

County of San Luis Obispo and San Luis Obispo County Employees Association

PERB Case No. LA-IM-309-M Factfinding Report and Recommendations

Procedural Background

During the course of recent contract negotiations between the County of San Luis Obispo and their various employee organizations, a separate issue arose when the County determined that they wished to make changes to the County Civil Service Commission's Civil Service Rules.

On August 10, 2021, the County via HR Analyst Michael Hobbs, notified the San Luis Obispo County Employees Association (SLOCEA) of the proposed changes. On September 29, 2021, SLOCEA, responded that they desired to negotiate any and all changes to both the Civil Service Commission's (CSC) Rules and any changes to the Commission's Procedural Guidelines.

Negotiations commenced with SLOCEA, from October 14th to January 21, 2022, the parties meeting a total of 4 times. The main issue of these meetings was a proposal by SLOCEA to give grievants in discipline and discharge matters the opportunity to opt for a qualified hearing officer jointly agreed to by the appointing authority and the Union.

That November proposal stated:

"In lieu of a hearing before the Commission, Grievant/Appellant shall have the option to have their grievance or appeal heard by a qualified hearing officer, mutually selected by the appointing authority, or his/her designee, and the Grievant/Appellant, or his/her representative. In such case the hearing officer that is selected by the parties shall conduct the hearing in accordance with the hearing procedures set forth in Rule 4.05"

The proposal also referred to outside hearing officers from a list provided by PERB, a 50/50 cost split, and a final and binding decision.

After a final meeting on January 21, 2022, an impasse was declared, and mediation proved unsuccessful.

Pursuant to a letter from PERB dated April 26, 2022, the undersigned was jointly selected by both parties to serve as Factfinding Chair.

The San Luis Obispo County Civil Service Commission

The parties were kind enough to provide a set of Joint Exhibits, including a stipulation of facts. Of interest here is Stipulation 3 and 4, which state:

3 - *"The Civil Service Commission (CSC) is a five-member commission that personally hears*

grievances and appeals (including appeals of discipline) filed by SLOCEA on behalf of SLOCEA represented employees, and by other employee organizations representing other County employees."

4 - "Each person of the 5-person Board of Supervisors selects one commissioner. The commissioners serve four-year terms and remain on the commission until a successor is selected or they resign."

The same Binder includes documents covering Ordinances, Rules, Procedural Guidelines, and Enabling Legislation pertaining to the Civil Service Commission. It also includes a Memo from Michael Hobbs dated August 10, 2021, stating that the Commission wants to proceed with some Civil Service Rule Changes, and anticipates the need to meet and confer with recognized employee organizations over said changes..

The Factfinding Hearing

A hearing took place on March 7, 2023, at the San Luis Obispo County Government Center, at 9:30 am. The employee County Panel Member was Mark McKibben, a Principal HR Analyst. The Union Panel Member was Erin Stitch, SLOCEA President.

The County was represented by Justin Otto Sceva, of Sloan, Sakai, Yeung & Wong LLP, and the Union was represented by Dennis Hayes, of Hayes, Ortega & Sanchez LLP.

A transcript of the proceeding was taken by Barkley Court Reporters and provided to both parties, as well as the Factfinder.

The basic issue at hearing by SLOCEA is based on the fact that in San Luis Obispo County, the Civil Service Commission itself handles disciplinary matters, as opposed to an external hearing officer selected by the parties.

This is a result of the fact that the San Luis Obispo Civil Service Commission was created back in the 1940's under a State Civil Service Act which allowed counties to adopt an Ordinance to create a Civil Service Commission with a jurisdiction including the processing of disciplinary matters by the Commission itself (County Exhibit 5)..

Of course, that same enabling legislation provided that there is an exception for Union contracts (MOU's) which have established grievance procedures. (RT, p.120). As the County itself mentions in their post hearing brief.

The Civil Service Commission

Anyhow San Luis Obispo County back in 1949 created their Civil Service Commission Ordinance. Tab 2 of the Joint Exhibits Binder includes the current Rules, Ordinances, Procedural Guidelines, and Enabling Legislation covering its Civil Service Commission.

It is necessary to go into some depth regarding the Commission since the structure and authority of the San Luis Obispo Civil Service Commission goes way beyond what most people think of when they think of a Civil Service Commission. Perfectly legal and valid,

but quite different.

In this system, each of the 5 members of the Board of Supervisors, appoints a Commissioner to the Civil Service Commission. Each of the Commissioners serve for a four year term, and the only qualification to be a Commissioner is being an elector in the County of San Luis Obispo.

In the case of disciplinary appeals, the Commission actually serves as the hearing officer, aided by an Outside Counsel, who is selected and compensated by the Civil Service Commission to provide support on legal issues as they may arise during the course of a hearing. Ultimately, the Commission meets in closed session to deliberate and then issue a final determination in a duly noticed Commission Meeting.

Of some note, the SLO Human Resources Administer, who is appointed by the Board of Supervisors, is also the Secretary to the County Civil Service Commission.

The Colleen Harmon Appeal

Back in 2012, the Civil Service Commission heard an appeal from one Colleen Harmon, who was given a 1 day suspension for insubordination and willful disobedience under the Civil Service Rules. She appealed to the Commission and was granted a hearing. (Union Exhibit #2)

On page 14 of the Commission's order pertaining to 'Proper Penalty', they relied on Commission Rule 4.05(i)1, which in pertinent part states "*In appeal hearings, the decision will affirm, revoke, or modify the order action, or ruling.*"

The final Decision stated that "*...the Commission concludes that the appropriate discipline is a three (3) day suspension without pay, and Respondent's Final Order of Suspension is modified accordingly.*"

County witness Jeannie Nix was a Commissioner from 1999 through 2021 (RT, p 182), and was a Commissioner during the Colleen Harmon (RT p.214). She had no difficulty in increasing the penalty from 1 to 3 days under the Commission Rules. There is nothing in the record to indicate that any other Commissioner had reservations about the increased penalty.

This decision was from 2012, was final, and evidently represents the San Luis Obispo Civil Service Commission's final word on the matter. Appeal a disciplinary action and the Commission reserves the right to increase the penalty beyond that in front of them.

Now I have been at this game a long time, on both management and labor's side, as well as a neutral. In all those years, I have never encountered a neutral body increasing the penalty when an employee exercises their appeal rights to a hearing.

The Union Proposal

By the time we had the hearing, SLOCEA had modified their initial proposal of a binding decision by a panel consisting of PERB Hearing Officers, to a non-binding version still using PERB's Panel of Neutrals.

In Tab 6 of the Joint Exhibits binder, the Union proposed an MOU between the Civil Service Commission and the Unions which would allow for the Unions to process their grievance heard by one of a list of 7 neutrals provided by PERB.

However, at Hearing the Union indicated it would be satisfied with an advisory process, still using the PERB strike list panel, with the caveat that the recommendation would be advisory only and could be overruled upon appeal to the Civil Service Commission.

For their part, it is clear that the County of San Luis Obispo is content with their current system of their version of a Civil Service System based essentially on 1950's law.

Analysis

However the parties got here, the Civil Service system in San Luis Obispo County is essentially a closed system, where the Commissioners are all direct appointees of the County Board of Supervisors, and their staffing procedures include the direct hiring of Outside Counsel to "advise" the Commissioner or Commissioners hearing a grievance.

If I have it correctly, the Human Resources Director is a direct report to the Civil Service Commission, along with the Outside Counsel.

Finally, as noted before, based on a 2012 Decision, the Commission reserves the legal right to increase the punishment meted out by a department if they believe that the miscreant has not been sufficiently punished.

At the same time it seems to me that the Commission has no interest in having a bunch of PERB Hearing Officers rooting around in their system, bringing with them all of the bureaucratic baggage which PERB itself brings to the table. And speaking as a member of the PERB Panel, it would be a mental leap to hear a SLO disciplinary case utilizing the existing Rules, Ordinances, Procedural Guidelines, and Enabling Legislation of the County. It's doable, but not trivial.

While negotiations with SLOCEA over Civil Service Rule changes, ultimately resulted in impasse and this factfinding, I have a modest proposal which might postpone the day of revamping the whole thing.

The Perception Problem

The San Luis Obispo County Civil Service Commission and its rules for the Commission handling all disciplinary matters has been around for a long time, and are materially different than the disciplinary appeal procedures in most other jurisdictions.

That is in and of itself not bad, but the enabling language of the Civil Service Commission is from the 50's, and language sounds like it. Over time, it is clear that the employee organizations like SLOCEA believe that the existing system favors the County rather than appellants.

So, while the current system is clearly legal, the record reveals that over time the SLOCEA believes that the system is a closed system which is not in fact neutral. In this context the Harmon appeal stands out, since I am unaware of any neutral appeal system which results in an increased punishment to the grievant on appeal.

One this perception takes hold, it doesn't make much difference to argue that the system is perfectly fair - the perception of favoritism is unlikely to go away, period.

From my perspective, it makes sense to take a look at the current appeal system and see if there is a way short of the MMBA/PERB system which is utilized in one way or another in most City/County jurisdictions.

Thus a modest modification to the current Civil Service disciplinary appeal provisions just might work out for both parties to provide a reasonably neutral alternative to litigation.

Recommendation

I will admit at the outset that I am comfortable dealing with Civil Service systems. In fact, from the early 90's to 2005, I ran the Los Angeles County Civil Service Commission, with all the teething difficulties and consensus posturing as the MMBA took hold.

So here is a suggestion that there is a way that the parties can put their foot in the water, before contemplating the leap to a totally different system.

I admit that I saw a notable reaction from the County side of the table when the Union kept referring to 'PERB Hearing Officers'. My take away was that the County representatives were not enamored with the idea of utilizing PERB hearing officers at all. While I could be wrong, I can only assume that the idea of using PERB based panelists has little chance of being recommended to the County Board of Supervisors by management.

I am therefore proposing an alternative hearing officer process, separate for discipline and discharge matters only. I recommend that the parties jointly establish a local panel of neutrals, with either 7 or 9 mutually agreed on members. In the event that there is no mutual agreement, you have a built in strike list with an odd number which will result in result in a hearing officer. Who goes first can be handled by a coin toss.

Further, panel members would be restrained in that under this scheme they could only make Advisory determinations of the matter before them. The record indicates that during the course of negotiations, the Union was ok with advisory recommendations under their amended proposal.

The appointed hearing officer would actually handle the hearing, constrained by whatever modified (if any) parameters at hearing.

The only individuals who potentially stand to lose anything under such a system would be the Civil Service Commissioners in terms of compensation, but objectively it is not a huge loss. They would potentially make less money, but that's not why they were appointed. They would still all be Commissioners, and could hear advisory appeals to the Commission as a whole, issuing a final decision..

Based on testimony, I don't think economic gain is why anyone wants to become a Civil Service Commissioner in the first place. It's a pure political process, and the only minimum requirement is that they live in the County. That is a low bar

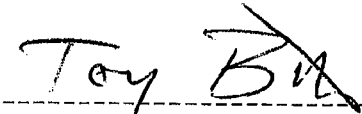
Anyhow, such a concept would involve a third party neutral, eliminate allegations of the Commission taking sides, and the system would have nothing to do with PERB; rather mutual picks who won't be subject to allegations of favoritism.

Final Note-

After a telephone conversation with Justin Otto Sceva, requesting an extension of time for the County to file a dissent, the following was agreed to:

"it is the County's understanding that the final Report and Recommendations will include language clearly affirming that the County and SLOCEA panel members both have a right to submit dissents for inclusion with the Report, and that the 10 day deadline for making findings and recommendations public under Government Code section 3505.5(a) shall not begin running until after both panel members either (1) submit a dissent or (2) confirm they do not intend to do so."

Submitted June 12, 2023

A handwritten signature in black ink that reads "Tony Butka". The signature is written in a cursive style with a large, sweeping "B" and "K".

Tony Butka, Factfinder



**COUNTY/COMMISSION PANEL MEMBER'S DISSENT TO
2023 SLOCEA CIVIL SERVICE RULES FACTFINDING RECOMMENDATIONS**

Introduction

The Factfinder's findings and recommendations are unsupported by the facts and include fundamental analytic errors. I accordingly disagree with and dissent from the Report, its conclusions, and all recommendations made therein.

Discussion

I. The Factfinder's Report Is Premised on Inaccurate and Unsupported "Facts"

The Factfinder's Report is tainted by numerous factual errors and omissions, including basic mistakes like stating the County originally decided to propose Civil Service Rule changes "during the course of recent contract negotiations," when contract negotiations with SLOCEA were actually completed more than one and a half years earlier, and claiming that the County's Director of HR reports directly to the Civil Service Commission instead of the Board of Supervisors. Some of the errors are more significant than others, but they all undermine the credibility of the overall analysis and recommendation.

Of particular note is the Factfinder's characterization of SLOCEA's hearing officer proposal as the "main issue" during the 2021 Civil Service Rule Change negotiations. These negotiations actually consisted of joint bargaining with multiple employee organizations and addressed a total of seventeen different proposed Rule changes. SLOCEA's hearing officer proposal was only one among many issues addressed in those negotiations. No other employee organization felt it was necessary to make a proposal on this subject, formally joined in SLOCEA's proposal, or signed on to SLOCEA's impasse declaration or factfinding request. Moreover, no one representing any other employee organization testified in favor of SLOCEA's proposal at hearing. Looking at the undisputed facts, it is obvious that SLOCEA's outside hearing officer proposal was at best SLOCEA's main issue in negotiations, not anyone else's. Similarly, the Factfinder asserts it is "clear" that "employee organizations like SLOCEA" believe the Civil Service Systems is biased against appellants, but SLOCEA didn't present testimony or evidence about what any other employee organization believes.

These misrepresentations are significant because they are central to the Factfinder's overall recommendation that the Civil Service Commission make a radical change to current hearing procedures in order to counteract an alleged widespread perception that hearings are biased in favor of the County. Even if that recommendation were not fundamentally flawed for many other reasons (which it is, as discussed below), the Factfinder's underlying factual findings are unsupported by the record.

II. The Factfinder Committed a Fundamental Analytic Error By Failing to Address Mandatory Factfinding Criteria Established By State Law

This factfinding arose from an impasse over SLOCEA's radical proposal to modify a long-standing *status quo* under which the Civil Service Commission is charged with the duty and responsibility to hear and decide all Civil Service appeals and grievances. This is not a case where the parties have proposed competing changes, but rather one in which the County and Commission position has been to maintain the *status quo* without any change. That is critically important, because it is a basic principle that the party in factfinding who proposes to change the *status quo* bears the burden of presenting evidence that their proposed change is justified by the need to actually address a real issue. The operative standard in this situation is "if it's not broke, don't fix it."

Moreover, Government Code section 3505.4(d) makes it *mandatory* for factfinders to "consider, weigh and be guided by" eight (8) specific statutory criteria as a basis for making their findings and recommendations. Taken together, this means SLOCEA bore the burden in this factfinding of submitting evidence to prove the statutory criteria justify adding an outside hearing officer option, and the Factfinder was required to use the same criteria in deciding what to recommend. The Factfinder's Report, however, does not once acknowledge or address SLOCEA's burden, never cites or discusses the statutory criteria, and includes no analysis of why or how his recommendation is supported by those criteria. These are all fundamental analytic errors.

Two mandatory statutory criteria are particularly relevant to this case. First, the "interests and welfare of the public" (Gov. Code § 3505.4(d)(4)) are better served by retaining the *status quo* than by implementing the Factfinders proposed rule change for many reasons. As the County explained both at hearing and in its post-hearing brief:

- The voters who originally approved creation of the County's Civil Service system did so with the understanding and expectation that the Commission would hear and decide appeals. Absent a substantial justification, using outside hearing officers would violate those voters' intent and expectations.
- Commissioners' regular involvement in all the other aspects of the Civil Service System means they can pull on a deep and broad pool of direct knowledge regarding how those issues relate to appeals, an expertise that would not be shared by outside hearing officers.
- Having appeals heard by the Commission as a whole, instead of a single outside hearing officer, increases the consistency and stability of decisions, and is also inherently fairer because it (a) allows for multiple viewpoints to be brought forward in deliberations, and (b) removes the possibility that a single person's bias could cause an incorrect result.
- At Hearing and in bargaining, SLOCEA argued that an outside hearing officer option is necessary to address "administrative burden" on the Commission and ensure hearings are not delayed by the need to schedule all Commissioners. In reality, however, having Commissioners directly hear all disciplinary appeals is cheaper, faster, and more efficient.

The Commission's need to review advisory decisions from outside hearing officers and the supporting evidence before issuing a final decision would essentially mean every appeal would be heard twice, would cost twice as much, and would take twice as long to be fully resolved.

Basically, adopting the Factfinders recommendation would make things worse, not better. It would cause the disciplinary appeal process to take longer and cost more, without resulting in any concrete benefit for County employees or the public. Unlike larger counties like Los Angeles, the volume of disciplinary appeals that need to be decided in the County of San Luis Obispo is small enough that the Commission itself can give prompt and careful personal attention to every single case.

The second statutory factfinding criteria particularly relevant to this case is comparability (see, e.g., Gov. Code § 3505.4(d)(5)), which requires factfinders to consider how the parties' competing proposals compare with similar public employers and employees. Here, the relevant comparison is with the Civil Service Rules adopted in other County Civil Service Systems. The undisputed data the County presented at hearing demonstrates that at least two other Counties have Rules that mirror the County's *status quo*, but *none* of them has adopted what was actually proposed by SLOCEA. The same data also shows that some of the aspects of the County's Civil Service System that the Factfinder claims contribute to a "perception problem" severe enough to justify radically changing the present hearing procedures are not nearly as unusual as the Factfinder implies. For example, Commissioners are directly appointed by the governing body in every single County Civil Service System, and a clear majority of such Systems also specify that the County HR Director is to act as or appoint the Commission Secretary. Similarly, although the Factfinder makes much of the fact that Commissioners are only required to be members of the County electorate, referring to that requirement as a "low bar," that specific language reflects the underlying enabling statute and is therefore common to many County Systems. (See, e.g., Gov. Code § 3111 ("members shall be selected from among the qualified electors of the county.") It is also notable that his own recommendation does not impose any higher requirement for members of the proposed local panel.

It is true that many other County Civil Service Systems use hearing officers for hearing some or all appeals of serious discipline, and the Factfinder's recommendation only applies to that one area. Even for disciplinary appeals, however, a key element of SLOCEA's proposal was giving employees the unilateral authority to choose whether a hearing officer will or will not be used for the initial hearing. Only a single other County (San Joaquin) has a similar Rule. Moreover, *none* of the Rules adopted by any other County Civil Service System involve creation of a local panel of hearing officers as proposed in the Factfinder's recommendation. For all these reasons, the comparability data also does not provide a compelling basis for adopting the Factfinder's recommendation.

III. The Factfinder Overstates the Impact and Relevance of the Commission's Position Regarding Its Authority to Increase Discipline on Appeal

One issue the Factfinder's Report places inordinate weight on is the alleged impacts of a single case more than a decade ago (the "Harmon decision"), where the Civil Service Commission increased an employee's suspension from one to three days on appeal. SLOCEA argued at hearing that an outside hearing officer option is justified because the Harmon decision has created a chilling effect, and discouraged employees from pursuing appeals out of fear that the Commission could increase their original discipline.

The Factfinder accepted SLOCEA's representations at face value, expressing shock at the Commission's position and asserting he has "never encountered" any other neutral body that has ever increased a penalty on appeal and that he is "unaware of" any neutral appeal system that allows for such increases. Those claims are extraordinary, given that the County cited cases in its post-hearing brief where the California Court of Appeal has addressed cases where the Civil Service Commissions for the Counties of San Diego (*Anderson v. Civil Service Commission* (1981) 122 Cal. App. 3d 577) and Mendocino (*Paoli v. Civil Service Commission of Mendocino County* (1993) 12 Cal.App.4th 1074) both did exactly that. Moreover, in both those cases the County relied on language stating the Commission had authority to "modify" discipline on appeal, which is the exact same language the County's Commission relied on in Harmon. In those cases, the Court of Appeal unambiguously held that a Civil Service Rule that allows discipline to be "modified" on appeal necessarily includes the possibility of both decreases *and* increases. (*Anderson, supra* at 579-80.)

Moreover, SLOCEA and the Factfinder both also fail to acknowledge that *Paoli* places significant limitations on potential discipline increases by clarifying that it is lawful to modify a suspension by increasing its length, but not to impose a *different* penalty by (for example) increasing a suspension to a dismissal. The County's Civil Service Commission has never asserted a right to impose a different penalty on appeal. If employees have been discouraged by SLOCEA's false claims that an appeal might result in their suspension being increased to a termination, that is on SLOCEA's head not the Commission's.

The County's position is simply not the shocking deviation from normality it is made out to be in the Factfinder's Report. The language allowing discipline to be "modified" on appeal in the County's Civil Service Rules (and, indeed, the Rules in San Diego and Mendocino Counties, as discussed in *Anderson* and *Paoli*) directly mirrors the County Civil Service Enabling Act, which *requires* all County Civil Service systems to hear disciplinary appeals and then "either affirm, *modify*, or revoke the order." (Cal.Gov. Code § 31108(3).) The exact same language is common in Rules adopted by County Civil Service Systems across the state, and no evidence was submitted at hearing to show that *any* of those other Civil Service System has ever expressly disavowed authority to *potentially* increase discipline based on that language pursuant to *Anderson* and *Paoli*, even if the factfinder has never been personally involved with a case where that occurred.

Ultimately, the most important fact is that even if the Commission's position were as unusual as the Factfinder claims, it would not justify his recommendation because creating a local panel of outside hearing officers to issue advisory decisions would have no impact whatsoever on this issue. The outside hearing officers would have exactly the same authority to increase discipline that the Commission itself currently has, because they would be applying the exact same Civil Service Rule allowing for discipline to be "modified" on appeal. Moreover, the fact that their

decisions would only be advisory means the Commission would still make the ultimate call and could still increase discipline in the unlikely case it determined doing so is appropriate. Because adopting the recommendation would have no meaningful impact on this issue, it cannot credibly be used to justify the recommended change.

IV. The Factfinder's Recommendation Would Also Not Meaningfully Impact Any Other Issue He Claims Has Caused a "Perception Problem" That Justifies Changing the Status Quo

The Factfinder justifies his recommendation by claiming it is necessary to address a "perception problem" that the Commission is biased. As with the issue of increased discipline, however, his recommendation would not actually address any of the factors he claims have caused that perception.

As is explained *supra*, the Factfinder's claim that a Rule change is needed because of the "perception problem" caused by Commissioners being appointed by Supervisors and/or the County's Director of HR acting as Commission Secretary is undermined by the fact that the same factors are true in many other County Civil Service Systems throughout the state. Similarly, his claim that a perception of bias has somehow been created because the Civil Service Commission use of its own independent outside counsel to provide advice on appeals, instead of County Counsel, makes no sense whatsoever. But even if there *were* any merit to those claims, the bottom line is that his recommendation would also not address them in any meaningful way. Final decisions would still be issued by the Commission, which would still be appointed by Commissioners, still use the Director of HR as Secretary, and still be advised by the same outside counsel. To the extent those factors have created any "perception problem," the Factfinder's proposal would change nothing.

V. The Factfinder's Recommendation Is Not Made Acceptable by The Fact It Does Not Call For PERB-Appointed Hearing Officers

One of the most mystifying aspects of the Factfinder's Report is his claim that the Commission rejected SLOCEA's proposal because it called for hearing officers to be provided by the Public Employment Relations Board (PERB), and that using a panel of local hearing officers would therefore address the County's objections and provide a basis for a mutually acceptable compromise. It is unclear where he got that idea, but nothing could be farther from the truth.

It is certainly true that the County and Commission disagreed strongly with SLOCEA's claim that it is specifically necessary to use PERB-appointed hearing officers because Commissioners are not adequately qualified or trained. As the County established at length at hearing, Commissioners have historically been chosen with care, receive extensive training on their duties and relevant legal principles, and take their responsibilities very seriously. Use of PERB hearing officers was not, however, a central reason why the County rejected SLOCEA'S proposal. Replacing the proposal for PERB-appointed hearing officers with a proposal for local hearing officers does nothing to address the real reasons the County rejected adding an outside hearing officer option. The Factfinder's claim that only Commissioners "stand to lose anything" under his proposed system and that the only thing they stand to "lose" is compensation is simply false. As

we explained at hearing and *supra*, the true losers if his recommendation were adopted would be County employees and the public, because allowing hearing officers to issue advisory opinions would result in *higher costs, longer delays*, a less fair process, and extensive duplication of effort, while at the same time completely failing to address any actual unfairness or impact any of the various factors the Factfinder claims have contributed to the "perception problem" he uses to justify the change.

Conclusion

The Factfinder's Report and Recommendations are not supported by the facts and do not provide any basis for the parties to bridge their disagreement or find common ground. Accordingly, I dissent from the Report and Recommendations and all recommendations made therein.

Submitted by:

Mark McKibben
Mark McKibben

June 28, 2023
Date