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' REPLY BRIEF

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INTRODUCTION

The Respondent's Brief does not cite a single case authorizing this lawsuit, even though the civil service rules at issue mirror those from civil service regimes throughout California and the United States. Plaintiff has never explained why he can receive a reasonable administrative remedy — a reinterview — and elect instead to file a lawsuit for damages. He has never explained why he can avoid mandamus review. And he has never cited any authority supporting his theory at trial that a civil service applicant can recover lost future wages as a remedy for unfair or impartial exam scoring.

Tellingly, on appeal, he now transforms his theory at trial. Despite instructing the jury not to consider "why" any unfairness occurred, and despite the fact that lowering plaintiff's education rating to "acceptable" irrefutably could not decrease his score ten points, plaintiff now disingenuously claims that this was a discrimination case and that he proved the interviewers lowered his score ten points to counter the veteran's credit.

Regardless, this case is no longer about plaintiff's particular allegations and accusations. It is about whether civil service applicants can file civil suits for lost future wages on grounds of unfair scoring, even where the administrative review process gave them a remedy. As we explained in Appellant's Opening Brief and further explain in this Reply, given the palpable threat to civil service systems everywhere, the judgment should be reversed.

I.

THIS APPEAL CONCERNS QUESTIONS OF LAW.

Plaintiff claims that the substantial evidence standard governs this appeal. (See Respondent's Brief dated 3/5/98 ["RB"] at 12.) It does not. This appeal concerns whether a trial should have occurred and whether, as a matter of law, damages were permissible. The issues are matters of law subject to independent review, e.g., whether a civil service applicant can pursue civil remedies for unfair scoring or is limited to administrative remedies and mandamus?; whether a civil service applicant can seek lost future wages for violations of civil service regulations?; whether plaintiff's failure to show in mandamus that the Civil Service Commission's reinterview remedy was unreasonable barred his action?; whether plaintiff's failure to pursue a reinterview barred any further relief?; whether the civil service rules relied upon by plaintiff support a damage claim under Government Code section 815.6?; whether defendants are immune from damages?; whether it is reasonable for a civil service agency to mathematically adjust raw scores on a qualifying (pass/fail) written exam thereby increasing an oral interview pool?; whether the D.A. Investigator's Office would have had to hire plaintiff?; whether plaintiff's causation claim is speculative?; and whether plaintiff diverged at trial from his government claim?[1]

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[1] The only exception is the trial court's error in admitting Trial Exhibit 17 into evidence, which is governed by the abuse of discretion standard. That issue only becomes relevant if plaintiff surmounts every other issue, which he cannot do.

II.

PLAINTIFF'S ACTION FAILS AS A MATTER OF LAW BECAUSE HE WAS NOT ENTITLED TO CIVIL REMEDIES.

A. Plaintiff's sole judicial remedy was mandamus, not a civil action for lost future wages.

As we explained in Appellant's Opening Brief ("AOB"), despite the existence of civil service regimes throughout California and the United States, our research has not disclosed a single case allowing civil remedies to a civil service participant claiming breaches of civil service rules. In the Respondent's Brief, plaintiff confirms no such authority exists by failing to cite any.

We also explained in the AOB that case law uniformly holds that a civil service *applicant* has no employment interest protected by due process and thus, where, as here, no statute expressly grants an evidentiary hearing on claims of unfair scoring, the sole judicial recourse is ordinary mandamus. (See AOB at 21-26.) Again, the Respondent's Brief fails to cite a single case to the contrary.

Since no case supports his position, plaintiff resorts to question-begging and sleight of hand. He acknowledges that he "had no right to administrative mandamus review of the Commission's denial of his hearing request." (RB at 14.) However, relying on the notion that mandamus cannot be used to compel the exercise of discretion, he argues that "[w]ithout a right to a hearing, or the ability to establish entitlement to a hearing, [plaintiff] was not required to seek ordinary mandamus review . . . [because it] would have been a futile act." (RB at 18.)

This misses the point. As explained in the AOB, if due process entitled plaintiff to an evidentiary hearing on his unfair scoring practices

claim, then a hearing would be required by law and he could seek a Commission hearing through mandamus. (See AOB at 30.) Accordingly, by conceding he had no right to an evidentiary hearing before the Commission, plaintiff admits he had no due process right to an evidentiary hearing on his claim. Indeed, plaintiff never argues in the Respondent's Brief that he had a due process right to a hearing.

Plaintiff's claim that ordinary mandamus would have been "a futile act" therefore rests on the incorrect premise that the sole purpose of ordinary mandamus would be to compel a hearing before the Commission, which plaintiff now concedes he could not do. Based on this faulty premise, he argues erroneously that courts do not always have jurisdiction "to review the final decision of an administrative agency." (RB at 20.) According to plaintiff — and only plaintiff — "[w]here, as in the present case, a hearing was not granted, review is unavailable; not because there was no record, but rather, because there was no application of administrative law upon which possible abuse could be established." (*Ibid.*) As we explain, this assertion misconstrues both mandamus law and the administrative conduct at issue.

Neither of the two cases plaintiff cites, *Weary v. Civil Service Com.* (1983) 140 Cal.App.3d 189, 195 ("*Weary*") and *Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843 ("*Bunnett*"), support his position. (See RB at 20.) In fact, as we explained in the AOB (see pp. 21, 24), *Bunnett* expressly repudiates it.

In *Weary*, the court of appeal found the trial court erred in applying administrative mandamus to a civil service commission's review of an evaluation rating since the hearing was discretionary, not mandatory. (140 Cal.App.3d at p. 195.) The court therefore remanded

the matter back to the trial court for ordinary mandamus review under Code of Civil Procedure section 1085. (*Ibid.*) Plaintiff argues that the "*Weary* court remanded the matter because, where a hearing had taken place, review of the lower tribunal was possible under CCP 1085." (RB at 20.) Thus, plaintiff suggests the court of appeal remanded the matter for ordinary mandamus review solely because the Commission had actually granted a full evidentiary hearing, and otherwise the court would have allowed a civil action. The court of appeal never even intimated that in *Weary*, and as *Bunnett* confirms, such a ruling would have contravened mandamus law.

In *Bunnett*, a professor sued his university-employer for denying his application to participate in a voluntary early retirement incentive program. The court of appeal recognized that his purported civil claims actually were "no more than challenges to the administrative decision of a state agency." (35 Cal.App.4th at p. 848.) Similar to plaintiff's right to protest to the Chief Administrative Office ("C.A.O.") here, the subject plan allowed a rejected applicant to file a written protest with an administrative official, but it did not mandate an evidentiary hearing. (*Id.* at p. 849 & fn. 4.) As is true here, the applicant made "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.) However, since the plan did not authorize an evidentiary administrative hearing and due process did not require one, the court properly held that "plaintiff's remedy in this case was an action for ordinary mandate, not a civil action." (*Ibid.*) Directly rejecting plaintiff's argument here, the court of appeal confirmed that "*the absence of an evidentiary hearing does not*

make mandate inapplicable; it merely affects the form of mandate that must be involved." (*Ibid.*, emphasis added.)

McGill v. Regents of University of California (1996) 44 Cal.App.4th 1776 ("*McGill*") further refutes plaintiff's mandamus theory. In *McGill*, a professor challenged his university-employer's decision not to grant him tenure. As is true here, the university had its own administrative review procedures but there was no "legal requirement that the tenure decision result from an evidentiary hearing [and] . . . [the professor] had no due process rights to a full adversarial hearing." (44 Cal.App.4th at pp. 1782, 1785.) Although no full adversarial hearing was ever held, the court reviewed the tenure decision under ordinary mandamus. (*Id.* at p. 1786.) The court of appeal reversed the trial court's decision to vacate the tenure decision, concluding that under limited, deferential ordinary mandamus review the record did not show the tenure decision was arbitrary or capricious or made for illegal or improper reasons. (*Id.* at pp. 1786, 1789.)

Bunnett and *McGill* therefore repudiate plaintiff's claim that ordinary mandamus is inapplicable without a full evidentiary hearing because there is "no application of administrative law upon which possible abuse could be established." (RB at 20.) Ordinary mandamus focuses on administrative *decisions*, not just full evidentiary hearings. This case involves several layers of administrative decisions, each of which could be challenged only in mandamus. First, there was the decision of the D.A. Investigator's Office to give plaintiff the score he received. Then there was the C.A.O.'s decision to deny his protest. And finally, there was the Civil Service Commission's decision to grant him a reinterview instead of a full evidentiary hearing.

Since the Commission gave plaintiff a form of relief — a reinterview — he needed to show in ordinary mandamus that limiting him to this remedy was an abuse of discretion under the circumstances. But even if the Commission had simply denied his hearing request outright, and not granted a reinterview, plaintiff's sole judicial recourse would have been ordinary mandamus review of his scoring grievance and the C.A.O.'s denial of his protest. That review would have focused on whether the limited record showed arbitrary or capricious conduct or abuses of discretion and it would have been highly deferential to the administrative decisions. (See AOB at 24-28.)

Plaintiff's admission that he could not compel the Civil Service Commission to hold an evidentiary hearing on his unfair scoring practices claim also creates a question he cannot reasonably answer: If plaintiff has no statutory or due process right to a full evidentiary administrative hearing on his unfair scoring practices claim, how can he have a right to a civil jury trial on the exact same issue? The fundamental flaw in plaintiff's logic is that he inexplicably leaps from the lack of any right to an evidentiary hearing before the Commission to the conclusion that he is therefore entitled to a civil trial. This defies both logic and the law, as evidenced by plaintiff's analysis of this Court's decision in *Fuchs v. Los Angeles County Civil Service Com.* (1973) 34 Cal.App.3d 709. (See RB at 15-18.) Plaintiff correctly notes that "[t]he pertinent facts of the *Fuchs* case are essentially the same as those presented here." (RB at 15.)[2] But he then turns *Fuchs* on its head by

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[2] *Fuchs* is not identical, however, because the petitioner in *Fuchs* was a permanent employee seeking a promotion. Permanent employees, as vested employees, have greater rights than job applicants or

suggesting that the ultimate holding — affirmance of the trial court's denial of the applicant's petition for writ of mandate — supports a civil trial here.

After the Civil Service Commission relied on written materials to deny petitioner's hearing request, the petitioner in *Fuchs*, unlike plaintiff here, sought an appropriate form of judicial relief. He sought a writ of mandate or declaratory judgment seeking to cancel the current eligibility list on the grounds that the exam did not properly evaluate qualifications and his oral interview was unfair, and he sought to compel a full evidentiary hearing before the Commission. (34 Cal.App.3d at p. 712.)

> "At the hearing in the trial court he set forth in detail his substantive complaints about the content of the examination, claiming that parts of the examination weighed factors not relevant to a determination of qualifications for head district attorney [and] [h]e contended further that his oral interview was not conducted fairly. The trial court rejected petitioner's offer of other evidence which petitioner claimed was newly discovered, but admitted into evidence affidavits from various county personnel relative to the conduct of the petitioner's examination. . . . [T]he trial court denied petitioner any relief." (*Id.* at pp. 712-713.)

This Court affirmed, rejecting petitioner's sole contention on appeal that he deserved a full hearing on his scoring practices claim before the Commission. (*Id.* at p. 714.) In doing so, this Court noted that the issue involved a weighing process, under which the civil service agency's interests had to be balanced against the potential harm to the petitioner and the public's interest in ensuring proper selection procedures. (*Id.* at p. 715.) This Court held that the potential harm

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probationary employees. (*Civil Service Com. v. Velez* (1993) 14 Cal.App.4th 115, 122.) Thus, this Court's denial of relief in *Fuchs* is even more compelling here since this case involves a job applicant, not a vested employee.

from requiring county agencies to prepare for and hold hearings on scoring protests outweighed any potential harm to the petitioner and other similarly situated employees that could result from no hearing. (*Id.* at pp. 715-716.) This Court further held that the administrative review procedures — a protest to the director of personnel and a discretionary, not mandatory, Civil Service Commission hearing — were "constitutionally adequate" to protect applicants with scoring grievances. (*Id.* at p. 716.)

Fuchs cannot be reconciled with the civil jury trial here. Plaintiff asserts that the court in *Fuchs* "recognized that potential injury exists without an available remedy at the administrative level" and that the plaintiff here "found himself in a similar situation to the plaintiff in *Fuchs*. After having been denied a hearing by the Commission, he was injured without an available remedy at the administrative level." (RB at 18.) This argument fails for several reasons.

First, it disregards the record because, unlike in *Fuchs*, here the Commission gave plaintiff a remedy — a reinterview. Given plaintiff's contentions that his interview was unfairly delayed and then rushed, and that the interviewers graded him improperly, a reinterview would seem the most appropriate remedy. If plaintiff nonetheless believed the reinterview remedy was constitutionally inadequate under the circumstances, he needed to establish by ordinary mandamus that it was an abuse of discretion.

Second, plaintiff overlooks that in *Fuchs* this Court upheld the administrative review procedures available for a scoring grievance — a protest to the director of personnel, coupled with possible, discretionary commission review — as "constitutionally adequate" despite any

potential harm resulting from a denied hearing request. Those same procedural remedies were accorded plaintiff here. Plaintiff's assertion that "not every administrative scheme provides a remedy for every complaint" therefore is a red herring. (See RB at 21.) And it is equally disingenuous for plaintiff to claim that "the statutory regulations under which the Commission exercised its investigative power, did not establish clearly defined machinery for the submission, evaluation and resolution of [plaintiff's] complaint." (See *ibid.*) As this Court expressly recognized in *Fuchs*, the County civil service rules expressly provide administrative machinery for reviewing scoring grievances and that machinery is "constitutionally adequate." If plaintiff believed the D.A. Investigator's Office, the C.A.O. or the Commission abused those review procedures here, he needed to establish that in ordinary mandamus.

Third, plaintiff's admission that he "found himself in a similar situation to the plaintiff in *Fuchs*" defeats his claimed right to a civil action — both the trial court and this Court ultimately denied the petitioner in *Fuchs* any relief, despite his claims of an unfair examination process and unfair oral interview grading. This Court did not hold or even intimate in *Fuchs* that the petitioner could nonetheless pursue civil remedies. Indeed, such a holding would have eviscerated this Court's conclusion that allowing full evidentiary hearings on scoring grievances would impose too harmful a burden on examining agencies. Given the delay and expense of civil litigation, the burden of forcing examining agencies like the D.A. Investigator's Office to endure civil jury trials greatly exceeds the burden of requiring administrative hearings, which this Court already found unacceptable in *Fuchs*. Thus, *Fuchs* must stand

for the proposition that a civil service applicant has no right to a full evidentiary hearing on a scoring grievance — whether a full administrative hearing or a civil trial — and a disgruntled applicant's sole *judicial* recourse is to try to show arbitrary or abusive conduct through limited ordinary mandamus review. Thus, in truth, the plaintiff here achieved exactly what this Court *disallowed* in *Fuchs*. The only difference is that he sought a full evidentiary hearing in civil court, instead of before the Civil Service Commission (which is the appropriate forum for full evidentiary hearings on civil service issues).

Fourth, this Court's analysis in *Fuchs* comports with authority establishing that grievances regarding administrative evaluations should be left to administrative experts, subject to mandamus review by courts. (See AOB at 26-30.) In *Fuchs*, this Court focused on whether due process required a hearing before the Commission, given the absence of any statutory authorization. This Court therefore implicitly recognized that the Civil Service Commission, not a jury, is the appropriate body to conduct any evidentiary hearing on civil service scoring grievances. No authority allows a jury to supplant the expertise or discretion of the D.A. Investigator's Office, the C.A.O. or the Civil Service Commission.[3]

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[3] The problems inherent in allowing juries to assess such grievances pervade this lawsuit. This action allowed the jury to supplant administrative expertise and discretion. But it also improperly asked the jury to interpret civil service rules, which are legal issues that even courts consider best left to administrative personnel. Courts give great weight to the rule interpretation of administrative agencies and will not substitute their own judgment if any reasonable basis exists for administrative interpretations. (*Ontario Community Foundations, Inc. v. State Bd. of Equalization* (1984) 35 Cal.3d 811, 816.) Where a court finds ambiguity in administrative rules "the proper remedy would be to remand to the [administrative] board so that it may clarify the

B. Allowing Civil Service Applicants To Pursue Civil Suits For Lost Future Wages Would Be Bad Policy And Would Unreasonably Give Applicants Remedies That The Law Disallows Permanent Civil Service Employees Who Have Vested Employment Rights.

The Respondent's Brief does not explain how an applicant alleging a breach of a government agency's statutory duty to treat civil service participants fairly and impartially can file a civil action for lost future wages, when permanent civil service employees alleging their dismissals violated the same duty are limited to statutory administrative remedies. (See AOB at 20-21; see, e.g., *Boren v. State Personnel Board* (1951) 37 Cal.2d 634, 637; *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1287-1288; *Valenzuela v. State of California* (1987) 194 Cal.App.3d 916, 922 & fn. 7; *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1432-1433.)

Nor does it explain how a civil service applicant can pursue a civil remedy of lost future wages when a probationary employee (i.e., someone who passed the civil service exam and was hired from the eligibility list, but has not completed the mandatory probationary period) can be dismissed summarily without judicially cognizable good cause and without a full evidentiary hearing (administrative or civil). (See, e.g., *Cox v. County of San Diego* (1991) 233 Cal.App.3d 300, 311; *Bell v. City of Torrance* (1990) 226 Cal.App.3d 189, 191.)

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ambiguity." (*Public Resources Protection Assn. v. Department of Forestry & Fire Protection* (1994) 7 Cal.4th 111, 120.) This lawsuit therefore flies in the face of settled construction principles.

Plaintiff essentially ends up speaking out of both sides of his mouth. His pursuit of lost future wages as civil damages implicitly assumes that he had a right to the job, same as a permanent employee. But given the overwhelming authority to the contrary (see AOB at 22-23), he effectively concedes in the Respondent's Brief that he has no contractual or vested right to a D.A. investigator position and thus no due-process-protected employment interest that would allow him to compel a hearing before the Civil Service Commission.

The mandamus argument in the Respondent's Brief therefore creates the following illogical result:

- Permanent civil service employees alleging wrongful terminations violating civil service rules have vested rights to continuing employment and therefore due process requires that they receive full evidentiary administrative hearings on their claims. The result of those hearings is reviewable only by administrative mandamus under Code of Civil Procedure section 1094.5.

- Civil service applicants have no due-process-protected right to public employment and thus they have no right to a full administrative hearing on claims of unfair examination scoring. If the Civil Service Commission exercises its discretion to hold a hearing on a claim (which it presumably will do when it finds a petition facially meritorious), then the Commission's resulting decision is reviewable by ordinary mandamus under Code of Civil Procedure section 1085.

- But if the Commission denies an applicant's hearing request, which it presumably will do when a petition facially appears without merit, *the applicant can file a civil action on his unfair scoring claim.*

Plaintiff's mandamus theory therefore turns the civil service system on its head — the party with no due-process-protected employment interest and whose claim the Commission ostensibly has deemed too weak to justify a hearing ends up with a civil trial. This makes no sense.

Plaintiff also elevates the rights of civil service applicants above the rights of permanent employees by claiming he can seek lost future wages as damages. It is well-settled that a permanent civil service employee claiming wrongful dismissal in violation of civil service rules is restricted to reinstatement plus back-pay. (See, e.g., *Cotran v. Rollins Hudig Hall Internat, Inc.* (1998) 17 Cal.4th 93, 117-118 (conc. & dis. opn. of Kennard, J.) [discussing difference between wrongful termination remedies in civil service context versus private employment].) Plaintiff nonetheless claims applicants claiming unfair scores can recover lost future wages even though they never completed the appointment process or the mandatory probationary period during which they could have been summarily dismissed. That is illogical.

Plaintiff cites only one case as allowing "salary and benefits" to an exam-taker improperly passed over in favor of lower scoring applicants. (See RB at 38, citing *Stationary Engineers Local 39 v. County of Sacramento* (1997) 59 Cal.App.4th 1177.) That case, however, shows plaintiff cannot pursue a civil action for lost future wages. In *Stationary Engineers Local 39*, the court of appeal held that the Sacramento Civil Service Commission's policy of allowing permanent employees with scores within five points of the third rank to be eligible for selection along with candidates in the first three ranks contravened a County Charter provision allowing promotional credits to

permanent employees passing civil service tests. (See 59 Cal.App.4th at pp. 1180, 1182.) The court held that the Charter provision required the Commission to treat all permanent employees equally and thus any permanent employee in the first three ranks had to receive the preference points also. (*Ibid.*) The court therefore granted a union's petition for a writ of mandate to (a) compel the award of preference points to all permanent employees and (b) compel the payment of lost salary and benefits to a permanent employee who had ranked first in the initial scoring but was promoted later after the appointment of several permanent employees who received the preference credit. (*Id.* at p. 1178.)

As explained further in section VII, *infra*, *Stationary Engineers Local 39* did not entail the causation and entitlement issues involved here: In that case, unlike here, (a) the county actually selected the applicant for the job, (b) the issue was the unequal awarding of preference points after exam scoring was complete and eligibility ranks determined, as opposed to the exam scoring process itself, and (c) the county's selection process would not have allowed the county to bypass the applicant initially had he also received the preference points. But more importantly, the union in *Stationary Engineers Local 39* properly sought relief *by mandamus*, not a civil action, and the "salary and benefits" at issue constituted the back-pay owed for the delay in giving the applicant the position. Thus, that case, as opposed to plaintiff's civil action, comports with settled civil service principles.

We are not suggesting that a civil service applicant claiming unfair scoring practices lacks remedies. The point is that those remedies do not include civil suits for lost future wages. As this Court recognized in

Fuchs, the civil service context requires a careful balancing of interests to avoid overburdening civil service systems, which means some applicants may be left prejudiced. Allowing plaintiff's lawsuit would open the floodgates for substantial damage suits against administrative agencies and officers. It would effect a fundamental and potentially catastrophic change in civil service law since the D.A. investigators office administers hundreds of civil service exams each year, the County administers thousands and plaintiff's lawsuit rests on language contained in civil service regimes throughout California.

The risk of personal liability might deter administrative officials from acting as interviewers or from otherwise administering civil service exams. It would force agencies to endure the expensive and distracting process of civil trials and the burden of paying damage awards for lost future wages. It would allow juries to interfere in administrative discretion and allow disgruntled applicants to circumvent administrative review procedures and proper administrative remedies, like the reinterview ordered here. And it ultimately would saddle the taxpaying public with the burden of financing damage awards.

Accordingly, *Fuchs*, prior mandamus precedent, and policy considerations compel the following approach. County civil service applicants claiming unfair scores should follow the prescribed administrative review procedures that *Fuchs* upheld as constitutionally adequate. If they believe those procedures were not properly followed or that the resulting agency decision was arbitrary, capricious or unfair, they must seek to reverse that decision in ordinary mandamus. This admittedly will be difficult to do, particularly where, as here, the review procedures produce a remedy such as a reinterview. If the applicants

succeed in mandamus, they can seek to annul the eligibility list and preclude the agency from using an unfair scoring practice on the next exam. Or if they show a proper scoring system was unfairly applied to them, they can seek a reinterview or a reexamination, or a score increase or placement in a higher eligibility band.[4] But under no circumstances can they do what plaintiff did here — seek lost future wages in a civil action.

C. Plaintiff Cannot Avoid The Mandamus Requirement By Disingenuously Claiming On Appeal That This Is A Discrimination Case.

Plaintiff also tries to side-step the mandamus requirement by recasting this jury trial as a discrimination case. He claims plaintiff is entitled to civil remedies because he "was within the class of people for whose protection veteran's rights statutes were enacted." (RB at 33.) This argument fails for two fundamental reasons.

First, it simply misses the point. As we pointed out in the AOB, no case in any jurisdiction in the United States has allowed civil

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[4] Conceivably, a court also could compel appointment as a remedy. An appointment remedy, however, seems problematic for several reasons. First, since an applicant has no vested right to employment even if placed on an eligibility list (see AOB at 22-23), compelling an appointment would seem like judicial interference with administrative discretion. Thus, an appointment remedy is best left to the discretion of the civil service commission or the examining agency. Second, the remedy may prejudice other applicants on the eligibility list by impacting their appointment prospects. Third, an appointment remedy would have to be crafted carefully to recognize that an applicant selected off the eligibility list must still pass additional tests — such as the background check and mental and physical exams plaintiff never took here — and must survive a probationary period to become a permanent employee.

remedies for mere violations of civil service rules and regulations. (See AOB at 20-22.) Civil service participants can file a civil action if they are proceeding under a distinct statutory scheme such as Title VII or FEHA that expressly allows such a suit and they are alleging violations of those statutes. Plaintiff references section 394 of the Military and Veteran's Code, which is designed to protect veterans from discrimination. (See RB at 34-35.) But plaintiff never filed his lawsuit under Section 394 or under Title VII or FEHA. From day one, he only has claimed violations of civil service rules and duties, in particular the duty to give a "fair and impartial" exam. No case has ever allowed civil remedies for such allegations.

Second, as confirmed by each of the following points, plaintiff did not present a discrimination case to the jury. Plaintiff is completely rewriting the record:

(1) In the AOB, we painstakingly described all of plaintiff's arguments to the jury and supporting evidence because we feared plaintiff might try to transform his case as he attempts now. (See AOB at 13-18.) As that summary shows, plaintiff never argued "discrimination" to the jury. He never even used the term in his opening statement (PT 158-169), or his closing argument (PT 192-218, 259-268), or during any witness examinations. (See AOB at 13-18.)

(2) In truth, plaintiff's counsel told the jury that the defendants' motives and intentions were irrelevant to the lawsuit and should not be considered. He told the jury members that their sole purpose was to determine whether any "instance of unfairness in th[e] examination process" caused plaintiff not to be hired and that they "won't be asked to determine why this type of impartiality and unfairness could occur"

because "in this lawsuit you'll be asked whether it occurred, *not why*." (PT 166-167, 265, emphasis added; see AOB at 13-14.) In closing argument, he expressly admitted that he "*d[id]n't know the reasons*, and we are not entitled, in this action, to speculate for the reasons why [the D.A. investigator's office] didn't want him." (PT 214, emphasis added.) And he specifically admonished the jury in closing argument not to let the issue of "why" the test was unfair "become[] a subject for deliberation in the jury box." (PT 209.) Plaintiff cannot attack the scoring as arbitrary and unfair and specifically tell the jury that the defendants' motives and intentions are irrelevant because this case is not about "why," and then claim on appeal that this is a discrimination case. A discrimination case is only about "why."

(3) Plaintiff never submitted a jury instruction on discrimination. (See CT 485-525.)

(4) Although the Respondent's Brief discusses a three-step analysis for discrimination cases (see RB at 35), plaintiff never presented any of those prongs to the jury either by argument or jury instruction.

(5) Plaintiff notes that County Charter Article IX, section 41, prohibits discrimination against applicants because of "affiliations." (See RB at 34.) But he never once cited or mentioned this provision during the entire trial. Nor did he ever mention County Civil Service Rule 25.01, the applicable Rule on discrimination (which requires an applicant to specify the exact basis for any discrimination claim, e.g., age, gender, race, etc.). (See CT 77.)

(6) Plaintiff never included a discrimination count or otherwise alleged discrimination in any of his complaints. (See CT 1-5, 99-111, 170-187, 241-258, 297-313.)

(7) In claiming this is a discrimination case, plaintiff states that he mentioned "discriminatory hiring practices and military veteran's credit misappropriation" *in his government claim* and he argued *to the Civil Service Commission* and *in his complaint* that the interviewers lowered his education rating when they realized he would receive a veteran's credit. (RB 33-34.) He claims that "[f]rom the beginning," he has alleged that "[t]he original score given [plaintiff] for his education was erased and replaced with a score that reduced his final score by 10 points, which was intended to deprive him of his veteran's credit." (RB at 30-31, 33.) This is not discrimination. But, more importantly, *the only germane issue on appeal is what plaintiff argued to the jury and, as shown below, this was not plaintiff's theory at trial.*

- Plaintiff disingenuously now argues that he "successfully proved to the satisfaction of the jury, that the legitimate reasons offered by appellants for erasing his educational rating were not the true reasons, but were a pretext to justify reducing his overall score by 10 points." (RB at 36.) This is pure fiction. Plaintiff did contend that the change in his education rating from "good" to "acceptable" after his interview was unfair. But he *never once mentioned* the veteran's credit in his opening statements or closing argument, or in jury instructions. (See PT 158-168, 192-218, 259-268; CT 485-525; see AOB at 13-18.) Indeed, the suggestion that he argued and proved that the interviewers lowered his score ten points to counter the veteran's credit is incompatible with his theory at trial that "why" plaintiff received his particular score was irrelevant. During their testimony, plaintiff never even accused the interviewers of changing the education rating to counter the veteran's credit. (See FAT 39-137 [Walters], 527-577 [Leonhardt], 606-713

[Maus].) Nor did he *ever* claim in any manner during the entire trial that he actually received an oral interview score of 87 but the defendant's lowered it to a 77, not even when arguing causation. (See, e.g., PT 262.)

- At trial, plaintiff never once mentioned either Civil Service Rule 7.15 (which provides for a 10 point veteran's credit) or Section 36 1/2 of the County Charter (which provides for a ten percent veteran's credit).

- The only references in the entire trial transcript to any veteran's credit misappropriation theory are indirect, consisting of a few references to plaintiff's appeal to the Civil Service Commission. Plaintiff now cites some of those references in the Respondent's Brief. (See RB at 33, citing to FAT 360 [witness reading text from the transcript of Commission appeal] and FAT 655 [witness reading memo to Commission].) These references cannot possibly transform plaintiff's theory that "why" was irrelevant, and his failure to ever claim his score was lowered ten points, into the theory he now proffers on appeal.

- As discussed further at pages 34-35, *infra*, plaintiff's trial counsel undoubtedly chose not to argue a ten point reduction given the undisputed fact that the interviewers could not have decreased plaintiff's score ten points by lowering his education rating from "good" to "acceptable."

(8) Even if plaintiff had argued to the jury that the interviewers reduced his score ten points to counter the veteran's credit, that would not make this a discrimination case. To prove discrimination, plaintiff would have had to plead and prove that the interviewers did not want him to be hired because he is a veteran. Plaintiff has never claimed that.

In truth, his veteran's-credit-argument to the Commission meant that the interviewers scored him based upon their assessment of his interview performance and qualifications, but then, in light of the veteran's credit, lowered his score ten points so the final score comported with their assessment. Such conduct would not mean the interviewers did not want plaintiff to be hired because he was a veteran.

In short, no matter how plaintiff attempts to characterize his lawsuit now, this is not a discrimination case. If plaintiff believed he was discriminated against because he was a veteran or for any other reason, he needed to argue and prove that in the trial court, rather than make such a claim for the first time on appeal.[5]

III.

PLAINTIFF'S ACTION FAILS AS A MATTER OF LAW BECAUSE HIS FAILURE TO ACCEPT A REINTERVIEW WAS AN UNREASONABLE FAILURE TO AVOID DAMAGES.

Defendants explained in the AOB that plaintiff's refusal to accept a reinterview barred his damage claim since tort victims cannot recover "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." (Rest. 2d Torts § 918., com. i; see AOB at 27, fn. 12.) The Respondent's Brief does not address this issue at all. In fact, although plaintiff acknowledges he refused a reinterview after being told to

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[5] A discrimination trial would have entailed a different evidentiary record. For example, it necessarily would have examined how these three interviewers treated other veterans during this particular oral interview session and in past ones as well.

prepare another essay, he never mentions that the D.A.'s Office later promised he could reinterview without another essay. (See RB at 7-8.)

In refusing any reinterview, plaintiff failed to avoid damages by reasonable effort. It is undisputed that the D.A.'s Office scheduled three investigators other than the defendants to conduct the reinterview. (See AOB at 11.) Even if they had not, plaintiff certainly would have been entitled to demand new interviewers. Plaintiff has never provided any authority allowing him to receive a reasonable administrative remedy, but then refuse it by filing a civil suit. Nor are we aware of any.

IV.

PLAINTIFF'S ACTION FAILS AS A MATTER OF LAW BECAUSE IT WAS NOT UNLAWFUL FOR THE COUNTY TO APPLY A MATHEMATICAL CONVERSION FORMULA TO THE RAW SCORES ON THE QUALIFYING WRITTEN EXAM.

As we explained in the AOB, plaintiff's causation argument fails as a matter of law if this Court upholds the County's right to apply a mathematical conversion formula to the raw scores on the threshold written exam. (See AOB at 43-44.) The erroneous "proximate causation" analysis presented in the Respondent's Brief confirms this because it deletes from the eligibility list all applicants with raw written exam scores below 70. (See RB at 41.) Since resolving this issue in the County's favor moots the other issues on appeal, we address this issue separately for simplicity's sake.

It is important to consider what is at stake. The County has applied this conversion formula to numerous qualifying written exams besides the one contested by plaintiff. And counties, municipalities and

other civil service regimes throughout California use similar conversion formulas to ensure sufficient applicant pools.[6]

In fact, as explained in the AOB, the State of California's civil service regulations expressly provide that the 70% minimum on a written exam need not be the raw score, but can 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." (See 2 Cal. Code Regs., tit. 2, § 206.) And the Government Code's provisions on state civil service exams similarly provide that "[t]he 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." (Gov. Code, § 18937.)

Thus, in attacking the County's adjustment formula, plaintiff is indirectly challenging a civil service practice that is routine throughout California. Plaintiff cites no cases or other authority in his attack. His theory rests solely on his own personal interpretation of Rule 7.14. (See RB at 25-26.) He notes that Rule 7.14 provides that "a final score of at least 70 percent, excluding veteran's credit, shall be required for

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[6] This issue exemplifies another fundamental problem with allowing a civil action. The propriety of adjustment formulas is not a matter for juries to decide based upon their own personal "fairness" conceptions. It is a pure legal issue that impacts civil service regimes throughout California. Plaintiff should have challenged the adjustment formula in mandamus as a distinct issue, thereby ensuring the development of a full and proper evidentiary and legal record. Instead, the issue suddenly arose during a civil action that was supposed to be addressing plaintiff's oral interview score.

passing." (RB at 26; see CT 57.) But as Rule 7.14 makes plain by referencing a "final" score, and as the D.A.'s Director of Personnel confirmed at trial (FAT 449-451, 501), that requirement applied here only to the oral interview scores, since the written exam was merely a qualifying test. Plaintiff offered no evidence to the contrary. Since applicants had to score at least 70 to pass the oral interview, the examination process comported with Rule 7.14. (See FAT 500-501; TE#21 at pp. 4, 6 ["Carrie A" and "William J" received oral interview scores of 64.70 and 65 and therefore did not make the eligibility list, TE#20].)

Moreover, it is unreasonable for plaintiff to claim, as he does, that any applicant who does not correctly answer at least 70 of the 100 questions on the written exam is not qualified to be a D.A. Investigator and thus should not proceed to the oral interview. Plaintiff, himself, only scored a 71 on the written exam. (See TE#20 at p. 2.) And the eight oral interview applicants plaintiff claims are unqualified because of this issue had raw written exam scores of, respectively, 69, 68, 67, 65, 64, 63, 62, and 61. (Compare TE#20 to TE#21.)

We also are unaware of any authority allowing plaintiff's employment interest to trump the interests of the County and the D.A. Investigator's Office. If the D.A. Investigator's Office believes that the oral interview best assesses an individual's qualifications to be a D.A. investigator, what gives plaintiff or a jury the right to second-guess that determination? Under plaintiff's theory, the D.A. Investigator's Office is simply out of luck if it has numerous positions to fill, but only a few individuals get raw scores above 70 on a 100 question written exam — the D.A.'s Office effectively would have to select anyone who correctly

answered at least seventy of the questions, even though those applicants never would have been selected from a larger oral interview pool.

Since it is reasonable for civil service regimes to adjust raw scores on qualifying written exams, thereby ensuring sufficient oral interview pools, plaintiff's entire lawsuit fails because his "proximate causation" theory dies with this issue.

Plaintiff also argues that the adjustment process was "unfair" because the exam bulletin did not state that the written exam scores might be adjusted. However, the bulletin clearly indicated that the written exam was merely a qualifying exam, and that the final civil service score would depend 100% on the oral interview. (TE#3, p. 2.) And the D.A.'s Director of Personnel explained that Rule 7.14 does not require that exam bulletins specify that a conversion formula might be applied to raw scores on a written qualifying exam. (FAT 450-451.) Plaintiff offered only his own self-serving conjecture in response.

Moreover, although the exam bulletin did not expressly state that the 70% threshold for the qualifying written exam might be an adjusted definition depending on the test's difficulty and the needs of the D.A. Investigator's Office, it also did not state that the 70% would be based solely upon the number of correct answers out of 100 total questions. As the Director of Personnel reasonably explained, the agency cannot specify the raw-score cut-off in the bulletin because the agency will not know what it will be until examinations are completed and the conversion formula is applied. (FAT 446.) There also is nothing bizarre about applying adjustment formulas to written exams. Not only are they a standard civil service practice, but most students of American high schools and universities are quite familiar with the concept that a

passing score of 70% is typically an adjusted score based upon a test's difficulty and desired grading curves.

Regardless, the "notice" issue is a red herring because the issue here is whether plaintiff can recover lost future wages. Plaintiff's causation argument rests on his erroneous concept that conversion formulas are unlawful and that the applicants with raw written exam scores below 70% were not qualified to be D.A. investigators. He cannot attribute his non-selection off the eligibility list to any purported lack of advance *notice* of a conversion formula, since receiving such notice would not have affected the scoring on either the written exam or the oral interview.[7]

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[7] If fairness principles mandate advance notice of a possible adjustment to raw scores on a qualifying written exam, at most the solution would be to vacate the eligibility list and order a new examination for all applicants after giving such notice. That further shows why administrative review and mandamus is the only proper avenue for contesting such issues. By the time a civil suit is complete, it is too late to cancel exam results and start over.

V.

PLAINTIFF'S ACTION FAILS AS A MATTER OF LAW BECAUSE DEFENDANTS ARE IMMUNE FROM DAMAGES.

Plaintiff's basic response to the immunity issue is to ignore the case law discussed in the AOB. As we explained in the AOB, plaintiff claims he can seek damages because County Civil Service Rules 1.02 and 7.25 impose a mandatory duty upon the County and its personnel to give a "fair and impartial" exam. Plaintiff therefore told the jury, in opening statement, closing argument and by jury instruction, that they could award damages if they concluded the defendants had not treated plaintiff fairly and this cost him his job. (See, e.g., PT 265, 161; CT 504, 512.)

The case law in the AOB, however, explains that laws or enactments imposing mandatory goals and policies, such as the duty to give fair and impartial exams, are not actionable under Government Code section 815.6. (See AOB at 34-37.) The enactment must tell the governmental entity exactly what specific action to take, and not leave any discretion as to how to implement the duty. (*Ibid.*) Rules 1.02 and 7.25 do not do that by any stretch of the imagination. Plaintiff's only response is to argue that these rules are "enactments" and their language is "obligatory." (See RB at 23-25.) True, but this misses the entire point of the AOB. Plaintiff's theory at trial therefore fails.

Regardless, even an enactment imposing a ministerial duty does not mean damages are permissible. In mechanically applying Government Code section 815.6, plaintiff loses sight of the true issue — did the County Board of Supervisors, in promulgating these rules, intend to allow civil damages for their violation? (See, e.g., *Fleming v. State*

of California (1995) 34 Cal.App.4th 1378, 1384; *Zolin v. Superior Court* (1993) 19 Cal.App.4th 1157, 1165; *State of California v. Superior Court* (1992) 8 Cal.App.4th 954, 958.) Nothing suggests the County Board of Supervisors did, and since statutory administrative remedies plus mandamus have always been the settled recourse for breaches of civil service rules, it is inherently implausible the Board of Supervisors intended to expose the County to civil damage suits.

Plaintiff's remaining arguments on the immunity issue are red herrings.

a. Plaintiff argues that the "70 percent minimum score for passing" was mandatory. (RB at 26.) True, but as explained in section IV, *supra*, and section II.D of the AOB, that provision applies to final exam scores, not qualifying exams, and a written exam affords discretion as to how to calculate a 70% threshold. Moreover, nothing in rule 7.04 indicates that the County Board of Supervisors intended to preclude adjustments to qualifying exams or to allow applicants to sue for damages whenever conversion formulas were used to expand oral interview pools.

b. Plaintiff misleadingly argues that the three interviewers "**admitted they had no discretion** to assign final scores outside fixed-ranges, nevertheless, they did so in breach of their duty" and the County chief of personnel admitted the interviewers "did not have '**any authority to go beyond**' fixed-ranges when assigning final-scores." (RB at 26, emphasis in original.) This is smoke and mirrors for two reasons. *First*, the reference to the interviewers going beyond the fixed-scoring ranges on the evaluation form does not refer to plaintiff — it refers to two applicants named Jennifer and John. As we explained in the AOB,

the defendants admitted that, although they could not remember the substance of the Jennifer and John interviews, the final scores they received appear to be mistakes because they exceeded the ranges on the evaluation forms. (See AOB at 17.) However, these scores, whether mistaken or intentionally wrong, are irrelevant to plaintiff's damage claim because it is undisputed that neither Jennifer nor John placed in Bands 1 or 2 and neither was ever selected off the eligibility list. (FAT 392-394; TE#19; TE#20 at p.2.) Plaintiff's counsel even stipulated to that. (FAT 457-458.) The only scores relevant to plaintiff's damage claim is his own score and the scores of the applicants actually selected off the eligibility list. Jennifer and John were the only applicants plaintiff ever identified as receiving scores outside the ranges on the evaluation form.[8] And it is undisputed that plaintiff's oral interview score of 77 fell within the proper fixed-scoring range given the number of goods and acceptables he received and that this would have been true even if his education rating was increased from "acceptable" to "good," as plaintiff insists. (See TE#12; FAT 568, 692.) *Second*, violations of the fixed-scoring ranges on the evaluation forms are not actionable under Government Code section 815.6 because the evaluation forms and the scoring ranges are not "enactments."

c. Plaintiff also argues that "[a]ppellants' acts were a departure from the otherwise ministerial implementation of the

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[8] The Jennifer and John scores are irrelevant even under plaintiff's erroneous causation theory, which focuses on the make-up of the eligibility list once all applicants with raw written exam scores below 70 are deleted. Jennifer and John both had written exam scores below 70. (See TE#21 at p. 1 ["John D"] and p. 8 ["Jennifer L"]). They therefore do not impact any of the parties' causation arguments, including the collapsing band analysis in the AOB. (See AOB at 43-45.)

established standards." (RB at 28.) He similarly asserts that "[t]he Civil Service Rules and County Charter required them to evaluate the candidates by a predetermined standard." (*Id.* at 29.) It is unclear what plaintiff is talking about. It defies logic to claim that the civil service rules and County Charter left the County and its interviewers with no discretion on how to evaluate and grade civil service applicants. The oral interviews were conducted according to set questions and criteria, but those questions and criteria were not set forth in the civil service rules or the County Charter. And the grading system afforded the interviewers broad discretion as to rating category answers and assigning a final score. The oral interview scoring is inherently subjective, not ministerial, no matter how hard plaintiff contends otherwise.

d. Plaintiff also argues that "the County's omission, in failing to investigate [plaintiff's] complaints, is evident from the record on appeal." (RB at 27.) This assertion is irrelevant to whether plaintiff can recover damages. And it ignores that the County gave plaintiff a remedy — a reinterview. Regardless, the assertion is false. Plaintiff cites to FAT 252-261, 284-287, and 451-454. The content on these transcript pages indicates that plaintiff contends the County's investigation was flawed because Melinda Fonseca, the witness who provided the cited trial testimony, never asked the interviewers why they erased plaintiff's education rating of "good" and changed it to "acceptable," even though she was investigating plaintiff's protest to the C.A.O.. This testimony does not show a flawed investigation by the County. *First*, and most importantly, Ms. Fonseca did not work *for* the C.A.O. and she was not investigating plaintiff's protest for the C.A.O.. (FAT 239, 285, 287, 451.) At the time, her job was advocate for the

D.A.'s Office, supporting the department in matters before the Civil Service Commission. (FAT 239, 287.) Therefore, what she did or did not do is irrelevant as to how the C.A.O. investigated plaintiff's protest. Fonseca explained that she never spoke to the interviewers about the education rating change, in part, because "the issue of the degree was a matter that had been or was being taken care of by the C.A.O.'s office." (FAT 285.) Plaintiff's counsel never put anyone from the C.A.O. on the stand. Instead, he relied on conjecture, noting that Fonseca did not personally know whether the Director of Personnel (the actual head of the C.A.O.) investigated the protest and then asking whether it would have been improper if Fonseca had been the only one doing so. (FAT 451-452.) But the documents irrefutably show that the C.A.O. investigated the protest, including the education rating issue. (See, e.g, TE#16 [C.A.O. memo to Commission]; TE#206 [C.A.O. letter to plaintiff].) *Second*, Ms. Fonseca's investigation was still reasonable, even if she did not personally discuss the education rating change with the interviewers because exam staff members who were assisting her did personally speak with them. (FAT 261.) And plaintiff's application set forth the only information she needed to verify the education score under the exam standards. (FAT 287.)

e. Plaintiff erroneously refers to a "trial court determination that appellants' acts were ministerial." (RB at 30.) The absence of a citation is not surprising since none of the various judges involved in this case ever made such a determination. (See CT 98, 167, 240, 294-296, 363, 478; FAT 807-811; PT 273-285.) The judge who presided over this trial (the Honorable John R. Stanton) never made a finding even remotely analogous. Presumably, plaintiff is referring to the Honorable

Cary H. Nishimoto's ruling on the demurrer to the third amended complaint, since he quotes that decision on page 31 of the Respondent's Brief and this is the ruling on the section 815.6 issue. But even Judge Nishimoto did not refer to any ministerial duty. He referred to the general civil service duty to be fair and impartial. (See CT 433-434.)

f. Plaintiff also claims he is entitled to damages because of the ten point veteran's credit. Again, the issue is whether the County Board of Supervisors intended for this provision to be a basis for damage suits, and nothing indicates that. Indeed, it is illogical to assume the County Board of Supervisors intended to allow veterans to file civil suits for scoring grievances, while restricting all other applicants to statutory administrative remedies. No matter how plaintiff characterizes the veteran's credit, the fact remains that an oral interview involves an inherently subjective evaluation. If the interviewers did not believe plaintiff was sufficiently qualified to place high on the eligibility list, then their conduct is shielded by governmental immunity. (See, e.g., *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 986-987 [school board's hiring and firing decisions immune even if evaluation included unlawful considerations]; see also cases cited in AOB at 32.)

The veteran's credit argument is also another red herring. Plaintiff asserts in the Respondent's Brief that the defendants erased his education score "and replaced it with a score that reduced his final score by 10 points, which was intended to deprive him of his veteran's credit." (RB at 30-31.) As evidenced by Judge Nishimoto's ruling quoted at page 31 of the Respondent's Brief, this was the "unfairness" theory plaintiff relied upon at the demurrer stage. It is also a claim plaintiff made to the Civil Service Commission, a claim one Commissioner

recognized as being "very bizarre." (TE#38 at p. 9.) But as explained at pages 20-21, *supra*, it was not plaintiff's theory at trial.

Plaintiff never argued to the jury that he actually received an oral interview score of 87, and thus deserved a final score of 97, but the interviewers changed his score after realizing he would receive the veteran's credit. (See *ibid.*) Why not? Because after reviewing the scoring process and plaintiff's evaluation form, plaintiff's trial counsel undoubtedly realized that the interviewers could not have reduced plaintiff's score ten points by changing his education rating from "good" to "acceptable." The scoring process does not work that way. (See generally AOB at 5-7.)[9]

No points are assigned to individual ratings and the ultimate score is derived from scoring ranges that depend on the overall ratings. (See *ibid.*) For plaintiff to have received a score of 87, he would have had to have received "mostly good and outstanding ratings." (TE#12 at p. 15.) But an education rating of "good" instead of "acceptable" still would have left plaintiff with six goods and one acceptable from "rater 5," five goods and two acceptables from "rater 2" and five goods and two acceptables from "rater 1." (See TE#12.) Thus, it still would have kept plaintiff in the 70-79 range required for "mostly acceptable and good

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[9] Plaintiff's operative complaint was founded on erroneous assumptions that a specific point credit existed for each rating and a ten point difference existed between education ratings of "good" and "acceptable." For example, plaintiff mistakenly alleged that "[t]he examiners were formally obligated to perform the obligatory duty of issuing a standard point amount for an education score of 'Good.'" (CT 307.) And he erroneously alleged that changing the education rating from "Good" to "Acceptable" "effectively offset[] the addition of the veteran's credit." (CT 306.)

ratings." (See TE#12 at p. 15.) In other words, to reduce plaintiff's score by ten points the interviewers would have had to completely re-do the entire evaluation, changing virtually every rating and supporting comment. Any claim plaintiff should have received a 97 once the veteran's credit was added also would be difficult to reconcile with his final score of 90 only one year before. Plaintiff therefore never even attempted to prove a ten point reduction, nor did he ever argue he should be treated as though he scored a 97. (See pp. 20-21, *supra*.)

Moreover, plaintiff's theory that defendants wrongfully changed his education rating boils down to conjecture, not evidence. Defendants explained that they had made a mistake and that plaintiff only deserved an education rating of "acceptable" because his B.A. was not actually in a police specialization.[10] Plaintiff now baldly contends the jury disbelieved the defendants, despite the fact his trial theory permitted the jury to believe the defendants on every issue but still award damages if

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[10] In disingenuously claiming on appeal that plaintiff proved the interviewers lowered his score by ten points to counter the veteran's credit, plaintiff points to only two things, the change in the education rating and plaintiff's assertion that "his final certifiable score was marked-over." (RB at 35.) This latter contention, which plaintiff's counsel did not even consider meritorious enough to mention in opening statement or closing argument, is more smoke and mirrors. The "mark-over" to which plaintiff is referring is the notation of "87" at the top-right corner of TE#204. Plaintiff apparently wants to suggest that the "8" has been changed from a "9", but every witness who examined the number said it looked as though someone had darkened the "8", not changed another number. (See FAT 435:5, 437:9-10, 785.) Regardless, plaintiff overlooks that the same document clearly references an oral interview score of "77" and that reference was not changed or marked-over. (See TE#204.) This precludes plaintiff's inference regarding the "87" since the final score could not have been marked-down to 87 without a change to the oral interview score.

they believed any scoring practice was "unfair."[11] But even disbelief of explanations is not direct evidence that the interviewers wrongfully reduced the rating. (See, e.g., *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 47-49 [jury's disbelief of witness's testimony that he did not know plaintiff had tendered defense to insurer was not sufficient basis for jury to conclude the witness actually had such knowledge].) "[T]he law does not condone inferences of improper purpose in the absence of direct evidence to support such inferences." (*Id.* at p. 47.) And it is not just a question of disbelieving the defendants. It is a question of disbelieving Melinda Fonseca, and the examination staff who assisted her, and the C.A.O.. Plaintiff's argument effectively turns the education rating issue into a broad conspiracy against him. There is no evidence of that. Plaintiff needed direct evidence that the education rating was not properly applied to him, such

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[11] A question raised by the jury during deliberations also contravenes plaintiff's assertion. The verdict form stated that the jury was finding against the County and the three individuals. During deliberations, the jury asked the judge whether they could separate the three individuals from the County and "hold the County solely responsible for the liability." (CT 483.) The court ruled that the original verdict language would stand. (SAT 251.) But the jury's question evidences that the jury did not believe the three individual interviewers were responsible for any "unfairness" to plaintiff, which further belies plaintiff's contention that the jury concluded the interviewers reduced plaintiff's score by ten points (a position he never argued). Even plaintiff's counsel recognized that the jury's question indicated that:

> "what has happened here. . . is that we've had a situation where the proof at trial was such that we found another way where we believe the County itself is liable and that the individuals that were named may not necessarily have been included in that negligence. And what I'm referring to specifically are the five people who were passed on their written exam despite having . . . a raw score of less than seventy." (SAT 249.)

as evidence that other interview participants had their education rated according to a different standard. He never offered anything except speculation and conjecture.

VI.

PLAINTIFF'S ACTION FAILS AS A MATTER OF LAW BECAUSE THE D.A.'S OFFICE WOULD NOT HAVE HAD TO HIRE HIM EVEN IF ALL APPLICANTS WITH RAW WRITTEN EXAM SCORES BELOW 70 WERE INELIGIBLE.

As we explained in the AOB, and plaintiff confirms in the Respondent's Brief, plaintiff's causation argument depends on the deletion of all applicants on the eligibility list with raw written exam scores below 70. As a matter of law, plaintiff therefore cannot establish causation since we have shown that the adjustment of the raw written exam scores was not actionable.

However, we also explained in the AOB why plaintiff cannot establish causation even if those applicants were deleted from the eligibility list. (See AOB at 44-45.) Plaintiff fails to show otherwise in the Respondent's Brief. He does not contest the D.A.'s Office broad discretion to bypass applicants in a particular band when the top band falls below five members, causing a collapsing of bands. Instead, his sole response is an erroneous factual argument that misconstrues the record.[12]

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[12] For clarity's sake, we note that plaintiff confuses the selection process when she discusses *Dawn v. State Personnel Board* (1979) 91 Cal.App.3d 588 and then states the facts here are distinguishable because "[h]ere, several candidates on the eligibility list did not attain by examination one of the three highest ranks." (RB at 38, emphasis

Plaintiff claims that the collapsing band scenario in the AOB is flawed because it assumes eleven applicants were selected from the eligibility list, when in fact the D.A.'s Chief Personnel Officer testified that ultimately ten candidates were hired. (See RB at 41-42.) Plaintiff misses the point. The AOB analysis does not assume eleven applicants were hired. It correctly relies on the fact that eleven applicants made it off the eligibility list. Plaintiff's proximate causation analysis must focus on the actual number of selections made off the eligibility list and the dates of selection. The eligibility list is set forth at TE#20. As TE#19 shows, the D.A.'s Office selected *eleven* applicants from the eligibility list. However, one of those chosen applicants, Alan Tate, failed the post-selection tests (the background check and mental and physical exams) and was not hired. (FAT 312, 389.) However, since Alan Tate had a raw score above 70 on the written exam (see TE#21 at p. 9), he must be included in any proximate causation analysis. Plaintiff cannot delete Mr. Tate from the analysis without altering the selection scenario. To even begin to suggest causation, plaintiff must establish that he would have made it off the eligibility list. As the collapsing band analysis in the AOB shows, he cannot do so.

Plaintiff's "simple mathematical breakdown" on causation also misconstrues the record. (RB at 41.) It assumes that of the twelve applicants remaining on the eligibility list after deleting those with initial written exam scores below 70, two applicants "were not selected because

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omitted.) The "rule of three" discussed in *Dawn* is a specific statutory rule applicable to state government civil service hirings (Gov. Code, § 19057), which differs from the County's selection band process set forth in County Civil Service Rule 11.02.

of disqualifying factors discovered after they had been placed on the eligibility list." (RB at 41, fn. 15.) Plaintiff therefore contends that since deleting those two applicants would leave ten applicants on the eligibility list, the County would have had to hire plaintiff since they ultimately hired ten people. This is factually wrong.

The "disqualifying factors" referenced by plaintiff refers to the requisite background check and psychological and physical exams. Those tests, however, are only conducted after an applicant is selected off the eligibility list. (FAT 312, 389-390, 573-574.) As we have explained previously, eleven applicants were selected off the list (see TE#19), but one of them, Alan Tate, failed the subsequent tests. In truth, the other candidate plaintiff suggests was "disqualified" — "Ronald D" — never made it off the eligibility list and thus was never subjected to the post-selection tests. (Compare TE#19 and TE#20 at p.1; FAT 316.) Since "Ronald D" had a raw written exam score above 70 (see TE#21 at p. 7), he must also be included in any proximate causation analysis. Thus, plaintiff's "simple mathematical breakdown" fails because once "Ronald D" is correctly factored into the analysis, the "breakdown" leaves eleven applicants available for ten hirings, even if Alan Tate is omitted.

Accordingly, even if the applicants with raw written exam scores below 70 are deleted from the eligibility list, the selection discretion left by the collapsing band process precludes plaintiff from establishing causation.

VII.

PLAINTIFF'S ACTION FAILS AS A MATTER OF LAW BECAUSE HIS CAUSATION CLAIM IS SPECULATIVE.

We also explained in the AOB that plaintiff's causation analysis is speculative as a matter of law since (a) an unfair interview process would have tainted every applicant's score, (b) the interview process affords broad scoring discretion, and (c) even if plaintiff had been selected from the eligibility list he still would have had to pass psychological and mental exams and a background check to be hired, and he could not have become a permanent employee unless he survived a probationary period during which he could have been summarily dismissed without a hearing. (See AOB at 45-46.) Under such circumstances, any award of lost future wages is speculative as a matter of law.

Plaintiff barely acknowledges these issues. He claims that "[n]othing in the record on appeal indicates respondent would have" failed the post-selection tests. (RB at 41, fn. 15.) But this misses the point. Nothing irrefutably establishes that he would have passed them either. Alan Tate failed these tests despite a law enforcement background like plaintiff's and other law enforcement officers have failed them as well. (FAT 390, 573-574.)

One of the cases plaintiff cites, *Stationary Engineers Local 39*, *supra*, 59 Cal.App.4th 1177, is instructive. We described that case at pages 14-15, *supra*, emphasizing that it was a mandamus case and the salary award was in the nature of back-pay, not lost future wages. But the case is also instructive from a causation standpoint because it shows under what circumstances a damage award is not speculative. The plaintiff in that case was a permanent employee who had passed the

probationary period for civil service applicants, thereby mooting the probation issue that is germane here. That plaintiff also eventually obtained the promotion at issue, so there was no causation issue regarding any post-selection exams and background checks as there is here. Moreover, the damage award was for back-pay only; it was not a lost future wages award such as this one, which speculatively assumes that the plaintiff would have become a permanent employee and been consistently promoted (passing all requisite promotional exams) until retirement age.

Finally, the scoring issue in that case concerned the disparate awarding of preference points *after the applicants had been placed in eligibility ranks*. No one was contesting the exam scores themselves and there was no collapsing band process. It therefore was possible to determine the plaintiff's final ranking by merely adding the preference points. That situation is fundamentally different from challenges to oral interview scoring. Oral interview scoring is inherently subjective and will depend on the interviewers' assessments of the entire interview pool. Thus, one cannot challenge the oral interview scoring process or insist upon deleting certain applicants from eligibility after the fact, as plaintiff does here, without casting doubt over every score. The only non-speculative remedy is to cancel the eligibility list and re-do the exam, something only mandamus, not a civil suit, will allow.

VIII.

PLAINTIFF'S ACTION FAILS AS A MATTER OF LAW BECAUSE HIS ARGUMENTS AT TRIAL DIFFERED FROM HIS GOVERNMENT CLAIM.

The Respondent's Brief ignores this issue entirely. Not a word. But this issue is also fatal to plaintiff's lawsuit. As explained in the AOB, plaintiff's government claim vaguely alleged that the County engaged in "discrimination" because the interviewers "misappropriated" his veteran's credit. Anyone investigating that claim would have realized it was not worth settling because the claim misperceives the scoring process and is therefore supported only by conjecture, not evidence.

However, plaintiff's theory at trial that any scoring conduct or practices the jury considered "unfair" constitutes an actionable breach of a mandatory duty is different because it opens the liability floodgates. The failure to present that theory therefore precluded the County from adequately "consider[ing] the fiscal implications of potential liability." (*Barkley v. City of Blue Lake* (1996) 47 Cal.App.4th 309, 316.)

In addition, plaintiff's government claim cannot be read to give the County notice that plaintiff would attack the common practice of converting raw scores on a qualifying written exam to ensure a sufficient oral interview pool. Since plaintiff never raised that issue in his government claim, he cannot use it as a basis for seeking damages. This defeats his entire damage claim, since plaintiff's erroneous causation theory rests on this issue.

IX.

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

Plaintiff proffers only two arguments in trying to justify the admission of Trial Exhibit 17.

1. He claims he was never allowed the opportunity to review even a summary of the underlying audit report, despite repeated prior requests for production. (See RB at 39-40.) The assertion of "repeated" prior requests being ignored is overstated. (See FAT 403:16-404:15; SAT 15:23-28.) Regardless, the issue was whether Exhibit 17 included D.A. investigator exams, because many of its references, particularly to improper appointments, otherwise were extremely prejudicial. Prior production requests cannot justify admitting an exhibit into evidence before its relevancy can be determined and its authenticity established. Here, after admitting the exhibit over defense counsel's objections (FAT 289-294), the trial judge reviewed a copy of the underlying audit report after defense counsel located a copy from the County auditor at the judge's request. (FAT 401, 603-604; 666-672.) After reviewing it, the judge explained to counsel that the "audit report has nothing, zero, to do with the deputy district attorney investigator's test scores" (FAT 603:27-604:1) and that "there is nothing specific in the [audit] summary that would indicate that the D.A. investigators were involved in any way." (FAT 670: 25-27.)

Although plaintiff is technically correct that he never reviewed the audit summary, the court read its germane contents to counsel, which only referenced deputy district attorneys, student workers, law clerks and promotional exams that had nothing to do with the D.A. investigator

exam. (FAT 604, 666-668.) The trial judge nonetheless refused defense counsel's request for an instruction that Exhibit 17 did not involve D.A. investigator exams, stating he did not know for certain whether the report did or did not include those exams. (FAT 672.) Thus, despite the judge's acknowledgement that the prejudicial document's relevancy was never established, plaintiff was allowed to leave the jury with the impression that Exhibit 17 included D.A. investigator exams. This was prejudicial error.[13]

2. Plaintiff's only other argument regarding Exhibit 17 is a cursory, confusing assertion that the exhibit "was properly admitted as an official record under Evidence Code section 1271, subdivision (a)." (RB 40.) Section 1271 concerns "business records," not official records. The letter is clearly not a business record because it is not a "writing made in the ordinary course of business" and no qualified witness "testifi[ed] to its identity and the mode of its preparation." (Evid. Code, § 1271, subds. (a) (c)). And it is not an "official record" under

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[13] Plaintiff unfairly argues that the defendants "did not show that the DA's office took steps to correct any of the Civil Service Rules violations" mentioned in Trial Exhibit 17. (RB at 40.) This misstates the record since the D.A.'s Director of Personnel did explain that the D.A.'s office resolved all improper appointments referenced in the Exhibit. (FAT 308.) But it also misstates the nature of both the trial and the audit. In 1986, the C.A.O. transferred responsibility for administering County civil service exams to the individual agencies, while retaining oversight responsibility. (FAT 374-376.) Exhibit 17 pertained to the first review that the C.A.O. performed after the decentralization to help rectify the mistakes that inevitably would occur at the agency level. (FAT 374-375.) Plaintiff now suggests the County should have showed what it did in response to this audit, even though Exhibit 17 is dated October 23, 1991, long after plaintiff took the subject exam. The scope of the trial was whether plaintiff received a fair score, not what changes or actions occurred after the audit.

Evidence Code section 1280 because there was no foundation regarding its "sources of information and method and time of preparation" and it is not "a record of an act, condition, or event . . . offered . . . to prove the act, condition or event." (*Ibid.*; *Bufano v. City & County of San Francisco* (1965) 233 Cal.App.2d 61, 72-73.) "'[R]ecords of investigations and inquiries conducted either voluntarily or pursuant to requirement of law by public officers concerning causes and effects, and involving the exercise of judgment and discretion, expressions of opinion, and the making of conclusions, are not admissible in evidence as public records.'" (*Pruett v. Burr* (1953) 118 Cal.App.2d 188, 200-201, citation omitted.)[14]

Trial Exhibit 17 therefore should have been excluded on hearsay, lack of authentication and Evidence Code section 352 grounds. Its admission was reversible error.

X.

UNDER NO CIRCUMSTANCES IS PLAINTIFF ENTITLED TO RECOVER ATTORNEY'S FEES.

Out of the blue, the Respondent's Brief requests an award of plaintiff's trial and appellate attorney's fees pursuant to Code of Civil

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[14] Aside from the hearsay issue, it is simply bad policy to allow such a document into evidence. Allowing the County's attempt to review and improve the examination process to be used as a basis for civil liability by exam-takers will only deter the auditing process, which should be encouraged and protected.

Procedure section 1021.5. Even if the judgment is affirmed, this impromptu request for fees must be rejected.[15]

Settled law establishes that plaintiff cannot show that "the necessity and financial burden of private enforcement . . . are such as to make the award appropriate." (Code Civ. Proc., § 1021.5, subd. (b).) Plaintiff argues that this lawsuit's burden was out of proportion to his individual stake because he will not be fully compensated for his loss once he pays his attorney out of the damage award. (RB at 46.) However, that would be true of any case. Plaintiff's argument therefore reads the necessity and financial burden prong out of section 1021.5 because it would allow a fee award whenever a significant public benefit occurs. That is not section 1021.5's purpose:

> "The private attorney general theory recognizes citizens frequently have common interests of significant societal importance, but which do not involve any individual's financial interests to the extent necessary to encourage private litigation to enforce the right. To encourage such suits, attorneys fees are awarded when a significant public benefit is conferred through litigation pursued by one whose personal stake is insufficient to otherwise encourage the action. *Section 1021.5 was not designed as a method for rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the public interest.* . . . Section 1021.5's policy of encouraging public interest lawsuits is not promoted by awarding fees to persons having strong personal economic interests in litigating matters." (*Beach Colony II v. California Coastal Com.* (1985) 166 Cal.App.3d 106, 114-115, emphasis added, citations omitted.)

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[15] It seems unfair to allow plaintiff to pursue fees now, since he never gave the slightest inkling below (not in his four complaints, at trial or elsewhere) that he would seek fees. The absence of any prior fee request merely confirms that plaintiff had sufficient incentive to file this lawsuit without any fee award. But it also deprived the County of the opportunity to assess the potential fiscal liability, which is one of the fundamental purposes of the Tort Claims Act's claim procedures.

Legions of cases confirm that where, as here, the plaintiff had sufficient financial incentive to bring the lawsuit, a fee award under section 1021.5 is improper. For example, in *Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, a $300,000 fee request was properly denied despite plaintiff's vindication of an employee's important constitutional right to refuse drug testing because the fact plaintiff sought and obtained substantial damages (approximately $500,000) "demonstrated a significant financial incentive for her to bring the underlying action." (*Id.* at p. 30; see also *California Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal.App.4th 562, 570 [subject regulations impacted plaintiff's business, thereby giving him sufficient incentive to litigate]; *Planned Parenthood v. City of Santa Maria* (1993) 16 Cal.App.4th 685, 691-692 [fees denied even though controversy impacted constitutional right to privacy because primary objective of plaintiff's action for declaratory and injunctive relief was to obtain $60,000 in grant money]; *Beach Colony II, supra*, 166 Cal.App.3d at p. 114 [development company had sufficient incentive to litigate public issues concerning development conditions because victory allowed developer to avoid $300,000 in development expenses].)

Moreover, plaintiff never explains what significant public benefit occurred here. Instead of identifying any public benefit in the Respondent's Brief, he makes a vague, unexplained reference about "compelling" the County to end unfair and impartial hiring practices. (See RB at 45.) But plaintiff has not compelled the County to do anything. He did not file a mandamus action, or seek declaratory or injunctive relief to prevent the County from engaging in certain scoring practices. Instead, he sued for damages based upon allegations that *his*

score was unfair, and he received an award that will allow him to enjoy a lifetime salary for a public job that he will never have to perform. How does the public benefit from this? If anything, the route plaintiff chose, while certainly the most financially lucrative for him, posed the greatest harm to the public because it yielded a damage award that the taxpayers will ultimately have to pay.

Plaintiff's fee request must be rejected.

CONCLUSION

For all the reasons set forth in the AOB and this Reply, the Defendants and Appellants respectfully request that the judgment below be reversed and a new judgment entered in favor of Defendants and Appellants.

Dated: March 30, 1998

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