

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

LEONARDO ORTIZ,

Petitioner and Appellant,

v.

CITY OF LOS ANGELES, et al.,

Respondents.

B280740

(Los Angeles County
Super. Ct. No. BS159358)

MICHAEL AYALA,

Petitioner and Appellant,

v.

CITY OF LOS ANGELES, et al.,

Respondents.

B280767

(Los Angeles County
Super. Ct. No. BS159359)

APPEALS from judgments of the Superior Court of the County of Los Angeles, Mary H. Strobel, Judge. Affirmed.

Stone Busailah, Michael P. Stone and Muna Busailah, for Plaintiffs and Appellants.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, Matthew A. Scherb, Deputy City Attorney, for Defendants and Respondents.

I.

INTRODUCTION

Former City of Los Angeles Police Department (LAPD) Officers Leonardo Ortiz and Michael Ayala (petitioners) were terminated from their employment after they engaged in a high speed pursuit of a reckless driver and fatally shot him. They appeal from the trial court’s denial of their petitions for writs of administrative mandamus challenging the decision of the City of Los Angeles (the City) to terminate their employment. According to petitioners, the City failed to provide them with an administrative appeal from the final decision to terminate them, as required by the Public Safety Officers Procedural Bill of Rights Act¹ (POBRA), as interpreted by *Morgado v. City and County of*

¹ Government Code section 3303 et seq. “[POBRA] provides procedural guarantees to public safety officers under investigation. [Citation.] Police officers are included within the protected groups. [Footnote omitted.] The purpose of the Act is to maintain “stable employer-employee relations[] between public safety employees and their employers.” [Citation.] “[T]he act is concerned primarily with affording individual police officers certain procedural rights during the course of proceedings which might lead to the imposition of penalties against them.”

San Francisco (2017) 13 Cal.App.5th 1 (*Morgado*). Petitioners maintain that the failure to provide the required administrative review deprived the trial court of subject matter jurisdiction, thereby rendering the court's judgments against them void. Petitioners also contend there was insufficient evidence to support the trial court's findings upholding the City's decision to terminate their employment.

We hold that petitioners forfeited their contention concerning the violation of their right to an administrative appeal under POBRA. We also hold that substantial evidence supports the trial court's finding that petitioners' shooting of the reckless driver violated the City's policy on the use of deadly force. We therefore affirm the judgments.

II. FACTUAL BACKGROUND

A. The Pursuit²

On December 13, 2013, at approximately 10:13 p.m., LAPD patrol officers received a broadcast report of a pursuit of a reckless driver in a Corvette. Initially, members of the Los Angeles County Sheriff's Department and the California Highway Patrol (CHP) were involved in the pursuit, but they

[Citations.] While granting certain rights to police officers, the Act balances the interests of the public in maintaining the integrity of the police force with the interest of the police officer in receiving fair treatment. [Citation.]" (*City of Los Angeles v. Superior Court* (1997) 57 Cal.App.4th 1506, 1512.)

² The description of the pursuit is based upon the trial court's version in its statement of decision which, in turn, was based largely on undisputed facts.

terminated their pursuit and the LAPD subsequently took over in the City limits.

Because Officers Antonio Hurtado and Elizabeth Preciado were in the first LAPD unit to pursue the Corvette, they became the primary unit. During their pursuit, Officer Preciado observed the driver, later identified as 51-year-old Brian Beaird of Oceanside (the driver), leaning toward the passenger side of the vehicle, which, based on her training and experience, indicated to her that the driver was arming himself. Petitioner Ortiz and Officer Andrew Rea responded to the pursuit shortly thereafter and became the secondary unit in the pursuit.

Sergeant Stacy Vandersall also responded and declared herself the incident commander. At some point during the pursuit, the primary unit requested and received permission to perform a pursuit intervention technique, or “pit” maneuver, and a third unit manned by Officers Armando Corral and Ruben Rosas entered the pursuit to assist with that maneuver. Officers Camille Spitaleri, Dennis Walden, petitioner Ayala and his partner David Dixon subsequently joined in the pursuit as well.

The driver drove his Corvette recklessly that night, proceeding through traffic at a high rate of speed, often on the wrong side of the road, almost hitting pedestrians and other cars. As noted, he was seen multiple times leaning over to the passenger side of the Corvette, and this information was broadcast to the pursuit officers. Based on the driver’s movements inside the vehicle, the pursuing officers suspected he may be armed and decided against the pit maneuver.

The pursuit ended when the Corvette collided with a Nissan Sentra at the intersection of Olympic Boulevard and Los Angeles Street. The collision spun the Sentra down the street

and onto the curb, shearing off a fire hydrant. The Corvette also spun around and became lodged at the northwest corner of the intersection, between a tree with which it collided and a light pole directly behind it. Pursuing LAPD units stopped behind the Corvette at various angles and distances at the end of the pursuit. A total of 18 officers and one sergeant arrived at the scene. As described in the percipient officer testimony set forth below, a fatal officer-involved shooting of the driver took place at the scene.

B. Petitioner Ortiz's Testimony

On December 13, 2013, petitioner Ortiz was working in Newton Division with Officer Rea, who was driving their patrol vehicle. At approximately 10:16 p.m., the officers responded to a pursuit of a driver who was wanted for reckless driving. At the end of the pursuit, the driver's vehicle collided with a red Nissan Sentra at the intersection of Olympic and Los Angeles. The Sentra "spun out northbound" and "[took] out a fire hydrant," which caused "water to just shoot up into the air, at least 30 to 60 feet"

Petitioner Ortiz "popped the door open" on the passenger side,³ exited his patrol vehicle, unholstered his weapon, "[took] two steps forward from [his] cover," "took a quick peek into the [Corvette]," and saw "the [driver] again reaching down into the seat." After he observed the driver "trying to find something under his seat," he "started to backpedal into cover," at which point petitioner Ayala grabbed Ortiz by the belt and guided him to cover behind the ballistic door of his vehicle. Because none of

³ The front passenger door of the patrol vehicle was equipped with a ballistic panel.

the pursuit vehicles had observed or reported that contraband had been thrown from the Corvette, petitioner Ortiz assumed the object for which the driver was reaching was a weapon inside the vehicle, i.e., “[the driver] was arming himself.”

Once behind the ballistic door panel, petitioner Ortiz observed the driver trying to move the Corvette. According to the officer, the driver “floored his gas and you could just hear the tires screeching and [see them] smoking.” The driver then “popped open” the Corvette’s driver’s side door and exited the vehicle. From his vantage point, petitioner Ortiz could not see the driver’s “body language” or hands, but he could hear other officers yelling commands at the driver, who failed to comply and instead kept “coming towards the officers.” When the driver reached the back of the Corvette, petitioner Ortiz could see him “from head to toe.”

Once the driver came around the back of the Corvette and reached the “midpoint [of] the bumper,” petitioner Ortiz could see “everything” that the driver was doing. At that point, the driver made “a gesture with his left hand” and “[went] into his waistband.” Based on what he was observing, petitioner Ortiz believed “[he was] in an immediate defensive life situation for [himself], for [his] fellow officers, and for [the] victims [in the Sentra].” Although petitioner Ortiz did not see a gun or weapon, he believed the driver was reaching under his waistband to arm himself, “so [he] fire[d] four shots at the [driver].” Prior to firing those rounds, he did not hear any other shots being fired.

Petitioner Ortiz then “assess[ed] the situation.” Because the driver’s “left hand was in his waistband,” the officer believed “he was still reaching for . . . the gun.” “At that point, [petitioner Ortiz] took a deep breath, focused on [his] front sight

and . . . fired [his] next five rounds.” He reloaded his weapon, again assessed the situation, and could see that the driver was on the ground. He therefore concluded “there was no need for [him] to fire additional rounds.”

C. Petitioner Ayala’s Testimony

On December 13, 2013, petitioner Ayala was assigned to Newton Division gangs. At approximately 10:16 p.m., he and his partner, Officer Dixon, heard a radio broadcast from a Sheriff’s Department helicopter reporting that a reckless driver in a Corvette was “coming into Newton Division.” When the Sheriff’s deputies terminated their pursuit of the Corvette, a unit from CHP “pick[ed] up the pursuit”

At some point, after the Corvette entered Newton Division territory, the Sheriff’s helicopter broadcast that the CHP was no longer in pursuit. LAPD Officers Hertado and Preciado then “spot[ted]” the Corvette and requested permission from the watch commander to “engage the reckless driver” The watch commander gave permission to engage in the pursuit, and Officer Preciado requested a back-up helicopter and a supervisor. Believing Officer Preciado’s vehicle was the only unit in pursuit, petitioner Ayala drove his unit to the area, following another Newton Division gang unit manned by Officers Walden and Spilateri. While en route to the area of the pursuit, petitioner Ayala heard a unit manned by petitioner Ortiz and Officer Rea broadcast that they were “secondary in the pursuit.” Petitioner Ayala then heard Officer Preciado’s primary pursuit unit request “permission to [perform a] pit,” a maneuver that required a third unit and a supervisor.

After Officer Preciado received permission to perform the pit maneuver, she broadcast multiple times that the suspect reckless driver was “reaching under his seat.” Petitioner Ayala also heard the helicopter broadcast a similar warning. The watch commander then broadcast that because the suspect appeared to be armed, he was calling off the pit maneuver. Seconds after that, petitioner Ayala heard Officer Preciado’s primary unit request that two additional units join the pursuit.

When petitioner Ayala arrived at the location of the pursuit, his unit was following the unit manned by Officers Spitaleri and Walden, which, in turn, was following Sergeant Vandersall’s unit. The sergeant approved Officer Preciado’s request for two additional units and “back[ed] off” to allow the units driven by Officer Spitaleri and petitioner Ayala to pass her and join “in trail” in the pursuit.

At the intersection of Olympic and Los Angeles, petitioner Ayala, who was in pursuit westbound on Olympic, heard “like an explosion” and saw a red sedan “spin” northbound on Los Angeles through the intersection. Petitioner Ayala stopped, exited his vehicle, and moved up to petitioner Ortiz’s vehicle. He observed the Corvette on the northwest corner of the intersection “slamming in reverse” against a utility pole. He saw petitioner Ortiz positioned in front of the closed front passenger door of Ortiz’s vehicle, “a little behind the front bumper.” Petitioner Ayala opened the front passenger door to petitioner Ortiz’s vehicle and, using his left hand, pulled Ortiz by his belt to a position behind “the ballistic door panel.” Petitioner Ayala took up a position to the “outside” of petitioner Ortiz and unholstered his weapon.

Petitioner Ayala saw the driver of the Corvette kick the door open and exit in an “aggressive manner.” The driver had “blood coming down his face” and looked “angry” and “desperate.” Petitioner Ayala observed the driver’s right hand “flailing” above his head and return to his side a “few times.”

Once the driver reached the Corvette’s rear bumper on the driver’s side, petitioner Ayala saw for the first time his entire body, the lower half of which until that point had been shielded from the officer’s view by the Corvette. As the driver moved along the bumper, he was headed northbound directly toward petitioners Ayala and Ortiz. But his left hand was concealed from the officer’s view. Petitioner Ayala could hear other officers to his left yelling at the driver.

When the driver reached the midpoint of the bumper, he was perpendicular to petitioner Ayala. Petitioner Ayala observed the driver’s left hand move under his shirt toward his waistband and saw “a bulge facing [his] way.” According to petitioner Ayala, “it looked like [the driver] had a pistol grip.”

When the driver reached the mid-bumper position, petitioner Ayala yelled, “Show me hands,” but the driver did not comply. Petitioner Ayala then heard gun shots which he believed were coming from the driver; but he did not see a muzzle flash. In response, petitioner Ayala fired two shots “toward the center mass” of the driver. Following those shots, the driver took two or three steps further northbound toward a light pole, at which point he stopped and took “a bladed stance” with his left hand

still under his shirt. Petitioner Ayala then fired an additional two rounds⁴ toward “the center mass” of the driver.

D. Other Officers’ Testimony

Two other responding officers, Bryant and Corral, also discharged their weapons at the scene. Officer Bryant fired a beanbag round at the driver before any live ammunition rounds were fired. He explained that, once the driver exited the Corvette, he walked toward officers with his fist clenched. Officer Bryant felt the driver was unsafe to approach and was a danger to other officers. When the driver arrived at the trunk of the Corvette, Officer Bryant “felt that he was going to attack the first car of officers so [he] fired a beanbag round.” The officer saw the beanbag hit the driver;⁵ “[i]t looked like he was off balance. He was going towards the ground, but at that point he was flinched in. [H]is hands went to his waistband like behind the passenger side of the vehicle.” The driver’s hands were “close in but they were not in his waist band.”

According to Officer Corral, after the driver exited the Corvette, he and other officers were yelling commands that the driver ignored. Officer Corral, who was certain he was the first to fire a live round at the driver, explained why he fired as follows: “[W]hen the [driver] reached the rear quarter panel of

⁴ Although Ayala recalled firing a total of four rounds, the internal Force Investigation Division report concluded he fired a total of eight.

⁵ The internal Force Investigation Division report concluded that the driver was struck once by a beanbag round in the back of the upper thigh.

his Corvette . . . his left hand drop[ed] and [went] under his shirt into his left waistband and [he] . . . crouch[ed] down. [Officer Coral] took that as a sign [the driver was] arming himself and seeking a position of cover behind the Corvette. [Officer Coral] formed the opinion that [the driver] was going to engage [the officers] in a fire fight. So that's when [he] fired [his] first two rounds[;] then [he] assessed, and [he] saw [the driver's] left hand come out, and at that point [he] perceived [the driver] to be retrieving a firearm so [he] fired another two [rounds]."

Officer Hurtado did not fire a round, but he unholstered his weapon when he arrived at the scene because he "feared the situation might escalate to [the use of] deadly force." He believed the driver was armed. At the time shots were fired, he was standing next to Officer Coral and he saw the driver's hands move toward his waistband. Officer Hurtado did not fire because he was repositioning himself so that he would not "injure [his] fellow officers"

Officer Preciado testified that, when the driver exited the Corvette and walked toward officers, she saw his hands "near his waistband." At the time shots were fired, Officer Preciado did not have a "clear shot" at the driver, but if she had been in a "position of advantage," she would have "most likely discharged [her] weapon." When she heard the shots, she believed the driver was shooting at officers.

Officer Rea saw the driver exit the Corvette and walk quickly toward the officers' position with "his hands towards his chest." When the driver reached the rear of the vehicle, "his hands went to his waistband." At that point, Officer Rea "had [his] firearm drawn" and was preparing to shoot, but "lost sight of [the driver] due to . . . the height of the light bar on [his] vehicle."

When Officer Dixon arrived at the scene, he unholstered his weapon because he “believed the situation could escalate to the use of deadly force.” He saw the driver move to the back of the Corvette and, as he reached the rear passenger side, the officer saw his “hands down to his side.” But after Officer Dixon heard “the first round go off,” he saw the driver’s “hands come up towards his midsection.” The officer then heard “other gunshots going off” and saw the driver fall to the ground.

Officer Spitaleri saw the driver exit the Corvette looking “disoriented” and “moving erratically.” His hands were moving “sporadically,” “flailing about.” She heard someone yell “beanbag” and saw a beanbag round “cross her line of vision.” She could not say where the driver’s hands were when the beanbag round was fired, but they were “somewhere out in front of his body.” She could not recall if she could see the driver’s hands as he made the turn toward the trunk of the car. She also did not recall seeing the driver “dig into his waistband.” And she did not see the driver place his hands under his shirt or any weapon from her vantage point.

E. Autopsy

The Deputy Medical Examiner determined the driver died from multiple gunshot wounds. The autopsy report noted a total of 15 gunshot wounds, three of which were fatal. Based on the trajectory of those fatal wounds, the driver was not in a standing position when he received them.

The toxicology report showed that the driver “had a significant amount of methamphetamine, a slight amount of marijuana and a trace [amount] of cocaine” in his blood stream at the time of the shooting.

F. Expert's Testimony

Sergeant Steven Arellano testified as an expert in the use of deadly force. He reviewed the statements given by each officer during the internal investigation of the shooting and reviewed the video and audio tapes related to the shooting. He did not see the driver make any furtive movements during the video that would have justified the use of deadly force and, based on everything he reviewed, he did not see anything else that would have justified the use of such force.

G. Video Evidence

The City introduced videos depicting portions of the pursuit and the shooting, as well as a PowerPoint presentation and a Police Commission presentation that included diagrams and enhanced, frame-by-frame breakdowns of the videos of the shooting. Petitioners introduced their own video depicting the shooting, as well as an enhanced, frame-by-frame breakdown of that video.

The videos were taken from an elevation that was higher than petitioners' point of view, and they each depict the following sequence of events: The driver exited through the driver's door of the Corvette and walked toward the rear of the car. When the driver reached the rear of the Corvette, he turned left and moved along the bumper. Once he crossed the length of the bumper, he moved toward a light pole and then turned left again, walking up the sidewalk, away from petitioners' location and along the passenger side of the Corvette. The driver then collapsed near the rear passenger-side tire of the car. No weapon or bulge can be seen on the driver, and the driver does not reach toward his waistband. Both petitioners conceded the videos did not show the

reaching or other provocative conduct on the part of the driver that they described in their testimony.

The trial court reviewed the video evidence and concluded that it contradicted the petitioners' testimony that the driver "moved his left hand towards his waistband when he was at the mid-point of the Corvette's bumper." According to the trial court, the video evidence instead supported a finding that "a reasonable officer in [p]etitioners' position would not have seen [the driver] make purposeful movements to the waistband."

III. PROCEDURAL BACKGROUND

The LAPD's Force Investigation Division investigated the shooting and submitted a detailed report to the Chief of Police. The shooting incident was next adjudicated by the Board of Police Commissioners, which issued a summary of its findings. The Board found petitioners' use of deadly force to be "out of policy." The Chief of Police then issued complaints against petitioners which directed them to appear for a Board of Rights, proposed a penalty of removal from employment, and temporarily relieved them from duty. The Board of Rights held an extensive evidentiary hearing, found petitioners guilty, and prescribed a penalty of removal from employment. Thereafter, the Chief of Police removed petitioners from their employment.

Petitioners filed petitions for writs of administrative mandamus pursuant to Code of Civil Procedure section 1094.5. They contended that the weight of the evidence before the Board of Rights showed that the shooting was objectively reasonable. Following a review of the administrative record from the Board of Rights hearing, the trial court issued a minute order denying the

petitions, explaining its ruling as follows: “The Weight of the Evidence Supports the Board’s Findings of Guilt [¶] The Board concluded that there was not ‘an objectively reasonable basis for the use of deadly force by either Officer Ayala or Officer Ortiz’ against [the driver] The Board considered the events leading up to the [shooting], including [the driver’s] reckless driving and that he may have been reaching for a gun while in his vehicle. . . . The Board found that [p]etitioners ‘testified in good faith to their subjective perceptions of [the driver’s] actions.’ . . . The Board also noted that multiple officers confirmed the essential features of [p]etitioners’ narrative. . . . [¶] . . . [¶] . . . The court must consider whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying use of deadly force. [¶] Here the weight of the evidence supports the Board’s conclusion that ‘the video record does not objectively reflect the purposeful movements to the waistband, which each of the accused officers described.’ . . . [¶] The Board’s findings are also corroborated by the testimony of Sergeant Arrellano, an expert on use of force, who reviewed the video and did not see any furtive movements made by [the driver]. He did not see anything on the video ‘that would justify deadly use of force in the situation.’ . . . Officer Spitaleri’s testimony also supports the Board’s findings. [¶] . . . [¶] Petitioners cite testimony of other officers that arguably corroborates [their] narrative that [the driver] moved a hand toward his waistband. . . . The court has considered the cited testimony and finds that the video, as well as other testimony and circumstantial evidence, is more compelling. [¶] . . . [¶] . . . The video of the [shooting] ‘was taken from different and much higher elevations . . . but the

video was taken generally from positions east of [the driver's] vehicle's resting place, just as the officers generally were east of [the driver].' . . . The video is reliable evidence of [the driver's] conduct at the time of the [shooting]. In context of the entire record, it also provides reliable evidence of [p]etitioners' perspectives. [¶] The Board's findings on guilt are supported by the weight of the evidence."

The trial court thereafter entered judgments against petitioners. Both petitioners timely appealed.

IV. DISCUSSION

A. Right to Administrative Appeal Under POBRA

1. Contentions

Petitioners, for the first time on appeal, contend that the City's disciplinary procedures violated their rights under POBRA, arguing that the City's procedures do not provide an opportunity for administrative appeal of the final disciplinary decisions in accordance with Government Code section 3304, subdivision (b).⁶ Citing the recent decision in *Morgado, supra*, 13 Cal.App.5th 1, petitioners assert that the hearing they had before the Board of Rights was not an appeal contemplated by section 3304, subdivision (b), because that hearing preceded the Chief of Police's final decision to terminate their employment. In petitioner's view, the decision of the Board of Rights was merely a recommendation to the Chief of Police on what discipline to impose, followed by the Chief of Police's final decision on discipline. Therefore, petitioners maintain that, before the

⁶ All further statutory references are to the Government Code, unless otherwise indicated.

decision to terminate them can be reviewed by a court in an administrative mandamus proceeding pursuant to Code of Civil Procedure section 1094.5, petitioners must first be provided with the administrative appeal mandated by section 3304, subdivision (b). Accordingly, petitioners ask this court not to review (and potentially affirm) the trial court's decision here, reverse the judgments, and remand with instructions to the trial court to vacate its decision and dismiss the petitions for a writ of mandate.⁷

The City contends that petitioners have forfeited their POBRA argument by failing to raise it during the City's disciplinary process or in the trial court during the administrative mandamus proceeding. Citing *Moore v. City of Los Angeles* (2007) 156 Cal.App.4th 373 (*Moore*), the City argues that procedural matters, such as the right to an administrative appeal under section 3304, are subject to the forfeiture rule and cannot be raised for the first time on appeal.

2. *Forfeiture of Rights Under POBRA*

We find that an officer's right to an administrative appeal under POBRA may be forfeited if not raised during the disciplinary proceedings or in the trial court on administrative mandamus. Because petitioners did neither, we hold they have forfeited this POBRA claim.

In *Moore, supra*, 156 Cal.App.4th 373, following a hearing before a Board of Rights, the appellant was removed from his

⁷ In their opening briefs, petitioners state they have brought a separate action in the Los Angeles County Superior Court seeking relief due to the City's purported failure to provide an administrative appeal.

position as a City of Los Angeles police officer. (*Id.* at p. 376.) The appellant filed a petition for administrative mandate pursuant to Code of Civil Procedure section 1094.5, which challenged the sufficiency of the evidence to support his removal. (*Ibid.*) The trial court rejected the appellant's challenge to the sufficiency of the evidence. (*Ibid.*) In addition, the trial court rejected appellant's argument that the City violated the appellant's right to have the investigation into his conduct completed within POBRA's one-year statute of limitations found in section 3304, subdivision (d)(1). (*Ibid.*) The appellant renewed his statute of limitations argument on appeal. (*Id.* at pp. 376-377.) The court in *Moore* held that the appellant's "failure to raise the statute of limitations before the board of rights . . . preclude[d] appellate review of the issue." (*Id.* at pp. 376-377.)

The court in *Moore, supra*, 156 Cal.App.4th 373 explained its holding as follows: "The trial court was correct in ruling that the statute of limitations defense was forfeited by failure to raise it before the board of rights. California law has long provided that a statute of limitations defense must be raised at an administrative hearing before relief may be sought on that ground under Code of Civil Procedure section 1094.5.

"It is well established that the statute of limitations is a personal privilege which is waived unless asserted at the proper time and in the proper manner, whether it be a general statute of limitations or one relating to a special proceeding. [Citations.] This general rule applies to proceedings before an administrative tribunal. [Citations.] [Citations.] In cases falling under [POBRA], the officer facing potential discipline is entitled to

litigate a statute of limitations defense at the administrative hearing level. [Citation.]

“The reason for the rule is clear. ‘It is fundamental that the review of administrative proceedings provided by section 1094.5 of the Code of Civil Procedure is confined to the *issues* appearing in the record of that body as made out by the parties to the proceedings, though additional *evidence*, in a proper case, may be received. [Citation.] It was never contemplated that a party to an administrative hearing should withhold any defense then available to him or make only a perfunctory or “skeleton” showing in the hearing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court. [Citation.] The rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play.” (*Moore, supra*, 156 Cal.App.4th at pp. 382-383.)

In finding that the appellant failed to raise the statute of limitations issue before the board of rights during the disciplinary proceedings, the court in *Moore, supra*, 156 Cal.App.5th at p. 383, noted that the appellant could have otherwise sought relief in the trial court under section 3309.5,⁸ which vests in the superior court authority to grant appropriate relief to remedy a POBRA violation. But, the appellant in *Moore* never sought relief under that section for the alleged violation of

⁸ Section 3309.5, subdivision (d)(1), states, in relevant part: “In any case where the superior court finds that a public safety department has violated any of the provisions of this chapter [POBRA], the court shall render appropriate injunctive or other extraordinary relief to remedy the violation”

POBRA's statute of limitations. Rather, the court observed that "[a]ll [appellant] alleged in his petition for administrative mandate under Code of Civil Procedure section 1094.5 was that the decision to discharge him 'was an abuse of discretion in that the findings of the board of rights are not supported by the weight of the evidence.'" (*Moore, supra*, 156 Cal.App.5th at pp. 384-385.) Thus, the court concluded, "[h]aving failed to invoke the superior court's remedial powers under section 3309.5, and having failed to raise his statute of limitations argument under section 3304, subdivision (d) at the board of rights, the trial court properly ruled the statute of limitations issue[] was forfeited." (*Id.* at p. 385.)

In this case, as in *Moore, supra*, 156 Cal.App.5th 373, it is undisputed that petitioners did not contend during their disciplinary proceedings that they were entitled to an administrative appeal following the Board of Rights hearing and the Chief of Police's final disciplinary decision to terminate. Instead, petitioners sought immediate judicial review in the trial court through an administrative mandamus proceeding under Code of Civil Procedure section 1094.5, raising only the issue of whether the weight of the evidence supported the Chief's final decision. Indeed, there is no dispute petitioners did not raise the City's purported failure to provide them with such an appeal during the Code of Civil Procedure section 1094.5 proceeding in the trial court. Therefore, petitioners have forfeited their POBRA administrative appeal claim in this appeal taken from the trial court's judgments in the administrative mandamus proceeding.⁹

⁹ As noted previously, petitioners state in their opening brief that they filed a separate action in the trial court (case no. BS 171514), seeking redress under section 3309.5 for the City's

3. *Subject Matter Jurisdiction*

Petitioners contend their claims under section 3304, subdivision (b) to an administrative appeal are not subject to forfeiture because the failure to have such an administrative appeal is jurisdictional. According to petitioners, because they have not yet had a section 3304 administrative review of the decision to terminate their employment, there has been a failure to exhaust administrative remedies. Thus, characterizing exhaustion of administrative remedies as a “jurisdictional” prerequisite to filing suit, petitioners argue the trial court lacked subject matter jurisdiction over their administrative mandamus action and, therefore, had no power to enter the judgments from which they appeal. Therefore, claim petitioners, because lack of subject matter jurisdiction can be raised at any time, including for the first time on appeal, the doctrine of forfeiture is

alleged violation of their POBRA administrative appeal rights. In their reply brief, petitioners assert, without explanation, that the pendency of that separate and subsequent action somehow means they have not forfeited their administrative appeal claim in *this* appeal. Because petitioners raise this issue for the first time in reply and do not support it with citation to legal authority or reasoned argument, we do not address it further. (*Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 583 [“[P]oints raised for the first time in a reply brief on appeal will not be considered, absent good cause for failure to present them earlier”]; *People v. Ham* (1970) 7 Cal.App.3d 768, 783 [“Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion”].) Indeed, the fact of this other proceeding is not in the record; we were not requested to take judicial notice of it; and we are unaware of any basis to address or consider the merits of claims asserted in a separate action not before us.

inapplicable to their POBRA contention. This argument, however, wrongly equates failure to exhaust administrative remedies with the court's subject matter jurisdiction.

In *Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1344-1345 (*Kim*), after losing at trial, the defendant employers claimed the court lacked jurisdiction to enter judgment on plaintiff's sexual harassment claims under the Fair Employment and Housing Act (FEHA), because plaintiff failed to prove exhaustion of administrative remedies, namely, that plaintiff timely filed an administrative complaint with the Department of Fair Employment and Housing (DFEH) and obtained a right-to-sue letter. "In other words, defendants posit[ed] that because plaintiff supposedly failed to establish proof of the 'jurisdictional' prerequisite of exhaustion . . . , the trial court lacked fundamental subject matter jurisdiction and the ensuing judgment was void." (*Id.* at p. 1347.) As the *Kim* court observed, "[d]efendants' argument hinge[d] on the theory that by referring to exhaustion as a 'jurisdictional prerequisite,' courts have intended to classify exhaustion as necessary to trial courts having subject matter jurisdiction. The importance of this supposition is that '[t]he adequacy of the court's subject matter jurisdiction' can be raised at any time (even on appeal) and is not subject to forfeiture or waiver. [Citation.]" (*Ibid.*)

But the court in *Kim*, *supra*, 226 Cal.App.4th 1336 rejected defendants' argument that the court lacked jurisdiction, explaining: "[J]urisdictional prerequisite' does not mean subject matter jurisdiction in the context of exhaustion of administrative remedies. "The concept of jurisdiction embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the requirement of due

process, some determined by the constitutional or statutory structure of a particular court, and some based upon mere procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional.”

[Citation.] ‘Although earlier cases tended to view the exhaustion doctrine as invalidating a court’s subject matter jurisdiction, thus allowing a defendant to raise it at any time [citations], later cases have generally . . . conclude[d] a defendant waives the defense by failing to timely assert it.’ [Citation.] ‘*[T]he administrative exhaustion requirement does not implicate the court’s subject matter jurisdiction. It is “jurisdictional” in the sense only that a court’s failure to apply the rule is judicial error and can be corrected by issuance of a writ of prohibition.*’ [Citations.]” (*Id.* at p. 1347, italics added.)

Here, even if petitioners are correct in their contention that the purported failure of the City to provide a further administrative review implicates the exhaustion of remedies doctrine,¹⁰ that failure does not implicate the subject matter jurisdiction of the trial court. As explained in *Kim, supra*, 226 Cal.App.4th 1336, a failure to exhaust administrative remedies

¹⁰ In the usual case, the exhaustion of remedies doctrine is asserted by an employer as a defense to a premature action by an employee in the trial court. (See, e.g., *Satyadi v. West Contra Costa Healthcare Dist.* (2014) 232 Cal.App.4th 1022, 1024 [employer contended employee’s action barred by her failure to exhaust administrative remedies available under Labor Code].) It is unusual, to say the least, for the employees here to affirmatively petition the trial court for administrative mandamus and thereafter attempt to undo the unfavorable result by claiming they should have first exhausted administrative remedies they did not originally pursue.

does not invalidate a trial court's subject matter jurisdiction over a case. (*Id.* at p. 1347; see also *Keiffer v. Bechtel Corp.* (1998) 65 Cal.App.4th 893, 900 [failure to exhaust administrative remedies for FEHA claim “does not concern the trial court's subject matter jurisdiction”]; *Mission Housing Development Co. v. City and County of San Francisco* (1997) 59 Cal.App.4th 55, 66-68 [taxpayers' failure to exhaust administrative remedies by filing valid applications for reduction in property tax assessments did not implicate court's subject matter jurisdiction]; *Green v. City of Oceanside* (1987) 194 Cal.App.3d 212, 219-223 (*Green*) [terminated public employee's failure to exhaust administrative remedies through City grievance procedure did not void judgment for lack of subject matter jurisdiction].)

Against the general weight of authority that failure to exhaust administrative remedies does not deprive a court of subject matter jurisdiction, petitioners cite in a supplemental letter to this court a recent Third District case, *Public Employees' Retirement System v. Santa Clara Valley Transportation Authority* (2018) 23 Cal.App.5th 1040, 1046-1047 (*Public Employees*), which states: “Under California law, exhaustion of administrative remedies . . . is a *jurisdictional* rule of procedure that forecloses judicial review until it is satisfied. [Citations.] This absence of subject matter jurisdiction is not a defense that a party may waive.” *Public Employees*, however, contains no analysis or discussion of how exhaustion of administrative remedies implicates a court's fundamental subject matter jurisdiction, and its observation about subject matter jurisdiction is not relevant to its holding, because, among other things, the issue of exhaustion had been raised and preserved in the trial court. Moreover, in so noting, the Third District cited two

cases—*Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235 (*Knickerbocker*) and *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280 (*Abelleira*). (*Public Employees, supra*, 23 Cal.App.5th at pp. 1046-1047.) Neither case supports *Public Employees*’s statement about exhaustion and jurisdiction. *Knickerbocker* does not equate exhaustion of remedies with subject matter jurisdiction, but instead merely refers to exhaustion as a “jurisdictional prerequisite” before the courts will act, relying principally upon *Abelleira*. (*Knickerbocker, supra*, 199 Cal.App.3d at p. 240.) Likewise, *Abelleira* does not hold failure to exhaust administrative remedies deprives a court of subject matter jurisdiction. (See *Abelleira, supra*, 17 Cal.2d at pp. 292-293.) To the contrary, as observed in a later case by the Fourth District, “*Abelleira* makes it abundantly clear that the exhaustion doctrine does *not* implicate subject matter jurisdiction but rather is a ‘procedural prerequisite’ ‘originally devised for convenience and efficiency’ and now ‘followed under the doctrine of *stare decisis* . . .’ [Citation.] It is ‘*jurisdictional*’ only in the sense that a court’s failure to apply the rule in a situation where the issue has been properly raised can be corrected by the issuance of a writ of prohibition.” (*Green, supra*, 194 Cal.App.3d at p. 222.)

We concur with *Green*’s reading of *Abelleira* and its well-reasoned view that failure to exhaust administrative remedies does not implicate a court’s fundamental subject matter jurisdiction. (See *Mokler v. County of Orange* (2007) 157 Cal.App. 4th 121, 135 [noting courts have generally followed *Green* and distinguishing cases that have not done so].) Therefore, as discussed *ante*, petitioners’ POBRA contention was subject to forfeiture if not properly raised in the disciplinary proceedings or

in the trial court. Because they did not do so, petitioners have forfeited the entire argument on this appeal.

B. Sufficiency of Evidence

1. Standard of Review

Judicial review of administrative findings by means of administrative mandamus under Code of Civil Procedure section 1094.5 is governed by the nature of the right under review. (*National Identification Systems, Inc. v. State Bd. of Control* (1992) 11 Cal.App.4th 1446, 1454.) If no fundamental right is implicated, the trial and appellate courts apply the same standard of review to the administrative findings—the substantial evidence test. (*Ibid.*)

If, however, the administrative action affects a vested fundamental right, such as a police officer’s right to employment (see *Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 658 (*Barber*)), the trial court “exercises its independent judgment upon the evidence disclosed in a limited trial de novo.” (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143; see also *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 816-817 & fn. 8 (*Fukuda*).) “In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.” (*Fukuda, supra*, 20 Cal.4th at p. 817.) Moreover, “[t]he determination of the trial court on conflicting evidence on the facts is binding on [the appellate court]” (*id.* at p. 812) and, “in exercising its independent judgment ‘the trial court has the power and responsibility to weigh the evidence at the

administrative hearing *and to make its own determination of the credibility of witnesses.*’ [Citation.]” (*Barber, supra*, 45 Cal.App.4th at p. 658.)

On appeal from a trial court’s ruling on a petition for writ of administrative mandamus involving a fundamental right, we review the trial court’s findings for substantial evidence. (*Fukuda, supra*, 20 Cal.4th at p. 824.) The scope of our review under that standard is well established: “When an appellant claims a factual finding is not supported by substantial evidence, our power “*begins and ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support” the finding. [Citation.] We presume that the record contains evidence sufficient to support the judgment; it is the appellant’s burden to demonstrate otherwise. [Citation.] We do not reweigh evidence or assess the credibility of witnesses on review for substantial evidence. [Citation.] Evidence is substantial if it is of ‘ponderable legal significance . . . reasonable, credible and of solid value.’ [Citation.] An expert’s opinion is substantial evidence if it has evidentiary support and is accompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion. [Citation.] While inferences may support a judgment, ‘the inference must be a reasonable conclusion from the evidence and cannot be based upon suspicion, imagination, speculation, surmise, conjecture or guesswork.’ [Citation.]” (*San Diego Gas & Electric Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1292.)

2. *LAPD Policy on Use of Force*

The Board of Rights determined, and the trial court agreed, that the evidence showed petitioners’ use of deadly force violated

the LAPD's policy governing such conduct because a reasonable officer under the circumstances would not have believed the driver was a threat to his life or the lives of others.

The LAPD's "Use of Force Policy" defines use of force in the following terms: "DEFINITIONS [¶] Objectively Reasonable. The legal standard used to determine the lawfulness of a use of force is the Fourth Amendment to the United States Constitution. See *Graham v. Connor*, 490 U.S. 386 (1989). *Graham* states in part, 'The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation. The test of reasonableness is not capable of precise definition or mechanical application.' The force must be reasonable under the circumstances known to the officer at the time the force was used. Therefore, the Department examines all uses of force from an objective standard rather than a subjective standard.

"Deadly Force. Deadly force is defined as that force which creates a substantial risk of causing death or serious bodily injury. [¶] Imminent. Black's Law Dictionary defines imminent as, 'Near at hand; impending; on the point of happening.' [¶] . . . [¶]"

The LAPD's policy on the use of force is described as follows: "POLICY. [¶] Use of Force – General. It is the policy of this Department that personnel may use only that force which is 'objectively reasonable' to: [¶] Defend themselves; [¶] Defend

others; [¶] Effect an arrest or detention; or [¶] Overcome resistance.

“Factors Used To Determine Reasonableness. The Department examines reasonableness using *Graham* and from the articulated facts from the perspective of a Los Angeles Police Officer with similar training and experience placed in generally the same set of circumstances. In determining the appropriate level of force, officers shall evaluate each situation in light of facts and circumstances of each particular case. Those factors may include, but are not limited to: [¶] The seriousness of the crime or suspected offense; [¶] The level of threat or resistance presented by the subject; [¶] Whether the subject was posing an immediate threat to officers or a danger to the community; [¶] The potential for injury to citizens, officers or subjects; [¶] The risk or apparent attempt by the subject to escape; [¶] The conduct of the subject being confronted (as reasonably perceived by the officer at the time); [¶] The time available to an officer to make a decision; [¶] The availability of other resources; [¶] The training and experience of the officer; [¶] The proximity or access of weapons to the subject; [¶] Officer versus subject factors such as age, size relative strength, skill level, injury/exhaustion and number officers versus subjects; and [¶] The environmental factors and/or other exigent circumstances.

“Deadly Force. Law enforcement officers are authorized to use deadly force to: [¶] Protect themselves or others from what is reasonably believed to be an imminent threat of death or serious bodily injury; or, [¶] Prevent a crime where the suspect’s actions place person(s) in imminent jeopardy of death or serious bodily injury; or [¶] Prevent the escape of a violent fleeing felon when there is probable cause to believe the escape will pose a

significant threat of death or serious bodily injury to the officer or others if apprehension is delayed. In this circumstance, officers shall, to the extent practical, avoid using deadly force that might subject innocent bystanders or hostages to possible death or injury.

“The reasonableness of an Officer’s use of deadly force includes consideration of the officer’s tactical conduct and decisions leading up to the use of deadly force.”

3. *Analysis*

Under the controlling substantial evidence test—which requires us to draw all reasonable inferences from the evidence in support of the judgment and precludes us from reweighing evidence or assessing credibility—the evidence was sufficient to support the trial court’s findings.

The trial court weighed the video evidence against the petitioners’ percipient testimony and concluded that it contradicted their claims that the driver made distinct, furtive moves toward his waistband. We have reviewed the video and agree with the trial court’s assessment of what is depicted therein. Moreover, even if reasonable minds might differ about how to interpret the events shown on the video, we certainly must conclude the trial court’s interpretation of that evidence was reasonably supported by the video’s content, at the very least. Thus, the video evidence was sufficient, substantial evidence, by itself, to support the trial court’s findings.

The expert’s testimony also supported the trial court’s findings. After reviewing the internal investigation statements of the responding officers and the video and demonstrative evidence, the expert concluded that the driver did not make any

furtive movements that would have justified petitioners' use of deadly force and he did not see anything else in the evidence that would have justified the shootings. Because the expert's opinion had evidentiary support and was accompanied by a reasoned explanation of his ultimate conclusions, it was additional substantial evidence in support of the trial court's findings. (See *San Diego Gas & Electric v. Schmidt, supra*, 228 Cal.App.4th at p. 1292.)

Here, after weighing the parties respective evidence and assessing credibility, the trial court made factual determinations on conflicting facts: petitioners' percipient account of the shooting versus the video and expert testimony to the contrary. We are bound on appeal by those factual findings, and we hold they support the trial court's ultimate conclusion that petitioners' use of deadly force under the factual circumstances was not objectively reasonable and violated the City's policy on the use of such force.

V.
DISPOSITION

The judgments are affirmed. The parties are to bear their own costs on appeal.

KIN, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

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