Case No. **C076497**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

RICHARD LUMAN

Plaintiff-Appellant

v.

MONO COUNTY PERSONNEL APPEALS BOARD,

Defendant-Appellant

MONO COUNTY

Real Party in Interest-Appellant.

On Appeal from the Superior Court, County of Mono
The Honorable Stanley Eller, Judge
CV120119

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF APPELLANTS MONO COUNTY PERSONNEL APPEALS BOARD AND MONO COUNTY

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TO: THE PRESIDING JUSTICE, COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT, DIVISION

This application is submitted by the California State Association of Counties ("CSAC"). Pursuant to Rule 8.200(c) of the California Rules of Court, CSAC respectfully requests leave to file the attached brief in support of Appellants Mono County Personnel Appeals Board and Mono County.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Committee monitors litigation of concern to counties statewide and has submitted amicus curiae briefs in prior appellate court cases involving matters that impact county government in general and public employee discipline matters in particular.

CSAC has an interest in ensuring that county administrative bodies responsible for public employee personnel matters perform their duties properly, independently and in accordance with state law. As a corollary, CSAC has an interest in ensuring that trial courts apply the correct standard of review when evaluating public employee disciplinary decisions. CSAC believes that a public employee personnel decision made by a duly appointed administrative body must be upheld unless the decision is a manifest abuse of discretion. CSAC, therefore, has an immediate and direct interest in this litigation and the Court's resolution of the pending appeal.

Counsel has reviewed the briefing submitted by the parties in this matter. The proposed amicus brief does not duplicate those arguments, but rather is intended to assist the court in deciding the matter by focusing on the error in the trial court's conclusion that termination was an abuse of

discretion. It is CSAC's position that the Mono County Personnel Appeals Board's ("PAB") decision terminating Mr. Luman should be upheld as being within their broad discretion and within the bounds of reason. CSAC urges this Court to overturn the trial court's decision that the PAB's determination was incorrect in any other respect.

DATED:

Respectfully submitted,

By: / s /

JENNIFER B. HENNING
Attorney for Amicus Curiae

California State Association of Counties

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STATEMENT OF FACTS

For purposes of this appeal, the salient facts are straight-forward and largely undisputed.[1]

On October 3, 2011, Richard Luman, a County equipment mechanic, made a threat of violence in the workplace which directly (and predictably) led to a physical altercation at the work site. (3 CT 647: 6-8 [Luman's threat "added fuel to the fire and contributed to the chain of events resulting in the physical altercation"].) After a thorough investigation, Luman's employer, the Mono County Department of Public Works, Road Division, terminated Luman for making (i) the threat of violence[2] and (ii) subsequent misleading statements about that threat. He promptly appealed to the local Personnel Appeals Board [PAB], the administrative body in Mono County responsible for holding administrative hearings on, and adjudicating, employee discipline. The PAB upheld the termination following an 11 day administrative hearing. [1 CT 28-43.]

Luman filed a writ of mandamus under Code of Civil Procedure section 1094.5 to challenge the PAB decision. The Superior Court conducted a hearing on the writ petition on March 26, 2014. Following full briefing and argument, the trial court issued its ruling containing four significant components:

1. Exercising its independent judgment, the trial court found that the words used by Luman constituted a true threat of violence. (3 CT 647:12-13 ["The words used by [Luman]…were a true threat"].)

2. The trial court exercised its independent judgment to specifically embrace the PAB's factual finding determination that, in the midst of "extremely heated and

[1] The parties devote a considerable number of pages in their briefs outlining select facts that reinforce their views. This Amicus Brief will neither recite nor attempt to parse those facts. The trial court succinctly summarized the relevant facts in its Statement of Decision. [3 CT 647-48.] As discussed below, since the trial court exercised its independent judgment in reviewing the extensive administrative record, its findings are binding if supported by substantial evidence. (See Standard of Review, p. xx.) The trial court's factual findings appear to be supported by substantial evidence.

[2] Mono County has a zero tolerance policy towards workplace violence.

volatile discussion," Luman's statement "provoked and further inflamed Mr. McCurry … added fuel to the fire and contributed to the chain of events resulting in the physical altercation." (*Id*, p. 647: 2-7.)

3. Luman's explanation that he intended his comment "as a wisecrack" was "not logical," hence misleading. (*Id*, p. 647: 14-15.)

4. The trial court evaluated the level of discipline imposed and found that termination was "grossly excessive" under the circumstances. The trial court properly noted its limited role in evaluating the PAB's penalty decision and correctly identified the seminal case, *Skelly v. State Personnel Board (*1975) 15 Cal.3d 194 as controlling authority. (3 CT 648: 9-13)[3] Despite acknowledging its limited role in evaluating the level of discipline, the trial court overturned the termination because, according to the trial court (i) it was a one-time occurrence, (see *id*. 648: 5 ["that was the first and last of it"]);
(ii) McCurry did not have residual fear of Luman, *ibid*; and
(iii) Luman "got the worst of it." (*Id*. footnote 4.)

The trial court issued its Order on April 17, 2014 vacating the PAB decision. This appeal followed.

Amicus CSAC respectfully contends that the trial court erred when it ruled that the termination was "grossly excessive," thus representing an abuse of discretion. The trial court's decision is inconsistent with *Skelly* and generations of public employee discipline cases that have followed *Skelly*. It is apparent that the trial court is substituting its judgment for the PAB's judgment on the level of discipline, which the court is not allowed to do. Amicus CSAC respectfully supports Mono County's contention that the trial court's Order is inconsistent with well-established state law, thus should be reversed.

STANDARD OF REVIEW

[3] Inexplicably, the trial court misquoted the *Skelly* court's teachings on what constitutes an abuse of discretion. As discussed further below, the inaccurate quote likely contributed to the trial court's flawed analysis.

More than most, this case hinges on the appropriate standard of review. As to the trial court's factual findings--specifically that Luman made a threat and subsequent misleading statements regarding that threat--because the trial court exercised its independent judgment, this Court will "review the record to determine whether substantial evidence supports the trial court's conclusions." (*Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 45.) If supported by substantial evidence, despite factual and evidentiary conflicts, "the Superior Court's determination of culpability is conclusive and binding on the reviewing court." (*Ibid.)*

Unlike the standard applied to a trial court's factual findings, neither this Court nor the trial court may disturb the penalty imposed by the administrative agency unless there is a manifest abuse of discretion. (*Kazensky v. County of Merced* (1996) 65 Cal.App.4th 44 , 53-54; see *Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 772 ["'It is settled that the propriety of a penalty imposed by an administrative agency is a matter resting in the sound discretion of the agency and that its discretion will not be disturbed unless there has been an abuse of discretion.'"]; see also *Pegues v. Civil Service Com.* (1998) 67 Cal.App.4th 95, 106 [same]; *Talmo v. Civil Service Com.* (1991) 231 Cal.App.3d 210, 226 ["courts should let administrative boards and officers work out their problems with as little judicial interference as possible…Such boards are vested with a high discretion and its abuse must appear very clearly before the courts will interfere"]; *Flippin v. Los Angeles City Bd. of Civil Service Commissioners* (2007) 148 Cal.App.4th 272, 279 [judicial review of agency's penalty assessment "is limited, and the agency's determination will not be disturbed in mandamus proceedings unless there is an arbitrary, capricious or patently abusive exercise of discretion by the agency"]; *Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 218 [in reviewing the exercise of this discretion, courts "should let administrative boards and officers work out their problems with as little judicial interference as possible"].)

This Court reviews the penalty imposed by the administrative body *de novo*, giving no deference to the trial court's determination. (*Flippin, supra,* 148 Cal.App.4th at 279; *Deegan, supra,* 72 Cal.App.4th at 46; *Schmitt v. City of Rialto* (1985) 164

Cal.App.3d 494, 504.) "Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed." (*Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 404.) "It is **only in the exceptional case**, when it is shown that **reasonable minds cannot differ** on the propriety of the penalty, that an abuse of discretion is shown." (*Bautista v. County of Los Angeles* (2010) 190 Cal.App.4th 869, 879 [emphasis added; citation omitted]; see also *Pegues, supra*, 67 Cal.App.4th at107 [no abuse of discretion when reasonable minds could differ as to the propriety of the penalty]; *Szmaciarz v. State Personnel Bd.* (1978) 79 Cal.App.3d 904, 921 [even in instances when the trial or reviewing court believes the penalty was too harsh, it cannot interfere with an agency's imposition of a penalty]; *Flippin*, *supra*, 148 Cal.App.4th at 279 [if "reasonable minds may differ with regard to the propriety of the disciplinary action, no abuse of discretion has occurred"].) *See also* cases cited in Respondent's Brief at pp. 19-20, note 5.

Stated another way, "[d]iscretion is abused where the penalty imposed exceeds the bounds of reason." (*Paulino v. Civil Service Com.* (1985) 175 Cal.App.3d 962, 970, citing *Ackerman* v. *State Personnel Bd.* (1983) 145 Cal.App.3d 395, 401.) If the administrative agency's penalty assessment is within the bounds of reason, the courts will affirm it, even if the court believes a different penalty would be more appropriate. (*Kazensky*, *supra*, 65 Cal.App.4th at p. 75; *Szmaciarz*, *supra*, 79 Cal.App.3d at 921.)

ARGUMENT

I.

TRIAL COURT ERRED IN CONCLUDING THAT TERMINATION WAS AN ABUSE OF DISCRETION ON THE FACTS OF THE CASE

The trial court erred when it overturned the discipline imposed by the PAB. The trial court concluded that the PAB abused its discretion by terminating Luman after he made a threat and engaged in a physical altercation at work. As discussed above, the trial court properly referred to the *Skelly* decision as the benchmark for determining whether

the PAB abused its discretion. However, the trial court appears to have misapplied the *Skelly* factors, presumably because it misquoted the *Skelly* opinion.[4]

In determining whether abuse of discretion occurred, the overriding or the most important consideration is the extent to which the conduct harms the public service ---or, **if repeated** is likely to harm the public service. Not only did Luman make a true threat of violence (in a County with a zero tolerance policy for violence in the workplace), he provided misleading statements about his behavior when confronted. The trial court, exercising its independent judgment, concluded that Luman made a true threat and subsequently made misleading statements about that threat (3 CT 650: 5-6) --both in violation of County policies and rules. This conduct inherently harms the public service and, if repeated, would greatly harm the County. The prediction that the conduct is unlikely to recur is immaterial in evaluating the "overriding consideration in these cases." (See *Schmitt, supra*, 164 Cal.App.3d at 504.)

The likelihood of recurrence is a factor identified by the *Skelly* court but, by definition, a lesser factor. The trial court appears to have placed disproportionate importance on this factor, as well as other factors like the situational nature of employee's misconduct or the employee's own injuries.[5] The Court dismissed the altercation in the workplace as being "the first and the last of it." (3 CT 648: 5.) While

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[4] The trial court quoted *Skelly* stating, "The factors to be considered in determining whether or not an abuse of discretion occurred include the extent to which the conduct harms the public service, the likelihood of recurrence, and the circumstances surrounding the misconduct." (3 CT 648: 9-13.) The Supreme Court in *Skelly* actually wrote, "In considering whether [an abuse of discretion] occurred in the context of public employee discipline, we note that the **overriding consideration** in these cases is the extent to which the employee's conduct **resulted in, or if repeated is likely to result in**, '[harm] to the public service.' Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence." (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 218 [emphasis added; citations omitted].)

[5] The court went so far as to acknowledge that the "Plaintiff got the worst of it as he suffered a cracked rib and a hernia requiring surgery." (Statement of decision p. 4, footnote 4) The injuries that Luman suffered should be entirely irrelevant to the abuse-of-discretion discussion.

the trial court's prediction that recurrence is unlikely certainly plays some role in the reviewing court's analysis, the **overriding** focus must be the harm to the public service. The trial court erred by focusing on these secondary factors.

II.

TRIAL COURT IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THE PAB'S REGARDING LEVEL OF DISCIPLINE.

The trial court independently judged the termination penalty as "grossly excessive," rather than conducting the appropriate judicial review of assessing whether any reasonable factfinder could conclude that termination is reasonable. The trial court acknowledges language in prior cases, notably *Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 218, recognizing that an administrative body such as the PAB has a "high discretion and its abuse must appear very clearly before the courts will intervene." (3 CT 648: 19-23.) However the trial court promptly distinguished *Landau* on the specific "far more aggregious [sic] facts" of the case, and disregarded the more important message: the court cannot substitute its judgment for the PAB's.

"'In reviewing the penalty imposed by an administrative body, which is duly constituted to announce and enforce such penalties, neither a trial court nor an appellate court is free to substitute its own discretion as to the matter nor can the reviewing court interfere with the imposition of a penalty by an administrative tribunal because in the court's own evaluation of the circumstances the penalty appears to be too harsh." (*Kazensky*, *supra*, 65 Cal.App.4th at p. 75 [citation omitted].)

The rule in California, as set forth in numerous cases (see Respondent's Brief, pp. 19-20, footnote 5) is that an abuse of discretion requires an administrative agency's imposition of discipline that is so unreasonable that **no reasonable person** can support it. "If reasonable minds may differ as to the propriety of the discipline imposed, the administrative decision may not be regarded as an abuse of discretion." (*Los Angeles County v. Civil Service Com*. (1995) 39 Cal.App.4th 620, 634; *Schmitt, supra,* 164

Cal.App.3d at 504; *Szmaciarz, supra,* 79 Cal.App.3d at 922.) If reasonable minds can disagree, the agency has not abused its discretion, even if the court would prefer a less harsh result.

The Luman case is clearly a matter where reasonable minds may differ as to the level of discipline or penalty imposed. In the PAB decision, the vote was split 2 to 1 in favor of termination. As in the *Schmitt* case, Mr. Luman's conduct maybe seen by some as "relatively innocuous" (*Schmitt,* 164 Cal.App.3d at 504) but it may also be reasonably viewed by some as "demonstrating a severe lack of good judgment and an indifference to safety and official regulations portending serious future consequences." (*Ibid*.) As Respondent notes, "The choice is not just between the axe and a wagging finger." (Respondent's Brief, p. 35.) In this quip, Respondent implicitly concedes there was a continuum of reasonable disciplinary options available to the PAB on the facts of the case. If the PAB had determined that a brief (or even a lengthy) suspension was appropriate, that would not be an abuse of discretion given (i) the facts of the case, coupled with (ii) the PAB's broad discretion. Similarly, the termination decision by the PAB does not "exceed the bounds of reason," thus cannot be an abuse of discretion under the law. Courts historically defer to the administrative agency on level of discipline, even if reasonable minds could disagree.

The bulk of Respondent's argument is based on the theory that the Mono County policies and procedures **do not require** termination on the facts of the case. (Respondent's Brief, pp. 32-33; 40.) The Respondent seeks judicial notice of a State Personnel Board decision, *In the Matter of the Appeal by Frank G. Bennett*, State Personnel Bd. Precedential Decision No. 94-01, SPB No. 29621 (1994), in which the Board imposed a lesser penalty for a public employee disciplined for fighting. The *Bennett* decision demonstrates why the Mono County position is correct: the PAB could have imposed a variety of reasonable disciplines. The PAB chose termination. The courts must affirm the PAB's choice unless that choice "exceeds the bounds of reason." "Once the determination is made that the misconduct has occurred, the administrative agency must be shown great deference in its determination of penalty." (*Deegan, supra*,

72 Cal.App.4th at 50.) In fact, the *Deegan* court concluded that the courts are required to uphold the agency's penalty determination if there is any reasonable basis to do so.

CONCLUSION

Amicus CSAC respectfully contends that the trial court erred when it ruled that the termination was grossly excessive. The trial court's misapplication of the *Skelly* factors caused it to substitute its own judgment for the PAB's on the level of discipline. This is not allowed. On the facts of the case, there were several penalty options, all within the "bounds of reason." The PAB chose termination. Under the circumstances, termination is not a manifest abuse of the PAB's broad discretion.

Therefore, CSAC respectfully requests that the trial court decision be reversed with instructions to affirm the PAB's penalty determination.

DATED: / s /

_____

Jennifer B. Henning, SBN 193915

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CERTIFICATE OF COMPLIANCE

Counsel of record certifies under Rule 8.204(c)(1) of the California Rules of Court, that the enclosed Amicus Curiae Brief of the California State Association of Counties in Support of Appellant County of Mono is produced using 13-point Times New Roman type and contains approximately 2,627 words, including footnotes. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: / s /

_____

JENNIFER B. HENNING
Attorney for Amicus Curiae

Proof of Service by Mail

Luman v. Mono County Personnel Appeals Board
Case No. C076497

I, MARY PENNEY, declare:

That I am, and was at the time of the service of the papers herein referred to, over the age of eighteen years, and not a party to the within action; and I am employed in the County of Sacramento, California, within which county the subject mailing occurred. My business address is 1100 K Street, Suite 101, Sacramento, California, 95814. I served the within APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF APPELLANTS MONO COUNTY PERSONNEL APPEALS BOARD AND MONO COUNTY by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Proof of Service List

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Trial Court	Hon. Stanley Eller Mono County Superior Court South County Branch P.O. Box 1037 Mammoth Lakes, CA 93546
California Supreme Court	One Electronic Copy (CRC 8.44(b)(1); 8.212(c)(2))

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on _____, at Sacramento, California.

_____

MARY PENNEY