

JONES & MAYER

Attorneys at Law

3777 N. Harbor Blvd.

Fullerton, CA 92835

Telephone: (714) 446-1400 ** Fax: (714) 446-1448 ** Website: www.Jones-Mayer.com

CLIENT ALERT MEMORANDUM

To: All Sheriffs & Chiefs of Police

From: Martin J. Mayer, Esq.

**NEGATIVE COMMENTS IN A SUPERVISOR'S DAILY LOG CAN,
SOMETIMES, BE KEPT FROM THE EMPLOYEE**

On August 24, 2015, the California Supreme Court addressed the question, in *Poole v. Orange County Fire Authority*, “whether [Gov. Code] section 3255 gives an employee the right to review and respond to negative comments in a supervisor’s daily log, consisting of notes that memorialize the supervisor’s thoughts and observations concerning an employee, which the supervisor uses as a memory aid in preparing performance plans and reviews?”

The conclusion of the Court is: it depends.

The Court acknowledged that “(u)nder the Firefighters Procedural Bill of Rights Act [FFBOR] (Gov. Code, § 3250 et seq.), a firefighter has the right to review and respond to any negative comment that is ‘entered in his or her personnel file, or any other file used for any personnel purposes by his or her employer.’”

However, the Court unanimously concluded that, “because the log was not shared with or available to anyone other than the supervisor who wrote the log, it does not constitute a file ‘used for any personnel purposes by his or her employer’ and section 3255 does not apply.”

Facts

“Captain Culp, plaintiff Steve Poole’s supervisor, maintained what he called a ‘daily log’ regarding each of the employees that he supervised. He created the log using both a computer and handwritten notes. He created a separate file for each employee, stored on a flash drive and also in hard copy, which he kept in his desk with the employee’s name on it.” He noted both positive and negative aspects of the employee’s behavior and, with each of the employees he supervised, “Culp would

address with the employee, behavior recorded in the log about which he had concerns, and [would inform the employee] if the behavior nevertheless continued it might be mentioned in the performance review.”

“From time to time Culp discussed his concerns about plaintiff’s performance with Culp’s own supervisor, Battalion Chief Phillips [and others]. But he did not share the log itself with them and he did not allow other employees to review the daily log.”

After receiving a below average annual performance evaluation, Poole went to a union representative who “demanded that Culp provide him with a copy of plaintiff’s ‘station file,’ and Culp gave him a copy of his daily log regarding plaintiff.” This was the first time that Poole became aware of the fact that his supervisor maintained such notes on him.

“Plaintiff and the Orange County Professional Firefighters Association filed a petition and complaint in the superior court, seeking declaratory and injunctive relief, damages, civil penalties, and a writ of mandate directing defendants to comply with section 3255 before including adverse comments in plaintiff’s personnel files.” The trial court denied relief.

The matter was heard by the Court of Appeal which “reasoned that the daily log constituted a ‘file used for . . . personnel purposes’ because a substandard performance evaluation was based on adverse comments contained in the daily log *and because Culp orally revealed some of the contents of the daily log to his battalion chief.* Therefore, the Court of Appeal concluded that section 3255 required that plaintiff be given an opportunity to respond to the negative comments in the log before

they were ‘made known to the employer.’” (Emphasis added.)

Supreme Court’s Analysis

The Court noted that, under FFBOR, “[a] firefighter shall not have any comment adverse to his or her interest entered in his or her personnel file, or any other file used for any personnel purposes by his or her employer, without the firefighter having first read and signed the instrument containing the adverse comment indicating he or she is aware of the comment.”

The question for the Court, therefore, was “whether negative comments contained in a document memorializing a supervisor’s own thoughts and observations that is not itself made available to or shared with anyone else comes within section 3255?”

The Court stated that “(t)he Act does not define the phrase ‘used for any personnel purposes by his or her employer.’” Furthermore, “(t)he statutory language referring to a file ‘used for any personnel purposes by his or her employer’ might, in isolation, be read broadly enough to include Culp’s log, which he used in the performance of his duties as a supervisor.”

However, “(r)eadng the statutory language in context convinces us that the Legislature did not intend section 3255 to be read so broadly.” The Court noted that the “Legislature was . . . specifically concerned with ‘personnel files that are used or have been used to determine th[e] firefighter’s qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.”

The Court found that several sections of FFBOR “appear to operate in parallel, and in the service of the same general goal - ‘to

facilitate the officer's ability to respond to adverse comments potentially affecting the officer's employment status.”

The purpose of those statutes is to “ensure that the employee's response is made part of the written record, so that any individual who accesses that record will have access to the employee's response as well as to the adverse comment.”

As such, the phrase “any other file used for any personnel purposes by his or her employer,” when “read in context, . . . should be interpreted to encompass any written or computerized record that, although not designated a personnel file, can be used for the same purposes as a file of the sort described in section 3256.5 - as a record that may be used by the employer to make decisions about promotion, discipline, compensation, and the like.”

However, the Court held, that “(a) supervisor's log that is used solely to help its creator remember past events does not fall within the scope of that definition. Even if a supervisor uses his or her notes to help draft performance evaluations and other documents that ultimately are placed in a personnel file, the notes themselves are not a file preserved by the employer for use in making decisions about the firefighter's employment status.”

“Here, Culp was not plaintiff's employer. Plaintiff does not contend, and nothing in the record demonstrates, that Culp himself had the authority to take adverse disciplinary actions, such as demotions or discharge, against plaintiff on behalf of his employer, the Orange County Fire Authority. Culp's comments thus could adversely affect plaintiff only if and when they were placed in a personnel file or in some other form to which the employer - that is, those who had

the authority to discipline plaintiff - had access.”

The Court agreed that “a document containing adverse comments may come within the disclosure requirement even if not formally entered into the official personnel file, if the document was either (1) maintained in such a manner that it would be available to those making personnel decisions in the future, or (2) was actually used by the employer in making a personnel decision, or both.”

The Court then discussed several cases decided pursuant to the Public Safety Officers' Procedural Bill of Rights Act (POBR) (Gov. Code sections 3300-3313).

The Court stated in a footnote that “Section 3255 is virtually identical to a statute applicable to public safety officers Consequently, cases interpreting those statutes are relevant to our interpretation of section 3255.” In reviewing each of those cases, the Supreme Court found reasons to distinguish them from the situation in *Poole*.

“In the present case, there is no evidence that Culp's log would be available to anyone making personnel decisions in the future. The log was available to no one other than Culp himself. Many of the potentially negative comments contained in the log were never included in any document made available to plaintiff's employer, because Culp either deemed the incidents inconsequential or resolved them in plaintiff's favor. And *it is undisputed that the documents Culp prepared with the assistance of the log - plaintiff's performance evaluations and improvement plan - were disclosed to plaintiff before they were entered into his personnel file.*” (Emphasis added.)

The Court addressed the fact that Culp discussed information from his logs with those who could impose discipline upon Poole, but found that not to be significant.

Culp “merely discussed with others some of the incidents that he had observed and also recorded in his log, preliminary to completing plaintiff’s evaluations and performance improvement plan. Nothing in the Act [FFBOR] attempts to regulate a supervisor’s preliminary verbal consultations with his superiors or human resources personnel prior to completing an evaluation. The statute plainly gives firefighters the right to review and file a written response to certain documents. Its language cannot be stretched to include a right to file a written response to verbal communications.”

HOW THIS AFFECTS YOUR AGENCY

As noted by the Supreme Court, since many sections of POBR and FFBOR are virtually identical, court decisions regarding one applies to the other, as well. Therefore, this decision is applicable to interpreting Gov. Code sections 3305 and 3306 of POBR, and modifies what many have believed to be the law up until now.

Historically, it was thought that a supervisor’s written comment, which was adverse to the interest of an officer, could be generated and maintained by the supervisor but, first, the officer needed to be made aware of it. The rationale was that the officer could then, pursuant to Gov. Code section 3306, have a written response attached to the adverse comment.

Now, however, that right to respond will depend upon circumstances. If, as the Court found, the note itself is “not shared with or available to anyone other than the supervisor

who wrote [it], it does not constitute a file ‘used for any personnel purposes by his or her employer’ and section [3305] does not apply.”

Does this mean that supervisors can keep “secret” notes on an officer’s performance and not inform the officer of them? Perhaps.

If those notes, as the Court states, are just “the supervisor’s thoughts and observations concerning an employee,” and the notes themselves are not shared with anyone, they need not be disclosed to the employee.

If a supervisor is keeping such notes in a personal file or on a computer, but they are not shown to anyone else, those would not be considered adverse comments which were “entered in his or her personnel file, or any other file used for any personnel purposes by his or her employer”

However, if the actual notes are shared with others, or if the supervisor has authority to impose discipline then, according to this decision, the officer would be entitled to know of their existence and be afforded an opportunity to respond, before they were placed in such a file.

As with all legal issues, it is imperative that you secure advice and guidance from your agency’s legal counsel. However, as always, if you wish to discuss this case in greater detail, please feel free to contact me at (714) 446 – 1400 or via email at mjm@jones-mayer.com.

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