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SUPERIOR COURT OF CALIFORNIA  
CENTRAL JUSTICE CENTER

NOV 16 2006

BY: M. WILSON

**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER  
DEC - 6 2006  
ALAN SLATER, Clerk of the Court  
*C. Neuwandwander*  
BY C. NEUENSCHWANDER

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ORANGE - CENTRAL JUSTICE CENTER**

PAUL M. DOUGHERTY,  
Plaintiffs,  
vs.  
LUCIEN C. HAAG, et al.,  
Defendants.

) Case No. 05CC06993  
)  
) JUDGE: Hon. Daniel J. Didier  
) DEPT: C15  
)  
) ~~PROPOSED~~ STATEMENT OF  
) DECISION  
)  
) Action Filed: March 16, 2005  
) Trial Date: October 23, 2006  
) January 22, 2007

The Petition for Writ of Mandate challenges the Association of Firearm & Toolmark Examiners ("AFTE"), a private trade association, in its public censure of Petitioner, a member of AFTE, as a result of ethics proceedings initiated by a fellow AFTE member, Lucien C. Haag. Haag's ethics complaint related to the case of *Ronnie G. Clark v. State of Louisiana* (Parrish of St. Charles, Louisiana, Case No. 44,194), in which Petitioner and Haag were separately retained as opposing firearm and ballistics reconstruction experts.

As contemplated by AFTE's Procedures for Enforcement of the Code of Ethics, there were three distinct stages of AFTE's disciplinary proceedings: (1) an ethics committee stage; (2) the board of directors stage, and; (3) a final hearing before the general membership. The ethics committee concluded that all charges against Petitioner were founded, and Petitioner exercised his right to appeal to the board of directors. The board of directors also concluded that the charges were founded, and Petitioner exercised his right to appeal that decision to the general membership.

[PROPOSED] STATEMENT OF DECISION

**GREEN & HALL**  
ATTORNEYS AT LAW  
A PROFESSIONAL CORPORATION

1 Each of the three phases of the disciplinary process was conducted *de novo*, as the ethics  
2 committee, the board of directors, and the general membership each independently evaluated the  
3 evidence presented, and formulated conclusions based thereon.

4 Specific challenges by Petitioner include alleged conflicts of interest, violations of AFTE  
5 rules, and due process violations at each stage of the proceedings, rather than a lack of evidentiary  
6 support for the public censure. As such, Petitioner’s exclusive challenge to AFTE’s administrative  
7 proceedings relates to the issue of procedural due process. The Petition does not make any  
8 allegations that the public censure is unsupported by substantial evidence. Consequently, this  
9 Court’s review is limited to the procedural issues raised by Petitioner, rather than a substantive  
10 review of the evidence supporting the public censure.

11 The ultimate determination of procedural fairness is a question of law to be resolved by the  
12 Court based upon a *de novo* review of the administrative record. *Rosenbilt v. Superior Court*  
13 (1991) 230 Cal.App.3d 1434, 1442-1444. Given the quasi-judicial nature of the underlying  
14 proceedings, the parties do not dispute that the Petition for Writ of Mandate is governed by Code of  
15 Civil Procedure section 1094.5. A writ of administrative mandamus will not be issued unless the  
16 Court is persuaded that there has been a prejudicial abuse of discretion. Code of Civil Procedure §  
17 1094.5(b).

18 While it is not disputed that Code of Civil Procedure section 1094.5 applies to  
19 administrative proceedings of non-governmental agencies, such as AFTE, the Superior Court’s role  
20 in a mandamus proceeding is limited to inquiring “into the validity of any *final* administrative  
21 order or decision” (emphasis added). *Hongsathavij v. Queen of Angels/Hollywood Presbyterian*  
22 *Medical Center* (1998) 62 Cal.App.4th 1123, 1135-1136 (“*Queen of Angels*”).

23 The Court has reviewed the joint administrative record filed in this case, including  
24 Exhibits 1-203, the pleadings in the case, and judicial notice is taken of the Court file. The Court  
25 has also viewed the DVD of the general membership meeting (Exhibit 200), as well as a  
26 supplementary pleading by Petitioner and subsequent evidence submitted on October 25, 2006,  
27 consisting of various depositions and a DVD of portions of depositions, which were referred to as  
28 “snippets” by Petitioner’s counsel during oral argument.

1 It is difficult to find any ethical or rule violations from a review of the administrative record  
2 as it pertains to the final stage of the administrative proceeding, which consisted of a hearing before  
3 the general membership in Vancouver, B.C. on May 24, 2004. It is equally difficult to find that the  
4 proceeding was anything other than exceedingly fair. Well in advance of the hearing all relevant  
5 materials relating to the ethics complaint were posted on the AFTE website for ease of review by  
6 all members. Petitioner's attorney requested and was granted additional time to submit additional  
7 defense materials for posting on the AFTE website. The voting members were encouraged to  
8 thoroughly review the material posted on the website prior to attending the general membership  
9 meeting so that they could make an informed decision.

10 The general membership hearing was perceived by this Court as a well-prepared, organized  
11 and professionally conducted adjudicative proceeding, consistent with fundamental fairness, and  
12 administrative and procedural due process. Procedures and the protocol for the meeting were  
13 established in advance, presentations were made and evidence was presented, follow by an  
14 extended question and answer session by the members. Voting was conducted by secret ballot in  
15 an orderly fashion. When faced with a vote of expulsion, by a margin of one vote, the voting time  
16 was extended to allow Petitioner to return to the hearing, which he had left, to allow the casting of  
17 his vote. This final vote was the difference between expulsion and public censure.

18 Petitioner argues that the format and protocol of the general membership hearing was one-  
19 sided, established by the then president of AFTE, Ann Davis. However, the record of  
20 communications between Ms. Davis and counsel for Petitioner, Brad Powers, preceding the  
21 meeting are compelling that the protocol was jointly determined with virtually all of Mr. Power's  
22 requests and suggestions accommodated. Ms. Davis offered to extend the time allowed for  
23 presentation of evidence, to re-word the secret ballots to insure that the voting members understood  
24 that it was a *de novo* review, and to delete any and all references in the written material to her role  
25 as being one of a moderator, all in response to Mr. Power's requests.

26 Petitioner's claims of bias and conflicts of interest are equally without merit. When viewed  
27 in the context of the controlling standard set forth in *Nasha v. City of Los Angeles* (2004) 125  
28 Cal.App.4th 470, 483, Petitioner has failed to establish any actual bias or the probability of actual

1 bias. Rather, Petitioner's allegations of bias appear to be subjective and perceived, at best. The  
2 record is entirely absent of any concrete facts which would suggest the probability of actual bias or  
3 conflicts of interest. There is no evidence of any improper financial dealings, and Petitioner's  
4 argument with respect to referrals within the AFTE organization is based on speculation and  
5 conjecture. First, the votes at every stage of the proceeding were overwhelmingly in support of the  
6 allegations. As there does not appear to be a deficit in the substantial evidence supporting the  
7 ethics violations, there would be little need for proponents of the ethics violations to resort to  
8 underhanded activity. Second, in an organization such as this, of relatively small membership, it is  
9 not unusual for there to be personal relationships, referrals, or even employer/employee  
10 relationships, particularly in light of the public entity employment status of many of the members.  
11 And lastly, since the balloting was secret, there would be little need to base ones votes on reasons  
12 other than the merits of the proceeding, especially at the general membership meeting.

13 Similarly, the claim of purported bias and conflicts of interest of the hearing officer, Joseph  
14 Saloom, and the prosecutor/AFTE president, Ann Davis, is again without evidentiary support,  
15 speculative, and subjective and perceived only. In *Queen of Angels, supra*, at pps. 1142-1143, it  
16 was noted that in the administrative setting, the overlapping of investigatory, prosecutorial, and  
17 adjudicatory functions is common, and it does not necessarily deny a fair hearing.<sup>1</sup> Here, Ann  
18 Davis' role of prosecutor for the hearing is not in conflict with her primary role of AFTE President.  
19 Furthermore, Joseph Saloom, while designated the "hearing officer," was not acting as the  
20 "adjudicator" or "decision-maker" commonly found in administrative hearings, but more of a  
21 procedural referee or moderator. The ultimate decision-makers were the voting members of AFTE  
22 in attendance at the general membership hearing.

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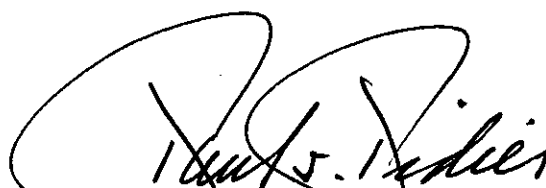
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26 <sup>1</sup> And, as herein, where an administrative body has a duty to act on an ethical complaint, and it is  
27 the only entity capable of acting, the fact that the body may have an interest in the result does not  
28 disqualify it from acting; the rule of necessity precludes a claim of bias from the structure of the  
process. *Queen of Angels, supra*, at pps. 1142-1143.

1 Other complaints of error at the general membership meeting, such as the failure to swear  
2 certain witnesses, if true, were *de minimus*, and if arguably error or rule violations, were harmless.  
3 There is generally not a due process right to sworn testimony. *Mohilef v. Janovici* (1996) 51  
4 Cal.App.4th 267, 289-294. Moreover, there does not appear to be any motivation to be untruthful  
5 at the hearing, particularly in light of the fact that the central concern of the hearing involved  
6 “professionally acceptable” conduct rather than “hotly contested” facts. *Broussard v. The Regents*  
7 *of the Univ. of California* (1982) 131 Cal.App.3d 636, 642. Based upon the totality of the  
8 administrative record, this Court does not find any material deviations from the AFTE Bylaws or  
9 the Procedures for Enforcement of the Code of Ethics, nor does it find any credible evidence of  
10 bias, conflicts of interest, or procedural due process violations.

11 While the *Queen of Angels* case holds that this Court is not to review preliminary  
12 proceedings in a mandamus proceeding under Code of Civil Procedure section 1094.5, such as the  
13 ethics committee stage and the board of directors hearing, the administrative record reveals that  
14 those proceedings would equally be devoid of concrete evidence in support of Petitioner’s claims  
15 of unfairness, rule violations, and procedural due process violations. This Court finds that the  
16 Petitioner was served with timely notice of the ethics complaint and supporting documents at the  
17 initial stage of the proceeding (Exhibit 22), and was given every reasonable opportunity to provide  
18 a response, to mount a defense to the charges, and to attend all hearings. This Court concludes that  
19 there was no material rule violations, no actionable bias or conflicts of interest, and no abuse of  
20 discretion, prejudicial or otherwise, by AFTE in conducting the disciplinary proceedings. The  
21 Court therefore awards judgment for Respondents on the Writ of Mandate cause of action, with  
22 Respondents to recover their costs.

23  
24 Dated: 12/6/06

  
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Honorable Daniel J. Didier  
Superior Court Judge, presiding