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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MOISES RODRIGUEZ,

Plaintiff and Appellant,

v.

CITY OF CHULA VISTA CIVIL SERVICE
COMMISSION et al.,

Defendants and Respondents.

D059694

(Super. Ct. No. 37-2009-00089925-
CU-WM-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, David B. Oberholtzer, Judge. Affirmed.

Moises Rodriguez, a former police officer for the City of Chula Vista (City), appealed his termination to the City of Chula Vista Civil Service Commission (the Commission), which affirmed the termination. Rodriguez petitioned for a writ of mandate in the Superior Court of the County of San Diego seeking to set aside the Commission's decision. The Commission and the Chief of Police of the City of Chula

Vista, Richard Emerson (together respondents), responded. The superior court denied the petition and we now affirm.

FACTUAL AND PROCEDURAL BACKGROUND¹

A. *Overview and Investigation of Misconduct*

On May 24, 2008, Rodriguez assisted with the arrest of Robert Carlton. Intoxicated and belligerent, Carlton made verbal threats to Rodriguez and Officers Bryan Maddox and Kristy Voshell, who also participated in the arrest and search incident to arrest of the suspect. Carlton told the officers, "Fuck you, fuck you and your tin badge," and "I'm going to kick your ass," among other things. Rodriguez's involvement in Carlton's arrest was captured by a video surveillance camera mounted on the exterior wall of a convenience store.

The surveillance video was included in the administrative record and was viewed by this court. The video shows Carlton handcuffed and bent over the hood of a police car during a search incident to arrest conducted by Maddox. As the search continued, the video shows Carlton's head being "forcefully" struck at least twice on the hood of the police car, causing the hood to buckle slightly. Not caught on video was the burst of

¹ Consistent with our substantial evidence review of the trial court's judgment, discussed *post*, we present the conflicting evidence from Rodriguez's administrative hearing in the light most favorable to affirmance. (See *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 824 [applying substantial evidence review]; *Vanderkous v. Conley* (2010) 188 Cal.App.4th 111, 121 ["When we review a judgment that is said to be unsupported by substantial evidence, we review the record in the light most favorable to the judgment and will draw all permissible inferences and presumptions in favor of its validity."].)

pepper spray Rodriguez directed at Carlton's face as Maddox was placing Carlton into the backseat of the patrol car for transport to jail.

After Carlton was secured in the back of the police car, Rodriguez completed a use of force form as required by department policy and gave it to Maddox. Because Maddox was uncomfortable with the force Maddox had observed Rodriguez use on Carlton during the search incident to arrest, Maddox told Rodriguez he would finish the form after taking Carlton to the police station.

While at the station, Maddox finished the booking paperwork and his own use of force form. Maddox sent his use of force form, but not the one completed by Rodriguez, to Lieutenant Scott Arsenault, the on-duty watch commander. In that form, Maddox disclosed some pushing and pulling of Carlton and Rodriguez's use of pepper spray on Carlton while the suspect was being placed in the backseat of the patrol car.

Arsenault determined that Maddox's use of force form raised some "flags" because it is "very rare[]" that an officer needs to use pepper spray after a suspect is cuffed. Arsenault contacted Maddox and arranged a face-to-face meeting. Arsenault also contacted Sergeant Mark Jones, who had been at the scene of the contact with Carlton but had left before the search incident to arrest. Jones and Arsenault together interviewed Maddox at the police station.

After some "prodding," Maddox informed Arsenault and Jones that he could not explain why Carlton had been pepper sprayed by Rodriguez. When Arsenault asked Maddox if Rodriguez had said anything to explain why he had used pepper spray,

Maddox said Rodriguez "smiled at him" and said, "I thought he [Carlton] was going to bite you [Maddox]." In response to Arsenault's question why Rodriguez had said that, Maddox told Arsenault and Jones that he felt Rodriguez was "covering his tracks as far as the use of force."

Maddox also informed Arsenault and Jones for the first time that Rodriguez had slammed Carlton's face on the hood of the police car and had used what Maddox believed was excessive force in applying a wrist twist too tightly to Carlton's hands, which left an abrasion or cut on Carlton's wrist. Maddox stated that Rodriguez's comments and demeanor toward Carlton suggested Rodriguez used excessive force for "personal gratification," and recommended that Arsenault determine whether the incident had been caught on video by cameras mounted on the exterior of the convenience store.²

Arsenault immediately commenced an internal investigation regarding the use of force in the arrest and search of Carlton. Arsenault directed Jones to go to the convenience store and determine whether there was in fact a video recording of the incident. As discussed in more detail *post*, Jones went to the convenience store the same day of Carlton's arrest and obtained from the store's manager a copy of the video. After reviewing the video, Arsenault determined there was a problem with an "officer using excessive force" involving Carlton.

² Officer Maddox subsequently was disciplined for improperly and inadequately completing the use of force form he initially gave Arsenault.

Arsenault also directed Sergeant David Nellis to check on the condition of, and take pictures of any injuries to, Carlton. Nellis found Carlton alone in a jail cell. After a few minutes, Carlton allowed Nellis to take some pictures and told Nellis he would see the officers in court after he sued for what Carlton described as an "ass whooping." Nellis observed that Carlton had an abrasion on his wrist, which Nellis described as a "line type bruising that went along . . . [Carlton's right] wrist." Nellis also observed a small red mark above Carlton's right eyebrow.

Arsenault contacted Captain Gary Wedge, and together they viewed the convenience store video. Wedge agreed with Arsenault that the video showed an excessive force issue. Wedge in turn contacted Sergeant Vern Sallee, who was in charge of internal affairs, to conduct an investigation. Wedge also instructed Arsenault to have Rodriguez prepare another use of force form.

As Arsenault told Rodriguez to prepare his own use of force form, Arsenault told Rodriguez that Maddox was unable to explain the reason for the need for force against Carlton. In Rodriguez's form, Rodriguez stated he "grab[bed] Carlton by the head and pull[ed] it into his left shoulder to stop [Carlton] from striking his [own] face into the hood" of the patrol car.

The day after Carlton's arrest, Jones inspected and took pictures of the police car involved in the incident. After confirming the police car had not been washed, Jones found on the passenger side of the car what appeared to be "some smudges" and a "slight indentation of the hood" of the car.

Sallee commenced his investigation the day following Carlton's arrest. As part of his investigation, Sallee reviewed the convenience store video, the use of force forms prepared by Maddox and Rodriguez and memoranda and various reports. He also conducted multiple witness interviews, including with Carlton, Maddox, Voshell and Rodriguez, among many others.

Sallee's investigation led to a 52-page report. Sallee in his report found that Rodriguez had lied in his use of force form by stating Carlton had banged his own head on the hood of the police car. Sallee also found that Rodriguez used "excessive force on Carlton when [Rodriguez] pushed his head into the hood of the patrol car two times" and sustained the findings that Rodriguez used excessive force on Carlton when wrist locking Carlton and when pepper spraying him.

Rodriguez was placed on administrative leave. Based on the internal investigation, Rodriguez was given notice of recommended disciplinary termination of employment. Rodriguez participated with Emerson in a predisciplinary "*Skelly* hearing" (based on *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194). Emerson sustained the allegations underlying the notice of intended termination and terminated Rodriguez effective July 29, 2008.

B. The Hearing and the Commission's Decision

Rodriguez subsequently appealed Emerson's decision to the Commission. The hearing before the Commission took place over several days, beginning in mid-December

2008 and concluding in early February 2009. The Commission finished deliberating on February 11, 2009, and issued its four-page opinion on February 18, 2009.

As discussed in more detail *post* in connection with the remand of the Commission's decision following the trial court's partial grant of writ of mandate, the Commission unanimously found that Rodriguez was dishonest in the use of force form and in his May 28, 2008 interview with Sallee, when Rodriguez claimed Carlton had struck his own face and head on the hood of the police car. The Commission also found Rodriguez made these dishonest statements "for the purpose of minimizing or covering up the amount of force used during the incident."

The Commission by a 3-2 vote found that Rodriguez used excessive force in slamming Carlton's head on the hood of the police car. The Commission also found this conduct brought discredit on the police profession and the department.

Finally, by a 4-1 vote the Commission affirmed the termination of Rodriguez.

C. Rodriguez's Petition for Writ of Mandate

Rodriguez filed a verified petition for writ of mandate to compel the Commission to vacate its factual findings of dishonesty and use of excessive force, set aside his termination and reinstate his employment with the City. Rodriguez in his petition alleged that the Commission improperly admitted the convenience store video because there allegedly was no proper or adequate foundation established for its admissibility; that the Commission improperly overruled his objection to the testimony of an unqualified witness (Sallee) regarding the reliability of the convenience store video; that Sallee's

testimony and 52-page report, based in part on the convenience store video, was admitted without the proper foundation; that the Commission disregarded the exonerating testimony of Voshell and Rodriguez, and further disregarded the testimony of Rodriguez's expert witness; and that the Commission made factual findings not supported by competent evidence.

The trial court granted the petition in part, ruling to set aside the decision of the Commission and to remand the matter in order for the Commission "to reconsider its factual findings that Petitioner [Rodriguez] used unreasonable, unnecessary or excessive force, in light of the statements and testimony provided by Officer Voshell." The trial court's ruling did not address the finding of the Commission regarding dishonesty by Rodriguez. In any event, the trial court noted that in reconsidering its findings, the Commission could consider the "entire record before it and anything that is appropriately before it," and thus was not limited on remand to revisiting only Voshell's testimony.

The trial court further ordered the Commission to reconsider the level of penalty in light of the testimony of Officer Voshell and if, on remand, the Commission again sustained Rodriguez's termination, the trial court ordered the Commission to "prepare a statement of findings and decision that provides an explanation of and justification for termination."

D. The Commission's Decision on Remand

The Commission reconsidered its decision in light of the trial court's order. A quorum of the commissioners who participated in the original hearing and decision

reviewed transcripts of the original hearing and met on two separate days to deliberate. The Commission updated its findings of fact and issued a new decision, set forth in part as follows:

"[2a] . . . Dishonesty.

"After evaluating the testimony of the various witnesses and reviewing the materials admitted into evidence, the Commission, by an original vote of 5-0 (reaffirmed 3-0 by a quorum of the Commission on November 4, 2010), finds that Appellant [Rodriguez] made dishonest statements in a Use of Force form (Exhibit 5N) that he prepared on May 24, 2008, and that he was dishonest during an interview with Sergeant Sallee of the Professional Standards Unit on May 28, 2008 (Exhibit 5R). This finding is based upon Rodriguez's statement in the Use of Force Form that 'Carlton began to pound his [own] face into the hood of the police car. I had to grab Carlton by the head and pull it into his left shoulder to stop him from striking his face into the hood.' Rodriguez made a similar statement in his May 28, 2008 interview with Sergeant Sallee, with regard to Carlton 'bringing his own head down on his own on the hood' and 'I . . . got him by the hair and pulled his head into his left shoulder so he could stop banging his face on the hood.'

"The Commission finds that Appellant's statements that Carlton was banging his own face and head on the hood of the police car are not truthful. This description of the incident is not consistent with the actions that are shown on the surveillance camera video of the incident, and is not consistent with the opinion of the City's use of force expert

regarding the incident. Although evidence was presented by Appellant that called into question the quality and reliability of the videotape, the Commission finds that the portion of the videotape showing the 'head slams' is sufficiently reliable evidence in order to be a basis for this finding. The portion of the video tape showing the two 'head slams' was complete and did not have any missing data. Additionally, the Commission rejects the argument that Appellant's actions were made to appear more aggressive or jerky due to the slow frame speed of the video, because other persons shown in the video appear to be moving in a slower and more fluid manner.

"In finding Appellant's statements about the 'head slam' incident dishonest, the Commission also considered the timing of the statements. Appellant's preparation of the Use of Force Form, and his May 28, 2008 interview, both occurred at a time when Appellant was aware that the incident was under investigation. Therefore, the Commission finds that the statements were made for the purpose of minimizing or covering up the amount of force used during the incident.

"In making this finding on the charges of dishonesty, the Commissioners did not rely on the testimony of Officer Maddox. The Commissioners find that Maddox's testimony about the incident is not credible, because Maddox himself was not truthful in reporting his own use of force, and did not timely report the use of force by Officer Rodriguez. [¶] . . . [¶]

"[2b] . . . Violation of an official regulation (use of force policy).

"After evaluating the testimony of the various witnesses and reviewing the materials admitted into evidence, the Commission, by a vote of 3-2 (reaffirmed 3-0 by a quorum of the Commission on November 4, 2010) finds that Appellant used unreasonable and excessive force for the situation, based upon facts showing that on May 24, 2008, Officer Rodriguez grabbed Mr. Carlton by the hair and slammed his head on the hood of the police car twice. The Commission finds that this level of force was not reasonable or necessary under the surrounding circumstances. The Commission bases its findings on the videotape evidence of the incident, and on the testimony and written report of the City's expert, Force Options Specialist Don Partch. Mr. Partch wrote in his report to the City, and stated in his testimony, that the 'head slam' incident constituted excessive force under the circumstances. The Commission gave great weight to Mr. Partch's opinion regarding excessive force because of his extensive training and experience. The Commission also found Mr. Partch's testimony credible, because he was not in complete agreement with the City's findings regarding excessive force in this case, and in fact disagreed with the City's findings that the use of a wrist lock and [pepper spray] was excessive force.

"The Commission finds that by grabbing Carlton's hair and slamming his head on the hood of the police car twice, Appellant violated the department's Use of Force Policy,

No. 2.05 (Exhibit 5Z) that prohibits officers from using force that is unreasonable, unnecessary, or excessive.

"The Commission finds that Appellant's use of a wrist lock and the use of [the pepper spray] during this incident did not constitute excessive force. The Commission's finding of excessive force in this matter does not include those actions. This finding is based on Mr. Partch's testimony, and also the fact that the videotape does not clearly show what was happening or what Mr. Carlton was doing at the time of those actions. The Commission finds that the testimony of Officer Maddox regarding the wrist lock and the use of [pepper spray] is not credible, for the reasons previously stated.

"The Commission gives no weight to the testimony of Officer Voshell, in making its findings regarding unreasonable, unnecessary or excessive force on the part of Officer Rodriguez Officers Rodriguez and Voshell testified that they had a personal friendship and had vacationed together, and it appeared to the Commission that Officer Voshell was reluctant to give testimony that would be damaging to Officer Rodriguez. Officer Voshell also testified that her attention during the incident was not focused on Officer Rodriguez and Mr. Carlton, but instead on the items of personal property that she was processing. She testified that her view of the incident was with her peripheral vision. She stated that she was not paying enough attention to have an opinion one way or the other about excessive force. She stated that she did not remember aspects of the incident, such as whether she heard any sounds. Based on Officer Voshell's testimony regarding her lack of attention to the incident, lack of memory, and the appearance that she was

withholding information about the incident in order to protect Rodriguez, the Commission did not give weight to her testimony in making its findings regarding unreasonable, unnecessary or excessive force.

"[2c] . . . Conduct that causes discredit to the agency or the employee's position.

"After evaluating the testimony of the witnesses and reviewing the material admitted into the evidence, the Commission finds by a 4-1 vote (reaffirmed 3-0 by a quorum of the Commission on November 4, 2010) that the Appellant committed conduct that reflects discredit on the police profession and the Chula Vista Police Department. The Commission finds that Officer Rodriguez's dishonesty regarding the May 24, 2008 incident, including his dishonesty in filling out a Use of Force form, and his dishonesty in subsequent interviews about the incident, was conduct that discredits the Department. Additionally, for those Commissioners who found that Officer Rodriguez used excessive force toward Mr. Carlton, those Commissioners also found that this use of excessive force, which occurred in a public place, is conduct likely to harm the reputation of the profession and the Chula Vista Police Department. Those Commissioners noted that police brutality is one of the most serious forms of misconduct that an officer can commit, and that such misconduct can do significant damage to a police department's reputation." (Bold and underscore omitted.)

As a result of these findings, the Commission initially voted 4-1—and reaffirmed that vote 3-0 on remand on November 4, 2010—to affirm the recommendation of termination of Rodriguez. In reaching its decision, the Commission found as follows:

"[3] . . . It is essential for a police officer for the City of Chula Vista to meet the standards of performance required by the City, including honesty, the use of reasonable force, and conduct towards the public that is professional. It is inappropriate for a police officer to be dishonest about his [or her] actions, to use more force than is reasonable for a situation, or to interact with the public in a way that has the potential to incite violence. The nature and repetition of Appellant's conduct makes it appropriate for the Department to terminate Appellant from his position as a Police Officer. The Commission also finds that Appellant's dishonesty alone was sufficient grounds for termination, based on the importance of honesty when serving as a police officer in a position of trust. Additionally, the Commission finds that it would have affirmed Appellant's termination in this matter based on the finding of dishonesty, regardless of the Commission's findings with regard to excessive force." (Bold omitted.)

E. Supplemental Motion for Writ of Mandate and Order Denying Petition

Following the Commission's reconsideration of its decision as ordered by the trial court, Rodriguez filed a supplemental motion in support of his petition, arguing the Commission abused its discretion in dismissing Voshell's statements and testimony and in upholding his termination.

The trial court denied the petition. In so doing, it ruled in part as follows:

"Standard of Review

"The parties agree Rodriguez's employment as a Chula Vista police officer is a fundamental vested right. Therefore, exercising its independent judgment, the court is to

review the administrative record to determine if the decision is supported by the weight of the evidence. Code of Civil Procedure § 1094.5. The Petitioner has the burden of proof, and the court is not to disturb the administrative finding unless the Commission has abused its discretion. *Id.* (An independent review, weighing the evidence to find if there has been an abuse of discretion, is an oxymoron, but clearly, the court is to review the process, not the outcome.)

"The Commission's Findings

"The officer's testimony [e.g., Voshell] favored Rodriguez; as noted, this court has already found she was in the best position to observe his actions. Nevertheless, [the] Commission gave that testimony little weight because the officer was friends with Rodriguez and reluctant to testify against him. Applying that standard, no patrol officer in a small police department would ever testify convincingly, but the Commission had other reasons as well.

"The officer testified she was concentrating on processing the arrested person's personal property, which was spread out on the hood in front of her. She was not paying attention to what Rodriguez was doing, which she could see only in her peripheral vision; she had no opinion whether Rodriguez used excessive force and could not recall details of the incident. To put it another way, while she may have been in the best position to observe the incident, she did not, which validates the Commission's choice to disregard her testimony.

"Rodriguez'[s] Veracity

"The Commission offers an alternative ground for terminating Rodriguez in its amended Statement of Findings and Decisions, that he was untruthful during the investigation of the incident. The court finds this conclusion is supported by the weight of the evidence as well. Rodriguez'[s] explanation he was trying to stop the suspect from banging his own head was implausible to begin with, and the videotape plainly shows otherwise.

"Conclusion

"In its original writ, the court directed the Commission to explain why it disregarded an officer's testimony, and it has. The court previously rejected Rodriguez'[s] other grounds for overturn[ing] the Commission's decision to terminate him from the Chula Vista Police Department. The amended Statement of Findings and Decisions is supported by the evidence, and Rodriguez'[s] application for a second writ of mandamus is denied."

Judgment on the order was entered in March 2011.

DISCUSSION

I

Governing Law and Standard of Review in Administrative Mandamus

This is an action for administrative mandamus under Code of Civil Procedure³ section 1094.5. This statute provides in part: "(a) Where the writ is issued for the purpose of inquiring into the validity of any 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, the case shall be heard by the court sitting without a jury. . . . [¶] (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. [¶] (c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other

³ All further statutory references are to the Code of Civil Procedure unless otherwise noted.

cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (§ 1094.5.)

Subdivision (c) of section 1094.5 provides that when the petitioner claims the administrative agency's findings are not supported by the evidence, as Rodriguez does in the instant case, the trial court's review of an adjudicatory administrative decision depends on the nature of the right involved. (*Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 313.) "If the administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence." (*Ibid.*, citing *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32.)

In such instances, the trial court must exercise its independent judgment "upon the weight of the evidence produced or which could not, in the exercise of reasonable diligence, have been produced before the administrative agency and any evidence which might have been improperly excluded by the administrative agency." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143, fn. 10; see also *SP Star Enterprises, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 459, 469 ["If the administrative decision involved or substantially affected a 'fundamental vested right,' the superior court exercises its independent judgment upon the evidence disclosed in a limited trial de novo in which the court must examine the administrative record for errors of law and exercise its independent judgment upon the evidence."].) This review by the trial court requires it to

reweigh the evidence and make its own determination of the credibility of the witnesses. (*Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 658.)

Here, the parties agree that the Commission's decision substantially affects a fundamental vested right, viz. Rodriguez's interest in continued employment with the City. (See *Civil Service Com. v. Velez* (1993) 14 Cal.App.4th 115, 121.) Thus, the trial court properly applied the independent judgment standard of review to the administrative record. (See *Wences v. City of Los Angeles, supra*, 177 Cal.App.4th at p. 313.)

"Regardless of the nature of the right involved or the standard of judicial review applied in the trial court, an appellate court reviewing the superior court's administrative mandamus decision always applies a substantial evidence standard." (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1058.) When, as here, a fundamental vested right is involved and the trial court therefore exercised independent judgment, "it is the trial court's judgment that is the subject of appellate review" and the appellate court reviews the record to determine whether substantial evidence supports the judgment. (*Ibid.*)

In applying "independent judgment," a trial court "must accord a ' "strong presumption of correctness" ' to administrative findings" (*Fukuda v. City of Angeles, supra*, 20 Cal.4th at p. 817), and the burden rests on the "complaining party to show that the administrative ' "decision is contrary to the weight of the evidence." ' [Citation.]" (*Ibid.*)

Moreover, when the issue on review concerns the nature or degree of an administrative penalty, the appellate court reviews the penalty to determine whether the agency abused its discretion. (*California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, 1580.) "[N]either a trial court nor an appellate court is free to substitute its discretion for that of an administrative agency concerning the degree of punishment imposed." (*Anserv Insurance Services, Inc. v. Kelso* (2000) 83 Cal.App.4th 197, 204–205.)

II

Analysis

Here, the trial court found the weight of the evidence supported the findings of the Commission that Rodriguez used unreasonable, unnecessary or excessive force *and* lied about the need to use such force in his use of force form and during the subsequent internal investigation. The court determined that each finding separately supported the decision of the Commission to terminate Rodriguez from employment.

Rodriguez's main argument on appeal is there is insufficient evidence to support the trial court's determination that the weight of the evidence in the administrative record supported the findings of the Commission because the convenience store video, which he claims is *the* basis for the findings of the Commission and the trial court, should not have been considered because it was not authenticated, was a duplicate of poor quality and was thus inadmissible.

However, as Rodriguez correctly notes in his briefing, adherence to the technical rules of evidence is not required in an administrative appeal hearing. (See e.g., Gov. Code, § 11513, subd. (c) ["The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions."]; see also *MacDonald v. Gutierrez* (2004) 32 Cal.4th 150, 158-159 [noting that in "an administrative hearing, '[a]ny relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs' [Citation.]"; *Big Boy Liquors, Ltd. v. Alcoholic Bev. etc. Appeals Bd.* (1969) 71 Cal.2d 1226, 1230 [observing that the "[t]echnical rules of evidence do not apply to administrative hearings."]; *Hildebrand v. Department of Motor Vehicles* (2007) 152 Cal.App.4th 1562, 1569 [citing Government Code section 11513, subdivision (c) in noting that "[a] 'police officer's report, even if unsworn, constitutes 'the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.'" ' [Citations.]")

In *Whitlow v. Board of Medical Examiners* (1967) 248 Cal.App.2d 478, 488, the court rejected the argument of petitioner physician that a state agency erred in admitting the testimony of a witness because that testimony was hearsay and unreliable. Specifically, the witness (King) "sat in a car listening to transmissions from electronic

equipment carried on the persons or in the effects of the several witnesses while they were in [petitioner's] doctor's office. King caused transcripts to be made of recordings of conversations on [various dates] and these were received in evidence. He produced what purported to be a transcript of a conversation he heard June 21st when [witnesses] were in the doctor's office. Only about 60 percent of the transmission was intelligible and King completed a transcript from his recollection. He was asked by the Attorney General to make use of the transcript and to relate the conversation he had heard. It was apparent to defense counsel that in preparing the transcript King had added descriptions of the movements of the persons in the office which he could not have observed from his position in the car. Objection was made that the testimony would be based in part upon a transmission of a conversation that was to a great extent unintelligible and that it would include statements that could not have been within the personal knowledge of King. The objection was overruled and, using the transcript, the witness testified to facts of which he could have had no personal knowledge and to what he had added to the transcript from memory. This is the hearsay testimony which appellant contends was erroneously admitted. The objection was to the entirety of the testimony sought to be elicited from the witness, not merely to the parts which would be hearsay."

In rejecting petitioner's claim of error, the court noted the hearing officer correctly allowed the admission of King's testimony because petitioner's "objection went to the weight of the testimony, rather than to its admissibility." (*Whitlow v. Board of Medical Examiners, supra*, 248 Cal.App.2d at p. 488.) The court further noted that King's

testimony was corroborated by other witnesses and that "in administrative hearings[,] more freedom in the receipt of evidence is permitted than in court trials." (*Ibid.*)

Here, the video came from a neutral source: a convenience store that was adjacent to where Carlton was arrested and searched incident to arrest. The police obtained the video on the *same* day Carlton was arrested, after Arsenault spoke to Maddox and determined there might be an issue regarding the use of force in connection with the arrest and search of Carlton.

We independently conclude the trial court did not err when it—like the Commission and others (e.g., Sallee) involved in investigating the incident—relied on the video to support the finding that Rodriguez used unreasonable, unnecessary or excessive force on Carlton when he twice slammed Carlton's head on the hood of the police car during the search incident to arrest. In view of *Whitlow v. Board of Medical Examiners* and similar cases (e.g., *Mast v. State Board of Optometry* (1956) 139 Cal.App.2d 78, 85), we conclude Rodriguez's objection to the convenience store video went to weight and not admissibility, as the video (viewed by this court) contains evidence that was highly relevant on the use of force issue and is the type of evidence on which " 'responsible persons are accustomed to rely in the conduct of serious affairs' " (See *MacDonald v. Gutierrez, supra*, 32 Cal.4th at pp. 158-159.)

We also conclude the admission of the convenience store video did not prevent Rodriguez from receiving a fair trial before the Commission. (See Code Civ. Proc., § 1094.5, subd. (b), *ante*; see also *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003)

108 Cal.App.4th 81, 87.) As noted by the Commission in its decision, Rodriguez vigorously attacked the quality and reliability of the convenience store video in that hearing, including offering the testimony of an expert. The Commission, however, found the portion of the video showing the "head slams" was sufficiently reliable, which the trial court also (tacitly) found when it noted the videotape *plainly* showed that Carlton was *not* banging his own head against the hood of the police car, as Rodriguez had claimed (a finding we conclude is amply supported by evidence in the administrative record).

Moreover, even if strict adherence to the rules of evidence was required, we would have little difficulty in ruling the trial court properly exercised its discretion when it admitted the video into evidence in connection with its independent review of the administrative record. (See *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1079 [ruling by the trial court as to the admissibility of evidence reviewed for an abuse of discretion].)

Here, there is substantial, reliable evidence in the record showing how police initially came to possess the video and the chain of custody of the video, both of which support its admissibility as secondary evidence.⁴ (See Evid. Code, § 260 ["A 'duplicate'

⁴ Jones testified that he was the direct supervisor of Rodriguez, Maddox and Voshell, and that he also had responded to the call involving Carlton; that he left the scene before the incident occurred, after he determined that the officers had the situation under control; that while in Arsenault's office later that evening, Arsenault directed him to obtain the video; that he went to the convenience store and observed two video

[e.g., the videotape] is a counterpart produced by the same impression as the original . . . by mechanical or electronic rerecording, . . . or by other equivalent technique which accurately reproduces the original."]; *People v. Phillips* (1985) 41 Cal.3d 29, 78 [secondary evidence is admissible even if it is " 'not . . . completely intelligible . . . as long as enough is intelligible to be relevant without creating an inference of speculation or unfairness.' [Citation.]"]; *People v. Bowley* (1963) 59 Cal.2d 855, 859 [observing "the testimony of a person who was present at the time a film was made that it accurately depicts what it purports to show is a legally sufficient foundation for its admission into evidence. [Citations.]".) The trial court did not err in admitting the videotape into evidence.

Finally, even without the convenience store video we would still conclude there is sufficient evidence in the record to support the finding of the trial court that Rodriguez used unreasonable, unwarranted or excessive force when he twice slammed Carlton's head on the hood of the police car during the search incident to arrest. Such evidence

cameras mounted on the wall outside the store; that he confirmed with store employees that the exterior video cameras were connected to a digital video system inside the store; that the store employees told Jones the manager previously had made copies of videos at the request of police; that Jones viewed the video and found that one of the exterior cameras had in fact filmed the incident; that he obtained a copy of the video from the store manager and made no changes to it; that after he obtained the copy he drove *directly* to the police station and handed the copy to Arsenault; that he and Arsenault together viewed the video on Arsenault's computer that same night; that Jones left the video with Arsenault; and that Jones viewed a portion of the video during the hearing before the Commission and confirmed the video played for the Commission was consistent with the videotape he *originally* had viewed.

includes the testimony of Maddox, who witnessed the incident and prepared a use of force form that alerted his superiors to the use of force issue.

Although Maddox *initially* neglected to mention the "head slams" in his use of force form and was disciplined as a result, the record shows that Maddox, when questioned by Arsenault after arriving back at the station, told how he had observed Rodriguez slam Carlton's head on the hood of the police car and how he could not explain why Rodriguez had used pepper spray on Carlton when Maddox was placing Carlton in the backseat of the police car.

Significantly, Maddox also was the individual who alerted Arsenault that the incident *might* have been captured on video by cameras mounted on the outside of the convenience store. (See *Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 658 [a trial court in its independent review of the record not only reweighs the evidence but also considers the credibility of witnesses anew]; see also *Pittsburg Unified School Dist. v. Commission on Professional Competence* (1983) 146 Cal.App.3d 964, 977 [under independent review standard, a trial court may reweigh the credibility of witnesses].) We conclude Maddox's testimony also supports the finding of the trial court that the weight of the evidence in the administrative record shows Rodriguez used unreasonable, unwarranted or excessive force when Rodriguez twice slammed Carlton's head on the hood of the police car during the search incident to his arrest.

Besides the testimony of Maddox, there is additional evidence in the record supporting the finding of unreasonable use of force by the trial court, including the expert

testimony of Partch and the statements by Carlton that he received an "ass whopping," which was corroborated in part by the red mark police observed on Carlton's forehead that same night and by the small indentation in the hood of the patrol car involved in the incident.

That there may also have been substantial, credible evidence in the record that Rodriguez did *not* use unreasonable, unnecessary or excessive force during the incident does not alter our decision: we do not reweigh the evidence but instead, review the administrative record and evaluate whether the findings of the trial court are supported by substantial evidence. (See *JKH Enterprises, Inc. v. Department of Industrial Relations, supra*, 142 Cal.App.4th at p. 1058.)⁵

Our review of the administrative record—with or without the convenience store video—shows it contains substantial evidence supporting the trial court's finding that

⁵ As such, we find unavailing Rodriguez's other contention on appeal—that the Commission "conveniently dismissed" the favorable testimony of Voshell. On appeal, we review the findings of the trial court and *not* those of the Commission. (See *JKH Enterprises, Inc. v. Department of Industrial Relations, supra*, 142 Cal.App.4th at p. 1058.) In any event, although the record shows Voshell was present at the incident, the record also supports the finding of the trial court (and the Commission) that Carlton was busy processing items taken from Carlton during the search incident to arrest and only saw Rodriguez and his interaction with Carlton out of the corner of her eye, if at all. As also noted by the trial court, the Commission additionally found that Voshell had a reason to be biased in giving conflicting testimony favorable to Rodriguez and the record shows that Voshell, like Maddox, was disciplined in connection with the incident.

Rodriguez used unreasonable, unnecessary or excessive force on Carlton during Carlton's arrest and search.⁶

DISPOSITION

Judgment affirmed. Respondents to recover costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.

⁶ Although unnecessary to affirm the judgment, we also conclude there is substantial evidence in the record supporting the alternate basis to support Rodriguez's termination, viz. the trial court's finding that Rodriguez was dishonest about his use of, and the need to use, such force on Carlton incident to his arrest.