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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

SAN FRANCISCO FIRE FIGHTERS LOCAL 798, **Plaintiff and Appellant,** **v.** **CITY AND COUNTY OF SAN FRANCISCO et al.,** **Defendants and Respondents.**	**A104822** **(San Francisco County Super. Ct. No. CPF 03-503025)**

After two years of negotiations over a change in a promotional rule for firefighters, the San Francisco Civil Service Commission and the firefighters' union reached an impasse in bargaining. The union argues that under the Charter the commission is required to submit the issue to binding arbitration. The Civil Service Commission refused, arguing that because the promotional rule is necessary to ensure compliance with antidiscrimination laws it falls within an exception to the arbitration requirement. The union petitioned the trial court for a writ of mandate compelling arbitration. The trial court denied the petition. We reverse.

In the published part of this opinion, we conclude that when a municipal agency makes a finding of fact that triggers an expansion of its powers, that finding is subject to independent judicial review. When the official or agency simply exercises its discretion

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part II.

within the ordinary scope of its powers, its decisions are reviewed for abuse of discretion. Here, the City made a finding that expanded its powers under the Charter. Unless an exception in section A8.509-5(g) applies, the City may not unilaterally change the terms and conditions of employment for firefighters, but must negotiate with the firefighters' union about proposed changes and if the negotiations end in impasse, must submit the issue to binding arbitration. Because the City's determination of necessity expanded its powers under the Charter, that determination is subject to de novo review.

In the unpublished part of this opinion, we conclude that the City has not established that adoption of its preferred promotional rule was necessary to ensure compliance with antidiscrimination laws. Therefore, the City must submit the promotional rule to binding arbitration.

FACTUAL & PROCEDURAL BACKGROUND

San Francisco Charter

The Charter of the City and County of San Francisco (Charter) charges the Civil Service Commission (Commission) with "providing qualified persons for appointment to the service of the City and County." (Charter, § 10.100.) The Commission is authorized to adopt rules, policies and procedures to carry out a civil service merit system and, "except as otherwise provided in this Charter," such rules govern hiring and promotion. (Charter, § 10.101.)

Section A8.590 of the Charter establishes collective bargaining procedures for firefighters and other public safety employees, who are denied the legal right to strike. (Charter, §§ A8.590-1 to A8.590-5.) "Notwithstanding any other provisions of th[e] charter, or the ordinances, rules or regulations of the City and County of San Francisco and its departments, boards and commissions," the Commission may not unilaterally change any term or condition of employment for these employees until it meets and confers with union representatives. (Charter, § A8.590-4.) If the parties bargain to impasse without reaching an agreement, the matter must be submitted to binding

arbitration, as set forth in section A8.590-5 of the Charter. (Charter, § A8.590-5, "Impasse Resolution Procedures.")

Critical to our decision, section A8.590-5(g)(3) exempts from binding arbitration "any rule, policy, procedure, order or practice . . . which is *necessary* to ensure compliance with federal, state or local anti-discrimination laws, ordinances or regulations." (Charter, § A8.590-5(g)(3).)

History of Litigation

The San Francisco Fire Department hired no African-American firefighters before 1955. (*U.S. v. City and County of San Francisco* (N.D. Cal. 1987) 656 F.Supp. 276, 278 (*Davis I*).) In 1970, only four of 1,800 uniformed fire personnel were African-American. (*Id.* at pp. 278-279.) The department allowed no women to apply before 1976 and hired no women until August 1987. (*U.S. v. City and County of San Francisco* (N.D. Cal. 1988) 696 F.Supp. 1287, 1289 (*Davis II*).)

Between 1970 and 1973, a federal district court ruled that three successive versions of the firefighter entry-level examination had an adverse impact on minority[1] applicants and had not been professionally validated as an accurate measure of the knowledge, skills and ability needed for the job. (*Davis I, supra,* 656 F.Supp. at 279, discussing *Western Addition Community Organization v. Alioto*, C-70-1335 WTS (*WACO*).) The court ordered affirmative action, requiring the City to hire one minority for each nonminority hired from the entry-level eligibility list until all minority applicants on the list had been hired. (*Davis I*, at p. 280.) More than 55 percent of the minorities who had been hired by the department as of November 1987 were hired pursuant to this court-ordered arrangement. (*Ibid.*) A consent decree terminated the *WACO* action in 1977 and set a goal of 40 percent representation of minorities on the list of eligibles for

[1] We use the term "minority" as it was used in the cited court opinions, that is, in comparison to the national population of the United States, which is majority white or Caucasian.

entry-level positions, but did not require strict ratio or quota hiring. (*Davis I*, at p. 280.) That consent decree expired in 1982. (*Ibid.*)

The California Fair Employment and Housing Commission found that a 1978 firefighter promotional examination had an adverse impact on minorities and that the City failed to show that the test was sufficiently job-related to be valid. (*Davis II, supra,* 696 F.Supp. at p. 1294.) Those findings were upheld on appeal. (*Ibid.*; *City and County of San Francisco v. Fair Employment and Housing Com'n* (1987) 191 Cal.App.3d 976.)

In 1986, a federal district court found that entry-level and promotional firefighter examinations used between 1982 and 1984 had adverse impacts on minorities and women. (*Davis I, supra,* 656 F.Supp. at p. 281; *Davis II*, 696 F.Supp. at p. 1296.) The City did not attempt to defend the validity of the tests. (*Davis I*, at p. 281.) The *Davis* court issued a permanent injunction requiring the development of new examinations that satisfied Title VII requirements. (*Davis I,* at pp. 289-292.) The court also established an interim hiring procedure. (*Id.* at pp. 292-293.) The Fire Department was allowed to hire from the existing eligibility lists, but had to "minimally assure that those offered positions reflect the minority and female proportions of the applicant pool," if feasible. (*Id.* at p. 292, ¶ 15.)

In June 1988, the *Davis* court approved a consent decree that set long term hiring goals of 40 percent minority and 10 percent female representation in the department. (*Davis II, supra,* 696 F.Supp. at p. 1299.) The goal for promotions was to reflect the minority representation in the applicant pool. (*Ibid.*) The goals were targets and not quotas; nevertheless, failure to meet a goal had to be justified to the court. (*Ibid.*) The consent decree had a term of seven years. (*Id.* at p. 1300; see also *id.* at pp. 1311-1322.)

In 1991, the district court approved the use of banding to help the City meet the hiring and promotion goals in the consent decree. (*U.S. v. City and County of San Francisco* (9th Cir. 1992) 979 F.2d 169, 170 (*Davis III*).) Candidates with scores within the designated band or group of scores were considered equally qualified with respect to the skills and abilities measured by the examination. Promotions were then made from among the candidates with scores in the band on the basis of secondary criteria, including

race. (*Ibid.*) The banding method the court approved was a form of statistically valid grouping. (See *ibid.*, citing *Officers for Justice v. Civil Serv. Com'n* (9th Cir. 1992) 979 F.2d 721, 722-724.)

In December 1997, the district court terminated the consent decree on the stipulation of the parties. (*U.S. v. City and County of San Francisco* (N.D. Cal. Dec. 1, 1997, C-84-7089 MHP) 1997 WL 776533 (*Davis IV*).) The stipulated order reaffirmed the hiring and promotional goals in the consent decree and required the City to use its best efforts within the law to attain a workforce that reflected the percentages of minorities in the city population. (*Id.* at pp. *1-2.) The City agreed to develop and implement a Cadet Program to replace the entry-level selection process and an Officer Candidate Program to replace the promotional process. (*Id.* at p. *3.) Prior to implementation of the Officer Candidate Program, the City would continue to use banding for promotions to the extent necessary to meet the promotional goals and avoid an adverse impact against women and minorities. (*Id.* at p. *4.)

The stipulated order expired in 1998. (*Davis IV, supra,* 1997 WL 776533 at p. *7.) The parties then entered into a one-year memorandum of understanding, which reaffirmed the goal of attaining a workforce that reflected the diversity of the City and required the City to develop an outreach program, a bilingual proficiency test, and the Officer Candidate Program. An Officer Candidate Program was never implemented and the Fire Department has not held promotional examinations since termination of the consent decree in 1998.

As of June 1, 2003, the uniformed force of the Fire Department was 57.7 percent Caucasian, 9.6 percent African-American, 13.9 percent Hispanic, 18.4 percent Asian/Pacific Islander/Filipino and 12.8 percent women.

Firefighter Promotional Rule

Typically, applicants for city employment take a civil service examination and are ranked in order of their scores on an eligibility list for new hires or promotions. Certification rules determine which names from the list of eligibles are certified as

candidates for an open position. The appointing officer must choose from among these certified candidates to fill the position.

As of April 2000, three certification rules governed hiring and promotions in the Fire Department. (San Francisco Civil Service Commission Rule 313, issued April 28, 2000.) First, under the Rule of Three Scores, all employees with the three highest scores on the list were certified as candidates when one position was available. (Rules 313.2.1(1), 313.3.1.) Because of tie scores, this group might include many more than three employees. For every additional available position, employees with the next highest score would be added to the list of certified candidates, so that when two positions were open, the list included all employees with the top four scores, when three positions were open, it included all employees with the top five scores, and so on. (Rules 313.2.1(2), 313.3.2.) Second, the Rule of Three or More Scores operated like the Rule of Three Scores, except the initial number of scores could be higher than three. (Rule 313.2.2) Third, under the Rule of the List, all employees on the eligibility list were certified as candidates. (Rule 313.2.3) Any of these rules could be applied to hiring for entry-level positions (Rule 313.2), at the discretion of the Civil Service Commission or the Department of Human Resources (Rules 313.2.1(4), 313.2.2(5), 313.2.4), but only the Rule of Three Scores could be used for promotions (Rule 313.3).

Appointing officers were responsible for establishing selection criteria for choosing among the certified candidates. (Rule 313.4.) Selection had to be "based on merit and fitness without regard to relationship, race, religion, sex, national origin . . . or other non-merit factors . . . and with due consideration of Equal Employment Opportunity goals." (Rule 313.4.)

Negotiations

In December 2000, the Commission notified San Francisco Fire Fighters Local 798, International Association of Fire Fighters, AFL-CIO (Union) that it intended to amend Rule 313, the firefighter promotional rule, and three related rules, Rules 310-312. It offered to meet and confer about the proposed changes. The parties quickly agreed on

amendments to Rules 310-312, but negotiated for two years about Rule 313 without reaching agreement. Negotiations focused on the banding method to be used to certify promotional candidates. The Union favored methods that resulted in a narrow band, thus limiting the discretion of appointing officers, and the Commission favored wider bands and greater discretion. During this period of negotiations, the Commission held two public hearings at which it heard conflicting expert testimony on the use of Statistically Valid Grouping. It also heard public comment from and held informational meetings with other interested parties, including the San Francisco Black Firefighters Association.

The Commission declared an impasse in December 2002. The Commission's final position was that Rule 313 had to employ Statistically Valid Grouping for certification of promotional candidates. The Union's final offer was a comprehensive proposal to use a Rule of Five Scores for certification of promotional candidates, implement an Officer Candidate Program, specify service requirements for promotions and lines of promotion, and identify secondary selection criteria, among other modifications to existing procedures.

Adoption of New Promotional Rule

After declaring the impasse, the Commission amended Rule 313, consistent with its last offer to the Union. (Rule 313, issued Feb. 21, 2003 [hereafter, Revised Rule 313].) Revised Rule 313 continues to authorize use of the Rule of Three Scores, the Rule of Three or More Scores, and the Rule of the List for entry level selection. (Rules 313.3.1, 313.3.2, 313.3.3.) But it now adds a fourth option, "Statistically Valid Grouping (Sliding Band)." (Rule 313.3.4.) The rule sets forth a statistical method for determining the width of the band, and provides, "Eligibles within the grouping are considered to be of comparable knowledge, skills and abilities with respect to the areas tested on the examination." (Rule 313.3.4(2).) "If at any time, the highest score in the grouping is exhausted, the grouping will slide so that its upper limit rests on the highest score remaining on the list." (Rule 313.3.4(3).) Any of the four rules may be used to fill

entry-level positions (Rule 313.5), but only Statistically Valid Grouping (Sliding Band) may be used for promotions (Rule 313.6).

The revised rule carries forward the requirement that appointing officers establish nondiscriminatory selection procedures, but now requires that the criteria be announced and approved by the Commission in advance of any job announcement. (Rule 313.2.1.) The revised rule deletes any reference to Equal Employment Opportunity goals. (Rule 313.2.1.)

Before approving the revisions to Rule 313, the Commission adopted a seven-page statement of legislative findings in support of its unilateral implementation of the rule. The Commission found that the amendments were "necessary to and will ensure compliance with federal, state and local anti-discrimination laws, ordinances or regulations."

Trial Court Proceedings

In response to the Commission's declaration of impasse, the Union invoked binding arbitration pursuant to Charter section A8.590-5. The Commission refused to submit the issue to arbitration, arguing the exemption in section A8.5905(g)(3) applied. The Union filed a petition for a writ of mandate to compel arbitration, naming the City and County of San Francisco and the Civil Service Commission of San Francisco as respondents (collectively "City"). The court denied the petition, ruling that the City's amendment of Rule 313 was a discretionary, quasi-legislative act and thus was subject to review only for abuse of discretion. The court found no abuse of discretion in the City's determination that adoption of Revised Rule 313 was necessary to ensure compliance with antidiscrimination law.

DISCUSSION

A writ of mandate may be issued "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station." (Code Civ. Proc., § 1085, subd. (a).) "It will not lie to control discretion within the area lawfully entrusted to an administrative board." (*City & County of S. F. v. Superior Court* (1959)

53 Cal.2d 236, 244.) Mandamus is available to compel performance of a clear and present duty in the context of public sector collective bargaining. (Cf. *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 540.)

I. *The City's Determination of Legal Necessity Is Subject to De Novo Review*

The primary dispute in this appeal is whether the determination that adoption of Revised Rule 313 was necessary to ensure compliance with antidiscrimination laws is a matter committed to the discretion of the Civil Service Commission or whether it is a matter subject to independent judicial review. The discretionary or nondiscretionary nature of this determination is a legal issue we decide de novo. (See *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800.)

A. *Declarations of Necessity or Emergency That Expand Municipal Powers Are Subject to Independent Judicial Review*

In a line of cases beginning with *San Christina etc. Co. v. San Francisco* (1914) 167 Cal. 762 (*San Christina*), California courts have independently reviewed declarations of necessity or emergency by municipal authorities that expanded the ordinary scope of their powers. Many of these cases involved San Francisco officials invoking emergency powers under the Charter. In *San Christina*, the Supreme Court ruled that a declaration of "great necessity or emergency" by the board of supervisors, which permitted it to levy taxes in excess of the maximum rate set in the Charter, was subject to judicial review. (*Id.* at pp. 769-770.) "[W]hen the power or jurisdiction of [a municipal body] is made to depend upon the existence of a fact, its determination of the fact is not conclusive unless declared to be so [in the pertinent charter or ordinance] in express terms or by necessary implication." (*Ibid.*)

Both the Supreme Court and the court of appeal have continued to apply *San Christina*. In two cases factually similar to *San Christina*, the Supreme Court reiterated that "the determination by the supervisors of the existence of [a great] necessity is not final." (*Josselyn v. San Francisco* (1914) 168 Cal. 436, 441; see *Burr v. San Francisco* (1921) 186 Cal. 508, 513; see also *Spreckels v. San Francisco* (1926) 76 Cal.App. 267,

273.) In *Mullins v. Henderson* (1946) 75 Cal.App.2d 117, the court of appeal reviewed a declaration of emergency by the mayor of San Francisco, which allowed him to unilaterally grant pay raises and seniority rights to certain employees affected by the merger of a private railway company with the San Francisco Municipal Railway, rather than follow established civil service commission procedures. (*Id.* at pp. 120-121.) "The question as to whether the existing conditions shown by the evidence justified the action taken by the mayor pursuant to the emergency powers granted by the charter was and is one of fact to be determined by the trial court." (*Id.* at p. 121, citing *San Christina, supra,* 167 Cal. 762.) More recently, in *Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86 (*Verreos*), the court of appeal reviewed a declaration of emergency by the San Francisco mayor that permitted him to grant a salary increase to striking police and firefighters without obtaining the consent of the board of supervisors. (*Id.* at pp. 91-92.) Citing *San Christina*, *Verreos* held that the declaration was not conclusive upon the courts but was subject to judicial review. (*Verreos,* at pp. 101-102.) "[T]he mayor is empowered to exercise emergency powers only when an emergency *in fact* exists; . . . the existence of an actual emergency is a question to be determined by the court; and . . . if no such emergency did exist, the exercise of the mayor's emergency powers was invalid." (*Id.* at p. 101.)

Verreos clarifies that the standard of judicial review in these cases is de novo, and not abuse of discretion. Based on a careful reading of *San Christina*, *Josselyn*, and *Burr*, the *Verreos* court expressly rejected a deferential standard of review that would permit reversal only if the declaration was fraudulent or so palpably unreasonable or arbitrary as to constitute an abuse of discretion. (*Id.* at pp. 102-104.) Rather, "the trial court *must determine for itself*, based upon the evidence presented, whether an actual emergency existed at the time of the declaration." (*Id.* at p. 104, emphasis added.)

B. *Only Actions of Municipal Agencies Acting within the Ordinary Scope of Their Authority Are Reviewed for Abuse of Discretion*

The City argues that the proper standard of review is abuse of discretion, but the case law it cites is inapposite. The City asserts that "the writ of mandamus may not be employed to compel a public administrative agency possessing discretionary power to act in a particular manner." (*Lindell Co. v. Board of Permit Appeals* (1943) 23 Cal.2d 303, 315 (*Lindell*).) When an administrative agency acts in a legislative capacity within the scope of authority conferred on it by statute, the City notes, courts will presume that the agency ascertained and found the existence of facts necessary to support its actions (*Board of Permit Appeals v. Central Permit Bureau* (1960) 186 Cal.App.2d 633, 642 (*Board of Permit Appeals*), citing *Lindell*), and will review the agency's actions only for an abuse of discretion (*Los Angeles City etc. Employees Union v. Los Angeles City Bd. of Education* (1974) 12 Cal.3d 851, 856 (*Los Angeles City Employees*)).

The cases cited by the City involve discretionary decisions by municipal agencies acting *within* the ordinary scope of their authority. In *Lindell,* the petitioner challenged a decision of the San Francisco board of permit appeals to overrule the city's Central Permit Bureau and deny permits to a builder. (*Lindell, supra,* 23 Cal.2d at pp. 308-310.) The Court applied an abuse of discretion standard because the board was exercising its full discretion under the Charter to approve or overrule the bureau. (*Id.* at pp. 313-315.) When a board "possess[es] discretionary power to act in a particular manner," the court "may not substitute its discretion for the discretion properly vested in the administrative agency." (*Id.* at p. 315.) In *Board of Permit Appeals,* the appellate court followed *Lindell* and reviewed for abuse of discretion the board of permit appeals' determination that proposed substitute building materials were equivalent to or superior to materials otherwise mandated by the housing and building code. (*Board of Permit Appeals, supra,* 186 Cal.App.2d at p. 642.) "It is clear that the board proceeded to act in the precise manner permitted under the charter." (*Id.* at p. 640.) In *Los Angeles City Employees,* the California Supreme Court reviewed for abuse of discretion the decision of a board of education, when carrying out its duty to set salary levels at or above prevailing wages, to

adjust salaries once rather than twice a year. (*Los Angeles City Employees, supra,* 12 Cal.3d at p. 856.) "[T]he Education Code contemplates that wage levels be adjusted on an annual basis, although the board may, *in its discretion*, provide a more frequent adjustment if it determines that such an adjustment would be appropriate." (*Los Angeles City Employees,* at p. 855, emphasis added.) "Since the decision . . . was within the board's discretion, and since no abuse of discretion has been shown, the trial court properly denied mandate." (*Id.* at p. 857.) In all of these cases, the municipal boards were acting well within the scope of their authority; they were not invoking an expansion of their powers.

The City cites several cases in which courts defer to the decisions of civil service commissions on employment-related issues, including employment testing, but, again, in each of these cases the commissions were acting within the ordinary scope of their authority. None of the cases involved situations where a city charter restricted the commission's right to unilaterally change terms and conditions of employment and the commission invoked an exception to that restriction on its powers. In *Almassy v. L. A. County Civil Service Com.* (1949) 34 Cal.2d 387, the California Supreme Court reviewed for abuse of discretion a civil service commission decision to alter the design of a civil service examination. (*Id.* at pp. 391-395.) Observing that the charter granted the commission "broad discretionary powers in determining the subjects of examination and the qualifications which are to be measured," the court held that "[j]udicial interference under such circumstances is unjustified except on a showing of arbitrary, fraudulent or capricious conduct, or a clear abuse of discretion." (*Id.* at p. 396.) In *Maxwell v. Civil Service Commission* (1915) 169 Cal. 336, the Supreme Court reviewed for abuse of discretion a civil service commission decision to omit a test of physical fitness or health from a firefighter promotional examination. (*Id.* at p. 337.) The Court explained that under the city charter, "the decision whether physical tests are appropriate is committed to the civil service commission." (*Id.* at p. 339.) In *Social Services Union v. City and County of San Francisco* (1991) 234 Cal.App.3d 1093, the appellate court reviewed for abuse of discretion a civil service commission decision to delegate part of the civil

service examination process to a screening committee. (*Id.* at pp. 1100-1101.) The appellate court explained that "the Charter charges the Commission with the control of all parts of the examination process, including the determination of 'appropriate tests' and 'selection techniques.' " (*Id.* at p. 1100.) In *Conroy v. Civil Service Commission* (1946) 75 Cal.App.2d 450, the appellate court reviewed for abuse of discretion a civil service commission decision about how to allocate good conduct points in promotional eligibility scoring. (*Id.* at pp. 450-453.) Following *Lindell* and *Maxwell*, the court held that the trial court could not "substitute its discretion for the discretion properly vested in the administrative agency." (*Conroy,* at p. 457.) Several other cases cited by the City fall within the same pattern of courts applying abuse of discretion review to decisions by local agencies that were acting well within the scope of their discretionary powers.[2]

The City argues that in adopting Revised Rule 313, the Commission was carrying out its statutory authority to make rules regarding employment testing and promotion schemes, a subject that is committed to the Commission's discretion under the Charter. (Charter § 10.101.) But the Commission's authority to make such rules is limited "as otherwise provided in this Charter." (*Ibid.*) One such limitation is Charter section A8.590-4, which governs "[n]otwithstanding any other provisions of this Charter, or the . . . rules . . . of the . . . [City's] commissions." (Charter, § A8.590-4.) Section A8.590-4 restricts the Commission from unilaterally changing the terms and conditions of firefighters' employment without first bargaining with the firefighters' union, and it

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[2] See *Nelson v. Dean* (1946) 27 Cal.2d 873, 880-881 [state personnel board validly exercised its discretion in interpreting sick leave to include care of a sick family member, a subject that fell squarely within its statutory powers]; *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 918 [board of supervisors validly exercised its discretion, unrestricted by law, to determine the appropriate legislative response to an allegedly illegal strike]; *Faulkner v. Cal. Toll Bridge Authority* (1953) 40 Cal.2d 317, 326-327 [toll authority validly exercised its discretion to declare a need for a bridge without considering the alternative of an earthfill crossing, where statute did not require consideration of any specific alternative]; *Nickerson v. San Bernardino* (1918) 179 Cal. 518, 522-524 [board of supervisors validly exercised its discretion to determine how much land and money were needed to construct a public hospital].

requires the Commission to submit unresolved issues of bargaining to binding arbitration unless one of the exceptions in section A8.509-5(g) applies. (Charter, §§ A8.590-4; A8.590-5(g)(3).) The collective bargaining context is critical to this case.

C. San Christina *Is Still Good Law*

The City argues that *San Christina* is no longer good law, relying on *Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267 (*Sonoma*) and *Northgate Partnership v. City of Sacramento* (1984) 155 Cal.App.3d 65 (*Northgate*). We disagree. The City cites the *Northgate* court's observation that "the vitality of *San Christina*'s decision that the legislative acts of inferior tribunals such as municipalities are not to be accorded deference has been eroded by judicial evolution." (*Northgate, supra,* 155 Cal.App.3d at p. 71, cited in *Sonoma, supra,* 1 Cal.App.4th at p. 276.) *Northgate* does not explain this dicta or cite any authority to support it. *Northgate* is distinguishable from *San Christina* as an emergency ordinance case. (See also *Verreos, supra,* 63 Cal.App.3d at p. 102.)

Both *Sonoma* and *Northgate* cite a specific rule applicable to the passage of emergency ordinances: "In the absence of evidence to the contrary it will be assumed that a municipal legislative body in enacting an emergency ordinance acted on sufficient inquiry as to whether an emergency existed. Its declaration is prima facie evidence of the fact. Where the facts constituting the emergency . . . are recited in the ordinance and are such that they may reasonably be held to constitute an emergency, the courts will not interfere, and they will not undertake to determine the truth of the recited facts." (*Northgate, supra,* 155 Cal.App.3d at p. 69; *Sonoma, supra,* 1 Cal.App.4th at p. 275.) An "emergency ordinance" is an ordinance that may be passed immediately upon its introduction, rather than after a prescribed period of time for public hearings, and that may take effect immediately upon passage, rather than after a prescribed period of time for notice and publication. (Gov. Code, §§ 36934, 36937, subd. (b).) Emergency ordinances were at issue in *Northgate* and *Sonoma*, as well as in two other cases cited by the City in favor of a deferential standard of review. (*Northgate*, at p. 68; *Sonoma*, at

p. 272; *Crown Motors v. City of Redding* (1991) 232 Cal.App.3d 173, 175; *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 299-300.)[3] The emergency ordinance rule is not applicable to the City's determination of necessity, which was made not to permit immediate passage or implementation of an ordinance, but to expand the scope of the City's powers under the Charter.[4]

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[3] *Doe v. Wilson, supra,* 57 Cal.App.4th 296 is distinguishable from *San Christina* for the additional reason that the statute authorizing the issuance of emergency regulations required a state agency *finding* of necessity, rather than the existence of necessity. (Compare Gov. Code § 11346.1, subd. (b) [permitting adoption of emergency regulations "if a state agency makes a finding that adoption of a regulation . . . is necessary for the immediate preservation of the public peace, health and safety or general welfare"], cited in *Doe*, at p. 300 with *San Christina, supra,* 167 Cal. at pp. 771-772 [distinguishing a charter provision that expands governmental powers upon a declaration of emergency and one doing so "in case of" emergency].) *Doe* does not distinguish or criticize *San Christina*. Its only mention of *San Christina* is a favorable citation to *San Christina*'s definition of "emergency." (*Doe*, at p. 306.)

[4] It makes sense to apply greater deference to declarations of emergency in the context of emergency ordinances than in the context of this case or the cases reviewed in the *San Christina* line of cases. In the context of an emergency ordinance, a declaration of emergency exempts the municipal body from procedural requirements; it does not expand the municipal authorities' substantive powers. In *Northgate,* for example, the declaration of emergency allowed a city to immediately implement an ordinance raising taxes before the effective date of Proposition 13. (*Northgate, supra*, 155 Cal.App.3d at pp. 67-68.) At the time the ordinance was passed in *Northgate*, the city had the power to raise taxes. The declaration of emergency merely allowed it to do so immediately rather than waiting 30 days. In *Sonoma,* the declaration of emergency permitted a county to immediately implement, without first meeting and conferring with the union, an ordinance that placed employees on administrative leave if they participated in job actions. (*Sonoma, supra,* 1 Cal.App.4th at pp. 270-272.) The county, unlike the Civil Service Commission in this case, the county had the power to unilaterally enact the ordinance after fulfilling its bargaining duty. The declaration of emergency allowed it to unilaterally implement the ordinance immediately rather than after a 30-day period of bargaining. (*Id.* at pp. 273-274, fn. 7, citing Gov. Code, § 3504.5.) The declarations of emergency in *Northgate* and *Sonoma* did not directly expand the municipal authorities' substantive powers. For this reason, they are not analogous to this case or the *San Christina* line of cases.

D. *Emergency and Necessity*

Finally, the City argues that the standard of review applicable to declarations of necessity is more deferential than the standard of review applicable to declarations of emergency, even assuming *San Christina* is good law. We disagree. *San Christina* involved a declaration of "great necessity *or* emergency" and the court held that deference was inappropriate. (*San Christina, supra,* 167 Cal. at pp. 764, 774, emphasis added.) None of the cases cited by the City based the standard of review on a distinction between "emergency" and "necessity." Nor did the cases involve "necessity" exceptions that expanded an agency's powers; all involved agencies exercising their discretion within the ordinary scope of their powers. (See *Faulkner v. Cal. Toll Bridge Authority, supra,* 40 Cal.2d at pp. 326-327; *Nickerson v. San Bernardino, supra,* 179 Cal. at pp. 522-524.) In *Berkeley High School Dist. v. Coit* (1936) 7 Cal.2d 132, for example, the California Supreme Court deferred to a local school district's declaration of necessity that allowed the district to borrow money against future, already-authorized tax collections. (*Id.* at pp. 136-137.) The *Berkeley High School* court expressly reaffirmed *San Christina* and explained why it was not applicable: "Its application . . . must depend upon the difference which exists between extraordinary powers to be exercised, and the common power to exercise discretion in . . . the administration of ordinary public business." (*Berkeley High School,* at p. 137.) "It is to this latter class that the present case should be referred." (*Ibid.*)

The City's determination of necessity permits it to act *outside* the scope of its ordinary powers under the Charter. It is not an exercise of legislative discretion *within* the ordinary scope of the City's powers. Thus, the determination is subject to independent judicial review, rather than review for abuse of discretion. The trial court erred in applying a deferential standard of review.

II. *The City Has Not Established that Adoption of Revised Rule 313 Was Necessary to Ensure Compliance with Antidiscrimination Law*

The City argues single-mindedly that the only question before us is whether the City abused its discretion in adopting Revised Rule 313. The City notes in passing that if

we determine that the standard of review is de novo, we must remand so that the trial court can decide in the first instance whether adoption of Revised Rule 313 was necessary to ensure compliance with antidiscimination laws. We disagree. This issue is a mixed question of law and fact, requiring us to apply governing legal principles, which we determine de novo, to the pertinent facts. " ' "If application of the law to the facts . . . requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo." ' [Citations]" (*Ghirardo v. Antonioli, supra,* 8 Cal.4th at pp. 800-801.) Determining whether adoption of Revised Rule 313 was necessary to ensure compliance with antidiscrimination law requires consideration of legal concepts, including the meaning of "necessary" and the requirements of federal civil rights statutes. The issue is subject to our independent review.

A. *Burden of Proof*

Because the City is invoking an exception to the requirement of binding arbitration, it bears the burden of proving that adoption of Revised Rule 313 was necessary to ensure compliance with antidiscrimination laws. Stated differently, the City must demonstrate that it was justified in invoking an expansion of its powers under the Charter. "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.)[5]

B. *What Does "Necessary" Mean in Charter Section A8.590-5(g)(3)?*

The Union argues that "necessary" means indispensable, essential, or the only available alternative. The City is silent: it neither proposes an alternative definition nor objects to the Union's definition. We note that the "only available alternative" definition

[5] To the extent *Sonoma, supra,* 1 Cal.App.4th 267 is analogous to this case, we reject that court's reasoning regarding the burden of proof. (*Id.* at p. 275.)

is consistent with the ordinary definition. The primary definition of "necessary" in the Oxford English Dictionary is "indispensable, requisite, essential, needful; that cannot be done without" (Oxford English Dictionary, 2d ed. 1989, Vol. XI, pp. 275-276), and the definition in Webster's 10th New Collegiate Dictionary (2000) page 774 is "absolutely needed[,] required." The plain meaning of words used in a charter is our primary guide in interpreting the Charter. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698; *Alesi v. Board of Retirement* (2000) 84 Cal.App.4th 597, 601-602.) As used in section A8.509.5(g)(3) of the Charter, we construe "necessary" to mean the only available means to ensure compliance with antidiscrimination laws.

C. *Title VII Requirements*

The City relies on the requirements of Title VII of the Civil Rights Act of 1964, title 42 of the United States Code, section 2000e et seq., and article I, section 31 of the California Constitution (enacted in 1996 as Proposition 209) to justify its unilateral implementation of Revised Rule 313. It argues that it has to use Statistically Valid Grouping to counter the adverse impact that rank order hiring or other selection devices might have on protected groups and that it could not use any explicit consideration of race or gender because of the requirements of Proposition 209.

Under Title VII, employment tests that have an adverse impact on protected groups are impermissible unless they are professionally validated[6] as job-related. (*Assoc. of Mexican-American v. State of California* (9th Cir. 2000) 231 F.3d 572, 584-585 (*AMAE*).) That is, they must actually measure skills, knowledge and ability required for successful performance on the job. (*Ibid.*) Even if a test is validated, it may violate Title VII if other selection devices are available that would also serve the employer's legitimate hiring interests but would have less adverse impact on the protected groups.

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[6] "Validation is the process of demonstrating that a test which is shown to have an adverse impact is nevertheless significantly related to on-the-job performance." (*U.S. v. City and County of San Francisco, supra,* 696 F.Supp. at p. 1291, fn. 14.)

(*AMAE*, at p. 584, fn. 7; *Brunet v. City of Columbus* (6th Cir. 1993) 1 F.3d 390, 410.) Title VII requires employers to use a promotional method that has the least adverse impact of all available methods that serve the employers' legitimate hiring concerns.

A test scoring system is valid only if it draws meaningful distinctions that reflect the applicants' probable future performance on the job. (*Guardians Assn. of New York City v. Civil Serv.* (2nd Cir. 1980) 630 F.2d 79, 95, 100 (*NYC Guardians*).) Our review is focused on scoring systems that use banding, not rank-order hiring. Banding is the practice of grouping scores together and treating them as equivalent for purposes of selection. Letter grading (A, B, C, D, F) is an example of banding, and even a 100-point scale is an example of banding when points are rounded to the nearest whole integer. All of the scoring proposals presented by both the City and the Union during negotiations were forms of banding. Indeed, the Charter sets the minimum certification rule at the Rule of Three Scores, thus prohibiting rank order hiring and requiring some form of banding. (Charter, § 10.101.) Courts have approved the use of banding in certain circumstances as a means of reducing the adverse impact of an employment test. (*NYC Guardians*, at pp. 100-106; *Officers for Justice, supra,* 979 F.2d at pp. 727-728; *Bridgeport Guardians, Inc. v. City of Bridgeport* (2nd Cir. 1991) 933 F.2d 1140, 1145-1146, 1148; see also *Chicago Firefighters Local 2 v. City of Chicago* (7th Cir. 2001) 249 F.3d 649, 655-656 [banding is not race-norming prohibited by Title VII].)

D. *When Is it Necessary To Adopt a Rule To Ensure Compliance with Title VII?*

If there were only one promotional method that complied with Title VII, it would be necessary for the City to adopt that method in order to ensure compliance with Title VII. Under Charter section A8.509-5(g)(3), the City would then be able to unilaterally adopt that method after bargaining to impasse with the Union.

There may, however, be more than one hiring or promotional method that would ensure compliance with Title VII. Theoretically, if multiple methods have the same impact on protected groups, and no alternatives exist that would have less of an adverse impact while still serving the employer's legitimate hiring interests, any of those multiple

methods would ensure compliance with Title VII. The City would be required to submit the choice among those methods to binding arbitration, absent agreement with the Union.

In the context of the City's collective bargaining relationship with the Union, the universe of "available alternatives" is not immediately apparent. Here, the parties discuss only those alternatives that were proposed during negotiations. For purposes of deciding this case, we accept the parties' implicit assumption that the alternatives available to the City were those proposed in bargaining.[7]

E. *Do the Legislative Findings Support a Declaration of Necessity?*

In support of its declaration that Revised Rule 313 was "necessary to and will ensure compliance with federal, state and local anti-discrimination laws, ordinances or regulations," the Commission adopted the following legislative findings:

1) "There is a history of successful legal challenge under federal and state anti-discrimination laws to the examination and selection procedures used by the Fire Department."
2) "Federal and state anti-discrimination laws, and implementing regulations, prohibit the use of employment tests with adverse impact unless they have been properly validated."
3) "Under federal law, if test scores have disparate impact, an employer cannot use rank order hiring where the test scores do not vary directly with job performance."
4) "Statistically valid grouping, or 'banding' is a valid selection device that does not involve discrimination against any group."

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[7] At oral argument, the City urged us to adopt a "common sense" interpretation of section A8.509-5(g)(3) that would allow it some leeway in choosing among alternative rules. Choosing a rule that will "ensure compliance," it argued, is an uncertain task because it requires forecasting how the rule will impact protected groups and whether a court will uphold the rule in future litigation. Hence, the City should be able to enact a rule it knows from experience or legal authority will ensure compliance with Title VII in favor of an untested alternative proposal. We need not decide whether to interpret section A8.509-5(g)(3) so liberally, because here the City fails to demonstrate based on experience or legal authority that Revised Rule 313 will ensure compliance with Title VII.

5) "The experts retained by the City to create and administer the Fire Department promotional examinations have recommended the use of statistically valid groupings ('banding') as a selection procedure."
6) "The proposed certification rule is consistent with and does not violate Article I, section 31 of the California Constitution."

These findings highlight two factors that led to the adoption of Revised Rule 313: first, the past history of legally deficient examination and selection practices; and second, the requirements of Title VII and California's Proposition 209. Critically missing is a finding that Revised Rule 313 would have the least adverse impact on protected groups compared with other available promotional methods while still serving the City's legitimate employment interests. The City finds that Statistically Valid Grouping is a valid, nondiscriminatory certification method, but it makes no finding of what impact it would have on protected groups and it draws no comparisons to alternative certification methods.

Notably, the findings say nothing about the Union's proposed promotional rules. The Union's proposals included several banding methods and a proposal specifying the secondary selection criteria to be used in conjunction with banding. In addition to banding, the Union's proposals included establishing clear lines of promotion and service requirements for firefighters seeking promotions; implementing the Officer Candidate Program; using a Qualifications Appraisal Interview, a combination oral interview and performance evaluation conducted by members of outside fire departments; weighting scores on multiple evaluations of job-related skills and combining them into a final score; using passing scores; and publishing reading lists to assist firefighters in preparing for the examinations. The Union asserts that each of these alternatives is used in other jurisdictions and the City has not disputed that assertion. The City fails to explain why these proposals would not ensure compliance with Title VII as effectively as Statistically Valid Grouping.

Without a finding that Revised Rule 313 had the least adverse impact of available alternatives, the City had no grounds to conclude that adoption of the rule was necessary to ensure compliance with state and federal antidiscrimination law.

F. *Has the City Produced Evidence Demonstrating That Adoption of Revised Rule 313 Was Necessary To Ensure Compliance with Title VII?*

In our independent review, we are not limited to the City's findings when considering whether the City's adoption of Revised Rule 313 was necessary to ensure compliance with antidiscrimination law. Our consideration of the record, however, is severely hindered by the City's failure to present any argument in its briefs that its determination of necessity is supported by evidence in the record. In both the trial court and on appeal, the City has relied exclusively on its argument that the courts must defer to the City's findings and to its ultimate determination of necessity. It makes no effort to cull from the voluminous record evidence demonstrating that adoption of Revised Rule 313 was necessary to ensure compliance with antidiscrimination law. Because it marshals no evidence on its behalf, the City has failed to meet its burden of proof to demonstrate that it was necessary to adopt Revised Rule 313. " 'The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment.' [Citation.]" (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.)

We note that some evidence in the record casts doubt on the City's determination of necessity. For example, the City argues that "banding is the *only* selection device to result in legal promotions in the Fire Department in at least the last 15 years." As the Union correctly notes, banding during that period was employed in conjunction with hiring goals for women and minorities. (*Davis II, supra,* 696 F.Supp. at p. 1313, ¶ III(6); p. 1315, ¶ IV(12).) The promotional system established by the 1988 consent decree, which lasted for ten years, was a race and gender conscious voluntary affirmative action plan. (*Id.* at pp. 1301-1305, 1307-1308.) Selection criteria included rank on the list of

test scores (later modified to placement within a band of scores), race or gender, and other work qualifications. (*Id.* at p. 1306; *Davis III, supra,* 979 F.2d at p. 170.)

It is not clear that in the absence of explicit consideration of race and gender, Statistically Valid Grouping would reduce the adverse impact of examination scoring. Expert critics of Statistically Valid Grouping contend that it has no impact on minority or women hiring or promotion in the absence of race and gender hiring goals. (See Campion, et al., *The Controversy Over Score Banding in Personnel Selection: Answers to 10 Key Questions* (Spring 2001) 54 Personnel Psychology 149, 167; see generally *id.* [reporting the disparate views of Dr. James L. Outtz and Sheldon Zedeck, experts who testified in favor of Statistically Valid Grouping at Commission hearings; Frank L. Schmidt and Jerard F. Kehoe, critics of Statistically Valid Grouping; and Kevin R. Murphy and Robert M. Guion, neutral commentators].) Dr. Outtz, the City's expert, disputed this contention at a Commission hearing, but his argument relied on the use of secondary selection criteria that would have less of an adverse impact on protected groups than test scoring. Because secondary criteria are undefined in Revised Rule 313, it would be speculation to conclude that their use will result in less adverse impact. Further, the secondary selection criteria discussed by Dr. Outtz are not unique to Revised Rule 313; all banding rules require the use of secondary criteria and the Union's final proposal, as well as many of its earlier proposals, required the use of secondary criteria.[8]

Because the City has not demonstrated that adoption of Revised Rule 313 was necessary to ensure compliance with antidiscrimination laws, it exceeded its powers under the Charter by unilaterally implementing the rule. After reaching impasse in its negotiations with the Union over a new firefighter promotional rule, the City was

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[8] There is also considerable professional debate about the validity of the theory and methodology of Statistically Valid Grouping. (See Campion, et al., *supra*, 54 Personnel Psychology at pp. 153-159.) Notably, the chairperson of the Civil Service Commission voted against adoption of Revised Rule 313 (and against adoption of the legislative findings) based on his personal study of the professional literature and the statistical methodology behind Statistically Valid Grouping.

required to submit the matter to binding arbitration. The trial court erred in denying the Union's petition to compel arbitration.

DISPOSITION

The judgment of the trial court is reversed and the case is remanded to the trial court with directions to issue a writ of mandate requiring the City and County of San Francisco and the San Francisco Civil Service Commission to submit the firefighter promotional certification rule to binding arbitration.

GEMELLO, J.

We concur.

JONES, P.J.

STEVENS, J.

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Trial judge:	Hon. Ronald E. Quidachay

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