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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RODERICK MARKS, Plaintiff and Appellant, v. CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES, Defendant; LOS ANGELES COUNTY PROBATION DEPARTMENT, Real Party in Interest and Respondent.	B239687 (Los Angeles County Super. Ct. No. BS121125)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ann I. Jones, Judge. Affirmed.

Law Offices of Russell J. Thomas, Jr. and Russell J. Thomas, Jr., for Plaintiff and Appellant.

No appearance for Defendant.

Hausman & Sosa, Jeffrey M. Hausman, Larry D. Stratton and Vincent C. McGowan, for Real Party in Interest and Respondent.

Roderick Marks was terminated as a probation officer with the Los Angeles County Department of Probation (Probation Department) for engaging in an inappropriate relationship and associating with a former ward of the juvenile court, conduct unbecoming his peace officer status, and violation of Probation Department rules, regulations, policies and procedures. On appeal Marks challenges the superior court's denial of his petition for writ of mandate seeking to reverse the decision of the Los Angeles County Civil Service Commission (Commission) approving his discharge, contending the disciplinary proceedings violated the one-year limitations period in the Peace Officers Bill of Rights Act (POBRA) (Gov. Code, § 3304, subd. (d) (§ 3304(d)) and his termination was an impermissibly harsh penalty for his misconduct. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Marks's Relationship with Lakema M.*

Marks began working with the Probation Department as a detention services officer on August 10, 1998. He was promoted to deputy probation officer I on March 28, 1999 and transferred from Los Padrinos Juvenile Hall to Camp Joseph Scott, a residential facility for the care, custody, treatment and training of girls ages 12 to 18 years old who have been declared wards of the juvenile court. Marks worked at Camp Scott through the time of the alleged misconduct.

During an investigation into the conduct of another probation officer, Lakema M., a former ward of the juvenile court who had been placed at Camp Joseph Scott, reported to county investigators that she and Marks began an inappropriate sexual relationship following her release from the camp in November 2003. (Lakema was apparently recommitted to the camp following her initial release and remained there until she graduated on April 26, 2004.) Their personal relationship continued at least through 2006.

In subsequent interviews Lakema described both sexual and nonsexual encounters with Marks and provided telephone records for the period December 2005 through April 2006 showing numerous calls between them made to and from Marks's personal and

work numbers. Marks denied his relationship with Lakema was sexual, but acknowledged he had significant contact with her after she graduated from Camp Scott, including helping her get job interviews. He also admitted he had taken Lakema to his house on one occasion.

2. *Notice of Intent To Discharge and Applicable Probation Department Policies*

By letter dated November 7, 2007 the Probation Department notified Marks in writing of its intent to discharge him from his position as a deputy probation officer I.[1] The notice explained the proposed action was based on "[i]nappropriate relationship and association with former client;" "[c]onduct unbecoming your peace officer status;" "[p]oor judgment;" and "[v]iolation of Departmental rules, regulations, policies and procedures." The notice quoted from a series of standards, policies and procedures Marks had allegedly violated, including section 15.6, "Employee-Client Relations," of the Probation Department Policy Manual No. 15: "It is the policy of the Probation Department that employees shall not knowingly enter into relationships or engage in any contacts with clients, parolees, their family members or friends, not arising out of the employee's performance of official duties. All contacts, including those that are incidental and non-preventable, shall be reported by the employee to his/her immediate supervisor forthwith, and in all cases within 48 hours of initial contact. [¶] In-person or telephone contact with clients, parolees, their family members, and their friends shall be limited to those required to carry out the employee's official assignment."

The notice of intent to discharge also quoted portions of Policy No. 32, "Personnel Policy," contained in the Los Angeles County Probation Department Residential Treatment Services Bureau (RTSB) Policy Manual: "Staff are forbidden to establish business or social relationships with clients, their families, or agents of their clients or families during the course of the camp commitment, nor for a reasonable period of time following expiration of the formal grant of probation. [¶] . . . It is a violation of policy

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[1] Marks was apparently served with the notice of intent to discharge on November 11, 2007.

for staff to contact minors after graduation. [¶] . . . [¶] . . . Whenever a staff member has a non-official contact (after graduation from camp) with a ward or ward's family, staff is responsible for making a written record of such contact and reporting this contact to his/her supervisor." Policy No. 32 also warns, "Staff who violate any regulations or policies of the Probation Department or the County of Los Angles are subject to disciplinary action up to and including dismissal from county services."

By letter dated January 2, 2008 the Probation Department informed Marks he was discharged from his position of deputy probation officer I and from Los Angeles County service effective January 3, 2008. The notice of discharge recited that, as of its date, Marks had not sought a prediscipline "*Skelly* hearing" (see *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194) to respond to the allegations of misconduct. The notice advised Marks of his right to appeal his termination and to request a hearing from the Commission.

3. *The Original Administrative Proceedings*

On January 10, 2008 Marks appealed his termination to the Commission. An evidentiary hearing was conducted over five days in November and December 2008 before a hearing examiner for the Commission. On February 17, 2009 the hearing officer issued his findings of fact, conclusions of law and recommended decision, proposing the specific charges against Marks be sustained and the penalty of discharge also be sustained.

The hearing officer characterized Lakema's testimony as "extremely weak and not persuasive or believable" and found the Probation Department had failed to establish Marks was involved in a sexual relationship with her. Nonetheless, Marks admitted during his testimony that he had numerous contacts with Lakema to assist her in obtaining employment: "Those are laudable efforts on the part of [Marks] and this Hearing Examiner believes they were well-intentioned. However, it should have been reported to his supervisor that he had such contact with a former camp ward . . . . Based on his own testimony, he did violate policies of the [Probation] Department." The

hearing officer further found Marks knew, or as a 10-year veteran of the Probation Department should have known, about the policies that prohibited his ongoing contact with Lakema and that required him to report any such contact to his supervisor.

The Probation Department's Guidelines for Discipline, introduced as exhibit 1 at the administrative hearing, specify the appropriate penalty for the first, second and third offenses for various types of misconduct and inappropriate behavior. Discharge is identified as the only penalty for the first offense for "[a]ssociation with former or current clients and/or their relatives and friends" (item 19), as well as for "[f]ailure to report relationship with former or current clients and/or their relatives" (item 17). Noting that a less severe penalty (demotion) might have been more appropriate given Marks's "spotless record" for 10 years, the hearing officer concluded the decision to discharge was within these departmental guidelines for discipline.

Marks filed objections to the hearing examiner's report. Emphasizing Lakema's lack of credibility and challenging the credibility of the Probation Department's investigators, Marks argued termination was too severe a penalty for his good faith acts of assisting a former camp ward to obtain employment, particularly in view of his unblemished record with the Probation Department. He did not contend the disciplinary proceedings violated the one-year limitations period in section 3304(d). On May 27, 2009 the Commission by a three-to-one vote (with one member absent) adopted the findings and recommendations of the hearing officer as its final decision. The formal order of the Commission sustaining Marks's termination was filed June 10, 2009.

4. *Marks's Successful Petition for Writ of Administrative Mandamus*

Immediately after the Commission's final decision, Marks petitioned the superior court for a writ of administrative mandamus overturning the decision to sustain his discharge. Following a hearing on March 26, 2010 and based on its independent examination of the administrative record, the court concluded the weight of the evidence did not support the conclusion Marks had violated the Probation Department's policy against establishing a nonofficial, post-camp relationship with Lakema while she was a

ward of the court or "for a reasonable period of time following expiration of the formal grant of probation." The court explained, although concededly Marks had a (nonsexual) relationship with Lakema outside of the camp, the evidence in the administrative record failed to establish how much time had elapsed between Lakema's departure from the camp and termination of juvenile probation and the beginning of her relationship with Marks. The hearing officer's repeated, but unexplained, references to "at all times relevant" were insufficient to support the conclusion Marks had violated Probation Department policy.

The court's minute order recited Marks was entitled to a writ of mandate commanding the Commission to vacate its order "and remanding the matter to the Commission for such further proceedings as it elects to take, that are consistent with the decision of this court." At the hearing itself, in announcing its decision to grant the petition, the court emphasized, "there's to be no attempt to dictate the exercise of discretion by the Board upon remand." Earlier in the hearing the court had stated, "Well, I'm going to remand it to the Board. If they think that because he had contact with a minor, after graduation, after the minor graduated, at any time, or forever without reporting that, he should be fired for that alone, they can do what they wish. I'm not going to control their discretion on remand. But I certainly don't have any reason to believe that's what—if that was all he did, they would have fired him."

A peremptory writ of mandate issued on May 5, 2010 pursuant to Code of Civil Procedure section 1094.5, commanding the Commission to vacate its decision sustaining Marks's discharge and remanding the matter for further proceedings consistent with the court's decision.

5. *Administrative Proceedings on Remand*

On July 21, 2010, acting pursuant to the writ of mandate from the superior court, the Commission set aside its decision of June 10, 2009 and returned the matter to the original hearing office for further proceedings and additional findings. The Commission identified four questions to be considered at the reopened hearing: (1) "What is the time

period that represents 'at all times relevant' referenced in the Hearing Officer's Findings of fact?" (2) "Did the former female ward's grant of probation, and in particular, the juvenile grant of probation, end in February, 2005?" (3) "Did [Marks] have a prohibited relationship with the former female ward that occurred within 'two years[] after the grant of probation has ended', which was effective February, 2005?" (4) "Did the [Probation] Department have a policy with respect to a prohibition on contacting former wards?" Counsel for the parties met and conferred on August 25, 2010 and agreed the four questions articulated by the Commission were "the issues to be heard in this matter, re-opened for a limited purpose after remand by the Superior Court."

The hearing officer conducted a further hearing on September 10, 2010, heard additional testimony and issued a recommended decision on November 9, 2010. Although reiterating his prior findings that Marks had inappropriate contact with Lakema and failed to report that contact to his superiors as required by Probation Department regulations (and repeating his prior assessment that termination was too harsh a penalty for Marks's transgressions), the hearing officer did not address the four questions identified by the Commission. Instead, he accepted the argument of Marks's counsel that the proceedings on remand from the superior court constituted a prohibited second attempt to discharge Marks. According to the hearing officer, "Section 3304(d) squarely prohibits the Department from discharging [Marks] in 2010 for events that allegedly occurred in 2005. [¶] . . . [¶] . . . While the matter was remanded to the Commission, that remand was for the limited purpose of vacating the discharge on the records of the Commission, and, to give the Commission the opportunity to attend to the consequences of the fact that [Marks's] discharge had been invalidated. The Commission was then free to deal with such issues as back pay, date of reinstatement, and the position to which Marks should be assigned." The hearing office recommended that Marks be reinstated with back pay.

The Commission rejected the hearing officer's recommendation on December 8, 2010 and returned the matter to the hearing officer to respond to the four questions it had

previously posed. On January 4, 2011 the hearing officer issued his additional findings of fact based on testimony presented at the September 10, 2010 hearing. He found Lakema was released from camp on probation in November 2003; her probationary period as related to her assignment in the camp setting ended in February 2005; and the Probation Department's prohibition of relationships with former wards for a "reasonable period of time" meant two year after release from juvenile probation. The hearing officer then observed Marks himself testified he had contact with Lakema beginning shortly after her release from camp in late November 2003 and his nonsexual relationship with her, which included both telephone and face-to-face contact, continued into 2005 and 2006.[2] As found by the hearing officer, "These contacts took place within less than the two (2) years expressed in the RTSB Policy and is therefore a violation by [Marks]. . . . Although well intentioned, these contacts by their very nature were not in the official capacity of his status as probation officer." Additionally, Marks's failure to report his contacts with Lakema to his supervisors was an independent violation of Probation Department policy. The hearing officer concluded, "Based on the response to the four questions posed/articulated by the [C]ommission when coupled with the facts established in the September 10th hearing it is respectfully recommended that the decision [to discharge Marks] be sustained."

On April 13, 2011 the Commission overruled Marks's objections and adopted as its final decision the findings and recommendation of the hearing officer to sustain the Probation Department's January 3, 2008 termination of Marks. The Commission's final order was filed April 20, 2011.

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[2] The hearing officer noted, "By his testimony all contact [by Marks] was in an effort on his part to assist her in finding employment."

6. *Marks's Second Petition for Writ of Administrative Mandamus*

Marks filed an amended and supplemental petition for writ of administrative mandamus on May 18, 2011. In a ruling filed January 25, 2012 the court denied the petition.

The court initially rejected the argument the proceedings on remand violated the one-year limitations period in section 3304(d), explaining, "There has been only one Notice of Intent, there has been one investigation and one issuance of discipline by the [Probation] Department on these exact same charges." The court further noted the claim the charges adjudicated on remand "are somehow different from those originally lodged against Marks is simply untrue. At all times, the basis for [Marks's] discharge has been an inappropriate relationship and association with a former client (whether or not it was sexual in nature), conduct unbecoming a peace officer, poor judgment and a violation of [Probation] Department rules and procedures."

The court then concluded the weight of the evidence supported the findings and decision to terminate. With respect to the claim the penalty was excessively harsh, the court stated, "According to the [Probation] Department's own Guidelines for Discipline, the sole recommended discipline for inappropriate contact and failing to report the contact is discharge. [Citation.] Thus, it is not a manifest abuse of discretion for the Commission to discharge [Marks]. [¶] County employees, and particularly peace officers, are held to a high standard of behavior. . . . Even if well-intentioned, [Marks's] contact with [Lakema] is exactly the type of behavior that the non-fraternization policy was intended to prevent."

Judgment was entered on February 10, 2012. Marks filed a timely notice of appeal.

DISCUSSION

1. *Standard of Review*

Termination of a nonprobationary public employee substantially affects that employee's fundamental vested right in employment. (*Bautista v. County of Los Angeles*

(2010) 190 Cal.App.4th 869, 874 (*Bautista*); *Jackson v. City of Los Angeles* (2003) 111 Cal.App.4th 899, 902.) Accordingly, when ruling on a petition for a writ of administrative mandamus seeking review of procedures that resulted in the employee's termination, the trial court examines the administrative record and exercises its independent judgment to determine if the weight of the evidence supports the findings upon which the agency's discipline is based or if errors of law were committed by the administrative tribunal. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 811 ["when a court reviews an administrative determination [affecting a vested fundamental right,] the court must 'exercise its independent judgment on the facts, as well as on the law . . .'"]; *Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 314; *Bautista*, at pp. 874-875.)

On appeal we review the trial court's factual findings for substantial evidence (*Jackson v. City of Los Angeles, supra*, 111 Cal.App.4th at p. 902; *Evans v. Department of Motor Vehicles* (1994) 21 Cal.App.4th 958, 967, fn. 1) and its legal determinations de novo. (See *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *Bautista, supra*, 190 Cal.App.4th at p. 875.)

2. *Marks's Discharge Did Not Violate Section 3304(d)*

Government Code section 3304 provides a number of procedural rights for public safety officers who may be accused of misconduct in the course of their employment. Section 3304(d)(1), at issue here, establishes a limitations period specifying that "'no punitive action' may be imposed upon any public safety officer for alleged misconduct unless the public agency investigating the allegations 'complete[s] its investigation and notif[ies] the public safety officer of its proposed disciplinary action' within one year of discovery of the alleged misconduct." (*Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 317.)[3] There is no requirement the discipline itself must be imposed within that one-year period. (§ 3304(d)(1).)

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[3] Section 3304(d)(1) states, "Except as provided in this subdivision and subdivision (g), no punitive action, nor denial of promotion on grounds other than merit,

Marks's contention his "second discharge" violated section 3304(d) rests on a fundamental misconception of the legal significance of the superior court's May 5, 2010 writ of mandate and the nature of the administrative proceedings on remand. As discussed, Marks has never argued, nor could he, that the original investigation of his inappropriate relationship with Lakema or the notice of intended discipline issued in November 2007 did not fully comply with the time limit of section 3304(d). Yet everything that followed—Mark's actual (and only) discharge on January 3, 2008, the Commission's initial approval of that discharge on June 10, 2009, and its subsequent affirmance of the discharge on April 13, 2011 following additional findings of fact after remand from the superior court—was based on this timely investigation and notice of intended discipline. There was no violation of section 3304(d). (See *Mays v. City of Los Angeles*, *supra*, 43 Cal.4th at p. 323 ["[S]ection 3304(d) functions as a limitations period. [Citations.] Limitations statutes ordinarily establish the period in which an action must be *initiated* [citations], but the outcome of the claim or charges generally remains to be adjudicated pursuant to separate statutes governing the specified subsequent procedure."]; see also *id*. at p. 322 ["it is evident that section 3304(d) limits the duration of the investigation and provides, through its notice requirement that discipline *may* be imposed, a *starting* point for predisciplinary responses or procedures"].)

Marks's contrary argument is premised on the mistaken belief a new notice of intended discipline was required after the superior court issued its writ of mandate

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shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. This one-year limitation period shall apply only if the act, omission, or other misconduct occurred on or after January 1, 1998. In the event that the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed discipline by a Letter of Intent or Notice of Adverse Action articulating the discipline that year, except as provided in paragraph (2) [concerning an act that is also the subject of a criminal investigation or prosecution]. The public agency shall not be required to impose the discipline within that one-year period."

directing the Commission to vacate its decision sustaining Marks's discharge and remanding the matter for further proceedings. However, in *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499 the Supreme Court expressly approved the procedure utilized in this case: remand by the superior court to the administrative agency, which can then take additional evidence, make additional findings and come to a new, albeit perhaps the same, decision: "[W]hen a court has properly remanded for agency reconsideration on grounds that all, or part, of the original administrative decision has insufficient support in the record developed before the agency, the statute [Code of Civil Procedure section 1094.5] does not preclude the agency from accepting and considering additional evidence to fill the gap the court has identified." (*Id.* at p. 526.) "[S]ubdivision (f) of section 1094.5 provides that, when granting mandamus relief, the court may 'order the reconsideration of the case *in the light of the court's opinion and judgment*.' [Italics added by Supreme Court.] This clearly implies that, in the final judgment itself, the court may direct the agency's attention to specific portions of its decision that need attention, and need not necessarily require the agency to reconsider, de novo, the entirety of its prior action." (*Id*. at p. 528.) That is what happened here; nothing more was required.

3. *The Penalty Imposed Was Not Excessive*

"'[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.'" (*Skelly v. State Personnel Bd., supra,* 15 Cal.3d at p. 217; accord, *Bautista, supra,* 190 Cal.App.4th at p. 879; *West Valley-Mission Community College Dist. v. Concepcion* (1993) 16 Cal.App.4th 1766, 1778-1779.) "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." (*Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 404.) "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." (*West Valley-Mission Community College Dist.*, at pp. 1778-1779.)

Marks contends the Commission abused its discretion in upholding his termination rather than requiring the Probation Department to impose a less severe punishment (at most, a 30-day suspension). He emphasizes that the Commission's own hearing officer believed a lesser penalty would have been sufficient and argues the Probation Department applied its disciplinary rules inconsistently when it suspended, rather than terminated, another officer who had engaged in similar misconduct. Marks's argument ignores that discharge is expressly stated in the Probation Department's Guidelines for Discipline as the appropriate punishment for violations of the prohibited-association and failure-to-report policies—a fact that led the hearing officer, notwithstanding his own misgivings about the severity of the penalty, to recommend Marks's termination be sustained by the Commission. Imposing this clearly stated consequence for Marks's undisputed, ongoing acts of misconduct, rather than applying principles of progressive discipline, was well within the Commission's discretion. (See *Talmo v. Civil Service Com.* (1991) 231 Cal.App.3d 210, 230 [upholding discharge of deputy sheriff]; *Bautista*, *supra*, 190 Cal.App.4th at p. 879 [same]; cf. *Pegues v. Civil Service Com.* (1998) 67 Cal.App.4th 95, 107 [no abuse of discretion when reasonable minds could differ as to the propriety of the penalty]; *Szmaciarz v. State Personnel Bd.* (1978) 79 Cal.App.3d 904, 921 [even in instances when the trial or reviewing court believes the penalty was too harsh, it cannot interfere with an agency's imposition of a penalty].)[4]

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[4] With respect to Marks's argument the Commission abused its discretion in sustaining his discharge because several of the witnesses at the administrative hearings, including Lakema, were not credible, it suffices to point out the hearing officer and the Commission based their findings that Marks had violated well-established Probation Department policies on Marks's own testimony. Likewise, in concluding the weight of the evidence supported the findings and decision to terminate, the superior court relied on Marks's admissions of misconduct, not the testimony of Lakema or the Probation Department investigators.

Marks's final challenge to his termination—that he is the victim of disparate treatment because another probation officer accused by Lakema of having an inappropriate sexual relationship with her was not discharged—similarly lacks merit on this record. First, as this court explained in *Talmo v. Civil Service Com., supra,* 231 Cal.App.3d at page 230, "When it comes to a public agency's imposition of punishment, 'there is no requirement that charges similar in nature must result in identical penalties.'" (Accord, *Kolender v. San Diego County Civil Service Com.* (2005) 132 Cal.App.4th 716, 723.) Second, the record here does not provide any basis for concluding the second officer was, in fact, found guilty of misconduct or, if he was, determining what discipline was imposed. Although the Commission's hearing officer originally suggested there may have been a lack of uniformity in the discipline imposed on the two men, he ultimately concluded, "Obviously, the information concerning [Lakema's] involvement with [the second officer] is more hearsay than anything else. There was no official testimony regarding his case, nor the facts and circumstances surrounding his case." Speculation as to what the second officer did and how he may have been disciplined does nothing to undermine the Commission's valid exercise of discretion in terminating Marks's employment with Los Angeles County.

DISPOSITION

The judgment is affirmed. The Probation Department is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J. SEGAL, J.*

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