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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GLENN SABEY, Plaintiff and Appellant, v. CITY OF POMONA, Defendant and Respondent.	B271417 (Los Angeles County Super. Ct. No. BS152939)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary H. Strobel, Judge. Affirmed in part, reversed in part, and remanded with directions.

Castillo Harper, Brandi L. Harper and Michael A. Morguess for Plaintiff and Appellant.

McCune & Harber and Steven H. Taylor for Defendant and Respondent.

This is the second appeal involving a decision of the City Council (City Council) of the City of Pomona (City) that: (1) rejects the recommendation in an arbitrator's Advisory Opinion and Award to reduce the termination of Glenn Sabey (Sabey) from City's police department to a suspension without pay and benefits, and (2) independently determines that Sabey should be terminated.

The first appeal resulted in a published opinion, *Sabey v. City of Pomona* (2013) 215 Cal.App.4th 489 (*Sabey*). In *Sabey*, we held that City Council's first decision to terminate Sabey was infirm due to a constitutionally intolerable risk of bias because it consulted an attorney with a conflict of interest. We directed City Council to reconsider Sabey's termination in light of independent legal advice. After remittitur, City Council held a second hearing and once again voted to terminate Sabey, but it did so without providing Sabey notice of the proceeding, and without adhering to our direction to obtain independent legal advice.[1] Subsequently, after Sabey objected to the lack of notice, City Council retained an attorney to provide independent legal advice and held a hearing at which it voted a third time to terminate Sabey's employment. In connection with a petition for writ of administrative mandate and request for civil penalties based on violation of the Public Safety Officers Procedural Bill of

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[1] Whether City Council obtained independent legal advice for the second hearing is not definitively established by the record. The circumstances strongly indicate that it did not. As we explain in part I of the Discussion, *post*, City bore the burden of proof on that issue because, inter alia, it had exclusive knowledge, and it failed to meet that burden. For purposes of this opinion, we deem it established that independent legal advice was not obtained.

Rights Act (PBRA), Sabey challenged City Council's decision, inter alia, on the grounds he was denied due process and City Council failed to comply with our directions in *Sabey*. He requested that the Advisory Opinion and Award be reinstated, and that the trial court award civil penalties under the PBRA. The trial court rejected Sabey's contentions and claims. Sabey now challenges that ruling.

In *Sabey*, our disposition stated: "If the City Council declines to review the arbitration in light of independent legal advice and render a decision within the prescribed time, the [A]dvisory [O]pinion and [A]ward shall become final." Because City Council held a second hearing without independent legal advice, it effectively declined to reconsider Sabey's termination pursuant to our instructions. City Council could not undo that decision by holding a third hearing. Thus, the Advisory Opinion and Award must become final, and we partially reverse the judgment on that basis. This decision is alternatively supported by our conclusion that Sabey was not afforded due process by the procedure employed by City Council. With respect to the denial of PBRA civil penalties, we affirm. On remand, the trial court shall enter judgment ordering that the Advisory Opinion and Award reducing Sabey's termination to a suspension without pay and benefits is City's final decision.

FACTS

Background[2]

"*Sabey's Misconduct*

"Sabey dated Caroline Atarian (Atarian) for about a year. She was living in a condominium complex in Corona. It had a

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[2] This background section quotes from our statement in *Sabey*.

pool and Jacuzzi secured by a fence and a locked gate. Their relationship ended in 2000 or 2001. They had off-and-on contact for many years. In 2008, she saw him in the Jacuzzi and told him that he was trespassing. Atarian said she would call the police if she ever saw him in the complex again. He returned on five or 10 occasions and illegally used the Jacuzzi. To gain access to the Jacuzzi, he had to jump over the fence.

"On April 1, 2008, Atarian saw Sabey by the pool and she called the Corona Police Department. When a responding Corona police officer asked for identification, Sabey appeared to be irritated. He said that his girlfriend lived in the complex, and implied he did not understand why the police had been called. Sabey acted as though he belonged at the complex. At one point, Sabey said he had an appointment with Atarian to cut his hair. Soon after, he left.

"Subsequently, a Corona police officer spoke to a resident at the complex named Cathy Lariviere. She said that in March she saw a man masturbating in the Jacuzzi. Lariviere identified the man as Sabey.

"Sabey did not inform his watch commander of the incident or his contact with the Corona police.

"Between April 2005 and December 2007, Sabey conducted unauthorized inquiries on his own name with the National Crime Information Center (NCIC) in violation of justice data interface controller (JDIC) rules. Sabey said he made the inquiries as a demonstration for trainee officers.

"*Internal affair's findings*

"The Pomona Police Department (Department) internal affairs office investigated Sabey and found that he violated various provisions of the Department's policies and procedures by

trespassing in violation of Penal Code section 602; by committing a lewd act in public in violation of Penal Code section 647, subdivision (a); by committing two misdemeanors and thereby impacting the way the public and another agency view the Department and law enforcement; by engaging in conduct that is unbecoming of a member of the Department, and which tends to reflect unfavorably upon the Department or its members; by failing to report activities that may result in criminal prosecution; by failing to report activities that have resulted in official contact by another law enforcement agency; and by violating JDIC rules by making inquiries on his own name with the NCIC.

"*Notice of intent to terminate Sabey's employment; termination*

"Sabey was sent notice of intent to terminate his employment due to violations of the Department's policies and procedures. After two prediscipline *Skelly* hearings (see *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14, 539 P.2d 774]), the chief of the Department, David Keetle, recommended that the city manager terminate Sabey's employment. The city manager followed Chief Keetle's recommendation.

"*Advisory arbitration*

"Pursuant to the memorandum of understanding between [] City and the City of Pomona Police Officers' Association, Sabey requested an advisory arbitration to determine whether he was properly discharged by the Department for cause. [City] was represented at the advisory arbitration by Debra L. Bray (Bray) from Liebert Cassidy Whitmore (LCW). In his [A]dvisory [O]pinion and [A]ward, the arbitrator sustained all of the

findings made by internal affairs except as to lewd conduct. The award provided that Sabey's termination should be converted into a suspension without pay or benefits.

"*[City Council's] response to the [A]dvisory [O]pinion and [A]ward*

"In July 2010, Peter Brown (Brown) of LCW was [] City's chief labor negotiator. As a result, he regularly met with [] City Council in closed session at City Council meetings. After [] City Council received the arbitrator's [A]dvisory [O]pinion and [A]ward, it asked Brown to be [] City Council's legal adviser. At that point, LCW implemented an ethical wall between Bray and Brown. They did not talk to each other about the Sabey matter, and they were prevented from accessing each other's files.

"On July 19, 2010, Brown met with [] City Council in closed session. He presented on the Sabey matter. Through counsel, Sabey objected to attorneys from the same firm acting as advocates for the Department and as legal advisers to [] City Council. On August 2, 2010, [] City Council rendered a decision that adopted the arbitrator's factual findings but rejected the recommendation that Sabey's termination be converted into a suspension without pay or benefits. As a result, Sabey's termination from employment was made final.

"*The writ petition; the motion*

"Sabey filed a petition pursuant to Code of Civil Procedure sections 1094.5 and 1085. According to Sabey, he was denied due process of law and a fair hearing because, inter alia, '[he] was terminated by a decision making body that received legal advice regarding this matter prior to deciding whether to review the [arbitrator's decision] from the law partner of the attorney who represented the Department prior to and at the [arbitration].'"

(*Sabey*, *supra*, 215 Cal.App.4th at pp. 493–495.) The trial court denied Sabey's writ petition. (*Id.* at p. 495.)

Subsequently, Sabey appealed.

The Opinion in *Sabey*

On April 16, 2013, we issued our opinion. (*Sabey*, *supra*, 215 Cal.App.4th 489.) We held that "that when a partner in a law firm represents a department within a city at an advisory arbitration regarding a personnel matter, and when the city's decisionmaking body later reviews that arbitrator's award for confirmation or rejection, the principles of due process prohibit the decision maker from being advised on the matter by a different partner from the same law firm. Because the law partners owe each other fiduciary duties[, and] the adviser partner is in the position of reviewing the efficacy of the advocate partner's work[,] there is 'a clear *appearance* of unfairness and bias' [citation], rendering the risk of actual bias too high to be constitutionally tolerable within the meaning of *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737 [88 Cal.Rptr.3d 610, 199 P.3d 1142] (*Morongo*)." (*Sabey*, *supra*, 215 Cal.App.4th at p. 492.) Thus, we reversed and remanded the matter, directing "the trial court to refer the matter back to [] City Council for further consideration in light of independent legal advice. For [that] purpose, the clock [was] reset under the memorandum of understanding. . . . If [] City Council decline[d] to review the arbitration record in light of independent legal advice and render a decision within the prescribed time, the [A]dvisory [O]pinion and [A]ward [were to] become final." (*Id.* at pp. 499–500.)

Remittitur was issued on July 30, 2013.

September 16, 2013, City Council Meeting

On September 16, 2013, City Council met in a closed session and voted to terminate Sabey's employment.[3] The minutes indicated that there was a conference with legal counsel[4] regarding the Sabey matter, and further stated: "A briefing was

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[3] The minutes do not establish that City Council voted to approve the termination of Sabey's employment, and there is no transcript. However, as we reference in our statement of facts, *ante*, City Council sent Sabey a notice on November 13, 2013, indicating that it had made a decision on September 16, 2013, and that any action taken by City Council was null and void due to lack of notice. Later, in connection with a federal action filed by Sabey, one of City's attorneys admitted in an e-mail that City Council voted to approve the termination. In an order dismissing Sabey's federal action, the federal court stated, "In a published opinion, the California Court of Appeal ordered [City Council] to vote again. [Citation.] [City Council] again voted to discharge Sabey—but without informing him of the vote beforehand. [City Council] therefore set aside the results of that vote, and is poised to vote on the question a third time." In its opposition to the petition for writ of administrative mandate, City Council averred that it "deemed it appropriate to review and consider with independent legal counsel the Arbitrator's Advisory Opinion and Award . . . at the September 16, 2013 closed session. [Citation.] However, [City Council] determined that through mistake, inadvertence or excusable neglect, notice of the review was not provided to [Sabey] pursuant to Government Code [section] 54957."

[4] In particular, the minutes indicated that City Council held a conference with legal counsel on five legal matters, one of which was Sabey's pending lawsuit. The minutes do not identify the legal counsel.

given, direction was given to bring the item back to the City Council; however, no further action was taken, and there is nothing further to report."

Sabey was not given notice of the hearing.

October 2013 Communications Between Sabey's Counsel and an Attorney Working on Behalf of City Council

On October 3, 2013, counsel for Sabey, Michael Morguess (Morguess), e-mailed attorney Kristine Exton (Exton), stating: "I want to confirm our telephone discussion earlier today regarding [the Sabey] matter. You indicated that [] City is not willing to reinstate Mr. Sabey to his position as a police officer. You stated the reasons are [City Council] feels that he exhibits stalking behavior that is a 'real concern' to it, his interaction with the local police agency, and prior discipline at another department. When I said to you that it sounds like [City Council] has already decided the matter, you informed me that it indeed had already met, and recently rendered a decision based on the above stated concerns."

On October 5, 2013, Exton replied: "I am not authorized to speak on behalf of [] City Council as to the reason(s) it would or would not like [Sabey] as a police officer. Therefore, your 'confirmation' is incorrect. I offered you my opinion based on the past case materials that I reviewed and have already argued in this matter. I was not present during [] [City Council's] September 2013 closed session discussion and am not privy to what was or was not discussed. [¶] I am in the process of looking into what notice was provided for [City Council's] September 2013 closed session regarding [Sabey]. I will get back to you regarding this issue."

The same day, Morguess e-mailed back. He wrote: "You are the attorney of record; therefore, you are authorized to speak on [City Council's] behalf, and sought fit to do so during our conversation. You gave no indication that you were merely offering your opinion. You made it quite clear that [City] had already made a determination and that you were familiar with its reasons."

Two days later, Exton wrote: "Shame on you for trying to twist my words. I expect more of you."

In his next e-mail, Morguess accused Exton of backtracking on comments she previously made. He inquired as to why Exton did not say she was forwarding his inquiry on to City Council if she lacked authority to speak for City Council. Morguess stated, "You didn't say anything like that. Again, I called you and asked if [City] might be willing to take [Sabey] back; you gave me a flat out no and proceeded to tell me why; I responded with something like 'sounds like [City Council] has already decided the matter;' and you responded with 'they did;' I then responded that we had no knowledge of it, that [City Council] was supposed to give [Sabey] 24 hours notice, and that it sounded like a Brown Act[5] violation; you said you didn't know if it was a violation. I also asked you who was the attorney who advised [City Council], and you said you didn't know. [¶] Do you really deny we had this conversation? If not, have you forwarded my inquiry to someone in [City] who can address it? And if you're not authorized to speak on behalf of [City Council], to whom should I be speaking?"

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5 The Ralph M. Brown Act (Brown Act) is set forth in Government Code section 54950 et seq.

Judgment Following Remand

On November 7, 2013, the trial court entered judgment granting Sabey's petition for writ of administrative mandate in accordance with *Sabey*.

Morguess's November 13, 2013, Letter Objecting to City Council's Vote on September 16, 2013

On November 13, 2013, Morguess faxed a letter to City Council objecting to its September 16, 2013, meeting and vote on the grounds that Sabey did not receive notice and, inter alia, that City Council's action violated the Brown Act as well as Sabey's right to due process.

November 13, 2013, Notice to Sabey Regarding the September 16, 2013, Hearing

On November 13, 2013, City Council sent notice to Sabey entitled "NOTICE OF THE DECISION OF THE CITY COUNCIL OF THE CITY OF POMONA—NULL AND VOID." It stated that City Council "deemed it appropriate to review and consider with independent legal counsel the Arbitrator's Advisory Opinion and Award issued by Alexander Cohn on September 16, 2013. However, it was determined that through mistake, inadvertence or excusable neglect, notice of the review was not provided to [Sabey] pursuant to Government Code Section 54957. Therefore, any action(s) by [City Council] are null and void."[6]

Tolling Agreement

Morguess and Exton entered into an agreement to toll the time prescribed by the memorandum of understanding for City Council to hold a hearing and render a decision. The tolling

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[6] As we explain in parts I and II of the Discussion, *post,* it is pivotal that City Council did not at any point identify the purported independent legal counsel.

agreement provided that the agreement would conclude "10 days following written notice by any party to the other party of termination of this tolling agreement. Such notice shall be served by mail, with a proof of service[.]"

Sabey's Federal Lawsuit

Sabey sued City and City Council in federal court for violating his civil rights. He sought damages and injunctive relief.

Exton's March 3, 2014, Meet and Confer E-mail

The day before Exton said she planned to file a motion to dismiss Sabey's federal action, she sent Morguess a meet and confer e-mail in which she acknowledged, in part, that "[b]efore the Los Angeles Superior Court returned the matter back to [] City Council, [] City Council voted to approve the termination of [Sabey]. As that vote occurred before [] City Council had jurisdiction and because it occurred without notice to [Sabey], the vote was null and void."

Dismissal of the Federal Case

The judge in the federal case denied the motions to dismiss by City and City Council. Nonetheless, the judge dismissed the case without prejudice, inter alia, because City Council had not yet taken action after *Sabey* and therefore the controversy was not yet ripe for adjudication.

Hire of Independent Legal Counsel

On August 7, 2014, City hired Nate J. Kowalski (Kowalski) of Atkinson, Andelson, Loya, Ruud & Romo to provide legal advice to City Council regarding its review of the arbitrator's advisory opinion.

Termination of the Tolling Agreement

On August 22, 2014, Morguess mailed a letter to Exton notifying her of "the conclusion of the Tolling Agreement[.]"

September and October 2014 Communications Between Sabey's Counsel and Persons Working on Behalf of City Council

On September 15, 2014, Morguess faxed a letter to City Council indicating that he still had not received a copy of the written decision in September 2013 despite his demands. He also stated: "Furthermore, under the applicable provisions of the Memorandum of Understanding, the appellate decision, and judgment, consideration by [City Council] is untimely at this point."

On October 13, 2014, Morguess sent an e-mail to Linda Matthews (Matthews), City's human resources/risk management director asserting that the City Attorney misspoke when saying no reportable action was taken on September 16, 2013. Morguess said "we now know there was" reportable action. He asked Matthews to make the disclosures required by Government Code section 54951.1, subdivision (a)(5), including a disclosure regarding how each member of the City Council voted in the Sabey matter.[7] Matthews asked Assistant City Attorney Andrew L. Jared (Jared) to respond. Jared wrote: "My recollection is that the matter was heard [on September 16, 2013] by [City Council] but that no action was taken by [City Council].

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[7] Government Code section 54951.1 was repealed in 1994. Presumably, reference to this statute was a typographical error. Government Code section 54957.1, subdivision (a)(5) requires a public report of an action in closed session that dismisses a public employee.

Accordingly, the report out from Closed Session was accurate. I understand that you may have received information from [Exton] which let you infer that final action was taken—to the extent so that you 'now know that there was' final action taken. However, any information you received regarding the activities occurring that evening were inaccurate and you should not rely on such representations as the basis for your perception regarding the report out. Therefore, I respectfully disagree with you that there needs to be a revision to the report for closed session as to the September 16, 2013 City Council meeting."

Through a series of e-mails, Morguess sought clarification as to whether final action had been taken at some other time. On October 15, 2014, Morguess wrote to, inter alia, Matthews, stating he did not understand Jared's "hostility and defensiveness," and also stating that "it appears no one is quite sure, nor being candid, about what happened in September 2013." He went on to state, "Judging from subsequent conduct, there appears to be enough evidence there was a hearing, final decision, and that it was set aside, and that's how we ended up here today."

Jared replied to Morguess's October 15, 2014 e-mail, stating, "The record is what it is. Again, to clarify any ambiguity you continue to read into the record and are now projecting onto others, [City Council] took no final action on September 16, 2013 in Closed Session, which is how I reported the action from closed session that evening."

In response, Morguess sent an e-mail which, among other things, pointed out that City Council sent a notice stating that City Council's September 16, 2013, decision was null and void. He stated that the title of the document explained "that a

decision was made on September 16, but that Sabey did not get notice and so it is 'null and void.'" Morguess added that Exton "was absolutely clear that there was a termination decision, and was absolutely clear on the basis for that decision; and I have a pleading filed in federal court, by [City], . . . that affirmatively states, more than once, [] City Council voted to approve the termination of [Sabey] but that decision was rendered null and void by [City] (the subject of the November 13 notice)[.]" He asked, "[I]f [] City did not take final action on September 16[, 2013,] [when] did [City Council] vote, after the [Court of Appeal] decision, to terminate [Sabey]?"

October 15, 2014, City Council Hearing

On October 15, 2014, City Council held another closed session regarding the Sabey matter. Kowalski attended as independent counsel to City Council. After attorneys for City's police department and Sabey presented their arguments, City Council voted to continue deliberations for review and consideration of a possible decision on October 20, 2014.

October 20, 2014, Decision of City Council

On October 20, 2014, City Council adopted the arbitrator's factual findings and unanimously voted to terminate Sabey's employment.

January 15, 2015, Writ Petition and Complaint

On January 15, 2015, Sabey filed a joint petition for writ of administrative mandate and complaint for civil penalties under the PBRA.

Sabey alleged he was entitled to writ relief because, among other things, City Council "failed to proceed in the manner required by law" and violated his right to due process. In addition, he alleged he was denied his rights under the PBRA

because City Council failed to provide him an administrative appeal with an independent and unbiased decision maker in violation of Government Code section 3304, subdivision (b). In his points and authorities, Sabey argued that "at some point the decisionmaker likely becomes entrenched in its prior decisions such that [it] is impossible to consider the matter before it in an impartial manner." He also argued, "While it is true that the remedy by the Court of Appeal was for [] City Council to consider the matter anew with independent legal counsel, such proviso only applied to the second [City] Council decision—the September 16, 2013, decision[.]" Next, he suggested City Council failed to comply with the disposition in *Sabey* requiring it to obtain independent legal advice to eliminate the taint of Brown's involvement, and said, "We will never know if [City] Council obtained independent legal advice when it considered the discipline the second time[.]"

In City's opposition, it stated that City Council was advised by Brown at the first hearing, and it was advised by Kowalski at the third hearing. According to City, the disposition in *Sabey* did not "set a numerical limitation on administrative hearings." City acknowledged that the second hearing "was the result of [Sabey's] first writ of mandate and subsequent appeal." At no point did City identify an independent legal advisor for the second hearing. Kowalski provided a declaration attesting to the fact that his firm was hired in August 2014 to advise on the Sabey matter.

The trial court found that the "weight of the evidence supports a conclusion that the City Council took a second vote to terminate Sabey prior to the proceeding on October 15, 2014." However, the trial court made no finding as to whether City Council had independent legal advice at the second hearing. The

trial court denied the petition as well as "the derivative second cause of action for damages."

This appeal followed.

DISCUSSION

I. Standard of Review.

In connection with a trial court's ruling on a petition for writ of administrative mandate, we review its factual findings under the substantial evidence test and its legal conclusions de novo. (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 87.)

II. Our Judgment In *Sabey* Dictates Reversal.

Our disposition in *Sabey* constituted "the rendition of judgment of appeal[.]" (*Ducoing Management, Inc. v. Superior Court* (2015) 234 Cal.App.4th 306, 312 (*Ducoing*).) Interpretation of that judgment is de novo. (*Ibid*.)

Our judgment on appeal gave City Council the option to hold one additional hearing and obtain independent legal advice for purposes of that hearing.[8] Otherwise, the Advisory Opinion and Award was to become final. We did not specifically prohibit the holding of an unnoticed hearing and vote without independent legal advice, and then the holding of an additional hearing and vote. But that was not necessary. We were not required to envision City Council's every action. (*Ducoing*, *supra*, 234 Cal.App.4th at p. 312.)

Sabey was entitled to the benefit of our disposition. (*Hampton v. Superior Court* (1952) 38 Cal.2d 652, 656 ["[t]he

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[8] We express no opinion regarding whether City Council would have run afoul of our disposition in *Sabey* if it held an unnoticed second hearing at which identified independent counsel provided advice.

order of the appellate court as stated in the remittitur[] 'is decisive of the character of the judgment to which the appellant is entitled'"].) As we discuss below, we conclude that Sabey did not receive that benefit.

In his memorandum of points and authorities below, Sabey argued generally that City Council failed to comply with our directions, and stated, "We will never know if [City] Council obtained independent legal advice when it considered discipline the second time[.]" This argument required the trial court to determine whether City Council complied with the disposition in *Sabey*. In its statement of decision, the trial court neglected this issue other than to note that the November 13, 2013, notice stated that City Council "deemed it appropriate to review and consider with independent legal counsel the Arbitrator's Advisory Opinion and Award issued by Alexander Cohn on September 16, 2013."

The decisive question is whether Sabey or City bore the burden of proof as to whether City Council obtained independent legal advice at the second hearing.

Generally speaking, Evidence Code section 500 allocates the burden of proof to a plaintiff "[e]xcept as otherwise provided by law[.]" "Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof." (Evid. Code, § 601.)[9]

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[9] ""'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.' [Citation.] The burden of producing evidence is 'the obligation of a party to introduce evidence sufficient to avoid a ruling against [it] on the issue.' [Citation.]" (*Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 880.)

The burden of proof is "'"sometimes allocated in a manner that is at variance with the general rule. In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact.'" [Citations.]" (*Samuels v. Mix* (1999) 22 Cal.4th 1, 19 (*Samuels*).) "'Fundamental fairness must be the lodestar for our analysis. The California Law Revision Commission comment to Evidence Code section 500 states, 'In determining the incidence of the burden of proof, "the truth is that there is not and cannot be any one general solvent for all cases. *It is merely a question of policy and fairness* based on experience in the different situations.'" [Citations.]" (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119–120.)

Whether a party bears the burden of proof is a mixed question of law and fact. A mixed question of law and fact qualifies for independent review. (*In re Raymond C.* (2008) 45 Cal.4th 303, 306.) Based on our review, we conclude that City bore the burden of proof regarding whether City Council had independent legal advice at the second hearing because it has exclusive knowledge of the facts; it is desirable that City Council bear the burden of proof because otherwise it could ignore the judgment on appeal with impunity and thwart due process; and there is a strong probability that City Council did not obtain independent legal advice for the second hearing because it did not hire Kowalski until later, Exton claimed she did not know who counsel was at the September 16, 2013, hearing when asked by Morguess, and the suggestion of independent counsel in the

November 13, 2013, notice is suspect given the various misrepresentations by City personnel regarding whether a vote occurred on September 16, 2013, given that Jared did not report the vote under Government Code section 54957.1, subdivision (a)(5) of the Brown Act, and given that City Council never provided the identity of any supposed independent legal counsel at that hearing.[10] Notably, even if City Council did receive advice from an attorney at the second hearing, that does not establish that he or she was conflict free or otherwise free of the taint of Brown's prior advice.

City may well contend that the issue had to be raised in the trial court. *Morris v. Williams* (1967) 67 Cal.2d 733, 760 is instructive. The court noted, "Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim." (*Ibid*.) The court rejected the defendant's claim that it had been misled by the trial court's misstatement about the burden of proof. The court stated that "despite the trial court's unfortunate language, defendants should have known that the burden rested on them." (*Id*. at pp. 760-761.) The same is true here. City had the burden of proof, and should have known it.

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[10] As we noted in our statement of facts, in its opposition below City identified Brown and Kowalski as attorneys who provided advice at the first and third hearing, respectively, but never identified an attorney who provided advice at the second hearing. Moreover, City's counsel at oral argument was unable to confirm whether independent legal counsel attended the second hearing.

City did not meet its burden of proof because it never identified an attorney who provided independent legal advice at the second hearing. This means courts must deem that it held the second hearing without independent legal advice, and therefore the judgment on appeal required City to make the Advisory Opinion and Award final. The trial court erred by not enforcing that judgment.

III. A Combination of Factors in Connection with City Council's Proceedings Created an Unacceptable Risk of Bias and Dictate a Finding that it Violated Sabey's Right to Due Process.

As we previously explained in connection with Sabey's first appeal, "When 'an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal.' [Citation.] A tribunal is not fair unless 'the judge or other decision maker is free of bias for or against a party. [Citations.]' [Citation.] Absent a financial interest in the outcome, an adjudicator in an administrative proceeding is presumed impartial. [Citation.] To show a '[v]iolation of [the] due process guarantee,' a party must prove either actual bias or that the situation is one '"in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. "' [Citation.]' [Citation.]" (*Sabey, supra,* 215 Cal.App.4th at p. 495.)[11] This is law of the case. (*Kowis v. Howard* (1992) 3

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[11] Our Supreme Court's decisions establish the rule that a party can show a violation of due process by adverting to a particular combination of circumstances creating an unacceptable risk that a decision maker is biased. (*Morongo*, *supra*, 45 Cal.4th at p. 741; *People v. Freeman* (2010) 47 Cal.4th 993, 996; *El-Attar v.*

Cal.4th 888, 892–893 ["The law of the case doctrine states that when, in deciding an appeal, an appellate court 'states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal'"].)

Case law requires that a party present specific evidence demonstrating a particular combination of circumstances creating an unacceptable risk of bias. (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 219.) With respect to issues on which the burden of proof has not been reallocated to the defendant, this means a plaintiff must make a case with concrete facts. Risk of bias will never be implied. (See *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483 (*Nasha*) [actual bias not implied]; *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1237 (*Breakzone*); ["A mere suggestion of bias is not sufficient"].) "Otherwise, the presumption that agency adjudicators are people of "'conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances'" will stand unrebutted. [Citation.]" (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education, supra,* 57 Cal.4th at pp. 221–222.) A rebuttable presumption, of course, is merely an allocation of the burden of proof. As previously discussed, the burden of proof regarding a particular, concrete fact can be reallocated to a defendant under *Samuels*.

Hollywood Presbyterian Medical Center (2013) 56 Cal.4th 976, 995–996.)

The reason case law requires concrete facts was explained in *Breakzone*. "'[A] party's unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals.' [Citations.]" (*Breakzone*, *supra*, 81 Cal.App.4th at p. 1237, citing *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 792.)

Precedent provides that the rules of impartiality for administrative decision makers is somewhat relaxed. As explained by *Nasha*, "The 'standard of impartiality required at an administrative hearing is less exacting than that required in . . . judicial proceeding[s].' [Citation.] It is recognized that 'administrative decision makers are drawn from the community at large. Especially in a small town setting they are likely to have knowledge of and contact or dealings with parties to the proceeding. Holding them to the same standard as judges, without a showing of actual bias or the probability of actual bias, may discourage persons willing to serve and may deprive the administrative process of capable decision makers.' [Citation.]" (*Nasha*, *supra*, 125 Cal.App.4th at p. 483.) Thus, courts will not be quick to perceive due process violations when administrative decision makers happen to be familiar with the litigants or the facts of a particular case.

Moreover, a risk of bias is not established merely because a decision maker previously erred and has to decide an issue again (see *People v. LaBlanc* (2015) 238 Cal.App.4th 1059, 1079 (*LeBlanc*)), or because an administrative tribunal expressed a prehearing opinion on the result (*Mennig v. City Council* (1978) 86 Cal.App.3d 341, 350 (*Mennig*)).

According to Sabey, the problem here is that City Council voted on two prior occasions to terminate his employment and therefore became entrenched in that decision before it decided the matter a third time. In making this assertion, Sabey assumes City Council did not retain independent legal advice for the second decision as required by *Sabey*. Also, he leans on the gist of the observation in *Tumey v. Ohio* (1927) 273 U.S. 510, 532 that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Sabey suggests the procedure of rendering a decision with Brown as its advisor and then a second decision without the independent legal advice required by *Sabey* to erase the taint of Brown's advice offered a possible temptation to City Council to forget its duty in connection with the third decision to fairly consider any advice that Kowalski might have given.[12] In making this suggestion, Sabey contends there was an unacceptable probability of actual bias. (*Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1022 [the generally accepted linguistic formation of the rule against bias has been framed in terms of probabilities, not certainties, and therefore "there must not be "'unacceptable probability of actual bias'" on the part of the municipal decision maker"].)

Sabey's argument is meritorious. As we discuss below, this case presents a "particular combination of circumstances creating

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[12] If Kowalski gave advice, it was confidential and not discoverable.

an unacceptable risk of bias." (*Morongo, supra,* 45 Cal.4th at p. 741.)

Our decision in *Sabey* gave City Council a simple directive to consider the matter in light of independent legal advice. (*Sabey*, *supra*, 215 Cal.App.4th at pp. 499–500.) Nonetheless, City Council considered the matter on September 16, 2013, without giving Sabey notice, and without obtaining the independent legal advice necessary to remove the taint of Brown's bias. By proceeding in this fashion, City Council deprived Sabey of the benefit of the disposition in our prior opinion. Compounding the unfairness of this procedure, City Council did not inform Sabey of its decision. Sabey only learned of City Council's action through Morguess's conversation with Exton. And it was only after Morguess objected to the lack of notice that City Council sent a notice stating that City Council's decision was null and void. Even if the lack of notices to Sabey before and after the hearing were an oversight, City Council's decision to ignore our directive to obtain independent legal advice was intentional. That action establishes a hostile attitude toward the notions of fairness and due process, and it indicates City Council had no intention of being a neutral, unbiased decision maker. In addition, the attorneys representing City Council refused to tell Morguess what happened at the September 16, 2013, hearing, and they continually denied that action had been taken. Instead of acting like agents of a neutral, unbiased decision maker, they acted like agents of an adversary. After all that, City Council held a third hearing and again voted against Sabey. These events, procedures and actions are concrete facts supporting Sabey's claim.

Based on these facts, it defies reason to presume City Council could be neutral and unbiased when deciding Sabey's matter a third time. Experience teaches that it is highly improbable that the members of City Council kept open minds. Accordingly, the principles of due process require that we set aside the decision.[13]

In making this decision, we note that this is not a case in which the risk of bias comes merely from members of City Council being familiar with the parties and issues. (*Nasha*, *supra*, 125 Cal.App.4th at p. 483.) Nor is this a case in which a risk arises simply because City Council voted to terminate Sabey two times before the third hearing and thereby previously expressed an opinion on the matter. (*Mennig*, *supra*, 86 Cal.App.3d at p. 350.) Finally, this is not a case in which Sabey is pinning his argument to some unilateral perception of an appearance of bias (*Breakzone*, *supra*, 81 Cal.App.4th at p. 1237), i.e., he is not asking us to infer a risk of bias based solely on the result, City Council's reasoning, or anything of the like. Rather, this is a case in which risk of bias flows from the combination of actions and choices made by City Council and its agents.

Due process requires that the Advisory Opinion and Award become City's final decision. In *Sabey*, we noted that if the decision maker "'has become personally "embroiled" in the controversy to be decided,' then the decision maker must be

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[13] We recognize that the September 16, 2013, hearing was held before the trial court entered judgment as we directed in *Sabey*. City Council might suggest that nothing it did prior to the judgment should matter. But that would ignore experience and the practical consequences of its action.

disqualified from further participation in the matter. [Citation.] In that situation, it is appropriate to allow the recommendation of an inferior decision maker to stand as the final decision. [Citation.]" (*Sabey*, *supra*, 215 Cal.App.4th at p. 498.) Here, City Council has arguably become personally embroiled in the controversy by declining to adhere to our directive in *Sabey* in connection with the second hearing. Regardless, because of the unacceptable risk of bias, it would be anathema to the concept of due process for us to remand the matter for City Council to decide a fourth time. As a practical matter, this situation carries the same risk as one in which a tribunal has been personally embroiled. The remedy is to allow the recommendation of the inferior decision maker to stand.

IV. Sabey is not Entitled to a Civil Penalty Under the PBRA.

The PBRA (Gov. Code, § 3300 et seq.) sets forth rights and protections which employers must afford all peace officers. (*Zazueta v. County of San Benito* (1995) 38 Cal.App.4th 106, 112.) In part, it provides, "No punitive action . . . shall be undertaken by any public agency against any public safety officer . . . without providing the public safety officer with an opportunity for administrative appeal." (Gov. Code, § 3304, subd. (b).) In addition, it provides that "upon a finding by a superior court that a public safety department, its employees, agents, or assigns, with respect to acts taken within the scope of employment, maliciously violated any provision of this chapter with the intent to injure the public safety officer, the public safety department shall, for each and every violation, be liable for a civil penalty not to exceed twenty-five thousand dollars ($25,000) to be awarded to

the public safety officer whose right or protection was denied[.]" (Gov. Code, § 3309.5, subd. (e).)

Sabey argues that if that he was not afforded due process, we should determine in the first instance that City Council maliciously, and with intent to injure, denied him an opportunity for administrative appeal. But he failed to cite any case law establishing that City Council is a public safety department for purposes of Government Code section 3309.5, subdivision (e), or that an employee is denied an opportunity for an administrative appeal if a public safety department provided for an appeal but imperfectly executed the appellate process. Moreover, Sabey tells us that "[t]here is no case law interpreting this specific provision," yet he fails to cite and apply the rules of statutory interpretation. "It is not our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.) "'When an appellant . . . asserts [a point] but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]'" (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862.)

All other issues are moot.

DISPOSITION

The judgment is reversed in part and remanded with directions for the trial court to grant Sabey's petition for writ of administrative mandate and direct City to reinstate the Advisory Opinion and Award as City's final decision. As a consequence, Sabey's termination shall be converted into a suspension without pay or benefits. The judgment is affirmed with respect to the denial of civil penalties under Government Code section 3309.5, subdivision (e).

Sabey shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

I concur:

_____, J.
CHAVEZ

HOFFSTADT, J.,—Concurring in Part and Dissenting in Part.

I respectfully dissent from the court's holding that Glenn Sabey (Sabey) is entitled to be reinstated as a peace officer. The court's holding rests on two distinct but interrelated rationales: (1) the Pomona City Council (City Council) violated due process when it voted to terminate Sabey's employment in October 2014; and (2) the City Council's failure to follow the directions we set forth in our prior opinion in *Sabey v. City of Pomona* (2013) 215 Cal.App.4th 489 (*Sabey*) obligated the trial court below to reinstate Sabey. I am not persuaded by either rationale.

I. Due Process

Litigants appearing before administrative tribunals are entitled due process (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737 (*Morongo*); U.S Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a)), and *an* essential ingredient—if not *the* essential ingredient—of due process is that the "decision maker is free of bias for or against a party" (*Morongo*, at p. 737; accord, *Goldberg v. Kelly* (1970) 397 U.S. 254, 271). A decision maker is biased if he or she has a financial stake in the outcome of the proceeding or is otherwise personally embroiled in the pending proceeding. (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170; *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 657.) In each situation, the decision maker has a proverbial "dog in the fight" that compromises his or her ability to be neutral, rending further participation constitutionally intolerable.

Establishing that a decision maker is biased within the meaning of due process is no easy task. Due process is concerned with whether the decision maker is *actually* biased; the *appearance* of bias is not enough. (*People v. Freeman* (2010) 47 Cal.4th 993, 996; *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 793-794; *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1237 (*BreakZone*).) And when it comes to actual bias, decision makers are presumed to be impartial. (*Today's Fresh Start, Inc. v Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 219; *Withrow v. Larkin* (1975) 421 U.S. 35, 47.)

It is up to the party asserting that the decision maker is biased to "overcome" that presumption with "specific evidence demonstrating [(1)] actual bias or [(2)] a particular combination of circumstances creating an unacceptable risk of bias." (*Morongo*, *supra*, 45 Cal.4th at p. 741.) A "particular combination of circumstances creating an unacceptable risk of bias" exists when "'"experience teaches that the probability of actual bias on the part of the . . . decisionmaker is too high to be . . . tolerable."' [Citation.]" (*El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 995-996, quoting *Morongo*, at p. 737.) Bias may not be "implied"; instead, the requisite "specific evidence" must come from "'concrete facts.'" (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483 (*Nasha*); *BreakZone*, *supra*, 81 Cal.App.4th at pp. 1236-1237 ["A mere suggestion of bias is not sufficient"].) "The 'standard of impartiality . . . is less exacting'" for administrative tribunals than for judges, in recognition of the fact that "'administrative decision makers are drawn from the community at large'" and thus are "'likely to have knowledge of and contact or dealings with parties to the

proceeding.'" (*Nasha*, at p. 483.) On the whole, as our Supreme Court has noted, these standards embody "a more practical and less pessimistic view of human nature in general and of state administrative agency adjudicators in particular." (*Morongo*, at pp. 741-742.)

Under these principles, a decision maker is not actually biased just because he or she decided an issue once before and is being asked to decide it again. When an intermediate appellate court determines that a trial court abused its discretion or otherwise erred, the fact that the trial judge made a wrong decision does not by itself mean he or she cannot decide the same issue impartially the second time around. (*People v. LaBlanc* (2015) 238 Cal.App.4th 1059, 1079 ["Mere judicial error does not establish bias and normally is not a proper ground for disqualification"]; accord, *Mennig v. City Council* (1978) 86 Cal.App.3d 341, 350 (*Mennig*) ["even a prehearing expression of opinion on the result does not . . . of itself disqualify an administrative body from acting on a matter before it"].) The same is true when an intermediate appellate court errs; the Supreme Court still sends the case back to the same appellate panel.

Consequently, the fact that the City Council had previously voted on the appropriate discipline for Sabey is not enough to call into question the impartiality of its members. When we overturned the City Council's first vote, we did so because we concluded that the rule allowing different attorneys from the same *public agency* to advocate before the decision maker and advise the decision maker as long as they were properly walled off from each other did not apply to attorneys from the same *private law firm*. We drew this distinction because attorneys

from the same law firm owe each other fiduciary duties, such that an ethical wall is insufficient to stave off "the unavoidable consequence of destroying the *appearance* of a fair proceeding." (*Sabey*, *supra*, 215 Cal.App.4th at p. 497, italics added.) We took pains to note that "there is no evidence that the City Council is personally embroiled in the termination of Sabey's employment, or that it is otherwise incapable of proceeding in a fair manner." (*Id.* at p. 499.) Thus, had the City Council followed our directive by holding a properly noticed second vote with independent counsel, the presumption of impartiality attaching to the City Council would have remained intact. But the fact that the City Council held a second vote that it subsequently nullified is not enough, by itself, to establish that its members were so wedded to their prior two votes that they could not be impartial in a third vote. During oral argument, Sabey conceded (appropriately, in my view) that there is no "two strikes, you're out" rule that gives a decision maker two bites at an apple, and never a third.

So what is it about the "combination of circumstances" surrounding the second vote that creates a "probability of actual bias on the part of the" the City Council members that "is too high . . . to be tolerable"? Sabey points to three circumstances: (1) the City Council did not give proper advance notice of the second vote, as required by the Brown Act (Gov. Code, § 54950 et seq.); (2) the City Council did not follow our directive to consult with independent counsel before voting again; and (3) two of the City's attorneys gave Sabey conflicting accounts of whether the City Council had held a second vote.

To be sure, the second vote was procedurally irregular, especially when one considers that the second vote was void on its face because it was held before our mandate even issued.

Are these procedural irregularities proof of negligence or incompetence? In my view, yes.

Are these procedural irregularities proof of an unacceptably high probability of actual bias? In my view, no.

Each circumstance Sabey cites is individually insufficient to establish an intolerably high probability of bias.

The first circumstance—that is, the fact that the City Council gave improper notice—is not enough. Nothing in the Brown Act's provision requiring advance notice of a closed session meeting where employee discipline is reviewed requires a new decision maker if those notice provisions are not followed. (Gov. Code, § 54957.) To the contrary, courts have held that it is appropriate in this instance to remand to the same decision maker to decide the disciplinary issue anew. (*Morrison v. Housing Authority of the City of Los Angeles Bd. of Comrs.* (2003) 107 Cal.App.4th 860, 876-877.)

It is also not clear that the second circumstance—that is, the fact that the City Council violated our mandate—exists at all. The court holds that the City Council had the burden of showing that it consulted independent counsel and that it did not carry that burden because it never identified that counsel by name. But the notice nullifying the second vote stated that "the City Council . . . deemed it appropriate to review and consult *with independent legal counsel*." The court discounts the notice's recitation that independent counsel was consulted as "suspect" in light of the other two circumstances. Because I do not find the other two circumstances to be indicative of actual bias, I disagree that they cast a pall of actual bias over this circumstance. And even if the second circumstance does exist—that is, even if the City Council held the second vote without consulting independent

counsel—there is nothing in the record to support the court's seemingly factual finding that the City Council made an "intentional" "decision to ignore our directive," rather than a procedural blunder. Blunders are neither proof of, nor the product of, embroilment.

The third circumstance—that is, the fact that two City attorneys gave Sabey conflicting accounts of whether the City Council conducted a second vote—does not in my view call into question the impartiality of the City Council's members. One lawyer who was not present at the closed session meeting told Sabey (ostensibly, based on hearsay) that the City Council held a second vote, while a second lawyer who was present at the closed session meeting told Sabey that no second vote occurred and that the first lawyer was mistaken. The court views the inconsistent reports as evidence that the City Council was acting in a "hostile" and "adversar[ial]"—and hence, a non-neutral—fashion.

I view it differently. Although the first lawyer's report of a second vote is, as the trial court found, sufficient to support a finding that a second vote occurred, I do not see how the disagreement between the City's lawyers calls into question the neutrality of the *City Council members* in the absence of evidence that those members were somehow involved with—or even aware of—the disagreement between the City's two lawyers. No such evidence appears in the record. The lawyers are undoubtedly agents of the City and thus of the City Council. But a principal is charged with its agents' *knowledge* (*O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 288), not with its agents' *intent* (*West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 978-979 [refusing to impute agent's intent to discriminate]). There is no transitive property of bias that would automatically

impute any bias by the City's attorneys to the City Council members. Nor do I view the City Council's failure to immediately disclose the second vote as an attempt to oust Sabey secretly and thus as proof of bias. The City eventually *had* to dispose of Sabey's appeal and thus *had* to tell Sabey how it voted; there is no evidence that the delay in doing so was intentional rather than inadvertent.

Even in the aggregate, I do not see—in my experience, at least—that this "particular combination of circumstances" evinces an intolerably high probability that the City Council members are actually biased. Instead, my experience teaches me that the City Council voted before it had the jurisdiction to do so and without giving proper notice, and then nullified its procedurally improper vote so it could start over and do it right. The transcript from the hearing preceding the third vote shows the City Council members engaged on the merits of how to discipline Sabey; it does not show a group of people whose minds were already made up and who were staging an elaborate ruse to conceal their personal embroilment.

Prior cases finding an administrative decision maker's personal embroilment have all relied on far more embroilment than is present here. Those cases have declared the probability of actual bias too high when the decision maker (1) was the same person whose decision is under review (*Gray v. City of Gustine* (1990) 224 Cal.App.3d 621, 631-632); (2) was a testifying witness in the proceeding under review (*Mennig*, *supra*, 86 Cal.App.3d at pp. 350-351); or (3) had previously advocated a position on the issue under review (*Nasha*, *supra*, 125 Cal.App.4th at pp. 483-484; *Woody's Group, Inc. v City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1022-1023). There is no showing that any of

the seven members of the City Council engaged in any such conduct.

In my view, the presumption of impartiality was not overcome.

II. *Sabey*'s Mandate

When an appellate court remands a case to the trial court with directions, the trial court "is bound to specifically carry out the instructions of the reviewing court." (*Coffee-Rich, Inc. v. Fielder* (1975) 48 Cal.App.3d 990, 998; see also *Hampton v. Superior Court* (1952) 38 Cal.2d 652, 656 [trial court must follow "the specific directions" of the appellate court].) "Any material variance from [these] directions is unauthorized and void." (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982.)

In *Sabey*, we remanded the matter to the trial court "with directions . . . to refer the matter back to the City Council for further consideration in light of independent legal advice" with the proviso that "the advisory opinion [of the arbitrator to reinstate Sabey with a period of suspension] shall become final" "[i]f the City Council declines to review the arbitration record in light of independent legal advice and render a decision . . . ." (*Sabey*, *supra*, 215 Cal.App.4th at pp. 499-500.) The court here holds that the plain language of these instructions required the trial court to void the City Council's October 2014 vote and to reinstate Sabey the moment that the City Council failed to consult independent counsel before the second vote because that failure constituted a decision by the City Council to decline to review the arbitration record.

I disagree with this holding for two reasons.

First, I do not agree that the City Council "decline[d] to review the arbitration record in light of independent legal

advice." As noted above, the record contains evidence that the City Council *did* consult with independent counsel in casting the second vote. But even if I were to discount that evidence, there is no evidence to support a finding that the City Council's failure to consult was, as the court finds, "intentional" and hence a conscious decision to forego the opportunity to review the arbitration record. Indeed, the City Council's subsequent acts tend to dispel the notion that it was consciously foregoing the chance to reexamine Sabey's discipline given that it subsequently vacated the second vote and proceeded to render a decision following a full hearing and with the assistance of independent counsel. Treating the City Council's blunder as sufficient to preclude it from ever reconsidering Sabey's discipline effectively erects an absolute "one-strike, you're out" rule that is stricter than due process in that it precludes further reconsideration after one mistake and does so without the need to prove actual bias.

Second, I do not agree that the law compels this result. The cases cited above stand only for the proposition that a trial court's acts on remand that are materially at variance with an appellate court's mandate are void. Those cases do not speak to what happens *after* the order is voided, and do not purport to erect a rule that forever disables the court (or, by extension in this case, an administrative agency on remand from the court) from trying to get it right a second or third time.

I would let the City Council's final vote stand, and deny any civil penalty under PBRA due to the absence of any predicate due process violation. Accordingly, I dissent from Parts II and III of the court's opinion, but concur in the result of Part IV of the court's opinion.

_____, J.
HOFFSTADT