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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARLEEN CAUDILLO,

Petitioner and Appellant,

v.

LOS ANGELES BOARD OF CIVIL
SERVICE COMMISSIONERS,

Defendant and Respondent;

CITY OF LOS ANGELES,

Real Party in Interest.

B261465

(Los Angeles County
Super. Ct. No. BS146740)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert H. O'Brien, Judge. (Retired Judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

The Myers Law Group, Adam Stern and D. Smith for Petitioner and Appellant.

Michael N. Feuer, City Attorney, Vivienne A. Swanigan, Assistant City Attorney, and Jennifer Gregg Handzlik, Deputy City Attorney, for Defendant and Respondent Los Angeles Board of Civil Service Commissioners, and Real Party in Interest City of Los Angeles.

Petitioner and appellant Marleen Caudillo (Caudillo) is a former civilian employee of the Los Angeles Police Department (LAPD). In November 2012, after two prior findings of misconduct, the LAPD terminated her employment after learning she had been arrested for driving under the influence and had failed to promptly report the arrest to her supervisor. Caudillo challenged her termination in proceedings before the Los Angeles Board of Civil Service Commissioners (Board). The Board sustained the LAPD's decision to discharge Caudillo and rejected her contention that she had received insufficient "notice of the proposed action[and] the reasons therefor" as required by *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215 (*Skelly*). Challenging only the Board's determination there was no *Skelly* violation ~-(AOB 16)~,¹ Caudillo filed a petition for writ of mandate seeking to overturn the Board's determination. The trial court denied her writ petition, concluding she received adequate *Skelly* notice, and we affirm the trial court's decision.

I. BACKGROUND

Caudillo joined the LAPD as a Management Assistant in 2001. After a promotion to Management Analyst II in 2006, she served as adjutant to Commanding Officer Yvette Burney (Officer Burney).

A. *Prior Misconduct and Disciplinary Actions*

In 2003, police cited Caudillo for disturbing the peace because her car alarm had been continuously sounding. The police report described Caudillo as argumentative, confrontational, and having directed profanities at one of the officers. One of the responding officers and two other witnesses stated they smelled alcohol on Caudillo's breath.

¹ An employee who suffers a *Skelly* violation but does not contest whether her discharge was supported by good cause is entitled to backpay damages but not reinstatement. (*Kirkpatrick v. Civil Service Com.* (1978) 77 Cal.App.3d 940, 945 (*Kirkpatrick*).)

The LAPD's Internal Affairs Group (Internal Affairs) investigated the disturbing the peace incident and determined that Caudillo's use of profanity could not be substantiated. Caudillo admitted, however, that she engaged in conduct that was unprofessional and unbecoming to the LAPD. She received an official reprimand.

Later in 2009, police arrested Caudillo at Universal Studios in Los Angeles for public intoxication and disturbing the peace. Internal Affairs investigated the incident and recommended the LAPD terminate Caudillo. The termination recommendation was made in part because the 2003 incident had also involved allegations of intoxication and inappropriate behavior.

To resolve the Internal Affairs matter arising out of the 2009 incident, Caudillo entered into an Agreement Regarding Proposed Discipline with the LAPD (Discipline Agreement), which she signed on October 13, 2010. Pursuant to that agreement, Caudillo admitted she had (1) been intoxicated in public, (2) made discourteous remarks to arresting officers, (3) failed to cooperate with investigating officers, (4) failed to timely report her arrest to a supervisor, and (5) engaged in conduct that reflected poorly on the LAPD. Caudillo agreed to a five-day work suspension as a penalty. Most significant for purposes of this appeal, the Discipline Agreement provided: "For a period of five years effective upon signing this agreement, Caudillo accepts and agrees that if she receives any future complaint of conduct wherein she is alleged to have committed acts that are the same and/or similar in nature to [the five charges] of this agreement, and the complaint is Sustained by the Chief of Police, it would be recommended that she be discharged from her position with the Department." In signing the Disciplinary Agreement, Caudillo acknowledged that she had carefully read and considered it, including its benefits and drawbacks, and that she had been encouraged to consult with legal counsel and had the opportunity to do so.

B. The Misconduct Resulting in Discharge

On January 21, 2012, less than five years after Caudillo signed the Discipline Agreement, law enforcement officers in Azusa arrested Caudillo for driving under the

influence (DUI). The California Department of Justice informed the LAPD of the arrest on January 26, 2012. An Internal Affairs officer called Caudillo's supervisor, Officer Burney, and Caudillo took the phone calls before transferring them to her boss. After Officer Burney left the office that evening with plans to be out for approximately two weeks, Caudillo sent her a text message in which she wrote, "I knew all those calls were about me . . . I regret signing that contract." The next day, Caudillo reported her DUI to Doreen Hudson, the acting commanding officer in Officer Burney's absence.

After investigation, Internal Affairs concluded Caudillo had (1) been arrested and convicted for DUI and (2) failed to timely report her arrest to a supervisor. Internal Affairs recommended that the LAPD discharge Caudillo for the two violations, reasoning that sanction was an appropriate penalty under the City of Los Angeles's (City's) Guide to Disciplinary Standards and under the Discipline Agreement.

In a meeting on August 9, 2012, Officer Burney notified Caudillo that she was being recommended for termination. During the meeting, Caudillo received a package of documents, which included a Complaint Adjudication Form and an Internal Affairs Letter of Transmittal (LOT). The text on the first page of the Complaint Adjudication Form, which we quote here in full, expressly references the Disciplinary Agreement:

ALLEGATION 1: The Department alleges that on January 21, 2012, MA II Marleen Caudillo, while off duty, operated her private vehicle while under the influence of an alcoholic beverage, which resulted in her arrest.

ALLEGATION 2: The Department alleges that on January 21, 2012, MA II Marleen Caudillo failed to notify a Department supervisor of her DUI arrest.

ADJUDICATION:

It was recommended that Allegations 1 and 2 be classified as **DISCIPLINARY** and adjudicated as **SUSTAINED**.

RATIONALE:

The Department was notified that Marleen Caudillo was arrested for DUI on January 21, 2012 by the Azusa Police Department. The investigation

confirmed that Caudillo failed to make timely notification to her Commanding Officer of the arrest even though she was aware of the requirement to make immediate notification and previously made such notification. Her behavior put herself and others at risk and the behavior negatively reflects upon the Department. This is the third alcohol related issue for Ms. Caudillo—the first instance resulted in an ‘Official Reprimand,’ the second instance resulted in a 5 day suspension and Disciplinary Settlement Agreement.

Therefore, Allegations 1 and 2 were classified as DISCIPLINARY and adjudicated as SUSTAINED.

The LOT Caudillo received reiterated the two allegations set forth on the Complaint Adjudication Form and summarized over four pages the reasons supporting the recommendation for termination, including a statement “recommend[ing] that Ms. Caudillo be terminated based on the terms of the *Agreement Regarding Proposed Discipline* she and the Chief of Police signed on October 13, 2010 and November 3, 2010, respectively. Allegation 1 is a third offense and Allegation 2 is a second offense. A penalty of ‘Discharge’ is in line with the City’s Guide to Disciplinary Standards.”² In addition to the Complaint Adjudication form and the LOT, Caudillo was also given a copy of the Discipline Agreement itself at the August 9, 2012, meeting.

Just over a month after the August 9, 2012, meeting, Caudillo submitted a written response to LAPD Chief of Police Charlie Beck regarding the recommendation that she be discharged. In it, she took responsibility for the DUI and her failure to report it. She asserted, however, that the 2003 incident did not involve alcohol and she emphasized that no criminal charges were filed as the result of the 2009 incident. She asked Chief Beck

² According to the LOT, Caudillo’s DUI constituted the offense of “[e]ngaging in illegal behavior or conduct in conflict with job duties, on or off the job.” The penalty recommended in the City’s Guide to Disciplinary Standards was, for a first offense, written notice up to discharge; for a second offense, a 10-day suspension up to discharge; and for a third offense, discharge. Caudillo’s failure to notify her supervisor of the DUI was deemed to constitute “[a] violation of departmental rules,” which was subject to the following penalty recommendations: an oral warning up to a five-day suspension for the first offense; a six-day suspension up to discharge for the second offense; and for a third offense, discharge.

not to impose the discipline called for under the Discipline Agreement—namely, termination—because she “felt that [she] had to sign it.” Caudillo concluded her response by asking Chief Beck to consider lesser penalties, such as suspension or even demotion, as an alternative to discharge.

On November 27, 2012, the LAPD notified Caudillo she would be terminated by serving her with a “Notice of Discharge, Suspension or Probationary Termination” form signed by Chief Beck. The form set forth two “causes of action,” which were substantively the same as specified earlier in the Complaint Adjudication Form and the LOT: “Count 1. On or about January 21, 2012, you, while off-duty, operated your private vehicle while under the influence of an alcoholic beverage, which resulted in your arrest. [¶] Count 2. On or about January 21, 2012, you, while off-duty, failed to notify a Department supervisor of your DUI arrest.” The Notice of Discharge form did not include the “Rationale” section of the Complaint Adjudication Form previously provided to Caudillo. After learning she had been discharged, Caudillo appealed the decision to the Board.

C. Challenge to Discharge

Caudillo and a City representative appeared at an evidentiary hearing before a Board hearing examiner. At the hearing, Officer Burney testified that she recommended Caudillo’s termination “based primarily on the settlement agreement” and that she “didn’t really have a choice, because the settlement agreement specifically spelled out what the penalty would be if it was a similar action. . . .” Officer Burney made her recommendation with a “very heavy heart” because Caudillo was an excellent employee.

After Officer Burney’s testimony on direct examination, Caudillo’s attorney asked the hearing officer to “dismiss the case” on the ground that the LAPD had committed an incurable *Skelly* violation. Counsel complained that the Notice of Discharge form signed by Chief Beck listed just two reasons for Caudillo’s discharge, the DUI and the failure to report it, yet Officer Burney’s testimony made clear “that the primary reason that [Caudillo] was terminated was because she violated the [Discipline Agreement].”

Caudillo's lawyer argued the LAPD should have listed violation of the Discipline Agreement among the formal allegations or causes of action on the form. The hearing examiner denied Caudillo's request to dismiss and allowed the hearing to proceed.

At the conclusion of the evidentiary proceedings, the hearing examiner issued a report reluctantly recommending the Board sustain the allegations against Caudillo as well as the penalty of discharge from employment. The examiner did recommend, however, that the Board find the LAPD had violated Caudillo's due process rights under *Skelly*. The examiner explained she recommended finding a *Skelly* violation because "[t]estimony from . . . Burney kept referencing the settlement agreement that left her no choice but to recommend discharge. If a breach of the settlement agreement was the reason for the discharge, then the Department had a duty [to] place that charge on the . . . Notice of Discharge [form signed by Chief Beck]."

When the matter came before the Board for decision,³ it unanimously concluded that the LAPD had complied with *Skelly*. During the hearing, various commissioners expressed the view that the Discipline Agreement merely "set[] the penalty," "indicate[d] what would be recommended if conduct occur[red]," and "[went] to the level of discipline and [was] not necessarily the basis of the charges." The Board also unanimously sustained the allegations that Caudillo suffered a DUI and failed to timely report it. On the question of the sanction for Caudillo's misconduct, the Board entertained her argument that it should decline to follow or give weight to the Discipline Agreement because she "made a mistake in signing the agreement only because [she] just wanted to sweep [the issue] away." The Board, however, found that termination was appropriate under the circumstances and sustained Caudillo's discharge.

Caudillo filed a petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5, seeking review of the Board's decision. The petition challenged only the

³ Section 19.37 of the Los Angeles Municipal Code permits the Board to "adopt, reject, or modify" a hearing examiner's report. Section 19.37 further provides that if the Board does not decide the matter upon the examiner's report the Board "may itself consider the matter either in whole or in part, upon the record, including the transcript, or may decide the matter after itself receiving the whole or any part of the evidence. . . ."

determination that proper notice under *Skelly* had been provided. Caudillo sought back pay and benefits, as well as costs and attorneys' fees.

At the hearing on Caudillo's writ petition, and after considering the parties' arguments and the full administrative record, the trial judge stated, "I think the reason she was fired was for the DUI and for failure to report. And the references to the settlement agreement [were for] the level of discipline. I mean, it had to be considered as to what was going to be the discipline." The court memorialized its ruling in a written order denying the petition. This appeal followed.

II. DISCUSSION

Caudillo contends the LAPD violated *Skelly* and its progeny because the Discipline Agreement was the reason she was terminated but it was not sufficiently alleged as a reason or basis for termination in the *Skelly* notice she received. She also asserts that the lack of adequate notice prevented her from challenging the enforceability of the agreement. We reject Caudillo's contentions and hold there was no *Skelly* violation. Caudillo undoubtedly had "notice of the proposed action[and] the reasons therefor," *Skelly, supra*, 15 Cal.3d at p. 215, based on the documents she received from the LAPD during the August 9, 2012, meeting. In addition, the manner in which the LAPD provided notice did not deprive Caudillo of an opportunity to challenge the agreement and argue it should not be relied upon to determine the appropriate punishment for her misconduct—indeed, the record shows she did just that throughout the administrative decision and review process.

A. *Standard of Review*

Because Caudillo's discharge affected her fundamental, vested right to employment, the trial court was required to apply its independent judgment when ruling on her petition for writ of mandate. (*Candari v. Los Angeles Unified School Dist.* (2011) 193 Cal.App.4th 402, 407; *McMillen v. Civil Service Com.* (1992) 6 Cal.App.4th 125, 129.) "At the same time, it had to afford a strong presumption of correctness to the

administrative findings and require the challenging party to demonstrate that such findings were contrary to the weight of the evidence.” (*Candari v. Los Angeles Unified School Dist.*, *supra*, at p. 407.) On appeal, we likewise exercise our independent judgment on the issue of whether the City violated Caudillo’s *Skelly* due process rights. (*Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1275 (*Gilbert*); see also *LaGrone v. City of Oakland* (2012) 202 Cal.App.4th 932, 940-941 [“If the decision of the lower court is right, the judgment or order will be affirmed regardless of the correctness of the grounds on which the court reached its conclusion”].)

B. Analysis

Permanent civil service employees are entitled to procedural due process protections before being discharged. (*Goss v. Lopez* (1975) 419 U.S. 565, 573.) Our Supreme Court’s decision in *Skelly* holds such employees must receive “notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.” (*Skelly*, *supra*, 15 Cal.3d at p. 215.) A Los Angeles City employee is entitled to notice in writing. (Los Angeles Mun. Code, §§ 1016, subs. (a) & (b), 1018.)

Due process is a “flexible concept.” (*Gilbert*, *supra*, 130 Cal.App.4th at p. 1276.) “The essence of procedural due process is notice and an opportunity to respond.” (*Id.* at p. 1279.) Providing public employees with pre-disciplinary notice “not only of the nature of the charges but also of the substance of the relevant supporting evidence,” gives them “a meaningful opportunity to respond.” (*Id.* at p. 1278, quoting *Arnett v. Kennedy* (1974) 416 U.S. 134, 170 (conc. opn. of Powell, J.)) *Skelly*’s requirements are designed to “‘minimize the risk of error in the initial removal decision.’ [Citation.]” (*Skelly*, 15 Cal.3d at p. 215.) “The minimal due process rights required by *Skelly* prior to discharge are merely anticipatory of the full rights which are accorded to the employee after discharge.” (*Kirkpatrick*, *supra*, 77 Cal.App.3d at p. 945.)

Here, the LAPD provided Caudillo with ample notice to satisfy *Skelly*'s dictates during her meeting with Officer Burney on August 9, 2012. The Complaint Adjudication Form notified her of the proposed action, namely, discharge from employment, and Caudillo does not contend otherwise. Rather, she claims she had no notice of the *reasons* for the action. Yet, on the first page of the form, the LAPD informed Caudillo of the conduct in which she engaged that gave rise to disciplinary proceedings and—in a section labeled “rationale” in all capital letters, see *ante*, at page 5—summarized the basis for the discharge recommendation, including Caudillo’s prior misconduct that “resulted in a 5 day suspension and Disciplinary Settlement Agreement.” The LAPD also gave Caudillo a copy of the LOT that explained the reasons for the recommended action in greater detail and unmistakably stated the termination recommendation was based in part on the Discipline Agreement (as well as the City’s disciplinary standards). In addition, the LAPD gave Caudillo an executed copy of the Discipline Agreement itself.

Caudillo protests, however, that the “vague and passing reference” to the Discipline Agreement on the Complaint Adjudication Form “is not sufficient notice to state *Skelly* charges.” We have reviewed the form and find the reference neither vague nor passing. The record also establishes that the form and the other documents the LAPD provided to Caudillo at the August 9 meeting were in fact effective in informing her the Discipline Agreement was one of the reasons she was being recommended for termination and in giving her a meaningful opportunity to respond. In the response letter Caudillo drafted and submitted to Chief Beck after receiving the documents, Caudillo urged the LAPD not to impose the discipline that the Discipline Agreement recommended (termination) because she “felt that [she] had to sign it.” Her claim on appeal, that the notice given was ineffective because references to the Discipline Agreement were “buried somewhere in the *Skelly* investigation packet,” therefore rings hollow.⁴

⁴ Caudillo also appears to argue that the LAPD did not provide appropriate *Skelly* notice because the Notice of Discharge form Caudillo received on November 27, 2012, did not reference the Discipline Agreement. This form, however, was not the operative

Although Caudillo’s due process notice claim therefore fails on the record, she attempts to resuscitate it with citations to administrative decisions that she believes demonstrate the notice she received was insufficient under the circumstances. Of course, these decisions are not binding, and more important, they do not establish that Caudillo suffered a due process violation.

In *In the Matter of the Appeal by S.K.* (State Personnel Bd., July 1-2, 1998) Cal.S.P.B. No. 98-05 (1998 WL 34068174), the California Highway Patrol (CHP) alleged, as one basis for disciplining an officer, that he violated two CHP manuals. The CHP did not identify the provisions allegedly violated nor did it provide copies of the manuals to S.K. The State Personnel Board found a *Skelly* violation. This case is obviously different. The reasons for Caudillo’s discharge were described in specific detail in the comprehensive set of materials she received—which included a copy of the Discipline Agreement itself.

In the Matter of the Appeal by E.A. (1995) (State Personnel Bd., Feb. 7-8, 1995) Cal.S.P.B. No. 95-03 (1995 WL 17007432) is also inapplicable. Among the charges identified in the employer’s pre-disciplinary notice to E.A. was his violation of a settlement agreement. Unlike Caudillo, however, E.A. violated an affirmative obligation set forth in the agreement. (*Id.* at p.1 [settlement agreement obligating employee to attend substance abuse counseling and to submit proof of attendance].) His was not a

Skelly notice. As prior cases, including *Skelly* itself, have held, notice of the proposed action and the “reasons therefor” is required *prior* to the time at which an agency takes action so the employee has a chance to be heard before the action. (*Skelly, supra*, 15 Cal.3d at p. 215 [“It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices on the high court agree that due process does mandate that the employee be accorded certain procedural rights *before the discipline becomes effective*” (emphasis added)]; *Kirkpatrick, supra*, 77 Cal.App.3d at p. 945 [“minimal due process rights required by *Skelly* prior to discharge”].) The LAPD gave such notice during the August 9, 2012, meeting. The Notice of Discharge, on the other hand, was issued after *Skelly* notice had been given—the Notice of Discharge effectuated what previously was only the “proposed action.” It was unnecessary to again reference the Discipline Agreement on the Notice of Discharge form signed by Chief Beck because the LAPD had already provided sufficient *Skelly* notice by that point.

situation, like Caudillo's, where conduct independent of the Discipline Agreement triggered the agreement's recommendation provision.

The record similarly belies Caudillo's claim that a purported lack of notice prevented her from arguing the various decision makers should not rely on the Discipline Agreement when considering whether termination was warranted. In fact, Caudillo argued against application of the Discipline Agreement throughout the disciplinary process.

As we have already explained, in her pre-termination response to Chief Beck, Caudillo contended that the 2003 incident had not involved alcohol, that her 2009 misconduct had been exaggerated, and that she felt she had to sign the Discipline Agreement and waive union representation to avoid embarrassing herself and her commanding officer. For those reasons and others, she asked that a lesser penalty be considered.

Caudillo also argued the Discipline Agreement should not be used as a factor supporting discharge before the hearing examiner. Her attorney argued that she had been an excellent employee, that the incidents of prior misconduct were all off duty and their significance inflated, and that the Discipline Agreement did not mandate termination.

Caudillo again challenged the Discipline Agreement at the hearing before the Board. After the Board sustained the DUI and failure-to-report charges, the Board president raised the propriety of the penalty by asking, "[i]s discharge appropriate, A, under the settlement agreement or, B, in any event." Caudillo's lawyer argued the Board should reverse her discharge because the Discipline Agreement did not compel termination. Caudillo herself testified that she had signed the agreement without seeking an outside opinion because she "just wanted to make it go away and that was also my mistake." She also suggested that discharge was an unduly harsh penalty considering the LAPD's treatment of other employees in similar circumstances.

In sum, the LAPD fired Caudillo because of her DUI offense, her failure to timely report it, and her prior history of misconduct, including the Discipline Agreement. The record demonstrates that, prior to her discharge, the LAPD gave her written notice of the

contemplated termination and the reasons—indeed, one might say on this record, the rationale—therefor. *Skelly* required nothing more.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

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BAKER, J.

We Concur:

KRIEGLER, Acting P.J.

KUMAR, J.*

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