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LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ANTHONY MARIO ASSENZA, et al.,	CASE NO. BC 115813
Plaintiffs/Petitioners,	PLAINTIFFS' OPENING BRIEF AS PER COURT ORDER OF AUGUST 19, 1998
vs.	
CITY OF LOS ANGELES, et al.,	Date: Sept 25, 1998 Time: 9:30 a.m. Dept: 14
Defendants/Respondents,	

Additional Attorneys for Plaintiffs:

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Novato, CA 94947
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COME NOW PLAINTIFFS who submit the following Opening Brief pursuant to this Court's Order filed August 19, 1998 regarding the issues set forth in that Order.

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Addington v. Texas (1979) 441 U.S. 418, 423,
99 S.Ct. 1804, 1808

Ingraham v. Wright, (1977) 430 U.S. 651, 672-73

United States v. Price, (1966) 383 U.S. 787

INTRODUCTION

Plaintiffs understanding of the Court's Order is that the brief submitted herewith addresses the following issues in the following order: (a) If the Court reviews the Chief's decision-making re: "good cause", should it be under a substantial evidence standard, with the burden of producing such evidence upon the Chief; (b) The Court should and need not bother so reviewing the decision-making, because all the Court need look at in this mater is either res judicata or conceded by defendants; (c) However, it is important that Plaintiffs' position is clearly enunciated, i.e., it is not necessary to review the issue of "good cause" because that is decided from the Judgment and defendants have, in effect, conceded they departed from the Judgment. In any event our answers to Court's questions re reviewing the Chief's decision-making and the substantial evidence standard follow.

A. Abuse of Discretion Standard; Substantial Evidence Rule

Again, Plaintiffs respectfully disagree with the Court's position as to the controlling principles of law regarding the standard of review. Plaintiffs' position is set forth in Plaintiffs' Brief filed on 8/14/98 (p. 4, l. 21 - p. 6, l.9):

The standard for review in this action, as well as for similar cases, is that of independent judgment on the basis of a limited trial de novo because a fundamental right is involved.[1]

[1] 9 Witkin California Procedure, 4th Edition, Section 122 at page 1166, states as follows:

"In reviewing factual determinations by an agency without judicial power under the California Constitution, courts exercises independent judgment and weigh the evidence if the proceeding substantially deprives a party of fundamental vested right." See also, Bixby v. Pierno (1971) 4 Cal. 3d 130.

There is no question that a fundamental right is involved here. The California Constitution, Article 1, §1 states:

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and privacy." California Constitution, Article 1, Section 1.

"Constitutional provisions should be construed according to the natural and ordinary meaning of its words." City and County of San Francisco v. County of San Mateo, (1995) 10 Cal.4th 554 at page 562.

The California Supreme Court in Professional Engineers v. Dot, (1997) 15 Cal.4th 543, 565, 63 Cal.Rptr. 467, 480, stated:

> "... California courts have held that Constitutional and other enactments must receive a liberal, practical common-sense construction which will meet changed conditions and the growing need of the people. [citations.]" (Id. at p.245.)

Also, the Federal Constitution grants all persons a right to personal security. In Ingraham v. Wright, (1977) 430 U.S. 651, 672-73 the Supreme Court of the United States stated:

> "Among the historic liberties protected [by the 14th Amendment] was a right to be free from and to secure judicial relief from unjustified intrusions on personal security." See also United States v. Price, (1966) 383 U.S. 787.

///

In Fukuda v. City of Angeles Camp, (1998) 63 Cal. App. 4th 1426 the court stated, at page 1430, as follows:

> "The scope of review in mandamus proceedings defines the deference to be accorded administrative decisions or the degree to which the correctness of the administrative determination is to be presumed. When a decision substantially affects a fundamental right, courts consistently have held that the judiciary is to exercise a vigilant and expansive role in reviewing the administrative decision. (Webster v. Trustees of Cal. State University (1993) 19 Cal. App. 4th 1456, 1462 ...; McMillen v. Civil Service Comm., supra, 6 Cal. App. 4th at p. 129; 301 Ocean Ave. Corp. v. Santa Monica Rent Control Bd., supra 228 Cal. App. 3d at p. 1555; San Dieguito Union High School Dist. v. Commission On Professional Competence, supra, 174 Cal. App. 3d at p. 1180) The court must exercise its independent judgment on the evidence and the administrative decision is entitled to less deference when a fundamental right is implicated.
>
> In this context, the trial court supplants the administrative agency as the ultimate finder of fact. [cite omitted] It is at liberty to independently assess credibility. [cites omitted]"

The court in Fukuda, supra, at page 1431, went on to note that ". . . burden of proof as the burden of producing evidence rarely applies in mandamus proceedings because evidence is rarely produced in superior court."

In the case at bar, the only evidence before the court is the uncontradicted and uncontroverted and admittedly credible evidence presented by plaintiffs in their renewal applications and declarations in support thereof. These declarations and applications establish that the plaintiffs were issued permits based upon the "good cause" enunciated in one of the five categories of criteria for licensure contained in the Judgment as was correctly stated by the court at page 20 of the Reporters Transcript of Proceedings before this Court on July 27, 1998.

Further, plaintiffs' circumstances giving rise to that good cause remain the same or are currently exceeded. Those circumstances have been established by stipulation and judgment.

Defendants have produced no evidence whatsoever controverting the facts contained in plaintiffs' applications and declarations. Therefore, plaintiffs' evidence contained therein must be considered proved.

Based on the current record in the case at bar, and the above stated authorities, the Court should order the defendants issue the permits to the five plaintiffs.

B. **"Good Cause": Elements; Proof**

Initially, it should be noted that the general language of item "E." of the Judgment in the instant case was not intended to be read or interpreted alone. As is clearly stated in the Judgment, at page 3 lines 26 and 27 thereof: **"F. The following further rules and guidelines are provided for the interpretation and implementation of Item E:"** (emphasis ours).

Secondly, as concerns the five plaintiffs in the instant case, it was stipulated and it is contained in the Judgment that

1 these plaintiffs stated "good cause" in their initial
2 applications. The foundational question for them, before moving
3 on to a review of "good cause", is whether the facts giving rise
4 to their "good cause" have changed. If they have not changed
5 materially, those plaintiffs have stated sufficient "good cause"
6 for permits to be issued. That is res judicata. Each of the five
7 plaintiffs stated in their declarations that their "good cause"
8 continues, or is greater than at the time of the Judgment. The
9 Judgment states that their declarations are "evidence." See page
10 8 of the Judgment at paragraph 7, lines 5 through 9.

11 It is important to note that the City Attorney has admitted
12 that these plaintiffs are credible and that he has no credible
13 evidence contrary to the evidence contained in their declarations.

14 The Judgment states, (p. 7, lls. 22 - 25) that, "Absent good
15 cause for denial, persons having good cause as defined in
16 paragraph 2 shall be issued licenses for the maximum time period
17 allowed by section 12050, and their licenses shall be renewed so
18 long as they **continue** to have good cause. (emphasis added). The
19 inescapable conclusion is that permits must be renewed for these
20 plaintiffs. Further, defendants have offered **no evidence** showing
21 good cause for denial as they are required by the Judgment
22 (emphasis added).

23 The Court is again referred to Plaintiffs' Brief filed on
24 August 14, 1998 concerning the issue of <u>res judicata</u>. It is
25 referred to herein and incorporated by reference. That Brief is
26 part of this Court's file and the Court is respectfully requested
27 to judicially notice it (Evidence Code §452(d)).
28 ///

Also, in Professional Engineers v. Dot, supra, 15 Cal.4th, the California Supreme Court stated at page 568:

> "As we have frequently explained, the collateral estoppel doctrine precludes relitigation of an issue previously adjudicated by final judgment between the parties. (See, e.g. Producers Dairy Delivery Co. v. Century Ins. Co., (1986) 41 Cal.3d 903, 910 [226 Cal.Rptr. 558, 718 P.2d 920].)"

Plaintiffs object to a rereview of their already adjudicated "good cause". Nevertheless, plaintiffs, in obedience of this Court's Order, submit the following pursuant to the Court's request.

(1) What is meant in law by the descriptor, "convincing" evidence?

The United States Supreme Court in Addington v. Texas (1979) 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, discusses the function of a standard of proof exhaustively, as set forth below:

> "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding is to "instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." In Re Winship 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring) the standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

1 Generally speaking, the evolution of this area of
2 the law has produced across a continuum three standards
3 or levels of proof for different types of cases. At one
4 end of the spectrum is the typical civil case involving
5 a monetary dispute between private parties. Since
6 society has a minimal concern with the outcome of such
7 private suits, plaintiffs' burden of proof is a mere
8 preponderance of the evidence. The litigants thus share
9 the risk of error in roughly equal fashion.
10 In a criminal case, on the other hand, the
11 interests of the defendant are of such magnitude that
12 historically and without any explicit constitutional
13 requirement they have been protected by standards of
14 proof designed to exclude as nearly as possible the
15 likelihood of an erroneous judgment. In the
16 administration of criminal justice, our society imposes
17 almost the entire risk of error upon itself. This is
18 accomplished by requiring under the Due Process Clause
19 that the state prove the guilt of an accused beyond a
20 reasonable doubt. In Re Winship, supra.
21 The intermediate standard, which usually employs
22 some combination of the words "clear," "cogent,"
23 "unequivocal," and "convincing," is less commonly used,
24 but nonetheless "is no stranger to the civil law."
25 Woodby v. INS, 385 U.S. 276, 285, 87 S.Ct. 483, 488, 17
26 L.Ed.2d 362 (1966). See also, McCormick, Evidence §320
27 (1954); 9 J. Wigmore, Evidence § 2498 (3d ed. 1940).
28 One typical use of the standard is in civil cases

1 involving allegations of fraud or some other quasi-
2 criminal wrongdoing by the defendant. The interests at
3 stake in those cases are deemed to be more substantial
4 than mere loss of money and some jurisdictions
5 accordingly reduce the risk to the defendant of having
6 his reputation tarnished erroneously by increasing the
7 plaintiff's burden of proof. Similarly, this Court has
8 used the "clear, unequivocal and convincing" standard of
9 proof to protect particularly important individual
10 interests in civil cases. See, e. g., Woodby v. INS,
11 supra, at 285, 87 S.Ct., at 487 (deportation); Chaunt v.
12 United States, 364 U.S. 350, 353, 81 S.Ct. 147, 149, 5
13 L.Ed.2d 120 (1960) (denaturalization); Schneiderman v.
14 United States, 320 U.S. 118, 125, 159, 63 S.Ct. 1333,
15 1336, 1353, 18 L.Ed. 1796 (1943) (denaturalization).
16 Candor suggests that, to a degree, efforts to
17 analyze what lay jurors understand concerning the
18 differences among these three tests or the nuances of a
19 judge's instructions on the law may well be largely an
20 academic exercise; there are no directly relevant
21 empirical studies. Indeed, the ultimate truth as to how
22 the standards of proof effect decision making may well
23 be unknowable, given that factfinding is a process
24 shared by countless thousands of individuals throughout
25 the country. We probably can assume no more than that
26 the difference between a preponderance of the evidence
27 and proof beyond a reasonable doubt probably is better
28 understood than either of them in relation to the

intermediate standard of clear and convincing evidence. Nonetheless, even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a "standard of proof is more than an empty semantic exercise." Tippett v. Maryland, 436 F.2d 1153, 1166 (CA4 1971) (Sobeloff, J., concurring in part and dissenting in part), cert. dismissed sub nom. Murel v. Baltimore City Criminal Court, 407 U.S. 355, 92 S.Ct. 2091, 32 L.Ed.2d 791 (1972). In cases involving individual rights, whether criminal or civil, "[t]he standard of proof [at a minimum] reflects the value society places on individual liberty." 436 F.2d at 1166."

The plaintiffs' declarations in the instant case are sufficient as "convincing evidence" unless contradicted in some fashion. They are not contradicted nor are they controverted; but, rather, they are admitted by the defendants.

(2) What is meant in law by the descriptor, "clear and present danger" to life or great bodily injury?

The Judgment states at page 3 line 17 that ". . . good cause exists if there is convincing evidence of a "clear and present danger to life or great bodily injury . . " The definition of "clear and present danger," therefore, is found in that same Judgment as the dangers set forth in the definition of "good cause" beginning at page 5 of that Judgment under the heading "Good Cause."

The Judgment in the instant case contains five exemplary categories of what is "clear and present danger." Since

plaintiffs' declarations bring them within one or more of the five categories enumerated in the Judgment, "good cause" exists and a permit should be issued absent defendants showing convincing evidence for denial. Defendants have not.

Plaintiffs' demonstrated a "clear and present danger" to life or great bodily injury when their declarations brought them within one or more of the five categories enumerated by the Judgment. Plaintiffs have, therefore, established a "clear and present danger" as enunciated in the Judgment, by which we are all bound.

C. <u>Court-Appointed Expert</u>

§731. Payment of court-appointed expert

Since the defendants admit that the current Chief's predecessor determined that plaintiffs had "good cause"; the controversy before this Court arises because the current Chief has decided to depart from that. Therefore, the person who altered the "status quo" should bear the costs of determining whether that alteration is legal and should be solely responsible for the court appointed expert fees.

Dated: August 31, 1998

Respectfully submitted,

BURTON C. JACOBSON and
WILLIAM ARTHUR CRAWFORD

By: ______________________
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PROOF OF PERSONAL SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, JAY JONES , declare:

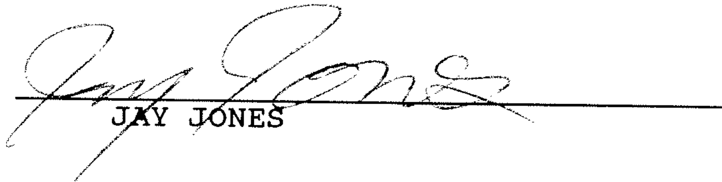
I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1111 West Sixth Street, Los Angeles, California 90017.

On September 1, 1998, I served the attached PLAINTIFFS' OPENING BRIEF AS PER COURT ORDER OF AUGUST 19, 1998 on the interested parties in this action by HAND DELIVERING a copy thereof, by close of business day 5:00 p.m., enclosed in a sealed envelope, addressed as follows:

James K. Hahn, City Attorney
Frederick N. Merkin, Senior Assistant City Attorney
Byron Boeckman, Assistant City Attorney
1800 City Hall East
200 North Main Street
Los Angeles, CA 90012

Executed on September 1, 1998 at Los Angeles, California.

I DECLARE UNDER PENALTY OF PERJURY PURSUANT TO THE LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.



JAY JONES