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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JAMES BELAND,

Plaintiff and Appellant,

v.

COUNTY OF LAKE,

Defendant and Respondent.

A140533

(Lake County
Super. Ct. No. CV411073)

INTRODUCTION

Plaintiff James Beland appeals from the trial court’s denial of his petition for writ of administrative mandate, following his termination from his position with the Lake County Sheriff’s Department. He maintains the Board of Supervisors (Board) violated the applicable memorandum of understanding (MOU) by substituting its findings for those of the hearing officer and in conducting its review in a closed session. We conclude the Board acted in accordance with the MOU and the Brown Act, and affirm.

PROCEDURAL AND FACTUAL BACKGROUND

We set forth the facts to the extent necessary to address the issues raised on appeal. Beland, a deputy sheriff with the Lake County Sheriff’s Department (Department), was terminated in 2008 for insubordination, willful disobedience, dishonesty, criticism of orders and “failure of good behavior” causing discredit to the department. Between April 2007, and June 2008, Beland was the subject of eight Internal Affairs investigations. In December 2008, the Department provided him with a Notice of Final Disciplinary Action, signed by Sheriff Rodney K. Mitchell, which

informed him of his termination and right to appeal the action by filing a written request for a hearing pursuant to the MOU between the County of Lake (County) and the Lake County Deputy Sheriff's Association.

Beland appealed the disciplinary action, and a hearing was conducted by hearing officer Luella E. Nelson. The parties were represented by counsel and "had the opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue issues in dispute." The parties stipulated the issues to be considered by the hearing officer were whether Beland was "dismissed for cause," and if not, "to what remedy is [he] entitled under the provisions of this Agreement?"

The hearing officer received evidence regarding the internal investigations. Beland was given notice of the first two investigations in April and May 2007. Both concerned an incident during which Beland allegedly struck a subordinate in the head, and the second also involved an allegation of retaliation for the subordinate's reporting of the incident. The third notice of investigation concerned comments Beland allegedly made on July 29, 2007, related to another officer's pursuit of a suspect, while the fifth investigation concerned his alleged violation of an order not to discuss that third investigation. The fourth investigation notice concerned an allegedly disparaging comment by Beland on April 11, 2008, about the deputy he had allegedly struck in the head. The sixth investigation concerned statements Beland allegedly made to a deputy district attorney and to Sergeant James Samples that he was ordered not to administer a preliminary alcohol screening test (PAS) to Chief Deputy Russell Perdock in April 2006, when he actually did not receive such an order. The seventh notice of investigation, filed on the same day as the sixth, generally alleged Beland had violated regulations regarding good conduct and employee and internal relations. The eighth notice alleged Beland was insubordinate, in that he initiated a conversation with Sergeant Andy Davidson about the investigation of an incident on April 11, 2008.

The notices of the internal investigations included admonitions not to discuss the investigations or allegations, either with "anyone other than the investigating officer or myself" (the first, fifth and seventh notices), or with "anyone other than your

representative or the internal affairs investigator” (the second, third, fourth and sixth notices). The final notice contained no admonition.

The hearing officer found that the County “has not established by a preponderance of the evidence that [Beland] was dismissed for cause.” She found, however, that “cause existed for a written reprimand for the divisiveness created by his laments over the decision not to [conduct a PAS test on] Perdock,” and for “the counseling that occurred during his IA interview on May 16, 2008, regarding the appropriate steps to clarify vague/ambiguous IA notices, and this counseling should be reflected in his personnel records.”

In regard to the allegation that Beland discussed pending internal affairs investigations with other deputies, the hearing officer found “[Beland] admittedly either raised or responded to co-workers’ comments or inquiries about pending IAs.” The hearing officer also found “none of these instances constituted insubordination . . . [or] willful disobedience,” because the investigation notices had “so little information that [Beland] could not prepare for the interview.” She also found three of the notices “improperly phrased the order not to discuss the [investigation],” because of their “implication that [Beland] could not even consult his own representative.” The hearing officer concluded, however, that Beland “did cross the line usually drawn in law enforcement by asking [Deputy] Davidson if he had done anything ‘stupid’ on April 11. Since the IA involved his actions on a day when he worked all day with Davidson, this inquiry improperly solicited input from a likely interviewee. Davidson’s reply, however, headed off the potential harm of tainting the investigation.”

As to the allegation Beland falsely stated and testified he had been ordered not to administer a PAS test on Perdock, the hearing officer found Beland’s “testimony at the preliminary hearing was not a matter of lying on the stand; it was a matter of over-reliance on memory weakened by the passage of time. His testimony was stumbling and hesitant, and thus unimpressive, but . . . I am unable to conclude that it was intentionally false, misleading, or evasive.” The hearing officer further found “It is fair to say that [Beland’s] response to [Sergeant] Samples was less than candid. However, it did not rise

to the level of dishonesty A lack of candor in a work-related conversation warrants severe discipline. A suspension of 20 days is sufficient”

In regard to the allegation Beland complained to others he had been ordered not to perform a PAS test on Perdock, the hearing officer characterized those comments as “laments over the decision not to PAS Perdock.” She concluded “cause existed for a written reprimand for the divisiveness created” by those comments.¹

The hearing officer’s recommended order was as follows: “1. James Beland was not dismissed for cause; however, cause existed for a suspension of 20 days for lack of candor; a written reprimand for making divisive comments; and counseling regarding the appropriate means to seek clarification of vague or ambiguous IA notices, as discussed above. [¶] 2. As a remedy, James Beland is entitled to be reinstated to his former position without loss of seniority or other contract benefits, and made whole for any and all loss of earnings occasioned by his dismissal, from a date 20 working days after the [date] of his dismissal to the date on which he is offered reinstatement, minus interim earnings. The period of time from the date of dismissal to and including 20 working days after the date of dismissal shall be considered a disciplinary suspension, and his personnel record shall be noted. He is further entitled to have expunged from his personnel file and any other records any record of the termination and the allegations against him that were not proven, as discussed above. His personnel file and other records should reflect that he received a 20-day suspension for lack of candor; a written reprimand for divisive comments he made in lamenting the lost opportunity to administer a Preliminary Alcohol Screening test; and counseling regarding the appropriate means to seek clarification of vague or ambiguous IA notices.”

The Board considered the hearing officer’s recommendation and final decision at a closed-door session, and issued a written response. In it, the Board accepted the factual findings of the hearing officer, but disagreed with her conclusions about whether those

¹ The hearing officer ruled she was “without authority to address the merits of [the] suspension” for what she characterized as “patting [a subordinate] on the head,” and this issue has not been raised on appeal.

facts demonstrated insubordination, willful disobedience or dishonesty, or warranted discipline less severe than termination.

As to the allegation Beland discussed internal investigations in violation of orders, the Board concluded: “1. If Mr. Beland did not clearly understand the nature and scope of direction he had been given in the course of these many internal affairs investigations, it was incumbent upon him as a sworn peace officer to inquire of the superior officer who had given him that direction. [¶] 2. Mr. Beland did ‘cross the line’ in attempting to elicit information from Deputy Davidson, obviously a possible witness in the above-described investigation given they worked together on the date in question.”

In regard to the allegations of dishonesty, the Board concluded: “1. Mr. Beland was not truthful and, therefore, dishonest when he stated that he did not recall a discussion with Sergeant Samples wherein he made statements inconsistent with statements made in an official supplemental report. [¶] 2. Mr. Beland’s testimony at the preliminary hearing was internally inconsistent and demonstrated that Mr. Beland was not well-prepared.”

Lastly, as to the allegations Beland complained to others about allegedly being ordered not to conduct a PAS test on Deputy Perdock, the Board did not disagree with the factual findings. Instead, it rejected the level of discipline the hearing officer recommended.

The Board ultimately concluded: “1. That this Board accepts the hearing officer’s recommended determination as to which factual allegations of misconduct have been proven to have occurred as more particularly described hereinabove. [¶] 2. That this Board rejects the hearing officer’s recommendations as to the level of discipline appropriately imposed for that conduct. This Board finds that it is incumbent upon the County of Lake and the Lake County Sheriff’s Office to hold peace officers to a high standard of conduct. Semantical distinctions cannot erase the significance of the misconduct of Mr. Beland. Insubordination, dishonesty, and the failure of good behavior bringing discredit upon his agency. [¶] It is, therefore the decision of this Board to uphold the termination of Mr. Beland for the reasons stated herein.”

Beland then filed a petition for writ of administrative mandate in the superior court. The parties stipulated the matter would be “submitted on the administrative record, without further evidence, and on the briefs filed by the parties.” After a hearing, the court issued a statement of decision and denied the writ petition.

DISCUSSION

Beland contends the Board exceeded its powers under the MOU by “making new findings supporting its rejection of the hearing officer’s decision.” He also claims the Board’s closed-door hearing violated his rights under the Brown Act and voided his termination. We review de novo the issues of interpretation of the MOU and whether the Board’s closed-door session was illegal. (See *City of El Cajon v. El Cajon Police Officers’ Assn.* (1996) 49 Cal.App.4th 64, 70–71 [interpretation of MOU]; *Furtado v. Sierra Community College* (1998) 68 Cal.App.4th 876, 880 (*Furtado*), [alleged Brown Act violation].)

The Board’s Authority Under the MOU

Beland maintains the Board had no authority under the MOU to do anything other than “accept or reject” in total the recommendations of the hearing officer. He frames the issue as “whether the Board retained the power of ‘independent review’ akin to that of a trial court, or whether it had only the more limited power of ‘appellate review’ where it is bound by the hearing officer’s findings so long as they are supported by substantial evidence.”

The MOU provides, in pertinent part, for the following procedure for the appeal of a disciplinary action: “The basic issues to be submitted in the absence of a jointly submitted statement of the issues to the hearing officer are as follows: Was [employee] [dismissed, suspended, demoted] for cause? If not, to what remedy is [employee] entitled under the provisions of this [MOU]? . . . Following the hearing, the hearing officer shall consider the evidence presented, shall make findings regarding facts and the existence of cause, and shall render a written decision and recommendation. The hearing officer may find the disciplinary action was without cause and should be totally rescinded, was with cause and should be upheld, or was with cause but should be modified. The finding for

modification shall be specific as to the modified disciplinary action recommended. . . . *The authority for [the] decision to accept or reject the recommendations of the hearing officer shall rest with the County Board of Supervisors.* If the hearing officer’s recommendation is that the disciplinary action be totally rescinded and the Board of Supervisors concurs, the affected employee shall be restored to his/her former position or circumstances with all losses of pay and benefits fully restored. If the hearing officer recommends that the disciplinary actions be modified and the Board of Supervisors concurs, the modified action shall be applied forthwith with all losses of pay and benefits, in excess of the modified action, fully restored. *The decision of the Board of Supervisors in these matters shall be binding upon all parties.*” (Italics added.)

Beland points to nothing in the MOU limiting the power of the Board to either accepting in full or rejecting in full either the recommendations or the facts as found by the hearing officer. Indeed, the MOU states the “authority for [the] decision to accept or reject the recommendations of the hearing officer shall rest with the [Board],” and mandates the decision of the Board “shall be binding on all parties.”

Beland, relying on *Jackson v. City of Pomona* (1979) 100 Cal.App.3d 438 (*Jackson*), claims the Board had “only the more limited power of ‘appellate review’ where it is bound by the hearing officer’s findings so long as they are supported by substantial evidence.” In *Jackson*, the city council demoted a police officer and suspended him without pay for one month. (*Id.* at p. 440.) The Pomona City Code provided the termination proceedings be initiated by a complaint, which was followed by a “pretermination hearing pursuant to *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.” (*Jackson*, at pp. 440–441.) The officer requested an administrative hearing as authorized under the Pomona City Code. (*Jackson*, at p. 441.) That code provided “ ‘In the event that the hearing officer determines that the aggrieved employee should not be dismissed, the aggrieved employee shall remain in the employ of the city, subject to the discretionary review of the city council.’ ” (*Id.* at p. 442.) The hearing officer found the charges supporting the officer’s dismissal were not substantiated by a preponderance of the evidence, but concluded the officer should be suspended without pay for one month.

(*Id.* at pp. 442–443.) Following the city council’s review, it made different findings of fact and concluded those facts warranted discipline of one month’s unpaid suspension and a demotion. (*Id.* at p. 446.) The court reversed the denial of the officer’s petition for writ of mandate, holding the hearing officer’s findings were binding “in the absence of a finding that the hearing officer’s findings are without support in the evidence.” (*Id.* at p. 452.)

Jackson provides no aid to Beland. The scope of the city council’s review of the hearing officer’s decision in *Jackson* was governed by the Pomona City Code, which provided the hearing officer’s findings were binding on the city unless found to be unsupported by substantial evidence. In this case, the scope of the Board’s review of the hearing officer’s recommendation is dictated by the MOU, which provides “The authority for [the] decision to accept or reject the recommendations of the hearing officer shall rest with the County Board of Supervisors. . . . The decision of the Board of Supervisors in these matters shall be binding on all parties.”

Even if the MOU could be read to require the Board to accept the facts as found by the hearing officer, it does not require the Board to draw the same conclusions from those facts. As to the charge of dishonesty, the hearing officer found “[i]t is fair to say that [Beland’s] response to Samples was less than candid. However, it did not rise to the level of dishonesty, nor did it destroy his ability to testify credibly.” The Board reviewed the hearing officer’s decision and recommendation, questioned her use of “semantics,” and concluded that being “less than candid” and giving inconsistent testimony was dishonesty, and thus a basis for termination. Similarly, the hearing officer found Beland had “admittedly” discussed the internal investigations with others, and had “cross[ed] the line . . . by asking [Deputy] Davidson if he had done anything ‘stupid’ on April 11.”

The hearing officer further found the investigation admonitions were “vague” and that Beland and Brown had “different understandings of the term ‘discuss’ in this context.” The Board did not disagree with those findings, but instead concluded if Beland “did not clearly understand the nature and scope of direction he had been given in the course of these many internal affairs investigations, it was incumbent upon him as a

sworn peace officer to inquire of the superior officer who had given him that direction.” Lastly, the Board agreed with the hearing officer’s findings that Beland had “complain[ed] to fellow officers that he had been ordered not to conduct a PAS test on Perdock which was both divisive and inappropriate,” but rejected the recommendation as to discipline.

In sum, the Board was authorized by the MOU to reject the recommendations of the hearing officer, and it did so. The MOU mandated the Board’s decision was binding on the parties. The court did not err in denying Beland’s writ petition.

The Board’s Closed Session to Consider Beland’s Termination

Beland asserts the Board’s “closed-door hearing held without notice to [him] resulted in a void termination” and violated the Brown Act. He claims the Board “engage[d] in its own fact-finding [and] . . . its deliberations evolve[d] into a hearing upon charges” at which he had a right to be present.

As relevant here, the Brown Act provides in part: “(b)(1) Subject to paragraph (2), this chapter shall not be construed to prevent the legislative body of a local agency from holding closed sessions during a regular or special meeting to *consider* the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to *hear* complaints or charges brought against the employee by another person or employee unless the employee requests a public session. [¶] (2) As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session. If notice is not given, any disciplinary or other action taken by the legislative body against the employee based on the specific complaints or charges in the closed session shall be null and void.” (Gov. Code, § 54957, subd. (b)(1)–(2), italics added.)

Beland claims the statute required notice of the Board’s closed-door session to consider his discipline or dismissal. The plaintiff in *Furtado, supra*, 68 Cal.App.4th 876

raised the same issue. Furtado, the assistant dean of the library at Sierra Community College, was terminated after her evaluations “plummeted.” (*Id.* at p. 879.) She then became a contract employee working as a librarian at a different campus of the college. (*Ibid.*) The faculty evaluation committee evaluated Furtado and recommended against renewing her contract, and Furtado “detailed in writing her objections to the committee’s report.” (*Ibid.*) Furtado was notified the board of trustees would “discuss her committee evaluation report in closed session.” She indicated she wanted to address the board at the closed session, but was informed she could not because “ ‘the Board Agenda item does not concern specific complaints or charges brought against you as defined under the Brown Act. . . .’ ” (*Ibid.*) The board held a closed session, and “voted not to renew Furtado’s contract.” (*Id.* at p. 880.)

In concluding excluding Furtado from the closed-door session did not violate the Brown Act, the court looked to the language of the statute, explaining: “Every word in a statute is presumed to have meaning. [Citation.] In section 54957, the word “or” appears before “dismissal” and then again before “to hear complaints.” The qualifying phrase (‘unless the employee requests a public session’) follows the second disjunctive phrase (‘or to hear complaints or charges brought against the employee’). [¶] An accepted rule of statutory construction is that qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. (2A Sutherland, Statutory Construction (5th ed. 1992) § 47.33, p. 270.) Pursuant to this rule, the qualifying phrase concerning an employee’s request for a public session refers only to situations where the board is hearing complaints or charges against the employee.” (*Furtado, supra*, 68 Cal.App.4th at p. 881.)

“This interpretation is further supported by the second paragraph of section 54957, which states: ‘As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session’ This paragraph clarifies the statute’s intention to permit an employee to request an open session when complaints or charges

have been brought against the employee. Conspicuously absent from this paragraph, however, is any mention of other personnel matters. “[W]hen the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded.” [Citation.]” (*Furtado, supra*, 68 Cal.App.4th at pp. 881–882.)

Further, “the board’s interpretation makes practical sense. The purposes underlying the personnel exception to the Brown Act are ‘to permit free and candid discussions of personnel matters’ and ‘to protect employees from public embarrassment.’” (*Furtado, supra*, 68 Cal.App.4th at p. 882.) “The statute permits an employee to call for an open session to address charges brought against the employee by another individual [¶] However, for personnel matters described in the first part of the statute—an employee’s ‘appointment, employment, evaluation of performance, discipline, or dismissal’—permitting open sessions upon demand would make no sense.” (*Ibid.*)

Even when “complaints or charges” against an employee are considered at a closed-door session, notice is not required unless the session is a hearing under the Brown Act. In *Bollinger v. San Diego Civil Service Com.* (1999) 71 Cal.App.4th 568 (*Bollinger*), the plaintiff was “demoted . . . from police agent to police officer II based upon his misconduct.” (*Id.* at p. 571.) The San Diego Civil Service Commission (Commission) “concede[d] that this matter does not involve a routine employee performance evaluation but ‘specific complaints or charges’ other police officers brought against Bollinger.” (*Id.* at p. 574.) Bollinger appealed, and the Commission appointed one of its members to hold a “noticed public evidentiary hearing” under the relevant civil service rules. (*Id.* at p. 571 & fn. 2.) The hearing officer recommended Bollinger’s demotion be upheld. (*Ibid.*) The Commission notified Bollinger by telephone that it would hold a meeting and “‘recess into closed session . . . to ratify [the] hearing[] in the case[] of Michael Bollinger.’” (*Ibid.*) During that closed session, the Commission “ratified” the factual findings and recommendation of the hearing officer that Bollinger’s demotion be upheld. (*Ibid.*)

Bollinger claimed the Commission’s action was void under the Brown Act because it failed to give him 24-hour written notice of his right to request a public hearing, while the Commission asserted no written notice was required because the closed session “was solely for the purposes of *deliberating* whether the complaints or charges justified disciplinary action rather than conducting an evidentiary hearing.” (*Bollinger, supra*, 71 Cal.App.4th at pp. 571, 574.) The court, in holding this closed-door meeting did not violate the Brown Act, relied on the difference in meaning between “hear” and “consider” as used in the statute. It explained “the second paragraph of section 54957, . . . provides ‘the employee shall be given written notice of his or her right to have the complaints or charges *heard* in open session rather than closed session[.]’ . . . [I]n the first paragraph of section 54957, the Legislature used ‘to consider’ in reference to the ‘appointment, employment, evaluation of performance, discipline, or dismissal’ of an employee, but used ‘to hear’ in reference to ‘complaints or charges brought against the employee by another person or employee.’” (*Bollinger, supra*, 71 Cal.App.4th at p. 574.) “To ‘consider’ is to ‘deliberate upon[.]’ [Citation.] To ‘hear’ is to ‘listen to in an official . . . capacity[.]’ [Citation.] A ‘hearing’ is ‘[a] proceeding of relative formality . . . , generally public, with definite issues of fact or law to be tried, in which witnesses are heard and evidence presented.’ [Citation.]” (*Ibid.*) Thus, the court concluded the “plain language of section 54957 lends itself to the interpretation the Commission urges.” (*Ibid.*)

The court also considered the legislative history of the Brown Act, and concluded it supported the position that no notice of the closed session was required. (*Bollinger, supra*, 71 Cal.App.4th at p. 574.) “As originally introduced, both bills read in part: ‘As a condition to holding a closed session *on the complaints or charges to consider disciplinary action or to consider dismissal*, the employee shall be given written notice of his or her right to have a public hearing rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session. [Citation.] Later, however, the italicized language was deleted and the bills were altered to what now appears in paragraph two of section 54957

[Citations.] The Legislature thus specifically rejected the notion an employee is entitled to 24-hour written notice when the closed session is for the sole purpose of considering, or deliberating, whether complaints or charges brought against the employee justify dismissal or disciplinary action. ‘The rejection of a specific provision contained in an act as originally introduced is “most persuasive” that the act should not be interpreted to include what was left out. [Citations.]’ [Citation.] . . . [W]e conclude a public agency may deliberate in closed session on complaints or charges brought against an employee without providing the statutory notice.’ (*Id.* at pp. 574–575.)

In sum, the Board’s closed-door session in this case was regarding a personnel matter rather than “complaints or charges,” and was a deliberation, not a hearing. Consequently, there was no Brown Act violation.²

DISPOSITION

The judgment is affirmed. The County of Lake shall recover its costs on appeal.

² Beland also claims the closed session violated his due process rights and the MOU because the MOU permitted him to be represented or represent himself at “all steps of th[e] appeal process.” He asserts “ ‘all steps’ should be construed to include the step where the Board heard argument and made its own findings.” As previously discussed, however, the Board neither heard argument nor made its own findings. The Board’s deliberative closed-door session did not violate Beland’s due process rights. (See *Bollinger, supra*, 71 Cal.App.4th at pp. 575–578.)

Banke, J.

We concur:

Margulies, Acting P. J.

Dondero, J.

A140533, *Beland v. County of Lake*