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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

JOSHUA DUKE,

Plaintiff and Appellant,

v.

CITY OF ONTARIO et al.,

Defendants and Respondents.

E052770

(Super.Ct.No. CIVRS70367)

OPINION

APPEAL from the Superior Court of San Bernardino County. David A. Williams, J. Michael Gunn and Joseph R. Brisco, Judges. Affirmed.

Corey W. Glave, for Plaintiff and Appellant.

Kinkle, Rodiger and Spriggs, Bruce E. Disenhouse and Janine L. Highiet-Ivicevic for Defendants and Respondents.

I

INTRODUCTION

Plaintiff Joshua Duke (Duke) challenges his termination as a police officer for the City of Ontario (Ontario) in the year 2000, nearly 12 years ago. The basis for the

termination was Ontario's contention that Duke supplied his underage stepson and friends with confiscated driver's licenses or identification cards to gain admission to bars and casinos.

After years of procedural skirmishing, the Ontario City Council conducted a public hearing and issued a written decision in December 2006, upholding the termination and rejecting an arbitrator's recommendation to reinstate Duke. In March 2007, Duke filed a petition for writ of mandate in superior court. In July 2009, the trial court issued a written decision also upholding Duke's termination. The court entered judgment in September 2010.

On appeal, Duke "challenges each and every ruling by the trial court in this action. The trial court simply erred in its factual and legal determinations." Duke admits to misusing the driver's licenses or identifications. Most of Duke's arguments focus on claims of procedural unfairness. Based on our review of the 2,000-page record, we conclude substantial evidence supports the findings of the trial court. We affirm the judgment.

## II

### FACTUAL AND PROCEDURAL BACKGROUND

#### *A. The Arbitration Hearing in December 2001*

In an arbitration hearing in December 2001, Duke was represented by Corey W. Glave (Glave), also his appellate counsel, and Ontario was represented by Steve A. Filarsky (Filarsky).

Eric Hopley (Hopley), an internal affairs investigator testified that Duke's former wife, Sabrina, had called him in June 2000 to arrange an interview. Hopley recorded the interview in which Sabrina said that Duke had recently given her three confiscated California driver's licenses. Prior thereto, Duke had given confiscated driver's licenses to Sabrina's son, Aaron, and his friend, Eric. Hopley interviewed Aaron who said Duke had supplied Eric and him with driver's licenses to use for entry to bars and casinos when they were on vacation in Laughlin in 1999.

Hopley interviewed Duke, who admitted he had provided identification to Aaron and his friends, who were under age, so they could enter bars and casinos while on vacation with Duke and Sabrina. Duke had possession of four more driver's licenses. Duke explained he had kept the identifications and not returned them to the DMV because he had "dropped the ball." Duke was placed on administrative leave with full pay. Hopley prepared a summary report about the facts of his investigation, including the rules and regulations violated by Duke.

Lloyd Scharf (Scharf), the chief of police, testified that he reviewed Hopley's summary and decided to terminate Duke because an officer who engaged in theft, embezzlement, or fraud was not an acceptable employee. He acknowledged Duke had competent or above average performance evaluations and a good record. But, in his view, Duke had committed "termination offense[s]."

John Duffield, an Ontario police officer, testified that Duke was an outstanding officer. Duffield acknowledged that confiscated driver's licenses should be booked as property and not used for any purpose.

Duke also presented an attorney expert, Bradley Sullivan, who had been involved in five police terminations for the Sutter Creek Police Department. The chief of police for Sutter Creek was Duke's brother. Sullivan offered his opinion that termination was too severe. Sullivan characterized using confiscated driver's licenses as civil conversion, not a criminal act.

The arbitrator recommended reinstating Duke. The arbitrator focused his decision solely on the delay in processing Duke's appeal to arbitration. The arbitrator did not discuss the facts or the merits of the termination. Instead, the arbitrator concluded that, because Duke had been denied due process, he should be reinstated and awarded back pay.

*B. June 2000-April 2006*

The procedural history between 2000 and April 2004 has already been discussed in a previous appeal, *Duke v. City of Ontario* (July 27, 2005, E035502 and E036188) [nonpub. opn.]. The following facts are taken from this court's July 2005 opinion.:

“After an internal affairs investigation, the Ontario chief of police, Lloyd Scharf, issued a notice of intent to terminate Duke on August 29, 2000. A predisciplinary *Skelly* meeting was conducted on September 14, 2000. Scharf then terminated Duke's employment on September 20, 2000, and Duke appealed.

“A two-day arbitration was conducted in December 2001 and the arbitrator recommended reinstating Duke, not on the merits but because Ontario delayed in scheduling the arbitration. Ultimately, on September 17, 2002, in a closed session and without notice to Duke, the city council rejected the arbitrator's recommendation and

sustained the termination. Duke was informed of the city council's decision in a letter dated October 1, 2002.

“In February 2003, Duke filed a petition for writ of mandate in the superior court. In April 2003, the Second District Court of Appeal published its decision in *Morrison v. Housing Authority of the City of Los Angeles Bd. of Comrs.* [(2003) 107 Cal.App.4th 860,] 872-876 (*Morrison*), requiring a public employee to receive notice of his right to demand an open hearing before a public agency on charges or complaints against the employee. (Gov. Code, § 54957, subd. (b)(1).) [¶] . . . [¶]

“In January 2004, the superior court granted Duke's petition and held the city council's decision was void based on [both] *Morrison* and the city council's failure to offer Duke a public hearing. The court did not order Duke to be reinstated. . . .

“In February 2004, Ontario scheduled [a second] hearing before the city council and offered Duke the opportunity to attend and present oral argument. Neither Duke nor his lawyer attended the [second] hearing held on February 24. The city council reaffirmed its earlier decision and, on April 2, 2004, issued a written decision upholding the termination of Duke's employment. . . .”

Duke filed a second petition for writ of mandate and, in April 2006, the superior court ruled the February 2004 action was null and void for lack of proper notice to Duke, finally entering judgment in March 2007 in favor of Duke.

### *C. The Third Council Hearing*

The memorandum of understanding (MOU) between Ontario and the Ontario police provides: “A final decision of award of the arbitrator shall be . . . subject to the

approval of the City Council.” In December 2006, Ontario conducted a third hearing in an open session of the city council, affording the city and Duke 30 minutes each for oral argument. Ontario was represented by Filarsky. The city council voted to sustain Duke’s termination.

The city council then issued a six-page written determination prepared by the city attorney John E. Brown. Ontario refused to find the city council lacked jurisdiction to review the recommendation. Ontario reviewed “the entire administrative record including that of the arbitration proceeding” and rejected the arbitrator’s recommendation for reinstatement, instead upholding Duke’s termination. Ontario found that Duke “admitted to the misconduct of which he stands accused,” in that he confiscated at least nine driver’s licenses or identification cards and gave five of them to his underage stepson and friends so they could “access adult establishments.” Duke returned the other four documents in August 2000. Fraudulent appropriation of property is embezzlement. Ontario found Duke’s conduct constituted violations of the rules, regulations, and orders of the Ontario Police Department, including neglect of duty, failure to safeguard prisoners’ property, failure to display good conduct and behavior, and the prohibition against conversion of property.

#### *D. The 2007 Petition for Writ of Mandate*

The present appeal involves the third hearing reviewing Duke’s termination, as conducted by the city council in December 2006. In March 2007, Duke filed a complaint and a petition for writ of mandate in the superior court. The superior court ruled in favor of Ontario in July 2009.

The superior court based its decision on the pleadings, the administrative record and transcripts, and the evidence and argument submitted by the parties. The court found Duke's petition was timely filed. Ontario's December 2006 written decision was proper, "given the entire context of its issuance, and was not a denial of a fair hearing or a failure to act in manner required by law." Duke failed to establish that Ontario exceeded its "authority or jurisdiction by sitting as the ultimate fact-finder in the termination" of Duke. Ontario complied with the *Morrison* case by affording Duke 30 minutes of oral argument before reviewing the arbitrator's decision in closed session. The court found it did not violate Duke's due process rights for Filarsky to represent Ontario both at the arbitration and the December 2006 hearing. Any violation of POBRA (the Public Safety Officers Procedural Bill of Rights Act, Government Code section 3300 et seq.) in 2000 was harmless. Sabrina's statements and Duke's letters to her were not made inadmissible by the privilege for marital communications. The delay in the termination procedures did not constitute a due process violation which justified dismissing the charges against Duke and reinstating his employment with an award of back pay. It was not an abuse of discretion to terminate Duke based on his admitted misconduct. The trial court finally entered judgment in September 2010.

### III

#### STANDARD OF REVIEW

The superior court performs an independent review and the appellate court evaluates the trial court's findings for substantial evidence.

Where a case involves a police officer's vested property interest in his employment, the trial court is required to exercise its independent judgment in reviewing the administrative record. (*Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 658, citing *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 44-45 and *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143, fn. 10 (*Bixby*); *Davis v. Los Angeles Unified School Dist. Personnel Com.* (2007) 152 Cal.App.4th 1122, 1130 (*Davis*).

The independent judgment test requires the trial court not only to examine the administrative record for errors of law but also exercise its independent judgment upon the evidence in a limited trial de novo. (*Bixby, supra*, 4 Cal.3d at p. 143.) The trial court is permitted to draw its own reasonable inferences from the evidence and make its own credibility determinations. (*Morrison, supra*, 107 Cal.App.4th at p. 868.) At the same time, it has 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. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.)

The appellate court reviews “the record and determines whether the *trial court's* findings (not the administrative agency findings) are supported by substantial evidence.” (*Candari v. Los Angeles Unified School Dist.* (2011) 193 Cal.App.4th 402, 407-408, citing *Bixby, supra*, 4 Cal.3d at p. 143, fn. 10; accord, *Davis, supra*, 152 Cal.App.4th at pp. 1130–1131; *Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 52 [where superior court required to exercise independent review of administrative record, “the scope of review on appeal is limited”].) We resolve all evidentiary conflicts and draw

all legitimate and reasonable inferences in favor of the trial court’s decision: “Where the evidence supports more than one reasonable inference, we are not at liberty to substitute our deductions for those of the trial court.” (*Morrison, supra*, 107 Cal.App.4th at p. 868; *Valiyee v. Department of Motor Vehicles* (1999) 74 Cal.App.4th 1026, 1031.)

#### IV

#### JURISDICTION OF CITY COUNCIL

Regarding the arbitration procedure for Ontario police officers, the governing MOU provides: “A final decision [or] award of the arbitrator shall be made within thirty (30) calendar days after the close of the hearing. Such decision or award shall be subject to the approval of the City Council.” Duke argues that the city council’s only authority under the MOU was to accept or reject the arbitrator’s decision and that the city council could not decide to terminate Duke, contrary to the arbitrator’s recommendation. We conclude that substantial evidence supports the trial court’s findings that Ontario did not exceed its “authority or jurisdiction by sitting as the ultimate fact-finder in the termination.”

The cases relied upon by Duke do not support his argument. In each instance, the cases involve a reviewing body failing to follow the express procedures governing its actions. In *California Sch. Employees Assn. v. Personnel Commission* (1970) 3 Cal.3d 139, the commission did not follow the applicable Education Code statutes. In *Jackson v. City of Pomona* (1979) 100 Cal.App.3d 438, the Pomona City Council did not comply with the provisions of the Pomona City Code governing employee discipline. In *Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 265, the city also failed to follow its

own ordinance. In *Usher v. County of Monterey* (1998) 65 Cal.App.4th 210, the county did not comply with the Government Code.

Other cases cited by Duke are not pertinent. *Birdsall v. Carrillo* (1991) 231 Cal.App.3d 1426 involved a limited holding, concerning the correct definition of a probationary employee as found in the Government Code. *Absmeier v. Simi Valley Unified School Dist.* (2011) 196 Cal.App.4th 311, involved a situation in which an administrative law judge abandoned the case.

Here the subject MOU provides an arbitrator's decision is subject to the city council's approval, which necessarily includes implied powers to implement procedures for approval. "Public agencies possess not only expressly granted powers but also such implied powers as are necessary or reasonably appropriate to the accomplishment of their express powers. [Citations.]" (*Cox v. Kern County Civil Service Comm.* (1984) 156 Cal.App.3d 867, 873, citing *County of San Joaquin v. Stockton Swim Club* (1974) 42 Cal.App.3d 968, 972.)

The Ontario City Council properly exercised its powers of approval by conducting a public hearing, allowing Duke 30 minutes to argue his case, and by preparing a six-page written decision. Based on a review of the undisputed facts regarding Duke's misuse of the confiscated driver's licenses and the evidence submitted at the arbitration hearing, we find there is substantial evidence supporting the trial court's independent findings that Ontario did not exceed its authority or jurisdiction by declining to approve the arbitrator's recommendation for reinstatement and deciding to terminate Duke's employment as a police officer.

## UNFAIRNESS AND BIAS

Filarsky who represented the police department in these proceedings, also represents the police department in many other matters. But Filarsky did not represent or advise the city council concerning Duke's termination. Instead, the city council was separately represented by John E. Brown and the law firm of Best, Best, and Krieger. Nevertheless, Duke argues that Filarsky's representation of the police department created an "appearance of unfairness [] sufficient to invalidate the City Council's third review hearing."

We disagree. In this case, the city council and the police department were separately represented by different lawyers. The cases upon which Duke relies involved government counsel performing dual roles before administrative review boards.

In *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, a detention officer was discharged by the city police department, and filed an appeal with the city personnel board. (*Id.* at p. 812.) The city attorney, who had acted as a legal adviser to the board, could not simultaneously advise the board and represent the city on the appeal without creating "the probability of actual bias . . . [and] the appearance of unfairness is sufficient to invalidate the hearing." (*Id.* at p. 816.)

In *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, the court found a due process violation when a city attorney took "an active and significant part in the renewal application process" for a cabaret's permit, and then "also appeared and participated in the administrative review of the denial of that application by advising

and assisting” a city employee acting as a hearing officer. (*Id.* at p. 90.) “There was a clear *appearance* of unfairness and bias,” because the city attorney’s participation “was the equivalent of trial counsel acting as an appellate court’s adviser during the appellate court’s review of the propriety of a lower court’s judgment in favor of that counsel’s client.” (*Id.* at p. 94.)

In *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, after a county deputy sheriff was disciplined, he challenged the discipline before a quasi-independent administrative tribunal established to resolve disputes between the county and county employees. During a contested hearing, the sheriff’s department was represented by county counsel, and county counsel also advised the appeals board. (*Id.* at p. 1578.) Because the employment appeals board was cast as a “‘supposedly neutral decision maker’ . . . the attorney’s dual role as both advocate for a party and adviser to the tribunal . . . does violence to [the] constitutional ideal” of due process. (*Id.* at p. 1586.)

No such circumstances exist in the present case in which the city attorney, John E. Brown, did not represent the police department. In any event, in *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, the California Supreme Court concluded that in the absence of any evidence of actual prejudice, the potential for unfairness when an attorney acted as a prosecutor before the board and also acted as an adviser to the board “in an unrelated matter is too slight and speculative to achieve constitutional significance,” in part because there was no evidence that the attorney acted in both capacities “in this or any other single adjudicative proceeding.” (*Id.* at pp. 737, 740.) The court also disapproved of *Quintero v. City of*

*Santa Ana, supra*, 114 Cal.App.4th at page 817, to the extent that it “contains language suggesting the existence of a per se rule barring agency attorneys from simultaneously exercising advisory and prosecutorial functions, even in unrelated proceedings.”

(*Morongo Band of Mission Indians*, at p. 740, fn. 2.)

The cases do not support a conclusion that an unacceptable appearance of bias, let alone actual bias, existed in the city council hearing on Duke’s termination. The equivalent in this case would be for Filarsky to represent the police department before the city council, and simultaneously to advise the city council. There is no evidence of such improper interference in the city council’s review of Duke’s appeal. What took place at the hearing was the unexceptional circumstance of the city attorney advising the city council regarding Duke’s termination. It cannot be said to violate due process for the city council to rely on the city attorney to investigate and make recommendations by reviewing the entire record and preparing an analysis which recommended Duke’s termination. (*Today’s Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2011) 197 Cal.App.4th 436, 470-471.)

## VI

### FILARSKY’S ARGUMENTS

Duke protests that Filarsky argued matters not contained in the administrative record during the December 2006 hearing. But there is no transcript of the December 2006 hearing and the audio recording is not part of the record on appeal. Based on discovery responses and Filarsky’s deposition, Duke makes a laborious effort to reconstruct what Filarsky actually argued at the hearing. In a single page of his opening

brief, Duke concentrates his objections on three areas supposedly argued by Filarsky: the information that the chief of police did not want to rehire Duke, that the city council had twice upheld Duke's termination, and the city council's previous decisions had been reversed on technicalities. Then, in his reply brief, Duke expands his argument to seven pages, thus depriving Ontario of an opportunity to respond.

In the absence of a transcript or an audio recording, we cannot credibly evaluate Duke's objections about Filarsky's arguments at the December 2006 hearing. Furthermore, we observe that Duke has violated appellate protocol by withholding (and thereby waiving) most of his arguments on this issue until his reply brief. Finally, we agree with Ontario that its six-page written determination does not rely on Filarsky's purported arguments. The determination is based entirely on the information developed before and during the December 2001 arbitration. Duke cannot point to substantial evidence that the December 2006 hearing was unfair based on Filarsky's arguments, whatever they may have been.

## VII

### THE BROWN ACT AND *MORRISON*

Duke next asserts the city council again violated the notice requirements of *Morrison* and the Brown Act after it conducted the public hearing but then adjourned to deliberate. Duke is wrong on this point.

The governing statute, Government Code section 54957, provides as follows:

“(b)(1) Subject to paragraph (2), nothing contained in this chapter shall 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.”

Thus, the city council could hold a closed session to consider the discipline or dismissal of Duke because it gave proper notice for the public hearing. (Gov. Code, § 54957, subd. (b)(1); *Moreno v. City of King* (2005) 127 Cal.App.4th 17.) After the charges against Duke had already been heard at a public evidentiary hearing, the city council could then hold a closed session to consider whether to discipline or dismiss the employee without giving the employee advance notice under the Brown Act. (*Bollinger v. San Diego Civil Service Com.* (1999) 71 Cal.App.4th 568 [advance notice was not required where the board discussed performance evaluation in a closed session and voted not to renew the employee’s contract].) Duke was not entitled to additional notice and a second evidentiary hearing, a result “neither desired nor required by law.” (*Kolter v.*

*Commission on Professional Competence of Los Angeles Unified School Dist. (2009) 170 Cal.App.4th 1346, 1353.)*

## VIII

### THE CITY COUNCIL'S WRITTEN DETERMINATION

Duke challenges the validity and legitimacy of the six-page written determination, prepared by John E. Brown, the city attorney, on behalf of the city council at its direction. The determination summarized the proceedings, reviewed the evidence presented at the arbitration, identified the violations committed by Duke, and thoroughly analyzed the reasons for Duke's terminations. We find no reason to reject the determination as null and void as urged by Duke, especially based on new contentions first raised in his reply brief.

## IX

### SUBSTANTIAL EVIDENCE FOR ARBITRATOR'S AWARD

Duke makes virtually the same argument in sections V.-F. and V.-H. of his brief. As we have already discussed, if an administrative decision substantially affects a fundamental vested right, the trial court exercises its independent judgment to decide whether the weight of the evidence supports the administrative findings. (*Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 313, 318.) Subsequently, the appellate court decides whether substantial evidence supports the trial court's conclusions. (*Ibid.*)

Here the arbitrator decided that Duke's due process rights had been violated under Government Code section 3304 by the 15 months lapse of time between Duke's termination and the arbitration hearing. The city council disagreed, finding there was no

prejudice to Duke caused by delay: “If he prevailed, he would be reinstated with back pay to the date of his termination. If he did not prevail, his termination would be upheld.” The trial court independently found no violation of due process. In our view, substantial evidence supports the trial court’s independent findings that Duke was accorded his due process rights.

## X

### POBRA VIOLATIONS

Duke also protests that the conduct of the initial investigation violated various sections of POBRA. Both the trial court and the appellate court conduct a substantial evidence standard of review. (*Wences v. City of Los Angeles, supra*, 177 Cal.App.4th at p. 313.)

Government Code Section 3303, subdivision (b) provides: “The public safety officer under investigation shall be informed prior to the interrogation of the rank, name, and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation. All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time.”

The notice of internal affairs investigation sent to Duke was dated July 10, 2000, and indicated Duke was to report for questioning on July 13, 2000. The letter was sent from Eric V. Hopley, Sergeant, clearly indicating the rank, name, and command of the officer in charge of the interrogation. Therefore, Duke was properly informed about the interrogation procedure. The omission of Duke’s name from the July 10, 2000, letter was

determined by the trial court to be minor and harmless. The interrogator advised that, during the interview, all questions would be asked through no more than two interviewers. Duke was represented by counsel for the August 1, 2000 interview, and no objection was made to the presence of a second person, Sergeant Steve Duke. Therefore, the trial court properly ruled that any violation of this section was minor and harmless.

Government Code section 3303, subdivision (c) states: “The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.” The notice of internal affairs investigation, sent on July 10, 2000, stated it would be “investigating alleged misconduct (improper disposition of prisoners property and personal use of found, recovered or property held for evidence) . . . . Also in question will be two letters you sent to your wife on or around June 17, 2000.”

During the interrogation on August 1, 2000, three contacts were discussed. Duke had arrested Enrique Rosales in April 2000 and taken his driver’s license. Carlos Ramirez was arrested by another officer on February 4, 1999, and Sergeant Hopley questioned Duke about how he came to be in possession of that subject’s license. Duke also had contact with Jeffrey Teague during a traffic stop on June 24, 1999 and took his license. Based on the July 10, 2000, notice, it was evident that Duke would be questioned about events occurring in 1999, when Duke had contact with two of the original owners of the identification cards.

Aside from these three identification cards, Duke was asked whether he had engaged in the same or similar behavior, confiscating identification cards and using them for his personal use. Duke responded he had. Before further questioning, Sergeant Steve

Duke twice indicated that Duke and his lawyer, Glave, could speak outside the presence of the interviewers. Glave denied wanting to speak with Duke and told Duke to answer the question, saying, “Okay, I think we’re okay.” Therefore, Duke waived any objection to questioning outside the scope of the July 10, 2000, letter.

Government Code section 3303, subdivision (g), provides, in pertinent part: “The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential”.

Duke cites *Pasadena Police Officers Association v. City of Pasadena* (1990) 51 Cal.3d 564 for the proposition that an officer under an administrative investigation must be given access to the tape recordings or transcribed notes of the interrogation ““if any further proceedings are contemplated or prior to any further interrogation at a subsequent time.”” Duke does not cite the remainder of the same sentence, which states, the statute “does not specify when that access must be given.” (*Id.* at pp. 575-576.) Notably, *Pasadena* involved a situation where one officer was seeking notes from another officer whose interrogation was already complete but before the requesting officer’s interrogation. *Pasadena* clarifies that “the right to discovery *before interrogation and before charges have been filed* . . . is without precedent.” (*Id.* at p. 578, emphasis in original.)

Duke's reliance on *San Diego Police Officers Assn. v. City of San Diego* (2002) 98 Cal.App.4th 779 for the proposition that "reports" and "complaints" includes raw notes, including draft reports, was directly contradicted in *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, indicating the Legislature intended something more formal than "raw notes." (*Id.* at p. 1286.) The *Gilbert* court directly held, "The only 'notes' to which such officer is expressly entitled under section 3303, subdivision (g), are the 'notes made by a stenographer,' who was implicitly present at the officer's interrogation. Fair treatment of such officer does not require that all material amassed in the course of the investigation, such as raw notes, written communications, records obtained, and the interviews conducted, be provided to the officer following the officer's interrogation." (*Id.* at pp. 1286-1287).

Furthermore, the *Gilbert* court followed *Pasadena*, indicating, "The Supreme Court held that 'the Legislature intended subdivision (f) [now subdivision (g)] to require law enforcement agencies to disclose reports and complaints to an officer under an internal affairs investigation only after the officer's interrogation.' [Citation.]" (*Gilbert, supra*, 130 Cal.App.4th at p. 1285).

Duke was interrogated on August 1, 2000, and subsequently on August 17, 2000, after Duke turned over additional confiscated identification cards still in his possession. At the time the second interrogation commenced, Glave stated on the record:

"We've been presented a copy of the IA admonishments. We understand those are continued from the first interview, and we've been provided a draft copy of the transcript of the first interview, that both sides acknowledge there are some mistakes. At this time I

request copies of all reports, memorandums, and other documents of your investigation up to this time. We are going to proceed without a copy of the tape, although we have a right to the one under your possession and that we're not going back into the first interview too much.”

Thus, Duke admitted at the time the second interrogation commenced, he was already in possession of the notes of the stenographer, referred to as the “draft copy of the transcript of the first interview.” Duke was not entitled to other documents at the time of his interrogation. Furthermore, Duke waived his right to a copy of the actual tape recording of his initial interrogation before proceeding with the second interrogation when his counsel stated “We are going to proceed without a copy of the tape, although we have a right to the one under your possession . . . .” The trial court properly ruled that any violation of this statute was minor and harmless.

Government Code section 3304 does not provide for an automatic appeal but only requires that an opportunity for administrative appeal be provided. (*Browning v. Block* (1985) 175 Cal.App.3d 423, 429; *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1807). Government Code section 3304 does not specify how the appeal process is to be implemented, as the details are left to be formulated by the local agency. (*Binkley*, at p. 1807.) If the local agency has not formulated any details regarding the appeals process, then the scope of the administrative appeals hearing procedure actually afforded is measured according to constitutional due process principles. (*Ibid.*) Here, an appeals procedure was established by the MOU. Specifically, section 13.23 of the MOU gives the city council the authority to approve the decision or award of the arbitrator as already

discussed at length in section IV of this opinion. For the same reasons, there was no violation of Government Code section 3304.

In summary, the only violation of POBRA that occurred was the failure to identify the fact that Sergeant Steven Duke would also be present for the interrogation of Duke. Duke waived any error by failing to object at the commencement of the interrogation. The trial court correctly ruled that any violation of POBRA was minor and harmless.

## XI

### INADMISSIBLE EVIDENCE AND EVIDENCE OUTSIDE THE RECORD

Duke repeats his untenable arguments that the city council did not consider the administrative record and that the evidence presented at the arbitration was inadmissible hearsay. As to the former contention, the record unquestionably establishes the city council based its written determination on a review of the administrative record. As to the latter contention, the hearsay evidence was admissible under Government Code section 11513:

“(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.

“(d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to

support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.”

Duke offered no objection to the subject hearsay evidence. Additionally, this court has held the marital communications privilege does not apply in law enforcement administrative investigations and hearings. (*Riverside County Sheriff's Dept. v. Zigman* (2008) 169 Cal.App.4th 763, 768-772 [Fourth Dist., Div. Two].)

## XII

### PENALTY OF TERMINATION

Duke finally argues termination is unwarranted and excessive because he was an exemplary employee, albeit he was also careless with confiscated property and let his stepson and friends unlawfully use the identification cards on family vacations in an effort to salvage his marriage.

The city council's written determination clearly demonstrated ample evidence that the decision to reject the arbitrator's award was based on substantial evidence. (See e.g. *County of Riverside v. City of Murrieta* (1998) 65 Cal.App.4th 616, 620 [Fourth Dist., Div. Two]), indicating that substantial evidence for the purposes of writ review is the state of the evidence where a reasonable trier of fact could have found for the respondent based on a review of the whole record; see also *Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89, 99, defining “substantial” as “reasonable,” “credible” and of “solid value,” and noting that it could be testimony from a single witness).

The determination carefully delineates all of the bases for rejecting the arbitrator's opinion that a due process violation occurred. Duke cites no authority that mandates

exactly when a “meaningful” post-termination evidentiary hearing must be provided. Duke either acceded to the delay or was not prejudiced by it.

Duke has not denied that he committed the offenses he has admitted to committing. The facts of his misconduct have not been disputed at any stage of the proceedings. Duke has not shown any prejudice by any alleged due process violation. Therefore, substantial evidence supports the trial court’s finding that there was no abuse of discretion by the city council in imposing the penalty of termination of employment based upon Duke’s admitted misconduct.

XIII

DISPOSITION

Substantial evidence supports the trial court’s ruling. We affirm the judgment. Ontario, the prevailing party, shall recover its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON  
J.

We concur:

HOLLENHORST  
Acting P.J.

KING  
J.