Case Number S204221

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PARATRANSIT, INC.

Plaintiff and Respondent.

vs.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Respondent.

CRAIG H. MEDEIROS,

Real Party in Interest and Appellant.

Petition for Review of a Decision of the Court of Appeal
Third Appellate District Court Case No. C063863

Appeal from a Judgment of the Superior Court of the
State of California, County of Sacramento
Honorable Timothy M. Frawley, Judge
Case No. 34-2009-80000249

TABLE OF EXHIBITS TO RESPONDENT'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ANSWER BRIEF TO PETITION FOR REVIEW [Exhibits A and B]

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TABLE OF EXHIBITS

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

PARATRANSIT, INC.,	)	
Petitioner and Respondent,	)	Civil No. C063863
vs.	)	
UNEMPLOYMENT INSURANCE	)	Sacramento County
APPEALS BOARD,	)	Superior
Respondent,	)	Court No.
CRAIG MEDEIROS,	)	34-2009-80000249
Real Party in Interest and	)	
Appellant.	)	

APPELLANT CRAIG MEDEIROS' OPENING BRIEF

Appeal from a Judgment of the Superior Court of the State of California, County of Sacramento

Honorable Timothy M. Frawley, Judge

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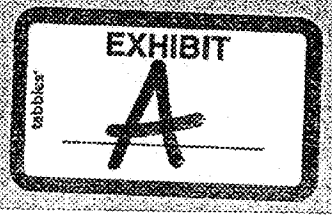

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I. INTRODUCTION

Appellant and Real Party in Interest Craig Medeiros was terminated from his employment with Respondent Paratransit because he refused to sign a disciplinary notice that did not comply with the applicable union contract provision providing that such notices must state the employee is not admitting fault or the truth of any facts alleged in the notice by signing. At issue in this case is whether or not Appellant committed misconduct for purposes of eligibility for Unemployment Insurance benefits by not signing the disciplinary notice. The trial court erred as a matter of law in its determination that the disciplinary notice complied with the union contract and that the failure to sign the notice was misconduct. The disciplinary notice on its face violates the union contract. Therefore, Appellant did not commit misconduct by refusing to comply and he is eligible for Unemployment Insurance benefits.

Furthermore, even if the disciplinary notice did comply with the union contract, the trial court's finding that Appellant's decision not to sign the disciplinary notice during the May 2, 2008 meeting was not merely a good faith error in judgment must be reversed. Substantial evidence does not support this finding, and the trial court failed to weigh and consider relevant evidence that the decision not to sign was, at most, a good faith error in judgment.

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II. STATEMENT OF APPEALABILITY

This is an appeal from a judgment granting a peremptory writ of mandate under Code of Civil Procedure § 1094.5. The Superior Court entered its judgment granting the writ of mandate directing the California Unemployment Insurance Appeals Board (hereinafter CUIAB) to set aside its decision and issue a new decision finding Appellant disqualified from receiving Unemployment Insurance benefits. (*See* Clerk's Transcript on Appeal (hereinafter "CT") 00471-00504.) The Superior Court entered its judgment granting the writ of mandate ordering CUIAB to set aside its decision on October 30, 2009. (*See* CT 00478-00488.) Notice of Entry of Judgment was filed and served on November 24, 2009. (*See* CT 00492.) Appellant timely appealed from the judgment on December 29, 2010. (*See* CT 00507-00508.)

The Superior Court's judgment granting a peremptory writ of mandate is appealable as a final judgment that fully disposes of all issues between the parties. (Code Civ. Proc. § 904.1(a)(1).)

III. STATEMENT OF FACTS

Appellant was employed by Respondent as a vehicle operator for approximately six years beginning in March 2002. (*See* CT 00016; CT 00026.) In that capacity, Appellant provided transportation services for the elderly and people with disabilities. (*Id.*)

As a condition of his employment, Appellant was required to join a designated union. (*See* CT 00021; 00054; 00070.) Appellant joined the union and his employment was governed by a collective bargaining agreement. (*Id.*) During his employment, Appellant's union president directed him not to sign any documents, especially documents concerning discipline, without a union representative present because once a document was signed, the employer would use it as an admission of guilt and the union could not defend him. (*See* CT 00021; 00053; 00068.) The union president also gave him a card which stated his rights to union representation. (*See* CT 00021; 00056-00057; 00075 ["Stating Your Weingarten Rights To Your Employer: 'If this discussion could in any way lead to my being disciplined or terminated or have any effect on my personal working conditions, I respectfully request that my union representative, officer, or steward be present at this meeting. Without union representation, I choose not to participate in the discussion.'"].) Pursuant to the collective bargaining agreement, Appellant was required to sign all disciplinary notices when they were presented by Respondent to him, "provided that the notice states by signing, the Vehicle Operator is only acknowledging receipt of said notice and is not admitting to any fault or to the truth of any statements in the notice." (*See* Collective Bargaining Agreement ¶ 54, CT 00076.)

On May 2, 2008 after he completed his shift, Appellant was called into a meeting with Respondent's employees Chris Brown (hereinafter "Brown") and Colleen Johnson (hereinafter "Johnson"). (*See* CT 00026.) Brown and Johnson told Appellant they had decided to discipline Appellant because of a passenger's complaint. (*Ibid.*) Appellant disputed the allegations and did not agree with their decision to discipline him. (*See* CT 00016; 00021; 00053-00055.) Brown and Johnson also discussed an allegation that Appellant lied on his employment application, submitted to Respondent six years prior to the meeting. (*See* CT 00055-00056.) Appellant was confused and tired after his shift and was unsure why Brown and Johnson were bringing up issues from six years prior. (*See* CT 00021; 00055.)

At the meeting, Brown and Johnson demanded that Appellant sign a disciplinary notice that discussed the passenger's complaint. (*Ibid.*) Underneath the signature line, the notice stated "Employee Signature as to Receipt." (*See* CT 00073-00074.) The notice did not state that the employee was not admitting fault or truth of any statements in the notice. (*Id.*) Appellant asked for union representation but Brown and Johnson refused his request. (*See* CT 00035; 00033; 00056.) Appellant told Brown and Johnson that the union president had told him not to sign anything without a union representative, because his signature could be construed as an admission to the truth of what he was signing. (*See* CT 00030; 000055-

00057.) Because Appellant disagreed with the contents of the notice, he did not want to sign it, as he believed signing the document would be an admission. (*See* CT 00053, 00055-00057.) Appellant was also concerned that signing would mean he could not obtain union representation because he understood that other union members had been denied representation on that basis. (*See* CT 00056-00059.) Brown and Johnson told Appellant he would be fired for insubordination if he did not sign the disciplinary notice. (*See* CT 00059-00060.) Appellant left the meeting without signing the disciplinary notice. (*See* CT 00030.) Appellant stated, "[s]o I'm not gonna sign this as of now . . . until I get the union representation . . . . " (*See* CT 00053.)

After Appellant left the meeting, Brown wrote him a letter stating he was being terminated from employment for insubordination because he failed to sign the disciplinary notice. (*See* CT 00030.)

IV. PROCEDURAL HISTORY

Upon termination by Respondent, Appellant applied for unemployment benefits with the Employment Development Department ("EDD"), which denied his application pursuant to Unemployment Insurance Code § 1256 because EDD found he had been discharged for misconduct connected with his most recent work. (*See* CT 00016.) Appellant appealed and the Administrative Law Judge affirmed EDD's decision. (*See* CT 00016-00018.) Appellant then appealed to the

California Unemployment Insurance Appeals Board ("CUIAB"), which overturned the Administrative Law Judge's decision and found Appellant was discharged for reasons other than misconduct and was not disqualified for benefits under Unemployment Insurance Code § 1256. (*See* CT 00020-00022.) Respondent then filed a Petition for Administrative Mandamus in the California Superior Court against the CUIAB naming Craig Medeiros as the Real Party In Interest. (*See* CT 00001-00013.) The CUIAB did not enter an appearance in the writ proceeding. (*See* CT 00478-00479.) On November 3, 2009, the trial court granted Respondent's Petition for Administrative Mandamus holding: 1) Respondent's disciplinary notice did not violate the union contract provision at issue and its demand that Appellant sign was therefore a lawful and reasonable order; 2) Appellant was not entitled to union representation at the meeting with Respondent; and 3) Appellant's failure to sign was not a good faith error in judgment. (*See* CT 00494-00504.)

V. STANDARD OF REVIEW

The trial court's decision to uphold or reject an administrative agency's findings in cases such as this, where the trial court exercises its independent judgment, is reviewed under the substantial evidence standard. (*Lacy v. California Unemployment Insurance Appeals Board,* 17 Cal.App.3d 1128, 1134 (1971).) Although deferential, the substantial evidence standard of review nevertheless requires that the supporting

evidence be reasonable, credible, and of solid value. (*Kuhn v. Department of General Services,* 22 Cal.App.4th 1627, 1633 (1994) [internal quotes omitted].) Further, inferences must be based on the evidence and result from logic and reason, rather than speculation. (*Id.*) That is, substantial evidence does not mean that any evidence or inference will suffice to support the lower court ruling. (*Id.*) Substantial evidence review includes examining the evidence that detracts from the decision. (*Newman v. State Personnel Board*, 10 Cal.App.4th 41, 48 (1992).)

Moreover, substantial evidence demands that the record demonstrate that the lower court "actually performed the fact-finding function." (*Kemp Bros. Const., Inc. v. Titan Elec. Corp.*, 146 Cal.App.4th 1474, 1477 (2007).) In the event that the lower court failed to weigh all relevant evidence and determine factual issues, the substantial evidence standard of review is inapplicable and no presumption of correctness applies. (*Id.* at 1477–1478; *see also Estate of Larson*,106 Cal.App.3d 560, 567 (1980).) Likewise, "where the probative facts are not in dispute, and those facts clearly require a conclusion different from that reached by the trial court," the conclusions of the trial court may be disregarded. (*Amador v. Unemployment Ins. Appeals Bd*, 35 Cal.3d 671, 679 (1984) [citations omitted].)

Although review of factual findings is confined to the substantial evidence standard, independent or de novo review is appropriate for

questions of law. (*See Lacy*, 17 Cal.App.3d at 1134; *see also Scott v. Common Council of City of San Bernardino*, 44 Cal.App.4th 684, 689 (1996).) A question of law is one requiring the "application of a legal principle or rule to undisputed facts." (*Lacy*, 17 Cal.App.3d at 1134.) The interpretation of a writing is a question of law unless such interpretation turns on conflicting extrinsic evidence presented to the lower court. (*Parsons v. Bristol Develop. Co.*, 62 Cal.2d 861, 865–866 (1965).)

VI. ARGUMENT

A. THE COURT ERRED IN DETERMINING THAT APPELLANT COMMITTED MISCONDUCT BY INSUBORDINATION BECAUSE RESPONDENT'S ORDER WAS NOT LAWFUL OR REASONABLE AS A MATTER OF LAW.

a. A Finding Of Misconduct For Insubordination Is Improper Unless The Employer's Order Is Lawful And Reasonable And The Employee's Refusal To Comply Is Without Justification And In Wanton Disregard Of The Employer's Interests.

Pursuant to Unemployment Insurance Code § 1256, an individual is disqualified from unemployment benefits if "he or she left his or her most recent work voluntarily without good cause or that he or she has been discharged for misconduct connected with his or her most recent work." (Unemp. Ins. Code § 1256.) California regulations outline four elements that must be present to find misconduct: 1) the claimant owed a material duty to the employer; 2) the claimant substantially breached that duty; 3) the breach was a "wanton or willful disregard of that duty"; and 4) the

breach disregarded "the employer's interest and injures or tends to injure the employer's interests." (24 Cal.Code.Regs. § 1256-30(b).)

California courts have further limited misconduct to actions of an employee:

> evincing such a willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intention and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

(*Maywood Glass Co. v. Stewart* (1959) 170 Cal.App.2d 719, 724.) Moreover, "mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct'" under Unemployment Insurance Code § 1256. (*Id.*)

For the purposes of Unemployment Insurance benefits, misconduct occurs when an employee refuses to follow a lawful and reasonable order of an employer without justification. (22 Cal.Code.Regs. § 1256-36(b)(1); *see also e.g. Matter of Gant* (1978) CUIAB P-B-400 at p.3, CT 00137-00140; *Matter of Ludlow* (1960, adopted 1976) CUIAB P-B-190 at p.3, CT 00120-00123.) However, not every demand made by an employer is lawful or reasonable. (*Matter of Anderson* (1968) P-B-3 at p.7 [citations omitted],

CT 00285-00296.) Where a demand is unlawful or unreasonable, disobedience of an employer demand is neither misconduct nor insubordination. (*Id.*; *Parrish v. Civil Service Commission*, 66 Cal.2d 260, 264 (1967) [citations omitted]; Labor Code § 2856.)

b. The Trial Court's Determination that Respondent's Demand to Sign the Disciplinary Notice Was Not Lawful Or Reasonable Is A Question of Law.

The lawfulness or reasonableness of an employer's order is a question of law when the determination rests on undisputed facts or where the inferences from the found facts point in one direction. (*Lacy*, 17 Cal.App.3d at 1135.) The determination as to the lawfulness of Respondent's demand here depends solely on whether or not the disciplinary notice violated the union contract.[1] The language of the disciplinary notice and the language of the union contract are undisputed and no extrinsic evidence was presented by the parties or considered as to the meaning of the contract provision and notice language at issue. (*See generally* Judgment Granting Petition for Administrative Mandamus, CT 00478-00488; *see also generally* Administrative Record.) Whether or not the union contract demanded that the notice include language stating both that signing is only as to receipt and is not an admission of fault is therefore

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[1] In fact, the trial court acknowledged that evaluation of whether or not Appellant's failure to sign was misconduct required consideration of whether or not the disciplinary notice violated the union contract. (CT 00486.)

a question requiring only the interpretation of a writing and not fact-finding. Similarly, whether or not the language of the notice complied with those union contract requirements likewise demands only interpretation of a writing. As a result, the court's interpretation of the requirements imposed by the union contract and determination of whether or not the notice is in accord with those requirements are questions of law subject to de novo review. (*See Parsons v. Bristol Develop. Co.*, 62 Cal.2d 861, 865–866 (1965).)

c. Respondent's Demand to Sign the Disciplinary Notice Was Neither Lawful Nor Reasonable And Appellant's Refusal to Comply Was Therefore Not Misconduct.

i. The disciplinary notice fails to include language required by the union contract.

The disciplinary notice at issue here violated the union contract on its face. The union contract requires employees of Respondent to sign all disciplinary notices "provided that the notice states by signing, the Vehicle Operator is *only* acknowledging receipt of said notice *and* is not admitting to any fault or to the truth of any statements in the notice." (*See* Collective Bargaining Agreement ¶ 54, CT 00076 (emphasis added).) Accordingly, if a disciplinary notice does not contain such a statement, there is no obligation to sign it. (*See id.*) The notice presented to Appellant, however, only stated, "Employee Signature as to Receipt" beneath the signature line. (*See* CT 00073-00074.) As such, the notice failed to include the second

requirement of the union contract that disciplinary notices state that the employee is not admitting fault or the truth of allegations in the notice by signing. (*See id.*) As a result, the notice objectively violated an express provision of the union contract rendering Respondent's demand that Appellant sign it unlawful and unreasonable.

ii. The trial court's determination that the demand to sign the disciplinary notice was nevertheless reasonable despite the absence of required language is flawed.

The court below concluded that the notice did not violate the union contract reasoning the contract did not require disciplinary notices to include the exact language specified in the union contract and that the language used was the functional equivalent to stating both that the signature was as to receipt only and not an admission of guilt. (CT 00476.) Specifically, the court held the two requirements were "just different sides of the same coin," and the notice was sufficiently clear to allow Respondent's demand to be reasonable and in keeping with the union contract. (*Id.*) The court further determined that, in any event, Respondent verbally assured Appellant that signing did not constitute an admission. (CT 00476-00477.)

This reasoning is problematic on several fronts. First, the contract provision expressly provides that the obligation to sign a disciplinary notice attaches "provided that" the disciplinary notice "states" that by signing the employee is: 1) "only acknowledging receipt;" and 2) not admitting the

facts therein. (CT 00076.) The language of a contract alone governs its interpretation where it is "clear and explicit, and does not involve an absurdity." (Civ. Code §§ 1638, 1639.) Further, the words used in a contract must generally be understood in their ordinary and popular sense, which means that "if the meaning of a layperson would ascribe to contract language is not ambiguous," the court must apply that meaning. (Civ. Code § 1644; *AIU Ins. Co. v. Superior Court*, 51 Cal.3d 807, 821-22 (1990), citing *Reserve Line Ins. Co. v. Pisciotta*, 30 Cal.3d 800, 807 (1982).) Here, the language at issue is clear and explicit. The use of the words such as "states" and "provided that" demands that the notice actually state the disclaimer as described in the provision, otherwise the duty to sign is not triggered. (*See Jacobsen v. Katzer*, 535 F.3d 1373, 1381 (C.A.Fed. (Cal.) 2008) (finding that the words "provided that" generally denote a condition under California contract law).)

Second, while the union contract may not state explicitly that it requires the exact verbiage contained in the provision, that does not excuse Respondent from including language in its disciplinary notices that effectuates *all* of that contract provision. (*See Canavan v. College of Osteopathic Physicians and Surgeons*, 73 Cal.App.2d 511, 518b (1946) (holding that where meaning is uncertain, interpretation is governed by all of the language in the contract).) A contract must be interpreted to give effect to the intent of the parties, and in doing so, a court must construe the

contract as a whole and "give effect to every part" so long as it is reasonably practicable. (Civil Code §§ 1636, 1641.)

The provision here contains two distinct requirements for the disclaimer. (CT 00076.) The use of the word "and" between the two evidences a distinction and unambiguously demands that both be included in the notice. (*See* CT 00076.) In holding otherwise, the trial court improperly failed to give effect to all of the language in the contract and each part of the contract provision at issue. Likewise, the trial court did not effectuate the intent of the parties, which was evidenced by Respondent's own primary witness, Chris Brown, who conceded during the administrative hearing that a disciplinary notice must state both that the notice is only an acknowledgment of receipt and not an admission of fault. (*See* CT 00036.)

Third, the two requirements in the provision are not functional equivalents and it is improper to deem the second clause mere surplusage. The language Respondent used in the disciplinary notice, "Employee Signature as to Receipt," cannot reasonably be equated with language stating that signing is not admission of the accuracy of the content of the notice. The language used simply does not provide employees the same express protection from the inference that the employee acknowledges or accepts the allegations contained in the particular writing signed. Under the

union contract provision, Appellant was entitled to the additional protection of that language.

Precise wording is essential in contracts because the rights and obligations of the parties are defined by the language used and those rights and obligations can be dramatically changed by the use of different language. (*See generally* Civ. Code §§ 1549 (defining contracts), 1638 (stating that language of the contract governs interpretation).) In interpreting a contract, it is not proper for a trial court to subtract or omit terms that are otherwise valid nor is it appropriate for a trial court to determine that something bargained for is immaterial where the parties made it material in the contract. (Code Civ. Proc. § 1858; *Livingston Rock & Gravel Co. v. De Salvo*, 136 Cal.App.2d 156, 164 (1955); *Perry v. Quackenbush*, 105 Cal. 299, 310 (1894).) The union contract could have been written to simply require that disciplinary notices state that the employee's signature only acknowledges receipt. However, the bargaining parties drafted the provision to include two distinct components of such notices and it is improper to assume, without any evidence and in absence of ambiguous language, that the parties did not do so intentionally.

Fourth, in any event, the language in the notice at issue fails to properly meet either of the two requirements described in the contract provision. As noted, the notice does not contain any language stating that signing is not an admission. (CT 00073-00074.) It likewise fails to meet

the first requirement in the provision, which is that the notice must state that by signing, the employee is, "only acknowledging receipt of said notice." (*See* CT 0076.) The notice here merely states ""Employee Signature as to Receipt." (CT 00073-00074.) As such, it fails to include the word "only" or any other similar word that would ensure that the signature is limited to acknowledging receipt. Thus, the disclaimer is defective under either half of the provision.

Fifth and finally, Respondent's verbal assurances cannot render an order to sign a disciplinary notice that violates the union contract a lawful and reasonable order. Union contracts are binding on employers and employees may individually enforce such contracts. (*See MacKay v. Loew's, Inc.* 182 F.2d 170, 172 (9th Cir. 1950).) In this matter, the union contract itself requires that the notice contain such assurances in writing. (CT 00076.) Appellant did not agree and was not required to agree to alter Respondent's obligations under the agreement. In light of that, a verbal assurance was insufficient to cure the defective disciplinary notice.

Further, it is untenable to require an employee to accept verbal assurances in lieu of required written assurances in a disciplinary context where the interests of the employee and the employer are not aligned. It is unreasonable to require Appellant to take such a risk when the union contract requires more extensive language than that used here, and where Respondent's agents could have, but did not, simply add their assurances in

writing on the disciplinary notice. Appellant notified Respondent of his concerns at the disciplinary meeting, which provided Respondent the opportunity to bring the notice in line with the union contract. (*See* CT 00480.) Respondent failed to take that opportunity and failed to provide any explanation as to why it did not amend the notice to comply with the union contract. As such, Respondent's verbal assurances cannot transform an otherwise problematic order into a lawful or reasonable demand.

iii. It was not misconduct for Appellant to decline to sign a disciplinary notice that did not comport with the union contract.

Employees are not required to comply with employer demands that violate applicable union contracts. In *Moosa v. State Personnel Board*, this Court reversed a superior court ruling imposing discipline on a professor who had refused to create an improvement plan. (*Moosa v. State Personnel Bd.*, 102 Cal.App.4th 1379, 1387 (2003).) The Court held that the professor had no duty as a matter of law to obey his employer's demand because the order was inconsistent with the applicable bargaining agreement, which allowed the employer only to suggest improvements rather than demand development of an improvement plan. (*Id.*) Here, the disciplinary notice is not consistent with all of the dictates of the union contract. (*See supra* Section A(i)-(ii).) As such, the reasoning in *Moosa* is instructive and Appellant should not be deemed to have committed misconduct for failing to comply with an order that does not comport with the procedure

developed through the collective bargaining process and memorialized in the union contract.

Based on the foregoing, it was error for the trial court to find that Respondent's demand was lawful and reasonable. The disciplinary notice violated the union contract as a matter of law and, therefore, Appellant's failure to sign was not misconduct.

B. THE FINDING THAT APPELLANT COMMITTED MISCONDUCT IS ERROR BECAUSE FAILURE TO SIGN WAS AT MOST A GOOD FAITH ERROR IN JUDGMENT

Assuming, *arguendo*, that Respondent's demand that Appellant sign the disciplinary notice and its refusal to allow union representation were lawful and reasonable, Appellant's refusal to sign the disciplinary notice was not misconduct because it was, at most, a good faith error in judgment. To date, three decision makers – EDD, CUIAB, and the California Superior Court – have reached different conclusions about whether or not Respondent's requirement that Appellant sign the disciplinary notice without union representation was lawful and reasonable. If three decision making bodies cannot come to one conclusion on this issue, it is clear that Appellant's decision not to sign the disciplinary notice should be considered, at most, a good faith error in judgment.

Unemployment insurance law is to be construed liberally to benefit persons who are unemployed. (*Amador v. CUIAB*, 35 Cal.3d 671, 683 (1984); *Rabago v. CUIAB*, 84 Cal.App.3d 200, 210 (1978).) A person who

makes a good faith error in judgment has good cause for his or her actions and has not committed misconduct. (*Moore v. CUIAB*, 169 Cal.App.3d 235, 242 (1984).) The worker's good faith error must be considered from the worker's standpoint, in light of the circumstances facing her and the knowledge possessed by her at the time. (*Amador v. CUIAB,* 35 Cal.3d at 683; *Sanchez v. CUIAB* (1984) 36 Cal.3d 575, 587.) Here, several factors indicate that Appellant' actions were, at most, a good faith error in judgment.

a. The Disciplinary Notice Did Not Contain The "No Admission" Language And Appellant Felt Signing It Would Conflict With The Advice He Received From His Union President; Appellant's Confusion About Whether Or Not Signing The Notice Could Be Deemed An Admission Was At Most A Good Faith Error In Judgment.

Appellant was concerned that his signing the disciplinary notice would be an admission regarding the allegations in the notice. (*See* CT 00050; 00053.) Given the totality of the circumstances, this concern was reasonable even if he was ultimately wrong about the issue, demonstrating at most a good faith error in judgment.

The disciplinary notice did not state that signing the notice was not admitting fault or truth of the allegations as required by paragraph 54 of the union contract. (*See* CT 00073-00074.) Paragraph 54 of the union contract *required* that any disciplinary notice state that signature was not an admission of fault or the truth of allegations. (*See* CT 00076; *see also*

supra Section A.) The notice simply did not contain the "no admission" language mandated by the union contract, and the union contact is unambiguous that an employee is not required to sign a disciplinary notice absent the "no admission" language. (*See* CT 00073-00074; *see also supra* Section A.) A reasonable person could certainly believe that a signature would be an admission when required language stating otherwise was not on the notice.

The trial court found, because the disciplinary notice stated under the signature block "as to receipt", that the language was sufficiently clear "that the employee was not admitting guilt;" thus, the disciplinary notice complied with Paragraph 54 of the union contract. (*See* CT 00476.) In other words, the court found as a matter of law the disciplinary notice did not violate the union contract. In doing so, the court limited its decision to the legal question. It failed to consider Appellant's testimony regarding his confusion about the affect of signing the notice, absent the "no admission" language, and whether or not that testimony showed Appellant's decision not to sign the notice was a good faith error in judgment. (*See* CT 00478-00488; *see also* CT 00053, 00055-00057.) Accordingly, the Appellate Court must consider this evidence de novo. (*See Kemp Bros. Const., Inc. v. Titan Elec. Corp.,* 146 Cal. App.4th at 1477; *Estate of Larson*, 106 Cal.App.3d at 567.) Alternatively, substantial evidence does not support the trial court's determination on this issue; rather, substantial,

uncontroverted evidence supports a finding that Appellant's confusion and resulting refusal to sign the notice was, at most, a good faith error in judgment.

The circumstances of the May 2, 2008 meeting demonstrate Appellant was confused and troubled by the notice's lack of the "no admission" language. Appellant was tired at the end of his shift, called into a meeting with two senior employees of Respondent, confronted with serious allegations he refuted, asked about lying on his employment application six years prior, faced with demands that he sign the disciplinary notice that confirmed the allegations, and was threatened with termination if he did not sign the notice. (*See* CT 00021; 00055; 00059-00060.) He was tired and confused and wanted the assistance of a union representative to help him decide whether or not to sign the disciplinary notice. (*Id.*) Based on his discussion with the union president and his understanding that the union had previously refused to assist employees who had signed disciplinary notices, he was concerned that if he signed it, he would admit the truth of the allegations and he would not be able to seek the assistance of the union in his defense against whatever discipline Respondent doled out to him. (*See* CT 00056-00059) These concerns were reasonable in light of the circumstances surrounding the May 2, 2008 meeting. (*See Amador v. CUIAB,* 35 Cal.3d at 683 [holding reasonableness must be viewed from the worker's standpoint, in light of the circumstances facing

her and the knowledge possessed by her at the time].) The trial court did not address these circumstances in its analysis of whether or not Appellant's decision not to sign the notice was a good faith error in judgment. Accordingly, the court failed to consider and weigh Appellant's testimony on this issue. The Appellate Court must consider this evidence *de novo* and should determine the circumstances weigh positively on a determination that Appellant's refusal to sign the disciplinary notice was, at most, a good faith error in judgment. (*See Kemp Bros. Const., Inc. v. Titan Elec. Corp.*, 146 Cal. App.4th at 1477; *Estate of Larson*, 106 Cal.App.3d at 567.)

Despite Respondent's assurances that his signature would not constitute an admission to the allegations in the notice, Appellant reasonably was skeptical and wanted assurances of a union representative, who would have his best interest in mind. Respondent's assurances conflicted both with the collective bargaining agreement itself and with the advice Appellant received from his union president that he should not sign documents absent union representation. Appellant's reliance on the advice from his union president in deciding not to sign the notice, to the extent this Court may find such reliance misplaced, was merely a good faith error in judgment.

The trial court found Appellant's testimony regarding the union president's advice not credible. (*See* CT 00475-00476.) To support the

adverse credibility determination, the court below found "[a]ccording to Medeiros' own testimony, the union president simply advised Medeiros to follow the advice provided on a written card stating his *Weingarten* rights." (CT 00476.) The court cited to pages of the transcript of the hearing before the Administrative Law Judge, yet these pages do not support this conclusion. In fact, the portions cited confirm Appellant's consistent testimony about the advice he received from the union president. Appellant's testimony on this issue is uncontradicted and credible. (*See e.g. Martori Brothers Distributors v. Agricultural Labor Relations Board*, 29 Cal.3d 721, 728 (1981).) Interestingly, the Administrative Law Judge who observed Appellant's live testimony and demeanor made no adverse credibility determination. (CT 00016-17.) Moreover, Appellant repeatedly testified about his reliance on the advice from his union president. (*See* CT 00050; 00053; 00056; 00057; 00059; 00068.) The court's adverse credibility determination is contrary to the weight of the evidence and is not entitled to deference. (*See Kuhn v. Dept. of Gen. Serv.*, 22 Cal.App.4th at 1633; *see also Amador v. CUIAB*, 35 Cal.3d at 687 ["where the facts are undisputed and opposing inferences may not reasonably be drawn from those facts, "[w]hether or not there is 'good cause' is an issue of law"" (citation omitted)].) The Appellate Court must consider Appellant's testimony on this issue *de novo*. (*See Kemp Bros. Const., Inc. v. Titan Elec. Corp.,* 146 Cal. App.4th at 1477; *Estate of Larson*, 106 Cal.App.3d at 567.)

Even if misplaced, Appellant's reliance on the advice from the union president was reasonable and, at most, a good faith error in judgment. Appellant respected the union president and believed his advice was accurate. (*See* CT 00057 ["this isn't just a union member, this is the president, you know what I mean... I had to respect them [the union]. . . . "].) During the May 2, 2008 meeting, Appellant, tired after a long day's work, decided to rely on the union president's advice instead of Respondent's assurances that the notice was not an admission. Appellant reasonably believed that, by signing the notice, he risked losing union representation at a later date to challenge whatever form of discipline Respondent might determine. As discussed above, Appellant was tired and confused and simply wanted a union representative to help him decide whether or not to sign the notice. Moreover, he understood that the union had denied representation to other members who had signed such notices. Appellant, in good faith, followed the advice of the union president in not signing the document without union representation; his decision to do this, to the extent this Court finds it was an error, was an unintentional, good faith error in judgment.

The trial court found that Respondent's assurances, combined with the "as to receipt" language on the disciplinary notice, should have been enough to convince Appellant that signing the notice would not be considered an admission. (*See* CT 00477.) There is no requirement that an

employee must believe everything an employer says, or that an employee must assume every assertion of his employer is true; an employee is simply required to follow reasonable and lawful orders of his employer. (*See* Appeals Board Decision No. P-B-400, CT 00137-00140.) In Appeals Board Decision No. P-B-190, the CUIAB held that deliberate disobedience of lawful and reasonable instructions is misconduct, and that if employees doubt the reasonableness or legality of supervisors' instructions, they should seek redress through other avenues than disobedience. (*Matter of Ludlow* (1960, adopted 1976) CUIAB P-B-190 at p.3, CT 00120-00123.) Here, Appellant complied with his duty to seek redress through other avenues than disobedience. He requested a union representative at the meeting and then he mentioned he wanted to talk to the union before signing the disciplinary notice. (*See* CT 00053 ["[s]o I'm not gonna sign this as of now . . . until I get the union representation. . . . "].) He chose a path much less drastic than an outright refusal to comply with Respondent's direction. Moreover, in a stressful situation where the power dynamic disadvantaged Appellant, he reasonably wanted assistance: someone to protect him and help him sort out what he should do in the situation, the very role a union representative would play. Even if Appellant was wrongly concerned about the "no admission" language not appearing on the notice and wrongly relied on the union president's advice, his failure to sign the notice was, at most, a good faith error in judgment.

Furthermore, Respondent could have avoided this unfortunate outcome in any number of ways. For example, Respondent could have allowed Appellant a union representative at the meeting, or rescheduled the meeting until after Appellant could secure advice from the union. Moreover, Respondent could have added language to the disciplinary notice that demonstrated signing the document did not constitute an admission, in accordance with the collective bargaining agreement. Even if Respondent had no duty to do either of these, Respondent was aware of Appellant's concerns about signing the notice; had it simply allowed him to consult a union representative or added the "no admission" language to the notice, Appellant likely would have signed it. Respondent presented no evidence that it would have suffered any injury or harm had it simply chosen either of these alternatives. Moreover, as stated above, Appellant's decision not to sign the notice until he consulted with a union representative is hardly a material breach of a substantial duty owed by an employee to his employer which tends to injure the employer's interest. (*See* Appeals Board Decision No. P-B-77.) Had Respondent chosen one of these alternative paths, it would have certainly avoided intervention by EDD, CUIAB, the California Superior Court, and now the California Court of Appeal.

Given the lack of the "no admission" language in the disciplinary notice and Appellant's reasonable skepticism of Respondent's statements

that signing the notice was not an admission, Appellant's decision not to sign the disciplinary notice was, at most, a good faith error in judgment.

b. Appellant Believed The May 2, 2008 Meeting Involved A Discussion Beyond The Predetermined Discipline, So He Reasonably Believed He Was Entitled To Union Representation; This Belief Was At Most A Good Faith Error In Judgment.

Appellant's belief that he was entitled to union representation was a good faith belief and his refusal to sign the disciplinary notice without first consulting a union representative was, at most, a good faith error in judgment. The trial court resolved the legal question of whether or not Appellant was entitled to union representation at the May 2, 2008 meeting.[2] (*See* CT 00474-00475.) The trial court, however, failed to weigh and consider Appellant's testimony about being reasonably confused about the issue and whether or not that confusion supported a finding that Appellant's failure to sign the disciplinary notice was a good faith error in judgment. Accordingly, the Appellate Court must weigh and consider Appellant's testimony *de novo* and should determine that his failure to sign the disciplinary notice was, at most, a good faith error in judgment. (*See Kemp Bros. Const., Inc. v. Titan Elec. Corp.,* 146 Cal. App.4th at 1477; *Estate of Larson,* 106 Cal.App.3d at 567.)

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[2] Appellant is not seeking review of this determination; rather, Appellant contends that the trial court improperly collapsed the analysis by addressing only entitlement to union representation and not whether the refusal to sign was a good faith, albeit mistaken, judgment that he was entitled to union representation.

Appellant testified that discussing the six year old issue of his employment application confused him because it was beyond the allegations and predetermined discipline described in the disciplinary notice. (*See* CT 00055.) In addition, at the meeting Brown demanded that Appellant sign the disciplinary notice upon threat of termination of employment. (*See* CT 00037.) Despite Respondent's statements that the meeting was only to inform Appellant of predetermined discipline, these two additional aspects of the meeting, which did not involve merely informing him of predetermined discipline, support Appellant's good faith belief that he was entitled to union representation at the meeting.

The combination of factors, including that the disciplinary notice did not meet the requirements of the union contract, that the union advised Appellant not to sign documents without representation, that other employees were denied union representation because of documents they signed, and that Respondent discussed matters beyond mere informing of predetermined discipline, strongly support Appellant's good faith in this matter. Given this totality of circumstances, the trial court's decision must be overturned because the court failed to consider and weigh evidence clearly supporting a finding that Appellant's failure to sign the disciplinary notice was, at most, a good faith error in judgment.

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VII. CONCLUSION

For the reasons stated above, the decision of the trial court should be reversed. Appellant Craig Medeiros did not commit misconduct because under the union contract he was not required to sign a disciplinary notice that lacked a statement that signing was not an admission of fault or of the truth of allegations contained in the notice. In the alternative, Appellant's decision not to sign the disciplinary notice was, at most, a good faith error in judgment, which is not misconduct, and the trial court failed to consider and weigh evidence supporting such a finding. Each of these reasons independently justifies reversing the lower court's decision and finding that Appellant did not commit misconduct and is entitled to Unemployment Insurance benefits.

Dated: August 19, 2010

Respectfully submitted,

LEGAL SERVICES OF NORTHERN CALIFORNIA

By: Sarah R. Ropelato

Sarah R. Ropelato

Attorneys for Appellant Craig Medeiros

CERTIFICATION

I certify, pursuant to California Rule of Court 8.204(c)(1) that the attached APPELLANT'S OPENING BRIEF contains 6,612 words, as measured by the word count of the computer program used to prepare this brief.

Dated: August 19, 2010

LEGAL SERVICES OF NORTHERN CALIFORNIA

By: Sarah R. Ropelato

Sarah R. Ropelato

PROOF OF SERVICE (Court of Appeal) ☒ Mail ☐ Personal Service	FOR COURT USE ONLY
Notice: This form may be used to provide proof that a document has been served in a proceeding in the Court of Appeal. Please read *Information Sheet for Proof of Service (Court of Appeal)* (form APP-009-INFO) before completing this form.	
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1. At the time of service I was at least 18 years of age and **not a party to this legal action.**

2. My ☐ residence ☒ business address is *(specify):*
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3. I mailed or personally delivered a copy of the following document as indicated below *(fill in the name of the document you mailed or delivered and complete either a or b):*
   Appellant Craig Medeiros' Opening Brief

   a. ☒ **Mail.** I mailed a copy of the document identified above as follows:

      (1) I enclosed a copy of the document identified above in an envelope or envelopes **and**

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            (ii) Address: Rediger McHugh & Owensby, LLP
            555 Capitol Mall, Suite 1240
            Sacramento CA 95814

         (b) Person served:

            (i) Name: MICHAEL HAMMANG, Deputy Attorney General

            (ii) Address: Office of the Attorney General, DOJ
            1300 I Street, Suite 125
            Sacramento CA 95814

         (c) Person served:

            (i) Name: HONORABLE TIMOTHY M. FRAWLEY

            (ii) Address: C/O Superior Court Of Sacramento
            720 9th Street
            Sacramento CA 95814

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Craig Medeiros

CASE NAME:	CASE NUMBER:
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3. b. ☐ **Personal delivery.** I personally delivered a copy of the document identified above as follows:

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(2) Person served:

(a) Name:

(b) Address where delivered:

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(d) Time delivered:

(3) Person served:

(a) Name:

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(d) Time delivered:

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

Date: July 19, 2010

Alexa C Garza
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

(SIGNATURE OF PERSON COMPLETING THIS FORM)

Craig Medeiros

APP-009 ITEM 3a

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Address: By electronic mail pursuant to California Rule of Court 8.212.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

PARATRANSIT, INC.,	)	
Petitioner and Respondent,	)	Civil No. C063863
vs.	)	
UNEMPLOYMENT INSURANCE	)	Sacramento County
APPEALS BOARD,	)	Superior
Defendant,	)	Court No.
CRAIG MEDEIROS,	)	34200980000249
Real Party in Interest and	)	
Appellant.	)	

APPELLANT CRAIG MEDEIROS' REPLY BRIEF

Appeal from a Judgment of the Superior Court of the State of California, County of Sacramento

Honorable Timothy M. Frawley, Judge

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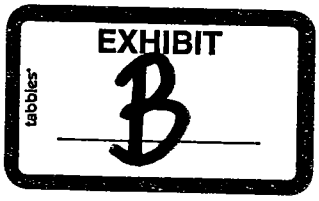

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INTRODUCTION

The purpose of unemployment insurance benefits is to "provide benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum." (Cal. Unemployment Ins. Code § 100.) In accordance with this stated purpose, the courts must liberally construe unemployment insurance law to benefit persons who are unemployed. (*Amador v. CUIAB*, 35 Cal.3d 671, 683 (1984); *Rabago v. CUIAB*, 84 Cal.App.3d 200, 210 (1978).)

Appellant Craig Medeiros was terminated from his employment and subsequently denied unemployment insurance benefits for exercising his right under the collective bargaining agreement to refuse to sign a disciplinary memorandum that did not comport with important rules under the agreement. Yet, Appellant's refusal to sign the disciplinary memorandum was not misconduct because the employer's demand was unlawful and unreasonable as a matter of law. Respondent Paratransit was required to honor its obligations under the bargaining agreement with respect to the disciplinary memorandum and failed to do so. Even if the Court determines otherwise, Appellant's decision not to sign the faulty memorandum was reasonable under the circumstances and at most, a good faith error in judgment. In any event, legal precedent and the policy underlying unemployment law do not permit a finding of misconduct in this matter.

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ARGUMENT

I. APPELLANT'S FAILURE TO SIGN THE DISCIPLINARY MEMORANDUM WAS NOT MISCONDUCT BECAUSE THE ORDER TO SIGN WAS NEITHER LAWFUL NOR REASONABLE

a. An Order That Violates the Applicable Bargaining Agreement is Not Lawful or Reasonable for the Purposes of Unemployment Insurance Benefits

Pursuant to Labor Code Section 2856, an employee must "substantially comply with all the directions of his employer concerning the service on which he is engaged, except where such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employee." (Cal. Labor Code § 2856.) Accordingly, in the unemployment insurance context, disobedience of an employer's demand is not deemed misconduct or insubordination where the demand is unlawful or unreasonable. (*Matter of Anderson* (1968) P-B-3 at p. 7 [citations omitted]; *Parish v. Civil Service Commission*, 66 Cal.2d 260, 264 (1967) [citations omitted]; Cal. Labor Code § 2856.) Respondent argues that a breach of an applicable collective bargaining agreement does not render a corresponding order unlawful or unreasonable and is irrelevant to the analysis. (Respondent's Brief [hereinafter RB] 9.) This argument disregards important precedent, misconstrues the authorities relied upon, and was rejected by the trial court below.[1]

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[1] The trial court held that whether the disciplinary memorandum violated the bargaining agreement was relevant to the misconduct analysis. (CT 00486.)

1) Respondent Fails to Account for the Decision in *May v. New York Motion Picture Corporation.*

In *May*, the Second District Court of Appeals expressly held that employees have a duty to comply with reasonable orders of the employers that are "not inconsistent with the contract." (*May v. New York Motion Picture Corp.* 45 Cal.App. 396, 402 (1920).) The court established a two-step analysis asking: first, whether or not the order is consistent with the contract, and second, "if it is," whether it was reasonable under the circumstances. (*Id.* at 405.) Therefore, here the threshold issue is whether Respondent's order to Appellant was consistent with the contract. Respondent improperly asks this Court to forego this initial step in the analysis by focusing only on whether the surrounding circumstances render the order reasonable.

2) Respondents Reliance on *Ludlow v. North American Aviation, Inc.* is misplaced.

Respondent's analysis of this matter principally relies on the precedent benefit decision of the California Unemployment Appeals Board (CUIAB) in *Ludlow v. North American Aviation, Inc.* (1960) P-B-190, wherein the CUIAB determined that an employee who refused an order to perform job duties he believed were outside of his job classification (i.e. dusting fire extinguishers) had committed misconduct. Such reliance is misplaced for three significant reasons.[2]

[2] It is also noteworthy that the trial court did not accept *Ludlow* for the propositions argued by Respondent; rather, it simply referenced the decision with respect to whether the advice of a union representative may establish a good faith error in judgment. (CT 000476.)

First, the CUIAB in *Ludlow* did not analyze whether the order violated a collective bargaining agreement. In fact, there is no mention of a collective bargaining agreement anywhere in the decision nor is there any indication that asking an employee to perform duties outside the job classification was a violation of the collective bargaining agreement. In the present case, the employer's order expressly violated the collective bargaining agreement. As such, *Ludlow* is not instructive on this point.

Second, to the extent that *Ludlow* stands for the proposition that an employee doubting the lawfulness or reasonableness of an employer's order must comply and then file a grievance, the case at bar is distinguishable. In *Ludlow*, the employer's order was such that, if followed and later grieved, no potential immediate harm for the employee could occur in the interim. The employee was merely asked to dust the fire extinguishers. The employee could perform that task with no potential harm befalling him, file a grievance, and then if successful, would not be required to perform the task again.

However, in the present case, once the disciplinary memorandum was signed, Appellant would not be unable to undo it. This is particularly true in this case given Appellant's uncontradicted testimony that he knew of other Paratransit employees who were terminated after signing disciplinary memoranda and that the union would not assist those employees because the signed disciplinary memorandum was an admission. (*See* CT 00053, 00059.) Under such circumstances, it is not reasonable to demand that an employee perform an

irreversible action that potentially opens him to immediate harm that could not be remedied through a grievance process that might occur later. Furthermore, Appellant did attempt a path short of refusing Respondent's demand in that he indicated he would simply delay signing pending obtaining union representation. (CT 00053.) Thus, to the extent possible, Appellant did comply with the dictates of Ludlow.

Third, if Respondent's characterization of the decision in *Ludlow* is correct (i.e. that compliance with the collective bargaining agreement is irrelevant to whether the order is lawful and reasonable), then *Ludlow* should not be followed because it is contrary to the insubordination analysis required by the *May* decision, public policy, and statutory intent. Although precedent benefit decisions are entitled to weight, whether an administrative interpretation is consistent with the law is within the province of the courts. (*See Pacific Legal Foundation v. Unemployment Insurance Appeals Board*, 29 Cal.3d 101, 111 (1981) [holding administrative interpretations are entitled to great weight, but if contrary to statutory intent, must be rejected.])

The law provides that employers are bound by collective bargaining agreements and employees may individually enforce such contracts. (*See MacKay v. Loew's, Inc.* 182 F.2d 170, 172 (9th Cir. 1950).) Further, unemployment insurance statutes and regulations must be liberally construed to benefit persons who are unemployed through no fault of their own. (*Amador v. CUIAB* (1984) 35 Cal.3d 671, 683; *Rabago v. CUIAB* (1978) 84 Cal.App.3d 200, 210.) If employer

compliance with an enforceable agreement was deemed irrelevant to whether the corresponding order was lawful and reasonable under that agreement, it would effectively punish employees who are terminated for disobeying an order they were never required to obey. Such a position is untenable and contrary to the statutory framework of unemployment insurance benefits and the well-settled precedent of *May* and *Moosa v. State Personnel Board.*

3) The Rationale in *Moosa v. State Personnel Board* applies.

In *Moosa v. State Personnel Board*, this Court held that a professor had no duty as a matter of law to obey an order that was inconsistent with the applicable collective bargaining agreement. (*Moosa v. State Personnel Bd.*, 102 Cal.App.4th 1379, 1387 (2003).) Respondent argues that the decision is inapposite because the Court reviewed the matter under California Education Code Section 89535 allowing for dismissal, suspension, and/or demotion for "unprofessional conduct" and/or "failure or refusal to perform the normal and reasonable duties," and not under Labor Code Section 2856 or the CUIAB decision in *Ludlow*. (RB 10.) This argument should be rejected on several fronts.

First, the holding in *Moosa* is broader than Respondent suggests. While true that *Moosa* arose under Education Code Section 89535 and the Court ultimately found no unprofessional conduct or a failure or refusal to perform normal and reasonable duties, the Court's rationale did not revolve around that standard, but rather on whether a duty to obey the order arose in the first place. (*Moosa*, 102 Cal.App.4th at 1387.) The Court reasoned that because the order

was inconsistent with the collective bargaining agreement, the order was unauthorized and no duty arose as a matter of law to obey it. (*Id.*)

Second, in so reasoning, the Court did not confine itself to an analysis of what constitutes "unprofessional conduct" or "normal and reasonable duties" under the Education Code. Instead, the Court relied on what it termed general principles of California employment law that an employee's duty of obedience extends to all reasonable orders "not inconsistent with the contract." (*Id.*) Specifically, the Court cited *May v. New York M. Picture Corporation*, discussed *supra* Section I, a (1). (*Id.*) Thus, the reasoning of the *Moosa* Court suggests the holding and rational are applicable outside of the statutory context of Education Code Section 89535. In fact, given the policy of the law to liberally construe unemployment law, the rationale in *Moosa* is particularly apt. (*See Amador v. CUIAB*, 35 Cal.3d 671, 683 (1984).

Third, Respondent's reliance on *Ludlow* to distinguish *Moosa* is misplaced for all of the reasons discussed *supra* Section I(a)(2). Such reliance is particularly inappropriate when confronted with the reasoning in *Moosa* which expressly discounts the main thrust of *Ludlow* which is that an employee must comply with a questionable order and then file a grievance, rather than disobey an order thought to be unlawful or unreasonable. (*See Moosa*, 102 Cal.App.4th at 1386-87.)

Fourth, neither Labor Code Section 2856 nor *Lacy v. California Unemployment Insurance Appeals Board*, 17 Cal.App.3d 1128, 1133 (1971) render *Moosa* inapplicable. Where an employer's demand violates the collective

bargaining agreement, it is both new and unreasonable as a matter of law. The *Moosa* Court expressly determined the employer's order exceeded the "normal and *reasonable*" duties required under the contract as a matter of law because it exceeded the allowable requirements under the contract. (*Moosa*, 102 Cal.App.4th at 1387 [emphasis added].) Thus, the employer's demand was implicitly held unreasonable. (*See id.*) Here, Respondent's demand was not only new, but affirmatively violated the express provisions of the bargaining agreement. As such, Respondent's demand was new and unreasonable as a matter of law under the reasoning of *May* and *Moosa*. Providing otherwise would eviscerate the rights of union members because an employer could violate its obligations under the bargaining agreement under the guise of "reasonableness," fire its employees for insubordination for disobeying orders that violate the agreement, and be immunized from unemployment insurance claims. Such an outcome is not consistent with the mandate to liberally construe unemployment insurance law to protect employees. (*See Amador v. CUIAB*, 35 Cal.3d 671, 683 (1984).)

In sum, whether an employer's order violates the applicable bargaining agreement is essential to determining the reasonableness of that order and accordingly, whether an employee commits misconduct by failing to obey that order.

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b. The Disciplinary Memorandum Violated the Applicable Collective Bargaining Agreement

Respondent fails to address nearly all of the arguments in Appellant's Opening Brief with respect to whether or not the disciplinary memorandum complied with the collective bargaining agreement. Rather, Respondent argues that the contract "only requires that the disciplinary memorandum set forth that the employee's signature will only be considered for the purpose of acknowledging receipt of the document, and that no allusion is made within the document that the signature will be considered an admission of fault." (RB 16). There are two problems with this reasoning: 1) it has no basis in the language in the contract, and 2) the disciplinary memorandum fails to comport with Respondent's interpretation.

The language of the agreement provides that an employee must sign all disciplinary notices "*provided that* the notice *states* that by signing, the Vehicle Operator is only acknowledging receipt of said notice *and* is not admitting to any fault or to the truth of any statement in the notice." (CT 00076-00077 [emphasis added].) As discussed extensively in Appellant's Opening Brief, the ordinary meaning of language in a contract must be applied and a contract must be interpreted to give effect to every part. (Appellant's Opening Brief [hereinafter AOB] 12-14 [citing Civil Code §§ 1636,1638, 1639, 1641,1644.) The use of words "provided that" denotes that the duty to sign is conditional on the remaining clauses. (*See Jacobsen v. Katzer*, 535 F.3d 1373, 1381 (C.A. Fed. (Cal.)(2008).)

The use of the word "states" denotes that the notice must actually state the disclaimer described. The use of the word "and" denotes a two part requirement to the disclaimer. Respondent fails to address any of these arguments, and asserts only that the notice is in compliance as long as it does not expressly state that signing is an admission. (RB 16.) Such an interpretation is wholly disconnected from any of the language of the contract and is unsupported by any authority. As such, it should be rejected.

As to the latter problem, even under Respondent's interpretation, Respondent fails to demonstrate that the disciplinary memorandum does, in fact, set forth that the employee's signature will only be used to acknowledge receipt. (CT 00073-00074.) The disciplinary notice here merely states, "Employee Signature as to Receipt," without any kind of limiting language such as the word "only" or "exclusively." (*Id.*) As such, it contains neither the assurance that the signature will only be used to acknowledge receipt nor that the signer is not admitting the truth of the statements contained in the notice.

Moreover, Respondent fails to address Appellant's arguments that it is improper for a trial court to subtract or omit otherwise valid terms or to determine that a bargained-for term is immaterial where the parties made it material. (*See* AB 15.) The collective bargaining agreement could have been written to merely require a statement that the signature was as to receipt only, but it was not. Rather, the bargaining parties included two components: 1) that by the signing, the employee is only acknowledging receipt, and 2) that the employee is not admitting

any fault or the truth of the statements in the memorandum. (CT 00076-00077.) As a result, it was not for the trial court or Respondent to unilaterally excise one of those components, particularly when a statement that the employee is not admitting to fault or the truth of the allegations in the notice provides an express protection that was not otherwise contained in the notice. (Code Civ. Proc. § 1858; *Livingston Rock & Gravel Co. v. De Salvo*, 136 Cal.App.2d 156, 164 (1955); *Perry v. Quackenbush*, 105 Cal. 299, 310 (1894).) Such an express protection has value by virtue of its certainty and it was improper for the trial court to determine that it was immaterial.

c. Respondent's Demand that Appellant Sign the Defective Disciplinary Memorandum Was Not Lawful or Reasonable as a Matter of Law

The lawfulness or reasonableness of an employer's order is a question of law when the determination rests on undisputed facts or where the inferences from the found facts point in one direction. (*Lacy v. California Unemployment Insurance Appeals Board*, 17 Cal.App.3d 1128, 1135 (1971).) Respondent concedes that the facts are undisputed in this matter, but argues that reasonableness of Respondent's order remains a question of fact because conflicting inferences may be drawn as to whether the surrounding circumstances rendered the order reasonable. (RB 14-15.)

Respondent's arguments on this point are flawed. As discussed above, under the *May* and *Moosa* analysis, the first question is whether Respondent's order complied with the collective bargaining agreement and accordingly, whether

Appellant had a duty to obey the order. (*See supra* Sections I(a)(1), (a)(3).) This analysis depends exclusively on the interpretation of two writings, the collective bargaining agreement and the disciplinary memorandum. The interpretation of a writing is a question of law unless such interpretation turns on conflicting extrinsic evidence presented to the lower court. (*Parsons v. Bristol Develop. Co.*, 62 Cal.2d 861, 865–866 (1965).) In this matter, neither party has contended that extrinsic or conflicting evidence was presented as to the meaning of the bargaining agreement provision and disciplinary memorandum at issue. As a result, this question remains one of law for this Court to adjudicate.

Here, Respondent's order to Appellant was unreasonable as a matter of law. As in *Moosa*, because the disciplinary memorandum violated the collective bargaining agreement through its failure to include the entirety of the required disclaimer, Appellant had no duty to comply with Respondent's unauthorized order. Absent such a duty, there is no insubordination or misconduct.

Respondent's arguments regarding the reasonableness of the surrounding circumstances do not alter this analysis. Respondent argues that its verbal assurances to Appellant that signing was not an admission should have been sufficient and that it would eviscerate Unemployment Insurance Code Section 1256 if an employee could disobey an order based on a belief that the employer was mistaken or lying. (RB 12-13.) This misstates Appellant's arguments. Appellant does not argue that the order was unreasonable because of Appellant's belief, but rather that Respondent's assurances do not cure its breach of the

bargaining agreement and that it is not reasonable to require an employee to accept verbal assurances of their employer in the disciplinary context where they are adverse parties. Respondent offers no response.

Respondent's argument also misunderstands the risk Respondent would have taken upon signing the faulty memorandum. Whether or not Appellant's signature could be used as admission was not within the sole province of Respondent. Appellant's uncontradicted testimony is that he had learned that the union refused to represent members who had signed statements with Respondent. (*See* CT 00053, 00059.) Further, Respondent would have no control over whether the statement would be used an admission in a civil suit or criminal prosecution. Under such circumstances, Respondent's assurances are meaningless because they have no power over the union or third parties.

Respondent's arguments that Appellant could have brought the disciplinary memorandum into compliance and that he had already signed a disciplinary memorandum in 2004 without consequence from Respondent are likewise unavailing. (*See* RB 13.) It was not Appellant's duty to bring Respondent's notice into compliance: it was Respondent's duty. Appellant's only duty was to sign a notice presented to him that comported with the bargaining agreement. He was never presented with such a notice, therefore no duty to sign was ever triggered.

As to the 2004 memorandum, there is no evidence in the record as to what the applicable bargaining agreement required in 2004. As such, no meaning can be attached to Appellant's signing of that memorandum. Moreover, even if the

bargaining agreement was similar, it only means that Respondent violated the bargaining agreement once before and Appellant did not assert his rights. Whether or not any negative consequences resulted from the Appellant taking a risk in signing the memorandum in 2004 without express protections has no bearing on whether it was reasonable to order him to sign another faulty memorandum. Again, whether or not Respondent would use Appellant's signature as an admission is simply not the only consideration as other parties at play could have done so regardless of the significance Respondent attaches to Appellant's signature.

Ultimately, none of Respondent's arguments render its order lawful and reasonable because none establish that the order was consistent with the bargaining agreement or that Appellant otherwise had a duty to sign the faulty memorandum. As the order was unauthorized, it was unreasonable and unlawful as a matter of law and Appellant's failure to obey was not misconduct.

II. APPELLANT'S DECISION NOT TO SIGN THE MEMORANDUM WAS AT MOST A GOOD FAITH ERROR IN JUDGMENT

Alternatively, Appellant's decision not to sign the disciplinary memorandum in the May 2, 2008 meeting was at most a good faith error in judgment. The reasonableness of his decision must be viewed from his standpoint in light of the circumstances facing him and the knowledge he possessed at the time. (*Amador v. CUIAB,* 35 Cal.3d 671, 683; *Sanchez v. CUIAB,* 36 Cal.3d 575, 587 (1984).)

a. Appellant's Reliance On His Union President's Advice Was Reasonable And In Good Faith.

In its Opposition Brief ("RB"), Respondent wrongly argues Appellant's reliance on the advice from the union president was unreasonable and not in good faith. (*See* RB 21.) Respondent argues, under *Matter of Ludlow*, Appellant was required to follow his employer's direction, and then file a grievance instead of refusing to comply with the employer's direction. (*Id.*) According to Respondent, a union representative could give improper advice *cart blanche* and all employees would be able to claim good faith error when refusing to comply with their employer's direction, thereby inflating all employees' *Weingarten* rights. (*See* RB 22.) Respondent is incorrect. Appellant's reliance on his union president's advice was reasonable because he respected the union president and knew other employees were denied union representation because of documents they signed which were deemed admissions. (*See* CT 00053, 00057, 00059.) Moreover, a decision in this case will determine only whether Appellant committed misconduct for purposes of determining his eligibility for unemployment insurance benefits and will not impact Appellant's *Weingarten* rights, or expand the *Weingarten* rights of all union employees. Respondent also equates Appellant's testimony regarding the advice of his union president with the information on the card Appellant received that states his *Weingarten* rights. (*See* RB 22.) This assertion mischaracterizes Appellant's testimony; Appellant repeatedly testified that his

union president's advice went well beyond the information provided in the card. (*See* CT 00055-00057.)

b. Appellant's Belief That He Was Entitled To Union Representation During The May 2, 2008 Meeting Was Reasonable And At Most A Good Faith Error In Judgment.

Respondent wrongly characterizes Appellant's discussion of the circumstances facing him during the May 2, 2008 meeting as a request for expanded *Weingarten* rights. (*See* RB 23-26.) Respondent even goes as far to say Appellant seeks to extend *Weingarten* rights "to that of an expansive judge-created right to representation in all employer-employee interactions." (RB 24.) This is a gross mischaracterization of Appellant's argument. Appellant merely explains that he believed he was entitled to union representation during the May 2, 2008 meeting because he was being threatened with termination and Respondent's agents raised an issue from six years previous. (*See* CT 00037, 00055.) Appellant's belief that he was entitled to union representation during the meeting was at most a good faith error in judgment; this is Appellant's argument. Appellant does not request expanded *Weingarten* rights for himself or anyone else, let alone all union employees, as Respondent contends.

Respondent also contends Appellant's belief that the meeting was disciplinary was unreasonable. (*See* RB 26-27.) Respondent argues it already had terminated Appellant from employment for the six-year-old offense and, had it decided to re-discipline him for that offense, Respondent needed no new information to do so. (*Id.*) Therefore, Respondent could not have possibly asked

questions about the six-year-old offense for purposes of further punishing Respondent. (*Id.*) To accept Respondent's position, the Court would require Appellant to be clairvoyant and know Respondent's intentions when its agents raised the six-year-old offense during the May 2, 2008 meeting. Unfortunately, Appellant is not clairvoyant and had no idea why Respondent's agents were raising the issue; rather, he reasonably believed the worst result could occur: the meeting became investigatory and he would be punished even more harshly. (*See* CT 00055.) Moreover, Respondent's agents threatened him with termination if he decided not to sign the memorandum, which clearly expanded the discussion beyond one concerning only predetermined discipline. (*See* CT 00037.) Accordingly, Appellant reasonably believed he was entitled to union representation at the meeting. Even if that belief was incorrect, it was at most a good faith error in judgment and therefore not misconduct.

c. Each Circumstance Facing Appellant During The May 2, 2008 Shows His Decision Not To Sign The Disciplinary Memorandum Was Reasonable.

Respondent argues each circumstance facing Appellant during the May 2, 2008 meeting is not sufficient to show his decision not to sign the disciplinary memorandum was unreasonable. (*See* RB 27-29.) In other words, Respondent argues each circumstance alone cannot independently show Appellant's decision was reasonable. Respondent seeks to apply this incorrect standard to determine the reasonableness of Appellant's decision. Instead, the Court must consider the totality of the circumstances, jointly, and in light of Appellant's subjective

position at the time he made the decision. (*Amador v. CUIAB,* 35 Cal.3d at 683; *Sanchez v. CUIAB*, 36 Cal.3d 575, 587 (1984).) The uncontradicted circumstances facing Appellant at that time were as follows: (1) he was tired and confused at the end of his shift; (2) he was confronted with serious allegations he refuted; (3) he was asked about lying on his employment application six years prior; (4) he was faced with demands that he sign the disciplinary notice that confirmed the allegations he refuted; (5) he was threatened with termination if he did not sign the notice; (6) based on the advice he had received from his union president, Appellant was wary to sign anything that could be construed as an admission; and (7) he knew of instances where the union denied representation of other employees who had signed similar notices. (*See* CT 00021, 00055, 00059-00060.) Upon review of all circumstances facing Appellant during the May 2, 2008 meeting, it is clear his decision not to sign the disciplinary memorandum was at most a good faith error in judgment, based on his subjective understanding of those circumstances he faced at the time.

d. The Trial Court Erred In Failing To Consider The Circumstances Facing Appellant During The May 2, 2008 Meeting.

Respondent argues the trial court did not commit error because its order was supported by substantial evidence because the order stated it considered the totality of the circumstances. (RB 30.) Respondent's argument is unavailing. The trial court was required to conduct two analyses in this case, identified clearly by counsel who respectfully addressed the lack of analytical clarity in the trial court's

tentative ruling. (RT 11:5-11 ["As I read the tentative ruling, I didn't see ... particular discussion of whether the order was lawful and reasonable. The way I read the tentative, it sort of collapsed the lawful and reasonable threshold discussion with whether or not compliance with the order was with faith"].)

The trial court's order does not clearly evaluate each circumstance facing Appellant during the May 2, 2008 meeting in light of Appellant's good faith arguments; rather, the trial court evaluated the circumstances in light of the legal questions of whether the disciplinary memorandum complied with the paragraph 54 of the bargaining agreement and whether Appellant was entitled to union representation during the May 2, 2008 meeting. (*See* CT 00471-00477.) In other words, the trial court considered the totality of the circumstance with respect to two legal questions, but failed to consider them in determining whether Appellant's decision not to sign the memorandum was a good faith error in judgment. Accordingly, this Court must weigh and consider Appellant's testimony on these issues *de novo*. (*See Kemp Bros. Const., Inc. v. Titan Elec. Corp.*, 146 Cal. App.4th at 1477; *Estate of Larson*, 106 Cal.App.3d at 567.) Upon such a review of the totality of the circumstances facing Appellant during the May 2008 meeting, the Court must find Appellant's decision not to sign the notice was at most a good faith error in judgment.

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e. Appellant Has Only Raised Arguments On Appeal That Were Presented Below

Respondent accuses Appellant of failing to raise certain arguments below, i.e., the power dynamic in the meeting, the lack of prejudice to Respondent, and the notion that an employee need not believe everything his employer says is true. (RB 30.) Respondent argues these assertions must not be considered on appeal because they were not presented before the trial court. (*Id.*) Respondent's view of the waiver doctrine is too narrow, and in any event, Appellant did raise such arguments. (*See, e.g., In re Estate of Westerman,* 68 Cal.2d 267, 278 (1968) ["a party to an action may not, for the first time on appeal, change the theory of the cause of action [citations omitted] and that issues not raised in the trial court cannot be raised for the first time on appeal"]; *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) [once a claim is "properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."]; *Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1314 (8th Cir. 1991) ["'a blanket statement condemning new arguments is far too broad'... The real question should be whether the new argument is such to raise a new issue... [W]e think it would be disharmony with one of the primary purposes of appellate review where we to refuse to consider each nuance or shift in approach urged by a party simply because it was not similarly urged below.'"].)

First, Appellant's counsel argued before the trial court that it was unreasonable for Appellant to be required to believe everything his employer said

to be true. (*See* RT 6:6-23.) Next, Appellant raised arguments about all circumstances he faced during the May 2, 2008 meeting in his written and oral arguments before the trial court. (*See* CT 00021, 00055, 00059-00060, 00265-00281.) By doing so, he left open the door to elaborate on some circumstances, namely the power dynamic in the meeting, despite not using the exact words before the trial court. (*See* CT 00276.) Moreover, when Appellant argues in his Opening Brief Respondent would not have been prejudiced had it afforded Appellant union representation at the May 2, 2008 meeting, Appellant simply advances a policy argument to support his contention that his decision not to sign the disciplinary memorandum was reasonable, in light of the circumstances and the equities. On appeal, Appellant raises no new causes of action and pursues no new theories of his case; rather, he relies on arguments raised before the trial court. Accordingly, these assertions must be considered by the Appellate Court, as they were properly presented below. *See In re Estate of Westerman*, 68 Cal.2d at 278 (1968); *Yee v. City of Escondido*, 503 U.S. at 534-35 (1992).

III. APPELLANT'S TESTIMONY BEFORE THE ADMINISTRATIVE LAW JUDGE WAS CREDIBLE

In its Opposition Brief, Respondent argues Appellant's testimony is not credible and should be discredited where it conflicts with testimony from Respondent's witnesses. (*See* RB 31-33.) Respondent gives three examples to show why Appellant's testimony is not credible: (1) An inaccuracy on Appellant's employment application; (2) Appellant's decision not to sign the disciplinary

memorandum in 2008, despite Respondent's assurances that it was not an admission; and (3) Appellant's testimony that he signed a disciplinary memorandum in 2004 because he understood Respondent would fire him if he did not sign it but said he did not believe Respondent would fire him if he did not sign the memorandum in 2008. (*See* RB 31-32.) Respondent argues Appellant's testimony conflicts with the testimony from its witnesses regarding whether Appellant left the 2008 meeting without indicating he was seeking advice from a union representative. (*See* RB 32-33.) Lastly, Respondent argues the Court should discount Appellant's testimony regarding the advice the union president told him. (*See* RB 33.) Each of Respondent's arguments about Appellant's credibility is misplaced.

First, Appellant's testimony is credible. The Administrative Law Judge, who witnessed Appellant testifying, and the CUIAB made no adverse credibility determinations. (*See* CT 00016-00017; 00021-00022.) As argued in his Opening Brief, the trial court erred in finding Appellant's testimony not credible because such a finding was contrary to the weight of the evidence. (*See* AOB 23.)

As for the bases Respondent uses to attack Appellant's credibility, Respondent's examples are inapposite. First, Appellant testified that he failed to include information on his job application because he misunderstood what information the application called for. (*See* CT 65.) Appellant's misunderstanding happened in 2002, six years before he was terminated by Respondent. Interestingly, Respondent points to no other issues in the intervening

six years to show a continuous pattern of lying or lacking credibility. An issue relating to Appellant's six-year-old prior termination hardly weighed on his credibility as he testified before the Administrative Law Judge.

Second, Appellant's suspicion of signing the disciplinary memorandum in 2008 was reasonable and has no bearing on his credibility. Appellant testified that he knew of other employees that the union has previously refused to assist because the union said signing the form was an admission. (*See* CT 00053, 00059.) Appellant further testified he was told by the union president that he should not sign documents absent union representation. (See CT 00050, 00053, 00056.) This testimony was neither contradicted nor impeached during the hearing and should thus be credited. (*See e.g. Martori Brothers Distributors v. Agricultural Labor Relations Board*, 29 Cal.3d 721, 728 (1981).)

Third, Appellant honestly believed he would not be fired for failing to sign the disciplinary memorandum in 2008, despite having signed a similar memorandum in 2004. (*See* CT 00071.) Appellant believed this because he thought requesting a union representative precluded termination; although this belief was incorrect, this does not implicate Appellant's credibility. (*Id.*) Additionally, a different union contract was in place during 2004; the union contract at issue when Appellant was terminated was effective starting April 2007. (*See* CT 00091-00092.) Absent evidence as to the requirements of the union contract in effect in 2004, it is impossible to know whether, as a matter of law, the two situations are comparable. This failure of proof makes any comparison

between the 2004 and 2008 disciplinary meetings meaningless. Moreover, even assuming the pertinent provisions of the union contract in place in 2004 was similar to the provisions in place in 2008, the fact that Mr. Medeiros agreed to a violation of his union rights previously by signing a memorandum that did not state that signing was not an admission did not require him to do so again.

Accordingly, Appellant's testimony is credible and uncontradicted. His consistent and repeated testimony regarding (1) the advice the union president gave him and (2) his statement to Respondent's agents that he wanted to seek union advice before signing the disciplinary memorandum is credible and must be credited. (See CT 00053-00054, 00056-00057, 00059-00060.)

CONCLUSION

For the reasons stated, the decision of the trial court should be reversed. Appellant Craig Medeiros did not commit misconduct because he could not be required to sign a disciplinary memorandum that violated the requirements of the collective bargaining agreement. In the alternative, Appellant's decision not to sign the disciplinary notice was at most a good faith error in judgment and the trial court failed to consider and weigh evidence supporting such a finding. Each of these reasons independently justifies reversing the lower court's decision and a finding that Appellant did not commit misconduct and is entitled to unemployment insurance benefits.

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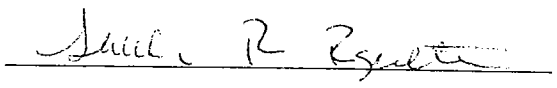
Dated: October 12, 2010

Respectfully submitted,

LEGAL SERVICES OF NORTHERN CALIFORNIA



Sarah R. Ropelato
Attorneys for Appellant Craig Medeiros

CERTIFICATION

I certify, pursuant to California Rule of Court 8.204(c)(1) that the attached APPELLANT'S REPLY BRIEF contains 5,814 words, as measured by the word count of the computer program used to prepare this brief.

Dated: October 12, 2010

LEGAL SERVICES OF NORTHERN CALIFORNIA

By: _____

Sarah R. Ropelato

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      Sacramento, CA 95814

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Alexa Garza
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Craig Medeiros

CERTIFICATE OF SERVICE

I am a citizen of the United States of America and am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 555 Capitol Mall, Suite 1240, Sacramento, California 95814.

On August 13, 2012, I caused to be served the within **Table of Exhibits to Respondent's Request for Judicial Notice in Support of Answer Brief to Petition for Review [Exhibits A and B]** in *Paratransit, Inc. v. Unemployment Insurance Appeals Board; Craig Medeiros*; California Supreme Court Case No. S204221 [Third Appellate Dist. Ct. of Appeal Case No. C063863; Sac. County Sup. Ct. Case No. 34-2009-80000249-CU-WM-GDS] by placing a true copy thereof enclosed in a sealed envelope, addressed as follows:

Sarah R. Ropelato, Esq.
Stephen E. Goldberg, Esq.
Legal Services of Northern California
515 – 12th Street
Sacramento, CA 95814

Attorneys for Real Party in Interest and Appellant, CRAIG MEDEIROS

The Honorable Timothy M. Frawley
Sacramento County Superior Court
720 Ninth Street
Sacramento, CA 95814

Trial Court Judge

Third Appellate District Court of Appeal
621 Capitol Mall, 10th Floor
Sacramento, CA 95814-4719

Michael Hammang, Deputy Attorney General
Department of Justice
1300 "I" Street, Suite 125
Sacramento, CA 95814

XXXX By personal service at address above.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 13th day of August 2012, at Sacramento, California.

LORRAINE L. RENFROE