No. A130030 & A129306
Consolidated

In the Court of Appeal

Of the State of California

First Appellate District

Division 3

KHEVEN LAGRONE

Petitioner, Respondent and Cross-Appellant,

v.

CITY OF OAKLAND, et al.,

Respondents, Appellants and Cross-Respondents.

RESPONDENT'S BRIEF and CROSS-APPELLANT'S OPENING BRIEF

Appeal from
Alameda County Superior Court Case No. RG09477713
The Honorable Frank Roesch

PAUL KLEVEN (SB# 95338)
LAW OFFICE OF PAUL KLEVEN
1604 Solano Avenue
Berkeley, CA 94707
Telephone: (510) 528-7347
Facsimile: (510) 526-3672
Pkleven@KlevenLaw.com

Attorneys for Petitioner, Respondent & Cross-Appellant Kheven LaGrone

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

INTRODUCTION

The City of Oakland ignored the City Charter and its own civil service rules in order to deny Kheven LaGrone and other laid-off Port Department employees their right to continued City employment. The City terminated LaGrone in his late forties with little more than a handshake after assuring him he would be moving into another position, and after he had spent more than half his life as an engineer in the City's Port Department.

This Court should affirm the trial Court's order requiring the City to follow the Charter and the civil service rules, which were designed to prevent City officials from arbitrarily ending the careers of public employees such as LaGrone.

LaGrone's writ petition has resulted in the enforcement of an important right affecting the public interest, and this Court should also reverse the trial Court's order denying LaGrone attorney fees as a private attorney general.

RESPONDENT'S BRIEF[1]

STATEMENT OF THE CASE

Kheven LaGrone filed a petition for writ of administrative mandamus on October 5, 2009, and an amended petition on January 11, 2010, alleging that respondents City of Oakland ("City"), City of Oakland Civil Service Board ("Board"), and Port of Oakland ("Port") had illegally terminated him from his classified position as a Port Associate Engineer. (Clerk's Transcript on Appeal, Volume I ("CT-I")[2] 1-2, 137-138.) The City and the Board answered on February 11, 2010 (CT 380), while the Port demurred. (CT-II 439.)

On June 4, 2010, the trial Court overruled the demurrer (CT-II 561-562), and granted the writ petition, determining that respondents had improperly denied LaGrone his right to "bump into a City position

---

[1] Pursuant to California Rules of Court, rule 8.216(b), this brief includes the Respondent's Brief on the City's appeal at pages 1-50, and the Cross-Appellant's Opening Brief at pages 51-62.

[2] LaGrone will follow the City of Oakland's practice in its Appellant's Opening Brief ("City AOB") 3 n.1, citing to the Clerk's Transcript filed in Case No. A130030 unless otherwise indicated.

in a common classification under the applicable layoff rules." (Order, CT-II 557.) The Court also granted in part and denied in part LaGrone's motion to augment the administrative record. (CT-II 555.)

The City and the Board appealed on August 9, 2010. (Case No. A129306 CT-II 715.)

LaGrone moved for attorney's fees pursuant to Code of Civil Procedure section 1021.5 and Labor Code section 218.5. (Cross-Appellant's Appendix on Appeal ("CAA") 1-22.) The Court denied the motion on September 23, 2010. (CAA 68.)

On September 22, 2010, the Court had entered Judgment granting the petition based on the reasons set forth in the June 4, 2010 Order (CT-II 575-576), and also issued the writ of mandamus. (CAA 66-67.) The City alone appealed from the Judgment on October 8, 2010. (CT-II 582.) On October 28, 2010, LaGrone appealed/cross-appealed from the order denying attorney fees, and from the partial denial of his motion to augment. (CAA 71.) LaGrone will not be pursuing his appeal from the denial of the motion to augment.

Pursuant to stipulation, this Court consolidated

the appeals on December 14, 2010.

STATEMENT OF FACTS

A. LaGRONE'S QUARTER CENTURY OF CIVIL SERVICE

Kheven LaGrone is a Civil Engineer licensed by the State of California who was 49 years old at the time of his hearing before the City of Oakland Civil Service Board in June 2009. (Administrative Record Re: Petition For Writ of Mandate, Oakland Civil Service Board ("AR-OAK") 170-171.) He received a Bachelor of Science degree in civil engineering from Cal Poly, and a Masters of Science degree. (AR-OAK 170.)

In 1981, LaGrone began working as an engineer for the Port of Oakland. (AR-OAK 171.) The Charter of the City of Oakland ("Charter") established the Port Department ("Port") as a department within the City of Oakland ("City"), which enjoyed a certain amount of autonomy. (Charter, Art. VII, §§ 700, 706; CT-II 421-423.) The Charter also established a unitary "comprehensive personnel system based on merit" under the supervision of a Civil Service Board, and mandated that, with certain specified exemptions, the

"competitive Civil Service shall include all offices and employments in the City government." (Charter, Art. IX, §§ 900(a), 901, and 902; CT-II 426.) The Charter specifically placed Port employees "within the personnel system of the City established pursuant to and subject to the provisions of Article IX of this Charter,..." (Charter, Art. VII, § 714; CT-II 425.)

After starting as a Junior Civil Engineer, LaGrone received promotions to Assistant Civil Engineer and, ultimately, to Associate Civil Engineer. (AR-OAK 171-173, 181-183.) In May 2002, while LaGrone was an Assistant Civil Engineer, the Port changed job titles by adding the word "Port" before the job title. (AR-OAK 24-25, 44-45, 103-106, 129, 171-173, 182-183, 191.) The title change had no effect on LaGrone's duties, and he received no notice that he could dispute the change. (AR-OAK 44-45, 171-173, 175, 182, 191.) The title change also had no effect on LaGrone's right to transfer into a City position, as shown by a March 4, 2003, letter from the City making sure that LaGrone was "still interested in remaining on the transfer list." (AR-OAK 29; see also AR-OAK 44-45, 171, 175, 191.) As

LaGrone explained, "you have to be in the same classification to be on the transfer list." (AR-OAK 191.)

When he was seeking his final promotion to the Associate Engineer level, LaGrone applied to both the City and to the Port, receiving rankings from each and a promotion to the position at the Port, which was officially titled Port Associate Engineer (Civil Work). (AR-OAK 44-46, 154, 179, 185-187.) According to documentation produced by the City, that classification had been created in 1953, was retitled "Civil Engineer" in 1982, and again retitled "Port Associate Engineer (Civil Work)," on May 21, 2002. (AR-OAK 129, 181.) LaGrone was also placed on a waiting list for the next City position in the higher classification, to which the City gave the title, "Engineer Civil (Office)." (AR-OAK 154, 185-187.)

As of June 30, 2008, CalPERS stated that LaGrone had 25.623 years of service credit with the City. (AR-OAK 20, 182-183.) LaGrone understood that he was eligible for transfer to a City engineering position, because other engineers had transferred between the

Port and the City. (AR-OAK 171-172, 190-191.) LaGrone also understood that, in the event of a layoff, he was entitled to "bump" other employees throughout the City who were in his classification. (AR-OAK 22, 27, 173-175.) As a Port Associate Engineer (Civil Work), he understood he was in the same classification as a Civil Engineer. (AR-OAK 184-185.)

B. DURING AUGUST 2008 LAYOFFS, THE CITY AND THE PORT BOTH NOTIFIED LaGRONE THAT HE WOULD BUMP INTO CITY POSITION IN THE CIVIL ENGINEER CLASSIFICATION

On August 15, 2008, Port Executive Director Omar Benjamin sent LaGrone a letter stating that his position was being eliminated in the new Operating Budget, and that he did not have enough seniority credits to "bump" any other employee in that classification at the Port. (AR-OAK 31, 74, 175-176.)

Benjamin continued:

> However, since the Port and the City of Oakland are under a comprehensive personnel system, and based upon your seniority credits in the classification of Port Associate Engineer (Civil Work) you do have seniority over other employees in the Civil Engineer classification at the City of Oakland and will bump a less senior City of Oakland employee in this classification.

(AR-OAK 31, 74, 175.)

The letter "officially notif[ied]" LaGrone that he was being reassigned and should report to his new position at the City Community & Economic Development Agency ("CEDA") on September 2, 2008. (AR-OAK 31.)

A week later, on August 22, 2008, the City sent LaGrone a letter welcoming him to CEDA, and confirming the time and place for him to report as he had been directed. (AR-OAK 33, 76, 176.)

C. NEW ACTING CITY ADMINISTRATOR SEARCHED FOR BASIS TO PREVENT PORT ENGINEERS FROM BUMPING INTO CITY POSITIONS

Acting City Administrator Dan Lindheim was opposed to allowing the laid-off engineers from the Port Department to bump other City employees. "[T]here was a fairly large number of engineers who were slated to bump into ... the City department, in addition to non-engineers who were slated to bump into other positions.... So at a gut level, my attitude was this is really going to be devastating to the City." (AR-OAK 208.) Lindheim, an attorney who had been acting City Administrator for three weeks and knew little about the

personnel rules,[3] began talking to people to try to develop "a basis for saying no." (AR-OAK 208.)

After learning that some City engineers had been unable to transfer to the Port, reading Port minutes regarding the creation of "separate kind of classifications,"[4] and looking at Port job descriptions, Lindheim decided "the City did have a case here" to reject the Port engineers, and suggested that strategy to the City Attorney. (AR-OAK 208-209.)

Although Lindheim did not know whether the City had previously allowed Port-specific employees to bump into City positions (AR-OAK 221), he advised Benjamin in an August 26, 2008 letter that, since the Port had

---

[3] Even at the time of the July 9, 2009 hearing, Lindheim did not know what a "classification" was, had never seen the Personnel Rules and Procedures of the Port of Oakland ("Port Personnel Rules"), was not sure they were relevant, had no knowledge of job title changes at the Port, and did not know whether the Charter authorized the Port to create its own personnel rules and procedures. (AR-OAK 129, 215-219.)

[4] While Lindheim stated that he reviewed Port minutes (AR-OAK 209), he gave no indication of specifically reading minutes from a May 21, 2002 meeting that led to the adoption of Port Ordinance No. 3702 (AR-OAK 103-107), contrary to the statement at City AOB 18.

exercised its "authority to create Port-specific classifications," the City "declines to accept laid off employees" in those classifications. (AR-OAK 78, 215.)[5] The letter was directed at the class of Port engineers rather than LaGrone, whom Lindheim did not know. (AR-OAK 215.)

Benjamin therefore sent another letter to LaGrone on August 29, 2008, placing him on administrative leave because the Port had been advised that the City would not be accepting any Port employees in his classification. (AR-OAK 40, 80, 177-178.) Benjamin hoped to arrange "to have you placed in a City position as you were originally notified. Ultimately, however, it will be the City officials' decision with which we must comply." (AR-OAK 40, 177-178.)

On September 11, 2008, Benjamin notified LaGrone that, since the City had refused to accept any Port employees in his classification, LaGrone was being laid off, and he would receive his final paycheck by

---

[5] Although Lindheim testified that he had received a written opinion on the issue of Port-specific positions from the City Attorney, the City never produced it. (AR-OAK 216.)

September 26, 2008. (AR-OAK 42, 82, 178.)

D. LaGRONE PURSUED ADMINISTRATIVE REMEDIES FOLLOWING HIS TERMINATION

LaGrone sought a "Skelly" hearing before the Port to protest his termination, which was held on September 30, 2008. (AR-OAK 44-46, 48-49, 179.) LaGrone's union, the Western Council of Engineers,[6] filed a Position Statement in connection with the "Skelly" hearing, reciting LaGrone's employment history and arguing that the Board had never approved any title changes to Port engineering positions, as required by section 902 of the Charter. (AR-OAK 44-46, 179, citing Charter, Art. IX, § 902; CT 426.) On November 12, 2008, the Port determined that the layoff was not a "just cause" termination, and that it could do nothing to enforce a transfer to the City. (AR-OAK 48-49.)

By that time, LaGrone had appealed to the Board on the grounds that his layoff had violated the Charter, as well as Articles 3 and 9 of the Personnel Manual of the City of Oakland Civil Service Board ("City

---

[6] Port engineers and City engineers were represented by different unions. (AR-OAK 185.)

Personnel Manual"), and the Personnel Rules and Procedures of the Port of Oakland ("Port Personnel Rules"). (AR-OAK 3, 12, and generally 3-66.)[7] The City responded (AR-OAK 67-164),[8] and the matter proceeded to a hearing on June 11 and July 9, 2009. (AR-OAK 165-233.)

At the hearing, in addition to Lindheim, the City presented testimony from City Principal Human Resource Analyst Jamie Pritchett. Like Lindheim (AR-OAK 215-216), Pritchett had absolutely no knowledge of the Port Personnel Rules. (AR-OAK 203.)

Pritchett testified that, during a reduction in force or layoff, an employee's seniority dictated the right to a position within a certain classification. (AR-OAK 198.) Employees of the City and the Port were considered to be in common classifications for purposes of seniority during layoffs as long as the City and the Port agreed. (AR-OAK 197-198, 201, 204.) If a laid-

---

[7] LaGrone specifically incorporated the Position Statement from the Skelly hearing. (AR-OAK 44-46, Exhibit L to Kheven LaGrone's Appeal from Termination.)

[8] The City's response included the applicable portions of the City Personnel Manual and the Port Personnel Rules. (AR-OAK 85-97.)

off Port employee had more seniority than a City employee in a common classification, the Port employee would have the right to "bump[]" the City employee, and would remain employed. (AR-OAK 197-198.)

During the summer of 2008, Pritchett was the City's layoff coordinator, responsible for working with the Port representatives to determine which City employees would be bumped by laid-off Port employees in common classifications who had more seniority. (AR-OAK 197.) LaGrone would have had 16 months of seniority in his current position, but also had reversion rights based on his 22 years in his former position as Assistant Civil Engineer, and could bump anyone with less seniority in either classification. (AR-OAK 198-200.)[9]

When Pritchett first discussed the common classifications with Port personnel during the 2008 layoffs, she believed that Port Associate Engineer and City Civil Engineer were common classifications, based

---

[9] Since Pritchett had no knowledge of the Port Personnel rules, her testimony was based on her assumption that "the Port's rules mimic the City's rules." (AR-OAK 200-201.)

on a comparison of their job descriptions. (AR-OAK 199, 202.) The classifications were therefore "initially deemed common" by the City and the Port, resulting in the August 15, 2008 and August 22, 2008 letters from the Port and the City advising LaGrone that he would bumping into a City Civil Engineer position. (AR-OAK 31, 33, 74, 76, 199, 202.) According to Pritchett, there was no list or other written document available at the time,[10] and "it was more a matter of the Port suggesting different classifications and the City countering yes or no." (AR-OAK 206.)

After the City had initially said "yes" regarding LaGrone's common classification, Pritchett "change[d]" her "understanding" of the classifications, "based on

---

[10] Following the hearing, LaGrone submitted a document entitled City of Oakland Seniority Report for Port as of 7-21-08 (AR-OAK 234-245), which showed LaGrone in Job Class 10101, which had a City Job Title of Engineer, Civil (Office), and a Port Job Title of Port Associate Engineer (CW). (AR-OAK 239, 242.) The Seniority Report was part of LaGrone's motion to augment (CT-II 393, 399), and the Court accepted the City's contention that the motion was moot as to the Report because it was already part of the administrative record. (CT-II 499, 555.)

direction from the City administrator." (AR-OAK 199.) Pritchett's understanding did not change because she had reviewed the Port Personnel Rules or any other documentation, but because she had spoken to Lindheim and been told that "certain engineering classifications were considered to be Port specific." (AR-OAK 199, 201-202, 205-206.)

According to Pritchett, the City still did not have a list of Port classifications as of the time of the hearing, and there was still no document showing which classifications the City and the Port agreed were common classifications, though the City was in the process of creating such a list. (AR-OAK 204-205.) Pritchett testified that the City's Classification Plan was not a written document "the way its stated in the City's civil service rules," but "is more of a concept as opposed to an actual document." (AR-OAK 203-204.)[11]

At the hearing, the City also presented City Principal Civil Engineer Wing Tak (David) Lau, whose declaration stated that he had once considered applying

---

[11] See City Personnel Manual 2.01(c) and 3.02-3.04 (AR-OAK 85-87; CT-I 162, 164-166.)

for a transfer to become the Principal Civil Engineer for the Port, but did not apply because an unidentified person in the Human Resources Department at the Port told him that the position was for Port employees only. (AR-OAK 139-140, 221-222.) Lau believed he was eligible for the position. (AR-OAK 222.)

As part of his appeal to the Board, LaGrone presented a July 31, 2008 letter to his union, Western Council of Engineers, in which Port counsel Jones Day stated that:

> the following Port classifications represented by [Western Council of Engineers] are common classifications with the designated City positions:

Port Classisfications		City Classifications
Junior Civil Engineer	–	Assistant Engineer I
Assistant Civil Engineer	–	Assistant Engineer II
Civil Engineer	–	Civil Engineer
Supervising Civil Engineer	–	Supervising Civil Engineer

(AR-OAK 22, 173-174, 225-226.)

The July 31, 2008 letter indicated that Port counsel was amending a statement contained in a July 25, 2008 letter to the effect that there were no common classifications. (AR-OAK 22.) At the hearing, the City produced the July 25, 2008 letter, in which Port counsel had been responding to a comprehensive request

for ten categories of documents from LaGrone's union, and made a statement about common classifications as part of Response No. 10. (AR-OAK 159-163, 226-227.)

The City also produced a July 14, 2008 letter from Port Human Resources Director Deborah L. Preston to the City. (AR-OAK 99-101, 226-227.) Preston's letter contained a list of common classifications that did not include the engineering classifications. (AR-OAK 99-101, 226-227.) Preston's letter stated that it was based on an attached May 17, 1994 letter, but the letter was not included in the City's evidence before the Board. (Exhibit 8; AR-OAK 98-101.)[12]

E. THE BOARD DENIED LaGRONE'S APPEAL AND ISSUED FINDINGS

The Board denied the appeal in closed session with

---

[12] The May 17, 1994 letter, which was attached as part of Exhibit 8 to LaGrone's Amended Petition (CT 309-311), demonstrated that Preston's July 14, 2008 letter inexplicably deleted the four common engineering classifications listed in the Jones Day letter of July 31, 2010. (CT 311; compare AR-OAK 100.). (CT-I 279-CT-II 371.) The trial Court, however, denied LaGrone's motion to augment the administrative record to include Exhibit 8 (CT-II 392-399, 555), and LaGrone has now abandoned his cross-appeal from that portion of the Order. (CAA .)

almost no discussion, and then provided individual rationales for the denial. (AR-OAK 227-233.) After advising the parties of its decision, the Board requested that the City's counsel prepare findings of fact and conclusions of law. (AR-OAK 211-212.)

On August 17, 2009, LaGrone submitted a written objection to the proposed findings, along with the City of Oakland Seniority Report for Port as of 7-21-08 (AR-OAK 234-245), which showed LaGrone in Job Class 10101, with a City Job Title of Engineer, Civil (Office), and a Port Job Title of Port Associate Engineer (CW). (AR-OAK 239, 242.)

At a hearing on August 27, 2009, the City counsel explained how The [Proposed] Findings of Fact and Conclusions of Law ("Findings") were prepared. (AR-OAK 250-251.) LaGrone attempted to discuss the Seniority Report, requesting that the hearing be reopened and that it be considered as new evidence (AR-OAK 251-255.) The Board later determined there was no motion to reopen the hearing, and passed a motion to approve the Findings, which were signed on October 23, 2009. (AR-OAK 258-259, 261-262.)

In the Findings, the Board reached the conclusion of law "that at the time appellant was laid off, the Port Associate Engineer classification was not a city-wide classification, and that appellant had no bumping rights into a City engineering position." (AR-OAK 262.) The Board based its conclusion on four findings of fact: (1) the Port had established "port-specific" classifications into which City employees could not transfer, a practice accepted by both the City and the Port; (2) Port and City engineers were represented by different unions; (3) Port counsel Jones Day did not provide any explanation the reversal of its opinion that there were no shared engineering classifications; and (4) "The determination of which classifications were considered city-wide common classifications for the purposes of establishing seniority in the event of a layoff was based on mutual agreement between the City and the Port. The City and the Port did not mutually agree that appellant's classification was a city-wide classification." (AR-OAK 262.)

F. AFTER INDEPENDENTLY REVIEWING THE RECORD, THE TRIAL COURT FOUND THAT LaGRONE WAS IN A COMMON CLASSIFICATION

After conducting its independent review of the administrative record pursuant to *Fukuda v. City of Angels* (1999) 20 Cal.4th 805 (June 4, 2010 Reporter's Transcript on Appeal ("6/4/10" RT") 6, 14), the trial Court concluded that the preponderance of the evidence established that LaGrone "was improperly denied his right to bump into a City position in a common classification under the applicable layoff rules." (Order, CT-II 557.) The Court determined that "Article IX Section 902 of the City Charter requires that all offices and employments in the City government are included in the Civil Service unless specifically excluded." (Order, CT-II 557.) Subsection (c) of Section 902 provided for the exclusion of certain "'positions peculiar to the operation of the Port,'" but such positions could not be "created unilaterally, or by de facto inaction on the part of the City or the Civil Service Board particularly." (Order, CT-II 557.)

The trial Court found no evidence that the Board had ever "approved any exclusion from the general civil

service rules for a port-specific classification of Port Associate Engineer." (Order, CT-II 557.) Although there was some evidence that the Port had treated the Port Associate Engineer position as limited to Port employees, at least in terms of promotional opportunities, that did not establish that the position was excluded. (Order, CT-II 557-558.) The re-titling of the position in 2002 also did not result in exclusion, because it was not followed by a Board determination that the position was "'peculiar to the operations of the Port.'" (Order, CT-II 558.) The City's asserted acquiescence in the Port's creation of port-specific positions also did not establish that the position was excluded from civil service. (Order, CT-II 558.)

At the time of the lay-off, LaGrone was therefore:

> in a common classification and was subject to the generally-applicable rules allowing reversion into a previously-held classification, regardless of whether the available position within the classification is at the Port or at some other department of the City, as the City originally determined in

its August 15, 2008 notice to Petitioner.[13] (Order, CT-II 558.)

The Court ordered a writ to issue requiring respondents to reinstate LaGrone and permit him to "exercise his reversion/bumping rights into an appropriate position, either at the Port or at another City department." (Order, CT-II 558.) The Court issued the writ on September 22, 2010, and entered a Judgment based on the reasons set forth in the Order. (Order, CT-II 575-576; CAA .)

ARGUMENT

I. STANDARD OF REVIEW

Although the City correctly notes that the standard of review governing its appeal is different from the standard that governed the trial Court's inquiry into the validity of the Board's decision under Code of Civil Procedure section 1094.5, (City AOB 22-23), the City inexplicably focuses almost exclusively on the latter standard, arguing at length that the

---

[13] The August 15, 2008 notice actually came from the Port. (AR-OAK 31, 74.) The City's notice was dated August 22, 2008. (AR-OAK 33, 76.)

trial Court gave insufficient deference to the Board's Findings. (City AOB 24-38.)

It is true that a "presumption of correctness" applies even in cases, such as this one, where the trial Court is authorized to exercise its independent judgment under *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817, because a fundamental vested right is at issue. (City AOB 22-27.) The City cites a string of cases construing that presumption,[14] which would be relevant if, for example, the court below had refused to apply the appropriate standard of review. (*Fukuda*, 20 Cal.4th at 824.)

But in this case, the trial Court explicitly stated that it had conducted an independent review under *Fukuda* and, after giving deference to the Board, arrived at the tentative ruling that ultimately became the Order. (CT-II 557-558; 6/4/10 RT 6, 14.) The trial Court functioned exactly as the California Supreme Court envisioned it would in *Fukuda*:

> [T]he presumption provides the trial court with a starting point for review – but it is

---

[14] The City even takes a passage at City AOB 26-27 verbatim from *Fukuda,* 20 Cal.4th 805 at 816-817.

> only a presumption, and may be overcome. Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings.

(*Fukuda*, 20 Cal.4th at 818.)

Even if the trial Court had refused to follow the *Fukuda* procedure, the error would only be relevant on appeal if the City also established that, as a result, there was no substantial evidence supporting the trial Court's Order – the standard of review that applies now that the trial Court has substituted its own findings for the Board's. (*Lake v. Reed* (1997) 16 Cal.4th 448.) On appeal, this Court "'need only review the record to determine whether the trial court's findings are supported by substantial evidence.'" (*Lake*, 16 Cal.4th at 457 (citations omitted); see also *Jackson v. City of Los Angeles* (2003) 111 Cal.App.4th 899, 902.) On appeal, this Court "'must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision.... Where the evidence supports more than one inference, we may not substitute our deductions for the trial court's.'" (*Lake*, 16 Cal.4th at 457 (citations

omitted).)

As discussed in section II.A *infra*, the City has made no attempt to apply the appropriate standard of review to the case before this Court, effectively waiving the issue.

The City does correctly note that, on appeal, this Court reviews questions of law independently and is not bound by the interpretations of the Board or of the trial Court. (City AOB 23-24; see *Jackson*, 111 Cal.App.4th at 902; *Runyan v. Ellis* (1995) 40 Cal.App.4th 961, 964.) The Court should, however, reject the City's further suggestion that the Board's interpretation of the City Personnel Manual and "its own civil service rules" is entitled to any deference. (City AOB 24, 27.)

The City has consistently argued that there are "no specific rules in the City Personnel Manual" governing the layoff procedure at issue here. (City AOB 16.) As the City Attorney argued below, while Rule 9 of both the City Personnel Manual and the Port Personnel Rules requires layoffs to occur based on City-wide classifications, "there are no specific

rules. There's no follow up. There's no policies and procedures that particularly turned on that broad statement.... [T]here are no specific procedures." (6/4/10 RT 3, 6.)[15] In opposing LaGrone's request to this Court to take judicial notice and additional evidence, the City argued that the "practice [of allowing bumping in common classifications] has occurred 'outside' the civil service rules." (City of Oakland's Memorandum of Points and Authorities In Opposition to Request for Judicial Notice and For Court To Take Additional Evidence ("Opposition") 5.)

As the Supreme Court explained in *Bonnell v. Medical Board of California* (2003) 31 Cal.4th 1255, "the weight accorded to an agency's interpretation is 'fundamentally situational' and 'turns on a legally informed, commonsense assessment of [its] contextual merit.'" (*Bonnell*, 31 Cal.4th at 1264-1265 (citations omitted).) The degree of deference depends on whether

---

[15] The City further argued that the Port had not followed its own rules for changing classifications (6/4/10 RT 7), and the City's witnesses at the administrative hearing acknowledged they had no knowledge of the Port Personnel Rules. (AR-OAK 203, 215-216.)

the agency has a "'"comparative interpretative advantage over the courts'" and on whether it has arrived at the correct interpretation." (*Bonnell*, 31 Cal.4th at 1265 (citations omitted).)

There is no reason in this case for the Court to give any deference to the Board's interpretation, because there were no rules for the Board to interpret. (City AOB 16; 6/4/10 RT 3, 6-7; Opposition 5.) The Findings purportedly relied on a "practice," and the Board makes no reference in the Findings to the City Personnel Manual, the Port Personnel Rules, the Charter, or any other rule, statute or ordinance. (AR-OAK 261-262.)

The Board therefore had no "comparative interpretative advantage" over the trial Court or this Court in evaluating the evidence regarding the practice, and any "deference is unwarranted here." (*Bonnell*, 31 Cal.4th at 1265.)

II. THE CITY HAS WAIVED ITS RIGHT TO CHALLENGE THE TRIAL COURT'S ORDER ON APPEAL

A. The City Misconstrues the Actual Holding In the Court's Order, Fails to Address The Order On The Merits, and Fails to Address the Evidence Supporting That Order under the Applicable Standard of Review

The entire premise underlying the City's critique of the trial Court's order is false, because the City fundamentally misstates the actual holding of the trial Court. (CT-II 557-558.) According to the City, this Court should reverse "the trial court's finding that respondent's classification had improperly been excluded from the civil service rules in violation of Charter Section 902(c)." (City AOB 46.) According to the City, the "court's finding and analysis is based on a clearly erroneous reading of the Charter" because the "consequence of the Port's action in making the Port Associate Engineer classification 'port-specific' was to remove the class from consideration as a 'common' class in the event of a lay-off, not to remove the class from the civil service system." (City AOB 42.)[16]

The fatal problem with the City's argument is that

[16] See also, *e.g.*, City AOB 39-40, 41, 42, 43, 45; Opposition 13.

the trial Court never found that LaGrone's position had been exempted, excluded or otherwise removed from the civil service system. (CT-II 557-558.) On the contrary, the trial Court found "no evidence" that the Board had ever excluded the position of Port Associate Engineer, and concluded that the re-titling of the position "did not effect the exclusion of the position from the general civil service rules." (CT-II 557-558.)[17]

The City has persisted in this misstatement of the Order even though the trial Court clarified the issue during oral argument (6/4/10 RT 5-7), and even though the remedy ordered by the Court – reinstating LaGrone, requiring the City, the Port and the Board to permit him to exercise his civil service rights, and remanding to the Board for determination of back pay and benefits – removed any possible doubt. (CT-II 558.) As the

---

[17] The City suggests in a lengthy quote from the Order at City AOB 38-39 that the Court misspoke here: "The fact that the position was retitled ... did not effect (sic) the exclusion of the position ...." (City AOB 39.) But the Court obviously meant that the retitling did not "effect[uate]" an exclusion, not that the retitling did not "affect" an exclusion already caused by some other action.

City itself argues, "Exempt employees who have been excluded from the civil service do not receive these protections." (City AOB 42.)

Adapting the observation of Division One of this Court in *IRMO Gong and Kwong* (2008) 163 Cal.App.4th 410, "to read the order as urged by [City] 'goes against common sense.' No reasonable attorney would so interpret Judge [Roesch's] order and therefore, this appeal is meritless and objectively frivolous." (*Gong and Kwong*, 163 Cal.App.4th at 518.)

The combination of the City's misinterpretation of the Order with the City's misunderstanding of the standard of review on this appeal (section I, *supra*), results in an opening brief that raises no substantive issues on this appeal.

When an appellant fails to analyze the underlying ruling in light of the appropriate standard of review, the court may deem the issue waived. (*Gombiner v. Swarz* (2008) 167 Cal.App.4th 1365, 1374.) An appellant who is appealing under the substantial evidence standard of review "must set forth, discuss, and analyze all the evidence on that point, both favorable

and unfavorable," or the court may, for that reason, also deem the issue waived. (*Doe v. Roman Catholic Archbishop* (2009) 177 Cal.App.4th 209, 218.)

The City makes no pretense of discussing "all the evidence ... both favorable and unfavorable" in either Section II (City AOB 24-38), where it purports to apply the trial Court's standard of review, or in Section III (City AOB 38-45, where it purports to apply the substantial evidence standard applicable on this appeal.

The City's discussion of LaGrone's evidence, and of any evidence supporting the trial Court's ruling, is confined to a paragraph in Section II, which misstates that evidence. (City AOB 31.) The City claims that LaGrone's "testimony was limited to his personal belief that he was in a common classification based on the August 15, 2008 letter" (City AOB 31), ignoring all of the other evidence presented by LaGrone regarding the common engineering classifications, as discussed in sections A-B, *supra*. The City nowhere acknowledges LaGrone's undisputed evidence that the City continued to consider him eligible to transfer into City

engineering positions after the May 2002 title change. (AR-OAK 29, 171, 175.)

In Section III, the City completely ignores any evidence supporting the trial Court's ruling, while attacking a straw man manufactured from its misinterpretation of that ruling. The City concludes that it has established in Section III that "there was no evidence in the administrative record ... that respondent's classification had ... been excluded from the civil service rules." (City AOB 46.) The victory is, of course, a hollow one, because the trial Court had also concluded that there was "no evidence that the Civil Service Board approved any exclusion from the general civil service rules ...." (Order, CT-II 557.)

California Rules of Court, rule 8.204(a)(1)(B) requires appellate briefs to "support each point by argument and, if possible, by citation of authority." As a result of its fundamental misinterpretation of the trial Court's Order, the City has violated rule 8.204(a)(1)(B), and waived its right to appeal.

> An appellant must provide an argument and legal authority to support his contentions. The burden requires more than a mere assertion that the judgment is wrong....

> It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.

(*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

This Court should determine that the City has waived its right to appeal the trial Court's Order and judgment by failing to provide any argument or authority attacking the actual Order, as opposed to the City's idiosyncratic misinterpretation of that Order.

B. The City Has Further Waived Its Right To Appeal By Taking Completely Inconsistent Positions In Prior and Subsequent Proceedings Before the Board

The City has waived its right to appeal, not only by filing a wholly defective opening brief, but also by successfully taking positions in prior and subsequent proceedings before the Board that cannot be reconciled with its position on this appeal.[18]

---

[18] LaGrone requested this Court to take judicial notice of certain Charter provisions and to take additional evidence regarding this issue, pursuant to Code of Civil Procedure section 909. On April 15, 2011, this Court deferred consideration of the request until the time of decision. Although

In a post-judgment, November 18, 2010 letter to the Board, City Attorney John Russo refers to a legal opinion issued in 1994 by one of his predecessors, and reaffirms it:

> This Office stands by the 1994 opinion. The same analysis that the Office of the City Attorney applied to the Port's creation of Port-specific classifications, applies here. If the Civil Service System is a unitary system as Article IX of the Charter suggests it is, then the Port's creation of new classifications and amendments of existing classifications absent Civil Service Board approval undermines the very essence of that unitary system....
> The Port is authorized to establish its own personnel rules so long as those rules are consistent with the Oakland City Charter.... A rule that does not require Civil Service Board approval of new or existing classifications is not consistent with the City Charter's mandate of a comprehensive personnel system.

(CAA 74.)[19]

---

counsel has found no rule specifically on point regarding a deferred ruling on the taking of additional evidence, First Appellate District Local Rule 9(b) provides that parties may refer to items in their briefs when the Court has deferred its ruling on a request for judicial notice, and counsel will follow that procedure.

[19] For the convenience of the Court and the parties, LaGrone has included the requested additional evidence in the Cross-Appellant's Appendix ("CAA".)

At the November 18, 2010 Board meeting, motions were made and carried "that the Civil Service Board to approve the creation or amendment of any position (classification) of the Port," and "to ask the City Administrator and/or City council for direction and guidance for the Civil Service Board's approval process of the creation and/or the amendment of Port positions." (November 18, 2010 Special Civil Service Board Meeting Minutes-Revised, page 4; CAA 83.)

In a December 17, 2010 letter to the Port, City of Human Resources Management Director Andrea R. Gourdine states that she is "pleased to inform you that the City administration supports the Civil Service Board's actions of November 18, 2010," quoting the two motions adopted at the November 18, 2010 meeting. (CAA 85.)[20]

The position of the City and Board disclosed in

---

[20] In a further display of bad faith, the Port is now arguing against the City on this issue before the Board (CAA 96-106), even though the trial Court Order is res judicata as to the Port, which did not appeal. (*IRMO Edward and Murray* (2002) 101 Cal.App.4th 581, 599-600.)
The Port has acted as its own, separate entity throughout these proceedings (CT-II 439-451, 561), in apparent disregard of Charter, Art. VII, § 706(1), which gives it the power only "To sue and defend in the name of the City." (CT-II 432.)

those documents is irreconcilable with the position taken by the City on this appeal; *i.e.*, that despite the Charters' mandate of a unitary civil service system, the City and the Port run separate personnel systems, the Port has the authority to change classifications without the approval of the Board, and the Port removed LaGrone from his common classification with City engineers in 2002 when it amended the old classifications to make them Port-specific. (City AOB 8-10, 16-19, 40-42.)

On the contrary, the position of the City as disclosed in these documents constitutes a party admission, under Evidence Code section 1200, that the trial Court correctly decided the only legal issue on this appeal. The City not only agrees with the trial Court's legal conclusion that the Port cannot change classifications without Board approval, but has argued in favor of that conclusion in front of its own Board since 1994. (Compare Order, CT-II 557-558, with CAA 76.)

Given the City's agreement with the trial Court that the Port had no legal authority to amend LaGrone's

common classification without Board approval, the appeal is frivolous, if not entirely moot. In *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, for example, the Court determined that the City of San Jose's post-judgment actions in complying with a writ of administrative mandamus, and in amending an ordinance in compliance with that writ, rendered the appeal moot and resulted in a waiver of the right to appeal. (*MHC*, 106 Cal.App.4th at 214.)

Admittedly, neither the City of Oakland, the Civil Service Board, nor the Port of Oakland has complied with the trial Court's Order to reinstate LaGrone, or has tried in any way to make him "whole for his lost benefits and compensation" after being laid off in violation of the Charter (Order, CT-II 558), even though the Port did not even appeal from the Order and is bound by it. (*Edward and Murray*, 101 Cal.App.4th at 599-600.) The City has been careful not to mention the trial Court's Order in presenting its legal analysis to the Board. But the City has otherwise complied with the trial Court's Order by adopting legal analysis

underlying the Order, and should not be allowed to pursue this appeal while taking a contrary legal position before its own Board.

The doctrine of judicial estoppel "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. [Citation.]" (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 735.)

Most cases analyzing judicial estoppel require, at least in *dicta*, that the incompatible positions be taken in judicial or quasi-judicial proceedings (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183), and the City may argue that on November 18, 2010, the Board was engaging in its quasi-legislative, not quasi-judicial, function. But the equitable doctrine of judicial estoppel should be flexible enough to prevent a party from taking incompatible positions in two such closely related proceedings, and even if it does not, the City's position before the Board, in 1994

and 2010, demonstrates that this appeal is frivolous, and this court should consider sanctions, either on its own motion or pursuant to a motion by LaGrone.

III. THE TRIAL COURT'S ORDER CORRECTLY DETERMINED THAT LaGRONE WAS ENTITLED TO BUMP INTO A CITY POSITION UNDER THE APPLICABLE RULES, AS THE CITY AND THE PORT HAD AGREED

A. The City Has Presented No Legal Challenge To The Correctness Of The Trial Court's Order

Turning to the actual Order, the trial Court correctly resolved the legal issues before it based on the evidence presented at the Board hearing. Even without considering the additional evidence discussed in the preceding subsection establishing that the City admits that the trial Court's legal position is correct, the City on this appeal agrees with virtually all of the Court's conclusions of law. (CT-II 557-558.)

The Court concluded that the Charter of the City of Oakland required that "all offices and employments in the City government are included in the Civil Service unless specifically excluded." (Order, CT-II 557, citing Charter, Art. IX, § 902, at CT-II 426.)

The City necessarily agrees with this conclusion. (City AOB 3.)

The Court further concluded that, under section 902, subsection (c) of the Charter, the Board and the Port had the authority to exclude certain positions in the Port Department of the City from the civil service, but had not exercised that authority. (Order, CT-II 557, citing Charter, Art. IX, § 902, subd.(c), at CT-II 426; 6/4/10 RT 6.) As discussed in section II.A, *supra*, the City emphatically agrees with this conclusion. (City AOB 39-45.)

The City also agrees with the trial Court's conclusion that the "general rule" under Rule 9 of both the City Personnel Manual and the Port Personnel Rules is that "in the event of a layoff ... the layoffs will occur according to seniority based on City-wide classifications." (6/4/10 RT 3, 6-7; Order, CT-II 557-558; City AOB 6, 10-11, 15.)[21]

The City also agrees with the trial Court's conclusion that, under the rules governing layoffs,

---

[21] City Personnel Manual, Rule 9 (AR-OAK 88-89; CT-I 192-195); Port Personnel Rules, Rule 9 9AR-OAK 96-97; CT-I 257-260.)

LaGrone was entitled to bump a City employee as long as he was in a common classification. (6/4/10 RT 6; see also City AOB 15-16.)

The City disagrees with the trial Court's finding that LaGrone was in a common classification at the time of the layoffs (CT-II 557-558), based on the Port's 2002 retitling of his position as "Port-specific." (City AOB 9-10, 18-19, 28-30, 35-38, 40.)

But the City has acknowledged that the Port did not follow its own rules in the retitling (6/4/10 RT 7), and that there were no rules, policies or procedures governing the "common classification" process. (6/4/10 RT 3, 6.) Not surprisingly, the City has not cited a single case in support of its premise that the City was free to disregard the Charter, the City Personnel Manual and the Port Personnel Rules in order to terminate Kheven LaGrone after more than a quarter century of civil service.

As the California Supreme Court explained more than fifty years ago:

> One of the chief purposes of civil service regulations is to safeguard honorable and efficient employees from arbitrary ouster, for the method of dismissal is as important as

that of selection and appointment.

(*Hanley v. Murphy* (1953) 40 Cal.2d 572, 581.)

Even in cases where the Charter grants officers discretion in effecting a reduction in employees, such a provision "cannot reasonably be construed to mean that the department head is subject to no limitation under civil service regulations." (*Hanley*, 40 Cal.2d at 577.)

The City has not presented any legal challenge to the trial Court's analysis, and the judgment should be affirmed on that basis alone.

B. The Administrative Record Provided Compelling, Substantive Evidence to Support The Court's Order

As the trial Court found, in this case "[t]he City initially followed the general rule and then changed their mind" (6/4/10 RT 7), precisely the type of arbitrary ouster denounced in *Hanley*. The Port and City officials directly involved in the layoffs agreed that LaGrone would be bumping a less senior City Civil Engineer (AR-OAK 31, 33, 74, 76, 175-176, 199, 202, 239, 242), but then the new Acting City Administrator decided to find a way to terminate the Port engineers

and prevent them from transferring. (AR-OAK 208-209.) The administrative record contained convincing, substantive evidence to support the Court's finding, and the Court found no good cause to augment that record with additional materials reinforcing that finding. (CT-II 555.)

Although the City denigrates LaGrone's evidence because "the only witness for respondent was respondent himself," (City AOB 31), LaGrone was in fact the only representative of the Port who testified – the City itself did not produce a single witness from its own Port Department to support its contention that the Port did not consider LaGrone to be in a common classification with City civil engineers.

It has long been clear that the testimony of a single witness, including a party, can constitute substantial evidence (*IRMO Mix* (1975) 14 Cal.3d 604, 614; Ev. Code § 411), and the City has not even attempted to challenge LaGrone's credibility. That testimony alone provided substantial evidence to support the trial Court's Order, and was largely reaffirmed by the City's own documentation.

LaGrone testified that the 2002 job title change did not remove him from a common classification, which the City confirmed in a March 4, 2003 letter making sure that LaGrone was "still interested in remaining on the transfer list." (AR-OAK 29, 171, 175; see also AR-OAK 24-25, 44-45, 103-106, 129, 172-173, 182-183.) As LaGrone explained, "you have to be in the same classification to be on the transfer list." (AR-OAK 191.) LaGrone further testified that transfers between the City and the Port were common – he knew "a lot of engineers went to the City and vice versa." (AR-OAK 172.) According to City documentation, the Port Associate Engineer classification that LaGrone was in at the time of his termination had been created in 1953 and retitled twice (AR-OAK 129, 181), and he was on a waiting list for the next City position in that classification, Engineer Civil (Office). (AR-OAK 154, 185-187.)

In addition to LaGrone's testimony and documentation, the evidence established that Port Executive Director Benjamin and Port Counsel, Jones Day, also considered LaGrone to be in a common

classification with City Civil Engineers. (AR-OAK 22, 31, 40, 42, 74.)

Even more tellingly, the evidence established that the City official responsible for determining common classifications at the time of the 2008 layoffs, Pritchett, agreed with the Port that LaGrone was in a common classification with City Civil Engineers. (AR-OAK 197-202, 204.) The evidence further established that CEDA, the City department that employed at least one less-senior City Civil Engineer than LaGrone, also agreed that he was entitled to bump into that position, and notified him to report for work. (AR-OAK 33, 76.)[22]

The administrative record contained substantial evidence easily establishing, as the trial Court explained during the oral argument, that "[t]he City initially followed the general rule and then changed their mind." (6/4/10 RT 7.)

This Court should affirm the judgment of the trial

---

[22] Evidence included in the administrative record but produced after the hearing, in the form of the City of Oakland Seniority Report for Port as of 7-21-08, reinforced the evidence that the City agreed that Port Associate Engineers and City Civil Engineers were in a common classification. (AR-OAK 239, 242.)

Court.

C. Evidence Relied On By City Was Not Substantial

Although this Court need not consider any of the evidence contrary to the trial Court's decision (*Lake v. Reed* (1997) 16 Cal.4th 448, 457; *Jackson v. City of Los Angeles* (2003) 111 Cal.App.4th 899, 902), that evidence was not substantial, much less compelling. "Substantial" evidence does not mean "any" evidence, and to be considered substantial the evidence must be "'"reasonable in nature, credible, and of solid value."'" (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336 (citations omitted).)

As stated in the preceding subsection, the City did not call a single Port witness to discuss the Port's alleged refusal to allow City employees to transfer into Port-specific positions, as determined in the Findings. (AR-OAK 261-262.) The City presented a July 14, 2008 letter from Port employee Preston (AR-OAK 99-101), but there was no evidence as to the basis for that letter, which was contradicted by the July 31, 2008 letter from Port counsel. (AR-OAK 22, 99-101.)

City Principal Civil Engineer Lau did not even

identify the Port personnel employee who allegedly told him not to apply for a transfer to the Port. (AR-OAK 221-222.) There was no evidence that his position, which was quite elevated, was in a common classification with any Port positions – it was above the positions identified as common in the July 31, 2008 letter from Port counsel, and the Port position he was seeking was not even among those retitled in 2002. (AR-OAK 22, 24-25, 103-104, 221-222.)

IV. TRIAL COURT DID NOT ERR BY BASING DECISION ON CITY CHARTER

Finally, the City contends that the trial Court erred because LaGrone did not specifically raise Charter Section 902, subdivision (c), in his writ petition or before the Board, and due to "this informational vacuum, the trial court made the erroneous assumption that respondent's 'port specific' job classification had been improperly excluded from the civil service system in violation of Charter Section 902(c)." (City AOB 45.)

As discussed at length in section II.A, *supra*, this sentence betrays a complete misunderstanding of

the trial Court's Order. The trial Court actually concluded that LaGrone's position had not been excluded from the civil service, because such an exclusion would have required compliance with Section 902, subdivision (c). (Order, CT-II 557-558.)

Since the City agrees that LaGrone's position was not excluded from the civil service (City AOB 39-45), its claims of surprise would fall flat even if the record supported those claims, which it does not.

Contrary to the City's contentions (City AOB 43-44), LaGrone has consistently claimed that the City failed to follow the Charter, as well as the City Personnel Manual and the Port Personnel Rules. LaGrone's October 16, 2008 amended letter of appeal to the Board stated that the "Port's layoff procedure violated Articles 3 and 9 of both the City and Port Personnel Manuals, as well as the Oakland City Charter." (AR-OAK 12.) The appeal incorporated the union's Position Statement, which explained that the Board had never approved any title changes to Port engineering positions, as required by section 902 of the Charter. (AR-OAK 45.) In his opening statement to

the Board, LaGrone's counsel argued that changing the title of LaGrone's position by adding "Port" did not remove the position from its common classification because "it is not in conformity with either the personnel rules and procedures of the Port of Oakland or the charter of the City of Oakland ...." (AR-OAK 168.) The City itself incorporated Rules 3 and 9 of the City Personnel Manual, which mandate that "Layoffs shall be on a Citywide basis by prescribed classification" (Rule 9.01, AR-OAK 88), and require Board approval of any amendments to classifications. (Rule 3.04, AR-OAK 86.)

The trial Court correctly analyzed the legal issue before it, as the City has acknowledged, albeit not in these proceedings. (CAA 73-79, 85-86.) The Board's Findings violated Section 902 of the Charter, as well as Rules 3 and 9 of the City Personnel Manual, and this Court should affirm.

CONCLUSION

For all the above reasons, this Court should affirm the judgment of the trial Court.

DATED: May 1, 2012

LAW OFFICES OF PAUL KLEVEN

By:_____
PAUL KLEVEN