues against the party bringing the complaint"]; *Morton v. Hollywood Park, Inc.* (1977) 73 Cal.App.3d 248, 257 [failure to use mandamus to compel administrative hearing bars lawsuit].

If due process required a full evidentiary hearing, then plaintiff's proceeding is one "in which by law a hearing is required to be given" (Code Civ. Proc., § 1094.5, subd. (a)) and he could compel a hearing through mandamus. "[W]hen a hearing is not explicitly required by law, *but is compelled by due process considerations* (i.e., where the statute, rule, or ordinance concerned does not provide for a hearing when property interests are involved), administrative mandamus may be the appropriate remedy to challenge the agency's refusal to provide one on grounds such refusal is a denial of due process." (*Kirkpatrick v. City of Oceanside* (1991) 232 Cal.App.3d 267, 279, emphasis added; accord *Civil Service Com. v. Velez, supra,* 14 Cal.App.4th at p. 118 ["when a hearing is not explicitly required by law but compelled by due process considerations, administrative mandate will lie"].)

In short, whether characterized as a failure to pursue his exclusive form of judicial review or to exhaust a judicial remedy, plaintiff's failure to proceed in mandamus barred his damage action.

II.

DEFENDANTS ARE IMMUNE FROM DAMAGES.

"Sovereign immunity is the rule in California. Governmental liability is limited to exceptions specifically set forth by statute." (*Colome v. State Athletic Com.* (1996) 47 Cal.App.4th 1444, 1454-1455.) Plaintiff's damage theory rests entirely on Government Code section 815.6, which states: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity established that it exercised reasonable diligence to discharge the duty." (See, e.g., CT 223, 228-229, 420.)[14]

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[14] Unless otherwise indicated, all remaining "section" references are to the California Government Code.

A plaintiff relying on section 815.6 must satisfy a three part test: (1) the enactment must impose a mandatory, not discretionary, duty; (2) the legislature must have intended for it to protect against the type of injury plaintiff suffered and (3) the breach of the mandatory duty must have proximately caused the plaintiff's injury. (*MacDonald v. State of California* (1991) 230 Cal.App.3d 319, 327; *Ibarra v. California Coastal Com.* (1986) 182 Cal.App.3d 687, 692-693.) Whether such a mandatory duty exists is purely a question of law. (*Nunn v. State of California* (1984) 35 Cal.3d 616, 624; *Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1239.)

As shown below, plaintiff cannot satisfy this test. In truth, his lawsuit merely claims abuses of discretion, which the Government Code immunizes. Moreover, the only purported "enactments" he has identified do not create an actionable duty under section 815.6.

A. Plaintiff, At Most, Contested Abuses Of Discretion Immunized By The Government Code.

Even if defendants acted unfairly or improperly, they are immune from damages under sections 820.2 and 815.2. Section 820.2 provides that "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of discretion vested in him, *whether or not such discretion be abused.*" (Gov. Code, § 820.2, emphasis added.) In turn, section 815.2 immunizes public entities "where the employee is immune from liability." (Gov. Code, § 815.2, subd. (b).)

Although plaintiff artfully couched his lawsuit as a claim for breach of mandatory duties, in actuality he sought to hold defendants liable for purported abuses of discretion. Plaintiff's counsel told the jury "Now I grant you that these oral interviews are subjective, that they all have to be by nature of the beast. But that doesn't mean that gives you carte blanche to go anywhere across the map." (PT 206.) Elsewhere,

he similarly argued that although the interview ratings are inherently subjective, the scoring of plaintiff's exam was "arbitrary" or "inconsistent" compared to other applicants' scores. (E.g., PT 162, 166; FAT 346, 678.) Boiled to its essence, this is simply an abuse of discretion claim. (E.g., *Bright Development v. City of Tracy* (1993) 20 Cal.App.4th 783, 795 ["In a traditional mandamus proceeding, the question of *abuse of discretion* turns not on whether the agency's findings are supported by substantial evidence . . . *but whether the agency's action was arbitrary or capricious,"* emphasis added].)

Any such hiring or qualification process requiring "comparisons, choices, judgments, and evaluations, comprises the very essence of the exercise of 'discretion' and. . . such decisions are immunized under section 820.2." (*Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 749 [county immune for negligently selecting custodian for minor]; accord *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 983 [school board members immune for decision to "hire or fire a person as the district's superintendent"]; *Summers v. City of Cathedral City* (1990) 225 Cal.App.3d 1047, 1064 [city immune for deciding to fire employee]; *Kemmerer v. County of Fresno, supra,* 200 Cal.App.3d at p. 1439 [administrative officers' immune for recommending, after investigation, that plaintiff be fired]; *Engel v. McCloskey* (1979) 92 Cal.App.3d 870, 883 [State Bar's character investigation of bar applicants involves "substantial exercise of judgment" and is therefore discretionary].)

Immunity is particularly apt here since "[t]he potential of harm in the judiciary exercising hindsight in the determination of qualification of applicants for employment in the executive branch is great." (*Jones v. Oxnard School Dist.* (1969) 270 Cal.App.2d 587, 593.)

Caldwell, supra, 10 Cal.4th 972, in particular, amply demonstrates section 820.2's broad protection for subjective evaluations. The California Supreme Court held school board members were immune from damages for terminating the district superintendent, *even though he claimed age and race discrimination violating FEHA.* (*Id.* at pp. 986-

987.) Noting the complaint alleged the board members "*did* purposefully employ standards they deemed relevant, but that the standards employed were wrong and impermissible," the Court held that "claims of *improper* evaluation cannot divest a discretionary policy decision of its immunity." (*Id.* at p. 984, emphasis in original.) Thus, statutes "simply impos[ing] a general legal duty or liability on persons, including public employees" cannot abrogate section 820.2's immunity unless there is a "clear indication of legislative intent that statutory *immunity* is *withheld or withdrawn.*" (*Id.* at p. 986, emphasis in original.)

Plaintiff here likewise never claimed he was not evaluated during his oral interview — rather, he argued the evaluation was improper. But as *Caldwell* and the above cases confirm, that evaluation remains immunized under section 820.2. The Supreme Court has duly noted that "[m]uch must be left to the judgment of the [civil service] examiners. The test cannot be wholly objective and to the extent that it is subjective the result may depend as much upon the fitness of the examiners as upon the fitness of the candidate. That is a risk inherent in all [examination] systems." (*Almassy*, *supra*, 34 Cal.2d at p. 401.) Letting juries nonetheless second-guess oral interview scores and award damages where they disagree undermines the very purpose of governmental immunities. It also contravenes the Supreme Court's requirement of "a clear indication of legislative intent that statutory immunity is withheld or withdrawn." (*Caldwell, supra,* 10 Cal.4th at p. 986, emphasis omitted.)

B. General Mandates of "Fair And Impartial" Civil Service Exams Are Not Actionable Under Government Code Section 815.6.

The crux of plaintiff's damage claim is that the defendants had "a mandatory duty to treat each applicant in a fair and an impartial manner" (PT 168) and thus are liable if any "unfair" act caused plaintiff not to be hired. (PT 158-162, 204, 265.) Plaintiff founded his fairness theory on three "enactments": (1) Article VII, § 1(b) of the California

Constitution, which states, "In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination"; (2) County Civil Service Rule 1.02, which states, in part, that the rules are "for the purpose of carrying out the Charter provisions . . . of assuring all employees in the classified service of fair and impartial treatment"; and (3) County Civil Service Rule 7.25 which states "[a]ll examinations shall be fair and impartial." (CT 298, 300; FAT 505.) These enactments cannot possibly create a section 815.6 mandatory duty.

1. Such Generalized Policy Goals Are Not Actionable Mandatory Duties.

For section 815.6 to apply, the enactment cannot "simply set forth a prohibition or a right, as opposed to an affirmative duty on the part of a government agency to perform some *act*. In every case, '[t]he controlling question is whether the enactment at issue was intended to impose an obligatory duty *to take specified official action* to prevent particular foreseeable injuries, thereby providing an appropriate basis for civil liability.'" (*Clausing v. San Francisco Unified School Dist., supra,* 221 Cal.App.3d at p. 1239, citations omitted, first emphasis in original, second added.)

Accordingly, an actionable mandatory duty does not exist where, as here, the enactments are merely "recitations of legislative goals and policies." (*Ibarra v. California Coastal Com., supra,* 182 Cal.App.3d at p. 694.)[15] For example, in *MacDonald v. State of California, supra,*

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[15] See also *Gray v. State of California* (1989) 207 Cal.App.3d 151, 155 [code provision did not foreclose State's "discretion to determine how to investigate potential handgun purchasers"]; *Clausing, supra,* 221 Cal.App.3d at p. 1240 ["The statutes set forth no guidelines or rules for schools to follow in implementing an affirmative duty to prevent corporal punishment"]; *Fleming v. State of California* (1995) 34 Cal.App.4th 1378, 1384 [statute requiring arrest of paroled prisoner leaving state without permission "does not specify who must arrest the parolee, or

230 Cal.App.3d 319, a child sought damages for injuries caused by a day care provider, relying on the state's statutory duty "to ensure the health and safety of children in family homes that provide day care." (*Id.* at p. 330.) The court of appeal recognized that this "general declaration of policy goals" or "general statement of legislative policy" could not create an actionable mandatory duty. (*Ibid.*) Although plaintiff also cited to more specific statutory requirements, such as site visits, the court recognized that "execution of the duties to visit day care homes and investigate complaints necessarily involves some exercise of discretion in deciding what action to take, and when, to evaluate and assess a particular situation." (*Id.* at p. 331.) Thus, because the "apparently obligatory language" did not foreclose discretion, the court held there was no actionable mandatory duty. (*Ibid.*)

The Supreme Court's decision in *Caldwell, supra,* 10 Cal.4th 972, is also instructive. In holding FEHA did not trump section 820.2's immunity for discretionary evaluations, the Court recognized that FEHA's discrimination prohibitions do not impose any mandatory duty "to take any *specific, affirmative action* in addressing matters of hiring and firing." (*Id.* at p. 988, fn. 8, emphasis in original.) The Court confirmed that its prior decisions do not "hold that a public employee acts beyond his discretion, or breaches a 'mandatory duty,' whenever he or she commits a statutory violation." (*Ibid.*) It explained that it found actionable mandatory duties in two seminal decisions because "[i]n both cases, the Legislature had made the basic policy decision about what *specific, affirmative actions certain public agencies must take* in particular circumstances, and their performance of those duties was therefore *merely ministerial.*" (*Ibid.*, emphasis added.)

A general mandate of "fair and impartial" civil service exams does not, by any stretch of the imagination, impose ministerial duties or specify what affirmative actions the County and its employees must take

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how long he must be held after his arrest"].

to ensure fairness and impartiality. To the contrary, the County's Civil Service Rules leave the County and its agencies broad discretion as to structuring exams and evaluating applicants. (See, e.g., County Civil Service Rule 1.02 [County has "exclusive right" to hire employees and "determine the methods, means and personnel by which the county's operations are to be conducted"]; Rule 3.01, subd. H [director of personnel's discretionary powers regarding structuring and reviewing exams]; Rule 3.03 [departments have broad discretion by delegation]; see FAT 252, 374-375.) Plaintiff improperly founded his entire damage claim upon a mere policy goal, which although obligatory, does not by any means foreclose discretion.

2. There Is No Evidence That The Legislators Intended To Authorize Damage Suits By Mandating "Fair And Impartial" Exams.

Plaintiff's claim also fails the second prong of the section 815.6 test. Even where statutory language mandates a specific act — as opposed to merely a goal or policy — a plaintiff still cannot recover damages unless the Legislature intended to authorize damage suits and the injury was "one of the consequences which the Legislature sought to prevent through imposition of the alleged mandatory duty." (*Keech v. Berkeley Unified School Dist.* (1984) 162 Cal.App.3d 464, 470.)[16]

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[16] Legions of cases have strictly applied this requirement to deny damage actions, even where statutes specify ministerial duties. (See, e.g., *Keech, supra,* 162 Cal.App.3d at p. 470 ["legislative intent to establish specific time limits for assessing [special education needs]" did not show intent to let parents of handicapped children recover costs of delay]; *Nunn, supra*, 35 Cal.3d at p. 626 [firearm training requirement for security guards was to protect public from incompetent guards, not "incidental" benefit of ensuring guards could defend themselves]; *Colome v. State Athletic Com., supra,* 47 Cal.App.4th at p. 1455 [neurological exam required as license condition not intended to prevent boxer's loss of prize money and future earnings]; *State of California v. Superior Court* (1992) 8 Cal.App.4th 954, 958 ["statutory guidelines for

Where, as here, "the provision is part of a statutory scheme characterized by the broad discretion of the [government] authority . . . it is not reasonable that '. . . the Legislature intended to impose a duty which would provide a basis for civil liability." (*Fleming, supra,* 34 Cal.App.4th at p. 1384, citations omitted.)

Moreover, the purpose of civil service systems is to eliminate the "spoils system," under which political or nepotistic considerations dictated employee selection and termination. (*Almassy, supra,* 34 Cal.2d at p. 404.) Thus, they are designed to protect the *public's* interest in good, efficient government, not to ensure every qualified applicant that he or she will receive a high score or a job. Plaintiff's subjective belief that he is more qualified than other applicants who became D.A. investigators does not show the operation of a spoils system.

Plaintiff has offered nothing to show that the mandate of "fair and impartial" exams was intended to allow damage suits. He has only relied on the fact that the language is mandatory — which clearly is not enough to impose liability.

3. Plaintiff's Theory Improperly Allows A Jury To Use Its Own Subjective "Fairness" Conceptions To Impose Liability For Policy Decisions.

Irrefutably, the Tort Claims Act immunizes policy decisions. (E.g., *Caldwell, supra,* 10 Cal.4th at p. 983.) Plaintiff's "fairness" theory, however, improperly allowed the jury to reject any policy decisions it considered unfair and award damages for those alternative policy choices. Plaintiff repeatedly argued to the jury that the defendants' failure to evaluate fitness to be a D.A. investigator accurately caused unfit applicants to score higher than plaintiff. For

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the denial of teaching credentials" did not permit private damage suits by molested students]; *Zolin v. Superior Court* (1993) 19 Cal.App.4th 1157, 1166 [duty to publish accurate traffic school list not intended to impose civil liability].)

example, he argued that converting the raw written exam scores allowed the selection of unfit applicants. And as confirmed by Statement of the Case, Section I.d, *supra,* (pp. 16-17), he argued the defendants' ratings were arbitrary and inconsistent based on his own erroneous belief that the interview's sole purpose was to assess knowledge and experience. (See, e.g., PT 207 [plaintiff's counsel: "you can rate [the applicants] as to their performance, I suppose, but that's not what these questions are going to. . . . It's based on your knowledge and experience"]; PT 199.) But, as the defendants repeatedly tried to explain, the oral interview is intended to evaluate much more than those two factors — ratings also subjectively assess an applicant's attitudes, personality, demeanor, communication and presentation skills, and thought processes, etc. (See, e.g., FAT 147-148, 150, 171, 205, 330, 561, 628, 675.) Plaintiff may believe that only knowledge and experience determine fitness to be a D.A. investigator, but determining what qualifications to evaluate, and how to rate them, are immunized policy decisions.[17] That includes deciding whether interviews ultimately assess fitness better than written tests, and how to balance the two.

C. No Enactment Mandates That Plaintiff Receive An Education Rating of "Good."

In claiming he deserved an education rating of "good," plaintiff referenced only two civil service rules: (1) the general mandate of "fair" exams (see, e.g., FAT 483) and (2) County Civil Service Rule 7.08. (See FAT 476; PT 201.) As shown above, the fairness requirement cannot support a civil suit for damages under section 815.6. As shown

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[17] Nor is plaintiff's view accurate — the California Supreme Court has already upheld "ascertainment of personality factors" as a valid purpose for civil service oral interviews, even though "a candidate's personality and attitudes cannot be measured through the mechanical application of fixed standards in the course of an interview." (*Almassy, supra*, 34 Cal.2d at pp. 397, 403.)

below, neither does Rule 7.08. Thus, even if plaintiff received the wrong education rating, he cannot recover damages.

Plaintiff based his Rule 7.08 argument on a strawman because he only quoted subdivision F. (FAT 476.) That subdivision describes the following test method: "Evaluation of education, training, experience or other qualifications as shown by the application or by other information submitted or by the record." (County Civil Service Rule 7.08, subd. F.) Plaintiff told the jury this language showed the defendants erred in only rating his bachelor's degree based upon his public affairs major. (PT 201-202.) On its face, however, subdivision F does not preclude using only the exact major to rate education. More importantly, subdivision F only describes a specific testing method known as a "rating from record," which is typically used in promotional exams and is not used in the D.A. investigator exam. (FAT 518-520; see, e.g, *Fuchs v. Los Angeles County Civil Service Com., supra,* 34 Cal.App.3d at p. 712.) Subdivision F is only one of eight different permissible testing methods specified in Rule 7.08 and County departments may use one or more of any of them. The oral interview used here falls under subdivision C, which allows "[i]nterviews covering general qualifications, education, training or experience."[18]

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[18] The only relevant education rating issue is whether plaintiff could recover damages for an error, and clearly he cannot. However, since plaintiff belabored this issue at trial, we will explain briefly why plaintiff's rating was proper. First, it is not unreasonable to determine a "specialization in administration of justice, criminology or police science and administration" by the actual major referenced by the degree, instead of requiring subjective evaluations of coursework at any given school. (FAT 522-523, 683-684; PT 164.) If a school does not offer an actual degree in these specialized areas, how can the raters objectively compare different schools and courses?

Second, plaintiff erroneously suggested that the interviewers rated him "acceptable" in 1989 because of his bachelor's degree, and therefore they should have rated him "good" in 1990 since the 1990 interview evaluation forms indicated an increased rating for a specialized

D. No Enactment Prohibits Mathematically Adjusting Written Exam Scores To Increase The Interview Pool.

Plaintiff's damage theory regarding adjustment of the written exam scores similarly fails because it also rested on the general mandate of "fair and impartial" exams. (PT 194.) However, because plaintiff's entire causation analysis rests on this issue (see Section III, *infra*) and he briefly referenced County Civil Service Rule 7.14 (FAT 449-450), we will further show why this issue is a red herring.

Rule 7.14 provides that "[u]nless otherwise provided in the bulletin or other notice announcing the examination, a final score of at least 70 percent, excluding veteran's credit, shall be required for passing." The D.A.'s office did not violate this Rule by mathematically adjusting the raw written exam scores. The exam bulletin expressly stated that the written exam was merely a qualifying test and the oral interview would be weighted 100 percent. (TE#3 at p. 2; FAT 451.) In accordance with Rule 7.14, applicants could not make the eligibility list unless their interview score exceeded 70 percent. (FAT 500-501.)

Plaintiff also erroneously assumes that a 70 percent score on the written exam can only be an arithmetic 70 percent. Because one can uniformly and objectively adjust raw written test scores, nothing precludes an adjusted definition. The D.A.'s office has long used this

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bachelor's degree. (PT 164, 193-194; compare TE#12 and TE#13.) Defendants explained, however, that they rated plaintiff "acceptable" in both 1989 and 1990 because of his specialized associate of arts degree ("A.A."). (E.g., FAT 223-224.) The 1989 form contained a typographical error because the definition of "acceptable" did not expressly reference a specialized A.A. (FAT 139-140, 144, 225.) However, bulletins for the pre-1990 D.A. investigator exams clearly show that a specialized A.A. always satisfied the minimum education requirement. (See, e.g., TE#1, TE#218; FAT 203-204.) Nonetheless, without any evidence, plaintiff's attorney conjectured that in 1990 the D.A.'s bureau of investigation decided to expand the applicant pool by letting individuals with specialized A.A.'s compete. (PT 193-194.) The pre-1990 exam bulletins belie this contention.

adjustment formula and other civil service regimes in California use similar ones. (FAT 389, 448, 500.) For example, the State's civil service regulations expressly provide that although applicants need "a general average score of not less than 70 percent in order to qualify in an examination. . . .*[i]n written tests, the 70 percent used to represent the minimum score need not be the arithmetic 70 percent of the total possible score but may be an adjusted score based on a consideration of the difficulty of the test, the quality of the competition, and the needs of the service.*" (2 Cal. Code of Regs., tit. 2, § 206, emphasis added.)

Plaintiff argued, nonetheless, that the public bulletin for this exam should have stated an adjustment formula might be used to calculate the final written exam scores. (FAT 451; see TE#3.) But Rule 7.14 does not require that. Even if it did, that violation would not be actionable under section 815.6 because nothing indicates the legislators intended to allow damage suits for such issues. Moreover, there is nothing wrong about converting written test scores without advance notice so long as the formula is applied equally to all applicants and for valid reasons, as was done here. (FAT 679.) Indeed, the California Legislature has codified the State's right to do so for State civil service exams. (See Gov. Code, § 18937 ["The passing mark for an examination *may be other than the true percentage or average published as a part of the announcement of the examination*, if deemed by the board or a designated appointing power *to be justified in order to provide an adequate eligible list* or to adjust for the apparent difficulty of an examination," emphasis added].)[19]

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[19] Plaintiff certainly cannot claim a due process right to his definition of 70 percent. Since public employment is held by statute, not by contract, a public employee "can have no vested contractual right in the terms of his or her employment, such terms being subject to change by the proper statutory authority." (*Hinchliffe, supra,* 165 Cal.App.3d at p. 725.) Mere job applicants therefore cannot have any vested right to examination requirements and examiners may change requirements without violating constitutional rights. (See, e.g., *White v. Office of*

III.

AS A MATTER OF LAW, IT IS SPECULATIVE FOR PLAINTIFF TO CLAIM THAT DEFENDANTS' PURPORTED WRONGDOING COST HIM A CAREER IN THE D.A. INVESTIGATOR'S OFFICE.

Plaintiff presented two erroneous causation arguments to the jury. First, he claimed that if he had received "three more points" on his oral interview (i.e., the same score he got in 1989) and the five people from bands 1 and 2 who initially scored below 70 on the written exam were removed from eligibility, "he [would have] be[en] in [band 2] and they would have [had] to hire him." (PT 262, see also PT 197; FAT 504.) Second, he claimed that even if his score stayed the same, the D.A. investigator's office "would have [had] to hire him" if those five people were deleted from the eligibility list. (PT 262.)

Plaintiff's contention they "would have had to hire him" is the sort of entitlement claim courts have universally rejected, as noted in Section I.B, *supra*. But it also fundamentally misconstrues the selection process.[20] As a matter of law, the D.A.'s office would not have had to hire him.

A. The D.A's Office Would Have Had Discretion Not To Select Plaintiff Even If He Had Placed In Band 2 And/Or All Applicants With Initial Written Exam Scores Below 70 Were Ineligible.

As a matter of law, the County did not have to hire plaintiff under

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Personnel Management, supra, 787 F.2d at pp. 664-665 [no constitutional claim where government abolished eligibility list and adopted new application procedures].)

[20] By ignoring the Bureau's broad discretion in appointing from the eligibility list, plaintiff further confirms that only the Civil Service Commission and/or the Chief Administrative Office (subject to mandamus review) should resolve these issues, not a jury lacking expertise in the selection process.

either of his causation theories. Generally, once applicants passing the oral interview are placed in the appropriate eligibility band (see footnote 2, *supra*), the Bureau must make appointments from the highest band. (County Civil Service Rule 11.01, subd. E; CT 452, 579.) Every applicant within a band is considered equal, regardless of exam score, and the Bureau has discretion to appoint anyone in the highest band, regardless of order within the band. (*Sharp v. Civil Service Com.* (1993) 14 Cal.App.4th 1507, 1511 [appointing authority can choose among any applicants on eligibility list of equal ability, regardless of ranking or score]; *Dawn v. State Personnel Bd., supra,* 91 Cal.App.3d at p. 591.) However, when the highest band contains less than *five* applicants, the Bureau's discretion increases even further — it may appoint applicants from the next highest band or bands that will allow the "appointment" band to contain at least five applicants. (Rule 11.01, subd. E; FAT 512.) In essence, bands collapse together so that their combined total contains five or more applicants, and the applicants in those collapsed bands become equal. (*Ibid.*, PT 226.)[21]

This discretion precludes plaintiff from proving causation. The Bureau actually selected only five of the original six applicants in band 2. (Compare TE#19 and TE#20.) Consequently, increasing band 2 to seven applicants by adding plaintiff would have left the Bureau with

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[21] That actually happened here. As shown on Trial Exhibit 20, the original eligibility list for plaintiff's exam contained the following number of applicants: six in band 1; six in band 2; four in band 3 (including plaintiff); two in band 4; and two in band 5. Trial Exhibit 19, in turn, lists the eleven applicants actually selected from the list, along with their band and date of selection. (FAT 511.) It shows that the Bureau made its first two selections from the eligibility list on July 16, 1990, selecting two applicants from band 1. (*Ibid.*, FAT 512.) However, since those two appointments reduced band 1 to only four applicants, the Bureau could choose any applicant from band 2 as well when making the next appointment. (FAT 512.) On July 23, 1990, the Bureau actually did so by selecting "Brent J. Smith" from band 2, and one applicant from band 1. (TE#19; FAT 512.)

discretion not to select him. Presumably in recognition of this, plaintiff linked both of his causation arguments to his claim that the Bureau should not have included the five applicants in bands 1 and 2 who initially scored below 70 on the written exam. *Consequently, since, as we have shown, adjusting the raw written exam scores did not breach any duty actionable under section 815.6, plaintiff's entire causation argument fails.*

But, even if adjusting the scores breached an actionable duty, plaintiff's causation argument still fails given the Bureau's discretion to select applicants from a lower band whenever the top band falls below five applicants. This is true whether he starts in band 2 or band 3. For example, if plaintiff starts in band 3, but every applicant with a raw written exam score below 70 is removed from eligibility, there would be four applicants in band 1, three in band 2, one (plaintiff) in band 3, two in band 4 and two in band 5.[22] As shown on TE#19, the Bureau selected applicants from the eligibility list as follows: two on July 16, 1990; two on July 23, 1990; one on July 30, 1990; and six on August 6, 1990. When these same selection numbers are used with the re-crafted eligibility list, the following scenario occurs: because band 1 contains less than five applicants, band 2 collapses into it, creating a top band of seven; after two applicants are selected from that top band on July 16, the band still contains five applicants; after the first selection on July 23, the top band falls to four applicants and so the next band (band 3, containing only plaintiff) collapses into it, creating a band of five applicants; thus when the Bureau makes its second selection on July 23 it does not have to select plaintiff and the top band falls to four applicants,

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[22] One can determine who initially scored below 70 on the written exam by matching the scores on the exam summary (TE#21) with the individuals on the eligibility list (TE#20). The comparison shows that plaintiff's erroneous causation theory would remove the following eight applicants from the eligibility list: Gregory T, Catherine L, James E, Linda J, Brent J, John D, Baron K, and Jennifer L.

causing band 4 to collapse into it, creating a top band of six applicants; when the Bureau chooses one applicant on July 30 from that band of six, it does not have to select plaintiff; after that July 30 selection, the top band now has five applicants, so on August 6, the Bureau must make its first appointment from that group of five applicants, but it does not have to choose plaintiff; since that selection causes the top band to fall below five applicants, the next band, band 5, collapses into it; the remaining band now contains six applicants, which means the Bureau would not have to choose plaintiff in making the final five selections. This is true even if plaintiff started in band 2, not band 3.[23]

In short, when the applicants with initial written exam scores below 70 are removed from eligibility, the resulting bands are so small that they continually collapse to ensure at least five applicants, thereby precluding plaintiff's causation argument.

B. An Unfair Scoring Process Taints Every Applicant's Score.

Plaintiff also ignores that if, as he claims, an unfair interview *process* deprived him of a higher score then every score derived from that process is tainted. A different review process would impact all

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[23] If plaintiff starts in Band 2, there would be four applicants in band 1, four in band 2 (including plaintiff), zero in band 3, two in band 4 and two in band 5. These numbers create the following scenario: because band 1 contains less than five applicants, band 2 collapses into band 1 and creates a top band of eight applicants; after two applicants are selected from that top band on July 16, the band still contains six applicants, so two more applicants are selected from it on July 23; because that top band now contains four applicants, and the next band, band 3, is empty, band 4 collapses into it, creating a new top band of six applicants; after the July 30 selection, the top band is now five applicants, so on August 6, the Bureau must make its first appointment from that group of five applicants; since that selection causes the top band to fall below five, the next band, band 5, then collapses into it, creating a remaining band of six applicants, potentially including plaintiff, from which only five are chosen.

scores. Thus, although plaintiff claims he would have received a higher score under a fairer or non-arbitrary process, he can only speculate what would have happened to everyone else's scores. Applicants who originally outscored him could score lower under the different process, but applicants he originally outscored could surpass him. An applicant attacking the entire scoring system should be seeking in mandamus to annul the eligibility list or to enjoin or modify the system's future use, not speculative damages.

C. Plaintiff Did Not Have To Receive A Higher Score Even If Defendants Had Rated Him "Good" On Education.

The discretionary scoring process also precludes plaintiff from showing the defendants had to score him higher had he received an education rating of "good." No set point score exists for any category, and the interviewers base their final numerical score on their overall subjective impression of the candidate within defined point ranges. A "good" rating on education still would have left plaintiff with "mostly acceptable and good ratings," leaving the interviewers with discretion to score him anywhere in the 70-79 range. (FAT 568; TE#12 at p. 5.)

D. Plaintiff Could Have Failed The Background Check And Psychological And Physical Examinations, Or Been Terminated During The Probationary Period.

The fact plaintiff never even completed the appointment process further undermines his causation claim. Even if selected from the eligibility list, plaintiff still had to pass a background check and psychological and physical exams. (FAT 198; SAT 151.) Plaintiff noted he took similar tests when he first became a peace officer 16 years ago. (SAT 49-50.) But obviously many things change in 16 years, particularly mental and physical health. Indeed, one of the eleven applicants selected from the eligibility list here failed these requirements despite a law enforcement background. (FAT 312, 389-390, 573-574.)

Further, even if plaintiff had passed these requirements, he only would have become a probationary employee, not a permanent D.A. investigator. (FAT 199; County Civil Service Rule 12.01.)

IV.

PLAINTIFF'S DIVERGENCE AT TRIAL FROM HIS GOVERNMENT CLAIM BARS HIS ACTION.

The Tort Claims Act's claim filing requirements are "intended to give the public entity the opportunity to investigate the factual basis of the claim while the evidence is fresh, to settle meritorious cases without litigation, and to consider the fiscal implications of potential liability." (*Barkley v. City of Blue Lake* (1996) 47 Cal.App.4th 309, 316.) For that reason, courts will not allow plaintiffs to pursue damage theories at trial that diverge from their original claim. (E.g., *Turner v. State of California* (1991) 232 Cal.App.3d 883, 890-891; *Fall River Unified School Dist. v. Superior Court* (1988) 206 Cal.App.3d 431, 435; *Donohue v. State of California* (1986) 178 Cal.App.3d 795, 803-804.)

But plaintiff did just that. His original claim specified only that the purported damage occurred on January 30, 1991 at a "Civil Service Hearing" where the "Civil Service Commission denied appellant's request for hearing to review discriminatory hiring practices and Military Veteran's Credit misappropriation by the District Attorney, Bureau of Investigation." (TE#220; CT 586.) Plaintiff's lawsuit, however, never directly attacked the Commission's decision — he focused on the exam itself. Moreover, the term "discriminatory hiring practices" has a specific meaning in the civil service context, which plaintiff never even sought to prove at trial.[24] Instead, he presented his sweeping "fairness"

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[24] County Civil Service Rule 25 provides that no job applicant shall be discriminated against "because of race, color, religion, sex, physical handicap, medical condition, marital status, age, national origin or citizenship, ancestry, political opinions or affiliations, organizational membership or affiliation, or other non-merit factors. . . ." (County

argument, which encompassed issues (e.g., his interview delay, the conversion of written exam scores, his negligence theories) that his vague discrimination reference could not possibly connote. That divergence is an independent ground for reversal.

V.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ALLOWING TRIAL EXHIBIT 17 INTO EVIDENCE.

This jury trial never should have occurred. The trial court then compounded the problem by improperly allowing the jury to consider Trial Exhibit 17, over defendants' objections. (FAT 289-294.) That Exhibit summarizes the County auditor's conclusions that mistakes occurred during certain examinations that the District Attorney's office conducted between January 1990 and July 1991. It includes highly prejudicial, misleading statements regarding some incorrect scoring and improper appointments.

Exhibit 17 is inadmissible hearsay. The trial judge allowed it in as "an official inter-governmental record," (FAT 294), but no such hearsay exception exists. The letter does not qualify as a business record under Evidence Code section 1271 or an official record under Evidence Code section 1280. (FAT 293-294; *Bufano v. City & County of San Francisco* (1965) 233 Cal.App.2d 61, 72-73; *Pruett v. Burr* (1953) 118 Cal.App.2d 188, 200-201.)

Further, the court should have excluded the letter on Evidence Code section 352 and foundation grounds. No one testified as to its

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Civil Service Rule 25.01, subd. A.) No hearing may be granted or evidence taken on a discrimination claim "based on unspecified non-merit factors" — a petitioner "must name the specific non-merit factor(s)." (*Ibid.*) Both during the administrative appeal process and at trial, plaintiff never presented any such discrimination claim. To the contrary, he told the jury that the defendants' motives were irrelevant to his "fairness" theory. (E.g., PT 209, 214, 265.)

preparation and meaning and there is no evidence the audit found *any problems with* or *even included* any D.A. investigator exams, let alone this one. The letter, and the underlying audit report (which never came in), facially refer only to promotional exams and other tests that are irrelevant to the D.A. investigator exam. (FAT 381-387, 603-604, 666-670, 672.) Despite the absence of any evidence that the criticisms in Exhibit 17 pertained to this or any other D.A. investigator exam, plaintiff's counsel repeatedly and prejudicially argued they did. (See, e.g., FAT 303, 308, 327, 333-334.)

CONCLUSION

Plaintiff's lawsuit scuttles settled principles of governmental immunity and limited, deferential judicial review of administrative decisions. Not only did plaintiff's flawed theory allow the jury to supplant the decisions of the Civil Service Commission and the Chief Administrative Office, it let the jury second-guess inherently subjective oral interview scores and award damages based upon its own policy preferences, fitness assessments, and subjective fairness conceptions. No case has allowed damages under circumstances even remotely analogous to this one, and for good reason. The judgment should be reversed.

Dated: November 19, 1997

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