Filed 12/20/16 Bravo v. State Personnel Bd. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ALEJANDRO BRAVO, Plaintiff and Appellant, v. STATE PERSONNEL BOARD, Defendant and Respondent; DEPARTMENT OF CORRECTIONS AND REHABILITATION, Real Party in Interest and Respondent.	B265314 (Los Angeles County Super. Ct. No. BS150149)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joanne B. O'Donnell, Judge. Affirmed.

Law Office of Michael A. Morguess and Michael A. Morguess for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Stephen D. Svetich for Real Party in Interest and Respondent.

The Department of Corrections and Rehabilitation (the Department) terminated Alejandro Bravo's employment as a parole agent for failing to timely release a parolee, falsely reporting that the parolee was timely released, and stating in an interview that his false report was accurate. Bravo appeals from a judgment denying his petition for a writ of administrative mandamus challenging the decision by the State Personnel Board (Board) upholding the dismissal. Bravo contends (1) his discipline for falsely reporting that the parolee was timely released was time-barred; (2) as he previously received informal discipline for falsely reporting that the parolee was timely released, he cannot be disciplined again for the same conduct; and (3) the evidence does not support the finding that he was intentionally dishonest in his interview.

We conclude that Bravo has shown no prejudicial abuse of discretion by the Board and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Bravo's Failure to Timely Release the Parolee*

Bravo worked for the Department as a correctional officer beginning in 1999, before becoming a parole agent in April 2010. He was responsible for releasing parole holds in accordance with orders from the Board of Parole Hearing, supervising parolees,

meeting with parolees in the office and the field, and overseeing their monthly anti-narcotic urinalysis, which is "critical to maintain the sobriety of the parolee." He was required to record his contacts with parolees in a Record of Supervision (ROS).

Paul Patchen was a parolee assigned to Bravo for supervision. On August 25, 2010, Patchen was incarcerated in the county jail for violating the terms of his parole. He was scheduled to be released on November 23, 2010. Bravo was responsible for removing Patchen's parole hold by the close of business on November 23, 2010, to ensure that Patchen was not detained beyond that date. Bravo did not work on November 23, 2010, and Patchen was not released that day. Bravo worked on November 24, 2010, but he did not work from November 25 through 30, 2010.

On an unknown date, Bravo made and signed an entry in Patchen's ROS, stating that on November 23, 2010, Patchen was released from custody, Patchen had reported to the office between 9:55 a.m. and 10:25 a.m., a urinalysis sample had been collected, "CAL Parole" updated, and Bravo, as the "agent of record," had checked the Justice Data Interface Controller Computer.

On November 29, 2010, another parole agent noticed that Patchen was still in custody and being held beyond his scheduled release date. She contacted their supervisor, William Brust, who authorized Patchen's release. On November 30, 2010, Patchen was released from jail and instructed to report to the parole office within 24 hours.

B. *Subsequent Events*

On December 1, 2010, Patchen reported to the parole office, where he met with Bravo. Bravo made an entry in Patchen's

ROS stating that on December 1, 2010, Patchen reported for supervision and Bravo conducted a urinalysis test and checked a computer database. Sometime in December 2010, Brust verbally counseled Bravo regarding Patchen's over-detention.

On November 30, 2011, Patchen filed a civil rights complaint in federal court alleging that he had been unlawfully incarcerated for seven days. He alleged that Bravo had violated his constitutional rights and "falsified records etc. while [Bravo] was Patchen's Parole Officer." Patchen alleged that Bravo had falsely reported that Patchen was released on November 23, 2010.

On January 12, 2012, Brust received a copy of the federal complaint and was directed by his superiors to investigate the matter. Brust confirmed that Patchen was released from custody on November 30, 2010. In the process, Brust reviewed Bravo's ROS entry for November 23, 2010 and noted that statements in that entry appeared to be false. Patchen was still in custody on that date, and lab results, obtained by Brust, revealed that the first urinalysis for Patchen was not done until December 17, 2010.

Bravo was absent from work due to a work-related injury from February 2012 until June 11, 2012. When Bravo returned to work on June 11, 2012, Brust handed him a memorandum entitled "Performance Plan of Action for Parole Agent Bravo, PAI."[1] The memorandum stated that during the review period from October 11, 2011 to April 11, 2012, Bravo had received "two write-ups for failure to release Parolee Paul Patchen . . . from

---

[1] The performance plan of action memorandum was dated May 7, 2012.

custody on November 23, 2010, missing specs on a 2nd Striker, CS, PM, and PAI cases." On June 12, 2012, Bravo handed Brust a written rebuttal stating, "this is the second write up I received Regarding Parolee Paul Patchen . . . . I feel you are harassing me . . . ."

On October 16, 2012, Jorge Lopez of the Office of Internal Affairs (OIA) interviewed Bravo. Lopez asked whether the entry for November 23, 2010 in the ROS was truthful and accurate. According to Lopez, Bravo responded, "yes, if I put it on there it occurred." Lopez then presented evidence that Patchen was not released until November 30, 2010. Confronted with that evidence, Bravo acknowledged that he could not have seen Patchen on November 23, 2010 because Patchen was still in jail on that date. Bravo also acknowledged that when he made the entry for December 1, 2010 he could have corrected the prior entry for November 23, 2010, but did not.

C. *Bravo's Dismissal*

On January 7, 2013, the Department served Bravo with a letter of intent to terminate his employment for misconduct. The letter identified two instances of misconduct:

"1. On or about November 23, 2010, you failed to release parolee Paul Patchen . . . from custody in the Los Angeles County jail on his scheduled release date.

"2. On or about November 23, 2010, you falsified the Record of Supervision for parolee Paul Patchen . . . when you documented that Patchen reported to the parole office on November 23, 2010 and submitted to an anti-narcotic test."

On February 1, 2013, the Department served Bravo with a notice of adverse action dismissing him as a parole agent as of

February 11, 2013. On February 11, 2013, the Department served an amended notice of adverse action dismissing Bravo as of February 12, 2013. The amended notice stated that the causes for discipline under Government Code section 19572 were inexcusable neglect of duty, dishonesty, willful disobedience, and other failure of good behavior (*id.*, subds. (d), (f), (o) & (t)). It stated that the reasons for Bravo's dismissal were (1) failure to release Patchen's parole hold on November 23, 2010, resulting in Patchen's over-detention; (2) falsely reporting that on November 23, 2010, Patchen reported to the parole office and Bravo oversaw a urinalysis test; and (3) dishonesty in the OIA interview when Bravo stated that the information about Patchen in his ROS roster was accurate.

D. *The Administrative Appeal*

Bravo appealed the decision and requested a hearing before the Board. On April 16, 2013, Bravo filed a motion to dismiss the notice of adverse action as untimely pursuant to Government Code section 3304, subdivision (d), because the Department did not serve the notice within one year after its discovery of the misconduct. Bravo argued that the misconduct underlying his discharge was the failure to release Patchen on November 23, 2010. Because Brust became aware of the alleged misconduct on November 30, 2010, the one-year limitations period expired on November 30, 2011. The Department opposed the motion. The motion to dismiss and opposition thoroughly explored the question of whether Brust's knowledge of the over-detention was sufficient to put the department on notice of misconduct, such that a reasonable investigation would have uncovered the record falsification. At oral argument on the motion, both parties

acknowledged they intended to present evidence on this issue at the hearing.

The administrative law judge (ALJ) treated the dismissal motion as a demurrer. The ALJ stated that the notice of adverse action did not clearly and affirmatively show that the Department was aware of the misconduct relating to the false entry on November 30, 2010, and therefore denied the motion. The ALJ ruled that whether the Department should be deemed to have knowledge of the misconduct outside of the one-year limitations period "raises a question of fact" to be decided at the hearing.

On July 29, 2013, the administrative appeal hearing began. In his opening statement, Bravo's counsel raised the statute of limitations defense, asserting that Bravo would establish that the department had "notice of the misconduct" but failed to take action against him within one year of the discovery. Brust was questioned on direct and cross examination about his assertion that he first discovered the false entry after the Department was served with Patchen's civil rights' complaint. Both sides questioned him about whether knowledge of the detention should have caused Brust to commence a broader investigation or report the matter to his supervisors. Brust testified that nothing about the over-detention itself would have triggered an investigation of Bravo's ROS entries; because this was Bravo's first over-detention, Bravo's error did not warrant further inquiry.

On the second day of testimony, before the conclusion of the Department's case-in-chief, Bravo orally moved to dismiss the allegation of over-detention. Bravo argued that Brust first became aware of the over-detention on November 30, 2010, more than one year before the service of the notice of adverse action.

The Department opposed the motion arguing that neither the allegation of over-detention nor the allegation of Bravo's false entry in the ROS should be dismissed. In response, Bravo's counsel argued that the motion to dismiss was limited to "the allegation of over detainment." The ALJ stated that was her understanding of the motion as well. She denied the motion "at this time" so she could consider "a new case . . . addressing notice and who can initiate an investigation . . . ."

Brust was recalled as a witness on the second day and provided further testimony about whether an investigation should have been initiated. He testified that a supervisor at his level was not authorized to institute an investigation and the over-detention was not the type of misconduct which needed to be reported to his superiors. No other evidence was presented by either party on the issue of whether the over-detention should have put the Department on notice of the record falsification.

Lopez was then called as a witness and testified that when he showed Bravo that Patchen was still in custody on November 23, 2010, making it impossible for Bravo to have met with Patchen and collected a urine sample, Bravo appeared "dumbfounded." Lopez stated that Bravo "[t]ried to make sense of what he wrote and what he had stated" because it apparently did not make sense to Bravo. Lopez stated that Bravo seemed apologetic and contrite.

In closing argument, neither party raised the statute of limitations issue nor asked the ALJ to make findings about whether the Department was on inquiry notice of the record falsification when it first learned of the over-detention.

On October 23, 2013, the ALJ issued her proposed decision, which the Board later adopted. The ALJ granted Bravo's motion

to dismiss as to the allegation of over-detention, but denied the motion as to the allegation of Bravo's false entry in the ROS.[2] The ALJ stated that the Board's precedent held that the Department could not impose discipline for the same conduct that was the subject of prior discipline. Because Brust had verbally counseled Bravo regarding the over-detention in December 2010, the Department could not impose further discipline on Bravo for the same conduct.

Because the ALJ concluded the Department had not imposed any prior discipline on Bravo for his false ROS entry, the ALJ overruled the request to dismiss that allegation.

Turning to the statute of limitations defense raised to the allegation of record falsification, the ALJ found the evidence insufficient to support a motion to dismiss. The ALJ stated: "While there was evidence presented that an employee of [the Department] received Parolee Patchen's lawsuit on January 11, 2012, there was no evidence presented at [the] hearing that PA Brust, any other supervisor, or any person authorized to initiate an investigation for the Hiring Authority had knowledge of [Bravo's] misconduct related to the erroneous entry on the ROS prior to January 12, 2012." The ALJ concluded that the Department timely notified Bravo of the proposed discipline by serving the letter of intent on January 7, 2013, less than one year after the Department first learned of the misconduct. The ALJ

---

[2] As the Department points out, the record is unclear which motion to dismiss the ALJ was referencing. The initial written motion to dismiss had been treated as a demurrer and denied; the oral motion to dismiss made by Bravo at the hearing had only focused on the over-detention issue.

therefore denied the motion to dismiss the allegation based on Bravo's false entry in the ROS.

The ALJ found that by knowingly making an erroneous entry in the ROS regarding the events of November 23, 2010, Bravo committed an inexcusable neglect of duty (Gov. Code, § 19572, subd. (d)); by knowingly making the erroneous entry and falsely stating in his OIA interview that the entry was accurate, Bravo violated the prohibition against dishonesty (*id.*, subd. (f)); by knowingly failing to maintain an accurate ROS, Bravo committed willful disobedience (*id.*, subd. (o)); and his conduct also constituted other failure of good behavior (*id.*, subd. (t)). The ALJ concluded that Bravo's dismissal was a just and proper penalty for his misconduct.

On February 6, 2014, the Board adopted the ALJ's proposed decision, and on April 24, 2014, the Board denied Bravo's petition for rehearing.

E. *Trial Court Proceedings*

On July 29, 2014, Bravo filed a petition for writ of administrative mandamus challenging the Board's decision. Bravo raised three grounds in support of the writ: the finding that Bravo was not previously disciplined for the record falsification was not supported by the record; the finding of dishonesty at the internal affairs interview was not supported by the record; and dismissal was not a just or proper penalty. The statute of limitations defense was not raised in the petition.

In his brief in support of the petition, however, Bravo argued that Brust "must have known" of the false entry as soon as he knew of the over-detention because it "defies logic" for Brust to have not known about it. He did not argue, however,

that there was evidence presented that the Department should be held to the inquiry notice standard adopted by *Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87 (*Pedro*). In its Opposition, the Department asserted that Bravo had presented no evidence to counter the Department's evidence that it first discovered the false entry on January 11, 2012 as part of Brust's investigation. In his reply brief, Bravo only focused on when Brust knew of the over-detention and did not argue that Brust should have discovered the record falsification earlier through a reasonable investigation.

After a hearing on the merits, the trial court denied the petition. The court found that the Board properly concluded that the "appropriate accrual [period] point for the running of the limitations period was when Brust received Patchen's . . . complaint on January 12, 2012," and that the assertion that it "should have started to run at an earlier date is not supported by any evidence in the record. [Bravo's] assertion that [the Department] 'must have known' about the false entry is an inadequate substitute for such evidence."

DISCUSSION

A. *Standard of Review*

"Code of Civil Procedure section 1094.5 governs judicial review of a final decision by an administrative agency if the law required a hearing, the taking of evidence, and the discretionary determination of facts by the agency. (*Id.*, subd. (a).) The petitioner must show that the agency acted without or in excess of jurisdiction, failed to afford a fair trial, or prejudicially abused its discretion. (*Id.*, subd. (b).) An abuse of discretion is shown if

the agency failed to proceed in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. (*Ibid.*)" (*Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1260.)

The Board is a statewide administrative agency to which the California Constitution grants the adjudicatory power to review disciplinary actions taken against state civil service employees. (Cal. Const., art. VII, § 3; *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 584.) "Because the State Personnel Board derives its adjudicatory authority from the state Constitution rather than from a legislative enactment, a superior court considering a petition for administrative mandate must defer to the board's factual findings if they are supported by substantial evidence. [Citation.]" (*State Personnel Bd. v. Department of Personnel Admin.* (2005) 37 Cal.4th 512, 522.) The Board's factual determinations are not subject to independent review by the trial court even if fundamental vested rights are involved. (*Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1125; *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 35.)

"In applying the substantial evidence test to such a decision, a court must examine all relevant evidence in the entire record, considering both the evidence that supports the board's decision and the evidence against it, in order to determine whether that decision is supported by substantial evidence. [Citation.] This does not mean, however, that a court is to reweigh the evidence. Rather, all presumptions are indulged and conflicts resolved in favor of the board's decision. [Citation.]" (*Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 742.)

On appeal, we independently determine whether substantial evidence supports the Board's factual findings. (*Department of Corrections & Rehabilitation v. State Personnel Bd.* (2016) 247 Cal.App.4th 700, 707.)

B. *Bravo Cannot Challenge the Administrative Decision Based on an Issue That Was Not Presented in the Administrative Proceeding*

Bravo argues on appeal that his discipline for the false ROS entry was time-barred because the Department served the letter of intent notifying him of the proposed discipline more than one year after Brust reasonably should have discovered the false record. Bravo argues that on November 29, 2010, when Brust first learned that Patchen had been incarcerated beyond his release date, Brust should have investigated the matter, and through a diligent investigation Brust would have discovered the false ROS entry. Bravo relies on *Pedro*, which held that the one-year limitations period under Government Code section 3304, subdivision (d), begins to run when a person authorized to initiate an investigation actually discovers or, through the exercise of reasonable diligence, *should have discovered* the allegation of misconduct. (*Pedro*, *supra,* 229 Cal.App.4th at p. 106.) Bravo argues that the Board applied the wrong legal standard in finding that the Department had no actual knowledge of the false ROS entry until Brust received Patchen's federal complaint on January 12, 2012.

The scope of judicial review in administrative mandamus proceedings is limited to issues presented to the administrative agency. (*Dobos v. Voluntary Plan Administrators, Inc.* (2008) 166 Cal.App.4th 678, 688; *City of Walnut Creek v. County of Contra*

Costa (1980) 101 Cal.App.3d 1012, 1019-1020.) The agency must have an opportunity to decide the issues, and issues not raised before the agency are forfeited. (*Moore v. City of Los Angeles* (2007) 156 Cal.App.4th 373, 383.) "'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.]' (*Bohn v. Watson* (1954) 130 Cal.App.2d 24, 36 . . . ; see also *Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464, 1481 . . . ['It has long been the law in California that any available defense should be asserted at the earliest opportunity and certainly at an administrative hearing']; *Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 894 . . . ['It is axiomatic that judicial review is precluded unless the issue was first presented at the administrative level']][, disapproved on another ground in *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 539]; *Cal. Employment Com. v. MacGregor* (1944) 64 Cal.App.2d 691, 692-693 . . . [failure to raise statute of limitations defense before state commission constitutes waiver of the issue].)" (*Id.* at p. 382.)

As *Moore* explained: "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.]'" (*Moore v. City of Los Angeles*, *supra*, 156 Cal.App.4th at p. 383.) If a state employee desires to "'avail [him or] herself of the asserted bar of limitations, [he or] she should have done so in the administrative forum, where the commissioner could have prepared [a] case, alert to the need of resisting this defense, and the hearing officer might have made appropriate findings thereon.'" (*Ibid.*)

The Department argues that Bravo failed to properly raise before the Board a statute of limitations defense to the record falsification charge. The Department points out that Bravo did not set forth a statute of limitations defense in the required prehearing settlement conference statement. It further argues that while Bravo generally raised a statute of limitations argument in his motion to dismiss filed on April 16, 2013, Bravo did not put the Department on notice that he was claiming that Burst should have known about the falsified ROS entry at the time the over-detention was discovered, or through the exercise of reasonable diligence should have discovered that act of misconduct. The Department further contends that Bravo expressly limited his motion to dismiss during oral argument before the Board on July 30, 2014, challenging only the timeliness of the prosecution of the over-detention claim. While it was prepared to put on evidence to counter any statute of limitations defense, the Department argues that the issue was never squarely presented either by opening statement, examination of witnesses, or closing argument, resulting in the Department never having a fair opportunity to counter the factual issue now presented on appeal.

Bravo counters that he raised a challenge to the timeliness of the record falsification claim by generally objecting to the allegations against him on the basis of Government Code section 3304, subdivision (d), in his motion to dismiss.

We are inclined to agree that Bravo did not properly present and preserve the argument that the statute of limitations ran on the Department's ability to terminate him for record falsification. Bravo did not raise the affirmative defense of the statute of limitations in his prehearing settlement conference statement, which must set forth the "[i]dentification of affirmative defenses to any claim." (Cal. Code Regs., tit. 2, § 57.1, subd. (f)(3).)[3] Bravo's statement of affirmative defenses merely provided: "Appellant contends that the facts are not accurate as alleged, that he was within policy in his conduct, and that even where all facts may be found to be true, the dismissal is not appropriate under the totality of the circumstances."

While Bravo's written motion to dismiss filed prior to the hearing could be interpreted to raise a statute of limitations challenge to both the over-detention and the record falsification

---

[3] The regulations provide that "[f]ailure to timely file or fully disclose all required items in the prehearing/settlement conference statement without good cause may, at the discretion of the ALJ, result in the exclusion or restriction of evidence at the hearing." (Cal. Code Regs, tit. 2, § 57.1, subd. (g).) We need not decide whether failure to raise a defense in the prehearing settlement conference statement constitutes an absolute waiver of the defense, as we find that Bravo failed to give adequate notice to the Department and the Board at multiple stages, which, when viewed together, constitute failure to adequately present the issue of the statute of limitations at the Board level.

charges, his counsel's subsequent presentation at the hearing down-played any claim by Bravo that the Department should have reasonably discovered the false entry when Brust first learned of the over-detention.

At the second day of the administrative hearing, counsel for Bravo made a renewed motion to dismiss. The Department questioned whether the motion to dismiss under Government Code section 3304, subdivision (b), was directed at both the over-detention and the record falsification charges. Bravo's counsel explained that the motion to dismiss was "limited to the allegation of over-detainment." The ALJ confirmed on the record that was her understanding of the motion as well, and the parties thereafter presented evidence based on counsel's representation. No evidence was presented to support Bravo's assertion, made on appeal, that Brust or other supervisors should have learned of the falsified record by making reasonable inquiries after the over-detention was discovered in November 2010. The only evidence presented on the issue was testimony elicited from Brust that he had no obligation to investigate further, that he was not a supervisor with power to initiate an investigation and he did not believe any further inquiry was required, based on all of the information known to him in November 2010 and the fact that it was Bravo's first over-detention. No contrary evidence was presented by Bravo, although he had the ability to present witnesses to support his inquiry-notice theory. In closing argument, Bravo's counsel did not raise a statute of limitations defense to the falsification charge, or argue that reasonable

inquiry would have uncovered the falsified record when the over-detention was first discovered.[4]

We need not hold Bravo forfeited the issue, however, because the record before the Board does not support his statute of limitations defense. The only evidence presented was Brust's testimony that a single over-detention did not warrant a report to Brust's superiors and that Brust reasonably believed counseling was sufficient without further investigation. Brust further testified that he was not authorized to conduct an investigation under the Department's policy. Even applying the inquiry notice standard adopted by *Pedro*, this was insufficient evidence that anyone who had authority to conduct an investigation knew or should have known about the misconduct until Patchen's civil rights complaint was served on the department. (*Pedro, supra*, 229 Cal.App.4th at p. 106 ["one-year limitations period under [Gov. Code, § 3304, subd. (d)(1)] begins to run when a person authorized to initiate an investigation discovers, or through the use of reasonable diligence should have discovered, the allegation of misconduct"].)

---

[4] The ALJ and the Board did consider and rule on the more limited statute of limitations defense advanced by Bravo at the hearing that Brust *had actual knowledge* of the falsification on November 30, 2010, when he first learned about the over-detention. The ALJ found and the Board adopted the finding that Brust did not have actual knowledge until January 12, 2012, when he received Patchen's federal complaint. Substantial evidence supports the Board's conclusion that Brust did not know about the falsified ROS entry until January 12, 2012, bringing the notice of adverse action within the one year provided by Government Code section 3304, subdivision (d).

C. *Substantial Evidence Supports the Finding that Bravo Received No Prior Discipline for the False ROS Entry*

Citing the Board's ruling that the Department cannot impose discipline for the same conduct that was the subject of a prior discipline, Bravo argues the performance plan of action memorandum and Brust's verbal counseling in June 2012 covered the false ROS entry, while conceding the false record is not mentioned anywhere in the performance plan. Bravo argues that despite the absence of any express reference to the false ROS entry in either the memorandum or his written rebuttal, "the only reasonable inference" is that Brust delivered the memorandum to Bravo upon Bravo's return to work in June 2012 *because* Brust had recently discovered the false ROS entry. Bravo testified at the administrative hearing that when Brust handed him the memorandum, Brust told him it addressed both the over-detention and the false ROS entry. Pointing to his own testimony and a reasonable inference to be drawn from the timing of the memorandum, Bravo argues that there was substantial evidence to support his defense that he had previously been disciplined for the false ROS entry, which would bar further discipline for that same offense.

The performance plan of action memorandum given to Brust on June 11, 2012, stated that during the review period from October 11, 2011 to April 11, 2012, Bravo had received "two write-ups for failure to release Parolee Paul Patchen . . . from custody on November 23, 2010, missing specs on a 2nd Striker, CS, PM, and PAI cases."[5] The memorandum did not mention the

---

[5] The "two write-ups" themselves, if they exist, are not in the record. Brust testified at the appeal hearing regarding the over-detention, "I don't recall writing him up for that incident . . . ."

false ROS entry. Bravo's written rebuttal, prepared on June 12, 2012, also did not mention the false ROS entry. Brust testified at the administrative hearing that he discovered the false ROS entry in January 2012 and reported it to his superiors, but he never issued any written corrective action to Bravo for the false ROS entry.

We conclude that in the absence of any written record of discipline for the false ROS entry, the absence of any reference to the false ROS entry in either the performance plan of action memorandum or Bravo's rebuttal, and Brust's own testimony that he never issued any write-up to Bravo for the false ROS entry, there is insufficient evidence to compel a finding that there was prior discipline for record falsification. Contrary to Bravo's argument, neither the circumstances and timing of the memorandum nor Bravo's testimony that Brust stated that the memorandum covered both the over-detention and the false ROS entry compels the conclusion that Brust formally or informally disciplined Bravo for the false ROS entry at the time of the memorandum. As the trier of fact, the Board could reasonably conclude that the language of the memorandum itself showed that it did not impose discipline for the false ROS entry and that Bravo's testimony regarding his conversation with Brust was inaccurate or false.

D. *Substantial Evidence Supports the Finding of Dishonesty*

Bravo argues that there was insufficient evidence to support the Board's finding that he was intentionally dishonest when questioned during the OIA investigation about the false November 23, 2010 entry in the ROS. He points to testimony by OIA investigating officer Lopez that Bravo appeared

"dumbfounded," "apologetic[,] and contrite" in his OIA interview when confronted with the inaccurate entry. Bravo also notes that the Board's decision did not "identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination" (Gov. Code, § 11425.50, subd. (b)). He acknowledges that at the start of the OIA interview, he stated "if I put it on there it occurred" with respect to the November 23, 2010 entry, until changing his statement when shown the actual record.

Government Code section 19572 lists causes for employee discipline, including "[d]ishonesty" (*id.*, subd. (f)). "'Dishonesty' connotes a disposition to deceive." (*Gee v. California State Personnel Bd.* (1970) 5 Cal.App.3d 713, 718.)

The Board determined that Bravo was dishonest when he knowingly made the false entry in the ROS and when he stated in his OIA interview that the entry was accurate. Bravo challenges the finding of dishonesty with respect to his statement in the interview.[6]

Lying during an investigation has significant public policy ramifications and supports a finding of dishonesty separate from the underlying offense. (*Department of Corrections & Rehabilitation v. California State Personnel Bd.* (2007) 147 Cal.App.4th 797, 808 ["public policy considerations—including the fact that correctional officers are involved, California's policy

---

[6] Bravo's only challenge to the dishonesty finding as it relates to the ROS entry is brought on statute of limitations grounds, which we have previously discussed. He does not challenge the sufficiency of the evidence on the issue of whether he prepared a false record.

against hiring dishonest employees, and the policy favoring honesty over dishonesty—support our finding that extensive lying does not merge with the underlying offense. . . . [A] contrary finding would encourage lying during investigative interviews because there are no consequences for lying if the lie is not caught prior to the expiration of the limitations period on the underlying misconduct"].) We review the evidence before the Board with these public policy considerations in mind.

There was substantial evidence before the Board that Bravo was intentionally dishonest when he told Lopez that the November 23, 2010 entry was correct and that his look of surprise and contrition was false. The record showed that Bravo had been counseled repeatedly about the over-detention prior to the OIA interview: in December 2010, Brust had verbally counseled Bravo about the over-detention; in June 2012, Bravo received the performance plan of action memorandum stating that he had received two write-ups for failing to release Patchen; and in June 2012, Bravo delivered a rebuttal stating that he had already been written up for the over-detention. Nonetheless, when asked by Lopez in October 2012 about his record-keeping generally and the November 23, 2010 entry specifically, Bravo maintained "if I put it on there it occurred." At the hearing Bravo tried to explain his surprise when confronted with the actual entry, stating he "was surprised, kind of, . . . upset at myself . . . for not releasing the guy." This explanation lends further support for the finding of dishonesty, as the evidence was overwhelming that Bravo had known about the failure to release Patchen for nearly two years by the time of the OIA interview. Any expression of surprise would appear fabricated given this long history. Bravo's statement to Lopez, "if I put it on there it

occurred," was further undermined by Bravo's admission at the administrative hearing that it was his practice to write entries days after his contact with the parolee and to include as facts in the ROS what typically occurred even if he had no memory of it. This testimony about his actual practice of completing these critical records squarely contradicts his statement to Lopez that "if I put it on there it occurred." In short, Bravo's own testimony constitutes substantial evidence, which fully supports the ruling made by the Board that Bravo was dishonest during an investigative interview.

DISPOSITION

The judgment is affirmed. The Department is entitled to costs on appeal.

KEENY, J*

We concur:

PERLUSS, P. J.

SEGAL, J.

---

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