



CIVIL SERVICE COMMISSION

COUNTY OF LOS ANGELES

COMMISSIONERS: DENNIS F. HERNANDEZ • NAOMI NIGHTINGALE • STEVEN AFRIAT • JOHN DONNER • Z. GREG KAHWAJIAN
STEVE CHENG, INTERIM EXECUTIVE DIRECTOR

February 12, 2018

TO: All Interested Parties 

FROM: Steve Cheng, Interim Executive Director

SUBJECT: 2018 Hearing Officer Trainings

Every year the Civil Service Commission ("CSC") holds training with Hearing Officers to address substantive legal considerations, contractual issues, procedural matters, and other topics related to the successful administration of Civil Service cases. In 2017, the CSC held several meetings with stakeholders to receive input on training Hearing Officers. Based on that feedback, the CSC updated its annual Hearing Officer training for 2018. The first session of in-person training will be on February 23, 2018.

Additional training will be provided in a second session and on-line. The outlines of the training materials are attached hereto. Additionally, the training materials for the first session will be made available online at <http://civilservice.lacounty.gov/>. Second session materials will be made available when the training date is announced.

If you would like to attend to observe the training on February 23, 2018, please let me know at csc@bos.lacounty.gov or contact me at (213) 974-2411.

Enclosed

SC:AMW

FIRST SESSION

Commission Policies and Procedures

The Civil Service Appeal System and How It Works
Knowledge of County Structures
Civil Service Rules
Hearing Burden of Proof Rule 4.12
Jurisdiction and Scope of Hearing - Clarification of Issues Certified for
Rule 18 - Can't go beyond the Notice of Intent
Rule 18.01 - 5 Part Issues
Civil Service Pre-Hearing and Briefs 4.17
Proper Application of Abuse of Discretion Standard
Affirmative Defenses

POBRA

Commission Jurisdiction on Issue
Government Code 3304(d)

Pitchess/Peace Officer Personnel Records

Hearing Officer Reports

Drafting of findings of Fact and Conclusions of Law in reports with emphasis on:

1. Revise the model hearing officer report that accompanies the RFQ
 - a. Statement of Issues Certified for Hearing.
 - b. Introduction - a concise statement of
 1. each of the charges alleged.
 2. a brief summary of the facts.
 3. a summary of the hearing officer's conclusions and recommendations.
 - c. Discussion.
 1. Discussion and analysis of each of the charges alleged, clearly identified by headings and subheadings.
 2. Discussion and analysis of the appropriateness of the discipline, including aggravating and mitigating factors.
 3. Other relevant issues.
 - d. Findings of Facts.
 - e. Conclusions of Law
 - f. Recommendations.
 - g. Summary of Testimony and Exhibits attached as an Appendix.

2. Topanga and Bridging the Analytical Gap
3. Page limit-25 pages (may be exceeded in extraordinary cases)

Miscellaneous

Appropriate Remedies Guidelines

Arbitrary/Capricious Discipline

Public Policy Considerations

Hearing Officer Contract

1. Compensation
2. Billing

SECOND SESSION AND ONLINE

Evidence

Cross Examination and leading witnesses
Ruling on Objections
Hearsay and the Civil Service Rules
Evidence Basics
Ruling on Objections
Rules of Evidence
Confidentiality and Privilege (especially for individual departments)
Significance of Evidence

Commission Policies and Procedures

Calendar Management
Post Hearing Processes and Grounds for Error

Ethics

Neutral/Judicial Ethics
Conflict and Recusal

Skelly

Skelly 2 Parts
Barber Remedy
Analysis of Appropriateness of Discipline

Miscellaneous

Legal Authority for Discipline of Off-Duty vs. On-Duty Conduct
Progressive Discipline Case Law
Knowledge of County Policies and Procedures



CIVIL SERVICE COMMISSION

COUNTY OF LOS ANGELES

COMMISSIONERS: LYNN ADKINS • VANGE FELTON • CAROL FOX • Z. GREG KAHWAJIAN • EVELYN V. MARTINEZ
LAWRENCE D. CROCKER, EXECUTIVE DIRECTOR
SANDY STIVERS, DEPUTY EXECUTIVE DIRECTOR • ROCHELLE L. WILLIAMS, CHIEF, COMMISSION SERVICES

July 23, 2010

To: All Hearing Officers and All Interested Parties

From: Lawrence D. Crocker *LDC*
Executive Director

Subject: **Certification of Issues at Hearing**

The Superior Court of the State of California has recently held that the Civil Service Commission's ("Commission") Hearing Officers may only consider issues that have been certified by the Commission. The Court adopted a strict interpretation of Civil Service Rule 4.03(C) which provides:

When granting a hearing, the Commission shall state the specific issue(s) in the petition to be heard and will notify the parties in writing of the issue(s). No other issues shall be heard.

The Commission had interpreted this provision to only bar consideration of any issue(s) that a party has specifically requested be certified but that request was denied by the Commission. The Commission had also interpreted the Rule not to preclude a Hearing Officer from addressing relevant issues that had not been denied certification by the Commission and that arose as affirmative defenses during the course of a hearing.

However, in light of the recent Court decision, Hearing Officers are directed to only address the issues certified by the Commission and set forth in the "Hearing Notice." Petitioners should specify in their petitions for hearing all issues they want certified by the Commission. For cases currently in hearing, Petitioners, or their representatives, may file a request with the Commission for certification of additional issues, if needed. If due to upcoming scheduled hearing dates the request for certification of additional issues requires expeditious treatment, please state this in the request.

Thank you for your prompt attention to this matter.

4.12 - Burden of proof.

In hearings on discharges, reductions or suspensions in excess of five days, the burden of proof shall be on the appointing power, except that the burden of proving affirmative defenses shall be on the person asserting them; provided that such raising of an affirmative defense does not relieve the appointing authority of its responsibility to sustain its burden of proof. In all other types of hearings the burden of proof shall be on the petitioner.

(Ord. 88-0020 § 1 (part), 1988: amended by Board Order No. 80 (part), 9/1/87.)

RULE 4.17

PRE-HEARING CONFERENCE

4.17 - Pre-hearing conference.

A. With respect to any matters set for hearing, both parties shall confer no later than 10 business days prior to the date for the hearing for the purpose of agreeing to a statement in writing setting forth the specific facts or contentions in issue. The facts or contentions in issue contained in the agreed statement must fall within the scope of the hearing, as defined by the commission in accordance with Rule 4.03C. The party having the burden of proof shall initiate the contact with the opposing party. The statement must be filed with the commission or hearing board not later than five business days prior to the hearing, and shall include an estimate of the time required for the hearing and a list of all witnesses intended to be called by both parties. The commission or hearing board may also require such additional matters in the written statement as it deems appropriate. The commission may issue such orders as are necessary to assure that both parties attend the pre-hearing conference and cooperate in preparation of the statement in writing. If either party does not attend the pre-hearing conference and participate in attempting the preparation of the statement in writing, the hearing board shall accept the statement of the other party as to the facts and contentions in issue to the extent such statement conforms to the scope of the hearing as defined by the commission in accordance with Rule 4.03C.

B. If the parties fail to reach agreement, then each party must file a written statement with the hearing board. The hearing board or a member designated by the board shall resolve all disputes, and announce the resolution to the parties as the first term of business in the hearing. The issues heard and the evidence taken must fall within the scope agreed upon by the parties or announced by the hearing board. Parties may object to proposed commission findings of fact and conclusions of law on the basis of the failure of the hearing board to comply with this Rule. When the commission finds such objections to be valid, it shall make appropriate amendments to the proposed findings and conclusions. (Ord. 88-0020 § 1 (part), 1988.)

- I. Purpose
 - A. To make your job easier.
 - 1. Delineating facts and issues to be heard
 - 2. Getting a time estimate
 - 3. Identifying witnesses and evidence
 - B. Control of the hearing
- II. What is required of the parties
 - A. Confer 10 business days before hearing date
 - B. Agree to a statement in writing setting forth the facts or contentions in issue
 - 1. Facts or Contentions must fall within the scope of the hearing as defined by the commission
 - 2. The party having the burden of proof must initiate contact with the opposing party
 - 3. The written statement shall include a time estimate for the hearing and a list of witnesses intended to be called by both parties.
 - 4. You can require that the parties address additional matters as you deem appropriate
 - C. The written statement must be filed with the commission not later 5 business days before the hearing.
 - D. Following the Conference the Parties Can't Agree on a Statement
 - 1. Each Party must file a written statement
 - 2. The Hearing Officer shall resolve the disputes and announce a resolution to the parties as the initial act in the hearing.
- III. Enforcement Mechanisms
 - A. The Commission is empowered to issue any such orders as are necessary to assure both parties attend the pre-hearing conference and cooperate in the preparation of the written statement
 - B. If either party does not attend the pre-hearing conference and participate in the preparation of the written pre-hearing conference statement you can accept the written statement of the party who did participate in the process

18.01 - Suspension.

- A. Subject to such appeal right as provided in this Rule, an employee may be suspended by the appointing power for up to and including 30 days, pending investigation, filing of charges and hearing on discharge or reduction, or as a disciplinary measure. Where the charge upon which a suspension is the subject of criminal complaint or indictment filed against such employee, the period of suspension may exceed 30 calendar days and continue until, but not after, the expiration of 30 calendar days after the judgment of conviction or the acquittal of the offense charged in the complaint or indictment has become final. The reason(s) for such suspension shall be forthwith furnished in writing to the employee and a copy sent to the director of personnel.
- B. An employee who is suspended shall be entitled to answer, explain or deny the charges in writing within 10 business days. A copy of the answer shall be sent to the director of personnel and filed as part of the employee's record.
- C. An employee who is suspended for up to five days may appeal such suspension to the director of personnel. Any such appeal must be in writing, shall contain specific detailed information, and must be received by the director of personnel within 15 business days of the employee's notification of the suspension. The director of personnel may not consider any information or charges made by the appointing power unless they are contained in the letter of suspension, nor any made by the employee unless the employee has previously provided them to the appointing power for consideration, unless such information or charges were not then known and could not have reasonably been expected to be known by the appointing power or employee. The director of personnel shall determine whether or not to consider the appeal, or whether or not the suspension is justified.

(Ord. 88-0020 § 1 (part), 1988.)

18.02 - Discharge or reduction.

- A. A permanent employee in a nonsupervisory class, a supervisory class in a bargaining unit as certified by ERCOM, or a managerial class in the Sheriff, may be discharged from county service or reduced in rank or compensation, and a permanent employee in all other supervisory classes and all other managerial classes may be discharged from county service or reduced in grade or compensation, after appointment or promotion is complete, and after completion

of the employee's first probationary period (except as provided in Rule 18.06). Before such discharge or reduction shall become effective, the employee shall receive a written notice from the appointing power of intent to invoke discharge or reduction, and specific grounds and particular facts therefor. The employee shall then be allowed a reasonable time, not to exceed 10 days, to respond orally or in writing to the appointing power before the discharge or reduction shall become effective.

- B. When a permanent employee is discharged or reduced, the employee shall be allowed 15 business days from date of service of said notice of discharge or reduction in which to reply thereto in writing and request a hearing before the commission. Notice of the time allowed for answer and for requesting a hearing before the commission shall be stated in the notice of discharge or reduction. The appointing power shall submit to the commission evidence showing that the employee has been served with the notice of discharge or reduction either personally or by certified or registered mail addressed to the employee's last known address, and the date of such service.
- C. The commission may not consider any information or charges made by the appointing power unless they are contained in the letter of discharge or reduction, nor any made by the employee unless the employee has previously provided them to the appointing power for consideration, unless such information or charges were not then known and could not reasonably have been expected to be known by the appointing power or the employee. The commission shall determine whether or not the discharge or reduction is justified.
 1. In the case of employees in nonsupervisory classes, supervisory classes in bargaining units as certified by ERCOM and managerial classes in the Sheriff, the civil service commission may not consider any information or charges made by the appointing power unless they are contained in the letter of discharge or reduction, nor any made by the employee unless the employee has previously provided them to the appointing power for consideration, unless such information or charges were not then known and could not reasonably have been expected to be known by the appointing power or the employee. The commission shall determine whether or not the discharge or reduction is justified.

2.

In the case of employees in all other supervisory and all other managerial classes, the commission may not consider any charges made by the appointing power unless they are contained in the letter of discharge or reduction, nor any response or affirmative defense made by the employee unless the employee has previously provided them to the appointing power for consideration, unless such affirmative defenses were not then known and could not reasonably have been expected to be known by the appointing power or the employee. The commission shall determine whether or not the discharge or reduction is justified.

(Ord. 88-0020 § 1 (part), 1988.)

18.03 - Hearing on reasons for discharge or reduction.

If the permanent employee to be discharged or reduced pursuant to Rule 18.02 so requests, the commission shall proceed in accordance with Rule 4.06. A public hearing pursuant to Rule 4 shall be held by the commission or by the hearing board.

(Ord. 88-0020 § 1 (part), 1988.)

18.031 - Discipline.

Failure of an employee to perform his or her assigned duties so as to meet fully explicitly stated or implied standards of performance may constitute adequate grounds for discharge, reduction or suspension. Where appropriate, such grounds may include, but are not limited to, qualitative as well as quantitative elements of performance, such as failure to exercise sound judgment, failure to report information accurately and completely, failure to deal effectively with the public, and failure to make productive use of human, financial and other assigned resources. Grounds for discharge, reduction or suspension may also include any behavior or pattern of behavior which negatively affects an employee's productivity, or which is unbecoming a county employee; or any behavior or condition which impairs an employee's qualifications for his or her position or for continued county employment.

(Ord. 88-0020 § 1 (part), 1988.)

18.04 - Insufficient facts.

A.

The commission may, on appeal, find in an appropriate case without a hearing that the specific facts alleged in the letter of discharge or reduction, if true, are not sufficient under all the circumstances to justify the discharge or reduction.

- B. If the commission concludes that the reasons are not sufficient to justify such discharge or reduction, it shall so notify the appointing power concerned. Such notification shall be a bar to any discharge or reduction for the specific reasons which have been presented, and the discharged or reduced employee shall be reinstated retroactively to his/her position as of a date set by the commission. If the commission finds that the employee was without fault or delinquency, the employee shall be reinstated as of the date of discharge or reduction.

(Ord. 88-0020 § 1 (part), 1988.)

Peace Officer Bill of Rights Act

(POBRA)

California Government Code 3304

(a) No public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure.

Nothing in this section shall preclude a head of an agency from ordering a public safety officer to cooperate with other agencies involved in criminal investigations. If an officer fails to comply with such an order, the agency may officially charge him or her with insubordination.

(b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required by his or her employing agency without providing the public safety officer with an opportunity for administrative appeal.

(c) No chief of police may be removed by a public agency, or appointing authority, without providing the chief of police with written notice and the reason or reasons therefor and an opportunity for administrative appeal.

For purposes of this subdivision, the removal of a chief of police by a public agency or appointing authority, for the purpose of implementing the goals or policies, or both, of the public agency or appointing authority, for reasons including, but not limited to, incompatibility of management styles or as a result of a change in administration, shall be sufficient to constitute "reason or reasons."

Nothing in this subdivision shall be construed to create a property interest, where one does not exist by rule or law, in the job of Chief of Police.

(d) (1) Except as provided in this subdivision and subdivision (g), no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. This one-year limitation period shall apply only if the act, omission, or other misconduct occurred on or after January 1, 1998. In the event that the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed discipline by a Letter of Intent or Notice of Adverse Action articulating the discipline that year, except as provided in paragraph (2). The public agency shall not be required to impose the discipline within that one-year period.

(2) (A) If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period.

(B) If the public safety officer waives the one-year time period in writing, the time period shall be tolled for the period of time specified in the written waiver.

(C) If the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies.

(D) If the investigation involves more than one employee and requires a reasonable extension.

(E) If the investigation involves an employee who is incapacitated or otherwise unavailable.

(F) If the investigation involves a matter in civil litigation where the public safety officer is named as a party defendant, the one-year time period shall be tolled while that civil action is pending.

(G) If the investigation involves a matter in criminal litigation where the complainant is a criminal defendant, the one-year time period shall be tolled during the period of that defendant's criminal investigation and prosecution.

(H) If the investigation involves an allegation of workers' compensation fraud on the part of the public safety officer.

(e) Where a predisciplinary response or grievance procedure is required or utilized, the time for this response or procedure shall not be governed or limited by this chapter.

(f) If, after investigation and any predisciplinary response or procedure, the public agency decides to impose discipline, the public agency shall notify the public safety officer in writing of its decision to impose discipline, including the date that the discipline will be imposed, within 30 days of its decision, except if the public safety officer is unavailable for discipline.

(g) Notwithstanding the one-year time period specified in subdivision (d), an investigation may be reopened against a public safety officer if both of the following circumstances exist:

(1) Significant new evidence has been discovered that is likely to affect the outcome of the investigation.

(2) One of the following conditions exist:

(A) The evidence could not reasonably have been discovered in the normal course of investigation without resorting to extraordinary measures by the agency.

(B) The evidence resulted from the public safety officer's predisciplinary response or procedure.

(h) For those members listed in subdivision (a) of Section 830.2 of the Penal Code, the 30-day time period provided for in subdivision (f) shall not commence with the service of a preliminary notice of adverse action, should the public agency elect to provide the public safety officer with such a notice. (Amended by Stats. 2009, Ch. 494, Sec. 1. (AB 955) Effective January 1, 2010.)

I. POBRA, who does it apply to?

A. Peace Officers as defined by California Penal Code Sections 830, 830.1, 830.2, 830.3, 830.31 et. seq.

1. Deputy Sheriffs

2. Sworn Peace Officers employed in that capacity by the county, i.e. Probation Officers

B. The protections of POBRA do not apply to non-sworn peace officers.

II. POBRA provides a detailed series of specific requirements for an employer to investigate and impose discipline upon a sworn peace officer

A. See the code section above if you're interested

B. We generally don't enforce POBRA because it is beyond our jurisdiction.

III. POBRA statute of limitations California Government Code Section 3304d

A. No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct.

B. Exception; Notwithstanding the one-year time period, an investigation may be reopened against a public safety officer if both of the following circumstances exist:

1 Significant new evidence has been discovered that is likely to affect the outcome of the investigation; and

2 One of the following conditions exist:

a. The evidence could not reasonably have been discovered in the normal course of investigation without resorting to extraordinary measures by the agency.

b. The evidence resulted from the public safety officer's pre-disciplinary response or procedure.

The only POBRA issue we certify is a 3304(d) statute of limitations issue, all others are decided by the court. The statute of limitations 3304(d) is certified as a THRESHOLD issue. This means that you are to decide if there was a 3304(d) violation before hearing any evidence on the charges against the employee. If such a violation is found then there is no need to proceed with the case (unless it applies to only one of multiple charges). If there is no violation of 3304(d) then you can proceed to the merits of the case.

If the commission has not certified the issue, you should not consider it. If the issue arises during the course of the proceedings you are to stay the hearing and instruct the parties to go back to the commission to certify the 3304(d) issue.

Some violations of POBRA can be considered to attack the credibility of a witness or other evidence but it cannot be used as a bar to the discipline EXCEPT in the case of 3304(d)



CIVIL SERVICE COMMISSION

COUNTY OF LOS ANGELES

COMMISSIONERS: EVELYN V. MARTINEZ • VANGE FELTON • CAROL FOX • JOHN DONNER • Z. GREG KAHWAJIAN
LAWRENCE D. CROCKER, EXECUTIVE DIRECTOR • STEVE CHENG, HEAD CIVIL SERVICE COMMISSION

April 16, 2014

TO: All Hearing Officers and All Interested Parties

FROM: Lawrence D. Crocker *LDC*
Executive Director

SUBJECT: *Public Safety Officer's Procedural Bill of Rights Act*

Several recent cases heard by the Civil Service Commission (Commission) involving public safety officers has prompted the Commission to clarify its position on the certification of issues for individuals entitled to the protections set forth in the *Public Safety Officer Procedural Bill of Rights Act* (POBR), Government Code Section 3300, *et. seq.* At its regular meeting of April 9, 2014, the Commission heard arguments, considered legal advice, deliberated, and unanimously voted as set forth below.

Pursuant to the provisions of Los Angeles County Civil Rules, Rule 4.03(C):

- (1) To continue the Commission's practice of certifying California Government Code Section 3304(d), *i.e.*, the one year statute of limitations on conducting an investigation and notifying a public safety officer of a proposed discipline, as a threshold issue for Hearing Officers to consider;
- (2) Because the provisions of California Government Code Section 3304(f), *i.e.*, the requirement to notify an officer within 30 days of the decision to impose discipline, does not specifically set forth a bar to the imposition of discipline, any allegations concerning violations will not be certified for hearing by the Commission; and,
- (3) Allegations regarding violations of other provisions of POBR will not be certified for hearing by the Commission. However, while not specifically certified by the Commission, evidence concerning the possible violation(s) of other POBR provisions may be given the appropriate evidentiary weight by a Hearing Officer in recommending a decision on the issues that are certified by the Commission for

hearing. In addition, any rulings by the Hearing Officer on possible violations of POBR **shall not result in the suppression of any evidence at hearing**. The Hearing Officers may reference such concerns in assessing the credibility of witnesses or statements, as well as the weight of the evidence, and shall address those issues in the Discussion section of their reports.

LDC

LOS ANGELES COUNTY CIVIL SERVICE COMMISSION

In the Matter of the Appeal of) Case No. 00-000
)
)
JANE DOE) PROPOSED FINDINGS OF FACT,
Appellant) CONCLUSIONS OF LAW,
) AND RECOMMENDATION
And)
)
LOS ANGELES COUNTY)
PUBLIC WORKS DEPARTMENT)
Respondent)
_____)

APPEARANCES

For the Appellant: John Smith
500 West Temple Street
Los Angeles, CA 90012

For the Respondent: Mary Brown
1234 Main Street
Los Angeles, CA 90013

Hearing Officer: Joe Scott

Petition Granted on: June 1, 2014

Hearing Dates: January 2, March 4, April 6, 20015

I. EXECUTIVE SUMMARY

A. Parties:

- a. Appellant: John Doe
(Employment history attached as Appendix 1)¹
- b. Dept: Dept. of Social Services, Lancaster Office²

B. Issues: On December 1, 2015, the Civil Service Commission certified the following issues:³

- a. Are the allegations contained in the Department's letter of March 26, 2014, true that:
 - 1. Appellant violated Department's Policy #10 that requires all eligibility workers to clock in for work at the beginning and end of each shift?
- b. If any or all the allegations are true, is the discipline appropriate?

C. Summary: The Appellant was suspended for 10 days for failing to clock in at the beginning and at the end of his shift in violation of Department Policy No. 10 and for failing to cooperate in the investigation in violation of Department Policy No. 45. Based on the evidence and testimony presented at the hearing, the hearing officer finds the allegations to be true. However, the Hearing officer finds that the discipline is not appropriate and recommends that the discipline be reduced to 5 days.

¹ It is up to the hearing officer to determine whether the employment history is sufficiently material to their determination that it should be discussed in the Appendix or in the body of the discussion.

² The report should specify the department and any specific office or assignment.

³ The hearing officer's reports should address only the issues that are certified by the Commission. If the Commission has certified additional issues, the issue should be stated in this Section. Additionally, if the issue is a threshold issue or is dispositive of the appeal (i.e., statute of limitations under Police Officer Bill of Rights), that issue should be the first issue stated and addressed in the discussion.

II. DISCUSSION

A. Procedural History:

- a. On July 1, 2014, a letter of Intent to Discharge was sent to the Appellant notifying her of its intent to discharge her from service. A Skelly hearing was held on August 15, 2014. Following the hearing, the Department discharged Appellant effective September 15, 2014.
- b. A hearing was held on January 2, March 4, and April 6, 2015.⁴ A list of Exhibits presented at the hearing is attached as Appendix 2. A list of witnesses that testified at the hearing and a brief summary of their testimony is attached as Appendix 3.

B. Statement of the Facts:

The appellant, Jane Doe, was notified by the Department of Social Services on March 26, 2009, in a Notice of Suspension, that effective April 15, 2009, she would be suspended for 10 days from her position as Eligibility Worker.

C. Allegations:

1. Did the Appellant violate Department's Policy #10? The Department alleges that the Appellant violated Department's Policy #10 which states, in relevant part,

⁴ If the hearing was held more than 6 months after the Petition for Hearing was granted by the Commission, the Report should state the reasons for the delay. For example, The Department requested continuances on September 20, 2014 and November 1, 2014 because the witnesses were not available.

“Eligibility Workers shall clock in for work at the beginning and end of each shift. . .”⁵

The Department presented Exhibits 1, 2 and 3, the time cards dated March 1, 2 and 3. Each of the time cards was signed and dated by the Appellant.

A. Department Policy No. 10 is not clear. Department Policy No. 10 states, in relevant part, ...⁶

2. Did the Appellant violate Department’s Policy #45? The Department alleges that the Appellant violated Department Policy 45 which states, in relevant part, “Employees shall cooperate with investigators in the course of an investigation of misconduct and shall testify truthfully in any inquiry. . . .” Ed Johnson, testifying on behalf of the Department, stated that he conducted the investigation. He stated that he interviewed the Appellant on March 15, 2014.

Appellant testified at the hearing. She denied the allegations or that she had violated the Department’s policies. She also asserted that even if the allegations were found to be true, the discipline was not appropriate.

2. Is the discipline appropriate? The Department alleges that the Appellant violated Department Policy 45 which states, in relevant part, “Employees shall cooperate with investigators in the course of an investigation of misconduct and shall testify truthfully in any inquiry. . . .” Ed Johnson, testifying on behalf of the Department, stated that he conducted the investigation. He stated that he interviewed the Appellant on March 15, 2014.

⁵ The relevant portion of any policy or guideline should be cited in the body of the report and, if appropriate, the entirety of the policy or guideline should be cited in a footnote for context.

⁶ The report should includes headings and subheadings as necessary for organization and clarity of the analysis and discussion.

III. FINDINGS OF FACT⁷

1. The Appellant, Jane Doe, was notified by the Public Works Department on March 26, 2009, in a Notice of Suspension, that effective April 15, 2009, she would be suspended from her position as Eligibility Worker for ten (10) days.
2. The Appellant failed to clock in on seven (7) occasions as required, during January 2009.
3. All Eligibility Workers are required to clock in for work at the beginning and end of each shift per the Department's Policy #10 (Timekeeping).
4. The Appellant signed the Department's Policy Manual #10 (Timekeeping) on January 3, 2005.

IV. CONCLUSIONS OF LAW

1. The Department has met its burden in proving that the allegations contained in its letter of March 26, 2009, are true.
2. The Department met its burden in providing that the discipline is appropriate.

V. RECOMMENDATION⁸

⁷ Please number all factual findings. Findings are what you determined to be the ultimate facts based on the evidence. This section should not be a narrative of what the parties state. What did the evidence prove? You don't need more than approximately two or three sentences for each "finding."

⁸ *The recommendation of whether or not to sustain the Department's discipline should be based on whether or not it is **within** the Department's guidelines/policies/procedures. If you reduce the discipline, please provide a justification based on the issues, including a discussion of mitigating factors in the discussion section.*

The Department did not meet its burden in providing that the Appellant violated #1 in their charging letter therefore, the duly appointed Hearing Officer recommends that the Appellant's 10-day suspension be reduced to a 5-day suspension.

OR

The Department met its burden in providing that the Appellant violated policies #3 and #4. Therefore, it is recommended that the Department be sustained in the discharge.

Appendix 1

Appellant's Employment History

This Appendix should summarize the relevant employment of the Appellant, including

- Years of service and any advancements or demotions
- Any prior discipline
- Relevant Performance Evaluations
- Any commendations or service achievements.

Appendix 2

List of Exhibits Presented at the Hearing

- List of Appellant's Exhibits
- List of Department Exhibits
- If there are any significant evidentiary issues that arose at the hearing involving the exclusion or inclusion of exhibits, the hearing officer may want to summarize the issue here.
- If the Hearing Officer believes it is important that the Commission review a particular document or other evidence, that should be noted in the discussion of issues and in the Appendix.

Appendix 3

Summary of Testimony

- If the Hearing Officer considers the witness' testimony to be important in their analysis of the issues and allegations, a summary of the relevant witness testimony, including such things as the background and title of the witness, the years of experience, their role in the decision to discipline or discharge the appellant.
- Any discussion of the relevance or the weight given to the testimony should be discussed in the body of the report.

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

RIVERSIDE COUNTY SHERIFF'S
DEPARTMENT,
Plaintiff and Respondent,

v.

JAN STIGLITZ,
Defendant;

RIVERSIDE SHERIFF'S ASSOCIATION,
Intervenor and Appellant.

E052729

(Super.Ct.No. RIC10004998)

OPINION

RIVERSIDE COUNTY SHERIFF'S
DEPARTMENT,
Plaintiff and Respondent,

v.

JAN STIGLITZ,
Defendant;

KRISTY DRINKWATER,
Real Party in Interest and Appellant.

E052807

(Super.Ct.No. RIC10004998)

APPEAL from the Superior Court of Riverside County. Mac R. Fisher, Judge.

Reversed.

Hayes & Cunningham, Dennis J. Hayes and Adam E. Chaikin for Intervenor and Appellant Riverside Sheriff's Association.

Stone Busailah, Michael P. Stone, Muna Busailah and Travis M. Poteat for Real Party in Interest and Appellant Kristy Drinkwater.

Lackie, Dammeier & McGill and Michael A. Morguess for Peace Officers' Research Association of California Legal Defense Fund as Amicus Curiae on behalf of Intervenor and Appellant Riverside Sheriff's Association and Real Party in Interest and Appellant Kristy Drinkwater.

Silver, Hadden, Silver, Wexler & Levine, Richard A. Levine and Michael Simidjian for Los Angeles Police Protective League as Amicus Curiae on behalf of Intervenor and Appellant Riverside Sheriff's Association and Real Party in Interest and Appellant Kristy Drinkwater.

Ferguson, Praet & Sherman, Jon F. Hamilton, Kimberly A. Wah and Bruce Praet for Plaintiff and Respondent.

Kathleen Bales-Lange, County Counsel (Tulare), and Crystal E. Sullivan, Deputy County Counsel, for California State Association of Counties and California League of Cities as Amici Curiae on behalf of Plaintiff and Respondent.

Jones & Mayer, Martin J. Mayer, Gregory P. Palmer and Krista MacNevin Jee for California State Sheriffs' Association as Amicus Curiae on behalf of Plaintiff and Respondent.

INTRODUCTION

Following the decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), the Legislature enacted Penal Code section 832.7. (See *Brown v. Valverde* (2010) 183 Cal.App.4th 1531, 1538.) That statute provides that, subject to some exceptions not pertinent here, "Peace officer or custodial officer personnel records and records maintained by any state or local agency . . . or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code."¹ (Pen. Code, § 832.7, subd. (a).)

This case presents the question whether the hearing officer in an administrative appeal of the dismissal of a correctional officer who was a nonprobationary employee of the Riverside County Sheriff's Department (Department) has the authority to grant a *Pitchess* motion. We conclude that the hearing officer in this case has the authority to do so, and we reverse the judgment.

PROCEDURAL AND FACTUAL BACKGROUND

¹ We will discuss the statutory *Pitchess* discovery scheme in detail below.

Kristy Drinkwater was terminated from her position as a correctional deputy employed by the Department, for falsifying her time records in order to obtain compensation to which she was not entitled. She appealed her termination pursuant to the terms of the memorandum of understanding (MOU) then in effect between the County of Riverside (County) and the Riverside Sheriffs' Association (RSA), the employee organization which represents employees in the law enforcement unit for purposes of collective bargaining. The law enforcement unit consists of County employees in several classifications, including correctional deputies.

The MOU in effect at the time of Drinkwater's termination provided for a procedure by which correctional deputies could appeal the termination of their employment, as provided for in Government Code section 3304, subdivision (b).² The appeal procedure provides for a hearing before a mutually agreeable hearing officer selected from a list of hearing officers and the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses, to impeach witnesses, and to rebut derogatory evidence. The MOU provides that it is the "duty of any County Officer or employee to attend a hearing and testify upon the written request of either party, or the

² Government Code sections 3300 through 3313 constitute the Public Safety Officers' Procedural Bill of Rights, or POBR. Government Code section 3303, subdivision (b) provides that no adverse employment action may be taken against a public safety officer without giving the officer the opportunity for a hearing. POBR does not apply to correctional officers, who are not public safety officers. (Pen. Code, § 831.5.) However, the MOU, which is a binding contract between the RSA and the County (see *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 337), provides the same protections for correctional deputies.

Hearing Officer, provided reasonable notice is given [to] the department employing the officer or employee. The Employee Relations Division Manager, or designee, shall arrange for the production of any relevant County record. The Hearing Officer is authorized to issue subpoenas.” The hearing officer may “sustain, modify, or rescind an appealed disciplinary action,” and his or her decision is final, subject to the right of the parties to seek judicial review pursuant to Code of Civil Procedure section 1094.5.³ The hearing is a “private proceeding among the County, the employee and the employee organization.” The attendance of any other person is at the hearing officer’s discretion.

Drinkwater asserted that the penalty of termination was disproportionate to her misconduct because other Department employees who had falsified time records had received lesser punishment. She submitted a motion to hearing officer Jan Stiglitz for discovery of disciplinary records of other Department personnel who had been investigated or disciplined for similar misconduct. Stiglitz found that Drinkwater had stated a “plausible scenario” showing good cause for the production of the records, but denied the motion without prejudice because Drinkwater had not identified the employees whose records she sought. Stiglitz held that although Drinkwater was entitled

³ Code of Civil Procedure section 1094.5 provides that administrative mandamus is available to permit a court to review a “final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer.” (Code Civ. Proc., § 1094.5, subd. (a).)

to discovery of the records on a proper showing, the Department was not required to search its records to provide her with the information requested.

In a subsequent renewed motion, Drinkwater identified the employees by name and stated the nature of the misconduct she understood they had committed and the resulting penalties, or absence thereof. However, she sought production only of records which had been redacted to conceal the identities of the employees involved.

The Department opposed the motion on its merits. It acknowledged that Stiglitz had jurisdiction to rule on the motion. On March 15, 2010, Stiglitz found good cause and ordered the Department to produce the requested records for his in camera review. On March 19, 2010, the Department filed its petition for a writ of administrative mandate, seeking to compel Stiglitz to vacate his decision that good cause existed. The petition did not challenge Stiglitz's authority to rule on the motion.

Brown v. Valverde, supra, 183 Cal.App.4th 1531 was decided shortly before the superior court was to rule on the petition. The Department brought the ruling to the trial court's attention and argued, for the first time, that only a judicial officer can rule on a *Pitchess* motion. Following supplemental briefing and further argument, the trial court found, based on *Brown v. Valverde*, that "there is no statutory authorization nor is there authorization pursuant to the [MOU] between [the Department] and [RSA] that would permit [a hearing officer] in a disciplinary hearing to consider *Pitchess* discovery motions." Accordingly, it granted the petition.

RSA, which had not been notified of the writ proceedings, brought motions for a new trial, to set aside and vacate the court's order, and for leave to intervene. The motions were granted, and RSA filed its opposition to the petition. The court again granted the writ and ordered Stiglitz to deny the motion.

RSA and Drinkwater each filed a timely notice of appeal. The two appeals were consolidated.

LEGAL ANALYSIS

1.

THE TRIAL COURT HAD JURISDICTION TO GRANT ADMINISTRATIVE MANDAMUS

A. The Finality Rule Does Not Bar Administrative Mandamus.

Code of Civil Procedure section 1094.5 provides that administrative mandamus is available to permit a court to review a “*final* administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer.” (Code Civ. Proc., § 1094.5, subd. (a), italics added; see *Temescal Water Co. v. Dept. Public Works* (1955) 44 Cal.2d 90, 101; *Keeler v. Superior Court* (1956) 46 Cal.2d 596, 599.) Here, we requested supplemental briefing to address the question whether the order granting the first phase of the *Pitchess* motion is a final order within the meaning of Code of Civil Procedure section 1094.5. We

conclude that although the order is not final, the trial court nevertheless had jurisdiction to review it under the “irreparable harm” exception to the finality rule.

The courts have long recognized that Code of Civil Procedure section 1094.5 permits review only of a final decision on the merits of the entire controversy and does not permit piecemeal review of interim orders and rulings. (*Kumar v. National Medical Enterprises, Inc.* (1990) 218 Cal.App.3d 1050, 1055.) This is a part of the requirement that administrative remedies must be exhausted before the parties may resort to the courts, and is “analogous to the one final judgment rule in judicial proceedings.” (*Alta Loma School Dist. v. San Bernardino County Com. On School Dist. Reorganization* (1981) 124 Cal.App.3d 542, 554-555 [Fourth Dist., Div. Two] (*Alta Loma*)). There are a few exceptions to the finality rule: where the administrative body lacks jurisdiction; where it would be futile to pursue the administrative process to its conclusion; or where irreparable harm would result if judicial intervention is withheld until a final administrative decision is rendered. (*Id.* at p. 555.)

A discovery order is not a final decision on the merits of the controversy. Accordingly, administrative mandamus does not lie at this juncture, unless one of the exceptions applies.

In its supplemental brief, the Department did not directly assert that any of the exceptions identified in *Alta Loma* applies. Rather, it contends that the order is not final for purposes of administrative mandamus because there was no other remedy available to

prevent disclosure of confidential personnel records to Stiglitz for purposes of his in camera review.

The Department relies on *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321. In that case, the California Supreme Court held that in California, in the absence of any remedy at law, traditional mandamus had been expanded “not only to compel the performance of a ministerial act, but also in a proper case for the purpose of reviewing the final acts and decisions of statewide administrative agencies which do not exercise judicial power.” (*Id.* at p. 330.) However, contrary to the Department’s contention, the court held that what is now called administrative mandamus is available only to review *final* acts and decisions of administrative agencies. (*Ibid.*) It did not hold that mandamus is available to review interim orders rendered in an administrative proceeding. Moreover, when the Legislature enacted Code of Civil Procedure section 1094.5, subdivision (a) in 1945, four years after the decision in *Bodinson*, it specified that administrative mandamus is available solely to review final orders and decisions in an adjudicative administrative proceeding. (Stats. 1945, ch. 868, § 1.) Consequently, even if *Bodinson* had held that review of interim orders was available through administrative mandate, it would have been overruled by the enactment of Code of Civil Procedure section 1094.5, subdivision (a), which provides for review of final administrative rulings only. Accordingly, the lack of any other remedy is not an exception to the rule that only final administrative rulings are subject to court review by administrative mandamus.

As part of its argument that administrative mandamus is available to review the order on the *Pitchess* motion because it has no other remedy, the Department contends that judicial intervention was necessary to prevent irreparable harm. It contends that because Stiglitz lacks jurisdiction to rule on a *Pitchess* motion, he also has no authority to review the confidential personnel files he ordered the Department to produce. It states that if it were required to wait to challenge the order for production of confidential personnel records until the controversy was finally resolved, “there would be nothing to protect since the very information sought [to be] protected . . . would be divulged,” at least to Stiglitz.

One of the fundamental purposes underlying the statutory *Pitchess* motion procedure is to protect the affected officer’s right of privacy in his or her personnel records. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83-84 [statutory scheme includes “forceful directive” to consider privacy interests of the officers whose records are sought].) Loss of privacy can be found to constitute irreparable harm. (*Clear Lake Riviera Community Assn. v. Cramer* (2010) 182 Cal.App.4th 459, 473.) Moreover, writ review is generally appropriate “when the petitioner seeks relief from a discovery order which may undermine a privilege or a right of privacy, because appellate remedies are not adequate to remedy the erroneous disclosure of information,” including confidential information sought in a *Pitchess* motion. (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1018-1019.) Consequently, we agree that if a hearing officer in an administrative proceeding lacks the authority to rule on a *Pitchess*

motion at all, then producing confidential personnel files for the hearing officer's review would constitute irreparable harm to the employees whose privacy would be violated. Accordingly, because the hearing officer's authority to rule on a *Pitchess* motion is the issue before us, the irreparable harm exception to the finality rule permits the Department to seek judicial intervention at this juncture.

B. Exhaustion of Administrative Remedies

Drinkwater and RSA assert that because the Department failed to raise the question of Stiglitz's authority to rule on the *Pitchess* motion before filing its petition for administrative mandamus, it did not exhaust its administrative remedies. Consequently, they contend, the trial court lacked jurisdiction to rule on the writ petition.

As a general rule, a court has no jurisdiction to intervene in an administrative matter until the parties have exhausted their administrative remedies by obtaining a final order from the administrative body. Exhaustion requires "a full presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings." [Citation.] "The exhaustion doctrine is principally grounded on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary)." [Citation.] (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609.) Exhaustion is required even if the issue is a pure question of law, as it is in this case. (*NBS Imaging Systems, Inc. v.*

State Bd. of Control (1997) 60 Cal.App.4th 328, 337; *Robinson v. Department of Fair Employment & Housing* (1987) 192 Cal.App.3d 1414, 1417.)

As discussed above, the finality rule is an aspect of the exhaustion requirement. (*Alta Loma, supra*, 124 Cal.App.3d at pp. 554-555.) The same exceptions apply, including irreparable harm: A party is not required to exhaust its administrative remedies if doing so would result in irreparable injury. (*City of San Jose v. Operating Engineers Local Union No. 3, supra*, 49 Cal.4th at p. 609.) This exception to the exhaustion rule has been applied “rarely and only in the clearest of cases. [Citation.]” (*City and County of San Francisco v. International Union of Operating Engineers, Local 39* (2007) 151 Cal.App.4th 938, 948.) However, for the reasons stated above in connection with the finality requirement, the exception applies in this case.⁴

2.

**THE HEARING OFFICER HAD THE AUTHORITY TO RULE ON THE
PITCHESS MOTION**

⁴ The Department contends that the exhaustion requirement was excused because Stiglitz lacked jurisdiction to address the *Pitchess* motion. In this context, jurisdiction does not refer to lack of authority to rule on a *particular issue* which arises in a dispute or proceeding over which the administrative body does have subject matter jurisdiction, which is the issue in this case. (See *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 286-291.) Rather, the lack of jurisdiction exception to both the finality rule and the exhaustion requirement applies only when the administrative body lacks the fundamental authority to resolve the underlying dispute between the parties. (*Alta Loma, supra*, 124 Cal.App.3d at pp. 555-556 [finality rule]; *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1081-1082 [exhaustion of administrative remedies may be excused when a party claims that the agency lacks authority, statutory or otherwise, to resolve the underlying dispute].)

A. Introduction

In its original ruling on the writ petition, the trial court held that a *Pitchess* discovery motion “may be heard only by sworn judicial officers unless there is some express authority which would permit someone other than a sworn judicial officer to consider *Pitchess* discovery motions as indicated in *Brown v. Valverde* (2010) 183 Cal.App.4th 1531.” The court further held that there is no statutory authorization which would permit a hearing officer in a disciplinary hearing to consider *Pitchess* motions and no authority in the parties’ MOU which would permit a hearing officer to hear a *Pitchess* motion. In its final ruling, after having vacated the first ruling to permit RSA to intervene, the court ruled, “In *Brown v. Valverde* (2010) 183 Cal.App.4th 1531, consistent with the ruling [*sic*], the Department’s petition for writ of mandate is granted. The respondent [hearing officer] is directed to reverse his earlier issued order granting [Drinkwater’s] discovery motion and is further directed to deny the motion.”

The phrasing of the trial court’s final ruling is somewhat unclear. However, we understand it to mean that the trial court concluded, based upon *Brown v. Valverde*, *supra*, 183 Cal.App.4th 1531 (hereafter *Brown*), that there is no statutory provision which permits a hearing officer in an administrative arbitration to hear and decide a *Pitchess* motion. This is a question of statutory interpretation which we review independently. (*McMahon v. City of Los Angeles* (2009) 172 Cal.App.4th 1324, 1331.)

On appeal, the parties and amici approach the issues in different ways, but boiled down to essentials, the issues in dispute are (1) whether *Pitchess* discovery is available in

an administrative proceeding, including a disciplinary hearing pursuant to Government Code section 3304, subdivision (b); (2) whether the *Pitchess* statutes require a court, rather than a hearing officer in an administrative hearing, to decide a *Pitchess* motion; (3) whether parties may provide for *Pitchess* discovery contractually, even if the statutory scheme otherwise does not provide for it in a particular context; and (4) whether the MOU in this case grants a hearing officer that authority.⁵

B. The Pitchess Discovery Statutes

In *Pitchess, supra*, 11 Cal.3d 531, “defendant Caesar Echeveria was, along with others, charged with battery against four deputy sheriffs. Echeveria moved for discovery of the deputies’ personnel files, seeking records showing prior complaints against the deputies, in order to establish at trial that he acted in self-defense to their use of excessive force. The superior court granted Echeveria’s motion, and Sheriff Pitchess sought a writ of mandate to quash a subpoena requiring production of the confidential records. The Supreme Court denied the writ, holding that a criminal defendant who is being prosecuted for battery on a peace officer is entitled to discovery of personnel records to show that the officer had a history of using excessive force and that defendant acted in

⁵ Drinkwater also assails the trial court’s ruling that there was insufficient evidence of a past practice allowing *Pitchess* discovery in disciplinary proceedings under the MOU, thus rendering *Pitchess* discovery a term of the contract. What she cites, however, is the trial court’s tentative ruling. Neither the original, superseded order nor the final order granting the writ petition reflects any ruling on the past practices issue. Because we conclude that both the statutory *Pitchess* discovery scheme and the MOU provide the hearing officer in this case the authority to grant *Pitchess* discovery, we need not address any issue pertaining to the parties’ past practices.

self-defense.” (*Brown, supra*, 183 Cal.App.4th at p. 1538, citing *Pitchess*, at pp. 535-537.)

“Following the *Pitchess* decision, allegations surfaced that law enforcement agencies were destroying records to protect the privacy of officers whose personnel files contained potentially damaging information. [Citation.] At the same time concerns were expressed that defendants were abusing *Pitchess* discovery by conducting fishing expeditions into arresting officers’ files. [Citation.] In 1978, the California Legislature addressed these concerns by codifying the ‘privileges and procedures’ of *Pitchess* motions, with the enactment of Evidence Code sections 1043 and 1045 and Penal Code sections 832.7 and 832.8.” (*Brown, supra*, 183 Cal.App.4th at p. 1538, citing *City of Santa Cruz v. Municipal Court, supra*, 49 Cal.3d at p. 81.)

“The Penal Code provisions define ‘personnel records’ (Pen. Code, § 832.8) and provide that such records are ‘confidential’ and subject to discovery only pursuant to the procedures set forth in the Evidence Code. (Pen. Code, § 832.7.)⁶ Evidence Code

⁶ Penal Code section 832.7 provides:

“(a) Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney’s office, or the Attorney General’s office.

“(b) Notwithstanding subdivision (a), a department or agency shall release to the complaining party a copy of his or her own statements at the time the complaint is filed.

“(c) Notwithstanding subdivision (a), a department or agency that employs peace or custodial officers may disseminate data regarding the number, type, or disposition of

[footnote continued on next page]

[footnote continued from previous page]

complaints (sustained, not sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved.

“(d) Notwithstanding subdivision (a), a department or agency that employs peace or custodial officers may release factual information concerning a disciplinary investigation if the officer who is the subject of the disciplinary investigation, or the officer’s agent or representative, publicly makes a statement he or she knows to be false concerning the investigation or the imposition of disciplinary action. Information may not be disclosed by the peace or custodial officer’s employer unless the false statement was published by an established medium of communication, such as television, radio, or a newspaper. Disclosure of factual information by the employing agency pursuant to this subdivision is limited to facts contained in the officer’s personnel file concerning the disciplinary investigation or imposition of disciplinary action that specifically refute the false statements made public by the peace or custodial officer or his or her agent or representative.

“(e)(1) The department or agency shall provide written notification to the complaining party of the disposition of the complaint within 30 days of the disposition.

“(2) The notification described in this subdivision shall not be conclusive or binding or admissible as evidence in any separate or subsequent action or proceeding brought before [a hearing officer], court, or judge of this state or the United States.

“(f) Nothing in this section shall affect the discovery or disclosure of information contained in a peace or custodial officer’s personnel file pursuant to Section 1043 of the Evidence Code.”

Penal Code section 832.8 provides:

“As used in Section 832.7, ‘personnel records’ means any file maintained under that individual’s name by his or her employing agency and containing records relating to any of the following:

“(a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.

“(b) Medical history.

“(c) Election of employee benefits.

“(d) Employee advancement, appraisal, or discipline.

“(e) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.

“(f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.”

sections 1043 and 1045 set out the procedures for discovery in detail.”⁷ (*City of Santa Cruz v. Municipal Court, supra*, 49 Cal.3d at p. 81.)

⁷ Evidence Code section 1043 provides:

“(a) In any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records maintained pursuant to Section 832.5 of the Penal Code or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records. The written notice shall be given at the times prescribed by subdivision (b) of Section 1005 of the Code of Civil Procedure. Upon receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought.

“(b) The motion shall include all of the following:

“(1) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard.

“(2) A description of the type of records or information sought.

“(3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.

“(c) No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section except upon a showing by the moving party of good cause for noncompliance, or upon a waiver of the hearing by the governmental agency identified as having the records.”

Evidence Code section 1046 provides:

“In any case, otherwise authorized by law, in which the party seeking disclosure is alleging excessive force by a peace officer or custodial officer, as defined in Section 831.5 of the Penal Code, in connection with the arrest of that party, or for conduct alleged to have occurred within a jail facility, the motion shall include a copy of the police report setting forth the circumstances under which the party was stopped and arrested, or a copy of the crime report setting forth the circumstances under which the conduct is alleged to have occurred within a jail facility.”

Penal Code section 832.7 does not refer to Evidence Code section 1045. However, that statute provides the procedure for ruling on a *Pitchess* motion:

“(a) Nothing in this article shall be construed to affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of

[footnote continued on next page]

“As statutory schemes go the foregoing is a veritable model of clarity and balance. [Evidence Code s]ection 1043 clearly requires a showing of ‘good cause’ for discovery in two general categories: (1) the ‘materiality’ of the information or records sought to the ‘subject matter involved in the pending litigation,’ and (2) a ‘reasonable belief’ that the

[footnote continued from previous page]

those investigations, concerning an event or transaction in which the peace officer or custodial officer, as defined in Section 831.5 of the Penal Code, participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties, provided that information is relevant to the subject matter involved in the pending litigation.

“(b) In determining relevance, the court shall examine the information in chambers in conformity with Section 915, and shall exclude from disclosure:

“(1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought.

“(2) In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to Section 832.5 of the Penal Code.

“(3) Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit.

“(c) In determining relevance where the issue in litigation concerns the policies or pattern of conduct of the employing agency, the court shall consider whether the information sought may be obtained from other records maintained by the employing agency in the regular course of agency business which would not necessitate the disclosure of individual personnel records.

“(d) Upon motion seasonably made by the governmental agency which has custody or control of the records to be examined or by the officer whose records are sought, and upon good cause showing the necessity thereof, the court may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression.

“(e) The court shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to Section 1043, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law.” (Evid. Code, § 1045.)

governmental agency has the ‘type’ of information or records sought to be disclosed.

([Evid. Code,] § 1043, subd. (b).)

“The relatively low threshold for discovery embodied in [Evidence Code] section 1043 is offset, in turn, by [Evidence Code] section 1045’s protective provisions which: (1) explicitly ‘exclude from disclosure’ certain enumerated categories of information ([Evid. Code,] § 1045, subd. (b)); (2) establish a procedure for in camera inspection by the court prior to any disclosure ([Evid. Code,] § 1045, subd. (b)); and (3) issue a forceful directive to the courts to consider the privacy interests of the officers whose records are sought and take whatever steps ‘justice requires’ to protect the officers from ‘unnecessary annoyance, embarrassment or oppression.’ ([Evid. Code,] § 1045, subs. (c), (d) & (e).)

“The statutory scheme thus carefully balances two directly conflicting interests: the peace officer’s just claim to confidentiality, and the criminal defendant’s¹⁸ equally compelling interest in all information pertinent to his defense. The relatively relaxed

⁸ *City of Santa Cruz v. Municipal Court, supra*, arose in the context of a criminal prosecution. *Pitchess* discovery is not limited to criminal proceedings, however. In *County of Los Angeles v. Superior Court* (1990) 219 Cal.App.3d 1605, the court held that “the Legislature’s use of the term ‘any criminal or civil proceeding’ in Penal Code section 832.7 was intended to apply to any situation, including a personal injury action such as the present case, where a party seeks to discover information contained in a peace officer’s personnel file.” (*Id.* at p. 1610.) Other courts have agreed that the *Pitchess* statutes are “generally applicable” (*City of Los Angeles v. Superior Court* (2003) 111 Cal.App.4th 883, 893 [disapproved of in part in *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 344-345]) and have held that *Pitchess* discovery is available in civil proceedings where it is relevant and not precluded by another statute (see, e.g., *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 397, 399-404 [wrongful death suit stemming from police shooting during investigation of a domestic dispute]; *Slayton v. Superior Court* (2006) 146 Cal.App.4th 55, 59-62 [dissolution of marriage]).

standards for a showing of good cause under [Evidence Code] section 1043, subdivision (b)—‘materiality’ to the subject matter of the pending litigation and a ‘reasonable belief’ that the agency has the type of information sought—insure the production for inspection of all potentially relevant documents. The in camera review procedure and disclosure guidelines set forth in [Evidence Code] section 1045 guarantee, in turn, a balancing of the officer’s privacy interests against the defendant’s need for disclosure.” (*City of Santa Cruz v. Municipal Court, supra*, 49 Cal.3d at pp. 83-84.)

C. Brown Does Not Hold That Pitchess Discovery Is Unavailable in All Administrative Proceedings As a Matter of Law.

As did the trial court, the Department relies on *Brown, supra*, 183 Cal.App.4th 1531 as its authority that *Pitchess* motions are not available in any administrative proceeding as a matter of law. This is not what *Brown* holds, however.

In *Brown*, the issue of the availability of *Pitchess* discovery arose in the context of a Department of Motor Vehicle (DMV) “administrative per se” hearing. An administrative per se hearing is one in which a hearing officer, typically a DMV employee, determines whether a driver’s license must be suspended following an arrest for driving with a blood alcohol level of 0.08 percent or greater. (*Brown, supra*, 183 Cal.App.4th at pp. 1535-1538.) The court expressly addressed only that issue. (*Id.* at p. 1546 [“The issue before us is whether a *Pitchess* motion is available in a DMV administrative per se hearing.”]; see also *id.* at pp. 1547-1559 [entire discussion falls under the subheading “*Pitchess* Discovery Is Not Available in DMV Administrative Per

Se Hearings”].) Moreover, although in the course of deciding the narrow issue presented the court rejected Brown’s contention that *Pitchess* discovery is available in all administrative proceedings, the court ultimately found itself forced to conclude that the scheme does not *foreclose* the use of *Pitchess* motions in all types of administrative proceedings. Rather, because Evidence Code section 1043 directs that a written *Pitchess* motion shall be filed “with the appropriate court or administrative body,” the court held that the Legislature intended *Pitchess* discovery to be available in some types of administrative proceedings. (*Brown, supra*, 183 Cal.App.4th at pp. 1549, 1555.) Consequently, the case does not stand for the proposition that *Pitchess* discovery is not available in any type of administrative proceeding. Rather, it holds that although *Pitchess* discovery is available in *some* administrative proceedings, it is not available in a DMV administrative per se hearing.

The reasoning *Brown* employs to hold that *Pitchess* discovery is not available in a DMV administrative per se hearing does not apply to a Government Code section 3304, subdivision (b) hearing (hereafter sometimes referred to as a section 3304(b) hearing). *Brown* points out, first, that the statutes which govern the DMV administrative per se hearings contain no provision for discovery of law enforcement personnel records. (*Brown, supra*, 183 Cal.App.4th at pp. 1547-1550.) These statutes do not apply to a section 3304(b) hearing.⁹ *Brown* also concluded that *Pitchess* motions may not be

⁹ *Brown* holds that Vehicle Code section 14104.7 “identifies the evidence that a DMV hearing officer is to consider,” and notes that it does not include peace officer personnel records. (*Brown, supra*, 183 Cal.App.4th at p. 1547.) In addition, the court
[footnote continued on next page]

brought in an administrative per se hearing because the arresting officer's personnel records are not relevant to the extremely limited issue to be decided in those hearings. (*Brown*, at pp. 1556-1558.) However, personnel records of other officers may be relevant in a section 3304(b) hearing where, for example, the defense is that the punishment imposed is excessive in comparison with the punishment imposed on other personnel in

[footnote continued from previous page]

holds that Vehicle Code section 14112, subdivision (a) provides that "all matters not covered by division 6, chapter 3, article 3 'shall be governed, as far as applicable, by Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code,' the provisions of the Administrative Procedure Act (APA), governing administrative hearings generally. [Citations.] And Government Code section 11507.6, part of the applicable APA provisions, addresses discovery in administrative hearings, identifying the discovery that a party may obtain from another party and the method by which that discovery may be obtained. . . . [Under Government Code section 11507.6, discovery] does not extend to discoverable matters in the possession of nonparties.' [Citation.]" (*Brown, supra*, 183 Cal.App.4th at pp. 1548-1549.) The court went on to note that Government Code section 11507.6 expressly provides that "[n]othing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential," and that Penal Code section 832.7, subdivision (a) specifically designates peace officer personnel records as confidential. And it "provide[s] the exclusive right to and method of discovery as to any proceeding governed by' the APA provisions. [Citation.]" (*Brown*, at p. 1549.)

The APA applies generally to adjudicatory proceedings of state administrative agencies, such as the DMV. (See 9 Witkin (5th ed. 2008) Cal. Procedure, Admin. Proceedings, § 96, p. 1221; Gov. Code, § 11501, subd. (a) ["This chapter applies to any agency as determined by the statutes relating to that agency."]) The APA does not apply by statute to administrative appeals conducted by a local law enforcement agency pursuant to Government Code section 3304, subdivision (b); on the contrary, Government Code section 3304.5 provides that such an administrative appeal "shall be conducted in conformance with rules and procedures adopted by the local public agency." The MOU between the parties to this case contains provisions for discovery in disciplinary hearings. Those provisions do not require compliance with Government Code section 11507.6, nor, needless to say, with the Vehicle Code.

similar circumstances. While there is “no requirement that charges similar in nature must result in identical penalties” with respect to disciplinary treatment of similarly situated public employees (*Talmo v. Civil Service Com.* (1991) 231 Cal.App.3d 210, 230; accord, *Pegues v. Civil Service Com.* (1998) 67 Cal.App.4th 95, 104-106), disparate treatment is nevertheless a recognized defense that may be raised in a disciplinary hearing in an effort to persuade the agency or the hearing officer that less severe discipline is warranted. (See *Talmo v. Civil Service Com.*, *supra*, at pp. 229-231; *Pegues v. Civil Service Com.*, *supra*, at pp. 104-106.) Public agencies must exercise “judicial discretion,” i.e., “an impartial discretion, guided and controlled in its exercise by fixed legal principles . . . to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.””” (*Harris v. Alcoholic Bev. Etc. Appeals Bd.* (1965) 62 Cal.2d 589, 594-595.) Hence, a penalty which is greatly in excess of the penalty imposed in similar circumstances may constitute an abuse of the disciplinary body’s discretion. For all of these reasons, *Brown* is completely distinguishable from the present case.¹⁰

¹⁰ We have not found any case other than *Brown* which addresses the availability of *Pitchess* discovery in administrative proceedings. The California Supreme Court has held that the *confidentiality* provision of Penal Code section 832.7 applies to peace officer personnel records regardless of the context in which they are sought. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284-1286.) In that case, a newspaper sought to obtain records from a Government Code section 3304(b) hearing via the California Public Records Act. The court held that although Penal Code section 832.7 explicitly provides that peace officer personnel records may not be disclosed in civil or criminal proceedings, except by compliance with Evidence Code sections 1043 and 1046, the purpose of the statute would not be effectuated unless the confidentiality provision is understood to apply in all contexts, not just in criminal or civil proceedings.

[footnote continued on next page]

D. An Administrative Hearing Officer May Rule on a Pitchess Motion Where Pitchess Discovery Is Relevant.

After having concluded that because Evidence Code section 1043 provides that a *Pitchess* motion is to be made in “the appropriate court or administrative body,” *Pitchess* discovery is available in at least some administrative proceedings, the *Brown* court then held, contradictorily, that because Evidence Code section 1045, which sets out the *Pitchess* procedure in detail, refers solely to the powers and duties of courts, the Legislature actually intended that all *Pitchess* motions are to be decided by courts, i.e., by sworn judicial officers and not by administrative hearing officers. (*Brown, supra*, 183 Cal.App.4th at pp. 1550-1552.) Although *Brown* limited its discussion to the issue before it, i.e., DMV administrative per se hearings, the Department adopts its reasoning to argue that the statutory language demonstrates the Legislature’s intention to limit *Pitchess* discovery to court proceedings.

In determining the meaning or application of a statute, a court’s task is to determine the intent of the Legislature. We look first to the statutory language, because it is normally the clearest indication of intention. (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737; *Murphy v. Kenneth Cole*

[footnote continued from previous page]

Accordingly, the court held that peace officer personnel records which are disclosed during administrative proceedings are not subject to discovery by means of the California Public Records Act. (*Copley Press, Inc. v. Superior Court, supra*, at pp. 1284-1286.) (The records sought in that case were personnel records of the officer who was the subject of the disciplinary hearing. The case does not involve a *Pitchess* motion seeking records of other officers as a basis for a defense, as in this case.)

Productions, Inc. (2007) 40 Cal.4th 1094, 1103.) Only if the language is ambiguous, or if a literal reading of the statute would lead to an anomalous result, do we resort to extrinsic aids to attempt to ascertain the Legislature's intent. (*Ibid.*)

Here, there is an ambiguity. Although Evidence Code section 1043, subdivision (a) provides that a *Pitchess* motion is to be filed in "the appropriate court or administrative body," Evidence Code section 1045, which provides the procedure for deciding a *Pitchess* motion, refers only to how a *court* shall proceed upon the filing of a *Pitchess* motion. It provides that the court "shall examine the information in chambers in conformity with Section 915" (Evid. Code, § 1045, subd. (b).) It also directs "the court" to consider various factors in determining relevance (Evid. Code, § 1045, subd. (c)); instructs that "the court may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression" (Evid. Code, § 1045, subd. (d)); and authorizes "the court" to "order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law" (Evid. Code, § 1045, subd. (e)). (See fn. 7, *ante*, for full text of Evid. Code, § 1045.) Furthermore, Evidence Code section 915, which is incorporated in Evidence Code section 1045, subdivision (b), distinguishes between the authority of judges and that of other presiding officers in ruling on privileges.¹¹ The *Brown* court

¹¹ Evidence Code section 915 provides:

"(a) Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division or attorney work product under subdivision (a) of Section 2018.030 of the Code of Civil Procedure in order to rule on the claim of privilege; provided, however, that in any hearing conducted pursuant to

[footnote continued on next page]

found this to be compelling evidence that the Legislature intended courts to have exclusive jurisdiction over *Pitchess* motions. (*Brown, supra*, 183 Cal.App.4th at pp. 1550-1551.) However, *Brown* does not address the following problem: If a *Pitchess* motion can be filed in an administrative proceeding but can be decided only by a sworn judicial officer, how does a party seeking *Pitchess* discovery in an administrative proceeding invoke the jurisdiction of a court to rule on the motion? As the parties concurred at oral argument, the statutory scheme does not provide any mechanism for doing so. This is strong evidence that in spite of the language in Evidence Code section 1045, the Legislature did not intend that *Pitchess* motions may be decided only by courts.

In any event, we cannot simply read the phrase “or administrative body” out of Evidence Code section 1043: “It is a settled axiom of statutory construction that significance should be attributed to every word and phrase of a statute, and a construction

[footnote continued from previous page]

subdivision (c) of Section 1524 of the Penal Code in which a claim of privilege is made and the court determines that there is no other feasible means to rule on the validity of the claim other than to require disclosure, the court shall proceed in accordance with subdivision (b).

“(b) When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) or under Section 1060 (trade secret) or under subdivision (b) of Section 2018.030 of the Code of Civil Procedure (attorney work product) and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither the judge nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.”

making some words surplusage should be avoided.” (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1010.) We see no justification for interpreting Evidence Code section 1043 in such a way as to render the phrase “or administrative body” meaningless.¹²

Moreover, an interpretation of Evidence Code sections 1043 and 1045, which excludes administrative bodies as venues for *Pitchess* motions, conflicts with the due process rights afforded to peace officers in disciplinary hearings by Government Code section 3304(b). In the context of a section 3304(b) hearing, due process requires the opportunity for a full evidentiary hearing. (*Giuffre v. Sparks* (1999) 76 Cal.App.4th 1322, 1329-1331.) Due process also necessarily includes the opportunity to present a

¹² Drinkwater and RSA contend that Penal Code section 832.7, subdivision (c) permits the disclosure sought in this case because Drinkwater specifically asked for records which were redacted to conceal the names of the officers. Penal Code section 832.7, subdivision (c) provides: “Notwithstanding subdivision (a), a department or agency that employs peace or custodial officers may disseminate data regarding the number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved.”

The type of data which may be disseminated pursuant to Penal Code section 832.7, subdivision (c) is not the type of information typically sought in a *Pitchess* motion, and it is not the type of information which would be useful in establishing a defense of disparate treatment. Statistical data stripped of any detail as to the circumstances of the other officers’ transgressions or their prior discipline history or any other circumstances which may be relevant to the reasons that the department or agency imposed specific sanctions on the other officers will almost never be sufficient to permit the conclusion that the officer who seeks the records was truly similarly situated, because the agency has broad discretion to take almost innumerable factors into account in determining an appropriate sanction for a particular officer. (See *Talmo v. Civil Service Com.*, *supra*, 231 Cal.App.3d at pp. 230-231.) It is certainly not sufficient for Drinkwater’s defense to show the number of other officers who were disciplined for falsifying time records and the discipline imposed, with regard for the reasons that a particular sanction was imposed on another officer.

meaningful defense. (*Petrus v. Department of Motor Vehicles* (2011) 194 Cal.App.4th 1240, 1244; see also *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 792-794.) Disparate treatment of similarly situated employees may be an abuse of discretion on the part of a public agency and consequently may provide a basis for rescinding or modifying discipline. (*Pegues v. Civil Service Com.*, *supra*, 67 Cal.App.4th at pp. 104-106; *Talmo v. Civil Service Com.*, *supra*, 231 Cal.App.3d at pp. 229-231; see *Harris v. Alcoholic Bev. Etc. Appeals Bd.*, *supra*, 62 Cal.2d at pp. 594-595.) Accordingly, where that defense is raised in a section 3304(b) hearing, due process mandates that the officer who is subject to discipline must have the opportunity to demonstrate the relevance of the personnel records of other officers. An interpretation of Evidence Code sections 1043 and 1045 which precludes the use of *Pitichess* discovery in section 3304(b) hearings would therefore be unconstitutional. Such an interpretation is to be avoided: “If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. [Citations.] The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers.’ [Citations.]” (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509.)

Next, we disagree with the Department that the history of the *Pitchess* legislation demonstrates that the Legislature did not intend to allow *Pitchess* motions in administrative proceedings. The statutory *Pitchess* scheme was enacted in response to concerns that “police departments across the state were disposing of potentially damaging records to protect the officers’ privacy.” (*City of Los Angeles v. Superior Court, supra*, 111 Cal.App.4th at p. 889.) The “main purpose” behind the legislation was curtailing the practice by some law enforcement agencies of shredding personnel records and curtailing defense discovery abuses which allegedly occurred in the wake of the *Pitchess* decision. (*Ibid.*, citing *San Francisco Police Officers’ Assn. v. Superior Court* (1988) 202 Cal.App.3d 183, 189, 190.) However, as we have discussed elsewhere, regardless of the initial impetus for the enactment of the *Pitchess* statutes, the language of the statute unambiguously reflects the Legislature’s recognition that *Pitchess* discovery may be relevant in a variety of contexts and that it chose to apply *Pitchess* discovery generally, not solely in criminal proceedings. (See fn. 8, *ante.*) Moreover, our review of the legislative history of the *Pitchess* statutes sheds absolutely no additional light on the Legislature’s intentions with regard to the phrase “administrative body.”¹³ Consequently,

¹³ Penal Code section 832.7 and Evidence Code sections 1043 and 1045 were all enacted as part of the same bill. (Sen. Bill No. 1436 (1977-1978 Reg. Sess.)) (Stats. 1978, ch. 630, §§ 1-6, pp. 2081-2083.) Our review of the history of that legislation reveals that the phrase “in the appropriate court or administrative body” was in the bill as originally introduced. The author of the legislation did not comment on his choice to include the phrase “administrative body,” and there is no reference to that phrase in any of the bill analyses or in any of the comments on the bill.

we can only conclude that the Legislature meant what it said, i.e., that a *Pitchess* motion can be made in any appropriate court or administrative proceeding.

The Department also contends that because peace officer personnel records are confidential, they cannot be disclosed in an administrative proceeding. We are not persuaded that protection of the noninvolved officers' privacy interests requires a blanket prohibition on the use of their personnel records in a section 3304(b) hearing, even a nonpublic proceeding as provided for in the MOU in this case.¹⁴ The Legislature devised the *Pitchess* procedure specifically to balance privacy concerns with legitimate discovery needs, and provided that where *Pitchess* materials are relevant, privacy interests must give way to the legitimate interests of parties to litigation. (See *City of Santa Cruz v. Municipal Court*, *supra*, 49 Cal.3d at pp. 83-84.) And, the statutory scheme includes ample protection for officers' legitimate privacy concerns. Evidence Code section 1045, subdivision (d) provides: "Upon motion seasonably made by the governmental agency which has custody or control of the records to be examined or *by the officer whose*

¹⁴ In *San Diego Police Officers Assn. v. City of San Diego Civil Service Com.* (2002) 104 Cal.App.4th 275, on an appeal from a sustained demurrer, the Court of Appeal held that the employee organizations had stated a cause of action for declaratory relief under Penal Code section 832.7, where the organizations alleged that the public agencies had routinely disclosed information from officer personnel files in section 3304(b) hearings which were open to the public, despite objections by the affected officers. (*San Diego Police Officers Assn. v. City of San Diego Civil Service Com.*, *supra*, at pp. 280-281, 287.) Because the issue was not properly before it, the Court of Appeal declined to decide whether all section 3304(b) hearings must be closed to the public. (*Id.* at pp. 287-288.) It also did not decide whether any means existed in a public hearing to protect officers' legitimate privacy concerns short of prohibiting the use of personnel records all together, such as redacting the records to shield the identity of the officers whose records were being used, as Drinkwater requested in this case.

records are sought, and upon good cause showing the necessity thereof, the court may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression.” (Italics added.) Subdivision (e) of that statute provides: “The court shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to Section 1043, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law.” If, as we have concluded, *Pitchess* discovery is available in administrative proceedings where it is relevant, these protections necessarily apply in those proceedings as well as in court proceedings. Moreover, as we have previously held, precisely *because* of the privacy interests involved, administrative mandamus is available to provide judicial review of a hearing officer’s order for production of officer personnel records before the records are actually produced. Because Evidence Code section 1045, subdivision (d) provides that the affected officer may file a motion seeking an order for protection from unnecessary annoyance, embarrassment or oppression, the officer him- or herself may petition for administrative mandamus, if the employing agency declines to do so. This affords an additional layer of protection for the officers’ concerns.

For the same reasons, we also disagree with *Brown*’s conclusion that because administrative hearing officers may not be well qualified to rule on *Pitchess* motions, the Legislature did not intend for *Pitchess* discovery to be available in proceedings not heard by sworn judicial officers. (See *Brown, supra*, 183 Cal.App.4th at p. 1558.) Our

conclusion that administrative mandamus is available to obtain judicial review of a hearing officer's ruling on a *Pitchess* motion *before* the personnel records are produced allays any concern that an administrative hearing officer who is not trained in the law may not be qualified to rule on a request for discovery of confidential materials.

E. Pitchess Discovery Is Available in a Section 3304(b) Hearing, If It Is Relevant.

There is no provision in the Public Safety Officers' Procedural Bill of Rights which permits or prohibits *Pitchess* discovery. On the contrary, Government Code section 3304.5 provides that an administrative appeal under section 3304(b) "shall be conducted in conformance with rules and procedures adopted by the local public agency." The only requirement is that the procedures adopted by the agency must comply with due process. (*Giuffre v. Sparks, supra*, 76 Cal.App.4th at pp. 1329-1331.) As we have discussed above, due process necessarily includes the opportunity to present a meaningful defense. (*Petrus v. Department of Motor Vehicles, supra*, 194 Cal.App.4th at p. 1244; *Dietz v. Meisenheimer & Herron, supra*, 177 Cal.App.4th at pp. 792-794.) Accordingly, if *Pitchess* discovery is relevant to an officer's defense in a section 3304(b) hearing, the officer who is subject to discipline must have the opportunity to demonstrate the relevance of the personnel records of other officers and to obtain the records if they are relevant.

F. The MOU Provides for Pitchess Discovery Where It Is Relevant.

Because we have determined that *Pitchess* discovery is available in a section 3304(b) hearing as a matter of due process where it is relevant to the officer's defense,

we need not address the parties' various contentions as to whether the MOU either expressly or as a matter of past practices provides for *Pitchess* discovery. The MOU provides for a full evidentiary hearing, including the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses, to impeach witnesses, and to rebut derogatory evidence. It also provides that "the Employee Relations Division Manager, or designee, shall arrange for the production of any relevant County record requested by either party," and in the same paragraph empowers the hearing officer to issue subpoenas. In order for the MOU to comport with due process requirements in the context of a section 3304(b) hearing, it must be inferred that where officer personnel records are relevant to the issues raised, this provision in the MOU affords discovery of the relevant records.

3.

REMAND FOR A RULING ON THE MERITS IS NOT REQUIRED

The Departments asks that if we find that *Pitchess* discovery is available in the section 3304(b) proceeding, we remand the cause to the trial court for a ruling on its original contention that Drinkwater did not meet her burden of establishing good cause for an in camera review of the personnel records. RSA responds that the trial court has already ruled that the documents Drinkwater requested were relevant.

Although the trial court stated during the hearing on the writ petition that the records Drinkwater sought are relevant, the court did not actually rule on that issue, relying instead entirely on *Brown, supra*, 183 Cal.App.4th 1531 as the basis for issuing

the writ. After the trial court granted the writ petition on the basis of *Brown*, the Department did nothing to seek a ruling on its original contention that Drinkwater failed to demonstrate good cause for the in camera review. (We presume that it did not seek such a ruling because the trial court had stated that it believed the materials sought were relevant to Drinkwater's defense.) By failing to seek a ruling on its original theory, the Department effectively abandoned that theory in favor of its contention that Stiglitz lacked jurisdiction to decide the motion at all. Having failed to prevail on appeal on the latter theory, the Department may not now return to the trial court to seek a ruling on its original theory.

4.

JUDICIAL NOTICE

The parties have filed three requests for judicial notice.¹⁵ We reserved ruling on all three requests for consideration with the appeal. None of the documents for which judicial notice has been sought is relevant to our resolution of the appeal. Accordingly, all three requests for judicial notice are denied.

¹⁵ On June 30, 2011, Drinkwater requested judicial notice of Stiglitz's curriculum vitae and standing as an attorney; on August 1, 2011, the Department requested judicial notice of a letter it sent to the trial court attached to its proposed order on the writ petition; on August 22, 2011, RSA requested judicial notice of a prior arbitration award allegedly reflecting the Department's past practice of accepting the authority of hearing officers in section 3304(b) hearings to rule on *Pitchess* motions.

DISPOSITION

The order granting the writ petition is reversed, and the trial court is directed to deny the petition.

CERTIFIED FOR PUBLICATION

MCKINSTER
Acting P. J.

We concur:

RICHLI J.

KING J.

convinced that the California procedure governing punitive action fails to satisfy either federal or state due process standards. (Randone v. Appellate Department, supra, 5 Cal. 3d at p. 541.) [15 Cal. 3d 217]

II

[5] Having determined that the procedure used to dismiss petitioner denied him due process of law as guaranteed by both the United States Constitution and the California Constitution, we proceed to examine under the well established standards of review fn. 31 the Board's action taken against petitioner. Petitioner first contends that the Board's findings are not supported by substantial evidence. Specifically he disputes the Board's determination that his absences on March 16 and June 26, 1972, were due to his drinking rather than to illness.

[6] The findings challenged are based upon the testimony of two apparently credible witnesses, Gerald Green and Bernard Moore, who stated that they personally observed petitioner at a bar drinking on the dates in question. With respect to the June 26th incident, petitioner himself testified that he had consumed two martinis at lunch, despite his illness. Clearly this evidence is sufficient to support the Board's findings with respect to the cause of petitioner's absences on these two occasions.

III

Petitioner finally contends that the penalty of dismissal is clearly excessive and disproportionate to his alleged wrong. We agree.

Generally speaking, "[i]n a mandamus proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of its discretion." (Magit v. Board of Medical Examiners (1961) 57 Cal. 2d 74, 87 [17 Cal.Rptr. 488, 366 P.2d 816]; see also Nightingale v. State Personnel Board (1972) 7 Cal. 3d 507, 514-516 [102 Cal.Rptr. 758, 498 P.2d 1006]; Harris v. Alcoholic Bev. etc. Appeals Bd. (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633, 400 P.2d 745]; Martin v. Alcoholic Bev. etc. Appeals Bd. (1961) 55 Cal. 2d 867, 876 [13 Cal.Rptr. 513, 362 P.2d 337].) [7] Nevertheless, while the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, "it does not have absolute and unlimited power. It is bound to exercise legal [15 Cal. 3d 218] discretion, which is, in the circumstances, judicial discretion." (Harris, supra, citing Martin, supra, and Bailey v. Taaffe (1866) 29 Cal. 422, 424.) In considering whether such abuse occurred in the context of public employee discipline, we note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to

result in, "[h]arm to the public service." (Shepherd v. State Personnel Board, supra, 48 Cal. 2d 41, 51; see also Blake v. State Personnel Board (1972) 25 Cal. App. 3d 541, 550-551, 554 [102 Cal.Rptr. 50].) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (Blake, supra, at p. 554.)

[8] Consideration of these principles in the instant case leads us to conclude that the discipline imposed was clearly excessive. The evidence adduced at the hearing and the hearing officer's findings, adopted by the Board, establish that the punitive dismissal was based upon the doctor's conduct in extending his lunch break beyond his allotted one hour on numerous occasions, generally by five to fifteen minutes, and in twice leaving the office for several hours without permission. It is true that these transgressions continued after repeated warnings and admonitions by administrative officials, who made reasonable efforts to accommodate petitioner's needs. It is also noteworthy that petitioner had previously suffered a one-day suspension for similar misconduct.

However, the record is devoid of evidence directly showing how petitioner's minor deviations from the prescribed time schedule adversely affected the public service. fn. 32 To the contrary, the undisputed evidence indicates that he more than made up for the excess lunch time by working through coffee breaks as well as on some evenings and holidays. With perhaps one or two isolated exceptions, fn. 33 it was not shown that his conduct in any way inconvenienced those with whom he worked or prevented him from effectively performing his duties.

Dr. Hale, senior medical consultant and petitioner's immediate supervisor for about 13 months, rated his work as good to superior, compared it favorably with that of other physicians in the office, and described him as efficient, productive, and the region's "right hand man" on ear, nose and throat problems. Two other employees who worked with petitioner testified that he was informative, cooperative, helpful, [15 Cal. 3d 219] extremely thorough and productive. No contrary evidence was presented by or on behalf of the Department of Health Care Services.

In his proposed decision, adopted by the Board, the hearing officer stated: "Appellant is 64 years old, has had a long and honorable medical career and is now handicapped by serious sight and speech difficulties. Also, the Senior Medical Consultant has no complaints about appellant's work. [¶] Consideration of appellant's age, his physical problems, the lack of any apparent affect on his work and sympathy for the man and his family are all persuasive arguments in favor of finding that appellant be given just one more chance." In testifying, petitioner apologized for his conduct and promised to adhere strictly to the rules if given another opportunity to do so.

40 Cal.Rptr.3d 863 (2006)

137 Cal.App.4th 1255

Jesse ZUNIGA, Plaintiff and Appellant,

v.

LOS ANGELES COUNTY CIVIL SERVICE COMMISSION et al., Defendants and Respondents.

No. B179975.

Court of Appeal, Second District, Division Four.

March 27, 2006.

864 *864 Green & Shinee, John S. Birke, Richard A. Shinee and Elizabeth J. Gibbons for Plaintiff and Appellant.

Law Offices of Hausman & Sosa, Jeffrey M. Hausman and Larry D. Stratton, Encino, for Defendants and Respondents County of Los Angeles, Los Angeles County Sheriff's Department and Leroy D. Baca.

No appearance for Respondent Los Angeles County Civil Service Commission.

EPSTEIN, P.J.

This is an appeal from a judgment denying former Los Angeles County Deputy Sheriff Jesse Zuniga's petition for writ of mandate. Zuniga seeks an order directing the Los Angeles County Civil Service Commission (Commission) to vacate its decision sustaining Zuniga's 10-month suspension following his indictment on felony charges, and award him back pay. We find the Commission lacked jurisdiction to hear and decide the appeal because Zuniga resigned from the Los Angeles County Sheriff's Department (Department) before the appeal process was concluded. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Zuniga was charged with grand theft and attempted receipt of stolen property while employed as a Deputy Sheriff in the Department. The charges arose from an alleged bank credit card and ATM scheme involving county employees. Zuniga was suspended from his position without pay pursuant to Los Angeles County Civil Service Commission Rule 18.01(A) (hereafter Civil Service Rules or Rule), which allows the Department to suspend an employee who has been criminally charged or indicted for a period which "may exceed 30 calendar days and continue until, but not after, the expiration of 30 calendar days after the judgment of conviction or the acquittal of the offense charged in the complaint or indictment has become final."

In April 2001, Zuniga requested a hearing before the Commission to challenge the suspension. The hearing was granted and held in abeyance until the criminal proceedings were concluded. Zuniga retired from the Department on February 12, 2002, after 10 months of suspension. The criminal charges against him were dismissed on February 25, 2002. Zuniga claims the charges were dismissed for lack of evidence, but nothing was cited to us that bears this out.

The hearing was held in July 2002 before a hearing officer. Zuniga argued that, as a matter of due process, he was entitled to a full evidentiary hearing on the underlying charges causing his suspension. To justify the suspension, the Department argued that it was required to prove only that charges were filed against
865 Zuniga. *865 The hearing officer concluded that Zuniga was entitled to back pay because the Department failed to prove that the suspension was an appropriate disciplinary measure without presenting evidence on the underlying charges. The hearing officer recommended to the Commission that Zuniga receive full back pay for the suspension period.

The Commission sustained the suspension without pay, finding that the Department met its burden of demonstrating that Zuniga had been charged with two felonies. It found that a nondisciplinary suspension was appropriate while the criminal charges were pending. Zuniga filed a petition for writ of mandate to the superior court, challenging the Department's decision. The trial court denied the petition and issued a statement of decision upholding the Department's findings.

Zuniga filed a timely notice of appeal.

DISCUSSION

Zuniga challenges the trial court's denial of his petition for writ of mandamus, arguing that he is entitled to back pay for the suspension period because the Commission did not prove he had committed the felonies with which he was charged. He claims that the Commission violated his due process rights by imposing the suspension without affording him a full evidentiary hearing. Finding the Commission lacked jurisdiction to adjudicate Zuniga's claim after he resigned from the Department, we do not reach the merits of the argument.

A trial court reviews a petition for writ of mandate challenging the validity of a final administrative decision made after a hearing by inquiring whether the agency: "(1) proceeded in excess of its jurisdiction; (2) afforded the petitioner a fair trial, or (3) abused its discretion. Abuse of discretion is established if (1) the agency did not proceed in the manner required by law, (2) the order or decision is not supported by the findings, or (3) the findings are not supported by the evidence. (Code Civ. Proc., § 1094.5, subs. (a), (b).)" (*Davis v. Civil Service Com.* (1997) 55 Cal.App.4th 677, 686, 64 Cal. Rptr.2d 121.) Where a trial court has independently reviewed an administrative agency's factual findings, we apply the substantial evidence test. (*Ibid.*)

"A civil service commission created by charter has only the special and limited jurisdiction expressly authorized by the charter. [Citation omitted.]" (*Hunter v. Los Angeles County Civil Service Com.* (2002) 102 Cal.App.4th 191, 194, 124 Cal. Rptr.2d 924.) Section 34 of the Los Angeles County Charter provides that the Commission "shall serve as an appellate body in accordance with the provisions of Sections 35(4) and 35(6) of this article and as provided in the Civil Service Rules. [¶] The Commission shall propose and, after a public hearing, adopt and amend rules to govern its own proceedings." Section 35(4) of the Los Angeles County Charter requires the Commission to adopt rules to provide for procedures for appeal of allegations of discrimination. Section 35(6) of the Los Angeles County Charter requires that the rules provide for "Civil Service Commission hearings on appeals of discharges and reductions of permanent employees."

There is no provision in the charter granting the Commission authority to hear a wage claim brought by a former civil servant. The Civil Service Rules allow the Commission to exercise authority over former employees in only a few limited circumstances. Rule 4.01 grants "[a]ny employee or applicant for

866 employment" the right to "petition for a hearing before the commission who is: [¶] A. Adversely affected *866 by any action or decision of the director of personnel concerning which discrimination is alleged as provided in Rule 25; [¶] B. Adversely affected by any action or decision of the commission made without notice to and opportunity for such person to be heard other than a commission decision denying a petition for hearing; [¶] C. Otherwise entitled to a hearing under the Charter or these Rules." The term "[e]mployee" is defined in Rule 2.24 as "any person holding a position in the classified service of the county. It includes officers."

Rule 18.01 allows the county to suspend an employee who has been the subject of a criminal indictment for up to 30 days after a final judgment in the case. A suspended employee may then petition for a hearing pursuant to Rule 4. After the dismissal of criminal charges, the Commission has 30 days to conduct an administrative investigation and determine whether administrative discipline is warranted. (See Rule 18.01(A).)

Zuniga requested a hearing on the suspension during his employment, but resigned before the hearing was held. The Commission does not retain jurisdiction over a former employee in these circumstances. Zuniga incorrectly compares his situation to that of employees who have been wrongfully terminated or suspended, over whom the Commission retains jurisdiction. Rule 18.09 governs resignations. It provides that a resignation may not be withdrawn, and may only be appealed if it was "obtained by duress, fraud, or undue influence." A discharged employee also has the right to request a hearing before the Commission. (Rule 18.02(B).) Zuniga does not claim that he resigned as the result of duress, fraud, or undue influence. Nor was he discharged. There is no provision in the charter or Civil Service Rules giving the Commission authority over an employee who voluntarily resigns without claiming duress, fraud, or undue influence. Without an express grant of such jurisdiction, the Commission lacked authority to investigate the charges and award back pay to Zuniga. (See *Hunter v. Los Angeles County Civil Service Com.*, *supra*, 102 Cal.App.4th at pp. 194-195, 124 Cal. Rptr.2d 924; *Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 824, 284 Cal.Rptr. 839 [administrative agency has only such powers as are expressly conferred upon it by constitution or statute].)

Zuniga contends the Department is barred from raising jurisdiction as a defense because it was not raised in the trial court. While the Department did not use the term "jurisdiction" in its arguments, this concept was argued before the court. In any event, an appellate court may consider lack of jurisdiction even if not raised in the trial court, as it constitutes a pure question of law. (*Inland Empire Health Plan v. Superior Court* (2003) 108 Cal. App.4th 588, 592, 133 Cal.Rptr.2d 735.)

The Department argued to the Commission that it lacked authority to conduct an administrative investigation because Zuniga resigned before it could determine whether he was rightfully suspended. The full record of Commission proceedings was presented to the trial court. Apparently, the court had the issue in mind when it said in its statement of decision that "[d]ue [p]rocess does not require that Petitioner should be rewarded with back pay for retiring before the criminal charges were dismissed, thus precluding the Department from conducting an administrative investigation of Petitioner and possibly imposing administrative discipline."

867 Zuniga also argues that jurisdiction is not at issue because he was employed by the Department at the time he filed the request for a hearing. Zuniga was a county *867 employee at the time he requested the hearing, but his voluntary resignation left the Commission with no authority over the merits of his case. As we have discussed, the Commission has authority only over current employees, except where the rules provide

otherwise. As we also have seen, they do not; Rule 4.01 applies only to those who maintain their employment throughout the administrative process.

We therefore conclude that the trial court acted properly to uphold the Commission's rejection of Zuniga's claim for back pay.

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

We concur: WILLHITE, J., and HASTINGS, J.^[*]

[*] Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Save trees - read court opinions online on Google Scholar.

ORIGIN

1 ANDREA SHERIDAN ORDIN, County Counsel
2 MANUEL A. VALENZUELA, Jr., Assistant County Counsel
3 STACEY S. LEE, Principal Deputy County Counsel
(SBN 180730)
4 648 Kenneth Hahn Hall of Administration
5 500 West Temple Street
6 Los Angeles, California 90012-2713
7 Telephone: (213) 974-0945 · Fax: (213) 626-5578
8
9 Attorneys for County of Los Angeles;
10 Sherriff's Department, Petitioner

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT

10 LOS ANGELES COUNTY SHERIFF'S
11 DEPARTMENT

CASE NO. BS 119 407

12 Petitioner,

WRIT OF MANDATE [^{LD}proposed]

13 v.

14 CIVIL SERVICE COMMISSION OF THE
15 COUNTY OF LOS ANGELES,

16 Respondent.

DEPT: 85
DATE: February 19, 2010
TIME: 9:30 a.m.

17 JENNIFER DRESMAL,

18 Real Party In Interest

19
20 TO: RESPONDENT CIVIL SERVICE COMMISSION OF THE COUNTY OF
21 LOS ANGELES:

22 WHEREAS on February 19, 2010, Judgment having been entered in this action in favor of
23 Petitioner, SHERIFF'S DEPARTMENT, COUNTY OF LOS ANGELES ordering that a Writ of
24 Mandate be issued from this Court:

25 YOU ARE HEREBY COMMANDED immediately upon receipt of this Writ of Mandate
26 to vacate your decision and order of December 10, 2008, in the matter of the Ten (10) Day
27 Suspension, effective December 10, 2008, of JENNIFER DRESMAL, from the position of Deputy
28 Sheriff.

RECEIVED
MAR 24 2010
DEPT 85

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

YOU ARE FURTHER COMMANDED to hold a new hearing on the merits, including Real Party in Interest Jennifer Dresmal's statute of limitations defense and to issue a new decision and to make appropriate factual findings which support that new decision.

YOU ARE ALSO COMMANDED to make and file with this Court a Return to this Writ within ninety (90) days after vacating the December 10, 2008, decision and order, setting forth what you have done to comply.



Attest my hand and the Seal of this Court this: APR 16 2010

JOHN A. CLARK, CLERK

BY *K.W. Kam* K.W. Kam
Deputy

ORIGINAL

1 ANDREA SHERIDAN ORDIN, County Counsel
2 MANUEL A. VALENZUELA, Jr., Assistant County Counsel
3 STACEY S. LEE, Principal Deputy County Counsel
(SBN 180730)
4 648 Kenneth Hahn Hall of Administration
5 500 West Temple Street
6 Los Angeles, California 90012-2713
Telephone: (213) 974-0945 · Fax: (213) 626-5578
7 Attorneys for County of Los Angeles,
8 Sherriff's Department, Petitioner

FILED
Superior Court of California
County of Los Angeles

APR 02 2010

John A. Clarke, Executive Officer/Clerk
By A. Fajardo, Deputy
ANNETTE FAJARDO

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT

11 LOS ANGELES COUNTY SHERIFF'S
12 DEPARTMENT

CASE NO. BS 119 407

13 Petitioner,

~~Proposed~~ JUDGMENT

14 v.

15 CIVIL SERVICE COMMISSION OF THE
16 COUNTY OF LOS ANGELES,

Respondent.

DEPT: 85
DATE: February 19, 2010
TIME: 9:30 a.m.

17 JENNIFER DRESMAL,

18 Real Party In Interest

19
20 The Motion of Petitioner SHERIFF'S DEPARTMENT, COUNTY OF LOS ANGELES,
21 for a Writ of Mandate came on regularly for hearing in Department 85 on February 19, 2010, at
22 9:30 a.m., the Honorable James C. Chalfant, Judge of the Superior Court presiding.

23 Stacey S. Lee, Principal Deputy County Counsel, appeared on behalf of Petitioner
24 SHERIFF'S DEPARTMENT, COUNTY OF LOS ANGELES, and Elizabeth Gibbons of Green &
25 Shinee appeared on behalf of Real Party in Interest JENNIFER DRESMAL. There was no
26 appearance for the Civil Service Commission.

27 After having duly received and considered all evidence, pleadings and arguments in this
28 proceeding, and having examined the administrative record and relevant case precedent, the

RECEIVED
MAR 24 2010
DEPT. 85

1 Petition for Writ of Mandate is granted.

2 THE COURT HEREBY ADJUDGES, ORDERS AND DECREES, as follows:

3 1. A Writ of Mandate shall issue under seal of this Court pursuant to Code of Civil
4 Procedure §1094.6, directing Respondent Civil Service Commission of the County of Los Angeles
5 to vacate the "Order of the Civil Service Commission" dated December 10, 2008 regarding the
6 administrative proceeding entitled *In the Matter of the ten (10) day suspension, effective November*
7 *26, 2006, of Jennifer Dresmal (Case No. 06-478), from the position of Deputy Sheriff, Sheriff's*
8 *Department.*

9 2. Furthermore, Respondent, Los Angeles County Civil Service Commission is
10 directed to hold a new hearing on the merits, including Real Party In Interest's statute of
11 limitations defense;

12 3. Judgment is hereby entered in favor of Petitioner SHERIFF'S DEPARTMENT,
13 COUNTY OF LOS ANGELES and against Real Party in Interest JENNIFER DRESMAL.

14 4. Costs are awarded to Petitioner SHERIFF'S DEPARTMENT against Real Party in
15 Interest JENNIFER DRESMAL in the amount of \$ _____.

16 DATED: 4/2, 2010

James C. Chalfant
JAMES C. CHALFANT, JUDGE

1 PROOF OF SERVICE

2 Case No. BS 119407

3 STATE OF CALIFORNIA, County of Los Angeles:

4 Takashi Kawahara states: I am employed in the County of Los Angeles, State of California, over the age of
5 eighteen years and not a party to the within action. My business address is 648 Kenneth Hahn Hall of Administration,
6 500 West Temple Street, Los Angeles, California 90012-2713

7 That on April 15, 2010 I served the attached

8 **JUDGMENT**

9 upon Interested Party(ies) by placing the original a true copy thereof enclosed in a sealed envelope addressed
10 as follows as stated on the attached service list:

11 Elizabeth Gibbons, Esq.
12 GREEN & SHINEE
13 16055 Ventura Boulevard, Suite 1000
14 Encino, California 91436

15 Lester J. Tolnai, Esq.
16 OFFICE OF THE COUNTY COUNSEL
17 648 Kenneth Hahn Hall of Administration
18 500 W. Temple Street
19 Los Angeles, California 90012

20 By United States mail. I enclosed the documents in a sealed envelope or package addressed to the
21 persons at the addresses on the attached service list (specify one):

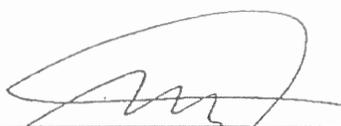
- 22 (1) deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
- 23 (2) placed the envelope for collection and mailing, following ordinary business practices. I am readily
24 familiar with this business's practice for collecting and processing correspondence for mailing. On
25 the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary
26 course of business with the United States Postal Service, in a sealed envelope with postage fully
27 prepaid.

28 I am a resident or employed in the county where the mailing occurred. The envelope or package
was placed in the mail at Los Angeles, California:

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

Executed on April 15, 2010, at Los Angeles, California.

29 Takashi Kawahara
30 (NAME OF DECLARANT)

31 
32 (SIGNATURE OF DECLARANT)

JE

Modified.

Los Angeles County Sheriff's Department v.
Civil Service Commission of the County of
Los Angeles
BS 119407

Tentative decision on
mandate: granted

FILED
Superior Court of California
County of Los Angeles

FEB 19 2010

John A. Clarke, Executive Officer/Clerk
By A. Sajardo, Deputy
ANNETTE SAJARDO

Petitioner Los Angeles County Sheriff's Department ("Department") applies for a writ of mandate overturning the decision by Respondent Civil Service Commission of the County of Los Angeles ("Commission") vacating the suspension of Real Party-in-Interest Jennifer Dresmal ("Dresmal"). The court has read and considered the moving papers, opposition,¹ and reply, and renders the following tentative decision.

A. Statement of the Case

The Department commenced this proceeding on March 4, 2009, seeking to overturn the Commission's decision to vacate Dresmal's 10-day suspension, and the restoration of pay and benefits for that period. The Department's Petition seeks both administrative and traditional mandamus. Traditional mandamus is sought on the ground that the Department was denied a fair hearing due to the hearing officer's decision to rule on a dispositive "summary adjudication" motion based upon a statute of limitations defense without holding a full evidentiary hearing on the merits, which the Commission adopted as its own ruling. The Department seeks administrative mandamus on the ground that the weight of the evidence does not support a finding that the notice of intent to discipline Dresmal was untimely pursuant to the limitations period set forth in Govt. Code section 3304.

The Petition alleges in pertinent part as follows. Real Party Dresmal is a deputy sheriff, assigned to the Department's Industry Sheriff's Station. Dresmal was served with a notice of a 10-day suspension after a criminal investigation brought to light that Dresmal, while on duty at Men's Central Jail on September 18, 2003, witnessed other Sheriff's deputies use force on an inmate and then (1) failed to report witnessing this use of force, (2) failed to provide or seek medical treatment for the inmate for his injuries, and (3) was untruthful to her senior by telling him that "everything is okay" just minutes after the incident with the inmate had occurred.

Dresmal requested a Civil Service hearing, which the Commission granted, defining and certifying the issues to the hearing officer as follows: (1) "Are the allegations contained in the department's letter of November 22, 2006, true? and (2) "If any or all are true, is the discipline appropriate?"

In his Report dated July 28, 2008, the Hearing Officer recommended that the Commission: (1) grant Dresmal's motion for summary judgment, (2) grant the appeal, and (3) order the restoration of pay and benefits for any time Dresmal had lost due to the suspension.

On November 19, 2008, Commission overruled the Department's objections and adopted, as constituting its final decision, the report and recommendations of its Hearing Officer.

B. Standard of Review

CCP section 1094.5 is the administrative mandamus provision which structures the

¹The court considered only the first 15 pages of the 16 page opposition. See CRC 3713(d).

3/27/10

procedure for judicial review of adjudicatory decisions rendered by administrative agencies. Topanga Ass'n for a Scenic Community v. County of Los Angeles, ("Topanga") (1974) 11 Cal.3d 506, 514-15. The pertinent issues under section 1094.5 are (1) whether the respondent has proceed without jurisdiction, (2) whether there was a fair trial, and (3) whether there was a prejudicial abuse of discretion. CCP §1094.5(b). An abuse of discretion is established if the respondent has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. CCP §1094.5(c).

Section 1094.5 does not in its face specify which cases are subject to independent review of evidentiary findings. Fukuda v. City of Angels, (1999) 20 Cal.4th 805, 811. Instead, that issue was left to the courts. An employer's right to discipline its employees is not a vested, fundamental right requiring the trial court to exercise its independent judgment on the evidence. Los Angeles County Dept. of Parks & Recreation v. Civil Service Commission, (1992) 8 Cal.App.4th 273, 279. As a result, the court reviews the evidence under the substantial evidence test. County of Los Angeles v. Civil Service Commission, (1995) 39 Cal.App.4th 620, 633. "Substantial evidence" is relevant evidence that a reasonable mind might accept as adequate to support a conclusion (California Youth Authority v. State Personnel Board, (2002) 104 Cal.App.4th 575, 585) or evidence of ponderable legal significance, which is reasonable in nature, credible and of solid value. Mohilef v. Janovici, (1996) 51 Cal.App.4th 267, 305, n.28. The trial court considers all evidence in the administrative record, including evidence that detracts from evidence supporting the agency's decision. California Youth Authority, supra, 104 Cal.App.4th at 585.

An agency is presumed to have regularly performed its official duties (Ev. Code §664), and the petitioner seeking administrative mandamus therefore has the burden of proof. Steele v. Los Angeles County Civil Service Commission, (1958) 166 Cal.App.2d 129, 137; Afford v. Pierno, (1972) 27 Cal.App.3d 682, 691 ("[T]he burden of proof falls upon the party attacking the administrative decision to demonstrate wherein the proceedings were unfair, in excess of jurisdiction or showed prejudicial abuse of discretion).

The agency's decision at the hearing must be based on the evidence. Board of Medical Quality Assurance v. Superior Court, (1977) 73 Cal.App.3d 860, 862. The hearing officer is only required to issue findings that give enough explanation so that parties may determine whether, and upon what basis, to review the decision. Topanga, supra, 11 Cal.3d at 514-15. Implicit in section 1094.5 is a requirement that the agency set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. Id.

C. Statement of Facts

1. The Investigation

Deputy Dresmal is a thirteen year veteran of the Department. On September 18, 2003, Dresmal was working in the Men Central Jail's administrative segregation section. An incident occurred in which Dresmal saw deputies Christopher Smith, Adrian Dominguez and Jesus Sanchez using force in an attempt to control an inmate. AR 609. Dresmal saw blood dripping on the inmate's face, but did not report the incident or seek medical treatment for him. She informed her superior that "[e]verything is okay." AR 609.

The Department's Internal Criminal Investigations Bureau ("ICIB") began a criminal investigation on the same day. Dresmal was among the persons interviewed. At the outset of the

September 19, 2003 interview, the ICIB investigating sergeant informed Dresmal that he was from ICIB conducting a criminal investigation of county employees, and asked her if she understood the difference between ICIB and Internal Affairs ("IA"). Dresmal stated that she understood. AR 588.

On March 24, 2004, the ICIB referred the case to the District Attorney. A year later, March 25, 2005, the District Attorney declined to prosecute. AR 676. The Department continued the investigation as an administrative disciplinary matter.

2. The Discipline and Appeal

On March 23, 2006, the Department served Dresmal with a letter of intent to suspend her for ten days without pay. As a result, on January 10, 2007, Dresmal was afforded a meeting under Skelly v. State Personnel Board, (1975) 15 Cal.3d 194. At the conclusion of that meeting, the Department notified Dresmal that she would be suspended from her position of deputy sheriff effective November 26, 2006.

Dresmal requested a hearing before the Commission challenging her suspension. AR 427. In her appeal, she argued the charges against her were time barred under the one-year statute of limitations set forth in Govt. Code section 3304 ("section 3304").

On January 10, 2007, Commission granted Dresmal a hearing and appointed Godfrey Isaac as the hearing officer ("Hearing Officer"). AR 421. The Commission defined the issues as follows: (1) Are the allegations contained in the department's letter of November 22, 2006, true? (2) If any or all are true, is the discipline appropriate? AR 419.

3. The Summary Judgment Motion

On November 8, 2007, Dresmal filed a motion with the Hearing Officer styled as a motion for summary adjudication. The motion sought to summarily adjudicate whether Dresmal's suspension should set aside on the ground that the Department's disciplinary action was barred by the one year limitation period of Govt. Code section 3304(d), and no statutory exception to the one year period applied. AR 235-418.

In opposing the motion, the Department argued that the motion was outside the scope of issues defined by the Commission, was not timely served under CCP section 437c, and the one-year limitations period of section 3304(d) was tolled both by the criminal investigation exception of section 3304(d)(1) and the multiple officers exception of section 3304(d)(4)(1). AR 496-97.

The Hearing Officer considered Dresmal's motion without an evidentiary hearing. AR 436-494. At hearing on the motion, the County's counsel conceded that the criminal investigation concerned use of excessive force (AR 459), Dresmal was a witness to the scuffle (AR 463), and there was no criminal investigation of her failure to report the use of force. AR 464.

4. The Hearing Officer's Recommendation

The Hearing Officer's report dated July 28, 2008 concluded that the motion for summary adjudication might have been better titled, it was a dispositive motion. AR 66. The Hearing Officer's report noted that no one suggested that Dresmal was the subject of the criminal investigation. AR 68. He decided that section 3304(d)'s multiple employee exception did not

apply because the investigation was not sufficiently complex. AR 69. He also decided that the criminal investigation exception did apply, but only for the March 23, 2004-March 28, 2005 period in which the District Attorney conducted a criminal investigation. AR 70. After the tolled time was subtracted, the Department's March 23, 2006 disciplinary notice took more than 18 months. This was obviously outside the one year limitation period. Ibid.

Based on his conclusions, the Hearing Officer recommended that the appeal be granted, that the 10-day suspension be set aside and that the Commission order restoration of pay and benefits that Dresmal lost due to the suspension. AR 2.

5. The Commission's Decision

In accordance with Civil Service Rules, the Department filed written objections to the Hearing Officer's recommendation. The only objections concerned tolling for the criminal investigation AR 52-59. On November 19, 2008, the Commission overruled the Department's objections and adopted, as constituting its final decision, the report and recommendation of its Hearing Officer. AR 2. As no hearing on the merits was conducted, no factual findings were issued or considered by the Commission.

D. Analysis²

1. Jurisdiction

The County contends that the Hearing Officer exceeded his scope of authority by ruling on the Motion for Summary Judgment regarding the statute of limitations which was never certified as an issue by the Commission, and the Commission's adoption of the Hearing Officer's decision also was improper and lacked jurisdiction. In addition, the Hearing Officer never ruled on the two issues that were actually certified before him.

a. Scope of Issues Certified

²The Department asks the court to judicially notice (1) the County's Civil Service Procedural Rules, (2) the County's Civil Service Rules. Dresmal also asks the court to judicially notice the Civil Service Rules. The request is granted. Ev. Code §452(b). Dresmal further asks the court to judicially notice a minute order and judgment from another superior court case. While these matters would be subject to judicial notice (Ev. Code §452(d) if relevant, they are not relevant. Dresmal's argument that *collateral estoppel* bars the County from applying the criminal investigation exclusion to section 3304 for non-criminal conduct is untenable because the court cannot judicially notice the facts of that case. The request is denied.

The Department also moves to augment the record with (1) its opposition to the summary judgment motion, (2) a transcript from the November 19, 2008 Commission meeting, and (3) the County's opening trial brief, Exhibit List, and Exhibits 1-15. Dresmal has no objection to items (1) and (2). She objects to item (3) which was never served upon her, although the County's attorney referred to one of the exhibits in argument. The mere fact that counsel prepared these documents for the evidentiary hearing and referred to one of them in his argument does not mean they should be in the record. The motion to augment is granted as to items (1) and (2), and denied as to item (3).

Civil Service Rule ("CSR") 4.03.C provides that "[w]hen granting a hearing, the commission shall state the specific issue(s) in the petition to be heard and will notify all the parties in writing of the issue(s). No other issues shall be heard."

The Commission defined the issues for the Hearing Officer as follows: (1) Are the allegations contained in the department's letter of November 22, 2006, true? (2) If any or all are true, is the discipline appropriate? The Commission did not certify for the Hearing Officer Dresmal's affirmative defense that section 3304(d)'s one year limitations had passed.³

Under CSR 4.03.C, the Hearing Officer could only decide whether the Department's accusation that Dresmal had failed to report was true, and whether the discipline was appropriate. The Hearing Officer apparently had no authority to decide whether section 3304(d)'s limitations period had passed.

Dresmal's opposition cites no authority that a statute of limitations defense need not be certified to the Hearing Officer. At the hearing, Dresmal's counsel purported to do so by arguing that an affirmative defense need not be certified as a specification of issue (CSR 4.03.C) and may be heard without the Commission's certification under CSR 18.01.C.1 AR 445. Dresmal's counsel also stated that "hearing officers have granted statute of limitations cases without certification...." AR 445.

There is no CSR 18.01.C.1. Counsel may have been referring to CSR 18.01.C, which permits the employee's appeal to be made on information not previously provided to the Department unless it was not previously known to the employee. This rule would permit Dresmal to raise a statute of limitations defense not made to the Department, but it does not bear on the issues identified for the Hearing Officer to decide.

b. Summary Judgment by a Hearing Officer

The County further contends that the Commission failed to follow the CSR and was not authorized to permit a motion for summary adjudication. The Hearing Officer wrongly treated the motion as made for summary judgment, not summary adjudication, and the motion failed to follow the notice and separate statement procedure of CCP section 437c.

The pertinent CSR provide as follows. "[T]he commission may, at its discretion, grant a hearing or make its decision on the merits based on a review of written materials submitted by the parties concerned." CSR 4.03 B. "On granting a petition for hearing, the president of the commission shall assign it either to one or more hearing officers." CSR 4.06. At the hearing, the petitioner may "[p]resent such affidavits, exhibits, and other evidence as the commission or hearing board deems pertinent to the inquiry." CSR 4.07.7. The hearing shall be formal, but need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is reliable, regardless of the rules of evidence in civil actions. CSR 4.10.A. Hearsay evidence may be admitted for any purpose, but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil

³Dresmal had raised as one of her eleven affirmative defenses a defense that "the Department violated Government Code section 3304(d)." See AR 431-32. Whether this was sufficient to place the Commission on notice that Dresmal was contending that the one year limitations period had passed is not before the court.

actions. CSR 4.10.B. Oral evidence shall be taken only under oath or affirmation. *Ibid.*

Thus, the Commission decides whether to grant a hearing, and then assigns a hearing officer. The assigned hearing officer conducts the hearing and may decide the case based on affidavits and reliable hearsay.

A civil service commission created by charter has only the special and limited jurisdiction authorized by the charter. *Zuniga v. Los Angeles County Civil Service Commn.*, (2006) 137 Cal.App.4th 1255, 1259. The County's charter provides that the Commission shall adopt rules to govern its own proceedings. *Ibid.* While the Commission could adopt a rule that permits a hearing officer to summarily recommend a decision through summary judgment, it has not done so. The Commission, and its Hearing Officer, must follow the Commission's own rules.

The purpose of summary judgment is to provide a mechanism to cut through the parties' pleadings in order to determine whether trial is in fact necessary to resolve the dispute. *Aguilar v. Atlantic Richfield Co.*, (2001) 25 Cal.4th 826, 843. There is nothing in the CSR expressly permitting a motion for summary adjudication. Dresmal's counsel candidly admitted as much: "[T]here's no specific rule that addresses summary judgment" in the Commission's rules or procedures. AR 447. Pursuant to CSR 4.03.B, only the Commission, not a hearing officer, has jurisdiction to hear a "motion for summary adjudication."

The Hearing Officer can and did hear motions ancillary to the hearing, including a discovery motion. AR 103-31. But the Hearing Officer must conduct a hearing. By its nature, a motion for summary judgment or summary adjudication is not a trial or hearing. A hearing officer can consider affidavits (or declarations) as part of an evidentiary hearing, but a hearing must be conducted. The Hearing Officer did not purport to conduct an evidentiary hearing. Instead, he decided the petition based on an affirmative defense supported by an attorney's hearsay declaration attaching police reports and other evidence. He cannot do so.⁴

The Hearing Officer initially doubted his authority to hear the motion. His decision was based in part on Dresmal's representation that the Hearing Officer had the authority to rule on a motion for summary judgment" under *Alameida v. State Personnel Board*, (2004) 120 Cal.App.4th 46. AR 442. *Alameida* has nothing to do with the Hearing Officer's authority to hear a summary adjudication motion. That case addressed the jurisdictional issue of whether a court has exclusive jurisdiction under Govt. Code section 3309.5 to consider the agency's purported violation of section 3304(d)'s one year statute of limitations, or whether an agency may properly decide the issue.

Dresmal's counsel also acknowledged that there no authority for a hearing officer to hear a summary judgment motion. He stated that the Commission's Executive Director said at a training session that "there was a tendency not to hear [summary judgment] motions...[but] we want to hear those motions because it saves a lot of time...." AR 444-45. Dresmal's counsel admitted that "there's no specific rule that addresses summary judgment," (AR 447), "the commission [and not the Hearing Officer] has traditionally and always heard these rules [*sic.*, probably meant "these motions"]", but that the Commission has jurisdiction to hear the statute of

⁴The court notes that nothing prevented the Hearing Officer from bifurcating the hearing so that the statute of limitations affirmative defense was tried first.

limitations issue and "I don't think you ought to be persuaded by the fact that we titled a document wrong." AR 448.

None of these arguments granted the Hearing Officer to avoid a hearing and rule on a summary adjudication. Assuming *arguendo* that he could do so, he converted the motion into a summary judgment. That is, he did not decide that the statute of limitations had passed and bring the parties in to determine the two issues certified to him. Instead, he effectively granted summary judgment.

Dresmal argues in opposition that if the Commission did not have the authority to rule on Dresmal's motion, then only the court would be able to rule on section 3304(d) violations contrary to Alameida. This is a *non sequitur*. The Commission does have jurisdiction to rule on section 3304(d) violations, but its rules do not delegate that decision to a hearing officer by the procedural vehicle of summary adjudication. The hearing officer can make that decision only after a hearing.

3. The Merits of Summary Judgment

Finally, even if the Hearing Officer could hear the summary adjudication motion without deciding the issues that were certified to him, the motion was wrongly granted because there were disputed issues of fact.⁵

The Department was aware of the incident by September 19, 2003. AR 272-73. Dresmal was notified of the Department's intent to suspend her on March 22, 2006, two years and six months later. Unless an exception applied, the one year limitations period of section 3304(d) passed.

The Department relied on two such exceptions: the criminal investigation exception and the multiple employee exception.

The criminal investigation exception provides: "if the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation has been pending shall toll the one year time period. Govt. Code §3304(d)(2)(A). Under the criminal investigation exception, the disciplined officer's conduct must be the subject of a criminal investigation. Parra v. City of San Francisco, (2006) 144 Cal.App.4th 977, 994 (assault misconduct investigation of off-duty officers included appellant though charges were never filed against him). It is not enough that the officer's conduct is related to the subject of a criminal investigation; it must be part of the investigation. On the other hand, if no criminal charges are filed against the officer, and only disciplinary charges result, that fact does not negate tolling under the criminal investigation exception. Id.

The ICIB conducted an criminal investigation into an inmate assault. It is a question of fact whether Dresmal's conduct was part of that investigation, or she was merely a witness. Dresmal relies on the fact that her name does not appear on the "subject" of the investigation line of a police report, or in the District Attorney's evaluation sheet. The reports also identify only three deputies as involved in the incident. At hearing, the County's attorney also acknowledged that "there was no criminal investigation of failure to report." AR 464.

⁵Contrary to Dresmal's contention in her opposition (Opp. at 6), she bore the burden of proof on her affirmative defense. CSR 4.12.

2/25/18

This is fairly strong evidence that Dresmal's conduct was not part of a criminal investigation. Certainly, that was the conclusion at the investigation's end. The problem is whether it was part of the criminal investigation at the beginning, or during the interim. This is and has always been the County's contention: "[when you start a criminal investigation i don't believe you know where it's going to turn out....So I don't think it's a case where they arrive the day after and knew exactly what the circumstances were and what the course of the investigation was going to be.... AR 464-65.

The Hearing Officer apparently thought that Dresmal's conduct was at issue in an investigation because he tolled the time of the District Attorney's investigation (March 23, 2004 to March 24, 2005), but not the period of the Sheriff's criminal investigation, relying on California Correctional Peace Officers Association v. State of California, (2000) 82 Cal.App.4th 294. This was wrong. The exception applies to internal criminal investigations of employees by a law enforcement agency. Van Winkle v. County of Ventura, (2007) 158 cal.App.4th 492, 500. If the criminal investigation exception applied, the facts presented showed that the Sheriff was conducting a criminal investigation through ICIB and that time should have been tolled also. On the other hand, if the criminal investigation did not apply because no law enforcement agency was conducting a criminal investigation, then no time should have been tolled.

Thus, it is a disputed question of fact whether Dresmal's conduct was ever part of a criminal investigation, and if so, how long her conduct was the subject of the investigation.

The Department also relies on the multiple officer exception to section 3304(d). The multiple officer exception states that the one year provision does not apply "[i]f the investigation involves more than one employee and requires a reasonable extension." Govt. Code §3304(d)(4).

The investigation had at least three subjects. Whether a reasonable extension was necessary is a question of fact. There was no evidence presented on the issue of reasonableness to the Hearing Officer. Nonetheless, he concluded that the multiple officer exception did not apply. AR 70-71.

Dresmal argues that the Department "failed to establish" that it met the reasonableness requirement for multiple officer exception, but she had the initial burden of negating such evidence on summary adjudication. She also argues that there is "no evidence that the Department actively investigated her alleged non-criminal misconduct after October 2003," and there was no need for an extension. But the evidence she relied upon -- police reports -- never addressed the issue of the length of the investigation of her, a need for an extension, or its reasonableness.

E. Conclusion

In sum, Dresmal's motion for summary adjudication was wrongly recommended to be granted by the Hearing Officer, and was wrongly granted by the Commission, because (1) the Commission did not certify the statute of limitations issue for hearing, (2) the CSR do not provide for a hearing officer to determine a matter on summary judgment or summary adjudication, and (3) summary judgment should not have been granted because there were disputed issues of fact. The matter must be remanded to the Commission with directions to hold a new hearing on the merits, including Dresmal's statute of limitations defense.

The County's counsel is ordered to prepare a proposed judgment and writ of mandate,

2/25/10

serve them on counsel for Dresmal for approval as to form, wait 10 days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment and writ along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for March 5, 2010.

Am

2/25/18

Filed 6/21/07

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MARGARET BERUMEN,

Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES
DEPARTMENT OF HEALTH
SERVICES,

Defendant and Respondent.

B189886

(Los Angeles County
Super. Ct. No. BS094512)

APPEAL from a judgment of the Superior Court of Los Angeles County,
David P. Yaffe, Judge. Affirmed.

Posner & Rosen, Jason C. Marsili and Michael Posner for Plaintiff and
Appellant.

Raymond G. Fortner, Jr., County Counsel, Manuel A. Valenzuela, Jr.,
Principal Deputy County Counsel; Law Offices of Hausman & Sosa, Larry D.
Stratton, Vincent C. McGowan and Jeffrey M. Hausman for Defendant and
Respondent.

INTRODUCTION

This appeal raises the question whether the Los Angeles County Civil Service Commission has jurisdiction to entertain a claim that an employee has been subject to a “constructive” or “de facto” demotion. Based upon the pertinent provisions of the Los Angeles County Charter and Civil Service Rules, we conclude that the Commission lacks jurisdiction to do so. We therefore affirm the judgment denying appellant’s petition for a writ of mandate compelling the Commission to hear her claim.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Margaret Berumen earned degrees in science and health care management. The County of Los Angeles Department of Health Services (the Department) hired appellant in 1979. Since then, she has held a number of positions. In 1995, she was appointed to the civil service position of Hospital Administrator I at General Hospital at the Los Angeles County – University of Southern California Medical Center (Medical Center). In that capacity, she reported to David Runke, the Medical Center’s Chief Financial Officer.

In 1998, the Department hired Roberto Rodriguez as Chief Executive Officer and Executive Director of the Medical Center. Rodriguez was charged with the responsibility of addressing several critical issues regarding delivery of health care services. In March 2000, following extensive review of the situation (a review that included meetings with employees such as appellant), Rodriguez restructured the administration of the Medical Center. As a result of the restructuring, appellant lost many of her job assignments and responsibilities. Nonetheless, appellant retained the same job title (Hospital Administrator I), and same salary, and continued to report to the same individual (Runke).

In September 2000, appellant filed a timely claim with the Commission. She alleged that she had suffered a “de facto” demotion when the Medical Center’s operations were reorganized because she had lost significant job responsibilities.¹ The Commission appointed a hearing officer to hear appellant’s case. Following nine days of hearings, the hearing officer rendered the finding of fact that because appellant had not been “reduced in pay, grade or rank, the changes were a reassignment and did not constitute a demotion,” and the conclusion of law that appellant “was not demoted from the position of Hospital Administrator I.”

The Commission amended the hearing officer’s conclusion of law to read “In the absence of a Rule 25 violation [the pertinent civil service rule proscribing invidious employment discrimination, set forth *infra* in fn. 3], the Commission lacks jurisdiction to make a finding of a de facto demotion or to order a remedy for a de facto demotion.”

Appellant filed a petition for writ of mandate in the superior court. (Code Civ. Proc., § 1094.5.) She conceded that she retained her job title, received the same salary, and reported to the same person. Nonetheless, she alleged that she had been constructively demoted because she had “been stripped of the duties and responsibilities she previously performed and continues to perform an increasing number of marginal tasks.” She alleged that the Commission had the inherent authority to decide a claim of a constructive demotion.

The trial court denied appellant’s petition. In a detailed five-page minute order, the trial court explained, in pertinent part:

¹ In addition, appellant raised claims relating to two job evaluations she had received after the reorganization and her failure to obtain other positions for which she had applied. Those claims are not before us on this appeal.

“[Appellant’s claim] has no merit because the civil service rules plainly do not give [her] any right to oppose before the Civil Service Commission a change in the duties that are assigned to her if she is not demoted or suspended or fired and if her compensation is not reduced.

“[She] does not contend that she was deprived of some liberty interest or that she was deprived of a remedy suitable to the denial of such an interest. She does not claim that the change in her duties was retaliatory, or discriminatory or that any disciplinary action was taken against her.

“Transfers and reassignments do not implicate a property interest, and [she] makes no contention that she was denied due process of law.”

The trial court’s judgment recites: “The Court finds *inter alia*, that the Petitioner . . . was not reduced in either rank or grade, and therefore was not demoted within the meaning of the provisions of [the pertinent] Civil Service Rules. . . . The Civil Service Rules do not recognize a direct civil service appeal for a ‘de facto demotion,’ which by itself does not constitute a ‘demotion’ under the Civil Service Rules.”

DISCUSSION

Appellant concedes, as she did below, that she has not suffered any reduction in grade or rank. Instead, she contends: “Consistent with the Commission’s express authority to ascertain whether or not an employee has suffered a lowering in rank or grade, the Commission has the inherent authority to determine whether an employee performs duties at the level of difficulty and level of responsibility commensurate with her stated rank or grade. Consequently, the Commission has the authority to make a finding of whether or not a de facto

demotion has occurred.” She therefore asks us to reverse the judgment and direct the trial court to issue a writ to compel the Commission to decide her claim of a “de facto” demotion² on its merits. She then “expect[s] the Commission to direct the Department to assign her duties and responsibilities commensurate with her civil service classification.”

“A civil service commission created by charter has only the special and limited jurisdiction expressly authorized by the charter. [Citation.]” (*Hunter v. Los Angeles County Civil Service Com.* (2002) 102 Cal.App.4th 191, 194-195.) Section 34 of the County Charter provides that the Commission will serve “as an appellate body” to review decisions about, inter alia, the “discharges and reductions of permanent employees.” (County Charter, Section 35(6).) Section 35 of the Los Angeles County Charter (the County Charter) requires the Board of Supervisors to adopt Rules for a Civil Service System. The Civil Service Rules adopted by the Board of Supervisors are codified in the Los Angeles County Code, title 5, appendix 1. (*Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 626, fn. 5.)

Rule 4.01 sets forth the three limited circumstances in which an employee may seek a hearing before the Commission. Two are not relevant to this case: the employee has been affected by a discriminatory action taken in violation of Rule 25³ or the employee has been adversely affected by a decision of the Commission

² Appellant defines a “de facto” demotion as a situation in which “it becomes clear that an employee holds limited responsibility and performs subordinate duties relative to his or her stated rank or grade.”

³ Rule 25.01(A) provides, in full: “No person in the classified service or seeking admission thereto shall be appointed, reduced or removed, or in any way favored or discriminated against in employment or opportunity for employment because of race, color, religion, sex, physical handicap, medical condition, marital status, age, national

made without notice or opportunity to be heard. The third circumstance is the only one potentially applicable to this case: the employee is “[o]therwise entitled to a hearing under the Charter or these [Civil Service] Rules.” (Rule 4.01(C).) We therefore examine the Charter and the Rules to see if they entitle appellant to a hearing on her claim of a “de facto” demotion.

As noted above, Section 35(6) of the County Charter requires the Civil Service Rules to provide for Commission “hearings on appeals of discharges and reductions of permanent employees.” Rule 2.17 of the Civil Service Rules explains that “‘Reduction’ and ‘demotion’ are synonymous.” Each is defined as “a lowering in rank or grade.” (Rule 2.17 [demotion]; Rule 2.49 [reduction].) Grade “as it pertains to classification, means one salary range.” (Rule 2.27.) Rank “as it pertains to classification, means the level of difficulty and responsibility of a class.” (Rule 2.46.) A permanent employee who has been reduced in grade or compensation (e.g., has been demoted) may appeal that decision to the Commission. (Rule 18.02.) In contrast, Rule 15.01 provides for managerial discretion in assigning employees to different positions within their class. It reads: “The assignment of . . . an employee from one position to another, within the class and department for which the . . . employee has been certified by the director of personnel . . . is *a matter of departmental administration.*” (Italics added.)

origin or citizenship, ancestry, political opinions or affiliations, organizational membership or affiliation, or other non-merit factors, any of which are not substantially related to successful performance of the duties of the position. ‘Non-merit factors’ are those factors that relate exclusively to a personal or social characteristic or trait and are not substantially related to successful performance of the duties of the position. Any person who appeals alleging discrimination based on a non-merit factor must name the specific non-merit factor(s) on which discrimination is alleged to be based. No hearing shall be granted nor evidence heard relative to discrimination based on unspecified non-merit factors.”

The clear language of these Rules refutes appellant's position that the Rules "do not make a distinction between actual and constructive demotion." Demotion is defined as a reduction in grade or rank, nothing more and nothing less. If an employee has been demoted within the meaning of the Rules, an appeal to the Commission may be taken. Appeal on any other ground, such as appellant's claim that she has suffered a "de facto" or "constructive" demotion because she has lost many of her job responsibilities, is simply not authorized by the Civil Service Rules. Consequently, the Commission had no jurisdiction to adjudicate appellant's claim. The trial court therefore properly denied appellant's petition to issue a writ compelling the Commission to decide her claim. (See *Shoemaker v. County of Los Angeles*, *supra*, 37 Cal.App.4th at pp. 626-628 [a doctor who is removed as department head and given a different assignment but suffers no reduction in grade or pay does not have a legitimate claim under Civil Service Rules] and *Weisbuch v. County of Los Angeles* (9th Cir. 1997) 119 F.3d 778, 780-781 [a reassigned managerial or supervisory County employee who keeps the same grade and pay has no property right to his prior position].)

Appellant's contrary arguments are not persuasive.

Appellant first relies upon cases that have held that a reassignment that results in significantly diminished responsibilities can be considered an adverse employment action and therefore actionable. This reliance is misplaced. Those cases dealt with a lawsuit predicated upon a violation of the California Fair Employment Housing Act (Gov. Code, § 12900 et seq.) or equivalent federal law. Plaintiff has never relied upon those statutory schemes, either in her appeal to the Commission or her superior court action. Her sole contention has been that she has suffered a "constructive" or "de facto" demotion and that the Commission has jurisdiction to evaluate that claim.

Appellant next relies upon two Civil Service Rules to support her jurisdictional argument.

First, she cites Rule 1.02. She claims that the rule gives the Commission “the exclusive right . . . to assign the work to be performed by each department,” including the right “to direct the Department to assign her duties and responsibilities commensurate with her civil service classification.” Appellant misreads Rule 1.02,⁴ the complete text of which is set forth below in footnote 4. The rule does not refer to the Commission. Instead, the rule, in substance, empowers the County, through its departments, to make those decisions.

Next, appellant cites Rule 2.17. It provides that “for other than disciplinary reasons an employee may be temporarily assigned the duties of a lower rank to avoid layoff of the employee. Reasonable efforts shall be made to limit the term of such temporary assignment, and in no event shall the assignment exceed one year except through mutual consent of the employee and the appointing authority.” Noting that her duties and responsibilities were taken away in 2000 and that she has not consented to her present work allocation, appellant claims that the Department has violated Rule 2.17. This argument cannot be reached on this appeal for two reasons. First, it does not appear that a complaint about duration of

⁴ Rule 1.02 reads: “These Rules are prescribed for the purpose of carrying out the Charter provisions, of assuring the continuance of the merit system, of promoting efficiency in the dispatch of public business, and of assuring all employees in the classified service of fair and impartial treatment at all times subject to Merit System Standards and appeal rights as set forth in these Rules. To these ends, *the county will exercise its exclusive right to determine the mission of each of its departments, districts, boards and commissions, and the assignment of work to be performed, transfer and reassignment of employees*, the right to hire or rehire, to properly classify employees, to promote or demote employees, to layout and recall employees, to discipline and discharge employees, and *to determine the methods, means and personnel by which the county's operations are to be conducted.*” (Italics added.)

a temporary assignment is the proper subject matter of an appeal to the Commission. (See Rule 4.01, *supra*.) Instead, a complaint would have to be lodged with the director of personnel. (Rule 15.04 [“An employee may appeal an assignment, interdepartmental transfer or change in classification to the director of personnel”].) Second, appellant did not pursue this theory at the administrative hearing. Consequently, its factual predicates were never established. That is, the issue whether appellant had been assigned “the duties of a lower rank to avoid [her] layoff” was not raised and was not litigated. The hearing officer made no findings in that regard.⁵ Appellant has therefore forfeited this claim.⁶

⁵ The portion of the hearing officer’s decision quoted by appellant does not support her implicit claim that the hearing officer reached this issue. The hearing officer simply observed, in what he characterized as a “caveat/warning,” that “although I cannot find that [appellant] was demoted, there will reach a point where the issue regarding her status *may* have to be revisited. I believe that [appellant’s] current situation is the product of reorganization. But in a Department the size of Health Services, which appears to have a fairly steady turnover rate in upper management, full time employment opportunities will undoubtedly come along. If [appellant] is not considered for and given such a position in within the next year, she *might* be able to claim that her continued underutilization constitutes punishment.” (Italics added.) The hearing officer then concluded, in two sentences omitted from appellant’s quote of his decision: “Nothing in this opinion should be read to preclude a claim by [her], should her situation continue, that her status is no longer the simple by-product of reorganization but is, instead, unfounded discipline. However, to succeed in such a claim, [she] will have to show that she did not unreasonably reject suitable offers.”

⁶ In the trial court, appellant raised this theory for the first time in her reply brief. The trial court wrote: “[Rule 2.17] does not entitle her to any relief. There is nothing in that rule that in any way says or implies that [she] must be restored to a position of the stature that she previously held if she does not qualify for such a position, and she does not contend that that was unfairly tested for the alternate positions for which she applied. [See fn. 1, *ante*.] [¶] . . . [She] makes no showing that her employer has not made reasonable efforts to limit the term of her temporary assignment, and she makes no showing that she has refused to accept her present assignment and insisted upon being laid off, as she is permitted to do by Rule 2.17.”

Lastly, appellant argues that if the Commission lacks jurisdiction to adjudicate her claim of “de facto” demotion, she has no remedy. She argues that the Department will be able to “instruct her to clean the toilets, vacuum the carpets, and take out the trash” and she will be powerless to complain “so long as she retain[s] the same title and receive[s] the same wage.” The argument misses the mark. “Commission jurisdiction must be based on express authority in the charter, not on the absence of any other designated forum.” (*Hunter v. Los Angeles County Civil Service Com.*, *supra*, 102 Cal.App.4th at p. 197; see also *Zuniga v. Los Angeles County Civil Service Com.* (2006) 137 Cal.App.4th 1255, 1260 [without an *express* grant of jurisdiction, the Commission lacks authority to investigate a claim and provide a remedy].) Moreover, appellant does have a remedy. As noted earlier, Rule 15.04 provides: “An employee may appeal an assignment, interdepartmental transfer or change in classification to the director of personnel.”⁷ Appellant has never pursued that avenue.⁸

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.

⁷ Pursuant to designation by the Board of Supervisors, the chief administrative officer functions as the director of personnel. (*Shoemaker v. County of Los Angeles*, *supra*, 37 Cal.App.4th at p. 628, fn. 9.)

⁸ The trial court found that appellant made “no showing that she has sought such an appeal or that it has been denied to her.”

Filed 12/18/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

COUNTY OF LOS ANGELES
DEPARTMENT OF HEALTH
SERVICES,

Plaintiff and Respondent,

v.

CIVIL SERVICE COMMISSION OF THE
COUNTY OF LOS ANGELES,

Defendant,

MARGARET LATHAM,

Real Party in Interest and Appellant.

B211625

(Los Angeles County
Super. Ct. No. BS109740)

APPEAL from a judgment of the Superior Court of Los Angeles County,
David P. Yaffe, Judge. Affirmed.

Posner & Rosen, Howard Z. Rosen and Jason C. Marsili for Real Party in Interest
and Appellant.

Hausman & Sosa, Jeffrey M. Hausman and Larry D. Stratton for Plaintiff and
Respondent.

No appearance for Defendant Civil Service Commission of the County of Los
Angeles.

This appeal presents a single question of law for our determination: Where civil service rules vest a civil service commission with jurisdiction over an employee's appeal of her discharge, including an attendant claim for a resulting loss of pay, does the employee's retirement during the pendency of civil service proceedings divest the commission of jurisdiction over the civil service appeal? Taking our lead from the opinion in *Zuniga v. Los Angeles Civil Service Com.* (2006) 137 Cal.App.4th 1255, we answer the question "yes."

FACTUAL & PROCEDURAL BACKGROUND

In 1972, the County of Los Angeles Department of Health Services (the Department) hired Margaret Latham as a staff nurse. By 1998, the Department had promoted Latham through the ranks to an administrative position as an assistant nursing director, where she oversaw the Nursing Resource Center. In that position, Latham had responsibilities over staffing and budgeting matters, collective bargaining, employee personnel issues, nursing practice standards, workload statistics, and performance improvement activities. As required by regulations governing patient care, the Department, under Latham's supervision, operated a patient classification system to assign "acuity" numbers to patients to determine and coordinate required levels of care and staffing.¹

On January 23, 2004, the Department suspended Latham without pay, pending an investigation into allegations of "inappropriate activity in connection with the reporting of patient acuity levels." On February 22, 2004, the Department reassigned Latham to "work at home." In March 2004, the Department informed Latham by letter that it had affirmed its decision to suspend her without pay for the period from January 23, 2004, through February 21, 2004.

¹ For example, the Department's classification system assigned a Level 1 rating to patients who required "minimum routine care," a Level 2 rating to patients who required "average care," a Level 3 rating to patients who required "above average care," and a Level 4 rating to those patients who required "almost constant care."

On July 20, 2004, the Department notified Latham of its intent to discharge her. By letter dated September 14, 2004, the Department notified Latham that she would be discharged effective September 20, 2004.

On a date uncertain, Latham filed an appeal with the Civil Service Commission of the County of Los Angeles (the Commission), challenging two employment actions taken by the Department: (1) the initial decision of January 23, 2004, suspending her without pay for 30 days pending an investigation, and (2) the final decision of September 20, 2004, discharging her from the Department.

In November 2005, a hearing officer assigned by the Commission began receiving evidence on Latham's civil service appeal.

Six months later, on May 16, 2006, *before* the Commission hearing officer issued a decision on Latham's civil service appeal, Latham voluntarily retired. Latham did not advise either the Commission or the Department of her retirement, and, on July 28, and August 31, 2006, the Commission hearing officer concluded the hearing.

On September 28, 2006, the Commission's hearing officer issued an extensive, 27-page report in Latham's civil service appeal. Broadly summarized, the hearing officer's report included a series of factual findings regarding various omissions and errors by Latham, and/or the staff which she oversaw, primarily connected with the Department's classification system. Despite these factual findings, the hearing officer concluded as matters of law that (1) the Department had wrongly suspended Latham for 30 days without pay pending its initial investigation because her errors and omissions had not presented any "emergency circumstances" justifying a pre-investigation suspension; (2) the Department's evidence did not show that discharge was the appropriate discipline for her errors; and (3) the Department's evidence showed that the appropriate discipline for Latham's errors was a 30-day suspension.

As of February 12, 2007, Latham's appeal was still pending before the full Commission. On that date, the Department delivered a letter motion to the Commission, requesting that it "immediately dismiss" Latham's appeal on the ground that the Commission had lost jurisdiction over the matter. According to the Department's letter,

Latham's retirement had recently come to its attention, and her intervening retirement meant that any further proceedings by the Commission would be "meaningless" because Latham could not be reinstated once she had retired.²

On April 11, 2007, the Commission issued its final opinion, rejecting the dismissal request and largely adopting its hearing officer's report. The ultimate decision imposed a reduction in rank, not suspension.

On July 3, 2007, the Department filed in superior court a petition for writ of administrative mandamus challenging the Commission's decision. The Department's petition sought a writ commanding the Commission to vacate its decision on Latham's civil service appeal, and then to dismiss her appeal on the ground that her retirement had divested the Commission of jurisdiction to render any decision in her civil service appeal.

On September 8, 2008, the trial court entered judgment granting the Department's petition for writ of administrative mandamus. On September 11, 2008, the clerk of the superior court issued a writ in accord with the trial court's judgment.

On October 8, 2008, the Commission complied with the writ and issued an order setting aside its April 2007 decision in favor of Latham, and adopted a new final decision dismissing Latham's civil service appeal.

On October 20, 2008, Latham filed a timely notice of appeal from the trial court's judgment.

DISCUSSION

A. Latham's Appeal Is Not Moot

Before addressing the merits of Latham's assignments of error on appeal, we consider the assertion by the Department that her appeal is moot and should be dismissed. According to the Department, the fact that the Commission complied with the trial

² The Department's letter did not explicitly explain when, or under what circumstances, it had "recently" learned of Latham's retirement.

court's writ, and has changed its April 2007 decision, means that Latham's current appeal is moot. The Department is wrong.

None of the legal authorities cited by the Department supports its proposition that no relief would be available to Latham in the event we were to rule that the trial court erred when it granted the Department's writ petition. Those authorities do not hold that, when a trial court's judgment granting a writ petition is reversed on appeal, the trial court is nonetheless precluded by law from recalling a writ that it has issued in accord with the judgment, nor do any of the authorities cited by the Department hold that an administrative agency such as the Commission is precluded by law from vacating an order issued in response to an improvidently issued writ, and reinstating a prior order issued before the writ. This case does not, as the Department suggests, present circumstances where our court would be "unable to fashion an effective remedy" (*In re Pablo D.* (1998) 67 Cal.App.4th 759, 761 [reunifications services already received by parents could not be rescinded].)

B. Latham's Retirement Divested the Civil Service Commission of Jurisdiction

Latham contends the trial court erred in ruling that the Commission lost jurisdiction over Latham's civil service appeal, including her attendant claim for back pay, at the moment she retired. More specifically, Latham argues her election to retire in May 2006 did not eliminate her claims that she should have kept her job, and therefore should have been paid, from September 2004, when the Department discharged her, to May 2006, when she took her retirement. We agree with Latham that the back pay issue remains unresolved, but we also agree with the trial court that, once Latham retired, the Commission was no longer the proper forum — that it lacked jurisdiction — to decide Latham's claim for back pay.

1. The Legal Framework

Latham and the Department agree that her current case is governed by *Zuniga v. Los Angeles County Civil Service Com.* (2006) 137 Cal.App.4th 1255 (*Zuniga*), with each

arguing for a different result based on their respective readings of the case. Inasmuch as *Zuniga* is the starting point for both parties' arguments, we begin with our own analysis of that case.

In *Zuniga*, the Sheriff's Department suspended a deputy sheriff without pay when he was criminally charged with grand theft and attempted receipt of stolen property. (See L.A. County Civil Service Com. Rules, rule 18.01(A) ["an employee may be suspended by the appointing power . . . until . . . the expiration of 30 calendar days after the judgment of conviction or the acquittal of the offense charged in [a criminal] complaint or indictment has become final"].)³ The deputy requested a hearing before the Commission to challenge his suspension without pay. A hearing was granted and held in abeyance until the deputy's criminal case was concluded. The deputy served his suspension for 10 months, during which time his criminal case remained unresolved, and then elected to take retirement. (*Zuniga, supra*, 137 Cal.App.4th at p. 1257.)

Two weeks after the deputy retired, the criminal case against him was dismissed. Five months later, the deputy's civil service appeal of his suspension without pay came before a hearing officer appointed by the Commission. At the conclusion of the hearing, the hearing officer rejected the Sheriff's Department's position that the deputy's suspension had been proper simply because he had been *charged* in a criminal case. Instead the hearing officer accepted the deputy's claim that no discipline was warranted because the Sheriff's Department had not presented evidence supporting the truth of the criminal charges. The hearing officer recommended that the deputy receive full back pay for the suspension period. The Commission rejected the recommendation of its hearing officer, and, instead, sustained the suspension without pay because the Sheriff's Department had met its burden by showing the deputy had been charged with two felonies. It concluded a suspension was appropriate while criminal charges were pending. (*Zuniga, supra*, 137 Cal.App.4th at p. 1258.)

³ All further rule references are to the Los Angeles County Civil Service Commission Rules.

The deputy then filed a petition for writ of administrative mandate, challenging the Commission's decision to sustain his suspension without pay. The trial court denied the deputy's writ petition, and Division Four of our court affirmed the trial court's judgment although for different reasons:

“ ‘A civil service commission created by charter has only the special and limited jurisdiction expressly authorized by the charter. [Citation.]’ [Citation.] Section 34 of the Los Angeles County Charter provides that the Commission ‘shall serve as an appellate body in accordance with the provisions of Sections 35(4) and 35(6) of this article and as provided in the Civil Service Rules. [¶] The Commission shall propose and, after a public hearing, adopt and amend rules to govern its own proceedings.’ Section 35(4) of the Los Angeles County Charter requires the Board of Supervisors to adopt rules to provide for procedures for appeal of allegations of discrimination. [Section 35(6) of the Los Angeles County Charter requires that the rules provide for Civil Service Commission hearings on appeals of discharges and reductions of permanent employees.]

“There is no provision in the charter granting the Commission authority to hear a wage claim brought by a former civil servant. The Civil Service Rules allow the Commission to exercise authority over former employees in only a few limited circumstances. Rule 4.01 grants ‘[a]ny employee . . . ’ the right to ‘petition for a hearing before the commission who is: [¶] A. Adversely affected by any action or decision of the director of personnel concerning which discrimination is alleged as provided in Rule 25; [¶] B. Adversely affected by any action or decision of the commission made without notice to and opportunity for such person to be heard other than a commission decision denying a petition for hearing; [¶] C. Otherwise entitled to a hearing under the Charter or these Rules.’ The term ‘[e]mployee’ is defined in Rule 2.24 as ‘any person holding a position in the classified service of the county. It includes officers.’

“Rule 18.01 allows the county to suspend an employee who has been the subject of a criminal indictment for up to 30 days after a final judgment in the case. A suspended employee may then petition for a hearing pursuant to Rule 4. After the dismissal of criminal charges, the Commission has 30 days to conduct an administrative investigation and determine whether administrative discipline is warranted. (See Rule 18.01(A).)

“Zuniga requested a hearing on the suspension during his employment, but resigned before the hearing was held. The Commission

does not retain jurisdiction over a former employee in these circumstances.”
(*Zuniga, supra*, 137 Cal.App.4th at p. 1259.)

After explaining that neither the Charter nor the Civil Service Rules expressly conferred jurisdiction on the Commission to hear a wage claim by a former employee, Division Four explained why the deputy’s arguments for a different result were not persuasive:

“Zuniga incorrectly compares his situation to that of employees who have been wrongfully terminated or suspended, over whom the Commission retains jurisdiction. Rule 18.09 governs resignations. It provides that a resignation may not be withdrawn, and may only be appealed if it was ‘obtained by duress, fraud, or undue influence.’ A discharged employee also has the right to request a hearing before the Commission. (Rule 18.02(B).) Zuniga does not claim that he resigned as the result of duress, fraud, or undue influence. Nor was he discharged. There is no provision in the charter or Civil Service Rules giving the Commission authority over an employee who voluntarily resigns without claiming duress, fraud, or undue influence. Without an express grant of such jurisdiction, the Commission lacked authority to investigate the charges and award backpay to Zuniga. [Citations.]

“In a petition for rehearing, Zuniga argues that he did not ‘resign,’ but instead ‘retired,’ and that the distinction is significant because the Commission retains jurisdiction in the cases of retirement. We disagree. As we understand the county’s system and others like it (e.g., State Personnel Board and the Public Employees’ Retirement System), the activating event is separation from service, whether by retirement, resignation, death, or discharge. The point at issue is the jurisdiction of the civil service agency — the Commission. Once a person has separated from service, the Commission has no further jurisdiction except in the limited situations specified in the governing constitutional charter or statutory provisions. As we have discussed, none of these apply in this case. It appears that Zuniga applied for and received retirement from the Board of Retirement of the Los Angeles County Employees Retirement Association, thereby effecting a separation from service. This voluntary separation from service constituted a resignation from employment. [Citation.] [¶] . . . [¶]

“The [Sheriff’s] Department argued to the Commission that it [(i.e., the Sheriff’s Department)] lacked authority to conduct an administrative investigation because Zuniga resigned before it could determine whether he was rightfully suspended. . . . Apparently, the [trial] court had the issue in

mind when it said in its statement of decision that ‘[d]ue [p]rocess does not require that Petitioner should be rewarded with back pay for retiring before the criminal charges were dismissed, thus precluding the [Sheriff’s] Department from conducting an administrative investigation of Petitioner and possibly imposing administrative discipline.’

“Zuniga also argues that jurisdiction is not at issue because he was employed by the [Sheriff’s] Department at the time he filed the request for a hearing. Zuniga was a county employee at the time he requested the hearing, but his voluntary resignation left the Commission with no authority over the merits of his case. As we have discussed, the Commission has authority only over current employees, except where the rules provide otherwise. As we also have seen, they do not; Rule 4.01 applies only to those who maintain their employment throughout the administrative process.

“We therefore conclude that the trial court acted properly to uphold the Commission’s rejection of Zuniga’s claim for backpay.” (*Zuniga*, *supra*, 137 Cal.App.4th at pp. 1259-1261.)

2. The *Zuniga* Analysis in the Context of Discharge Followed by Retirement

Citing *Zuniga*, *supra*, 137 Cal.App.4th at page 1260, Latham contends that the “activating event” which triggered the Commission’s jurisdiction was her discharge. Although it appears to us that Latham misunderstands Division Four’s use of the phrase “activating event” in its *Zuniga* opinion, we agree with Latham’s fundamental assertion that the Commission had jurisdiction over her civil service appeal at the time she first contested her discharge. Latham’s case, does not end there. Rather, subsequent events create the following issue for us: Where the Commission *initially* has jurisdiction over a discharged employee’s civil service claim, does the employee’s retirement divest the Commission of jurisdiction?

Latham argues that her subsequent retirement did not “negate the fact that she had been discharged [20] months earlier,” and did not “alter the nature of her separation from employment” with the Department, and that, for these reasons, the Commission retained jurisdiction over her civil service claims. We agree with Latham’s assertion that her retirement had no transformative effect on her discharge to the extent that, if the discharge was unlawful, her retirement did not “cure” the unlawfulness. We see the issue

as more temporal than substantive. *Zuniga* stands for the bright line proposition that, where an employee retires during the pendency of a civil service appeal, her future status as an employee by definition is no longer at issue. The then pending appeal becomes a “wage claim brought by a former civil servant,” and under *Zuniga* the Commission has no jurisdiction over such a wage claim because neither the Charter nor Civil Service Rules vests such jurisdiction. (*Zuniga, supra*, 137 Cal.App.4th at p. 1259.) In short, the Commission only has authority to address matters involving a member of the civil service, and a person who has retired is no longer a member of the civil service.

Latham argues that this case is different from *Zuniga* because the hearing officer took significant testimony before she retired. That is a factual difference that does not change the legal analysis. It is true that testimony was taken here and not in *Zuniga*. But in both cases, the civil service appeal had commenced before the employee retired. If there were a “once jurisdiction vests it vests forever” rule, then *Zuniga* would have come out the other way. Pointedly the *Zuniga* court rejected such a claim, concluding “the Commission does not *retain* jurisdiction over a former employee in these circumstances.” (*Zuniga, supra*, 137 Cal.App.4th at p. 1259; italics added.) At the time of resignation - - whether evidence has been received or not - - the underlying claim essentially becomes one for back pay. As *Zuniga* teaches, “Without an express grant of such jurisdiction, the Commission lacked authority to investigate the charges and award back pay to [the employee].” (*Ibid.*)⁴

⁴ We hold only that Latham’s retirement affected the availability of relief through civil service, and we express no view on whether she has a viable civil claim for back pay which may be asserted in another forum. (See L.A. County Code, § 6.20.100, subd. (B).) As Division Four of our Court explained in *Berumen v. Los Angeles County Dept. of Health Services* (2007) 152 Cal.App.4th 372: “ ‘Commission jurisdiction must be based on express authority in the charter, not on the absence of any other designated forum.’ ” (*Id.* at p. 380, citing *Hunter v. Los Angeles County Civil Service Com.* (2002) 102 Cal.App.4th 191, 197, and *Zuniga, supra*, 137 Cal.App.4th at p. 1260.) “There is no provision in the charter granting the Commission authority to hear a wage claim brought by a former civil servant.” (*Zuniga, supra*, at p. 1259)

DISPOSITION

The trial court's judgment entered September 8, 2008, is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

MOHR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.



1 of 45 DOCUMENTS



Caution
As of: Oct 11, 2013

**BRENT TALMO, Plaintiff and Respondent, v. CIVIL SERVICE COMMISSION
OF LOS ANGELES COUNTY et al., Defendants and Appellants**

Nos. B041326, B046777

Court of Appeal of California, Second Appellate District, Division Seven

*231 Cal. App. 3d 210; 282 Cal. Rptr. 240; 1991 Cal. App. LEXIS 673; 91 Cal. Daily Op.
Service 4604; 91 Daily Journal DAR 7097*

June 14, 1991

PRIOR-HISTORY: Superior Court of Los Angeles County, C657819, Kurt J. Lewin, Judge.

COUNSEL: De Witt W. Clinton, County Counsel, and Stephen R. Morris, Deputy County Counsel, for Defendants and Appellants.

Green & Shinee, Richard A. Shinee and Audrey Heller for Plaintiff and Respondent.

JUDGES: Opinion by Johnson, J., with Lillie, P. J., and Woods (Fred), J., concurring.

OPINION BY: JOHNSON

OPINION

The central issue in this case is whether the civil service commission abused its discretion in upholding the discharge of a deputy sheriff who committed batteries on two prisoners, uttered threats and racial slurs against a co-employee and lied about these actions to his superiors. After hacking our way through a thicket of procedural issues, we conclude the commission acted well within its discretion in discharging Deputy Brent Talmo.

Facts

The commission's findings of fact are uncontested.

Deputy Talmo was discharged by the Los Angeles County Sheriff's Department for violating numerous sections of the sheriff's department's manual of policies and procedures. The letter of discharge described these actions as "bizarre behavior and unprofessional conduct." Some of Talmo's conduct involved destruction of county property, such as pouring dirt in the gas tank of a county vehicle. But the more serious charges against Talmo involved abuse of jail inmates and lying about these acts to his superiors. In one instance, Talmo placed a dead gopher in the pocket of a prisoner. He then falsely denied to a superior officer he had done this act and attempted to get another deputy to lie on his behalf. In another instance, Talmo lifted up the bed of a sleeping prisoner and tipped it over causing the prisoner to fall to the floor face first and suffer a bloody nose. Talmo wrote an injury report on this incident claiming the prisoner had tipped the bed over himself in his sleep. The commission also found Talmo telephoned a jail guard and called him a "fucking snitch" and "nigger."

Talmo previously had been given a two-day suspension for having "inhumanely handcuffed two inmates in a holding cage."

Proceedings Below

Talmo appealed his discharge to the civil service commission. The commission appointed a hearing officer who took evidence pertaining to the charges against

Talmo. The hearing officer found Talmo had engaged in the conduct described above. She recommended, however, the penalty of discharge be reduced to a 90-day suspension.

The commission adopted the hearing officer's findings but not her conclusion. Instead the commission voted to uphold the discharge. The parties were given notice of this proposed decision and an opportunity to comment. Talmo filed objections to some of the evidentiary findings and to the decision to uphold his discharge.

Upon receiving Talmo's objections, the commission, on April 22d, voted to adopt the hearing officer's recommendation of suspension rather than discharge. (We will refer to this as the commission's April 22d decision.) The commission again gave the parties notice of this decision and an opportunity to comment only on the issue of penalty. The sheriff's department objected to the proposed suspension and argued for Talmo's discharge.

On May 20th, the commission reversed itself on the issue of penalty and adopted its original position sustaining Talmo's discharge as the commission's final decision on the matter. (We will refer to this as the commission's May 20th decision.)

Talmo filed a petition for writ of mandate under *Code of Civil Procedure section 1094.5* to obtain court review of the commission's May 20th decision. Talmo contended the commission's April 22d decision, in which it ordered a 90-day suspension, constituted the commission's final decision under its rules and the commission lacked jurisdiction to reopen the matter and issue the May 20th decision reversing the order imposing suspension and imposing discharge instead. Talmo also contended the May 20th decision upholding his discharge was an abuse of discretion because he was denied progressive discipline and treated more harshly than other deputies who had committed similar acts of misconduct.

The trial court found there was substantial evidence to support the commission's findings and that "the accusations found to have been proven are sufficient grounds for discharge." On the issue of the commission's jurisdiction to render its May 20th decision, the court found any objections to the commission's proceedings had been waived. However, the trial court also concluded the record lacked any findings pertaining to Talmo's claims he was denied progressive discipline and punished more harshly than other deputies who had committed similar acts. Therefore, the court granted a judgment ordering a writ of mandate issue directing the commission to make additional findings, through its hearing officer, on the progressive discipline and disparate treatment questions. Talmo appealed from this judgment insofar as it denied him reinstatement based on the commission's lack of

jurisdiction to amend its April 22d decision. (See pt. I of the discussion below.)

On remand to the commission, the hearing officer made findings with respect to Talmo's claim he was denied progressive discipline and punished more harshly than deputies who committed similar acts of misconduct. The hearing officer found the sheriff's department normally follows the principle of progressive discipline when it punishes its deputies. She also found other deputies had engaged in pranks and horseplay similar to that engaged in by Talmo. However, as to the charges of battery, making false reports, lying to supervisors and making threats and racial slurs against a fellow employee, the hearing officer did not find similar conduct on the part of other deputies.

The commission adopted the hearing officer's original and additional findings of fact and sustained Talmo's discharge. Talmo then made a motion in the trial court for a supplemental writ of mandate directing the commission to set aside its decision upholding his discharge on the ground the commission's decision was an abuse of discretion. After briefing and argument, the trial court granted Talmo's motion and ordered a supplemental writ to issue directing the commission to reinstate Talmo subject to a 90-day suspension.

The County of Los Angeles appeals from the order granting the supplemental writ. (See pts. II-IV below.)

For the reasons set forth below, we affirm the trial court's original judgment insofar as it denied Talmo reinstatement based on the commission's lack of jurisdiction to amend its April 22 decision. We reverse the trial court's order after judgment granting a supplemental writ of mandate directing the commission to order Talmo's reinstatement.

Discussion

I. The Commission's "New Proposed Decision" Imposing Suspension Instead of Discharge Was Not a Final Decision of the Commission. Therefore, It Was Subject to Revision.

Talmo contends the commission's April 22 decision that he be suspended for 90 days was final under the commission's own rules and could not be further amended or reversed by the commission. Therefore, the commission's May 20 decision to discharge Talmo was null and void because it exceeded the commission's jurisdiction.

In making this argument, Talmo relies on rule 4.13(E) of the civil service commission (rule 4.13 (E)) which, at the time of these proceedings, provided:

"If either party files objections to the proposed findings and conclusions within the time specified above and

the commission believes that the objections or parts thereof have validity, the commission shall amend the proposed findings and conclusions accordingly; and *as so amended, they constitute the final decision of the commission.*" [Italics added.]

We review, briefly, the relevant procedural facts. The commission's first decision adopted the hearing officer's findings and conclusions except for the conclusion discharge was not appropriate. Instead, the commission sustained the sheriff's action discharging Talmo. The parties were given notice of this proposed decision and were afforded the opportunity to file objections. Talmo filed timely objections to certain of the findings and to the decision to sustain the discharge. The sheriff did not file objections and did not respond to Talmo's objections. On April 22 the commission sustained Talmo's objections on the issue of discharge only and issued a "new proposed decision" adopting the hearing officer's recommendation of suspension rather than discharge. The parties were afforded the opportunity to file objections to the April 22 decision only with respect to the issue of discharge versus suspension. The sheriff objected to suspension and urged the commission to uphold Talmo's discharge. After receiving the sheriff's objections, the commission reversed its position a second time and returned to its original position upholding Talmo's discharge.

Talmo argues the commission's April 22 decision was final as a matter of law because under rule 4.13(E) the commission can amend its proposed findings and conclusions only once "and as so amended, they shall constitute the *final* decision of the commission." (Italics added.) The April 22 decision having become final, the commission lacked jurisdiction to further amend, modify, reconsider or reverse it.

(See fn. 1.) If we accept Talmo's premise, that the April 22 decision was the commission's final decision, then his conclusion, the commission lacked jurisdiction to alter it, is incontestable.¹

¹ We disagree with the trial court's suggestion Talmo waived any objection to the commission's May 20 decision by failing to object to its announced intention to reconsider the April 22 decision on the issue of penalty. Once the commission loses jurisdiction by rendering a final decision it cannot reacquire jurisdiction by the consent of a party. (Cf. *Grant v. Superior Court* (1963) 214 Cal.App.2d 15, 24 [29 Cal.Rptr. 125].)

Furthermore, we find no merit in the commission's claim the April 22d decision did not amend the commission's findings and conclusions

but only its penalty determination. Under rule 4.13(E) the commission's findings and conclusions "shall constitute the final decision of the commission."

It is well settled an administrative agency is bound by its own rules and regulations. (*Bonn v. California State University, Chico* (1979) 88 Cal.App.3d 985, 990 [152 Cal.Rptr. 267].) Under California law, a civil service commission has no inherent power to set aside an order once it is final. (*Heap v. City of Los Angeles* (1936) 6 Cal.2d 405, 407 [57 P.2d 1323].) There being no express authority for the commission to set aside a final order, an attempt to do so is beyond the commission's jurisdiction and void. (*Ibid*; and see *Lindell Co. v. Board of Permit Appeals* (1943) 23 Cal.2d 303, 323 [144 P.2d 4]; *Civil Service Assn. v. Redevelopment Agency* (1985) 166 Cal.App.3d 1222, 1227 [213 Cal.Rptr. 1].)

The leading California case on an agency's jurisdiction to reconsider a final decision is *Heap v. City of Los Angeles, supra*, which, coincidentally, also involved a civil service commission determination. *Heap* was discharged from his employment with the city, and the discharge was upheld on appeal by the city's civil service commission. A month later the commission adopted a motion rescinding its previous order and ordered *Heap* restored to duty. The city cited a provision of its charter which provided an order of the commission "with respect to . . . removal, discharge, or suspension . . . shall be final and conclusive." Based on that provision, the city argued, when the commission acted on the matter it exhausted its jurisdiction and the subsequent resolution restoring *Heap* to duty was void. (*Heap v. City of Los Angeles, supra*, 6 Cal.2d at pp. 406-407.)

The Supreme Court held the commission lacked jurisdiction over the matter after rendering its initial decision and its subsequent resolution purporting to reinstate *Heap* was void. The court stated:

"The jurisdiction of the commission is a special and limited one. (*Peterson v. Civil Service Board*, 67 Cal.App. 70 [227 Pac. 238].) The required procedure was followed, and the question of appellant's discharge was determined by the commission when it adopted the first resolution. Its action sustaining his discharge was "final and conclusive". (*Krohn v. Board of Water & Power Commissioners*, 95 Cal.App.289, 296 [272 Pac. 757].) It had no jurisdiction to retry the question and make a different finding at a later time. The charter gives no such grant of power, and it may not be implied. "A civil service commission has no inherent power after entering a final order dismissing an officer from the service to entertain a motion for new trial or rehearing and review and set aside its prior order." (43 Cor. Jur. 682. See, also, *Cook v. Civil Service Commission*, 160 Cal.

598, 600 [117 Pac. 662].)" (6 Cal.2d at p. 407.) The court based this holding on public policy grounds, reasoning:

"[T]he rule stated above, that a civil service commission has no such power in the absence of express authorization, is sound and practical. If the power were admitted, what procedure would govern its exercise? Within what time would it have to be exercised; how many times could it be exercised? Could a subsequent commission reopen and reconsider an order of a prior commission? And if the commission could reconsider an order sustaining a discharge, could it reconsider an order having the opposite effect, thus retroactively holding a person unfit for his position? These and many other possible questions which might be raised demonstrate how unsafe and impracticable would be the view that a commission might upset its final orders at its pleasure, without limitations of time, or methods of procedure." (6 Cal.2d at pp. 407-408.)

As we noted above, if we accepted Talmo's premise the commission's April 22 decision was a final decision under rule 4.13(E), *Heap* would be controlling and Talmo would be entitled to reinstatement subject to a 90-day suspension. However, we do not accept the premise the April 22d decision was final for the reasons we will explain.

It is clear the commission did not intend to issue a final decision on April 22 imposing a suspension from duty rather than a discharge. The commission's intent was to obtain comment from the sheriff on the issue of suspension in lieu of discharge. The sheriff had not previously commented on suspension of Talmo, presumably because the commission's proposed decision was to uphold the sheriff's action in discharging Talmo. While it might have been prudent for the sheriff to submit written argument in support of the commission's proposed decision to uphold Talmo's discharge, the sheriff had not done so. This may be explained by the fact rule 4.13(E) referred only to filing *objections* to the commission's proposed decision. Because the sheriff obviously had no objection to a proposed decision upholding his discharge of Talmo he was at least discouraged, if not precluded, from filing an argument in support of the commission's proposed action.²

2 Subsequent to the Talmo proceeding, the commission amended rule 4.13 to ensure it receives the views of both parties. Rule 4.13(D) now provides:

"D. If either party files objection to the proposed findings and conclusions within the time specified above and the commission believes that the objections or parts thereof have validity, the

commission shall amend the proposed findings and conclusions accordingly, *and shall notify the parties that the amended findings and conclusions are a new proposed decision. Any party who has not previously filed objections shall have 10 business days from the date of the notice of the new proposed decision to file objections to that decision. The commission shall then consider those objections, and notify the parties of its final decision.*" (Italics added.)

The commission owes a duty to the employee and to the public to make a fair and informed decision on discipline matters. If, as was the case here, the commission believed it needed further information from one of the parties in order to exercise its judgment the commission surely had the authority to obtain such information. The decision as to *when* a case is ready to be decided is a matter of judgment for the commission to determine. (See *Wyatt v. Arnot* (1907) 7 Cal.App. 221, 228 [94 P. 86]; *Engel v. McCloskey* (1979) 92 Cal.App.3d 870, 883 [155 Cal.Rptr. 284].)

Talmo makes much of the fact the commission labeled its April 22 order a "new proposed decision." He reasons that because rule 4.13(E) does not recognize such a thing the order must, by default, be deemed the commission's final order. Courts should avoid mechanical application of a rule which would produce an inequitable result. Such an inequitable result would follow if the sheriff was denied the opportunity to argue why a deputy should be found unfit for service and discharged. If the commission's April 22 order had been labeled "Request for Comment" or "Request for Reply to Proposal to Suspend" or something similar, Talmo would have no grounds to object. To sustain his objection simply because the commission labeled its order "new proposed decision" exalts form over substance.

The case before us does not present the problems alluded to in *Heap* which arise if an agency is allowed to set aside a final decision. (See *Heap v. City of Los Angeles*, *supra*, 6 Cal.2d at pp. 407-408 quoted, *ante*, p. 219.) We do not hold the commission was authorized to set aside its final decision on Talmo's discipline. We hold only that under the facts of this case, the April 22d decision was not the commission's final decision.

For the reasons set forth above, the trial court's judgment is affirmed insofar as it denied a writ of mandate ordering Talmo's reinstatement.

II. The Trial Court's Order Granting a Supplemental Writ of Mandate Is Appealable by the County. The County Counsel May Represent the County in Such an Appeal.

Talmo argues the county's appeal from the order granting a supplemental writ should be dismissed because the county lacks standing to appeal. He further argues county counsel cannot represent the county in its appeal because such representation would constitute a conflict of interest with the civil service commission. Finally, he argues that having failed to appeal the initial judgment in this matter the county is barred by estoppel or *res judicata* from contesting the trial court's order granting a supplemental writ. None of these arguments have merit.

Again, we review the relevant procedural facts.

Following the commission's May 20 order affirming Talmo's discharge, Talmo filed a petition for administrative mandamus under *Code of Civil Procedure section 1094.5*. The commission and the county were both named as respondents. The petition alleged the commission abused its discretion in sustaining his discharge because it failed to proceed in the manner required by law; the decision was not supported by the findings; the findings were not supported by substantial evidence; and the penalty of either suspension or discharge was disproportionately harsh and excessive. The commission and the county filed a joint answer to the petition. After briefing and oral argument the trial court issued a statement of decision followed by a judgment and peremptory writ of mandate. The writ ordered the commission to set aside its decision sustaining Talmo's discharge and remanded the matter to the commission directing it "to instruct your Hearing Officer to make further findings of fact, consistent with the Court's Statement of Decision dated December 5, 1988, on the following issues:

"1. Was conduct similar to that perpetrated by Petitioner perpetrated, detected and tolerated as to other deputies at the Honor Ranch?

"2. Was Petitioner subjected to disparate treatment by being denied progressive discipline which was provided to other similarly situated deputies?

"3. Was the discipline imposed upon Petitioner herein appropriate in light of the treatment afforded other employees who engaged in similar conduct, or was it disparate?

"The hearing officer may, if she deems it appropriate, conduct further hearings to take evidence to permit her to make these findings; if she is satisfied with the state of the record, she may simply make the required additional findings based upon existing evidence."

In its statement of decision, the trial court explained the reasoning behind the writ. The court agreed with Talmo's contention the commission had acted in excess of its jurisdiction in issuing the April 22 "new proposed decision" but refused to order Talmo's reinstatement on

that ground because the court viewed the commission's act as "invited error."³ The trial court disagreed with Talmo's contention discharge was too harsh a penalty for his actions. The court stated, "There is ample evidence in the record to demonstrate that the accusations which the hearing officer found to be proven did, in fact, occur. It is also clear that the accusations found to have been proven are sufficient grounds for discharge." The court concluded, however, the matter had to be remanded for further findings on Talmo's claim his discharge was unlawful because he was denied "progressive discipline" and because his punishment, discharge, was more severe than that imposed on deputies guilty of the same or similar conduct. Therefore the court remanded the matter to the commission for findings on the issues set out in the writ quoted above.

3 See part I of this opinion, *ante*, pages 217-220.

Talmo appealed this judgment insofar as it denied him reinstatement. Neither the commission nor the county cross-appealed from this judgment.

On remand, the hearing officer made additional findings of fact based on the existing record. The hearing officer found:

"[C]onduct similar to that perpetrated by Talmo was perpetrated, detected and tolerated as to other deputies at the Honor Ranch.

"When the Department administers correction for infractions, it normally does so according to the principles of progressive discipline.

"Talmo was denied progressive discipline administered by the Department to other deputies." The hearing officer again recommended against discharge.

The commission adopted the hearing officer's original and additional findings but again rejected the recommendation of suspension and upheld the sheriff's discharge of Talmo.

Talmo then filed a motion in the trial court under *Code of Civil Procedure section 1097* to compel compliance with the court's original judgment which Talmo interpreted as mandating a punishment less severe than discharge if the hearing officer found Talmo had been denied progressive discipline or that he was the victim of disparate treatment.

After another round of briefing and oral argument the trial court concluded, on the basis of the commission's findings, the commission abused its discretion in sustaining Talmo's discharge. The court issued a supplemental writ of mandate directing the commission to modify its decision by ordering Talmo reinstated with

backpay subject to a 90-day suspension. The county filed a timely notice of appeal.

A. The County Has Standing to Appeal.

Talmo points out, correctly, the civil service commission is autonomous in nature and distinct from the county's corporate identity. (*Department of Health Services v. Kennedy* (1984) 163 Cal.App.3d 799, 802 [209 Cal.Rptr. 595].) It does not follow from this, however, the commission is the only party with standing to appeal. The county was named as a respondent in Talmo's writ petition and in his motion to compel compliance. The county appeared and answered the petition and has participated as a party throughout these proceedings. The supplemental writ is directed to the county as well as to the commission. Furthermore, the county has a beneficial interest in this litigation. It was the county, through its sheriff's department, which hired and fired Talmo, and it is the county which would have to reinstate Talmo, pay his backpay, arm him with a badge and a weapon and loose him once again on the public. The county is clearly an aggrieved party and entitled to pursue this appeal.

B. There Is No Conflict of Interest Between the Civil Service Commission and the County.

Talmo argues the office of the county counsel cannot represent the county on this appeal because it represented the civil service commission below and a conflict of interest exists between the county and the civil service commission. The conflict of interest, according to Talmo, arises from the fact the commission chose not to appeal the order granting the supplemental writ of mandate.

We find no merit in Talmo's argument. This is not a case in which a county department is challenging the decision of the commission. (Cf. *Civil Service Com. v. Superior Court* (1984) 163 Cal.App.3d 70, 73 [209 Cal.Rptr. 159]; *Department of Health Services v. Kennedy*, *supra*, 163 Cal.App.3d at p. 801.) Throughout these proceedings the county has supported the final decisions of the commission which upheld the county's discharge of Talmo. Having rendered a final decision upholding Talmo's discharge, the commission is bound by that decision. (See Discussion, *ante*, p. 217.) Even if the commission now privately believes it was wrong and the trial court was right, its public position is that Talmo was correctly discharged. Thus, there is no conflict between the county and the commission. In any case, we do not construe the commission's failure to appeal as acquiescence in the trial court's order but rather a decision to allow the beneficially interested and aggrieved party, the county, to pursue the issue of Talmo's discharge.

C. The County Is Not Estopped From Appealing the Trial Court's Order Granting a Supplemental Writ.

Talmo argues the trial court's statement of decision, incorporated into its February 7 judgment, ruled as a matter of law that if the commission found Talmo was denied progressive discipline or disciplined more severely than other deputies who engaged in similar conduct then his discharge would be an abuse of discretion. The county did not appeal this judgment and the commission adopted the hearing officer's findings Talmo was denied progressive discipline and deputies who committed similar acts were not discharged. Therefore, Talmo contends, the county is barred from challenging the order granting a supplemental writ in which the trial court merely applied the legal rule it announced in its earlier judgment. If the county had objections to this result, Talmo argues, it should have appealed the judgment.

A final judgment operates as an estoppel as to issues actually litigated and determined in the action. (7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 253 and see also § 193.) However, we know of no doctrine of prospective collateral estoppel in which a party is bound to appeal an *anticipated* legal ruling or be barred from appealing that ruling if and when it is actually made. The trial court remanded the matter for further findings of fact and a new decision by the commission. The county was not obligated to appeal abstract questions of law. The proper procedure, which the county followed, was to await a new decision by the commission and the outcome of any further court review of that decision.

Talmo relies on *Carroll v. Civil Service Commission* (1970) 11 Cal.App.3d 727 [90 Cal.Rptr. 128], but that case is clearly distinguishable.

In *Carroll*, the petitioner was fired for stealing a dollar from the employees' coffee fund. The civil service commission upheld his discharge and Carroll petitioned for review under *Code of Civil Procedure* section 1094.5. The trial court held that firing Carroll for stealing a dollar was "an arbitrary and clear abuse of discretion." (11 Cal.App.3d at p. 730.) The court's judgment ordered a writ of mandate issue directing the commission "to set aside [its] order affirming the summary dismissal of petitioner . . . and to redetermine the penalty imposed . . ." The judgment also ordered the commission "to reexamine all of the evidence and the entire record and to impose a penalty for the taking of the One Dollar that is fair, just and reasonable." (*Ibid.*) This judgment was not appealed.

The commission reconsidered Carroll's appeal and reaffirmed his discharge. Carroll filed a motion in the trial court for an order compelling the commission to

comply with the court's previous judgment. The trial court found its previous judgment "clearly ordered respondent to restore to petitioner the position of employment previously held. . . ." (11 Cal.App.3d at p. 731.) In other words, the previous judgment held an order affirming discharge was an abuse of discretion. The court then went on to add new provisions to its previous judgment. (*Ibid.*)

The commission appealed requesting the appellate court to reverse the trial court's initial judgment directing the commission to set aside its order dismissing Carroll and to impose a different penalty and to reverse the second order adding new provisions to the initial judgment. The Court of Appeal held it was too late for the commission to challenge the trial court's initial judgment. The court noted the commission did not appeal the initial judgment and the time for appeal had expired. Therefore, the court held, "[t]hat order has become final and it is not within our power to reverse it, whatever our views may be as to the severity of the penalty imposed by the commission. The finality of that order is not affected by the fact that subsequent proceedings may have become necessary to enforce the order." (11 Cal.App. at p. 733.)⁴

4 The court held the trial court's second order was appealable to the extent it modified the initial judgment. (*Ibid.*; see *Code Civ. Proc.*, § 904.1, subd. (b).)

In the present case, the trial court set aside the commission's order sustaining Talmo's discharge but it did not hold discharge was an abuse of discretion as the trial court did in *Carroll*. To the contrary, the trial court in the present case held "[i]t is clear that the accusations found to have been proven are sufficient grounds for discharge." The judgment in the present case set aside the commission's decision and remanded the matter to the commission for further findings and a new decision taking into account Talmo's defense of discriminatory treatment in the severity of his punishment. Unlike *Carroll*, the judgment here did not preclude the commission from again sustaining Talmo's discharge. The court only concluded the existing findings "do not provide a factual basis upon which a court can make a judgment as to whether or not the ultimate discipline of discharge was a gross abuse of discretion." The court noted that *if* additional findings supported Talmo's claim of discriminatory treatment "it *might* well establish that petitioner's discharge was a gross abuse of discretion." (Italics added.)

It is clear from the trial court's statement of decision that, unlike the trial court in *Carroll*, the court here did not find Talmo's discharge an abuse of discretion; only that it *might* be an abuse of discretion depending on the new findings after remand. Talmo focuses on the trial

court's statement, "in sum, this record does not support the discipline imposed upon this petitioner." This statement must be read in context. The court had earlier stated, "the accusations found to have been proven are sufficient grounds for discharge." The later statement cited by Talmo only refers to the lack of findings on Talmo's defense of discriminatory treatment.

Upon remand, the commission referred the matter of Talmo's defense to the hearing officer who made additional findings of fact as directed by the trial court's order. The commission adopted these findings and, again, upheld Talmo's discharge. Talmo sought review of this second commission decision by way of a motion to compel compliance with the original judgment.⁵ At the hearing on the motion the trial court stated it did not intend its first judgment as an order to the commission to "rubber stamp" the hearing officer's findings or to deny the commission authority to exercise its ordinary discretion on whatever findings were presented. The court made clear the difference between the first and second hearings was that at the first hearing "we didn't have these findings. Now, we have the findings." On the basis of the new findings after remand the court found Talmo's discharge an abuse of discretion.

5 The proper procedure would have been to file a new petition under *Code of Civil Procedure* section 1094.5. (*Professional Engineers in Cal. Government v. State Personnel Bd.* (1980) 114 Cal.App.3d 101, 110-111 [170 Cal.Rptr. 547].) However, the appealability vel non of the order granting a supplemental writ is not contested. (*Code Civ. Proc.*, § 904.1, subd. (b); *Carroll v. Civil Service Commission*, *supra*, 11 Cal.App.3d at p. 733.)

Whether or not the commission abused its discretion in upholding Talmo's discharge is now ripe for appellate review.

III. An Appellate Court Reviews De Novo the Question Whether an Agency Abused Its Discretion in Imposing a Penalty.

It is well settled that in a mandamus proceeding to review an administrative order the determination of penalty by the administrative body will not be disturbed unless there is a clear abuse of discretion. (*Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 404 [134 Cal.Rptr. 206, 556 P.2d 306]; *Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666 [49 Cal.Rptr. 901].)

The standard of review on appeal from a judgment granting or denying a writ of mandate as to an administrative penalty is not as well settled. The majority view is stated in *Osburn v. Department of Transportation* (1990) 221 Cal.App.3d 1339, 1344 [270 Cal.Rptr. 761].

"When review of an administrative determination by administrative mandamus is sought and the trial court has applied an abuse of discretion standard, the scope of review is the same in the appellate court as it was in the superior court. The appellate court must determine whether the administrative agency exercised its discretion to an end or purpose not justified by all the facts and circumstances being considered." (Accord: *Brown v. Gordon*, *supra*, 240 Cal.App.2d 667; *Schmitt v. City of Rialto* (1985) 164 Cal.App.3d 494, 501 [210 Cal.Rptr. 788]; *Chodur v. Edmonds* (1985) 174 Cal.App.3d 565, 574 [220 Cal.Rptr. 80]; *County of Santa Clara v. Willis* (1986) 179 Cal.App.3d 1240, 1250 [225 Cal.Rptr. 244].) Thus, the majority of appellate courts review de novo the agency's exercise of discretion in imposing a penalty.

A contrary view was expressed in *Toyota of Visalia, Inc. v. Department of Motor Vehicles* (1984) 155 Cal.App.3d 315 [202 Cal.Rptr. 190]. There, the court held, "The question of the appropriateness of a penalty is a mixed question of law and fact to which the appellate court may defer to the trial court on the basis of the substantial-evidence rule. . . . [para.] We do not believe that one can say *as a matter of law* the penalties of [license] revocation in the instant case are excessive or not excessive. The correctness of the penalty is not so apparent that only one inference can reasonably be drawn from the proved or admitted facts. Consequently . . . we conclude the issue of excessiveness of the penalty is more an issue of fact than law." (*Id.* at pp. 326-327; italics in original.)

Toyota of Visalia was criticized in *Schmitt v. City of Rialto*, *supra*, to the extent it holds or otherwise indicates that on review of the severity of an administrative penalty the appellate court reviews the *trial court's* determination to see if it is supported by substantial evidence rather than reviewing the *agency's* determination de novo to determine if it was an abuse of discretion. (164 Cal.App.3d at p. 501.) The *Schmitt* opinion points out the court in *Toyota of Visalia* confused the question whether the board's factual findings are supported by substantial evidence with the question whether the board's penalty decision is an abuse of discretion considering those findings. (164 Cal.App.3d at pp. 501-502.) Thus, *Schmitt* concluded, the case relied on by *Toyota of Visalia* was not on point because in that case, *Lacy v. California Unemployment Ins. Appeals Bd.* (1971) 17 Cal.App.3d 1128 [95 Cal.Rptr. 566], the issue was whether the plaintiff was guilty of misconduct and the question on appeal was whether substantial evidence supported the trial court's determination plaintiff was not guilty of misconduct. *Lacy* was not a case involving the review of an administrative penalty. (*Schmitt v. City of Rialto*, *supra*, 164 Cal.App.3d at pp. 501-502.)

We agree with the analysis by Justice Kaufman in *Schmitt*. We also find additional reasons for rejecting the views expressed in *Toyota of Visalia*. The court in that case concluded it could not say as a matter of law whether the penalties were excessive or not. The correctness was "not so apparent that only one inference can reasonably be drawn from the proved or admitted facts." (155 Cal.App.3d at p. 327.) Therefore, the court deferred to the trial court's judgment. The court does not explain why the correctness of the penalty was any more apparent to the trial court than to the appellate court. More important, the situation described by the court, where reasonable minds could differ over the penalty, is exactly the situation where the court must find no abuse of discretion by the *agency*. (*Harris v. Alcoholic Beverage etc. Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633, 400 P.2d 745].)

Furthermore, the formulation of the standard of review in *Toyota of Visalia* would eviscerate the rule a court cannot substitute its discretion for that of the administrative agency on the degree of punishment to be imposed. (See, *Barber v. State Personnel Bd.*, *supra*, 18 Cal.3d at p. 404.) Under *Toyota of Visalia*, superior courts could substitute their views on the appropriate penalty for those of the agencies and the appellate courts would be powerless to reverse these decisions so long as they were supported by substantial evidence. The administrative agency would be relegated to the role of an advisory body and the appellate courts to a role more appropriate in reviewing jury verdicts in automobile accident cases. (See *Lacy v. California Unemployment Ins. Appeals Bd.*, *supra*, 17 Cal.App.3d at p. 1135, *fn.* 2.)

We note the standard of review formulated in *Toyota of Visalia* has not been followed by other appellate courts, not even by the district that decided it. (*Osburn v. Department of Transportation*, *supra*, 221 Cal.App.3d at p. 1344.)⁶

6 *Toyota of Visalia* was distinguished in *Williamson v. Board of Medical Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346 [266 Cal.Rptr. 520]. In *Noguchi v. Civil Service Com.* (1986) 187 Cal.App.3d 1521, 1543 [232 Cal.Rptr. 394], we stated, without citation to any authority, "The issue is whether there was substantial evidence to support the superior court's determination that there was no abuse of discretion in [Noguchi's] demotion."

It does not appear appellate standard of review was made an issue by the parties in *Noguchi*, as it is in the present case. Moreover, the text of our opinion in *Noguchi* shows we reviewed the commission's penalty determination de novo rather than reviewing the trial court's

judgment for substantial evidence to support its decision upholding the commission. (187 Cal.App.3d at pp. 1546-1549.) In any event, we conclude based on the foregoing analysis, the issue statement in *Noguchi* does not reflect the correct rule of law.

IV. The Commission Did Not Abuse Its Discretion in Upholding Talmo's Discharge.

The hearing officer found Talmo engaged in serious acts of misconduct including battery on inmates and lying to his superiors to cover up his acts. Talmo tipped over the bunk of a sleeping inmate causing the inmate to fall to the floor and suffer a bloody nose. Talmo then wrote a false report on the incident claiming the prisoner had tipped the bunk over on himself in his sleep. In another incident, Talmo placed a dead gopher in a prisoner's pocket and when confronted by a supervisor denied doing it. Talmo also made a threatening telephone call to a co-employee calling the employee a "fucking snitch" and "nigger." Again, Talmo falsely denied his action.

The commission adopted the hearing officer's findings on these incidents and those findings are not challenged on appeal. The trial court found those acts of misconduct constituted sufficient grounds for discharge. We agree. It is difficult to imagine conduct more deserving of discharge than committing battery on prisoners and then lying about it to superior officers. Without doubt the public was entitled to rid itself of a deputy who demonstrated such a callous disregard for the duties of his profession. Because discharge was clearly warranted in this case, the cases cited by Talmo reversing discharge as an abuse of discretion are inapposite. In each of these cases the court found discharge was too harsh given the nature of the infractions. (See *Boyce v. United States* (1976) 211 Ct. Cl. 57 [543 F.2d 1290, 1292]; *Albert v. Chafee* (9th Cir. 1978) 571 F.2d 1063, 1068.)

Talmo does not challenge the commission's findings he committed battery on prisoners, made threats and racial slurs against a co-employee and that he falsely denied these actions to his supervisors. Rather, he claims discharge was too severe a penalty for his actions and the sheriff's department first should have been required to try suspension to correct Talmo's behavior. Furthermore, Talmo contends, he was the victim of discriminatory treatment because other deputies committed similar acts of misconduct but were not discharged. We find no merit in Talmo's claims.

While at common law, every dog was entitled to one bite, we know of no rule of law holding every deputy sheriff is entitled to commit one battery on a prisoner before he or she can be discharged. The question whether progressive discipline was appropriate in Talmo's case

was a matter within the commission's discretion. (*Paulino v. Civil Service Com.* (1985) 175 Cal.App.3d 962, 971 [221 Cal.Rptr. 90].) In reviewing the exercise of this discretion we bear in mind the principle "[c]ourts should let administrative boards and officers work out their problems with as little judicial interference as possible. . . . Such boards are vested with a high discretion and its abuse must appear very clearly before the courts will interfere." (*Maxwell v. Civil Service Commission* (1915) 169 Cal. 336, 339 [146 P. 869]; accord: *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 217 [124 Cal.Rptr. 14, 539 P.2d 774].) The "overriding consideration" in cases of public employee discipline "is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, [h]arm to the public service." (*Id.* at p. 218.)

We find no abuse of discretion in discharging Talmo in the first instance. When an officer of the law violates the very law he was hired to enforce and lies about it to his superiors he forfeits the trust of his department and the public. (Cf. *Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 770, fn. 13 [221 Cal.Rptr. 779, 710 P.2d 845]; *Paulino v. Civil Service Com.*, *supra*, 175 Cal.App.3d at p. 972.) Furthermore, it is not accurate to say the sheriff did not apply principles of progressive discipline to Talmo. Talmo had previously been given a two-day suspension for having "inhumanely handcuffed two inmates in a holding cage." The commission could reasonably conclude Talmo's abusive conduct toward prisoners should no longer be tolerated.

Talmo's final argument is that he was treated unfairly because other deputies committed similar acts and were not discharged. Talmo's argument is not supported by the commission's findings. Even if it was, it would not establish an abuse of discretion.

There are no findings in this case that other deputies committed batteries on prisoners, made threats and racial slurs towards co-employees and lied to their superiors about their conduct but received less harsh treatment than Talmo.

Even if such findings had been made, they would not establish an abuse of discretion in discharging Talmo. When it comes to a public agency's imposition of punishment, "there is no requirement that charges similar in nature must result in identical penalties." (*Coleman v. Harris* (1963) 218 Cal.App.2d 401, 404 [32 Cal.Rptr. 486], accord: *Marino v. City of Los Angeles* (1973) 34 Cal.App.3d 461, 466 [110 Cal.Rptr. 45]; *Butz v. Glover Livestock Comm'n. Co.* (1973) 411 U.S. 182, 187 [36 L.Ed.2d 142, 147-148, 93 S.Ct. 1455]; and see *Nicolini v. County of Tuolumne* (1987) 190 Cal.App.3d 619, 637 [235 Cal.Rptr. 559].)

A deputy sheriff's job is a position of trust and the public has a right to the highest standard of behavior from those they invest with the power and authority of a law enforcement officer. Honesty, credibility and temperament are crucial to the proper performance of an officer's duties. Dishonesty is incompatible with the public trust. Abuse of power cannot be tolerated. The commission acted well within its discretion in discharging Brent Talmo from his position as a deputy sheriff.

The judgment granting a peremptory writ of mandate is affirmed. The order after judgment granting a supplemental writ of mandate is reversed and the trial court is ordered to vacate the supplemental writ. Appellant County of Los Angeles is awarded its costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DARTHEATUS LLOYD,

Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES,

Defendant and Respondent.

B200505

(Los Angeles County
Super. Ct. No. BC342669)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Theresa Sanchez-Gordon, Judge. Affirmed.

Law Offices of Leo James Terrell and Leo James Terrell for Plaintiff and
Appellant.

Thomas and Thomas, Michael Thomas; Greines, Martin, Stein & Richland,
Martin Stein and Alison M. Turner for Defendant and Respondent.

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for partial publication. The portions of this opinion to be deleted from publication are those portions enclosed within double brackets, [[]].

Plaintiff and appellant Dartheatus Lloyd (Lloyd) appeals a judgment following a grant of summary judgment in favor of his former employer, defendant and respondent County of Los Angeles (the County).

The essential issues presented are whether Lloyd's action is barred by a failure to exhaust administrative remedies, and if not, whether a triable issue of material fact exists so as to preclude summary judgment.

In the published portion of this opinion, we hold:

Lloyd's claim he suffered a retaliatory dismissal for whistleblower activity did not constitute a claim of discrimination on the basis of a "non-merit factor" within the meaning of rule 25.01 of the County's Civil Service Rules (rules). Therefore, Lloyd was not required to exhaust his administrative remedies under the County's internal rules.

We also hold Lloyd's causes of action alleging statutory violations of the Labor Code are not barred by his failure to exhaust the administrative remedy afforded by Labor Code section 98.7. There is no requirement that a plaintiff pursue the Labor Code administrative procedure prior to pursuing a statutory cause of action. (*Daly v. Exxon Corp.* (1997) 55 Cal.App.4th 39, 46, review den.; *Murray v. Oceanside Unified School Dist.* (2000) 79 Cal.App.4th 1338, 1359, review den.)

We further hold Lloyd's common law tort claims against the County, alleging retaliation and wrongful termination in violation of public policy, are barred by Government Code section 815's elimination of common law tort liability for public entities. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 899.)

In the unpublished portion of the opinion, we address the merits of Lloyd's other causes of action. We conclude the County met its burden to establish a legitimate justification for its employment decisions, and that Lloyd failed to raise a triable issue of material fact as to whether the County's reasons were pretextual. Therefore, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Employment history.*

In 1991, Lloyd commenced his employment with the County. In 1995, he became a permanent heat and frost insulator. In June 2003, Lloyd was laid off. In March 2004, he was rehired as a temporary employee. He worked in that capacity until January 2006, until he was laid off for a second time.

2. *Pleadings.*

The operative second amended complaint, filed June 9, 2006, sets forth five causes of action against the County. The gravamen of the action is that Lloyd (1) was laid off initially, (2) rehired as a *temporary* employee, (3) kept in a temporary appointment for nearly two years, and then (4) was laid off for a second time, all in retaliation for his complaints about asbestos removal at Los Angeles County-USC Medical Center (LAC-USC) and his refusal to remove asbestos without being duly certified.

The first cause of action alleges retaliation in violation of public policy (Cal. Const., art. I, § 1). The second cause of action alleges retaliation in violation of whistleblower statutes (Lab. Code, §§ 6310, 6311). The third cause of action alleges retaliation in violation of public policy (Cal. Const., art. I, § 8). The fourth cause of action alleges retaliation in violation of whistleblower statutes (Lab. Code, §§ 98.6, 1102.5, 6399.7 & Gov. Code, § 8547). The fifth cause of action alleges retaliation in violation of the public policy delineated in said statutes.

3. *Summary judgment proceedings.*

a. *Moving papers.*

On March 12, 2007, the County filed a motion for summary judgment, arguing Lloyd could not establish a *prima facie* case of retaliation. The County further contended it had legitimate, nondiscriminatory reasons for the adverse employment actions of which Lloyd complained.

Specifically, the County asserted Lloyd was laid off in 2003 because (1) there was a department-wide work-force reduction, part of an effort to reduce the budget for the County's Department of Health Services (Department); (2) the reduction affected the permanent heat and frost insulator positions; and (3) Lloyd was the least senior heat and frost insulator at the time of the reduction.

Thereafter, Lloyd was rehired in March 2004 as a *temporary* employee because (1) six months after Lloyd was laid off, the County realized it needed an additional heat and frost insulator at LAC-USC; (2) at that time, LAC-USC had a budget for an additional 1.7 temporary positions; and (3) the County rehired Lloyd because he was at the top of the re-hire list.

The County further contended it retained Lloyd in that capacity for nearly two years because various projects warranted Lloyd's continued employment.

Finally, Lloyd was laid off from his temporary appointment in January 2006 due to a lack of work.

b. *Opposition papers.*

In opposition, Lloyd asserted the following facts were undisputed: (1) he was illegally ordered to remove asbestos without proper certification; (2) he was twice fired for refusing to remove asbestos illegally; (3) the County retaliated against him by maintaining him in a temporary position exceeding 12 months, in violation of civil service rules; (4) he made numerous requests for an investigation into unlawful asbestos removal but the County failed and refused to conduct such an investigation; and (5) despite the existence of numerous job opportunities and openings, the County denied him permanent employment.

c. *Trial court's ruling.*

On June 1, 2007, the matter came on for hearing. The trial court granted the motion for summary judgment and orally delivered its ruling, as follows:

"There is no triable issue of fact that defendant had legitimate, nondiscriminatory reasons for its employment decisions. [¶] . . . [¶] Defendant has provided evidence of legitimate nonretaliatory reasons for plaintiff's terminations from permanent and

temporary employment. The termination from permanent employment was due to budget cuts. The termination of temporary employment was due to lack of work. Plaintiff has failed to produce evidence that the reasons were pretextual.

“There is no evidence of proximity in time between the protected activity, refusing to remove asbestos and making complaints that he was asked to remove asbestos. Plaintiff was first asked to remove asbestos in 2001, two years before his termination. Plaintiff refused to remove asbestos ten to 15 times before his termination. Plaintiff engaged in the protected activity repeatedly over two years before termination without consequences.

“As a temporary employee, plaintiff also refused to remove asbestos and within the first three months of employment, filed two complaints that he was being asked to illegally remove asbestos. However, he was not terminated as a temporary employee until January, 2007, well over a year after he filed his complaint.

“Plaintiff also claims he was not given permanent status. The evidence is undisputed that the job posting at the time of his termination was in error and withdrawn, that the funding for his temporary position was only for a temporary, not permanent, position, and that plaintiff’s name would remain on the rehire list for one year. The positions plaintiff states that he was not offered were advertised in January, 2006, after a rehire list expired. Plaintiff has not alleged that he applied for those jobs. Defendant did not have the ability to make his temporary position permanent, nor would defendant offer plaintiff a job for which he did not apply.

“It is necessary for each of the causes of action that plaintiff establish he was subject to retaliation. As plaintiff has not raised a triable issue of fact to defeat defendant’s legitimate, nondiscriminatory retaliatory reasons for its actions, the motion for summary judgment is granted.”

Lloyd filed a timely notice of appeal from the judgment.

CONTENTIONS

Lloyd contends: he established a prima facie case of retaliation; the County failed to meet its burden to present a nonretaliatory justification for each of its four adverse employment decisions; his evidence created a factual issue as to whether the County's purported justifications for its adverse employment decisions were pretextual; and any exhaustion argument by the County is irrelevant.

The County contends summary judgment should be affirmed on the ground that Lloyd failed to exhaust his administrative remedies, and moreover, Lloyd failed to present evidence to create a triable issue of fact as to whether the County's reasons for its actions were a pretext for retaliation.

DISCUSSION

I. *Trial court properly rejected the County's claim that Lloyd was required to exhaust internal administrative remedies prior to filing suit.*¹

Citing the rule of exhaustion of administrative remedies (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292; *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321), the County contends Lloyd was obligated to pursue internal administrative remedies pursuant to the County's civil service rules, and his failure to exhaust bars his entire action. The County's argument is meritless because Lloyd's claim he suffered discrimination based on *whistleblowing* is not governed by the internal rules on which the County relies. We agree with the trial court's resolution of this issue.

¹ The issue of exhaustion of internal administrative remedies was raised in a demurrer by the County to the second amended complaint. The demurrer was overruled. The trial court ruled the civil service rule upon which the County relied did not apply to whistleblower retaliation claims. In view of that ruling, the County did not raise that issue in its motion for summary judgment. Nonetheless, the trial court's ruling on the demurrer is reviewable on the appeal from the final judgment. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 152, p. 229.) Therefore, although the County did not seek summary judgment on the ground that Lloyd failed to exhaust his internal administrative remedies, the County is entitled to argue this issue on appeal as a basis for affirmance of the judgment.

Rule 4.01 provides in relevant part: “Right to petition for a hearing. *Any employee or applicant for employment may petition for a hearing before the commission who is:* [¶] A. Adversely affected by any action or decision of the director of personnel concerning which *discrimination* is alleged as provided in Rule 25.” (Italics added.)

Rule 25.01 provides: “Employment practices. A. No person in the classified service or seeking admission thereto shall be appointed, reduced or removed, or in any way favored or *discriminated against in employment* or opportunity for employment because of race, color, religion, sex, physical handicap, medical condition, marital status, age, national origin or citizenship, ancestry, political opinions or affiliations, organizational membership or affiliation, *or other non-merit factors*, any of which are not substantially related to successful performance of the duties of the position. *‘Non-merit factors’ are those factors that relate exclusively to a personal or social characteristic or trait and are not substantially related to successful performance of the duties of the position.* Any person who appeals alleging discrimination based on a non-merit factor must name the specific non-merit factor(s) on which discrimination is alleged to be based. *No hearing shall be granted nor evidence heard relative to discrimination based on unspecified non-merit factors.*” (Italics added.)

The County contends a claim of retaliation for whistleblower activity is discrimination on the basis of a “non-merit factor” within the meaning of rule 25.01. In support, the County relies on *Shuer v. County of San Diego* (2004) 117 Cal.App.4th 476 (*Shuer*), which held an employee’s complaint that her dismissal was retaliatory was a complaint of discrimination based on a non-job-related factor and thus cognizable by that county’s civil service commission. (*Id.* at p. 485.)

However, the County’s attempt to equate rule 25.01 with the provision considered by the *Shuer* court is unpersuasive. There, “[t]he charter and rules repeatedly state that all employment decisions must be made on the basis of ‘*job related qualifications, merit and equal opportunity without regard to age, color, creed, disability, national origin, political affiliation, race, religion, sex, or any other non-job-related factor.*’ (San Diego County Charter, art. IX, § 901, italics added; Civil Service Rules, rule 6.1.1, italics

added.)” (*Shuer, supra*, 117 Cal.App.4th at p. 485.) Guided by that definition, *Shuer* found a decision to dismiss an employee “for revealing unethical or illegal conduct by county employees is to discriminate against her based on a non-job-related factor.”

(*Ibid.*)

In contrast, rule 25.01 contains its own definition of discrimination based on non-merit factors. Rule 25.01 was written much more narrowly than the provision construed by the *Shuer* court. Pursuant to rule 25.01, “*Non-merit factors’ are those factors that relate exclusively to a personal or social characteristic or trait and are not substantially related to successful performance of the duties of the position.*” (Italics added.)

Obviously, whistleblowing is *conduct* – it is not a “personal or social characteristic or trait.” Therefore, a claim of retaliation for whistleblower activity does not constitute discrimination on the basis of a non-merit factor within the meaning of rule 25.01.

Because Lloyd’s claim he suffered a retaliatory dismissal for whistleblower activity does not fall within the ambit of rule 25.01, we reject the County’s contention that Lloyd was required to exhaust said internal administrative remedy prior to filing suit.

II. *Lloyd’s first, third and fifth causes of action, purporting to plead common law tort claims against the County, fail to state a cause of action.*

Turning to the operative second amended complaint, Lloyd’s first cause of action alleges retaliation in violation of the public policy set forth in article I, section 1 of the California Constitution.² Specifically, Lloyd pled “Defendants retaliated against [him] by terminating his employment in 2003, by hiring him back in 2004 as a temporary employee, by keeping him as a temporary employee for over one year and by threatening to terminate his employment.”

² Article I, section 1 of the California Constitution provides: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”

The third cause of action alleged retaliation in violation of the public policy contained in article I, section 8 of the California Constitution.³ Specifically, Lloyd pled “Defendants retaliated against [him] by terminating his employment on or about January 27, 2006, effective on January 31, 2006.”

The fifth cause of action, a *Tameny* claim,⁴ alleged wrongful termination in violation of the public policy against retaliation for whistleblower activity, predicated on the public policies set forth in Labor Code sections 98.6, 1102.5 and 6399.7, and Government Code section 8547, relating to whistleblower activity.

It is unnecessary to address whether a triable issue exists with respect to these three causes of action because said causes of action against the County fail to state a claim. *Miklosy, supra*, 44 Cal.4th 876, is controlling.

Miklosy states: “The Government Claims Act (§ 810 et seq.) establishes the limits of common law liability for public entities, stating: ‘*Except as otherwise provided by statute: [¶] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.*’ (§ 815, subd. (a), italics added.) The Legislative Committee Comment to section 815 states: ‘This section *abolishes all common law or judicially declared forms of liability for public entities*, except for such liability as may be required by the state or federal constitution, e.g., inverse condemnation. . . .’ (Legis. Com. com., 32 West’s Ann. Gov. Code (1995), foll. § 815, p. 167, italics added.) *Moreover, our own decisions confirm that section 815 abolishes common law tort liability for public entities.* (See *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1179 [7 Cal.Rptr.3d 552, 80 P.3d 656]; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1127-1128

³ Article I, section 8 of the California Constitution provides: “A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.” For purposes of this appeal, Lloyd concedes said constitutional provision would not support his claim.

⁴ *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167.

[119 Cal.Rptr.2d 709, 45 P.3d 1171]; see also *Adkins v. State of California* (1996) 50 Cal.App.4th 1802, 1817-1818 [59 Cal.Rptr.2d 59]; *Michael J. v. Los Angeles County Dept. of Adoptions* (1988) 201 Cal.App.3d 859, 866-867 [247 Cal.Rptr. 504].)” (*Miklosy, supra*, 44 Cal.4th at p. 899, certain italics added.)

Therefore, “[Government Code] section 815 bars *Tameny* actions against public entities.” (*Miklosy, supra*, 44 Cal.4th at p. 900.) Accordingly, Lloyd’s fifth cause of action against the County, a *Tameny* claim for wrongful termination in violation of public policy, fails to state a claim. Lloyd’s first and third causes of action, which purport to allege common law claims against the County for retaliation in violation of public policy, similarly are infirm. (*Ibid.*)

We recognize that notwithstanding the elimination of common law tort liability for public entities, they remain liable under the doctrine of respondeat superior for the actions of their employees. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209.) Irrespective of Government Code section 815’s elimination of common law tort liability for public entities, a public employee generally is liable for an injury caused by his or her act or omission to the same extent as a private person (Gov. Code, § 820, subd. (a); *Zelig v. County of Los Angeles, supra*, 27 Cal.4th at p. 1127), and “when the act or omission of the public employee occurs in the scope of employment the public entity will be vicariously liable for the injury.” (*Zelig, supra*, at p. 1127, citing Gov. Code, § 815.2.) Therefore, Lloyd asserts that even if the County cannot be held directly liable for his common law claims, the County may nonetheless be held liable for the actions of its employees within the course and scope of their employment under the respondeat superior doctrine.

The flaw in Lloyd’s argument is that “a *Tameny* action for wrongful discharge can only be asserted against *an employer*. An individual who is not an employer cannot commit the tort of wrongful discharge in violation of public policy; rather, he or she can only be the agent by which *an employer* commits that tort.” (*Miklosy, supra*, 44 Cal.4th at p. 900.) Likewise, a “supervisor, when taking retaliatory action against the employee, is necessarily exercising authority the employer conferred on the supervisor

Thus, in a retaliation case, it is the *employer's adverse employment action* that constitutes the substance of the tort, and the supervisor's action merges with that of the employer." (*Id.* at pp. 901-902, fn. 8.)

Therefore, a common law *Tameny* cause of action for wrongful termination, or a claim of retaliation, lies only against the employer, not against the supervisor through whom the employer commits the tort. (*Miklosy, supra*, 44 Cal.4th at pp. 900-901.) Accordingly, the doctrine of respondeat superior has no application to Lloyd's common law claims against the County.

In sum, pursuant to the principles set forth in *Miklosy, supra*, 44 Cal.4th 876, Lloyd's first, third and fifth causes of action against the County are barred by Government Code section 815.

III. *Second and fourth causes of action alleging Labor Code violations.*

1. *With respect to 2nd and 4th causes of action for Labor Code violations, no requirement that plaintiff exhaust Labor Code administrative remedy.*

The County asks this court to hold that Lloyd's failure to exhaust the administrative remedy of Labor Code section 98.7 bars Lloyd's second and fourth causes of action for statutory violations of the Labor Code.

Labor Code section 98.7 provides in relevant part: "Any person who believes that he or she has been discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner *may file* a complaint with the division within six months after the occurrence of the violation." (*Id.*, at subd. (a), italics added.) "Each complaint of unlawful discharge or discrimination shall be assigned to a discrimination complaint investigator who shall prepare and submit a report to the Labor Commissioner based on an investigation of the complaint." (*Id.*, at subd. (b).) If the Labor Commissioner "determines a violation has occurred, he or she shall notify the complainant and respondent and direct the respondent to cease and desist from the violation and take any action deemed necessary to remedy the violation, including, where appropriate, rehiring or reinstatement, reimbursement of lost wages and interest thereon, payment of reasonable attorney's fees . . . and the posting of notices to employees."

(*Id.*, at subd. (c).) If the Labor Commissioner “determines no violation has occurred, he or she shall notify the complainant and respondent and shall dismiss the complaint. . . . *The complainant may, after notification of the Labor Commissioner’s determination to dismiss a complaint, bring an action in an appropriate court, which shall have jurisdiction to determine whether a violation occurred, and if so, to restrain the violation and order all appropriate relief to remedy the violation. Appropriate relief includes, but is not limited to, rehiring or reinstatement of the complainant, reimbursement of lost wages and interest thereon, and other compensation or equitable relief as is appropriate under the circumstances of the case.*” (*Id.*, at subd. (d)(1), italics added.) Finally, subdivision (f) of Labor Code section 98.7 provides: “*The rights and remedies provided by this section do not preclude an employee from pursuing any other rights and remedies under any other law.*” (Italics added.) Therefore, it would appear Labor Code section 98.7 merely provides the employee with an additional remedy which the employee may choose to pursue.

Further, case law has recognized there is no requirement that a plaintiff proceed through the Labor Code administrative procedure in order to pursue a statutory cause of action. (*Daly v. Exxon Corp.*, *supra*, 55 Cal.App.4th at p. 46 [suit under Lab. Code, § 6310 alleging retaliation for complaint of unsafe working conditions]; *Murray v. Oceanside Unified School Dist.*, *supra*, 79 Cal.App.4th at p. 1359 [suit under former Lab. Code, § 1102.1 relating to sexual orientation discrimination].) We see no reason to differ with these decisions and to impose an administrative exhaustion requirement on plaintiffs seeking to sue for Labor Code violations.

We make the additional observation that construing Labor Code section 98.7 to obligate a plaintiff to seek relief from the Labor Commissioner prior to filing suit for Labor Code violations flies in the face of the concerns underlying the Labor Code Private Attorneys General Act of 2004 (PAG Act) (Lab. Code, § 2698 et seq.). As we stated in *Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330, 337, the PAG Act was adopted to augment the enforcement abilities of the Labor Commissioner with a private attorney general system for labor law enforcement. “The Legislature declared its intent as

follows: '(c) Staffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future. [¶] (d) *It is therefore in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general*, while also ensuring that state labor law enforcement agencies' enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act.' (Stats. 2003, ch. 906, § 1, italics added.)" (*Id.* at p. 337.) The PAG Act's approach, enlisting aggrieved employees to augment the Labor Commissioner's enforcement of state labor law, undermines the notion that Labor Code section 98.7 compels exhaustion of administrative remedies with the Labor Commissioner.

We now turn to the merits of Lloyd's second and fourth causes of action against the County.

2. *No triable issue of material fact with respect to second and fourth causes of action; the County met its burden to show a legitimate justification for its employment decisions and Lloyd failed to raise a triable issue with respect to whether the County's reasons were pretextual.*

[[Begin nonpublished portion.]]

[[a. *General principles.*

(i) *Standard of appellate review.*

Summary judgment "motions are to expedite litigation and eliminate needless trials. [Citation.] They are granted 'if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' [Citations.]" (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 590.)

A defendant meets its burden upon such a motion by showing one or more essential elements of the cause of action cannot be established, or by establishing a complete defense to the cause of action. (Code Civ. Proc., §437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) Once the moving defendant has met

its initial burden, the burden shifts to the plaintiff to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (*Ibid.*)

We review the trial court's ruling on a motion for summary judgment under the independent review standard. (*Rosse v. DeSoto Cab Co.* (1995) 34 Cal.App.4th 1047, 1050.)

(ii) *The parties' respective burdens.*

In the context of employment discrimination or retaliation, California has adopted the three-part burden-shifting analysis established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [36 L.Ed.2d 668]. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*); *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 110-112.)

Under "that framework, the plaintiff may raise a presumption of discrimination by presenting a 'prima facie case,' the components of which vary with the nature of the claim, but typically require evidence that '(1) [the plaintiff] was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive. [Citations.]" (*Guz, supra*, 24 Cal.4th at p. 355.) A satisfactory showing to this effect gives rise to a presumption of discrimination which, if unanswered by the employer, is mandatory – it requires judgment for the plaintiff. (*Ibid.*) However the employer may dispel the presumption merely by articulating a legitimate, nondiscriminatory reason for the challenged action. [Citation.]" (*Reeves v. Safeway Stores, Inc., supra*, 121 Cal.App.4th at pp. 111-112.)

Once the employer has articulated a legitimate reason for the challenged action, the burden shifts back to the plaintiff to show that the employer's proffered reasons are a pretext for discrimination or retaliation. (*Guz, supra*, 24 Cal.4th at p. 356; *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384 [whistleblower retaliation claim under Lab. Code, § 1102.5].)

At this juncture, the County does not dispute that Lloyd met his prima facie burden. The issues before us are whether the County met its burden to present legitimate, nonretaliatory reasons for the adverse employment actions, and if so, whether Lloyd raised a triable issue as to whether the County's proffered reasons were pretextual.

b. *The County met its burden to present legitimate reasons for each of its challenged employment decisions.*

(i) *The 2003 layoff from permanent employment.*

The County asserted Lloyd was laid off in 2003 because (1) there was a department-wide work-force reduction, part of an effort to reduce the budget for Lloyd's department; (2) the reduction affected the permanent heat and frost insulator positions; and (3) Lloyd was the least senior permanent heat and frost insulator at the time of the reduction.

Lloyd contends the declaration of David Cochran, on which the County partially relied, fails to present admissible evidence in this regard because Cochran lacked personal knowledge of these facts. We note the trial court sustained Lloyd's objections to nearly the entirety of the Cochran declaration. Nonetheless, the trial court *overruled* Lloyd's objections to the declarations of Clarence Hampton and David Law. Those remaining declarations are sufficient to show a legitimate justification by the County for the 2003 layoff.⁵

(ii) *The 2004 rehire as a temporary employee.*

The County asserted below that it properly rehired Lloyd in March 2004 as a *temporary* employee because (1) six months after Lloyd was laid off, it realized it needed an additional heat and frost insulator at LAC-USC; (2) at that time, LAC-USC had a budget for an additional 1.7 temporary positions; and (3) the County rehired Lloyd

⁵ Lloyd's opening brief, in a series of footnotes, contends the trial court failed to rule on his objections to the Cochran, Law and Hampton declarations. Lloyd seems to be unaware of the trial court's rulings on his evidentiary objections, even though the rulings appear at page 20 of the reporter's transcript. Lloyd's opening brief does not argue the trial court's evidentiary rulings were erroneous; he merely asserts, incorrectly, that the trial court failed to rule on his objections.

because he was at the top of the re-hire list.⁶ This rationale is fully supported by the Hampton declaration, which is before us in its entirety.

Therefore, the County presented a legitimate justification for rehiring Lloyd as a temporary employee in 2004.

(iii) *Lloyd's status as a temporary employee for two years.*

The County's Civil Rule 13.03 provides in relevant part: "A temporary appointment may continue for no longer than 12 months of continuous, full-time service except that, with the approval of the director of personnel, persons may be employed in the same position for an additional specified period of time upon written presentation of facts to justify an extension."

The Hampton declaration states "After the Pediatric ICU was completed around December 2004, various additional projects warranted the continued employment of Mr. Lloyd on a temporary basis." This constitutes a legitimate justification for extending Lloyd's temporary appointment beyond the 12-month period.

(iv) *The 2006 layoff.*

Finally, the County argued it released Lloyd from his temporary appointment in January 2006 due to a lack of work.

The assertion is supported by the Hampton declaration, which states in relevant part: "By January 2006, Facilities Management was unable to justify continuing to employ Mr. Lloyd on a temporary basis, due to the lack of work, and he was released from his temporary appointment."

This constitutes a legitimate justification for the 2006 layoff.

In sum, the County presented a sufficient justification for each of the four adverse actions being challenged by Lloyd. The remaining issue is whether Lloyd raised a triable issue of material fact as to whether the County's stated reasons were a pretext for retaliation.

⁶ LAC-USC's budget at the time also allowed for three permanent heat and frost insulator positions; however, the three budgeted permanent positions were already filled by Catello, Meijer and Warren.

c. *Lloyd failed to raise a triable issue as to whether the County's reasons for its employment decisions were pretextual.*

Once the County presented substantial evidence of a legitimate, nonretaliatory reason for its actions, the burden shifted to Lloyd to produce substantial, responsive evidence that the County's showing was untrue or pretextual. (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807.) “ ‘To avoid summary judgment, [appellant] “must do more than establish a prima facie case and deny the credibility of the [defendant's] witnesses.” [Citation.] [He] must produce “specific, substantial evidence of pretext.” [Citation.]’ [Citation.] We emphasize that an issue of fact can only be created by a conflict of evidence. It is not created by speculation or conjecture. [Citation.] We review the evidence presented to the trial court and independently adjudicate its effect as a matter of law. [Citation.]” (*Ibid.*, italics added.)

We address Lloyd's arguments regarding pretext, seriatim.

(i) *The 2003 layoff from permanent employment.*

As indicated, the County asserted Lloyd was laid off in June 2003 due to a workforce reduction. Lloyd contended the purported justification was pretextual based on various circumstances, discussed below.

On June 16, 2003, the same day Lloyd received his termination notice effective June 30, 2003, the County posted a job listing for a heat and frost insulator. However, the declaration of Theresa Aleman, the section manager of the Department's Recruitment and Exam Office, stated the examination for said position was cancelled on June 23, 2003 because the position was affected by a departmental workforce reduction. As the trial court found, the evidence showed the job posting was in error and was withdrawn.

Lloyd relies on the fact that Domingo Villanueva, the building craft manager, never saw any document showing a financial reason for his layoff. However, that circumstance does not give rise to an inference that no financial reason existed. This argument by Lloyd is based on mere conjecture.

Lloyd asserts the County provided no explanation as to why he was laid off. In fact, the June 16, 2003 notice specified Lloyd was being laid off due to financial constraints, in accordance with rule 19.

Lloyd emphasizes he was the only heat and frost insulator who was laid off, even though Warren performed no heat and insulator duties due to asbestosis and Catello performed no heat and insulator duties following his return from triple bypass surgery. However, Lloyd admitted that both Warren and Catello had greater seniority than he.

Lloyd relies on the fact that when Tesloff, the MLK facility director, indicated Lloyd would be laid off, Tesloff did not indicate whether any other individuals would be laid off. This fact does not support an inference that Lloyd's layoff was retaliatory.

Lloyd cites the fact that the County's budget report for the 2003-2004 fiscal year indicated a "0.7 vacant" heat and frost insulator position, meaning he could have worked as a part-time employee in June 2003. However, during that fiscal year, 1.7 temporary positions were budgeted. The full-time temporary position was filled by Lloyd. It is unclear how not giving Lloyd the temporary 0.7 position instead of the temporary full-time position constituted an adverse employment action.

As further evidence of pretext, Lloyd asserts he was repeatedly asked by his supervisors to remove asbestos even though they knew he was not certified to do so. This amounts to a prima facie showing by Lloyd that he engaged in protected activity; it does not tend to show the employer's justification for the layoff, namely, a workforce reduction, was pretextual.

Lloyd also argues his supervisors ignored his repeated complaints concerning their requests that he remove asbestos illegally, and that a grievance he filed in June 2003 was ignored. Again, this does not tend to show the employer's fiscal justification for the layoff was pretextual.

Lloyd also relies on a statement by Toby Morrie, an employee in human resources, who, upon reviewing the job posting for a heat and frost insulator on the day after Lloyd was told he would be terminated, told Lloyd to call one Ms. Miller if he did not get his job back. This advisement by Morrie does not support an inference the County's justification for the layoff was pretextual.

Lloyd also contends the grievance he submitted in June 2003 was ignored. However, Lloyd conceded he did not mention the asbestos issue in his grievance. Therefore, the disposition of his grievance does not support an inference he was laid off in retaliation for complaining of asbestos.

Finally, Lloyd cites the statement of Hampton, his supervisor when he returned to LAC-USC as a temporary employee. According to Lloyd's deposition testimony, Hampton told him that he "shouldn't have been laid off." The statement is unavailing to Lloyd because Hampton did not make the layoff decision. This statement by a nondecisionmaker "is entitled to virtually no weight in considering whether the firing was pretextual or whether the decisionmaker harbored discriminatory animus. [Citations.]" (*Horn v. Cushman & Wakefield Western, Inc.*, *supra*, 72 Cal.App.4th at p. 809.)

(ii) *The 2004 rehire as a temporary, rather than a permanent, employee.*

In March 2004, the County rehired Lloyd as a temporary employee because it needed an additional heat and frost insulator at LAC-USC. Lloyd contends the decision to rehire him as a temporary, rather than permanent employee, was pretextual and was intended to punish him for complaining about the County's efforts to coerce him to remove asbestos illegally. We address Lloyd's pretext arguments seriatim.

Here, Lloyd reiterates the fact that simultaneous with the June 16, 2003 layoff, the County posted a job position for a heat and frost insulator. As already discussed, the declaration of Theresa Aleman established the job posting was erroneous and was withdrawn.

Lloyd relies again on the fact that for the 2003-2004 fiscal year, there were 3 permanent and 1.7 temporary positions budgeted. As discussed above, the 3 permanent positions were filled and Lloyd obtained the full-time temporary position. The fact there remained a 0.7 temporary position does not show pretext.

Lloyd also points to the fact that 30 days after he was rehired to work at LAC-USC, he was sent back to MLK to do the same work he was doing prior to his layoff. However, merely because Lloyd was performing the same work does not tend to show his rehiring as a temporary employee for budgetary reasons was pretextual.

Lloyd also relies on the fact that upon his return to MLK, he was again asked to do asbestos work on several occasions. This does not tend to show Lloyd's rehiring as a temporary employee for budgetary reasons was pretextual.

(iii) *Lloyd's status as a temporary employee for nearly two years.*

To reiterate, rule 13.03 provides in relevant part: "A temporary appointment may continue for no longer than 12 months of continuous, full-time service except that, with the approval of the director of personnel, persons may be employed in the same position for an additional specified period of time upon written presentation of facts to justify an extension."

The County contended it permitted Lloyd to work as a temporary employee for nearly two years because of the need to complete additional projects. Lloyd contends this lengthy stint as a temporary employee was a pretext for punishing him for complaining about the County's efforts to have him remove asbestos illegally.

As the County argues, it is unclear how Lloyd's continued employment as a temporary employee beyond the one-year mark could be deemed an adverse employment action, when the alternative would have been to let him go.

Further, the County could not simply change Lloyd's status from temporary to permanent at the end of the one-year period. Rule 13.03 specifically states: "A person given a temporary appointment may not be transferred or reassigned to any other position except on a temporary basis, *and shall never attain permanent status from such assignment.*" (Italics added.)

Lloyd also contends the County violated Rule 13.03 because no one filled out the necessary paperwork to extend his temporary employment beyond the one-year mark. However, such omission by the County does not tend to show its retention of Lloyd as a temporary employee was pretextual.

Finally, Lloyd points to evidence that a permanent heat and frost insulator position opened in the Internal Services Department in 2005. The evidence showed Hampton told Lloyd about the position and gave him a copy of the bulletin. (As noted, rule 13.03 precluded the County from simply reassigning Lloyd from his temporary appointment into a permanent position.) The job bulletin advised Lloyd how to apply for the position. However, there is no indication that Lloyd made any attempt to apply for the open permanent position.

In short, Lloyd has not shown his retention by the County in a temporary position for nearly two years was a pretext for retaliation.

(iv) *The January 2006 layoff.*

The County contended it terminated Lloyd's temporary employment in January 2006 due to a lack of work at LAC-USC. Here too, Lloyd contends the proffered reason is pretextual.

Lloyd points to the fact that on January 19, 2006, just days before the County notified Lloyd that it would terminate his employment for a second time, the County posted a bulletin for a heat and frost insulator. However, this job posting was by the County's Internal Services Department. This opening in the County's Internal Services Department does not call into question the County's evidence that there was a lack of work for Lloyd at LAC-USC, within the County's Department of Health Services.

Lloyd points out that at the time he was terminated in January 2006, there was a temporary heat and frost insulator position budgeted for the 2005/2006 fiscal year at LAC-USC. The existence of budgeted positions does not equate with the availability of work to be done. Although said position was budgeted, the evidence showed there was a lack of work at LAC-USC and facilities management could not justify continuing Lloyd's temporary employment beyond January 2006.

To establish pretext, Lloyd also relies on his favorable performance reviews in 2004 and 2005, prior to his second termination. However, Lloyd's positive evaluations do not tend to show the County's justification for the second termination, namely, a lack of work at LAC-USC, was pretextual.

Finally, Lloyd argues he presented evidence that he was terminated about one month after he refused to sign his performance evaluation and had a meeting with supervisors, at which time he complained of his temporary status and the fact that he repeatedly was being asked to remove asbestos illegally. Proximity between protected activity and adverse action may be sufficient to establish a prima facie case of retaliation. (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1110, fn. 6; *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 353.) However, temporal proximity between protected activity and discharge does not raise a triable issue that the County's justification for the second termination, i.e., a lack of work at LAC-USC, was pretextual.

For all these reasons, we conclude Lloyd failed to raise a triable issue of material fact with respect to whether the County's justifications for the adverse employment actions were pretextual.]]

[[End of nonpublished portion.]]

DISPOSITION

The judgment is affirmed. The parties shall bear their respective costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 06/20/14

DEPT. 82

HONORABLE LUIS A. LAVIN

JUDGE

N DIGIAMBATTISTA

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

M CLARK/COURTROOM ASST

ELECTRONIC RECORDING MONITOR

NONE

Deputy Sheriff

NONE

Reporter

1:30 pm

BS144885

Plaintiff

Counsel

RICHARD TAYLOR

VS

Defendant NO APPEARANCES

LOS ANGELES COUNTY CIVIL SERVIC

Counsel

COMMISSION

NATURE OF PROCEEDINGS:

CLERK'S CERTIFICATE OF MAILING/NOTICE OF ENTRY OF JUDGMENT AND JUDGMENT

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the Judgment upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Dated: JUNE 20, 2014

SHERRI R. CARTER, EXECUTIVE OFFICER/CLERK

BY: N Digiambattista
N DIGIAMBATTISTA

JONATHAN M. COHEN, ROTHNER, SEGALL, ET AL, 510 S. MARENGO AVE., PASADENA, CA 91101-3115

LESTER J. TOLNAI, ASST COUNTY COUNSEL, 500 W. TEMPLE ST., 6THY FL., LOS ANGELES, CA 90012

GEOFFREY S. SHELDON, LIEBERT CASSIDY, ET AL, 6033

MINUTES ENTERED 06/20/14 COUNTY CLERK

1 GLENN ROTHNER (CSB No. 67353)
2 JONATHAN COHEN (CSB No. 237965)
3 ROTHNER, SEGALL & GREENSTONE
4 510 South Marengo Avenue
Pasadena, California 91101-3115
Telephone: (626) 796-7555
Facsimile: (626) 577-0124

5 Attorneys for Petitioner Richard Taylor

ORIGINAL FILED

JUN 20 2014

**LOS ANGELES
SUPERIOR COURT**

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES

11 RICHARD TAYLOR,
12 Petitioner,
13 v.
14 LOS ANGELES COUNTY CIVIL SERVICE
15 COMMISSION; and DOES 1 through 10,
inclusive,
16 Respondent.

CASE NO. BS 144885

Hon. Luis A. Lavin
Dept. 82

~~PROPOSED~~ JUDGMENT

18 This matter came regularly before this court on May 27, 2014, for hearing in Department
19 82, the Honorable Luis A. Lavin presiding. Jonathan Cohen appeared on behalf of petitioner
20 Richard Taylor ("Petitioner"). John I. Manier appeared on behalf of respondent Los Angeles
21 County Civil Service Commission ("Commission"). Geoffrey S. Sheldon appeared on behalf of
22 real party in interest County of Los Angeles ("County").

23 The record of the administrative proceedings having been received and examined by the
24 court, arguments having been presented, and the court having issued its May 30, 2014 decision
25 and order granting Petitioner's writ of mandate,

26 ///
27 ///
28 ///

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 05/30/14

DEPT. 82

HONORABLE LUIS A. LAVIN

JUDGE

N DIGIAMBATTISTA

DEPUTY CLERK

HONORABLE
1

JUDGE PRO TEM

M CLARK/COURTROOM ASST

ELECTRONIC RECORDING MONITOR

NONE

Deputy Sheriff

NONE

Reporter

8:30 am

BS144885

Plaintiff
Counsel

RICHARD TAYLOR

VS

Defendant NO APPEARANCES

LOS ANGELES COUNTY CIVIL SERVIC
COMMISSION

Counsel

NATURE OF PROCEEDINGS:

HEARING ON PETITION FOR WRIT OF MANDATE
RULING ON SUBMITTED MATTER

The court having taken the above matter under sub-
mission on May 27, 2014, now makes its ruling as
follows:

The petition for writ of mandate is granted for the
reasons set forth in the document entitled DECISION
AND ORDER GRANTING WRIT OF MANDATE, signed and filed
this date.

Petitioner's exhibit 1 is ordered returned forthwith
to the party who lodged it, to be preserved unaltered
until a final judgment is rendered in this case and is
to be forwarded to the court of appeal in the event of
an appeal.

Counsel for petitioner is to prepare, serve and lodge
the proposed judgment and proposed writ within ten
days. The court will hold the proposed documents ten
days for objections.

A copy of this minute order as well as the Decision
and Order are mailed via U.S. Mail to counsel of
record addressed as follows:

JONATHAN M. COHEN, ROTHNER, SEGALL, ET AL, 510 S.
MARENGO AVE., PASADENA, CA 91101-3115

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 05/30/14

DEPT. 82

HONORABLE LUIS A. LAVIN

JUDGE

N DIGIAMBATTISTA

DEPUTY CLERK

HONORABLE
1

JUDGE PRO TEM

M CLARK/COURTROOM ASST

ELECTRONIC RECORDING MONITOR

NONE

Deputy Sheriff

NONE

Reporter

8:30 am

BS144885

Plaintiff

Counsel

RICHARD TAYLOR

VS

Defendant

NO APPEARANCES

LOS ANGELES COUNTY CIVIL SERVICE
COMMISSION

Counsel

NATURE OF PROCEEDINGS:

LESTER J. TOLNAI, ASST COUNTY COUNSEL, 500 W. TEMPLE
ST., 6TH FL., LOS ANGELES, CA 90012

GEOFFREY S. SHELDON, LIEBERT CASSIDY, ET AL, 6033
W. CENTURY BLVD., 5TH FL., LOS ANGELES, CA 90045

JOHN I. MANIER, NASSIRI & JUNG, 1055 W. 7TH ST.,
SUITE 2800, LOS ANGELES, CA 90017

CONFORMED COPY
ORIGINAL FILED
Superior Court of California
County of Los Angeles

MAY 30 2014

Shari R. Carter, Executive Officer/Clerk
By N. DiGiambattista, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Richard Taylor,)
Petitioner,)
)
v.)
)
Los Angeles County Civil Service Commission,)
Respondent.)

Case No. BS144885

**Decision and Order
Granting Writ of Mandate**

Since 2006, Petitioner Richard Taylor has been a clerk for the County of Los Angeles Department of Health Services. In a criminal complaint filed in February 2010, he was charged with falsification of childcare forms and illegal receipt of childcare benefits between November 2005 and July 2006. As a result of those criminal charges, Petitioner was suspended without pay for thirteen months. Once the criminal charges were dismissed against him, Petitioner was allowed to return to work but was not paid for the thirteen-month suspension period.

Petitioner challenged the County’s actions at a post-suspension administrative hearing. After the administrative hearing was completed, the hearing officer found that Petitioner’s suspension was based on a “meritless criminal case,” and that he “committed no acts that could be construed as criminal conduct, or even conduct morally or ethically objectionable in any way.” (AR 39). The Los Angeles County Civil Service Commission, however, disregarded Petitioner’s innocence and ignored the merits of the criminal charges which were the sole basis for suspending Petitioner without pay. Instead, the Commission limited the scope of the post-suspension hearing, and its review of the hearing officer’s recommended decision, to a single issue: whether there was a nexus between the criminal charges against Petitioner and his job duties. By doing so, the Commission rendered the post-suspension hearing meaningless and denied Petitioner due process. Accordingly, the petition for writ of mandate is granted.

Factual and Procedural Background

Petitioner was hired by the County’s Department of Health Services (“DHS” or “County”) in 2004, and has worked as an intermediate clerk for DHS at the Long Beach Comprehensive Health Center since 2006. (AR 372). As an intermediate clerk, Petitioner is responsible for registering patients, preparing patients’ medical records, screening patients’ financial records, and processing other paperwork. (AR 240, 271). In performing these tasks, Petitioner has access to patient information, such as patients’ names, birth dates, social security numbers, and driver’s license numbers. (AR 272).

On February 24, 2010, the Los Angeles County District Attorney’s Office filed a felony complaint against Petitioner and six other defendants. Petitioner was charged with one count of grand theft under Penal Code section 487(a) and one count of perjury under Penal Code section 118(a). (AR 194, 196-198). The criminal charges arose out of Petitioner’s alleged involvement

in falsification of childcare forms and illegal receipt of childcare benefits. (AR 297-298, 376-381).

In March 2010, Richard Washington, a Senior Departmental Personnel Technician with DHS, received notice of the felony charges filed against Petitioner. (AR 288-289, 291). Using Live Scan, a fingerprint imaging system, Mr. Washington cross-referenced the County's employment records using Petitioner's personal and employment information with Petitioner's criminal record to verify that felony charges had been filed against Petitioner. (AR 291-292). Mr. Washington also verified that Petitioner had been charged with grand theft and perjury by contacting the District Attorney's Office, conducting a search of the Los Angeles Sheriff's Department's database, and obtaining a copy of a March 8, 2010 certified minute order from Petitioner's criminal case. (AR 293). After verifying Petitioner's charges and conferring with his supervisors, Mr. Washington determined that Petitioner should be suspended without pay under Civil Service Rule 18.01.¹ (AR 294-295). Although Rule 18.01 does not address whether an employee should be paid during a term of suspension, DHS routinely suspends employees without pay if the suspension is based on a pending criminal matter. (AR 326). However, the administrative record reflects that the Commission has, on at least one occasion, interpreted Rule 18.01 to allow it to retroactively award back pay during the period of an employee's suspension. (AR 93-104).

In deciding to suspend Petitioner without pay under Rule 18.01, DHS officials determined that an adequate nexus existed between the criminal charges filed against Petitioner and the nature of Petitioner's job duties. (AR 294-295, 333-334). Although not expressly required by Rule 18.01, the County has applied a "nexus" analysis to its suspension decisions since November 1998, when the County Board of Supervisors passed a resolution governing the hiring of individuals with prior criminal convictions. (AR 333-334). The 1998 resolution provides that the County "shall not place a person in a sensitive position if he or she has been convicted of a felony or a misdemeanor, except that such conviction may be disregarded if it is determined that there were mitigating circumstances or that the conviction is not related to the position and poses no threat or risk to the County or to the public." (AR 222). Based on this language, whenever criminal charges are filed against a County employee holding a "sensitive position," County officials will compare the nature of the criminal charges against the nature of the employee's job duties to determine whether the employee should be suspended pending resolution of the criminal proceedings. (AR 334).

According to Michael Lampert, DHS's Chief of Performance Management, the determination to suspend Petitioner under Rule 18.01 using the resolution's "nexus" analysis was straightforward because the County considers every position in DHS "sensitive" (see AR 243), and Petitioner's job duties involve accessing confidential patient information. (AR 334). This determination was based in part on Mr. Lampert's consideration of the County's Department of Human Resources' hiring policy, which sets forth potentially disqualifying job related offenses based on the nature

¹ In relevant part, Civil Service Rule 18.01 provides: "[A]n employee may be suspended by the appointing power for up to and including 30 days, pending investigation, filing of charges and hearing on discharge or reduction, or as a disciplinary measure. Where the charge upon which a suspension is the subject of criminal complaint or indictment filed against such employee, the period of suspension may exceed 30 calendar days and continue until, but not after, the expiration of 30 calendar days after the judgment of conviction or the acquittal of the offense charged in the complaint or indictment has become final." (AR 189).

of an employee's job duties. (AR 368; see also AR 224-231). Under the hiring policy, an individual should be disqualified from a position that entails accessing confidential or classified information if that individual has been charged with extortion, fraud, forgery, or perjury. (AR 227). That is, DHS did not conduct an investigation into the underlying conduct before suspending Petitioner. (AR 356).

On March 8, 2010, DHS sent Petitioner a notice of "Suspension Pending Court Adjudication," informing Petitioner that he would be suspended without pay pursuant to Rule 18.01 pending resolution of the criminal charges filed against him. (AR 174-175). The notice of suspension also informed Petitioner that he had a right to respond to DHS's allegations supporting the suspension within 10 days of the date of the notice's mailing. (AR 175). Although Petitioner appealed his suspension and requested a pre-suspension meeting pursuant to Skelly v. State Personnel Bd., (1975) 15 Cal.3d 194, he canceled the meeting on March 18, 2010 and waived his right to meet with DHS management prior to the effective date of his suspension. (AR 179).

Petitioner's suspension went into effect on April 7, 2010. (AR 179). Although Petitioner did not return to work until April 20, 2011,² he received two weeks' worth of pay during his suspension to maintain his child's health benefits. (AR 385; see also AR 375-376).

On May 5, 2010, the Commission granted Petitioner's request for a hearing on his appeal from his suspension. (AR 460, 462). However, at the County's request, the Commission placed Petitioner's appeal in abeyance pending resolution of his criminal case. (AR 462; see also AR 116).

On July 6, 2011, the Commission issued a "Special Notice" limiting the scope of Petitioner's appeal to the single issue of whether "there [is a] sufficient nexus between the criminal charges filed against [Petitioner] and the duties of [Petitioner's] position to support imposition of the non-disciplinary suspension of [Petitioner] as set forth by the Department in its letter dated March 8, 2010[.]" (AR 112).

On September 9, 2011, Petitioner requested that the Commission expand the scope of his appeal to include the following issues:

1. Based on the Department's confirming letter dated 3/8/10, was the decision to suspend without pay, for up to thirty (30) days after the outcome of criminal offenses, appropriate?
2. Was the action in violation of Civil Service Rule 18.01 and/or due process?
3. If the decision to suspend without pay was not appropriate, what is the appropriate remedy?

(AR 91).

On October 26, 2011, DHS filed an opposition to Petitioner's request. (AR 57-62). On November 9, 2011, the Commission summarily denied Petitioner's request to expand the scope of his appeal. (AR 56).

² Petitioner's criminal charges were dismissed in April 2011. (See AR 40).

The Commission conducted Petitioner's post-suspension hearing before Hearing Officer Douglas R. Boyd on March 15, 2012. (AR 34). In keeping with the Commission's November 9, 2011 decision, Hearing Officer Boyd limited the scope of Petitioner's hearing to the single issue of whether a sufficient nexus exists between the criminal charges filed against Petitioner and the duties of Petitioner's position to support Petitioner's suspension. (AR 361). Nevertheless, Petitioner was permitted to testify about the merits of the criminal charges filed against him and the financial hardships he suffered as a result of the thirteen-month unpaid suspension. (AR 375-381).

On June 12, 2012, Hearing Officer Boyd issued his recommended decision. (AR 34-41). Although Hearing Officer Boyd concluded that there was a sufficient nexus between the underlying criminal charges and Petitioner's duties as a DHS employee to support Petitioner's suspension, he asked the Commission to consider awarding Petitioner back pay due to the fact that the criminal charges were ultimately dismissed. (AR 40-41). Hearing Officer Boyd observed the following:

Notice is taken of the long standing practice not to award back pay upon dismissal of charges or even acquittal.

However, this case points out a need to set limits in this regard.

Appellant suffered a loss of pay and benefits for over one year. That is a severe hardship upon Appellant, but completely justifiable upon conviction of criminal charges.

However, this Appellant was not convicted. Moreover, he committed no acts that could be construed as criminal conduct, or even conduct morally or ethically objectionable in any way.

Appellant simply took his child out of a school, and someone else subsequently forged his name on childcare forms. There is no allegation that Appellant even knew of this illegal action by his child's former teacher until he was contacted by police investigators as a victim of identity theft. Appellant consistently maintained his innocence to all actors within the criminal justice system and to everyone within the Department of Health Services.

In sum, this could happen to any of us without our causation and without our knowledge.

We do not know why a criminal case filed in February 2010 was not dismissed as to Appellant until April 2011, an unusually long period of time for a criminal matter.

We do know that Appellant was not found guilty of criminal charges, and that he waited patiently while asking the Department repeatedly to return to work for more than one year.

We also know that Appellant has a clean work history with the County and no deficiencies in his job performance whatsoever. The only reason he was suspended, and for an extremely long time, was the meritless criminal case arising out of his employment of which Appellant knew nothing until contacted by police investigators.

It is respectfully suggested that the Commission consider whether an award of back pay should be granted in this case.

(AR 39-40).

After considering Petitioner's objections to Hearing Officer Boyd's nexus finding, the Commission adopted Hearing Officer Boyd's recommended decision by a 3-2 vote on November 14, 2012. (AR 1-2). The Commission's final three-sentence decision does not indicate whether the Commission considered Hearing Officer Boyd's suggestion to award back pay to Petitioner. (See AR 1-2). However, it is undisputed that the Commission did not award any back pay to Petitioner.

On September 9, 2013, Petitioner filed a petition for administrative writ of mandate seeking to set aside the Commission's November 14, 2012 decision and restore all back pay and benefits that he would have received between April 7, 2010 and April 20, 2011 but for his thirteen-month unpaid suspension. The matter was argued and submitted on May 27, 2014.

Summary of the Law

Petitioner seeks a writ of mandate pursuant to California Code of Civil Procedure section 1094.5. Code of Civil Procedure section 1094.5 governs judicial review by administrative mandate of any final decision or order rendered by an administrative agency. Under Code of Civil Procedure section 1094.5(b), the pertinent issues are: whether the respondent has proceeded without jurisdiction, whether there was a fair trial, and whether there was a prejudicial abuse of discretion. An abuse of discretion is established if the respondent has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. Code Civ. Proc., § 1094.5(b).

A trial court's review of an adjudicatory administrative decision is subject to two possible standards of review depending upon the nature of the right involved. Code Civ. Proc., § 1094.5(c). If the administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence. Strumsky v. San Diego County Employees Retirement Assn., (1974) 11 Cal.3d 28, 32; Bixby v. Pierno, (1971) 4 Cal. 3d 130, 143. The trial court must not only examine the administrative record for errors of law, but must also conduct an independent review of the entire record to determine whether the weight of the evidence supports the administrative findings. Bixby, supra, 4 Cal.3d at p. 143.

It is well established that "discipline imposed on public employees affects their fundamental vested right in employment, and therefore, when a public employee challenges an employer's disciplinary action in a mandamus proceeding, the trial court is required to exercise its

independent judgment on the evidence.” Wences v. City of Los Angeles, (2009) 177 Cal.App.4th 305, 314. Here, the petition challenges an administrative decision affirming Petitioner’s thirteen-month unpaid suspension. In such a case, the Court exercises its independent judgment on the evidence. See Ibid; see also McMillen v. Civil Service Com., (1992) 6 Cal.App.4th 125, 127-129 (applying independent judgment standard to petition challenging a 12-day suspension of an ambulance driver). While foundational factual findings must be sustained if supported by substantial evidence, the ultimate determination of whether the administrative proceedings were fundamentally fair is a question of law. Clark v. City of Hermosa Beach, (1996) 48 Cal. App. 4th 1152, 1169.

Analysis

Petitioner argues that the Commission’s November 2012 decision should be set aside because he was denied a fair administrative hearing. Specifically, Petitioner contends that the Commission violated his due process rights by denying him a meaningful opportunity to contest the unpaid suspension. Generally, a procedural due process claim has two distinct elements: “(1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections.” Hufford v. McEnaney, (9th Cir. 2001) 249 F.3d 1142, 1150; Kildare v. Saenz, (9th Cir. 2003) 325 F.3d 1078, 1085. These elements are discussed below.

1. Petitioner Had a Protected Property Interest to Continued Employment and Income

Petitioner contends that he had a property interest in the income the County withheld from him during his suspension because a public employee cannot be disciplined or discharged without cause. Although the County and the Commission concede that a permanent County employee generally holds a property interest in continued employment,³ they argue that Civil Service Rule 18.01 precludes a County employee from maintaining a property interest in receiving income during a period in which criminal charges are pending against that employee.

It is well settled that “[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194, 207. Thus, the extent and characteristics of an employee’s property interests arising out of his public employment may be defined by the terms of his employment, as they are established by state and local law. See Board of Regents of State Colleges v. Roth, (1972) 408 U.S. 564, 577-78; American Federation of State etc. Employees v. County of Los Angeles (1983) 146 Cal.App.3d 879, 889 (“the extent of the protected interest or entitlement (i.e., the terms and conditions of employment) is governed purely by statute”).

³ See Resp. Opp., p. 7 (“it is undisputed that permanent County employees generally have a property interest in continued employment”); RPI Opp., p. 3 (“The Civil Service Rules generally provide permanent, classified County employees a property interest in continued employment”); see also Skelly v. State Personnel Bd., (1975) 15 Cal.3d 194, 206.

As a starting point, the parties do not dispute that Petitioner holds a protected property interest in his continued employment with the County. See Skelly, *supra*, 15 Cal.3d at p. 206 (“the California statutory scheme regulating civil service employment confers upon an individual who achieves the status of ‘permanent employee’ a property interest in the continuation of his employment which is protected by due process”). From there, however, the parties dispute the extent of Petitioner’s right to continued employment with the County and whether he had any right to a continued salary during the suspension period.

The Commission and the County argue that Rule 18.01 carves out of a public employee’s protected interest in continued employment the right to receive income during a period in which criminal charges are pending against the employee. The Commission and the County base this argument on an interpretation of Rule 18.01 that is not supported by the rule’s plain language. For example, they assert that the rule clearly provides that a County employee will be subject to an unpaid, non-disciplinary suspension due solely to the fact that criminal charges have been filed against him. However, Rule 18.01 is silent as to whether a suspension made pursuant to its terms will be without pay; instead, this is a practice that the County has established through practice, but which does not appear to be authorized by any Civil Service Rule. (See AR 189, 326). In fact, the Commission has, on at least one occasion, determined that a Rule 18.01 suspension, where the underlying criminal complaint is not sustained, is disciplinary and awarded the affected employee 133 days of back pay. (AR 93-98). Further, by its terms, Rule 18.01 does not mandate that the County suspend an employee against whom criminal charges have been filed; rather, it provides that “an employee *may* be suspended” if charges, criminal or non-criminal, are filed against the employee. (AR 189) (emphasis added).

Thus, there is no language in Rule 18.01 that establishes that a County employee is automatically and permanently stripped of his right to receive income for a period during which he is suspended as the result of a pending criminal proceeding against him. The County and the Commission do not point to any other state or local law that prevents Petitioner’s right to continued employment from encompassing the period during which he was suspended because criminal charges were pending against him. See Skelly, *supra*, 15 Cal.3d at p. 207; American Federation of State etc. Employees, *supra*, 146 Cal.App.3d at p. 889.

The County’s and Commission’s reliance on Gilbert v. Homar, (1997) 520 U.S. 924, is misplaced. There, the Supreme Court recognized that the State of Pennsylvania had a significant interest in immediately suspending a police officer without pay after felony charges were filed against the officer such that the State was not required to afford the officer a pre-suspension hearing. Id., at p. 932-933 (emphasis added). However, to the extent that the Gilbert decision can be read to establish that the police officer held no property interest in receiving pay, whether concurrent with or following his suspension, that case is distinguishable from Petitioner’s in an important aspect: the police officer in Gilbert was suspended pursuant to a Pennsylvania statute that expressly required a law enforcement agency to suspend without pay a police officer against whom felony charges had been filed. See Id., at p. 933 (citing 4 Pa. Code § 7.173). Here, no such statute or local law governs Petitioner’s employment.

In short, Rule 18.01 does not terminate an employee’s constitutionally protected property interest as soon as he is charged with a crime.

2. The Commission's and the County's Post-Suspension Procedures Were Inadequate

Next, the Court must determine whether the Commission and the County provided Petitioner with adequate procedural safeguards in suspending him without pay. “The determination of the procedure necessary to satisfy due process requirements in a particular context is guided by the three-part balancing test described in Mathews v. Eldridge, 424 U.S. 319, 335.” Hufford, *supra*, 249 F.3d at p. 1150. The Supreme Court in Mathews described the three factors as follows: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews, *supra*, 424 U.S. at p. 335. These factors are addressed below.

a. The Nature of Petitioner's Interest Affected by the County's Suspension Decision

As discussed above, Petitioner had a protected property interest in continually receiving income throughout his employment with the County. See Association for Los Angeles Deputy Sheriffs v. County of Los Angeles, (9th Cir. 2011) 648 F.3d 986, 991 (“Temporary suspensions, like terminations, are deprivations of employment that can implicate the protections of due process”). Indeed, Petitioner’s interest in his income during the thirteen-month suspension period was substantial. As a result of being denied income for thirteen months, Petitioner was unable to pay his children’s school tuition, had his credit damaged because he could not pay his bills, and was unable to complete the purchase of a home. (AR 376).

The County attempts to minimize the significance of this interest by arguing that Petitioner controlled his own destiny leading up to and throughout his suspension. Essentially, it blames Petitioner for the fact that the District Attorney’s Office filed criminal charges against him that were found by the hearing officer to be “meritless.” (AR 40). For example, the County asserts that “Petitioner fails to appreciate that his involvement in criminal activity also created a hardship for the County” and that “it is not the County’s fault that Petitioner got himself arrested and was charged with two felony counts.” (See County Opp., pp. 11, 12).

The County’s argument is untenable. First, as Hearing Officer Boyd determined below, Petitioner was wrongly accused of grand theft and perjury after his child’s former teacher forged his name on childcare forms. (AR 39-40, 378-379). This issue was not seriously contested by DHS at the administrative hearing. Second, there is no evidence in the record that Petitioner was at fault with respect to the circumstances giving rise to the criminal prosecution. Thus, it cannot be said that Petitioner somehow diminished his interest in receiving back pay for the period of his suspension by unwillingly becoming the subject of criminal charges that were ultimately dismissed.

The Commission similarly attempts to minimize the significance of Petitioner’s protected interest by arguing that Petitioner is to blame for the prolonged suspension because he waived his speedy trial rights—i.e., his criminal prosecution was not resolved within 60 days of his arraignment. This argument also lacks merit. There are important tactical reasons why a

criminal defendant would waive his speedy trial rights. To strip an individual of property interests arising out of his employment because he decided to waive his speedy trial rights in an ongoing criminal proceeding would place an additional and unfair burden on that individual in deciding how to proceed with his criminal case. At a minimum, it is grossly unfair to allow a government employer to withhold thirteen months of salary for a crime that was never proven and to treat an employee's arrest as a final criminal judgment.

b. The Risk of an Erroneous Deprivation of Petitioner's Interest Through the Procedures Applied at his Administrative Hearing

Without the opportunity to challenge the County's refusal to award him back pay following the dismissal of the criminal charges, Petitioner is left only with the ability to challenge the County's finding that a nexus existed between the nature of the criminal charges and the nature of his job duties. The Court finds that limiting a post-suspension hearing to this singular issue creates a significant risk of an erroneous deprivation of Petitioner's interest in continued employment.

In this case, the Commission's nexus finding bears no connection to the issue of whether Petitioner was indeed guilty of the alleged criminal conduct. In other words, under the parties' current practice, whether an employee should or should not be suspended without pay—regardless of the duration of the suspension—is in no way dependent on whether the employee engaged in blameworthy or culpable conduct. Certainly, a fundamental aspect of procedural due process “is the opportunity to be heard at a meaningful time and in a meaningful manner.” Los Angeles Police Protective League v. City of Los Angeles, (2002) 102 Cal.App.4th 85, 91. The Court finds little meaning in a post-suspension hearing that precludes a suspended County employee from challenging the merits of criminal charges filed against him when those criminal charges formed the sole basis for his suspension. In fact, it is difficult to ascertain the need for a post-suspension hearing that is limited solely to the determination of whether a nexus exists between the criminal charges supporting an employee's suspension and the nature of the suspended employee's job duties. Such a finding can be easily made by comparing the description of the charged crimes set forth in the Penal Code with the County's description of the employee's duties. See, e.g., Coleman v. Department of Personnel Administration (1991) 52 Cal.3d 1102, 1121 (“These relatively simple determinations generally can be made from personnel records”).

The Commission argues that the post-suspension hearing procedures adequately protect a County employee's rights under Rule 18.01 because that rule anticipates that a criminally-charged employee may be acquitted. (See AR 189 [“the period of suspension may exceed 30 calendar days and continue until, but not after, the expiration of 30 calendar days after the judgment of conviction *or the acquittal* of the offense charged . . .”]) (emphasis added). Thus, according to the Commission, County employees facing criminal charges should expect their unpaid suspensions to be justified even if they are acquitted or their criminal charges are dismissed. This argument is misguided. As discussed in greater detail above, Rule 18.01 is silent as to whether a suspension made pursuant to its terms shall be paid or unpaid and it provides the County with discretion in deciding whether to suspend an employee facing criminal charges. Therefore, a County employee cannot be expected to understand that his unpaid suspension will be justified regardless of the outcome of his underlying criminal proceedings when the operative

Civil Service Rule does not establish that suspensions made under its terms are mandatory and will necessarily be enforced without pay. Indeed, as stated by the Commission in an earlier decision, an employer cannot rely on Rule 18.01 to justify an employee's loss of compensation; that would be "both punitive and absurd." (AR 98).

Finally, the County relies on Coleman, *supra*, to argue that Petitioner is not entitled to *any* post-suspension hearing. This reliance is misplaced. In Coleman, the California Supreme Court determined that a post-deprivation hearing was not required after a state employee was deemed to have resigned under Government Code section 19996.2. *Id.*, at p. 1122. Under Government Code section 19996.2, a state employee who is absent without leave for five consecutive working days is automatically deemed resigned from state service. *Id.*, at p. 1111. In rejecting a disgruntled employee's argument that he was entitled to a hearing before being deemed resigned, the Supreme Court held that the only process necessary under Government Code section 19996.2 is written notice of the state's contemplated action and the opportunity to respond. *Id.*, at p. 1122. In holding that no post-deprivation hearing is required under Government Code section 19996.2, the Court analyzed the three factors set forth in Mathews, *supra*, 424 U.S. at p. 335. Coleman, *supra*, 52 Cal.3d at pp. 1119-1122. In doing so, the Supreme Court focused largely on the distinction between disciplinary dismissals for cause and non-disciplinary dismissals, such as an automatic resignation. *Id.*, at pp. 1119-1121. Pertinent here, the court in Coleman observed: "Unlike a disciplinary discharge, resignation from state employment does not seriously damage an employee's standing and associations in the community, nor does it foreclose other employment opportunities. . . . A resignation, therefore, carries no stigma." *Id.*, at p. 1120.

There is an important distinction between the statutory scheme at issue in Coleman and Rule 18.01. While this case does not involve resignation or permanent discharge, it does involve a prolonged unpaid suspension arising out of criminal allegations. Thus, the due-process scale tips in favor of providing stricter procedural safeguards because the underlying government action—the suspension—is tainted by the stigma of the criminal proceedings that triggered the government action. See *Id.*, at pp. 1119-1120. Without the opportunity to clear one's name of the alleged criminal conduct, a County employee that is suspended under Rule 18.01 will never have the opportunity to shed the stigma associated with his suspension.

For these reasons, the Commission's current post-suspension hearing practice under Rule 18.01 poses a risk of erroneous and significant deprivation; it precludes all County employees from effectively challenging the basis for their suspension, regardless of the duration of, or the merits of the underlying justification for, the suspension.

c. The Government's Interest

Finally, the Court finds that the County's and the Commission's interest in maintaining the limited scope of post-suspension hearings under Rule 18.01 is outweighed by Petitioner's and other County employees' interests in receiving broader post-suspension safeguards. While the Court does not dispute that a government employer has an important interest in suspending employees against whom felony charges have been filed, (see Gilbert, *supra*, 520 U.S. at p. 932), this interest is not so important as to necessarily override any interest the charged employee may have in clearing his name following resolution of the criminal proceeding. See Brown v.

Department of Justice, (D.C. Cir. 1983) 715 F.2d 662, 669 (“When an employee . . . is acquitted and the agency chooses to reinstate him or her, it would be unfair to penalize the employee for having become a target of the criminal justice system”). This is especially true when the charged employee does not occupy a position of great public trust or high public visibility. (Cf. Gilbert, *supra*, 520 U.S. at p. 932; Association for Los Angeles Deputy Sheriffs, *supra*, 648 F.3d at p. 99). While Petitioner’s position was deemed to be “sensitive,” the Court agrees with the Hearing Officer that DHS’ blanket declaration that all of its positions are “sensitive” is “overkill [and] renders the limiting term (sensitive) meaningless.” (AR 38).

Additionally, the Court finds that under the circumstances of Petitioner’s individual suspension, the burden of allowing Petitioner to challenge the justification for his suspension is not so great so as to outweigh Petitioner’s interest in a broader post-suspension hearing. In fact, all of the procedural guards appear to have been provided to Petitioner at his administrative hearing, with the exception of the most important one—permitting a finding on the issue of whether the suspension was ultimately justified. See Brown, *supra*, 715 F.2d at p. 669 (“Indeed, were reparations not available for the subsequently acquitted and reinstated employee, we would have grave doubts about the lawfulness of an indefinite suspension based solely on an employee’s indictment on work-related charges”). Allowing Hearing Officer Boyd to determine this issue would have imposed little additional burden on the Commission and the County as both parties allowed Petitioner, without objection, to present evidence of his innocence and the financial hardship he suffered as a result of the unpaid suspension. (See AR 375-381). Indeed, Hearing Officer Boyd made factual findings that the criminal charges filed against Petitioner were dismissed and that he suffered severe financial hardship as a result of the suspension through no fault of his own. (AR 39-41). Thus, there is no indication that allowing Hearing Officer Boyd to resolve the issue of whether Petitioner’s suspension was justified—after the suspension had been served and Petitioner’s criminal case had been resolved—would have imposed significant and adverse financial and administrative burdens on the County and the Commission. See Mathews, *supra*, 424 U.S. at p. 335.

Disposition

For these reasons, the Court grants the petition for writ of mandate. Judgment shall be entered ordering a writ of mandate to issue from this Court remanding the proceedings to the Commission commanding it set aside its November 2012 decision and reconsider its actions in light of this decision and order.

Petitioner shall file and serve a proposed judgment and a proposed writ of mandate within 10 days with a proof of service showing that they were served on all parties. The administrative record shall be returned to the party who lodged it, to be preserved without alteration until the judgment is final, and to be forwarded to the Court of Appeal in the event of an appeal.

IT IS SO ORDERED.

May 30, 2014



Hon. Luis A. Lavin
Judge of the Superior Court of California



County of Los Angeles CHIEF EXECUTIVE OFFICE

Kenneth Hahn Hall of Administration
500 West Temple Street, Room 713, Los Angeles, California 90012
(213) 974-1101
<http://ceo.lacounty.gov>

WILLIAM T FUJIOKA
Chief Executive Officer

Board of Supervisors
GLORIA MOLINA
First District

MARK RIDLEY-THOMAS
Second District

ZEV YAROSLAVSKY
Third District

DON KNABE
Fourth District

MICHAEL D. ANTONOVICH
Fifth District

March 11, 2011

To: All Department Heads

From: William T Fujioka
Chief Executive Officer

COUNTY EMPLOYEE RESPONSIBILITIES WHEN SUBPOENAED

Recently, the Board of Supervisors requested that the Civil Service Commission (CSC) "appear to advise the Board regarding steps it has taken, or that could be taken by the Commission or the parties before it, to expedite the (civil service) appeals process." On March 1, 2011, CSC issued a memorandum (attached) to the Board responding to the Board's concerns and identifying factors impeding the timeliness of the appeals process. One of the factors highlighted in the report was the lack of compliance by County employees in complying with subpoenas for testimony in civil service hearings.

Departments are reminded that when an employee is subpoenaed either as a witness or ordered to appear as a County representative for a civil service or legal proceeding, **the subpoena or order to appear are considered a primary work assignment and attendance is not optional.** Department managers should immediately take all necessary steps to communicate employee responsibility when served with a subpoena and ensure employee attendance at all future proceedings.

If you have any questions or require further information on this matter, please contact Ellen Sandt, Deputy Chief Executive Officer at (213) 974-1186, or esandt@ceo.lacounty.gov.

WTF: EFS
SAW:ef

Attachment

c: Each Supervisor

03.10.11 employee resp when subpoenaed.docx

"To Enrich Lives Through Effective And Caring Service"

**Please Conserve Paper – This Document and Copies are Two-Sided
Intra-County Correspondence Sent Electronically Only**



CIVIL SERVICE COMMISSION

COUNTY OF LOS ANGELES

COMMISSIONERS: EVELYN V. MARTINEZ • VANGE FELTON • CAROL FOX • LYNN ADKINS • Z. GREG KAHWAJIAN
LAWRENCE D. CROCKER, EXECUTIVE DIRECTOR • SANDY STIVERS, DEPUTY EXECUTIVE DIRECTOR

March 1, 2011

To: Supervisor Michael D. Antonovich, Mayor
Supervisor Gloria Molina
Supervisor Mark Ridley-Thomas
Supervisor Zev Yaroslavsky
Supervisor Don Knabe

From: Lynn Adkins, President

for
L.A.

SUBJECT: Board of Supervisors' Motion on Citizen's Economy & Efficiency Commission
Recommendations

On January 25, 2011, the Los Angeles County Board of Supervisors ("Board") approved a motion by Supervisor Molina and seconded by Mayor Antonovich that, *inter alia*, requested that the Civil Service Commission ("CSC" or "Commission") appear to advise the Board regarding steps it has taken or that could be taken by the Commission or the parties before it, to expedite the appeals process. With this memorandum we offer our comments on the Citizen's Economy & Efficiency Commission ("CE&EC") report and its recommendations. In addition, we offer an outline of the steps the Commission has already taken and is taking to expedite the appeals process as well as what additional steps could and/or should be taken.

First, it is important to note that the Commission shares many of the frustrations about the lengthy timeframes to resolve disciplinary cases, particularly discharge cases, and has dedicated a great deal of effort to reducing these delays. Commissioners and staff provided the CE&EC complete cooperation, including attendance at several meetings to inform them about the processes that have been put in place over the years to ensure compliance with all the relevant county, state and federal regulations and court rulings.

Several years ago as our caseload doubled and the number of non-disciplinary cases increased, we sought approval from the Executive Officer of the Board and the CEO to increase the size of our staff and improve the quality of its leadership. We thank the Board and the CEO for their past support and the renewed focus on this important area. We also welcome the board's attention and the CE&EC's review. While we may disagree with some of the assessments and comparisons, we fully support efforts to streamline and speed up the process and the efforts to reduce the number of cases filed with the commission. We would also be direct beneficiaries of such efforts.

It is important to note that the Commission's increased caseload comes, primarily, in non-disciplinary matters. In this regard, the Department of Human Resources' (DHR) recent steps to re-structure their appellate review process, such as for examination appeals, is a step in the right direction, and should result in a reduced flow of cases to the Civil Service Commission in the future. Better communication between the employing departments and the employees being rated, and a DHR appeals process that includes meaningful meetings between the employees and the appellate staff to ascertain all relevant facts, and to help employees understand the rationale for their scores if the appeal should be denied, should go a long way to reduce some of the tensions between employees and their managers in examination disputes.

I. Background

The Los Angeles County Civil Service Commission is a Los Angeles County Charter mandated independent commission, which serves as the administrative appellate body for the County's nearly 100,000 classified employees. It is the initial appellate body for employees who have received major discipline, such as discharges, reductions, suspensions in excess of five days, as well as for discrimination complaints. The Commission also hears appeals of scored portions of examinations. Additionally, the Commission also serves as the administrative appellate body for a number of cities that directly contract with the County. Pursuant to Civil Service Rule 4.03, the Commission must grant petitions for hearings in cases of discharge, reduction, or suspension in excess of five (5) days.

For the past several years, the CSC has received over 500 petitions for hearings annually. Typically, 40% of those appeals involve non-disciplinary matters. Hearings for these issues are rarely granted due to the structure of the Civil Service rules and the high threshold a petitioner must meet. The Commission granted hearings in more than 250 appeals each year. The overwhelming majority of the hearings granted were for disciplinary cases where employees are entitled to a hearing per the Los Angeles County Civil Service Rules, adopted by the Board. The following table illustrates the CSC's annual workload from calendar year 2008 through 2010:

CSC Caseload

Calendar Year	2008	2009	2010
Petitions filed	531	525	520
Disciplinary Cases	280	335	328
Hearings Granted	264	306	272 ¹
Non Disciplinary/Discretionary Petitions	251	190	192
Non-Disciplinary Discretionary Hearings Granted	6	4	3

¹ As of 2/8/11, with several discretionary petitions still pending.

In addition to processing these appeals, the Commission's staff responds to hundreds of discovery motions (*Pitchess* motions) filed each year by assistant public defenders and alternate public defenders. In 2010, the staff also responded to over 250 public records act requests and prepared six (6) administrative records for Petitions for Writ of Mandate filed with the Superior Court.

II. Actions Taken by the CSC to Expedite Hearings

Since 2007, the CSC has implemented several actions in an attempt to expedite the appeals process. Following are some of the highlights:

1. In April 2008, the CSC's Executive Director submitted proposed revisions to the CSC's procedural Rules to the CEO's Employee Relations Division to facilitate discussion with the unions representing County employees. The purpose of the proposed revisions were to introduce procedural changes in an effort to expedite the appeals process, correct typographical errors and make other necessary updates;
2. Hearing Officers were notified in May of 2008 that the Commission would strictly enforce the terms of their contracts and they were no longer to be compensated if they granted continuances, other than as expressly provided in the contract.
3. Concurrent with item 2 and at the CSC's request, the Chief Deputy Executive Officer for the Board of Supervisors sent a memorandum to all Department Heads and Chief Deputies that Hearing Officers would be less likely to grant continuance requests going forward and this would require the cooperation of their advocacy staff;
4. Beginning in June 2008, the CSC intensified training for its Hearing Officers making training an annual activity. This training has focused on, among other things, mechanisms to better control the hearing process and staying focused strictly on the matters to be adjudicated. This training has including coaching from a retired Superior Court Judge and comments from advocates for departments and employees, as well as representatives from the Office of the County Counsel;
5. In September 2008, the CSC's Executive Director and the Commission's legal advisor attended a meeting of departmental Chief Deputies to discuss problems caused by department witnesses ignoring subpoenas and/or not attending hearings where their testimony was required. The delays caused by these absences continue to impact timely completion of the process. The Board could be of great assistance in this regard if you would issue clear direction to department heads to compel department witnesses to appear at hearings.
6. New hearings are now scheduled within one (1) week of the selection of the Hearing Officer. In December 2008, the staff of the CSC was divided into an agenda team and a hearing team, both led by Head Board Specialists. The supervisor of the hearing team immediately began scheduling the backlog of cases. Historically, there had been 100 to 150 cases that were ready for scheduling but were not scheduled due to the unavailability of the parties (*i.e.*, backlogged). Staff was directed to immediately begin

scheduling based upon the availability of the Hearing Officers. Within three months, all the backlogged cases were scheduled;

7. On March 25, 2009, the CSC's Executive Director published the proposed changes to the CSC's Procedural Rules and requested comments from all interested parties;
8. After lengthy and open discussions with employee and departmental representatives as well as the Coalition of Unions, at its December 2010 meetings, the CSC discussed and subsequently adopted revisions to the Commission's Procedural Rules which became effective on January 1, 2011; and
9. This month the CSC's Executive Director and Deputy Executive Director developed with the Executive Office of the Board a proposed "Statement of Work" to be used in the solicitation and selection of Hearing Officers. The new language in the upcoming contract should address many concerns about delays and bring about more timely conclusions to the cases before the CSC.

III. Additional Steps and possible Board Actions to Expedite the Appeals Process

Following are actions, which if addressed, will help further expedite the appeals process:

1. Additional Hearing Rooms for Hearing Officers - The Commission requests the Board's assistance through the Executive Office to identify and allocate additional hearing rooms for use by the CSC's Hearing Officers. The CSC currently conducts three to five hearings per day. However, the Commission only has one (1) dedicated hearing room and is forced to dedicate too many resources to negotiate logistics/availability for any other rooms. If additional rooms were made available in or near the Hall of Administration, there would be a proportional increase in the number of hearings scheduled on any given day.
2. Availability of Employee and of Departmental Advocates to Reduce Delays - The Commission requests the Board to urge both employee representatives and departments to adequately staff their advocacy units. Unavailability of advocates lead to hearing dates being continued, unduly extending the length of the appeals process. In 2010, Departmental advocates individually or jointly with opposing counsel requested 126 hearing continuances. Departments drive the examination and disciplinary processes and should staff appropriately. Long delays also impact the availability of witnesses, and can affect the final outcome.

In conclusion, the Commission is committed to quickly resolving all appeals. The Commission will continue to implement whatever changes are within its power to expedite the process. If and when the Board votes to make any of the other changes in the Charter or the Civil Service Rules the CE&EC proposed, the CSC stands ready to implement those changes as well.

Thank you for this opportunity to participate in the process and express our views.

COUNTY OF LOS ANGELES
CIVIL SERVICE COMMISSION

522 Kenneth Hahn Hall of Administration
500 W. Temple Street
Los Angeles, CA 90012

CLAIM FOR COMPENSATION FOR HEARING OFFICER SERVICES
PLEASE USE ONLY ONE FORM PER APPELLANT.

Appellant's Name -

Case No -

County Department -

Hearing Services Rendered:

Date(s) of Service –

Hours per day (excluding lunch and breaks) –

Total compensation for hearing services -

Hearing Report Charge(s):

Cancellation charge **per the contract** -

TOTAL CHARGES:

Print name – Hearing Officer

Signature of Hearing Officer

Address

City State Zip Code

Date request submitted: _____

Frequently Asked Questions

1. May I observe a hearing prior to conducting my first hearing day with the Commission?

Yes, hearings are open to the public with the exception of peace officer cases.

2. Do I need to notify anyone that I'd like to observe a hearing?

Please contact Harry Chang at (213) 974-2411 to find out about the hearing schedule, or email him at hchang@bos.lacounty.gov . There are frequent hearing cancellations so I would suggest you call late afternoon, the day before any hearing you would like to observe, to find out the status. The day before you observe a hearing you may also make a request to Harry to arrange parking.

3. Where do I park?

Your parking will be pre-arranged at the Music Center/Dorothy Chandler Pavilion (Lot 14). The lot is located on Grand Avenue between Temple and 1st on the west side of the street. Your name will be at the parking office.

4. What will I be given on my first day of hearing?

You will be given an accordion file that contains a stapler, name plate, and holder, two exhibit pads, a note pad, a pen, a pencil, and a highlighter. Please return everything at the end of the day, including the accordion file and any exhibits submitted by the parties during hearing.

5. What should I bring my first day of hearing?

Bring a copy of the Civil Service Rules and the Civil Service Procedural Rules.

6. How long is lunch?

Lunch shall be an hour. If it is not convenient to break right at noon because you can finish a witness's testimony or for some other reason, please ask the court reporter if she is okay with working another 15-30 minutes. Please do not go longer than an additional half hour (even if the court reporter states she's okay). There shall also be a morning and an afternoon break of fifteen (15) minutes per the Court Reporter's contract.

7. Will the hearing rooms outside of room 522 be locked during lunch?

If your hearing room is located in the building where a key card is needed, Commission staff will assist you in letting you in. Ask staff what will occur during

lunch, that is, will the room be locked and if not, do you have to take your belongings, how will you get back in, etc.

8. How late can a hearing be conducted?

Hearings must end by 4:45 p.m., pursuant to the Court Reporters' contract. If a hearing is held in the court house across the courtyard, the hearing must end by 4:30 p.m.

9. Do I have to fill out the yellow "Daily Hearing Information Sheet provided to me?"

Yes, please record your start and end times. If the hearing has not been completed, do not arrange additional dates with the parties unless a Commission staff is there. The dates you select may not be available on our master calendar.

10. How do I know how many dates of hearing are permitted?

Once assigned a case, you will be sent a memo from the Executive Director which states the maximum allowable number of compensable days of hearing and report-writing. If you need additional dates beyond what the letter outlines, you must get pre-approval. For example, if you are permitted three days of hearing and at the end of the second day you realize you'll need more than one additional day, make your request in writing before you leave that day or email the request shortly thereafter. You can either use the "Daily Hearing Information Sheet" or you can send an email to Harry Chang. Please provide your justification for additional days; simply stating the parties are requesting more days is not specific.

"Special notes of the Hearing Officer" on the "Daily Information Sheet" are for you to make any notes you'd like to remember for the following hearing date.

11. Will I be given transcripts at the end of the hearing date(s) in order to write my report?

No, the Commission does not provide transcripts. If you would like an audio recording of the hearings, please let us know and we will obtain them from the court reporting company. Please return them to us after you have submitted your report. Do not make copies of the CDs or loan them to the parties. The CDs are the property of the court reporting firm and must be returned to the court reporter.

12. Do I turn in my invoice at the end of the hearing day or once the case has ended and I have submitted my report?

Your choice, either way.

13. If I have questions, who should I contact?

If you have a question, please contact Harry Chang.

Miscellaneous

- There is no provision to exclude one party who is filing a written brief from leaving the room because the other side is doing an oral closing. The hearings are not confidential from the parties. You may ask that they both file closing briefs or both do an oral closing.
- You must swear in the witnesses. Please do not ask the court reporter to do so.
- When using a room outside of the Commission's office, please do not ask non Commission for assistance in moving furniture, audio system, etc., please contact Commission staff. At the end of the day, please look around and remind the parties to discard any water bottles, etc.
- Please do not use the Commission staff conference room as a place for you to take a break (unless your hearing is schedule in that room).
- For cases involving minors or public participants of county programs such as medi-cal, only the first name and first letter of the last name are to be used. You may need to remind witnesses of this.