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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

EARNEST A. DAVIS,

Plaintiff and Appellant,

v.

CIVIL SERVICE COMMISSION,

Defendant and Respondent;

COUNTY OF SAN DIEGO AIR  
POLLUTION CONTROL DISTRICT,

Real Party in Interest and Respondent.

D060468

(Super. Ct. No. 37-2010-00093196-  
CU-WM-CTL)

APPEAL from an order of the Superior Court of San Diego County, Randa Trapp,  
Judge. Affirmed.

Earnest A. Davis, in propria persona, appeals the trial court's denial of his petition for a writ of administrative mandamus (Code Civ. Proc., § 1094.5) requesting that a ruling of the California Civil Service Commission (Commission) be set aside. He has

forfeited his appeal, however, by not timely submitting the administrative record. We affirm the order.

## BACKGROUND<sup>1</sup>

Davis is a former employee of the County of San Diego. His most recent position was Associate Air Pollution Control Engineer with the Vapor Recovery/Chemical Engineering Section of the Air Pollution Control District (the District). In July 2008 the District provided him with a Performance Improvement Plan (PIP) to assist him in correcting several areas of deficiency. Davis did not complete the 2008 PIP, as he took a nine-month leave of absence because of an injury to his upper extremities.

In mid-June 2009 Davis returned to work "with a 25% reduction in keyboarding work restriction." The District accommodated Davis's work restriction, and provided him with a second PIP. Among other goals, he was expected to specifically enumerate his tasks on his daily timesheets. Davis understood the District "generates revenue based upon charging time to projects." Further, he was expected to process at least four applications for a permit to operate (PO) per day and submit them to his supervisor for approval.

Between June 16 and August 4, 2009, Davis reported to work and was paid for a total of 213.7 hours. According to his timesheets for that period, he spent only two hours, or less than 1 percent of his time, working on projects. He submitted no PO's for

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<sup>1</sup> Because Davis has not supplied an adequate appellate record in this case, we take some of the background facts from his appeal in another matter. (*Davis v. California Unemployment Insurance Appeals Board* (Nov. 14, 2012, D060471 [nonpub. opn.] )

approval, and provided no acceptable explanation. In September 2009 the District terminated Davis's employment on the ground he produced "virtually no work" and "failed to demonstrate even the slightest effort . . . to perform."

Davis appealed his termination to the Commission, which decided against him. He then filed a petition for writ relief in the Superior Court of San Diego County, challenging the Commission's findings. The court denied the petition after independently examining the administrative record. The court found substantial evidence supported the Commission's findings.

## DISCUSSION

The Commission contends Davis has forfeited appellate review by not timely submitting the administrative record. We agree.

"Appellate courts have no independent knowledge of cases brought before them for review. A 'record' of the lower court proceedings must therefore be prepared, enabling appellant to demonstrate the claimed error . . . and facilitating the appellate court's review." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶ 4:1, p. 4-1 (Eisenberg); *In re Marriage of Wilcox* (2004) 124 Cal.App.4th 492, 498.)

"Error is *never presumed* on appeal. To the contrary, appealed judgments and orders are *presumed correct* . . . and appellant has the burden of overcoming this presumption by affirmatively showing error on an *adequate record*." (Eisenberg, *supra*, ¶ 4:2, p. 4-1; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.) "Where exhibits

are missing we will not presume they would undermine the judgment." (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 291.)

"This is not only a general principal of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) "When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record it did not happen; and third, when in doubt, refer back to rules one and two." (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.)

"If an appellant intends to raise any issue that requires consideration of the record of an administrative proceeding," it is his or her burden to ensure that the administrative record is included in the appellate record. (Cal. Rules of Court, rule 8.121(b)(2).) In reviewing an agency's findings, "we consider all relevant evidence in the administrative record." (*TG Oceanside, L.P. v. City of Oceanside* (2007) 156 Cal.App.4th 1355, 1371.)

Davis submitted a clerk's transcript, which only includes the trial court's minute order, his notice of appeal, and his notice designating the record on appeal. In the notice, he requested that the superior court include a number of documents in the clerk's transcript, but to any extent the documents were part of the administrative record, there is a notation on the form, presumably made by a court clerk, stating they were not in the court file. The clerk's transcript was filed in this court on December 2, 2011, and the parties submitted their briefing between January 9 and February 28, 2012.

After the completion of briefing, Davis filed a motion to augment the appellate record with the administrative record. In an accompanying declaration, he surmises the

administrative record must have been stolen from the court file, since it was not in the file when he checked. He implies that the Commission's attorney took it. By local rule, however, the administrative record is ordinarily returned to the plaintiff.<sup>2</sup> Further, Davis's declaration contains conflicting information. It states, "Davis hired an attorney . . . during the previous court trial associated with this appeal, such that he [Davis] never had access to the file . . . prior to filing this appeal, so he obviously did not take the file." The declaration also states, however, that with the motion to augment Davis "provide[d] the Court of Appeals [sic] with his only copy of the Administrative Record." The declaration indicates Davis did not supply us with the administrative record earlier because he could not afford to make a copy of it.

The Commission opposes the motion and we deny it. Davis has not presented a satisfactory explanation for not submitting the administrative record in the normal course. Davis claims that he and the Commission's attorney agreed he did not have to provide the Commission with documents it already had, but even if true that does not affect Davis's duty to provide this court with the administrative record and with appellate briefs that cite the record. Augmentation at this late date would cause undue delay for another round of

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<sup>2</sup> "The party intending to use a part of the administrative record in a case brought under Code of Civil Procedure section 1094.5 must lodge that part of the record at least five days before the hearing." (Cal. Rules of Court, rule 3.1140.) Under Superior Court of San Diego County, Local Rules, rule 4.3.2(F), "Lodged materials will be returned to the tendering party after the resolution of the calendared matter, unless the party requests their destruction. Therefore, when submitted, lodgments must be accompanied either by a stamped, self-addressed envelope or an attorney service pick-up slip. Following the return of the lodged documents by the court, the tendering party should retain them until the applicable appeal period has expired."

briefing and unfairness to the Commission. Davis has forfeited appellate review of the Commission's ruling.<sup>3</sup>

#### DISPOSITION

The order is affirmed. The Commission is entitled to costs on appeal.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

McINTYRE, J.

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<sup>3</sup> A party appearing in propria persona "is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys." (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1210.) "[M]ere self-representation is not a ground for exceptionally lenient treatment." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984.)