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7 Sizemore

FILED/ENDORSED
FEB 19 2020
By: A. Turner
Deputy Clerk

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SACRAMENTO**

10
11 CAL FIRE LOCAL 2881, and WADE
12 SIZEMORE,

13 Petitioners,

14 v.

15 CALIFORNIA STATE PERSONNEL
16 BOARD; CALIFORNIA DEPARTMENT OF
17 HUMAN RESOURCES; and CALIFORNIA
18 DEPARTMENT OF FORESTRY AND FIRE
19 PROTECTION,

20 Respondents.

Case No. **34-2020-80003329**

**VERIFIED PETITION FOR WRIT OF
MANDATE**

[CODE CIV. PROC., § 1085]

1 Petitioners CAL FIRE Local 2881 ("Local 2881" or "Petitioner") and Wade Sizemore
2 ("Sizemore" or "Petitioner") petition this Court for a writ of ordinary mandate pursuant to Code of
3 Civil Procedure section 1085, directed to Respondents California State Personnel Board ("SPB"),
4 California Department of Human Resources ("CalHR"), and California Department of Forestry
5 and Fire Protection ("CAL FIRE") (collectively "Respondents"), mandating that Sizemore, and all
6 others similarly situated (including Firefighter I's (seasonals) and Limited Term employees)
7 receive an administrative appeal of terminations and other adverse actions imposed within the
8 statutory relevant limitations period.

9 Further, Petitioners petition this Court for an award of attorneys' fees and costs pursuant to
10 Government Code sections 800, 1021.5, and 3260.

11 In support of these requests, Petitioners allege as follows:

12 1. At all times herein pertinent, Respondent California State Personnel Board ("SPB")
13 was and is a duly constituted body created and existing under the authority of the California State
14 Constitution and statutes of the State of California. The SPB is entrusted with and is responsible
15 for the State of California's civil service system.

16 2. At all times herein pertinent, Respondent California Department of Forestry and
17 Fire Protection ("CAL FIRE" or the "Department") was and is a duly organized State entity,
18 existing under the California State Constitution and applicable statutes of the State of California.
19 CAL FIRE was and is an agency of the State of California and is the hiring authority for
20 Petitioners in this action.

21 3. At all times herein pertinent, Respondent California Department of Human
22 Resources ("CalHR"), was and is a duly organized State entity, existing under the California State
23 Constitution and applicable statutes of the State of California. CalHR represents the Governor as
24 the "employer" in issues involving employer-employee relations, including collective bargaining
25 pursuant to the Ralph C. Dills Act, and also administers the State's classification plan, salaries and
26 manager/supervisor programs and other personnel-related programs.

27 4. Petitioners bring this action to enforce their procedural rights to administrative
28 appeals of terminations and other adverse employment actions under the Firefighters Procedural

1 Bill of Rights Act (“FFBOR”), Government Code section 3254.

2 5. Local 2881 is the exclusive bargaining representative for all firefighters and related
3 classifications within State Bargaining Unit 8, including the individual Petitioner in this action,
4 including seasonal and limited term employees within State Bargaining Unit 8.

5 6. Wade Sizemore worked as a Firefighter I (seasonal) for CalFire for the 2015
6 through 2018 fire seasons – approximately May or June of each year to November of each year.

7 7. Firefighter I (seasonal) employees are hired under Gov. Code section 19058 and
8 per Cal. Const., art VII, section 5 can only work up to nine months in a twelve-month period. At
9 the end of the fire season, Sizemore and all other seasonal firefighters are separated from CAL
10 FIRE employment with the right to rehire the next season. Separated seasonal firefighters then
11 receive notices from CAL FIRE before the beginning of the fire season to indicate on what date
12 they will return. Seasonal firefighters do not serve a probationary period.

13 8. Limited Term employees are hired under Gov. Code section 19080, et seq., and
14 whenever an appointing power requires the appointment of a person on a limited term basis, the
15 request for certification shall state the duration of the position. Limited Term employees do not
16 serve a probationary period.

17 9. As relevant to this Writ Petition, Petitioners are not challenging Respondents’
18 rights to non-punitively separate seasonal employees at the end of the fire season nor
19 Respondents’ rights to non-punitively separate Limited Term employees at the end of their
20 designated term. Rather, this Petition challenges Respondents’ practice of disciplining or
21 separating such employees early and in response to alleged misconduct, and/or negatively
22 impacting their right to rehire the following fire season, without the ability to have an
23 administrative appeal pursuant to the Firefighters Procedural Bill of Rights Act (“FFBOR”).

24 10. Sizemore was a firefighter as defined under the FFBOR, Government Code section
25 3251(a).

26 11. Sizemore is not a probationary employee in his position as a Firefighter I
27 (seasonal).

28 12. In or around June of 2015, Sizemore began his employment with CAL FIRE as a

1 Firefighter I (seasonal). Sizemore worked through the 2015, 2016, 2017, and most of 2018 fire
2 seasons. Sizemore was stationed in the Mendocino Unit, Fort Bragg Station.

3 13. On August 3, 2018, CAL FIRE served Sizemore with a Notice of Termination with
4 Cause, a true and correct copy of which is attached hereto as **Exhibit A**. This Notice of
5 Termination was based on allegations from only one other employee. The allegations were never
6 thoroughly investigated prior to the discipline being imposed.

7 14. Before August 3, 2018, Sizemore had never been disciplined by CAL FIRE.

8 15. Because the Notice of Termination was with Cause, Sizemore was not eligible for
9 rehire in the 2019 fire season (2 California Code of Regulations (“CCR”) section 211(a)), and was
10 in fact not re-hired in the 2019 fire season.

11 16. Per 2 CCR section 63.1, the Notice of Termination with Cause provided for a
12 name-clearing hearing with Sizemore’s Unit Chief but did not provide for an evidentiary hearing
13 as required under the FFBOR Act, Government Code section 3254.

14 17. On August 4, 2018, the termination became effective.

15 18. Sizemore made a timely request for a name-clearing hearing with Unit Chief
16 George Gonzalez of the Mendocino Unit. A “name-clearing” hearing is not a full evidentiary
17 hearing. Witnesses are not permitted to be called, there is no “discovery” of exhibits, and the
18 hearing officer does not have the authority to overturn the discipline imposed. Rather, all that is
19 permitted at a “name-clearing” hearing is an attempt have the decision-maker change the “for
20 cause” status of the discipline, and in some cases, alter conclusions of fact that might be
21 stigmatizing. This is not an administrative appeal hearing pursuant to, or in conformance with, the
22 Administrative Procedures Act, Government Code sections 11500 et seq.

23 19. On August 10, 2018, Unit Chief Gonzalez held the name-clearing hearing. Shortly
24 thereafter, Unit Chief Gonzalez inquired with CAL FIRE Staff Services Manager Ashley Glisan
25 from Region Headquarters whether Unit Chief Gonzalez had the authority to overturn the
26 termination. Ms. Glisan informed Unit Chief Gonzalez that he only had the authority to remove
27 the “for cause” designation from the termination and could not reverse the termination. 2 CCR
28 section 63.1(b)(4).

1 20. On August 23, 2018, Unit Chief Gonzalez issued his decision to remove the “for
2 cause” designation from Sizemore’s Notice of Termination, but because his authority was limited
3 to removing the “for cause” designation, Sizemore was still removed from his job and would not
4 be rehired.

5 21. Government Code section 3254(b), states “[P]unitive action or denial of promotion
6 on grounds other than merit shall not be undertaken by any employing department or licensing or
7 certifying agency against any firefighter who has successfully completed the probationary period
8 without providing the firefighter with an opportunity for administrative appeal.” CAL FIRE does
9 not require seasonals and/or LT’s to complete a probationary period. Government Code section
10 3254.5 requires that the administrative appeal conform to the rules set forth in the Administrative
11 Procedures Act, Government Code sections 11500 et seq. The Administrative Procedures Act
12 provides for a hearing presided over by an Administrative Law Judge, discovery, and the right to
13 examine witnesses, introduce exhibits, and cross-examine opposing witnesses among other
14 procedural protections. *Id.*

15 22. On September 20, 2018, Sizemore filed an appeal of his termination with the SPB.

16 23. On October 16, 2018, the SPB issued a letter asserting that it did not have
17 jurisdiction to hear Sizemore’s appeal from termination.

18 24. On November 19, 2018, Sizemore’s counsel sent a letter to SPB, CalHR, and CAL
19 FIRE demanding an evidentiary hearing per Government Code section 3254. These three agencies
20 were included in the demand because with SPB’s refusal to hear the appeal, the forum for the
21 appeal is unclear. Sizemore’s right to an evidentiary appeal hearing is clear under Government
22 Code sections 3254(b) and 3254.5.

23 25. On November 28, 2018, CalHR Chief Counsel Frolan Aguilin responded to the
24 November 19, 2018 letter via telephone and indicated that CalHR would not hear Sizemore’s
25 appeal.

26 26. On January 14, 2019, SPB responded to the letter confirming its position that it did
27 not have jurisdiction to hear such an appeal.

28 27. On September 26, 2019, CAL FIRE responded to the letter, indicating that it would

1 not hear Sizemore's appeal and more generally would not provide administrative hearings to
2 Firefighter I's (seasonals).

3 28. This Petition is brought on behalf of all other Firefighter I's (seasonals) and
4 Limited Term employees terminated from CAL FIRE without the opportunity for an
5 administrative appeal, within the applicable limitations periods. These Firefighter I's (seasonals)
6 include, but are not limited to: (1) Michael Mullett, a Firefighter I, who received a Notice of
7 Termination with Cause, effective October 19, 2019. Although he was given the opportunity to
8 challenge the "for cause" status of his termination, he was not afforded any type of administrative
9 appeal. As a result, Mullett was terminated and will not be rehired; and (2) Jacob Martin, a
10 Firefighter I, who received a Notice of Termination with Cause, effective on or about May 21,
11 2019. Although he was given the opportunity to challenge the "for cause" status of his
12 termination, he was not afforded any type of administrative appeal. As a result, Martin was
13 terminated and will not be rehired.

14 29. Local 2881 (on behalf of its members) and Sizemore are all beneficially interested
15 in this action and have no plain, speedy and adequate remedy in the ordinary course of law, other
16 than the relief sought in this petition. All agencies that could hear the appeal as required under
17 Government Code section 3254 have declined to do so.

18 30. The actions of Respondents are arbitrary and capricious within the meaning of
19 Government Code section 800 because they lack fair and substantial reason and are contrary to
20 established law. Petitioners have incurred and will continue to incur attorneys' fees in the course
21 of prosecuting this action in an amount to be proven at trial. All attorneys' fees have been
22 incurred as a result of the arbitrary and capricious actions alleged above thereby entitling
23 Petitioners to an award of attorneys' fees pursuant to Government Code section 800 in an amount
24 not to exceed \$7,500.

25 31. This action will result in the enforcement of an important right for seasonal
26 firefighters under Government Code section 3254. Petitioners have incurred, and will continue to
27 incur, attorneys' fees in the course of prosecuting this action in an amount to be proven at trial.
28 All attorneys' fees have been incurred in the furtherance of the interests of a large class of persons,

1 seasonal firefighters, thereby entitling Petitioners to an award of attorneys' fees pursuant to
2 Government Code section 1021.5.

3 WHEREFORE, Petitioners pray:

4 1. For a writ of ordinary mandate pursuant to Code of Civil Procedure section 1085,
5 compelling the Respondents to proceed in a manner authorized by law and provide an
6 administrative appeal (Government Code §§ 3254(b) and 3254.5) for Sizemore and all other
7 Firefighter I's and Limited Term employees within State Bargaining Unit 8, to challenge their
8 terminations and other discipline;

9 2. For reasonable attorneys' fees pursuant to Government Code sections 800 and
10 1021.5;

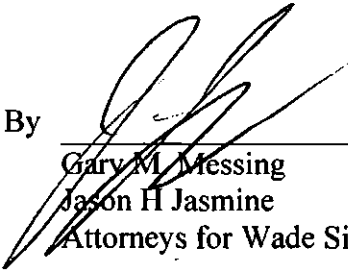
11 3. For costs of suit incurred in this action; and

12 4. For such other and further relief as the Court deems just and proper.

13 Dated: February 14, 2020

MESSING ADAM & JASMINE LLP

14
15 By



16 Gary M. Messing
17 Jason H. Jasmine
18 Attorneys for Wade Sizemore
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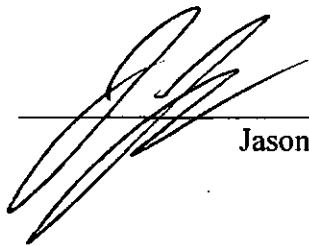
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VERIFICATION

I am one of the attorneys for WADE SIZEMORE, a party to this action. Such party is absent from the county of aforesaid where we attorneys have our office, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 2/14/2020 in Sacramento, California



Jason H Jasmine

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VERIFICATION

I am the President of CAL FIRE Local 2881, and as such am authorized to sign this verification on behalf of CAL FIRE Local 2881. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 2/19/2020 in Sacramento, California



Tim Edwards

EXHIBIT A



801 Capitol Mall Sacramento, CA 95814 | www.spb.ca.gov

Governor Edmund G. Brown Jr.

October 16, 2018

Wade Sizemore
c/o Messing Adam & Jasmine
980 9th Street, Suite 380
Sacramento, CA 95814

Re: Appeal from Termination

Dear Mr. Sizemore:

The State Personnel Board (SPB) is in receipt of your appeal filed on September 20, 2018, through our Automated Online System. Upon review of your appeal, it was determined that the SPB does not have jurisdiction of your request. SPB lacks jurisdiction for an appeal from a termination of a seasonal appointment.

California Code of Regulations, title 2, section 63.1 reads:

(a) In those situations where an employee's Limited Term (LT), Seasonal, or Temporary Authorization (TAU) appointment is terminated for fault, based on charges of misconduct which might stigmatize his or her reputation, or seriously impair his or her opportunity to earn a living, or which might seriously damage his or her standing or association in his community, the employee shall be entitled to file a request for a "Name Clearing" Hearing to be conducted by the appointing authority.

(b) Any Name Clearing Hearing conducted by an appointing authority should, at a minimum, conform to the following requirements:

(1) The employee should file his or her request with the appointing authority within five business days of the effective date of the notice of termination;

(2) The appointing authority should conduct the hearing and issue its decision within 21 days of the effective date of the notice of termination, unless the employee agrees to a hearing to be conducted at a later date;

(3) The Employee should be entitled to be represented by a representative of his or her choosing;

(4) The appointing authority's representative should be a neutral, impartial decision-maker, who has the authority to sustain the termination, or revoke the "for fault" designation concerning the appellant's termination;

(c) Upon conclusion of the hearing, the appointing authority's representative shall determine whether the allegations contained in the notice of termination are supported. If the allegations are not supported, a decision shall be issued to reflect that the employee's termination was without fault. Such a decision will not, however, require that the appellant be reinstated to his or her position, except otherwise required by law.

(d) The Board does not conduct Name Clearing Hearings, nor is there any right of appeal to the Board from a decision by an appointing authority, except as otherwise required by law.

As indicated, California Code of Regulations, title 2, section 63.1 subd. (d), "...nor is there any right of appeal to the Board ..." the SPB does not have jurisdiction for your request. Therefore, the State Personnel Board will not be moving forward with your Appeal.

For more information regarding the appeals process and procedures, please visit SPB's website at www.spb.ca.gov.

Based on the above, SPB will not be taking any further action on your appeal.

Sincerely,

STATE PERSONNEL BOARD

cc: Forestry and Fire Protection – Legal
P.O. Box 944246, Room 1516-20
Sacramento, California 94244-2460



DEPARTMENT OF FORESTRY AND FIRE PROTECTION

Mendocino Unit
17501 North Highway 101
Willits, CA 95490
(707) 459-7414
Website: www.fire.ca.gov



**PERSONAL AND CONFIDENTIAL
NOTICE OF TERMINATION WITH CAUSE**

Wade Sizemore
XXX-XX-6775
Firefighter I
California Department of Forestry and Fire Protection (CAL FIRE)
Mendocino Unit
17501 North Highway 101
Willits, Ca 94590

You are hereby notified that you are being Terminated with Cause from your employment as a **Firefighter I (Seasonal)** with CAL FIRE, effective at the close of business on August 4, 2018. The reason for Termination with Cause is:

You have been assigned to a strike team on the Mendocino Complex incident since June 28th, 2018, during which time you have repeatedly failed in your duty by exhibiting insubordinate and disrespectful behavior which undermined crew cohesion and increased safety risk of your crew; as described below:

On July 28, 2018, around 01:30 hours, during chainsaw operations, you were working at an unsafe distance with a chainsaw operator, pulling brush from the area being cut. Your Fire Captain (FC) witnessed this failure, and despite your proximity to the cutting, the FC observed you being unproductive. When the issues were addressed with you, you functioned in a safe and productive manner for approximately 15 minutes, then returned to being unsafe and unproductive.

On July 30, 2018, around 05:15 hours, you were given direction by your FC to extinguish some burning material. You did not to obey this lawful order, resulting in your co-workers completing your unfinished assignment.

On July 30, 2018, around 06:05 hours, while in a moving engine, you unbuckled your seatbelt and proceeded to remove your safety gear. This concerned the FC enough to stop the vehicle. After he stopped, you said that you just wanted to let him know you would not be ready to fight fire. It is unacceptable for you to remove your safety gear under such circumstances.

Again, on July 30, 2018, and approximately two minutes following the safety gear issue, you asked the FC if he wanted to, "stop and put out a stump?" Because you were in an area actively burning, the FC stopped the vehicle to find out if there was burning material that needed to be extinguished. When questioned what the issue was, you laughed that the FC stopped the vehicle. The operator asked if you were trying to make a joke, to which you replied, "I'll just lick the window now." The FC perceived this as a reference to a

disabled person and was highly upset, as he has a special needs child. He asked you to clarify your comment, to which you stuck out your tongue toward the window of the fire engine.

Again, on July 30, 2018, around 07:00 hours, under the supervision of another FC, you were observed standing around while others worked to suppress fire next to a structure. Upon returning to the engine, you stated to your crewmates sarcastically, "good job guys, we really kicked ass on that thing." Despite your subpar actions, you decided to chide the crew. Unprofessional actions and statements that are demeaning to your crew greatly impact crew cohesion and morale.

Later on July 30, 2018, around 10:20 hours, you stated to the crew, "congratulations, how do you feel about yourself?" in a condescending tone and tenor. You continued to chide and demean the crew, affecting crew safety and cohesion.

On July 31, 2018, around 07:40 hours, you were asked to stop playing music the FC considered inappropriate. You challenged the FC repeatedly about what you felt was inappropriate. The FC ultimately required all music be shut off, because you were using it to challenge the leadership of the crew and to antagonize your crewmates.


Following the failure to engage work duties, and your disrespectful outbursts; you were assigned to work under a different FC. However, your insubordinate, disrespectful conduct continued.

If you would like the opportunity to schedule a name clearing appeal hearing with your Unit Chief you have ten (10) calendar days following the date you receive this notice to contact Unit Chief George Gonzalez, Mendocino Unit, 17501 North Highway 101 Willits, Ca. 94590, (707) 459-7414 to request a hearing.

The Unit Chief will schedule a name clearing appeal hearing with you and your representative within seven (7) calendar days following your request. At this hearing, you will be given the opportunity to present the reasons why you should not have been terminated. The Unit Chief shall render a final decision regarding the Termination with Cause within thirty (30) calendar days following the date of the hearing. This name clearing appeal hearing before the CAL FIRE Chief Officer is your only opportunity to have the "with cause" designation removed from your termination.



PAUL DUNCAN
Assistant Chief - Administration



DATE