

COUNTY OF VENTURA

civil service commission

BOARD OF REVIEW AND APPEALS



Commissioners
Don Becker
Alyse M. Lazar
J. William Little
Haywood Merricks III
James Vandenberg

**MINUTES OF
SPECIAL MEETING
MONDAY, JULY 16, 2012
9:30 a.m.**

**County of Ventura Government Center
LOWER PLAZA ASSEMBLY ROOM
(800 S. Victoria Avenue, Ventura, CA 93009)**

Chair Vandenberg called the meeting to order at 9:34 a.m. Present were Chair Vandenberg, Commissioners Becker, Little and Lazar, Cheryl Shaw, Commission Assistant, and Bob Boehm, Law Advisor.

- I. OLD BUSINESS** – Continued hearing in accordance with Order dated April 27, 2011, of Superior Court, State of California, County of Ventura Case No. 56-2010-00383044 entitled William Markov v. Steve Lipson, et al., affirmed on April 17, 2012, by Court of appeal of the State of California, Second Appellate District, Division Six (Case No. B234138). Continued from July 13, 2012.

Present for the Ventura County Public Defender's Office was Matthew Smith, Assistant County Counsel. Mr. Markov was present along with his attorney, Stephen Silver.

Mr. Smith addressed the Commission stating that the County's argument was outlined in the County's filed brief. In summary the County's position is that there is no constraint on the discretion of the County in taking away Mr. Markov's title designation and pay associated with the title. Mr. Smith proceeded to summarize the cited case law and also summarized the *Dobbins* case wherein the Court of appeal limited the *Head* case to its factual context. He argued, under the Ventura County Personnel Rules there is unlimited discretion for the County to remove a title designation and pay. Without the creation of a property right, there is no due process right, and, therefore, there is no jurisdiction of the Commission to grant Mr. Markov's request.

In response to a question from Chair Vandenberg, Mr. Smith stated that the question of due process and jurisdiction go hand in hand as if there is a due process right, then the Commission would have jurisdiction. In this matter the Personnel Rules only apply in disciplinary matters for which cause is required. The Superior Court only remanded the

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matter back to the Commission to decide whether the Personnel Rules would apply in this particular case.

In response to Commissioner Little, Mr. Smith outlined the history of the case law cited in the County's brief. Commissioner Little commented that there was language in the rules with regard to the title designation being reviewed every 6 months which appears to indicate that the renewal process for the title does not seem logical without the ability to also take away the associated pay and to do otherwise would exceed the authority granted in the classification and pay designation as established by the Board of Supervisors.

Commissioner Lazar commented on the *Dobbins* case which was decided based on the particular facts of that case, but that part of the basis of the removal in that instance was for deficient performance. Here, even though each party agrees that there does not need to be for cause regarding removal of the designation, Mr. Markov did receive a letter which seems to suggest there was some discipline involved in the removal of the designation. Mr. Smith stated that the County does not just arbitrarily remove a designation, and the letter was sent to explain the reason for the designation removal. The County tries to be fair by pointing out to the employee any problems which led to the issuance of the letter. It is not disciplinary in a true sense. Commissioner Lazar questioned whether a property interest was potentially created because of the fact that the designation was removed for the reasons set forth in the letter. Mr. Smith reiterated that there is no limit on the County's discretion to remove the designation with or without regard to the employee's performance.

Commissioner Becker commented that there are selection criteria set forth in the rules with regard to granting the designation. Mr. Smith stated the criteria were guidelines and did not create a mandate but if one possesses the qualities outlined, the employee has a potential to receive the designation. There is still no constraint about the County's ability to remove the designation. In response to a further question of Commissioner Becker, Mr. Smith stated that the new section 402 in the applicable MOA provides for the pay reduction in a two-step process. Mr. Smith stated that the County feels that both the status and pay have historically gone hand in hand and the terms of the new MOA just recognizes what was already historically in existence.

Mr. Silver addressed the Commission and stated that he wished to file declarations with regard to the negotiations that led up to the new MOA. Mr. Silver indicated that he was incensed about the argument made by the County concerning the new MOA as it was never intended to apply to Mr. Markov's matter. Commissioner Little indicated that he felt that the terms of the new MOA had no bearing on this particular matter. Mr. Silver filed the declarations of himself, and Margaret Coyle. Mr. Boehm stated that the Commission had discretion to decide whether or not to accept the declarations. Commissioner Lazar inquired about any objection the County had with regard to the declarations. Mr. Smith stated that he had some concern about the speculative nature of the declarations so to the extent that they are not factually based, the County would have an objection.

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A motion was made to accept the declarations into the record but to rule that they are not admissible as they contain hearsay and facts not relevant as they refer to things that occurred after what happened to Mr. Markov. Commissioner Lazar amended the motion to state that the declarations are not admissible as they contain hearsay, speculation and facts not relevant to the decision as they refer to things that occurred after what happened to Mr. Markov. The motion was seconded by Commissioner Little and passed by yes votes of Chair Vandenberg and Commissioners Little and Lazar, with Commissioner Becker abstaining.

Mr. Silver stated that Section 2102 is the constraint which limits the County's ability to reduce pay which must be for cause. For cause in section 2105 defines certain types of conduct which would justify a reduction in pay and when that is done, safeguards are in place to ensure that due process is afforded to the employee. The *Head* case is directly on point which held that even if a designation is removed, the County was required to comply with due process requirements before reducing pay. Although Mr. Markov's pay could be reduced, it could not be done without the procedural due process safeguards as set forth in the Personnel Rules. The Court of Appeal in the instant matter distinguished the *Dobbins* case as that there was no reduction in pay in *Dobbins* and the court held that the loss of overtime opportunities did not equate to a reduction in pay. Mr. Silver stated that the County's argument regarding jurisdiction is disingenuous as during the earlier proceeding in Superior Court they only argued that Mr. Markov failed to exhaust his administrative remedies as the Commission had jurisdiction.

In response to Chair Vandenberg's question, Mr. Silver stated that Mr. Markov was not given a proper hearing. Mr. Silver argued that *Skelly* requires notice of the proposed action and the specific reasons for the proposed action. None of those safeguards, however, were provided in Mr. Markov's instance. Mr. Silver further stated that even if the new contract did apply, the MOA negotiations made clear that there was never a waiver of rights under the Personnel Rules. Commissioner Lazar reiterated that the Commission has already decided that the MOA issue is not relevant and expressed that the record not be muddled by this area of analysis.

In response to Commissioner Little's question, Mr. Silver stated that the *Head* case was the underpinning of his argument. In response to a question from Commissioner Lazar, Mr. Silver stated that the property interest lies in that if there are certain conditions which limit the ability to take away something, just as the pay in this case, that then created the property interest and Section 2102 indicates the County can only do that for cause. The rule does not specifically say that a senior attorney's pay cannot be reduced for cause but as in the *Head* case, there is only a broad provision. Unless there is an exception to the broad prohibition, then you cannot reduce anyone's pay without cause.

Commissioner Lazar stated that the County does have a provision regarding the senior attorney position and the fact that it is discretionary and there is language regarding the salary and the discretion of management. Mr. Silver stated that there is nothing in the

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rules that state a reduction in pay can be done without due process safeguards. Commissioner Lazar reiterated that each of the cases cited relied upon specific regulations of that County. Mr. Silver indicated that there is nothing that says that pay can be reduced without cause and both the *Dobbins* and *Head* case involved the rules of San Diego County.

In response to Commissioner Becker's inquiry that the senior attorney designation was created only to allow someone extra pay whom was already in the top tier of the Attorney III pay scale, Mr. Silver stated that the pay could be reduced, as long as procedural due process rights were afforded. The *Head* case reiterated that even if one no longer was performing extra duties, safeguards needed to be followed before reducing pay. Commissioner Becker indicated the MOA contained various other provisions regarding extra pay such as working nights, etc. and could the County state that cause was just that the employee did not actually work in accordance with those provisions. Mr. Silver stated he would not concede a position that the cause asserted by the County could simply be that an employee was no longer working as a senior attorney.

Mr. Smith re-addressed the Commission, stating that Mr. Markov's entire argument is based on an assumption of a property right. The question is that the property right only exists if it is created and there is nothing in the rules which created said right. The Personnel Rules apply to disciplinary actions against a permanent employee and once an employee gains a permanent status in a classification then you come within the rules. Without permanent status in the designation there is no permanent status in the pay. The *Head* case interpreted specific words in the San Diego rules which do not exist in this scenario. If Mr. Markov's situation happened today, the MOA states the position is at-will and pay will be reduced and there is no provision with regard to procedural rights.

Chair Vandenberg reiterated that the case was very unusual and he was bothered by the way in which this case began back in 2010. He clearly recalls that performance was an issue and there seemed to be a cause as to the trigger of the removal of the designation by the Public Defender. Mr. Smith stated that "cause" is a term of art as there is a definition of it in the rules. The Public Defender had a reason to take an action, but was not required to go to the level of "cause" to do so. Mr. Smith reiterated that he has addressed similar issues to the Commission in the past with respect to fire fighters in the paramedic program and the issue of the due process right is appropriately submitted to the Commission. The County feels that there is no property right but that the Commission must make that determination. The Personnel Rules do not constrain the discretion of the Public Defender to take away the designation and the linked pay.

Commissioner Little, commented that the difference is that in the *Head* case the rules included basic salary and also special pay and a hearing was required as there was a certain definition of the word "compensation." Mr. Smith agreed that under the San Diego rules that pay for field training officers was included in the definition of compensation and was subject to procedural rights, however, there exists no property right unless specifically given.

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Mr. Silver responded that if you take the County's position then the reduction in pay does not include pay and inquired as to how can a reduction in pay not include a loss in 12% pay.

The Commission went into deliberations at 11:02 a.m. The Commission concluded deliberations at 11:43 a.m.

Chair Vandenberg announced that the decision of the Commission is that the Civil Service Commission lacks jurisdiction regarding this matter, by a vote of 3 to 1, with Commissioner Becker dissenting. The Commission will be issuing a minute order to the parties with regard to its ruling.

- II. CLOSED SESSION** – Conference with legal counsel regarding existing litigation (Gov. Code section 54956.9) in the case of Ventura County Sheriff's Department vs. Ventura County Civil Service Commission, et al.; Superior Court of California, County of Ventura, Case No. 56-2012-0042008.

The Commission proceeded into closed session at 11:45 a.m. Closed session and the special meeting were adjourned at 12:15 p.m.