Filed 9/12/12 Hernandez v. City of Los Angeles CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

EDDIE HERNANDEZ, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B232826 (Los Angeles County Super. Ct. No. NC043384)

APPEAL from an order of the Superior Court of Los Angeles County. Roy L. Paul, Judge. Reversed and remanded with directions.

Lackie, Dammeier & McGill, Michael A. Morguess and Michael A. McGill, for Plaintiff and Appellant.

Carmen A. Trutanich, City Attorney, Thomas A. Russell, General Counsel and Timothy A. Hogan, Assistant City Attorney, for Defendants and Respondents.

This case involves a challenge to the procedural process used by respondents City of Los Angeles and its Harbor Department to terminate appellant Eddie Hernandez's status as a probationary sergeant in the Los Angeles Port Police. Appellant appeals from the judgment denying his petition for a writ of mandate. We reverse and remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

The undisputed facts are that appellant began his career as an officer with the Los Angeles Port Police (Port Police) in 2003.[1] On July 6, 2008, he was promoted to Police Sergeant, which entailed a six-month probationary period. (See City of Los Angeles, Rules of the Board of Civil Service Commissioners, rule 5.26.) After appellant's probationary period ended on January 5, 2009, his appointment to sergeant would be complete. At about the same time he was promoted, appellant obtained approval to take a family vacation to Lake Tahoe, California beginning December 30, 2008 and ending January 7, 2009.

Appellant was the acting watch commander on the night of December 6, 2008, when another probationary sergeant notified appellant that he had observed a suspicious box in the roadway. After partially examining the box, appellant concluded it was trash. Without following the required guidelines for handling suspicious boxes (e.g. calling out the LAPD bomb squad), appellant allowed the other sergeant to shoot three bean bag rounds at the suspicious box, which was discovered to contain clothes. Appellant was told by his superiors that he handled the situation improperly, but was not told that his actions could result in termination of his probation.

On December 29, Lieutenant Titus Smith signed a written evaluation of appellant. The evaluation described the December 6 incident and stated: "[Appellant] normally

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[1] The Port Police is under the independent and autonomous control of the Harbor Department, not the Los Angeles Police Department. (Los Angeles City Charter, art. VI, § 657.)

All undesignated section citations are to the Los Angeles City Charter.

uses good judgment and common sense when making decisions. . . . [¶] . . . [However in the December 6 incident, he] failed to display decisiveness in his supervisory decision-making, and displayed questionable judgment. This incident has been fully discussed with [appellant], who has ensured that there will not be a repeat of the recognized supervisory behavior." The evaluation did not state that appellant's probationary status would or should be terminated because of the incident.

The next day, December 30, a Senior Personnel Analyst sent a memo to the Executive Director, Deputy Executive Director of Finance and Administration and the Human Resources Department recommending that appellant's probation be terminated "due to [appellant's] failure to carry out supervisory responsibilities adequately during his probationary period." The memo was approved by the Director of Human Resources.[2] That same day, Lieutenant Steve Kreie telephoned appellant at his home to inform appellant that his probationary status had been terminated. But appellant was in Lake Tahoe on his pre-approved vacation, so Kreie left a voice mail message asking appellant to call him; Kreie did not explain the reason for his call. On December 31, Laurence Russell, manager of the Port Police, also tried to telephone appellant at his home without success; Russell left a voice mail message directing appellant to call him back "about service of important papers." When Russell informed Lt. Smith that he had been unable to reach appellant at his home telephone number, Smith said he might be able to reach appellant some other way. Later that day, Smith told Russell that he had called appellant on his cell phone and informed him that Russell was trying to serve some papers on him; Smith informed Russell that appellant said he was on vacation in Lake Tahoe, California.

After talking to Smith, Russell discussed the matter with Martin Chavez in the Human Resources Office; Russell and Chavez concluded that written notice should be delivered to appellant's home and that Chavez would cause another copy to be sent to appellant's home by certified mail. Although Russell knew appellant was in Lake Tahoe

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[2] The probation of the other sergeant involved in the December 6 incident was also terminated as a result of the incident, but he was subsequently re-promoted.

and not at his home on December 31, that day Russell directed Officer Kreie to go to appellant's home to serve appellant with a document entitled "Notice of Discharge, Suspension or Probationary Termination" (Probation Termination Notice). Finding no one at appellant's home, Kreie left a copy of the Probation Termination Notice under the front door. The Probation Termination Notice falsely states that it was personally served on appellant.[3] A second copy of the Probation Termination Notice was also sent to appellant's home by first class mail. On January 2, 2009, respondents filed a copy of the Probation Termination Notice with the Civil Service Commission. And on January 5, respondents sent a third copy of the Probation Termination Notice to appellant at his home by certified mail. Appellant did not receive the copy left at his front door until he came home from vacation on January 7; he picked up the copy sent by certified mail on January 12. When appellant returned to work on January 8 (the day after he picked up the copy left at his home and several days before he picked up the copy sent by certified mail), he received the written evaluation signed by Smith on December 29, 2008, and by a reviewing Lieutenant on January 2, 2009.

The Probation Termination Notice states: "There is no appeal from this action. However, you may request restoration of your name to the eligible list . . . ." Appellant did not follow the grievance procedure outlined in the labor agreement between the respondents and the union representing the officers of the Port Police (i.e. the Memorandum of Understanding or MOU) to challenge the action returning him to police officer status. Instead, appellant requested a Board of Civil Service Commissioners hearing to challenge what he maintained was a demotion (see Gov. Code, § 3300 et seq. [The Public Safety Officers Procedural Bill of Rights Act (POBRA)]). Maintaining that appellant was terminated from his probationary status as sergeant, not demoted,

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3 In a declaration, Russell states that when Kreie returned to the Port Police after leaving a copy of the notice under appellant's door, Russell directed Kreie to check the box for personal service and not the box for service by certified mail even though Russell knew Kreie had not personally served appellant and that Chavez intended to send another copy by certified mail.

respondents denied the request because there is no right to a POBRA hearing on a termination of probation.

In February 2010, appellant initiated this action with the filing of a Petition for Writ of Mandate seeking to be reinstated as sergeant with back pay, and a POBRA hearing on the demotion.[4] The gist of appellant's claim is that he was never served with the Probation Termination Notice in the manner prescribed by section 1018 of the Los Angeles City Charter; as a result, appellant's appointment to sergeant was complete and he was entitled to a POBRA hearing on the demotion. Respondent countered that appellant was properly served with the Probation Termination Notice by both the copy left under his door on December 31 and the copy sent by certified mail on January 5, 2009. Alternatively, respondents argued that appellant's six-month probation was extended to January 19 by 14 days of sick and vacation leave he took during the probationary period; therefore he received notice within the probation period when on January 7 he picked up the copy left under his door, and on January 12 when he picked up the copy sent by certified mail.

The trial court denied the writ petition. It reasoned that leaving the Probation Termination Notice under appellant's door satisfied the "due diligence" requirement of section 1018. The court observed, "The fact that [appellant] was on vacation and not at his residence, and that respondents knew this at the time Lt. Kreie [left the notice] does not render respondent's efforts insufficient to meet the requirements of due diligence under the facts of this case." The court further concluded that, although appellant did not receive actual notice until he returned from vacation on January 7, service was effectuated during the probationary period because that period was extended by the number of sick and vacation days appellant took during the period.

Appellant timely appealed.

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[4] Respondent demurred to the petition on the ground that appellant had failed to exhaust his administrative remedies. In December 2010, the trial court denied appellant's motion to strike the demurer and overruled the demurer.

DISCUSSION

A. Standard of Review

"Under administrative mandamus, we exercise our independent judgment as to questions of law, and apply the substantial evidence test to questions of fact." (*Lanigan v. City of Los Angeles* (2011) 199 Cal.App.4th 1020, 1029 [review of police officer demotion].) On undisputed facts, whether an employee's procedural rights were violated is a legal question which we independently review. (*Mission Housing Development Co. v. City and County of San Francisco* (1997) 59 Cal.App.4th 55, 73.)

Respondents contend the proper standard of review is abuse of discretion, and argue that the "crux of this action involves the interpretation of the notice delivered to [appellant's] residence and mailed to him through U.S. mail." Respondents are incorrect. The "crux" of the issue on appeal is not interpretation of the notice; it is interpretation of the charter provision prescribing the manner in which notice must be given. Interpretation of a charter provision is a question of law. (*Hall-Villareal v. City of Fresno* (2011) 196 Cal.App.4th 24, 29.) We apply the undisputed facts to the charter and determine de novo whether service was made in the prescribed manner.

B. Subject Matter Jurisdiction

Respondents contend the trial court lacked subject matter jurisdiction because appellant failed to exhaust his administrative remedies. They argue that because appellant's probation was terminated, he was required to use the grievance process set forth in the MOU. As we explain in the next section, because respondents did not serve appellant with the Probation Termination Notice in the manner prescribed by law, appellant's appointment to sergeant was complete. As a result, the purported termination of probation was in fact a demotion, which is not subject to the grievance procedure set forth in the MOU.[5] Accordingly, appellant was not required to exhaust the grievance

[5] The grievance procedure outlined in the MOU applies to "any dispute concerning the interpretation or application of this written Memorandum of Understanding or

procedure set forth in the MOU, and the trial court and this court have subject matter jurisdiction.

C. Respondents Did Not Serve the Probation Termination Notice in the Statutorily Prescribed Manner

Appellant contends his appointment to sergeant was complete as a result of respondents' failure to comply strictly with the notice procedures set forth in sections 1011(b) and 1018 of the City Charter. We agree.

Like all city charters, the Los Angeles City Charter is "the equivalent of a local constitution. It is the supreme organic law of the city, subject only to conflicting provisions in the federal and state constitutions and to preemptive state law." (*Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011, 1017.) With exceptions not relevant here, employment of all city employees, including Port Police officers, is governed by Article X, sections 1000, et seq. of the City Charter. (§ 1000.) It is undisputed that Port Police officers promoted to sergeant are subject to a six-month probationary period. (See § 1011(a); Civil Service Rules, rule 5.26.)[6]

Termination of probation (i.e. return to officer status) during the probationary period is governed by section 1011(b), which reads: "At or before the expiration of the probationary period, the appointing authority may terminate the probationary employee by delivering written notice of termination to the employee assigning in writing the reasons for the termination. The appointing authority shall subsequently notify the board

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department rules and regulations governing personnel practices or working conditions applicable to employees covered by this Memorandum of Understanding." (Art. 5.1(A).) It expressly does not apply "to matters for which an administrative remedy is provided before the Civil Service Commission." (Art. 5.1(B)(1).) The procedure for challenging a demotion is covered by sections 1016(c) and 1017 of the City Charter and includes a hearing before the Civil Service Commission Board.

6 In its minute order, the trial court refers to a 12-month probationary period but both parties agree that the original probationary period, exclusive of extensions, was to be six months.

of such termination. Unless the probationary employee is served with written notice of termination during the probationary period, the employee's appointment shall be deemed complete."[7] Section 1018 sets forth the procedure for serving the written notice required by section 1011(b). It reads: "Service of notice in accordance with [Article X] may be made by handing a copy to the person *or* sending a copy by certified mail to the person's last known residence *if, after due diligence, the person cannot be found.*" (§ 1018, italics added.) Thus, section 1018 prescribes the two methods of giving written notice to the employee: (1) handing a copy to the employee (i.e. personal service) or (2) sending a copy by certified mail to the person's last known address. But the statute makes clear that the second option is available only on the condition that the employer has used due diligence to find and personally serve the person, but has been unable to do so. The certified mail option is not available where the employer knows where the person is but undertakes no reasonable efforts to personally serve him or her.

Zeron v. City of Los Angeles (1998) 67 Cal.App.4th 639, 641-642, is instructive. Zeron was a candidate for police officer with the Los Angeles Police Department (LAPD). During his 18-month probationary period, it was discovered that Zeron lied on his pre-investigation questionnaire. At the time, former City Charter section 109 set forth the procedure for terminating a probationary candidate: "At or before the expiration of the probationary period, the appointing authority of the department or office in which the candidate is employed may terminate him upon assigning in writing the reasons therefor to [the board of Civil Service Commissioners]. Unless he is thus terminated during the probationary period his appointment shall be deemed complete."[8] Written notice of

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[7] After the probationary period has ended, section 1016 governs discharge or suspension of city employees. Officers of the Port Police are peace officers (Pen. Code, § 830.1, subd. (a)); and as such they are protected by the POBRA (Gov. Code, § 3300 et seq., § 3301). Pursuant to POBRA and section 1016, once probation has been completed, an officer cannot be demoted without being given an opportunity to appeal to the Board of Commissioners.

[8] Former section 109(c) was replaced in part with current section 1011(b).

termination was mailed to Zeron (there was no personal service requirement at the time), but the LAPD did not notify the commission of the dismissal until eight days after Zeron's probationary period had expired. The court concluded that Zeron achieved tenured police officer status because the LAPD did not strictly comply with the requirement to notify the commission in writing of the termination prior to the end of the probationary period. The court held, a "civil service probationer is entitled to have the statutory procedure for dismissal strictly followed. [Citations.]" (*Zeron,* at p. 642.)

Here, under *Zeron's* strict compliance test, respondents were required to strictly adhere to the notice requirements of section 1018 to effect termination of appellant's probation. That is, respondents had to hand appellant a copy of the written Probation Termination Notice unless, after due diligence, they could not find appellant. Respondents did not hand a copy of the Probation Termination Notice to appellant. The certified mail option was not available because respondents were not unable to find appellant. On the contrary, it is undisputed that before Russell sent Kerie to leave a copy of the Probation Termination Notice at appellant's home, and before a copy was sent to appellant by certified mail, Russell knew that appellant was on vacation in Lake Tahoe, California and that he was reachable by cell phone. Nothing in the record suggests anything prevented Russell from finding out where appellant was staying in Lake Tahoe and causing him to be personally served with the Probation Termination Notice there. Having failed to use due diligence to find and personally serve appellant, respondents did not meet the condition for using the alternate method of service by certified mail. We disagree with the trial court's conclusion that leaving the paperwork under the door of appellant's home satisfied the due diligence requirement of section 1018. Sliding a copy of the written notice under the door at appellant's home when respondents knew appellant was away on vacation is not a prescribed manner of service under any circumstances. Under *Zeron,* because respondents did not strictly comply with the procedures set forth in section 1018, appellant was not served with notice of termination during the probationary period and, under section 1011(b), his appointment to the rank of sergeant must be deemed complete.

We are not persuaded to the contrary by respondent's argument that *Zeron* is distinguishable because it concerned termination of probation that resulted in dismissal from employment, whereas this case involves termination of probation for a promotion which resulted in a return to the lower level position with an opportunity to reapply for the promotion. It is a difference without a distinction for purposes of the employer's obligation to strictly comply with section 1018. Nothing in section 1018 suggests that strict compliance with section 1018 is required for service of notice of discharge under section 1016(b), but not for service of notice of termination during probation under section 1011(b).

Because we conclude that appellant's appointment was complete as a result of respondent's failure to properly serve him with the Probation Termination Notice, we need not address appellant's alternate argument that respondents should be deemed to have not timely notified the Civil Service Commission as required by Section 1011(b).

D. Whether the Probationary Period Was Extended By Appellant's Vacation and Sick Leave Is Immaterial

Also without merit is respondents' argument that service complied with section 1018 because appellant actually received written notice during the probationary period because the probation had been extended to January 19. Respondents argue the extension came into effect because of the number of days of sick and vacation leave appellant took during the probationary period. We need not decide whether appellant's probation was extended as a result of his days off because, even assuming it was, respondents never served appellant with the Probation Termination Notice in the manner prescribed by section 1018. They never caused a copy of the Probation Termination Notice to be handed to appellant and the condition precedent that would have allowed respondents to use the certified mail manner of service was not satisfied. That prior to January 19 appellant picked up the copy left at his door does not satisfy the requirement that he be personally served; and that he picked up the copy sent by certified mail before that date is immaterial since the conditions for service by certified mail had not been met.

(Cf. *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1226 ["Knowledge by a defendant of an action will not satisfy the requirement of adequate service of a summons and complaint."]; *Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1466-1467 [notice requirement " ' "is not satisfied by actual knowledge without notification conforming to the statutory requirements" [citation]; it is long settled that methods of service are to be strictly construed and that a court does not acquire jurisdiction where personal service is relied upon but has not in fact taken place. [Citations.]' ")

E. Appellant is Entitled to a Hearing

Appellant contends that, under POBRA, he is entitled to a hearing before the Board of Civil Service Commissioners to challenge the demotion. We agree.

Under POBRA, an action that leads to a demotion is a "punitive action" (Gov. Code, § 3300), and no punitive action may be taken against a public safety officer without providing the officer with an opportunity for an administrative appeal (Gov. Code, § 3304, subd. (b)). Administrative appeals instituted by public safety officers shall be conducted in conformance with the rules and procedures adopted by the local public agency. (Gov. Code, § 3304.5.) In this case, those rules are set forth in the City Charter. Specifically, section 1016(c) sets forth the procedures for the employee to obtain a hearing before the Board of Commissioners.[9] There is no dispute that appellant followed these procedures and that his request for a hearing was denied solely based on respondents' characterization of its action as a termination of probation, not a demotion. Based on our conclusion that appellant's appointment to sergeant was complete, the action taken by the Port Police constitutes a demotion and under POBRA appellant is entitled to a board hearing on that punitive action.

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9 Section 1016 does not expressly refer to demotions. But section 1017 states: "Whenever it is claimed by any person that he or she has been unlawfully demoted . . . and that person has filed an application for a hearing as provided in Section 1016(c) and reinstatement or restoration to duty has been denied, the person may file a written claim for compensation and a demand for reinstatement." (§ 1017.) Thus, the section 1016(c) procedures apply equally to application for a hearing to challenge a demotion.

F. Penalty for Violation of POBRA

Appellant contends he is entitled to the statutory $25,000 penalty and attorneys fees pursuant to Government Code section 3309.5, subd. (e) because respondents' POBRA violation was malicious and intentional. We disagree.

Upon a finding that the department, its employees or agents "maliciously violated any provision of [POBRA] with the intent to injure the public safety officer" the department shall be liable for a civil penalty of up to $25,000 to be awarded to the officer, and for reasonable attorneys fees. (Gov. Code, §3309.5, subd. (e).) Government Code section 3309.5 does not define malice. But malice is defined in Civil Code section 3294 as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." "Malice implies 'an act conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others. There must be an intent to vex, annoy or injure. . . . Mere negligence, even gross negligence, is not sufficient to justify such an award.' [Citation.]" (*Kendall Yacht Corp. v. United California Bank* (1975) 50 Cal.App.3d 949, 958.)

Here, there is no evidence that respondents acted with the legal intent necessary to trigger the statutory penalty. Respondents' apparent misunderstanding of the service requirement did not rise to the level of an intent to vex, annoy or injure.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for it to grant the petition for writ of mandate. Appellant shall recover costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.