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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

BRANDON LEROY,

Plaintiff and Appellant,

v.

CITY OF SAN JOSE et al.,

Defendants and Respondents.

H039710

(Santa Clara County

Super. Ct. No. 1-11CV208223)

By petition for writ of administrative mandamus (Code Civ. Proc., § 1094.5), appellant Brandon LeRoy challenged his termination from his job as a San Jose firefighter. Appellant contends the trial court erred in denying his petition because: (1) respondent City of San Jose (City) violated the administrative appeal provisions of the Firefighters Procedural Bill of Rights Act (FBOR) (Gov. Code, §§ 3250 et seq.)¹ by processing his appeal through respondent San Jose Civil Service Commission (Commission); (2) the City provided appellant an incomplete *Skelly*² packet; (3) the Commission's decision that appellant committed misconduct was unsupported by substantial evidence; and (4) terminating appellant as a penalty for that misconduct was an abuse of discretion. For the reasons stated here, we will affirm.

¹ Unspecified statutory references are to the Government Code.

² *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 (*Skelly*).

I. ADMINISTRATIVE AND TRIAL COURT PROCEEDINGS

According to his verified petition for writ of administrative mandamus, appellant was hired as a firefighter by the City in 2006. In April 2007, appellant received a Documented Oral Counseling (DOC), a form of minor discipline, after posting a photograph of himself wearing “Fire Department turnout pants” in a City fire station on “a web-based personals ad” In October 2008, appellant received a second DOC after he allowed his Pediatric Advanced Life Support certification to lapse.

In May 2010, a City fire engineer named Brandon Ragan sent a “Harassment Claim” memorandum to the City’s Office of Employee Relations regarding appellant. Ragan slept in a communal dorm at the fire station. The bed he used was next to a wall that his room shared with a private dorm room used by appellant. Ragan claimed that after 11:00 p.m. on April 14, 2010, he heard appellant’s television through the shared wall as well as muffled voices, including a female voice talking and giggling. Those noises were followed by the sounds of the bed in appellant’s room creaking and a female moaning. Between midnight and 1:00 a.m. that night, Ragan saw a black Mazda car parked across the street from the back driveway to the station and noted that the car was gone by 6:55 a.m. When confronted the next morning by Ragan, appellant reportedly initially denied having a visitor but eventually acknowledged that a woman had been in his room the night before.

During the next shift where Ragan and appellant worked together, Ragan informed appellant that his conduct made Ragan uncomfortable and that if it happened again he would alert a superior officer. Despite this warning, Ragan’s memo states that on May 2, 2010 around 11:45 p.m. he again heard the sounds of a woman’s voice, kissing, and a bed creaking in appellant’s dorm room. Ragan saw the same black Mazda parked behind the station and, later that night, saw a woman leave the station and drive away in the Mazda. Ragan claimed a third visit occurred just after 11:00 p.m. on May 6, 2010. As on the previous occasions, Ragan heard a female voice in appellant’s room, followed by kissing,

whispering, and female giggling. The following morning, Ragan reported the incident by phone to the City and followed up with a written complaint.

The City investigated Ragan's complaint and prepared a memorandum summarizing that investigation. The City interviewed appellant in June 2010 with a representative of his union present. Appellant "confirmed his understanding that visitors were not allowed in the Station after 9:00 p.m. and that before 9:00 p.m. visitors were okay so long as they were not in the bedrooms." He claimed a female friend named Sharra Carr visited him in the evening of April 14, 2010 but left before 9:00 p.m. in a white Nissan Altima. Appellant denied ever having after-hours guests in his private dorm room, and specifically denied having after-hours guests on April 14, May 2, and May 6, 2010. Regarding Ragan's claim that on April 15, 2010 appellant admitted having an after-hours visitor the night before, appellant denied making any admission. Appellant suggested that the noises Ragan heard might have come from phone calls, the television, or appellant's video chats with his girlfriend. Finally, appellant claimed Ragan might have made up these stories because Ragan was upset that appellant had a single-occupancy room and wanted that room for himself.

Given the conflicting accounts, the City investigator conducted a credibility assessment of Ragan and appellant. The City memo states: "It seems unlikely that ... Ragan would completely fabricate multiple events, down to the exact times he noted events occurred, quotes of things that were said and admitted[,] and events he claimed he personally saw." If Ragan's only goal was to get appellant in trouble and secure the private room for himself, the investigator found it more likely he would have immediately reported appellant to his superiors rather than confronting appellant about it first. As for appellant, the memo referenced his two previous DOC's and summarized an interview with one of appellant's superiors, Captain Patrick Mulcahy, who detailed concerns with appellant's work performance and stated appellant " 'needs a lot of work.' " Unlike Ragan, the investigator found appellant "would have plenty of reason to

deny the allegations” because they could result in disciplinary action. The investigator concluded Ragan was more credible.

From the foregoing evidence, the City served appellant a Notice of Intended Discipline informing him that the Fire Chief recommended that he be terminated. The recommendation was based on findings that on three occasions (April 14–15, May 2–3, and May 6, 2010) appellant had an unauthorized visitor in his quarters at the fire station and “engaged in sexual and/or intimate contact” with that visitor. According to the Notice, appellant’s conduct provided cause for discipline under section 3.04.1370 of the City’s Municipal Code (SJMC 3.04.1370) as misconduct, failure to observe applicable rules and regulations, discourteous treatment of another employee, and conduct detrimental to the public service. The City found appellant violated section 12.10 of the City’s Fire Department Rules and Regulations (visitor policy), which states fire captains “[s]hall not permit intoxicated or otherwise undesirable persons to remain in or about quarters at any time, nor allow visitors after 2100 hours without specific permission of the Battalion Chief.” The City found appellant’s conduct also constituted sexual harassment violating the City’s discrimination and harassment policy, which prohibits “verbal or physical conduct of a sexual nature ... when this conduct explicitly or implicitly affects an individual’s employment, unreasonably interferes with an individual’s work performance, or creates an intimidating, hostile, or offensive work environment.” In addition to the sexual misconduct, the City found appellant was dishonest during the administrative investigation, which was itself cause for discipline under SJMC 3.04.1370 as misconduct, failure to observe applicable rules and regulations, and dishonesty.

Along with the Notice of Intended Discipline, in August 2010 the City provided appellant with a *Skelly* packet consisting of the City’s investigative memorandum and several attachments, including Ragan’s written complaint and excerpts from City rules and regulations. A *Skelly* conference occurred in September 2010 and, after

consideration of appellant's responses to the Notice of Intended Discipline, in October 2010 the City served on appellant a Notice of Discipline which finalized his termination.

Appellant, represented by counsel, appealed his termination to the Commission, which heard the matter over three meetings in 2011. The parties called several witnesses, two of whom are relevant to this appeal. Captain Mulcahy testified that in April 2010, while the captain was on disability leave following surgery and taking pain medications that he admitted affected his cognizance, appellant sent him a text message "about having visitors at the station and [Captain Mulcahy] told him he needed to talk to his ... on duty captain." Though acknowledging that the visitor policy stated there should be no visitors after 9:00 p.m., Captain Mulcahy believed that the policy was flexible. Despite that flexibility, however, Captain Mulcahy suggested any visitation a captain allowed after 9:00 p.m. "would have to be something that didn't directly impact on the crew." The captain stated that sexual activity in the dorms is unacceptable and that he had never heard of it occurring during his 16 years as a firefighter. He explained that any sexual activity in the dorms would be "a pretty blatant violation of policy" and stated that if one firefighter engaged in sexual conduct in the dorms that another firefighter could hear, it would indicate a lack of good judgment and might constitute sexual harassment.

Testifying on his own behalf, appellant denied ever having sexual or intimate contact with anyone while at the fire station. Regarding the visitor policy, appellant stated that although he knew about the policy by the time he spoke with the investigator in June 2010, he had only learned of the policy earlier that month and did not know about any specific restrictions on visitors before then. Appellant claimed that on May 2 and May 6 he had his television on and was video chatting with his friend Sharra Carr. He also repeated his earlier claim that Ragan fabricated the allegations because Ragan wanted the single-occupancy dorm room for himself.

The Commission sustained the findings of the Notice of Discipline that on three occasions (April 14–15, May 2–3, and May 6, 2010) appellant had an unauthorized visitor in his quarters at the fire station and “engaged in sexual and/or intimate contact” with that visitor and also found that appellant was dishonest during the administrative investigation. The Commission sustained the City’s decision to terminate appellant for that misconduct.

Appellant, by then representing himself, challenged the Commission’s decision in a petition for writ of administrative mandamus. After a hearing, the court denied appellant’s petition, finding “[t]here were ample grounds to justify the termination” and that appellant had waived the FBOR and progressive discipline arguments by not asserting them during the administrative proceedings.

We reject the City’s suggestion that appellant waived his right to appeal the trial court’s decision during the hearing on appellant’s petition in the trial court. Although appellant agreed with the judge’s statement at the hearing that “whichever way [the court] rule[s], effectively, this case is over,” we interpret the colloquy between the trial court and appellant as referring only to the end of proceedings in the trial court and not as an informed and intentional waiver by appellant of his right to appeal.

II. DISCUSSION

When an administrative agency decision challenged by petition under Code of Civil Procedure section 1094.5 implicates a “ ‘fundamental vested right,’ ” the trial 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.” (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1057 (*JKH Enterprises*), quoting *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143–144.) We review the trial court’s independent judgment for substantial evidence. (*JKH Enterprises, supra*, 142 Cal.App.4th at p. 1058.) Where, as here, the petitioner does not make a timely

request for a statement of decision from the trial court (Code Civ. Proc., § 632), we “must infer any finding to uphold the judgment that has substantial evidence in support in the administrative record[,]” (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 198–199 (*Smith*)), substantial evidence being evidence that “is reasonable in nature, credible and of solid value.” (*JKH Enterprises*, at p. 1057.)

A. COMPLIANCE WITH THE FIREFIGHTER PROCEDURAL BILL OF RIGHTS ACT

Appellant claims the administrative appeal provided by the City violated the FBOR because the Commission appeal lacked the more robust procedural safeguards guaranteed by the FBOR. The trial court found that appellant had waived his arguments relating to the City’s purported violations of the FBOR by failing to assert them during his administrative appeal to the Commission. On appeal, appellant claims he did not waive his FBOR rights because agreeing to conduct his administrative appeal through the sole method provided by the City was not a knowing and intelligent relinquishment of those rights. We need not reach the issue of waiver here because, even assuming appellant preserved the issue, the administrative appeal provided by the City was functionally equivalent to an appeal under the FBOR.

The FBOR, which became effective in 2008, contains several provisions that relate to disciplinary proceedings for firefighters. (*International Assn. of Firefighters, Local 230 v. City of San Jose* (2011) 195 Cal.App.4th 1179, 1187–1188, 1199–1206 [finding that section 3254.5 of FBOR, governing administrative appeals, applied to City of San Jose despite charter city status but “express[ing] no opinion as to any issues that may arise from the actual implementation of any provisions of the FFBOR imposing procedural requirements on administrative appeals of firefighter discipline”].) Section 3254.5, subdivision (a), states: “An administrative appeal instituted by a firefighter under this chapter shall be conducted in conformance with rules and procedures adopted by the employing department or licensing or certifying agency that are in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2.” Chapter

5 (§ 11500 et seq.) contains requirements for formal adjudicative administrative hearings and generally applies to state agencies. Appellant points to a number of procedural protections in Chapter 5 that he claims the City did not provide, including pre-hearing discovery, a pre-hearing settlement conference, and a hearing before a neutral administrative law judge. (Citing §§ 11502, 11505, 11507.6, 11511, 11511.7.)

Appellant does not demonstrate how the process he received fell below that mandated by section 3254.5. Though appellant asserts that he was denied “formal pre-hearing discovery,” he does not explain what that discovery might have entailed, nor does he show that the City denied any request for discovery appellant made. Appellant cites section 11511, which states “an administrative law judge ... may order that the testimony of any material witness residing within or without the state be taken by deposition,” but a deposition under that section is only available on “a showing that the witness will be unable or cannot be compelled to attend” the appeal hearing. (§ 11511.) As appellant does not argue he ever requested depositions, much less that he requested depositions for individuals who would be unable to attend the Commission hearing, the City did not violate section 11511. Similarly, appellant does not show any violation of section 11507.6, which requires disclosure by the agency of, among other things, “the names and addresses of witnesses to the extent known” as well as “[a] statement of a person ... when it is claimed that the act or omission of the respondent as to this person is the basis for the administrative proceeding” (§ 11507.6; see also *id.* at subd. (a).) The Notice of Intended Discipline and accompanying *Skelly* packet provided the disclosure mandated by section 11507.6 by including the City’s investigative memorandum (containing the names of individuals interviewed by the City) as well as Ragan’s harassment complaint memo. As for appellant’s citation to section 11511.7, relating to pre-hearing settlement conferences, that section gives an administrative law judge discretion to “order the parties to attend and participate in a settlement conference” but does not mandate one in every

case. (§ 11511.7, subd. (a).) Thus, appellant has not shown any pre-hearing rights under the FBOR were violated.

Appellant's main argument related to the FBOR is that the City failed to provide a neutral administrative law judge and that the Commission was inherently biased because "having employees of the City serve as the panel to determine the outcome of a termination recommendation by the City renders the Commission[']s findings unfair." At oral argument, counsel for appellant essentially argued that plaintiff had a right to have his disciplinary matter reviewed by an administrative law judge and that the City's failure to satisfy that right requires reversal as a matter of law.

Few errors are reversible per se. To rise to the level of structural error, the error must affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310.) Most errors are reversible only upon a showing of prejudice. For violations of state law, the California Constitution provides: "No judgment shall be set aside, or new trial granted, in any cause, ... for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13; *Herbert v. Lankershim* (1937) 9 Cal.2d 409, 477 [miscarriage of justice test "applies to civil as well as to criminal cases"].) The miscarriage of justice test "is not met unless it appears 'reasonably probable' the defendant would have achieved a more favorable result had the error not occurred." (*People v. Breverman* (1998) 19 Cal.4th 142, 149, citing *People v. Watson* (1956) 46 Cal.2d 818, 836; cf. *Hinrichs v. County of Orange* (2004) 125 Cal.App.4th 921, 927–928 [violation of notice provision in section 3303 of the Public Safety Officers Procedural Bill of Rights Act (§ 3300 et seq.) "subject to a harmless error analysis"].)

Even assuming the City erred by not providing appellant an administrative law judge, plaintiff has not demonstrated prejudice. Appellant was represented by counsel

during the Commission hearings. Apart from their employment status as City employees, appellant provides no evidence to support his claim that the Commission members were biased and we find no support in the record. And, as we discuss in greater detail in the following sections, the Commission's decision was supported by substantial evidence. On this record, we see no reasonable probability of a more favorable result had appellant's administrative appeal been decided by an administrative law judge instead of the Commission.

B. SKELLY DISCLOSURE

Appellant challenges the trial court's decision that the City provided an adequate *Skelly* packet, arguing that the City's failure to include transcripts of its investigatory interviews violated his due process rights. As appellant correctly notes, in *Skelly, supra*, 15 Cal.3d 194, the California Supreme Court held that before the government takes punitive action against a permanent civil service employee, constitutional due process mandates "preremoval safeguards ... includ[ing] notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (*Skelly*, at p. 215.) However, appellant's claim that "[i]t is indisputable that 'materials upon which the action is based' would include interview transcripts" is unsupported by any authority. (Quoting *Skelly*, at p. 215.) The City provided appellant with the Notice of Intended Discipline specifying the charges against him, an investigative memorandum detailing who the City interviewed and summarizing the contents of their statements, the full text of Ragan's harassment claim memorandum, and copies of relevant rules and regulations. We find that the City's disclosure here satisfied appellant's constitutional due process rights.

C. SUBSTANTIAL EVIDENCE REGARDING VIOLATION OF VISITOR POLICY

Appellant claims his termination was based on an impermissibly vague and indefinite standard. He contends that because the visitor policy is advisory and each

Captain had discretion to set his or her own rules regarding visitors, appellant “had no objective manner to determine when and where visitors were permitted” As these arguments depend on facts developed at the Commission hearings, we will review the record for substantial evidence.

The visitor policy plainly states fire captains “[s]hall not permit intoxicated or otherwise undesirable persons to remain in or about quarters at any time, nor allow visitors after 2100 hours without specific permission of the Battalion Chief.” Contrary to the mandatory language of that policy, appellant cites Captain Mulcahy’s testimony at the Commission hearing, where he stated that the visitor policy was flexible and was subject to the discretion of the on-duty captain.

Appellant also points to his own testimony before the Commission explaining that he had only learned of the policy in June 2010 and did not know about any specific restrictions on visitors before that time. Appellant fails to take into account our standard of review, under which we “must infer any finding to uphold the judgment that has substantial evidence in support in the administrative record.” (*Smith, supra*, 120 Cal.App.4th at pp. 198–199.) Although appellant testified at the Commission hearing that he did not know about the visitor policy in April and May 2010 when the after-hours visits were alleged to have occurred, the Commission and trial court were entitled to find his testimony not credible. The Commission and trial court were also permitted to agree with the investigative memorandum’s conclusion that Ragan’s account of appellant’s after-hours visitors was more credible than appellant’s. Finally, although Captain Mulcahy testified regarding some flexibility in the visitor policy, he also explained that any visitation a captain allowed after 9:00 p.m. “would have to be something that didn’t directly impact on the crew” and that sexual activity at the station would be “a pretty blatant violation of policy” Substantial evidence supports both the finding that appellant had sexual or intimate contact with someone in the dorms late at

night that disrupted another crew member, and the conclusion that appellant's conduct violated the visitor policy.

D. NO ABUSE OF DISCRETION IN TERMINATION DISPOSITION

Appellant claims his termination must be reversed because the City did not follow its policy of progressive discipline and improperly considered his previous disciplinary DOC's when deciding whether to terminate him. "In 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." (*Magit v. Board of Medical Examiners* (1961) 57 Cal.2d 74, 87; accord *Bautista v. County of Los Angeles* (2010) 190 Cal.App.4th 869.) "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." [Citation.]" (*Bautista*, at p. 879.)

1. No Abuse of Discretion Regarding Progressive Discipline

The City's Fire Department Disciplinary Procedures Manual (disciplinary manual) calls for a system of progressive discipline involving "progressively more severe action if the employee has not responded to previous instructions or warnings." (Underline omitted.) Though the disciplinary manual states that a "primary concern in progressive discipline is that the employee is given every chance to correct his or her behavior, and failing that, is liable for harsher disciplinary measures," it also notes that "certain offenses are serious enough that the first incident may call for immediate formal discipline"

Here, the City deemed appellant's misconduct serious enough to initiate formal discipline and the Commission implicitly affirmed that decision by sustaining the misconduct findings and the termination disposition. Substantial evidence supports the following sequence of events: appellant had sexual or intimate contact with an unauthorized after-hours visitor in April 2010, was warned by a coworker (Ragan) that his conduct made Ragan uncomfortable, and, despite that warning, proceeded to engage

in the same misconduct on two more occasions. Substantial evidence also supports the finding that appellant was dishonest about those unauthorized visits during the investigation that followed. On this record, appellant has not shown that termination was an abuse of discretion.

2. Consideration of DOC's Does Not Compel Reversal

A disciplinary DOC is a “verbal notification that performance or behavior must be improved,” which is then documented in written form. The disciplinary manual states that a written DOC “will not be placed in the Fire Department Personnel File nor will it be placed in the City’s Central Personnel File. A copy should be kept in BAS [Bureau of Administrative Services] for tracking purposes.” (Bold omitted.) The manual states that “an employee may request to have a [DOC] memo removed from the BAS file after six months” An executive for the City’s Office of Employee Relations testified at the Commission hearing that a copy of a DOC is also sometimes placed in a supervisor’s file, which is a file that a supervisor maintains for each of his or her employees, and is separate from an employee’s personnel file. Appellant notes that he received a letter in April 2009 from the City announcing “a new process for removal” whereby DOC’s “will be automatically removed from [an employee’s] ‘Supervisor’s’ file after six months--if there is no reoccurrence of the documented behavior in that period.” Appellant points to nothing in the disciplinary manual that explicitly forbids consideration of DOC’s in disciplinary proceedings.

Appellant argues the City violated section 3256.5, subdivision (g) of the FBOR, which requires an employer to maintain “each firefighter’s personnel file or a true and correct copy thereof” and to make that file available within a reasonable time after a request by a firefighter. Appellant asserts that the City retained copies of the DOC’s in his personnel file after they were supposed to be removed, which violated section 3256.5 because his personnel file was no longer “true and correct” given the extra documents. Appellant also argues that if the DOC’s were retained in his personnel file, providing him

with a copy of the file that did *not* contain DOC's violated section 3256.5 because the City did not provide him a complete copy of the file. Appellant's arguments appear to be based on the premise that because the City considered the DOC's, those documents were necessarily retained in his personnel file. But the disciplinary manual plainly states that a DOC is not to be placed in a Fire Department Personnel File nor in the City's Central Personnel File. The DOC's are instead placed in a Bureau of Administrative Services file. There is no evidence the DOC's were retained in appellant's personnel file (as opposed to another location such as a supervisor's file or a Bureau of Administrative Services file), and we see no inconsistency with the FBOR in the City's policy of not including the DOC's in a firefighter's personnel file.

As for the Commission's consideration of the DOC's, the Notice of Intended Discipline appellant received from the City in August 2010 stated that in addition to the evidence of unauthorized visitors, the Fire Chief "reviewed your personnel history and noted," among other things, that appellant received two previous DOC's. Appellant asserts this is improper because the DOC's should have been removed automatically from the City's files in April 2009 (six months after the last DOC in October 2008), well before Ragan's harassment complaint. Even if the DOC's were not timely removed from the City's files, consideration of the DOC's during the City's investigation, without more, does not demonstrate an abuse of discretion sufficient to reverse appellant's termination, and the extent to which the DOC's were considered is unclear. The Notice of Discipline terminating appellant does not identify the DOC's as items upon which his termination was based. The DOC's were also not mentioned in the Commission's decision sustaining the City's decision to terminate appellant. Rather than basing appellant's termination on the comparatively minor misconduct described in the DOC's, it appears the termination was based on the seriousness of the present findings, namely that appellant repeatedly had sexual or intimate contact with an unauthorized after-hours visitor within earshot of

another employee and then lied about that behavior during the investigation that followed. On this record, we find no abuse of discretion.

III. DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

Grover, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Mihara, J.