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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

JAMES SALAS,

Plaintiff and Appellant,

v.

CALIFORNIA STATE PERSONNEL
BOARD,

Defendant and Respondent;

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION,

Real Party in Interest and
Respondent.

H037215

(Santa Clara County

Super. Ct. No. 1-10-CV178823)

I. INTRODUCTION

Respondent California Department of Corrections and Rehabilitation (CDCR) dismissed appellant James Salas from his employment as a parole agent after determining that he had engaged in misconduct. Salas appealed the dismissal to the California State Personnel Board (Board), which upheld the dismissal. Salas thereafter filed a petition for a writ of administrative mandamus in the superior court pursuant to Code of Civil

Procedure section 1094.5.¹ The court denied the petition and entered judgment in favor of the CDCR and the Board.

On appeal, Salas contends that “it does not appear that there is any indication that the trial court applied the correct standard of review” with respect to the Board’s decision and that the matter should be remanded so that the court may apply the proper standard. He also argues that there is not substantial evidence to support the Board’s findings. Salas further contends that his dismissal from employment was “grossly disproportionate to the alleged wrongs.”

For reasons that we will explain, we will affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Termination of Salas’s Employment

In December 2007, the CDCR notified Salas in writing that he was being dismissed from his position as a parole agent effective January 17, 2008. The stated causes for dismissal included inexcusable neglect of duty, dishonesty, violation of the prohibitions set forth in accordance with Government Code section 19990, and other failure of good behavior either during or outside of duty hours which was of such a nature that it caused discredit to the appointing authority or the person’s employment. (Gov. Code, § 19572, subs. (d), (f), (r) & (t).) The written notice identified multiple incidents leading to the dismissal, including that Salas had “attempted to use undue influence as a peace officer to assist [another person] in avoiding a traffic citation,” that Salas was “dishonest” during the subsequent internal investigation, and that Salas “failed to request proper authorization” from his supervisor before closing a parole office early.

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

B. The Proceedings Before the Board

Salas appealed the dismissal to the Board, and a hearing was held before an administrative law judge (ALJ). The evidence presented at the hearing included the following.

1. Parole agents

Parole agents are armed and have peace officer duties. Parole agents from the San Jose parole office were responsible for supervising youth offenders who were released into the area from the California Youth Authority or Division of Juvenile Justice institutions. The parole agents' duties also included preparing various reports and documents, including parole placement plans, reports regarding parole violations, and reports regarding progress on parole. These documents were used by the CDCR, and may also be used by the Juvenile Parole Board or the court. The parole agents' duties further included testifying at parole violation hearings.

Parole agents were expected to have the qualities of integrity and honesty. These qualities were important and affected a parole agent's "ability to be effective" in the position. For example, parole agents were expected to be honest when testifying before the parole board and in preparing reports that were used by the parole board. They were also expected to be honest during an interview for an internal affairs investigation. Further, parole agents, as peace officers, were expected to not take advantage of their position. Expectations concerning integrity and honesty were communicated during basic parole agent academy, were reflected in the peace officer oath, and were made familiar to parole agents during their careers with the CDCR.

Salas was a parole agent who had been employed by the CDCR for nearly 20 years. Since 2001, he had worked as a "parole agent two, resident agent for Monterey County." As a resident agent, he lived in the area and worked out of a home office. He also worked in the San Jose parole office.

2. Traffic citation incident

Joseph Grebmeier,² the Chief of Police of the City of Greenfield, testified about an incident that occurred on November 30, 2006, involving Salas. Chief Grebmeier had been working in law enforcement since the late 1970's, including 22 years in the Monterey County Sheriff's Office. Chief Grebmeier prepared a memorandum about the incident involving Salas the same day that it occurred, and he faxed it to Salas's supervisor. Chief Grebmeier testified that the memorandum was written "within hours of the incident," and that its contents were his "most accurate recollection" of the incident.

According to his memorandum, Chief Grebmeier contacted James Marlar because he believed Marlar had driven the wrong way on a street. As Chief Grebmeier was issuing a citation, Marlar walked over to him, handed him a cell phone, and told him that someone wanted to talk to him. Chief Grebmeier took the phone, identified himself as Chief Grebmeier, and asked to whom was he speaking. The person on the other end of the phone "identified himself as Officer Sales [*sic*], State Parole." Chief Grebmeier asked what Salas wanted, and Salas responded that Marlar "was a friend of his." Chief Grebmeier then asked Salas "what his involvement was in this traffic stop." Salas "replied that his friend had called him." Chief Grebmeier then asked whether Salas "had an issue with the traffic stop or wanted [Chief Grebmeier] to do [something]." Salas did not respond. Chief Grebmeier again identified himself as the Chief of Police and asked Salas "what his interest was in this traffic stop." Salas "then wanted to speak to [Sergeant] Perez." Chief Grebmeier responded that Sergeant Perez was not at work, and that Sergeant Perez worked for him. Before Salas could say anything further, Chief Grebmeier handed the phone back to Marlar.

² In the transcript of the hearing before the ALJ, the reporter transcribed the police chief as spelling his last name "Gredmeier." However, in the police chief's written verification of form interrogatory responses and in a self-prepared memorandum, he spelled his own name as "Grebmeier." We will use the latter spelling in this opinion.

In his memorandum, Chief Grebmeier stated that he “did not want the conversation to go any further, as [he] felt that [Salas] was placing . . . himself in a position that could result in charges being made against [Salas] for Interfering with a Peace Officer (148 PC).” Chief Grebmeier expressed concern that 1) Marlar believed Salas “could somehow intervene on his behalf regarding” the traffic citation, and 2) Salas “would take this type of call and then try to speak to [the issuing officer] about the traffic stop.” Chief Grebmeier indicated that his department had worked with Salas’s employer in the past and he wanted the “close cooperation to continue.” Chief Grebmeier felt, however, that Salas’s “actions were inappropriate”

Chief Grebmeier testified that Marlar knew, prior to handing over his phone, that he was being issued a citation. When Chief Grebmeier was subsequently on the phone with Salas, Salas did not sound confused by the call, nor did he ask Chief Grebmeier why Marlar had handed over the phone. Further, although Salas never directly asked Chief Grebmeier on the phone not to issue a citation or ticket, Chief Grebmeier had the “impression” that Salas was “trying to get [him] to not write [Marlar] a ticket.” Chief Grebmeier testified that he “couldn’t get a straight answer” from Salas about why they were having the conversation. After Salas said words to the effect that “this guy was a friend, or working on his store,” Chief Grebmeier felt he was “starting to see the connection” as to why Salas was talking to him and that the conversation “had nothing to do with State Parole.” When Salas indicated that he wanted to speak to Sergeant Perez, it was Chief Grebmeier’s impression that “somebody wanted to speak to my supervisor while I was writing a ticket.” Chief Grebmeier ended the conversation out of concern that if it continued, “instead of just being inappropriate, it would have been criminal.” Chief Grebmeier finished issuing the citation to Marlar and returned to his office.

After returning to his office, Chief Grebmeier contacted Jeff McLaughlin, who was an assistant supervising parole agent for the CDCR and who supervised Salas for a period of time. Chief Grebmeier told McLaughlin about the incident. At McLaughlin’s

request, Chief Grebmeier wrote the memorandum regarding the incident and faxed it to him. Chief Grebmeier later learned from Sergeant Perez, to whom Salas had demanded to speak, that the two knew each other from when Perez had worked for the Soledad Police Department.

McLaughlin, the assistant supervising parole agent, testified that the incident could “tarnish” the reputation of the San Jose parole office or the CDCR with the Greenfield Police Department.

Salas testified that Marlar called him from Greenfield while Salas was approximately 150 miles away in the San Jose parole office. Salas owned Subway restaurants in Soledad, Salinas, and Gonzales, and Marlar was the contractor who had handled the construction or remodel of those restaurants for Salas. When Salas acquired his first Subway franchise, which was in Soledad, Marlar was the only Subway-approved contractor in the area. At the time of the phone call at issue, Marlar was handling the construction of a Subway restaurant for Salas in Greenfield.

Salas testified that Marlar told him, “I need you to talk [to] this officer.” Salas assumed Marlar was referring to a police officer. Salas asked who it was, and Marlar replied that he did not know. Marlar then put Chief Grebmeier on the phone, without identifying him to Salas. According to Salas, Marlar did not state why he was putting Chief Grebmeier on the phone, nor did Marlar mention anything about a traffic or parking citation. Based on past experience with Marlar starting a new construction or remodeling job, Salas assumed that the phone call “was just another routine call regarding the construction of the business.”

Salas testified that the “majority” of Chief Grebmeier’s statements in the memorandum concerning their phone conversation were lies. Salas testified that Chief Grebmeier came on the phone yelling and sounding upset. According to Salas, Chief Grebmeier did not initially identify himself. Instead, Chief Grebmeier asked Salas who he was. Salas responded that he was the owner of the Subway. Chief Grebmeier “cut

[Salas] off mid-sentence” and asked “who do you work for.” According to Salas, it was only in response to this question by Chief Grebmeier that Salas identified himself as a parole agent who worked for the state. Chief Grebmeier then stated that Salas was interfering with an investigation. Salas replied that he did not understand what was going on. Chief Grebmeier again said that Salas was interfering, and Salas stated, “you wanted to talk to me, I don’t understand.”

Salas testified that he “couldn’t get an answer out of” Chief Grebmeier and felt frustrated with him. Salas eventually asked whether Sergeant Perez was present. Sergeant Perez was the “parole contact” and the only person Salas knew in the Greenfield Police Department. Sergeant Perez was a “calm” person, and Salas felt that Sergeant Perez could tell him what was going on. If Sergeant Perez was present, Salas was going to ask to speak to him.

According to Salas, Chief Grebmeier became irate and belligerent. Chief Grebmeier stated that Sergeant Perez worked for him and that he was the chief of police. Salas told Chief Grebmeier that he did not understand what Chief Grebmeier wanted. Chief Grebmeier indicated that he was going to talk to Salas’s supervisor. Salas questioned what the supervisor would be told. Chief Grebmeier then asked whether Salas was “going to get involved with traffic enforcement in the City of Greenfield.” Salas “said what,” and then Marlar came back on the phone. Marlar told Salas he would call him back. Salas testified that during his phone conversation with Chief Grebmeier, Marlar’s name never came up and Salas never identified himself as a friend of Marlar.

Salas testified that when he called Marlar approximately one-half hour later, Marlar stated that he had been unhooking a trailer in front of the business when an officer drove up. Marlar had called Salas because he did not think he was doing anything wrong and thought Salas “could talk some sense into” the officer. In their phone conversation after the incident, Salas told Marlar that Marlar needed to explain the situation to the officer himself.

Salas testified that he had never tried to get someone out of a ticket. Salas further testified that he did not talk to his supervisors about the incident immediately after it occurred because he “didn’t think there was anything to say.” Salas also did not attempt to further talk to Chief Grebmeier. Salas believed Chief Grebmeier would “calm down” and that if Chief Grebmeier sent something to Salas’s supervisor, it would “sound ridiculous” as Chief Grebmeier had been “doing all the yelling” and “questioning” and they “never got to the facts of the situation.”

3. Internal investigation of traffic citation incident

An internal affairs investigation was conducted by the CDCR regarding the traffic citation incident and another incident, described below, regarding Salas’s early closure of the San Jose parole office. As part of the investigation, several individuals were interviewed on June 15, 2007. Transcripts of the interviews of Chief Grebmeier, Sergeant Perez, Marlar, Assistant Supervising Parole Agent McLaughlin, and Salas were received into evidence at the hearing before the ALJ. All of these individuals, except Marlar, also testified at the hearing before the ALJ.

According to the transcript of Marlar’s interview, Marlar was asked why he had Chief Grebmeier speak to Salas on the phone. Marlar responded, “I figured professional courtesy between two officers.” Marlar further stated that “it was a bogus cite” by Chief Grebmeier, and that he “figured . . . professional courtesy might kick in” after Salas identified himself as a parole agent.

According to the transcript of Salas’s internal affairs interview, Salas stated that Marlar had called and told him, “ ‘I need you to talk to this guy.’ ” Salas reported that Marlar did not identify the person. Salas thought the call involved an issue related to the Subway restaurant that Marlar was building for him, as he had in the past received calls from Marlar concerning “whether it’s Coke or whether it’s carbonation or where does this go” or “where [are] you going to mount this.” Salas told the interviewer that he did

not know the person was the chief of police or from the Greenfield Police Department “ ‘til the end” of the call.

Salas also informed the interviewer during the internal affairs investigation that he did not initially identify himself as a parole agent to Chief Grebmeier on the phone. Rather, he identified himself as the owner of the Subway restaurant. It was not until Chief Grebmeier specifically asked Salas who he worked for that Salas claims he identified himself as a parole agent.

Additionally, Salas denied in the internal affairs interview that he had asked to speak to Sergeant Perez during the call. Salas told the internal affairs interviewer that after Chief Grebmeier finally identified himself as the Chief of Police from Greenfield, Salas made a comment to Chief Grebmeier to the effect that the only person he knew in the Greenfield Police Department was Sergeant Perez.

4. Early closure of parole office

The “normal hours of operation” for the San Jose parole office were from 8:00 a.m. to 5:00 p.m. The office was sometimes closed during the lunch hour between 12:00 and 1:00 p.m. There had also been times when an employee party, such as a birthday party, that was usually was held during the lunch hour went beyond that time and the office remained closed until 1:30 or 2:00 p.m.

Six parole agents and two clerical staff worked at the San Jose parole office. About 20 to 30 percent of a parole agent’s time was spent in the office, while the remainder of the time was spent working in the field, including making contact with parolees and other agencies and gathering evidence.

A parole agent had to be present in the San Jose parole office if the office was open. Staff members who were not peace officers were not allowed to be left in the office by themselves.

The “officer of the day” was a parole agent who was scheduled to be in the parole office. The officer of the day had various responsibilities, including fielding phone calls

from law enforcement, processing a parolee who came in to make a contact, and ensuring the safety and security of the office. Although the officer of the day “somewhat” oversaw the office, the officer of the day was “still under supervision by one of the assigned supervisors.”

The officer of the day did not have the authority to close the parole office early. McLaughlin, the assistant supervising parole agent who supervised Salas for a period of time, testified that permission was needed from regional headquarters before the officer of the day may close the office early. Ronald George Cannon, who had been working for the CDCR for approximately 28 years, had recently been working as a parole agent in the San Jose parole office for approximately 12 years, and had “routinely served” as officer of the day, similarly testified: “We operate under supervision. The office should only be shut down with the approval of a supervisor or an administrator.”

On April 11, 2007, Salas was the assigned officer of the day at the San Jose parole office. About 4:00 p.m., Salas closed the office early and sent home two staff members. The two staff members were responsible for transferring incoming phone calls to the cell phones of parole agents who were not in the office.

Salas had not contacted a supervisor before closing the office. About 4:05 p.m., parole agent Cannon drove into the parking lot of the office and observed that the parking lot was empty. After discovering that the office was locked and that no one was in the building, he spoke by telephone with two supervisors, McLaughlin and Reggie Watkins. At the direction of McLaughlin, parole agent Cannon remained at the office until the normal closing hour. While Cannon was present in the office, one parolee came in for his weekly office contact.

According to McLaughlin, at some point after the office had been closed, Salas informed him that he had closed the office because he had not felt well. At the hearing before the ALJ, McLaughlin testified that he could not recall any other time that the San Jose parole office was closed before normal business hours. He further testified that if

Salas had called him first, and if there was no choice, he “most likely” would have directed the staff to go home.

It is unknown whether there was any “harm” to the San Jose parole office as a result of the office being closed early. McLaughlin testified that if someone had called the office or if a parolee had attempted to visit the office after it was closed early, that “could cause a problem.”

Salas testified that he felt sick before going to work that day. After arriving for work, he “progressively got worse.” He threw up two or three times, but “tried to hang in there as long as [he] could.” Salas eventually felt “so sick” that he thought he was going to have to call his wife to pick him up. He “lasted up until” 4:00 p.m. Salas had previously been instructed that clerical staff may not be left in the office alone, so he told the staff that they had to leave, too. When interviewed during the internal affairs investigation, Salas stated that he “planned on letting [his] supervisor know the next day.”

Salas testified that about 10 minutes after he left the parole office, he received a call from his supervisor, Watkins. Watkins had heard that the office was closed and wanted to know whether Salas had left the office. Salas told Watkins that he was feeling sick and that he had tried to stay at the office as long as he could. According to Salas, Watkins stated “that’s fine,” but indicated that Salas should try to inform him beforehand. Salas testified that McLaughlin called him thereafter and he again explained the situation. According to Salas, McLaughlin stated that he would have told Salas “to do the same thing that [Salas] did,” so Salas “felt reassured that [he] made the right decision”

Salas testified that he had “seen the office . . . closed for a couple of hours for . . . staff birthdays and for retirements and going away.” He further testified that he would not try to leave the parole office early just because he wanted to, and that he had left because he felt it was a “medical necessity.”

C. The Board's Decision

The ALJ issued a proposed decision, finding several causes for discipline of Salas. Regarding the traffic citation incident, the ALJ observed that Chief Grebmeier and Salas had offered conflicting testimony regarding their phone conversation. The ALJ made a credibility finding in favor of Grebmeier and stated that Salas's "testimony is not believed." Regarding these credibility findings, the ALJ explained as follows: Salas "offered inconsistent statements regarding the incident," Salas "had a motive to help Marlar avoid a traffic ticket" because "Marlar was the only authorized Subway contractor" in the area, Salas's "actions after the phone call failed to comport with his version of the incident" as "one would expect [Salas] to contact his supervisors or Grebmeier to straighten out the misunderstanding" but he never did, Grebmeier "had no motive to concoct the allegations against" Salas, and to the extent Grebmeier "gave inconsistent statements" regarding whether Salas stated he was a friend or business acquaintance of Marlar such "impeachment was minor, and collateral."

Based on the credibility findings, the ALJ determined that Salas had "attempt[ed] to dissuade a police chief from issuing a traffic ticket to his business acquaintance." The ALJ further found that Salas knowingly made false statements during an investigative interview, and closed the parole office early without informing his supervisors although he knew he was required to inform them. The ALJ determined that Salas's dismissal from employment was the appropriate penalty.

The Board subsequently adopted the ALJ's proposed decision. Salas petitioned for rehearing. The Board granted the rehearing petition and "decided to hear the case itself." The Board received written briefs from the parties, heard oral arguments, and considered the record, including transcripts and exhibits. The Board again adopted the ALJ's original proposed decision.

D. The Petition for a Writ of Administrative Mandamus

In August 2010, Salas filed an amended petition for a writ of administrative mandamus in superior court seeking to have his dismissal from employment set aside. The CDCR and the Board opposed the petition.

The matter was set for hearing on February 10, 2011. Prior to the hearing, Salas and the CDCR each filed a memorandum of points and authorities in support of their respective positions. The record on appeal does not contain a reporter's transcript of the hearing.

On June 2, 2011, the superior court filed an order denying Salas's petition³ and entered judgment in favor of the CDCR and the Board. The CDCR filed a notice of entry of judgment on June 8, 2011. Salas filed a notice of appeal on August 1, 2011.

III. DISCUSSION

On appeal, Salas contends that the superior court erred in denying his petition for a writ of administrative mandamus directing the Board to set aside his dismissal from employment with the CDCR. First, Salas argues that "it does not appear that there is any indication that the trial court applied the correct standard of review" with respect to the Board's decision and that the matter should be remanded so that the court may apply the proper standard. Second, he contends that there is not substantial evidence to support the Board's findings. Third, Salas argues that his dismissal from employment was "grossly disproportionate to the alleged wrongs." We will consider each contention in turn.

³ The record reflects that Judge Lucas presided over the February 2011 hearing on Salas's petition. The order denying Salas's petition was signed by Judge Overton pursuant to section 635. Section 635 states that, "[i]n all cases where the decision of the court has been entered in its minutes, and when the judge who heard or tried the case is unavailable, the formal judgment or order conforming to the minutes may be signed by the presiding judge of the court or by a judge designated by the presiding judge."

A. Whether the Superior Court Used the Correct Standard in Reviewing the Board's Decision

Salas contends on appeal, as he did below, that the superior court was required to exercise its *independent judgment* on the evidence before the Board, because the Board's decision affected his fundamental vested right in employment. In the superior court, the CDCR had argued that the court had to determine whether *substantial evidence* supported the Board's decision to dismiss Salas. Salas acknowledges that the record on appeal does not reflect which standard the court applied. He nevertheless contends that "[w]here . . . the wrong standard of review was argued [by the CDCR] and where the matter is factually close, it would seem appropriate to remand so that the trial court can evaluate the evidence of the administrative agency under the appropriate standard of review."

The CDCR continues to assert that the substantial evidence test applies when the superior court reviews the Board's decision, as the Board is an agency of constitutional authority.

For the following reasons, we determine that remand, as requested by Salas, is not warranted in this case.

First, Salas fails to demonstrate that the superior court applied an incorrect standard in reviewing the Board's decision. A fundamental rule of appellate review is that an "order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*); *Conservatorship of Rand* (1996) 49 Cal.App.4th 835, 841.) In this case, Salas acknowledges that the record is silent as to which standard the superior court applies. Under the circumstances, we must presume the court's order is correct.

Second, we are not persuaded by Salas's argument that the superior court was required to exercise its independent judgment on the evidence before the Board.

“The Board is a statewide administrative agency which is created by, and derives its adjudicatory power from, the state Constitution. (Cal. Const., art. VII, §§ 2, 3) Under that constitutional grant, the Board is empowered to ‘review disciplinary actions.’ In undertaking that review, the Board acts in an adjudicatory capacity. . . . As such the Board acts much as a trial court would in an ordinary judicial proceeding. Thus, the Board makes factual findings and exercises discretion on matters within its jurisdiction.” (*Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 823 (*Department of Parks & Recreation*).

“Because the State Personnel Board derives its adjudicatory authority from the state Constitution rather than from a legislative enactment, a superior court considering a petition for administrative mandate must defer to the board’s factual findings if they are supported by substantial evidence. [Citation.]” (*State Personnel Bd. v. Department of Personnel Admin.* (2005) 37 Cal.4th 512, 522; accord *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1125 (*Coleman*); *Moosa v. State Personnel Bd.* (2002) 102 Cal.App.4th 1379, 1384-1385 (*Moosa*); *Department of Parks & Recreation, supra*, 233 Cal.App.3d at p. 823; see *Pan v. State Personnel Bd.* (1986) 180 Cal.App.3d 351, 357 (*Pan*)). Moreover, “[d]ecisions of the State Personnel Board . . . are reviewed only to determine whether substantial evidence supports the determination, even when vested rights are involved. (. . . *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 35 [(*Strumsky*)])” (*Coleman, supra*, 52 Cal.3d at pp. 1125-1126; accord *Pollak v. State Personnel Bd.* (2001) 88 Cal.App.4th 1394, 1404 (*Pollak*)).

In *Strumsky*, the California Supreme Court explained the basis for the different standards of judicial review. With respect to “the considerations which counsel in favor of fuller judicial review in cases involving vested, fundamental rights,” the court stated: “When an administrative decision affects a right which has been legitimately acquired or is otherwise ‘vested,’ and when that right is of a fundamental nature . . . [,] then a full and

independent *judicial* review of that decision is indicated because ‘[the] abrogation of the right is too important to the individual to relegate it to exclusive administrative extinction.’ [Citation.]” (*Strumsky, supra*, 11 Cal.3d at p. 34.) This reasoning “has been held inapplicable,” however, in the case of “agencies of constitutional origin which have been granted limited judicial power by the Constitution itself. [Citations.]” (*Id.* at p. 35, fn. omitted.) “It is established that when review of a decision of an agency falling within [this category] is sought pursuant to section 1094.5 of the Code of Civil Procedure, the court’s scrutiny of the agency’s factual findings is limited to a determination whether those findings are supported by substantial evidence in light of the whole record—and this is so *whether or not* the decision of the agency affects a fundamental vested right.” (*Ibid.*)

The *Strumsky* court explained that the “roots” of the distinction with respect to “so-called ‘constitutional agencies’ can be traced to their ultimate source in one of our most fundamental constitutional doctrines, that of separation of powers. That doctrine, which has been a part of the Constitution of this state since its inception, is presently expressed in article III, section 3 as follows: ‘The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others *except as permitted by this Constitution.*’ (Italics added.) It is the italicized proviso which forms the basis for the exercise of judicial powers by so-called ‘constitutional agencies’; insofar as specific constitutional provisions relating to the individual agencies in question directly vest judicial power in them, the agencies so favored can perform judicial functions to the extent of the grant without offending the doctrine of separation of powers. [Citations.] Thus, even though a vested fundamental right be involved, the determination of the agency on factual issues is entitled to all the deference and respect due a judicial decision.” (*Strumsky, supra*, 11 Cal.3d at pp. 35-36, fns. omitted.)

Although Salas cites several cases, including *Strumsky*, for the proposition that the superior court must exercise its independent judgment when the administrative agency's decision affects a fundamental vested right, Salas fails to address the circumstance of a decision by an agency, such as the Board, which "derives its adjudicatory authority from the state Constitution." (*State Personnel Bd. v. Department of Personnel Admin.*, *supra*, 37 Cal.4th at p. 522; accord *Strumsky*, *supra*, 11 Cal.3d at pp. 35-36.) Accordingly, we determine that Salas fails to articulate a persuasive basis for remanding the matter to the superior court for reevaluation of the evidence.

B. Substantial Evidence

The Board adopted the ALJ's decision, in which the ALJ determined that Salas 1) made an "attempt to dissuade a police chief from issuing a traffic ticket to his business acquaintance," 2) knowingly made false statements during an investigative interview, and 3) closed the parole office early without informing his supervisors although he knew he was required to inform them.

On appeal, Salas contends that substantial evidence does not support the Board's findings, and that his dismissal from employment should therefore be set aside.

In response, the CDCR argues that there was "ample evidence" supporting the Board's findings.

The scope of judicial review of an administrative mandate proceeding is set forth in section 1094.5. The superior court's review may include whether there was any "prejudicial abuse of discretion" by the Board. (§ 1094.5, subd. (b).) An abuse of discretion is established if the Board's "findings are not supported by the evidence." (*Ibid.*) As explained, the superior court "must defer to the board's factual findings if they are supported by substantial evidence. [Citation.]" (*State Personnel Bd. v. Department of Personnel Admin.*, *supra*, 37 Cal.4th at p. 522; accord *Coleman*, *supra*, 52 Cal. 3d at p. 1125; *Strumsky*, *supra*, 11 Cal.3d at p. 35; *Moosa*, *supra*, 102 Cal.App.4th at pp. 1384-

1385; *Pollak, supra*, 88 Cal.App.4th at p. 1404; *Department of Parks & Recreation, supra*, 233 Cal.App.3d at p. 823; *Pan, supra*, 180 Cal.App.3d at p. 357.)

“ ‘In reviewing a decision of [the Board] on a petition for administrative mandamus, we [the appellate court] stand in the same shoes as the trial court, applying the substantial evidence rule.’ [Citation.]” (*California Dept. of Corrections v. State Personnel Bd.* (2004) 121 Cal.App.4th 1601, 1611.) Under the substantial evidence rule, “all reasonable and legitimate inferences must be drawn in support of [the Board’s factual] findings.” (*Pan, supra*, 180 Cal.App.3d at p. 357.)

1. Attempt to dissuade during traffic citation incident

Regarding the Board’s first finding that Salas attempted to dissuade Chief Grebmeier from issuing a traffic ticket, Salas contends that there is “nothing in the record that hints that such an action took place.” Salas points to Chief Grebmeier’s testimony that Salas “never asked” him not to write Marlar a ticket. Salas also points to testimony by Chief Grebmeier in which he indicated that he ended the phone conversation before it went from what he thought was “inappropriate” to being “criminal.” Salas asserts that the Board’s findings concerning this incident “is simply inconsistent with the testimony of Grebmeier.”

We conclude that substantial evidence supports the finding that Salas attempted to dissuade Chief Grebmeier from issuing a traffic ticket to a business acquaintance. Although Salas did not specifically ask Chief Grebmeier to not issue a ticket to Marlar, Chief Grebmeier testified that it was his “impression” that Salas “was trying to get [him] to not write this person a ticket.” The evidence before the Board established that Marlar knew he was being issued a citation before he had Salas talk to Chief Grebmeier. In the ensuing conversation between Salas and Chief Grebmeier, Salas did not sound confused, nor did he ask Chief Grebmeier why Marlar had handed over the phone. During the phone call, Salas knew that Grebmeier worked for a police department and that he was handling a traffic stop. Salas identified himself as a parole officer, referred to Marlar as a

friend or business acquaintance, and did not offer any response when Chief Grebmeier specifically inquired as to whether Salas had “an issue” with the traffic stop or wanted something done. After Chief Grebmeier again identified himself and asked Salas about his interest in the traffic stop, Salas indicated that he wanted to speak to Sergeant Perez, who worked in the same police department as Chief Grebmeier. As noted above, our review in this case is governed by the substantial evidence test, and we must draw “all reasonable and legitimate inferences . . . in support of [the Board’s factual] findings.” (*Pan, supra*, 180 Cal.App.3d at p. 357.) In this case, based on the circumstances of the phone call, and the substance of Salas’s responses to Chief Grebmeier’s questions, a reasonable and legitimate inference arises that Salas was attempting to dissuade Chief Grebmeier from issuing a citation to Marlar. Moreover, Salas admitted that during the call, he knew Chief Grebmeier was angry, that Chief Grebmeier had indicated he was going to talk to Salas’s supervisor, and that Chief Grebmeier had raised the issue of whether Salas was “going to get involved with traffic enforcement” in Greenfield. Salas also admitted that Marlar later explained to him the situation involving the ticket and that Marlar had thought Salas “could talk some sense into” the officer. Salas did not immediately thereafter try to clarify or explain the situation to either his supervisor or Chief Grebmeier. Salas also had a motive to help Marlar avoid a ticket, as Marlar was an authorized contractor for Subway and was handling the construction of a Subway restaurant for Salas. In sum, after drawing “all reasonable and legitimate inferences . . . in support of [the Board’s factual] findings,” we determine there was ample evidence to support the conclusion that Salas had attempted to use his parole agent or peace officer status for private advantage during the phone call with Chief Grebmeier. (*Pan, supra*, 180 Cal.App.3d at p. 357.)

2. False statements during internal investigation

The Board’s second finding was that Salas knew the following statements were false when he made them during an investigative interview on June 15, 2007: 1) he was

unaware that Grebmeier was a police officer when he spoke to him, 2) he did not initially identify himself to Grebmeier as a parole agent, and 3) he did not ask to speak to Sergeant Perez.

On appeal, Salas first contends that “no evidence was presented regarding this issue” at the hearing before the ALJ. Second, we understand Salas to contend that the ALJ improperly relied on “findings of dishonesty” by an investigating officer who “did not testify at the hearing” before the ALJ. According to Salas, the ALJ “simply took the declaration of the investigating officer at face value and adopted his conclusions of dishonesty” and Salas “was not afforded a right to confront and cross-examine [this] adverse witness.”

We are not persuaded by Salas’s arguments. First, Salas fails to provide a citation to the record supporting his claim that the ALJ relied on a “declaration” or “findings of dishonesty” by an investigating officer involved in the internal affairs investigation. In another section of his brief on appeal, Salas refers to a “Confidential Report dated June 29, 2007” by “Special Agent Paul Edwards.” Salas does not provide a citation to the record for this document, nor does it appear from the record that such a report was introduced into evidence at the hearing before the ALJ. Consequently, Salas fails to demonstrate error due to the ALJ’s purported reliance on an investigating officer’s declaration or findings. (See *Denham, supra*, 2 Cal.3d at p. 564 [appellant must affirmatively show error].)

Second, there was evidence presented regarding Salas’s statements during the internal affairs investigation. Specifically, a transcript of Salas’s June 2007 internal affairs interview was introduced into evidence at the hearing before the ALJ without objection. According to that transcript, Salas indicated to the internal affairs interviewer that 1) he did not know Grebmeier was the chief of police or from the Greenfield Police Department until the end of the call, 2) he did not initially identify himself as a parole agent to Chief Grebmeier on the phone, and 3) he did not ask to speak to Sergeant Perez

during the call. Based on this transcript and other evidence presented at the hearing, including the testimony of Chief Grebmeier and the memorandum he prepared shortly after the incident, and after drawing “all reasonable and legitimate inferences . . . in support of [the Board’s factual] findings,” we determine that there was substantial evidence to support the finding that Salas had knowingly made false statements during the investigative interview. (*Pan, supra*, 180 Cal.App.3d at p. 357.)

3. Early closure of parole office without informing supervisors

The Board’s third finding was that Salas closed the parole office early without informing his supervisors although he knew he was required to inform them. On appeal, Salas contends that there was “no policy regarding closure of the parole office,” the “office [was] closed on an ad hoc basis,” and thus it was “inappropriate” to punish him for closing the parole office.

We determine that there was substantial evidence to support the Board’s finding that Salas closed the parole office early, that he failed to inform his supervisors before doing so, and that he knew he was required to inform them. The evidence was undisputed that the San Jose parole office was normally open until 5:00 p.m., and that Salas, who was working as officer of the day, had closed the office about one hour early. There was also undisputed evidence that the officer of the day did not have the authority to close the parole office early, and that permission was needed in order for the officer of the day to do so.

A reasonable inference arises that Salas knew he needed to inform a supervisor before closing the office early. First, Salas had worked as officer of the day numerous times. He testified that he “volunteered” to work “extra officer of the day duties” and that at times, he worked “more than 30 hours a month” as officer of the day. Thus, the officer of the day assignment was not unfamiliar to him. Second, two other individuals who had worked out of the San Jose parole office—McLaughlin, an assistant supervising parole agent who supervised Salas for a period of time, and Cannon, a parole agent who

had served as officer of the day—testified that they were aware of the requirement that permission was needed in order for the officer of the day to close the office early. Even Salas admitted that after he told his other supervisor, Watkins, that he had left early because he was sick, Watkins responded that Salas should “try to tell us before.” Thus the policy requiring advance notice to a supervisor before closing the office early appears to have been generally known amongst those working out of the San Jose parole office. Third, in view of a) the duties of the officer of the day, including fielding phone calls from law enforcement, processing a parolee who comes in to make a contact, and ensuring the safety and security of the office, and b) the fact that other staff may not remain in the office without a peace officer present, commonsense dictates that an officer of the day who desires to leave his job duties early and close the office should seek to inform a supervisor beforehand.

Salas points to evidence that the parole office was closed at times for staff birthdays or similar events. Salas does not, however, cite any evidence establishing that those closings were undertaken by an officer of the day without first notifying a supervisor.

Salas also challenges the following factual finding by the ALJ: “[Salas] had been instructed in the past that he could not leave clerical staff in the office without a parole agent present, because a parolee might drop by the office.” We determine that there is ample factual support for this finding. According to the transcript of Salas’s June 2007 investigative interview, which as noted above was introduced into evidence at the hearing before the ALJ without objection, Salas stated: “And it’s always been told to us that if we’re not -- if we’re not there, we can’t have clerical there by themselves because parolees come in.” Salas similarly testified at the hearing before the ALJ as follows: “Reggie Watkins, my supervisor, he has told, he has instructed me that anytime that we have to leave the office, that clerical can’t be there by themselves.”

In sum, after drawing “all reasonable and legitimate inferences . . . in support of [the Board’s factual] findings,” we determine that there is substantial evidence to support the Board’s finding that Salas closed the parole office early without informing his supervisors, although he knew he was required to inform them. (*Pan, supra*, 180 Cal.App.3d at p. 357.)

C. Penalty

The Board determined that Salas’s dismissal from employment was an appropriate penalty. The Board explained: “[Salas’s] misconduct harmed the public service. His attempt to influence a traffic ticket discredited CDCR in the eyes of another law enforcement agency. Using his peace officer status for private advantage, and then trying to cover up the incident with dishonest statements, severely undercut [Salas’s] reputation for integrity. [Salas’s] dishonest statements could be used to impeach him should he need to testify in court in the future, thereby reducing [Salas’s] effectiveness and value as a parole agent. Failing to notify his supervisors that he was closing down the parole office undermined his supervisor’s authority, and could have impeded the efforts of parolees to report to their parole officers. Finally, [Salas’s] failure to acknowledge his misconduct increases the odds that such misconduct could recur in the future.”

On appeal, Salas argues that the Board abused its discretion because his dismissal from employment was “grossly disproportionate to the alleged wrongs.”

The CDCR contends that dismissal was appropriate, because Salas’s conduct “brought harm to the public service, discredited CDCR, discredited his status as a peace officer, and brings into question all of the work he has conducted.”

“ ‘[I]n the context of public employee discipline,’ the ‘overriding consideration’ is ‘the extent to which the employee’s conduct resulted in, or if repeated is likely to result in, ‘harm to the public service.’ [Citations.] Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. [Citation.]’ [Citations.]” (*County of Siskiyou v. State Personnel Bd.* (2010) 188

Cal.App.4th 1606, 1615; accord *Thompson v. State Personnel Bd.* (1988) 201 Cal.App.3d 423, 429 (*Thompson*.) The nature of the profession in issue may also be considered, “since some occupations such as law enforcement, carry responsibilities and limitations on personal freedom not imposed on those in other fields. [Citation.]” (*Thompson, supra*, 201 Cal.App 3d at p. 429.)

“ ‘ “[I]n a mandamus proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of its discretion.” ’ [Citations.] ‘Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed.’ [Citation.] ‘It is only in the exceptional case, when it is shown that reasonable minds cannot differ on the propriety of the penalty, that an abuse of discretion is shown.’ [Citations.]” (*Bautista v. County of Los Angeles* (2010) 190 Cal.App.4th 869, 879; accord *Pollak, supra*, 88 Cal.App.4th at p. 1404; *JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1058, fn. 11 [“appellate court reviews the penalty de novo to determine whether the agency abused its discretion”].)

In arguing that his dismissal was “grossly disproportionate” to his conduct, Salas first contends that the evidence shows only that he “may have taken a telephone call from his contractor” and that he did not do anything improper, that there were “no set policies” regarding closing the parole office and it had been closed on other occasions, and that “the alleged falsity in the investigative process does not appear to exist.” Salas’s contentions are contrary to the Board’s factual findings and, as we have explained, the Board’s factual findings were supported by substantial evidence.

Second, Salas challenges the ALJ’s finding that there were discrepancies between his testimony at the hearing and his statements during the investigative interview. We are not persuaded by Salas’s argument that there were no discrepancies, or his argument that they were “inconsequential.”

In sum, Salas fails to offer a persuasive basis for concluding that the penalty of dismissal in this case was an abuse of discretion by the Board.

IV. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

GROVER, J.*

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