Filed 8/25/15 Gurrola v. City of Los Angeles 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

RICHARD GURROLA, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B254721 (Los Angeles County Super. Ct. No. BS141739)

APPEAL from a judgment of the Superior Court of Los Angeles County, Luis Lavin, Judge. Affirmed.

Law Offices of Gregory G. Yacoubian and Gregory C. Yacoubian for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, and Paul L. Winnemore, Deputy City Attorney, for Defendant and Respondent.

Los Angeles Police Officer Richard Gurrola was discharged by the Los Angeles Police Department (Department) after a board of rights found him guilty of being absent without leave from his job for two months in late 2011. Gurrola unsuccessfully petitioned the superior court for mandamus relief under Code of Civil Procedure section 1094.5 to set aside his termination. On appeal Gurrola contends termination was an excessive penalty because the Department was partially responsible for his absence: It had given him incorrect information regarding the requirements for him to return to work after recovering from a work-related injury. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Complaint and Board of Rights Proceedings*

On May 16, 2012 Officer Gurrola was served with a personnel complaint and notice of relief from duty and proposed removal, suspension or demotion issued by Chief of Police Charlie Beck, charging him with one count of being absent from work without leave between October 17, 2011 and December 16, 2011 (count 1) and one count of providing false statements during the investigation into his absence (count 2).

On December 3, 2012 the board of rights convened, and Officer Gurrola pleaded not guilty to both counts. On December 5, 2012, after hearing testimony from seven witnesses and examining 17 exhibits, the board of rights found Gurrola guilty of count 1 and not guilty of count 2. The board recommended that Gurrola be removed from his position. On December 13, 2012 Chief of Police Beck signed an order adopting the recommendation, and Gurrola was terminated.

a. *Officer Gurrola's testimony*

Officer Gurrola, hired in March 1997, testified he was a police officer II with the Harbor Division at the time of the hearing. On October 5 or 6, 2011 Gurrola suffered a back spasm, which was a flare-up of a prior work-related injury. Gurrola scheduled an appointment with Dr. Simon Lavi, who had treated the initial injury, but could not get an appointment earlier than October 11, 2011. Dr. Lavi's office, which had previously backdated medical notes for Gurrola, assured him he would receive injured on duty (IOD) pay notwithstanding the delay in seeing the doctor. Gurrola then informed

Sergeant Clayson, who worked a different watch from Gurrola, of his status. Although Clayson had told Gurrola he would inform Gurrola's supervisors that he was IOD, two days later Sergeant Hearn, one of Gurrola's direct supervisors, called Gurrola to find out why he had not reported to work that day. Gurrola repeated to Hearn what he had told Sergeant Clayson.

On October 12, 2011 Sergeant Richard Gabaldon called Officer Gurrola because Gurrola's name was on the list for the day's lineup but he had not reported for duty. Gurrola told Gabaldon that he had a medical note dated October 11, 2011 placing him off work from October 6 through October 14, 2011 (although the note stated Gurrola was "released to return to full duty work" on October 15, 2011, that day and the next were Gurrola's regularly scheduled days off). Gabaldon asked Gurrola to fax or drop off the medical note that night so that the Department's personnel section could begin preparing the IOD paperwork. According to Gurrola, he faxed the note to Gabaldon.

The next morning, October 13, 2011, Officer Gurrola listened to a voice mail message he had received late the prior evening from Sergeant Danielle Wells, who was preparing the IOD paperwork. Wells asked Gurrola to call her because she had some questions. Although Gurrola had intended to call Wells around 5:00 p.m. when her shift began, he forgot to do so.

On Saturday, October 15, 2011 Sergeant Wells and Sergeant Julie McInnis, who was Officer Gurrola's primary supervisor on the third watch, conducted a "sick check" of Gurrola at his home.[1] Gurrola immediately apologized for not returning Wells's call, explaining he had simply forgotten. Wells then told Gurrola his medical note was incomplete because, for example, it did not identify Gurrola's injury or indicate whether it was new or a reoccurrence of an old injury or indicate the doctor had the authority to release him back to full duty status. Although Gurrola explained his circumstances and told Wells similar notes had sufficed in the past, Wells told him he could not come back

---

1 The Department policies and procedures manual provides an in-person interview shall be conducted when unauthorized use of sick time is suspected, there is any indication the employee needs assistance, or IOD status is claimed.

to work until he obtained a new note and, if he tried to report for duty, he would be sent home. Gurrola told Wells it could take a week to get another appointment with Dr. Lavi because of the doctor's busy schedule.

On October 17, 2011 Officer Gurrola left a message with Tai, an employee with Dr. Lavi's office, explaining he needed a new medical note. Tai did not return his call. Gurrola left several more messages for her over the next few weeks. Although Gurrola may have spoken with Tai once in the beginning of November, she failed to call him after that. Gurrola never thought to go to Dr. Lavi's office to talk to Tai in person.

During the time Officer Gurrola was attempting to contact Tai, he also tried to contact police service representative Margaret Taylor, the Harbor Division sick and IOD coordinator; but she was never available.[2] Gurrola left at least one voicemail message, asking Taylor to clarify what he needed to do to return to work. Taylor did not return his call. Gurrola did not go to the station to talk to Taylor, even though he only lived five miles away, because he had been told Taylor was either on vacation or out sick or on IOD and there did not seem to be any reason to simply show up there. Gurrola did not attempt to contact his direct supervisors because he believed they knew he had been ordered by Sergeant Wells not to return to work until he obtained a more complete medical note. Although Gurrola conceded he was charged with knowledge of the contents of the Department's policies and procedures manual and acknowledged he was familiar with the IOD process as a result of his original back injury, he testified he had never read the section of the manual providing that employees who are IOD must contact a supervisor in their assigned division once a week "for the purposes of providing a report of their status and maintaining contact with the Department for duty-related matters."

In early November Officer Gurrola contacted the workers' compensation attorney who had initially referred him to Dr. Lavi for help obtaining a new medical note. Megan, one of the attorney's assistants, periodically updated Gurrola that they had been

---

2 Sergeant Wells assisted Taylor, who primarily worked during the day. In addition to completing paperwork, Wells took officers injured during the evening to the contract hospital.

communicating with Tristar Risk Management, the Department's third party claims administrator, but were still trying to figure out what Gurrola needed to return to work.

On December 16, 2011, at Megan's suggestion, Officer Gurrola again tried to contact Taylor. This time, he was finally able to reach her. (Gurrola had still not tried to contact his direct supervisors.) Although Taylor recalled Gurrola had been out a few months earlier pursuant to a medical note, she did not realize he had not returned to work. Taylor then reviewed the October 11, 2011 medical note and told Gurrola it was sufficient and that he should return to work the following day. In response Gurrola asked if he could take vacation time because he had been advised he had vacation days he would lose if he did not use them before the end of the year. Taylor told Gurrola she was not sure because Gurrola, who had continued to receive paychecks while he was off duty, might be considered absent without leave for the period after the medical note had cleared him to return to duty. Gurrola returned to full duty on Monday, December 19, 2011.

Officer Gurrola's phone records for October through December 2011 were introduced into evidence.

b. *Other witness testimony*

Other witnesses who testified included Sergeant Gabaldon, Sergeant Wells, Sergeant McInnis and Taylor. There was conflicting testimony on several points. For example, contrary to Officer Gurrola's testimony he had told Wells he saw Dr. Lavi on October 11, 2011 and did not know when he would be able to see him again to get a more complete medical note, Wells testified Gurrola said he was going to see Dr. Lavi for the first time on October 18, 2011 and was certain he would get a medical note clearing him to return to full duty later that day. Wells further testified she told Gurrola, and he confirmed he understood, "And I'll tell Sergeant Jones when I return that you're coming back full-duty, according to you. October 18th on Monday you will be sitting in roll call in the chair with a doctor's note stating that you're going back to work." Although Wells testified McInnis followed up on her comments and reiterated everything Wells had told Gurrola, McInnis testified she was not paying close attention to the conversation between

Wells and Gurrola and only heard some references to Gurrola needing a note or his note was not sufficient.

There was also conflicting testimony on less significant points including whether Sergeant Wells saw the medical note before the sick check or had a copy of it during the check (McInnis testified she did not recall Wells having any paperwork with her when they went to Officer Gurrola's house), whether Gurrola left any voicemail messages for Taylor during the period October 2011 through December 2011 and whether Gurrola had hand-delivered the medical note to the station or only faxed it.

There were several material points on which there was no conflicting testimony. For example, on June 22, 2010 Officer Gurrola had been issued a notice informing him he had to provide medical documentation when he called in sick—known as a sick letter—because a review of his attendance record suggested an "inappropriate pattern of absenteeism." For the period January 1, 2010 and June 30, 2010 Gurrola had called in sick 10 times, using 120 hours, on days surrounding his scheduled days off, which resulted in significant periods off duty, for example, 10 consecutive days in one instance and 11 in another. In contrast, the average amount of sick time used by officers for 2009-2010 was 60.4 hours per year. The notice also stated, "In addition, failure to provide appropriate medical documentation upon your return to work may be reported as 'Absent without Leave' . . . ." Moreover, it was undisputed the Department's policy and procedure manual provided that, in addition to an IOD employee being required to contact his or her supervisor every seven days, the employee's "commanding officer shall ensure that a supervisor conducts a follow-up interview within seven days of the initial interview and another during each succeeding seven-day period." Sergeant Gabaldon testified he was unaware of the policy, and there was no evidence any Department personnel initiated contact with Gurrola after Sergeants Wells and McInnis conducted the sick check in October 2011.

c. *The board of rights' decision*

The board of rights found Officer Gurrola guilty of being absent from work without leave, explaining, "Gurrola was not sick, ill or injured during the time period

between October 17, 2011 and December 16, 2011. During this time period, he did not have approval to be absent. Gurrola testified that he was aware he was being carried as sick and that he was not, in fact, sick during this time period. While Gurrola made a number of attempts to contact the sick and IOD coordinator and his doctor, he failed to make a reasonable effort to return to work. He failed to come into the station or to call any of his supervisors in an attempt to resolve the situation when he was aware he was being carried as sick and was not sick. . . . The board concludes that it is not reasonable to believe that Gurrola, with 15 years on the Department, was not aware that he was absent without leave, nor is it reasonable for Gurrola to interpret Sergeant Wells's admonishment that he may be sent home if he reported to work without a new note as direction not to return to Harbor Station for any reason until such time he procured a new doctor's note." The board found, however, the Department did not carry its burden of demonstrating Gurrola had made false statements during the investigation.

After hearing testimony from two character witnesses and reviewing Officer Gurrola's personnel file, which included a satisfactory work history and some commendations, the board recommended he be terminated. The board explained Gurrola had taken "advantage of the system to remain absent," conduct it described as falling "far short" of the "high level of ethical standards" to which the Department held its officers. The board in part explained, "The impact of this case on police department operations is significant. Through his actions, Gurrola demonstrated disregard for his fellow officers and their safety. He undermined the image of the LAPD by continuing to collect a salary while absent from work without approval. Gurrola's absence without leave would have affected the deployment negatively, forcing his peers to pick up his workload and would have undermined management's ability to manage the work force."

The board also found significant what "appear[ed] to be a pattern of inappropriate use of sick time as demonstrated by" the June 2010 letter requiring Officer Gurrola to present evidence of illness in conjunction with sick leave. That letter "outline[d] an unacceptable pattern of absenteeism on the part of Gurrola, where he used sick time in conjunction with days off. During that six-month period, Gurrola used four times the

average number of sick time hours as other officers." The board also found a 2002 complaint against Gurrola raised similar issues regarding his understanding and follow-through relative to sick reporting, but did not give it significant weight because of its age.

2. *Proceedings in the Superior Court*

On March 1, 2013 Officer Gurrola petitioned for a peremptory writ of mandate in the superior court seeking an order compelling the City of Los Angeles to set aside its decision to terminate him, reimburse him for lost wages plus interest and restore all of his employment benefits. Gurrola contended the guilty finding was not supported by substantial evidence[3] and the penalty was excessive because it was a "radical departure" from discipline that had been recently imposed for similar or even more severe misconduct by other officers. The court denied Gurrola's petition, finding the weight of the evidence established he was absent without leave. With regard to the decision to terminate him, the only issue Gurrola challenges on appeal, the court found the City of Los Angeles had acted within its discretion in terminating Gurrola: "[T]here was evidence adduced at the hearing that this was not the first instance of [Gurrola] being absent from work without a valid excuse. Indeed, [Gurrola] was inexcusably absent on such numerous occasions prior to this incident that [Gurrola's] commanding officer issued [Gurrola] the sick notice requiring him to submit a doctor's verification each time he requested a sick day."

DISCUSSION

"'[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 Board* (1975) 15 Cal.3d 194, 217 (*Skelly*); accord, *Bautista v. County of Los Angeles* (2010) 190 Cal.App.4th 869,

---

3 Officer Gurrola argued the evidence demonstrated the Department had refused to accept his valid doctor's note returning him to duty, he had made exhaustive efforts to get clarification as to what he needed to return to work, the Department had failed to contact him during the period his status was IOD as required by Department policy, and official Department records did not indicate he was absent without leave between October 17, 2011 and December 16, 2011.

879.) We review "the administrative determination, not that of the superior court, by the same standard as was appropriate in the superior court." (*Schmitt v. City of Rialto* (1985) 164 Cal.App.3d 494, 501.) "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.) "This rule is based on the rationale that 'the courts should pay great deference to the expertise of the administrative agency in determining the appropriate penalty to be imposed.'" (*Hughes v. Board of Architectural Examiners* (1998) 68 Cal.App.4th 685, 692.) "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. v. Concepcion* (1993) 16 Cal.App.4th 1766, 1778-1779.) "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion the administrative body acted within the area of its discretion." (*Pegues v. Civil Service Com*. (1998) 67 Cal.App.4th 95, 107; accord, *Hughes*, at p. 692.)

While an administrative agency has broad discretion in imposing a penalty or discipline, it is not unfettered. (*Skelly, supra*, 15 Cal.3d at pp. 217-218 [agency "does not have absolute and unlimited power"].) In considering whether an agency abused its discretion, "the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, '[harm] to the public service.' [Citations.] Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence." (*Id.* at p. 218.)

Officer Gurrola contends the board of rights abused its discretion in terminating him because the Department was partially at fault for his absence from work. Gurrola argues, if the Department had conducted follow-up interviews as required by its own policy, the inadequacy of his doctor's note would have been quickly identified and resolved, resulting in a more timely return to work. Gurrola further contends, as in *Skelly* in which the Court found termination was an excessive penalty, his job performance had met or exceeded expectations and colleagues had described him as a hard worker, liked by both his peers and supervisors. (See *Skelly, supra*, 15 Cal.3d at pp. 218-219 [Dr.

Skelly's immediate supervisor "rated his work as good to superior . . . and described him as efficient, productive, and the region's 'right hand man' on ear nose and throat problems. Two other employees who worked with [Skelly] testified that he was informative, cooperative, helpful, extremely thorough and productive."].)

As a threshold matter, the facts presented in *Skelly* are only comparable to the extent that they involved the question whether termination was an excessive penalty for misconduct. Unlike the instant case in which Officer Gurrola was entirely absent from work without leave for approximately two months, the primary misconduct at issue in *Skelly* was the length of Skelly's lunch breaks—generally five to 15 minutes beyond the allotted one hour—and twice leaving the office for several hours without permission. The Court found the record was "devoid of evidence directly showing how petitioner's minor deviations from the prescribed time schedule adversely affected the public service. To the contrary, the undisputed evidence indicates that he more than made up for the excess lunch time by working through coffee breaks as well as on some evenings and holidays. With perhaps one or two isolated exceptions, it was not shown that his conduct in any way inconvenienced those with whom he worked or prevented him from effectively performing his duties." (*Skelly supra*, 15 Cal.3d at p. 218, fns. omitted.) Moreover, although Gurrola's performance as a police officer II—not a supervisory position—was generally satisfactory, and may have exceeded expectations in some respects, Skelly, a medical consultant described as a "'right hand man,'" clearly possessed critical and unique skills.

With respect to the Department's role in Officer Gurrola's situation, it may be correct that the adequacy of the medical note would have been ascertained earlier had a supervisor initiated weekly contact with Gurrola as required by the Department manual. Nonetheless, this departmental lapse does not absolve Gurrola of his responsibility or culpability. The Department has a multitude of employees to track; Gurrola had only his own welfare to ensure. Indeed, given Gurrola's early experience during this absence—Sergeant Clayson's failure to advise Gurrola's supervisors he was IOD, and Sergeant Hearn's apparent failure to ensure the day's lineup reflected Gurrola's status—it was

apparent the Department's ability to monitor its personnel's IOD and sick status was compromised. That Taylor herself was continually out (and Wells also went out on IOD) was confirmation of the Department's confusion in this regard. It was not unreasonable for the board to find Gurrola took advantage of this state of affairs in part by only trying to contact Taylor, not one of his direct supervisors, while he was physically able to return to work.

Although the penalty of termination is harsh, these facts do not present the exceptional case in which reasonable minds cannot differ: The board properly found that public service was compromised by Gurrola's two-month absence from work without leave, requiring other personnel to cover his shifts. In addition, the evidence supports a finding Gurrola's actions were consistent with a pattern of improperly taking extended absences from work. Gurrola's argument this case "has nothing to do with [his] use or misuse of 'sick days'" because it "pertains to return to duty after being off IOD" is a false distinction. The 2010 sick letter and the facts of this case, including Gurrola's failure to comply with Department policy requiring him to contact a direct supervisor once a week while on IOD, demonstrate a lack of commitment to being present on the job and put at issue, as the board of rights found, Gurrola's integrity: As a 15-year veteran who had previously been out on IOD and had similar medical notes considered acceptable, Gurrola's explanation of his choices in addressing Wells's statement regarding the adequacy of the note lacked credibility. The City did not abuse its broad discretion in choosing to terminate Gurrola. (Cf. *Haney v. City of Los Angeles* (2003) 109 Cal.App.4th 1, 12 [upholding termination for officer who attended barbecue while on duty without authorization and submitting false daily report to conceal time spent at barbecue].)

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.