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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOHN GOINES, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B282701 (Los Angeles County Super. Ct. No. BS161783)

APPEAL from a judgment of the Superior Court of Los Angeles County, Amy D. Hogue, Judge. Affirmed.

Rains Lucia Stern St. Phalle & Silver, Jacob A. Kalinski and Amanda J. Waters for Plaintiff and Appellant.

Office of the Los Angeles City Attorney, Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, and Paul L. Winnemore, Deputy City Attorney for Defendant and Respondents.

Petitioner John Goines, an officer with the Los Angeles Police Department, appeals from the judgment denying his challenge to the 10-day suspension imposed because Goines made remarks to a civilian that were both discourteous and of an "ethnic" nature. Goines contends that: (1) respondents violated his due process rights by not giving him adequate notice that the charges against him had been amended; (2) he was deprived of a fair hearing; (3) we should independently review the factual basis for the charges against him; and (4) the 10-day suspension was excessive. We reject these contentions and therefore affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Background

John Goines, an African American, has served as an officer with the Los Angeles Police Department (the department) since 1988. He has been assigned to the West Traffic Division since 2009. The incident at issue here occurred between Goines and Christian Kemmerling, a Caucasian male, on October 11, 2012.

Kemmerling Initiates a Complaint

On November 26, 2012, Kemmerling lodged a complaint against Goines alleging that he (1) was discourteous by making a profane statement during their contact; (2) made an improper remark by asking something to the effect of "In what world do you believe I believe a White man would stop for a Black man to help him?"; and (3) conducted an unnecessary frisk search of his person. The complaint went through the chain of command, and

Sergeant Christopher Kunz conducted an administrative investigation.[1]

Witness Interviews

Kemmerling was interviewed by Internal Affairs investigators. According to Kemmerling, on the date in question, he stopped his car after observing a man frantically waving for assistance. The man, later identified as Dominique Harris, told Kemmerling that he was okay but asked to use his phone. Harris lived far away and his tow service from the Auto Club was capped at seven miles. Kemmerling suggested Harris should call his insurance company for assistance. Then, a fire truck stopped, and a firefighter leaned out the window to ask Harris if he was okay. Harris said yes and the fire truck left. A tow truck pulled up shortly thereafter, even though nobody had requested a tow.

Goines arrived a few minutes later. Suspecting Kemmerling was working as a "capper" for a bandit tow truck driver, Goines immediately asked Kemmerling "'who do you work

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[1] When a complaint is lodged against an officer, the department generates a complaint sheet and a determination is made as to whether it will be investigated by Internal Affairs or by someone in the officer's chain of command. If the complaint is adjudicated through the chain of command, a supervisor is assigned as an investigator. After the investigation is complete, the investigator recommends whether or not the complaint should be sustained. When a complaint is sustained, the investigator recommends a penalty. The recommendation is reviewed "at the bureau level" and by Internal Affairs, which then presents the investigation materials and its recommendation to the chief of police. The chief makes the final decision.

for?"[2] Kemmerling said he worked for DPC Woodwork, a construction company. Goines walked over to the tow truck driver and instructed him to leave. After Kemmerling told Goines what happened, Goines yelled at Harris to get off the phone. Kemmerling left after Goines said he would handle the situation.

Kemmerling said that after he drove off, Goines flagged him down. Kemmerling stopped, and Goines accused him of being a liar, asked if Kemmerling thought he was "fucking stupid," and said it was not his first day on the job. Kemmerling was confused, asking Goines what he was talking about. The officer said that Kemmerling knew exactly what he was talking about and told Kemmerling he was going to jail for "soliciting." Harris explained that he had flagged down Kemmerling for assistance. Goines again accused Kemmerling of lying and instructed him to turn around and place his hands on his head.

Goines kicked Kemmerling's legs out and frisked him, instructing him to remove his identification. Kemmerling asked what was going on. Goines responded, saying: "'don't officer me, I am not an idiot. I have been doing this for 25 years,'" and "'in what world do [you] believe . . . a white man will stop for a black man to help him?'" Kemmerling did not know how to respond, but he told Goines that his brother was a sheriff and "'is going to

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[2] A "bandit" tow truck driver searches the roads for stranded motorists and solicits them to use their towing service, charging them exorbitant fees in exchange for a return of the vehicle. Bandits often work in conjunction with "cappers," a person pretending to be a good Samaritan but who is actually soliciting the stranded motorist to use the bandit's services.

love this.'" Goines said "'I don't give a shit that your brother is a sheriff.'"

After observing the construction materials in the bed of Kemmerling's truck, Goines told him to "'get the hell out of here.'" Kemmerling said "'no good deed goes unpunished.'" Goines responded, "'Don't give me that shit.'" Kemmerling believed the incident was unjust, that Goines displayed an angry temperament, and that Goines's comment "was completely racist."

Harris was also interviewed by Internal Affairs investigators. Harris's account largely mirrored Kemmerling's. He could barely hear the conversation between Goines and Kemmerling, but he noticed that they both looked "upset" and "mad." Harris heard Goines tell Kemmerling, "'don't give me that shit.'" However, he never saw Goines frisk Kemmerling. Harris did not recall hearing the words "white man," but he heard Goines say something to the effect of "'do you think I believe that you would stop for this black boy[?]'"

Adjudication of the Complaint

Following a lengthy investigation, the department issued a Complaint Adjudication Report sustaining two counts of misconduct: discourtesy (count one); and making an improper remark (count two). A third count (the purported frisking) was deemed unfounded. Captain Rolando Solano was the commanding officer who adjudicated the complaint. Solano opined that although Goines's comment "touch[ed] on race," it would have been more appropriately deemed to be an "improper

remark" rather than an ethnic remark.[3] Solano recommended that Goines receive a three-day suspension.

Goines was served with a copy of the complaint adjudication form on November 3, 2013.[4] On November 21, 2013, then-Chief Charles Beck increased the recommended penalty from three days to 10 days, in what the department refers to as a "Military Endorsement."[5] The Chief did so by determining that the conduct alleged as a basis for count two amounted to an "ethnic remark," not an "improper remark" as originally charged. Later that day, Internal Affairs issued an internal memorandum advising that Beck had increased the recommended penalty and that Goines needed to be "'re-skellied.'"[6]

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[3] Under the department's disciplinary guide, the penalty for a first-time improper remark is a four-day suspension, whereas the penalty for a first-time improper ethnic remark is a five to nine day suspension.

[4] The record reflects the complaint was served in the year 2014, but it appears this is a typographical error because the relevant proceedings took place in 2013.

[5] A military endorsement occurs when the chief of police does not accept a recommendation made by the captain.

[6] This was a reference to *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 (*Skelly*), which held that before discipline of a public employee becomes effective, the employee must be given "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (*Skelly*, at p. 215.)

On November 26, 2013, the department again served Goines with a copy of the Complaint Adjudication Form. It included the original complaint and recommended penalty, as well as Chief Beck's new recommendation of a 10-day penalty for making an ethnic remark, along with another document identifying the proposed 10-day suspension As part of that pack of documents, Goines was informed that he had until December 6, 2013 to respond to what was characterized as a "Notice of Proposed Disciplinary Action." Goines acknowledged that he received a copy of the investigation materials, that he was informed of his right to representation, and that he had the right to respond orally or in writing by December 6, 2013. Goines also checked a box reflecting his intention to submit a response.

However, although Captain Solano told Goines about the increased penalty, he did not tell Goines that the second count had been changed from making an improper remark to making an ethnic remark. Instead, when Goines asked about the increased penalty, Captain Solano told him it related to a prior complaint against him from five years ago.[7]

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[7] The city attorney describes the incident as follows: "there was another complaint [Goines] had over five years ago where [he] stopped a young, black male for speeding." The record does not include any documentation from this incident. According to Goines, he cited a young African American driver who was in the process of applying for a job with the department. The driver was concerned the citation would inhibit his prospects of employment with the department. Goines gave the driver encouragement, explaining that he had been arrested when he was 17 years old and still secured a position as an officer. No further details are included in the record.

Administrative Appeal

After receiving the new complaint and proposed penalty on November 26, Goines, with the assistance of another police officer who was representing him in the disciplinary proceedings, requested an administrative appeal hearing to challenge the degree of the 10-day suspension penalty. An administrative appeal applies only when the employee agrees to waive a Board of Rights hearing, admit guilt, and limit the appeal to the degree of penalty.

The administrative hearing convened on January 5, 2016. At the outset of the hearing, Goines pled guilty to the first count, but contested the second count because he was not aware that it had been changed from an "improper remark" to an "ethnic remark." Goines admitted he was "re-Skellied" regarding the increased penalty, but asserted that he was not "re-Skellied" regarding the change in the charge from an "improper remark" to an "ethnic remark."

The department reminded Goines that he agreed to plead guilty and waive a Board of Rights hearing and that, therefore, the scope of the hearing was limited to the degree of the penalty. The department argued that Goines should have requested a Board of Rights hearing if he did not agree to plead guilty. Goines's representative responded: "we tried to resolve this before we came here today. We caught this last week and we tried to tell the Department to change the allegation. We understand that he had to plead guilty and we tried—but the commander said, no. I'm not changing it. Go with your admin appeal. And we said okay." Goines's counsel reiterated that "[w]e would've taken it to a board of rights had we been told." Apart from this assertion, however, Goines offered no evidence to

support his claim that he asked the department to change the allegation. The hearing officer decided to proceed with the hearing.

Goines's Hearing Testimony

On October 11, 2012, Goines received a traffic call on Sunset Boulevard near UCLA. Due to rain, Goines was riding in a patrol vehicle instead of a motorcycle. When he arrived at the scene, Goines saw a "young black kid" standing next to a car in a ditch, and a known "bandit" tow truck driver parked in the middle of the center divider. Goines told the suspected bandit driver to leave.

The motorist, later identified as Harris, told Goines that his vehicle lost traction and ended up driving into a ditch. Kemmerling approached them from the side, asking, "Can I help you?" Kemmerling told Goines he stopped to let Harris use his phone. Goines surmised that Kemmerling was a capper, working in conjunction with the bandit driver to solicit an unauthorized tow.

Goines asked Harris whether he knew Kemmerling and how Kemmerling arrived at the scene. Harris said he did not know Kemmerling, that Kemmerling was driving down the street, turned around, and stopped to offer his cell phone. Kemmerling also asked if Harris needed a tow truck, whether he had insurance, and whether he needed to take the vehicle to a body shop. These responses confirmed Goines's suspicion that Kemmerling might have been acting as a capper, so he asked Kemmerling to leave. An argument ensued when Kemmerling denied being a capper.

According to Goines, he told Kemmerling something to the effect of "if you expect me to believe that you just stopped to help this—. . . black kid, black boy, that's not something that normally happens and I'm not saying it can't happen but I doubt it." Kemmerling denied being involved with the bandit tow truck driver, said that his brother was a sheriff, and that "no good deed goes unpunished."

Goines admitted he is "very stern" with tow truck bandits and that he had "a heated discussion" with Kemmerling. He denied saying "In what world do you believe a white man is going to stop to help a black man?" Instead, he asked something to the effect of, "in what world do you expect me to believe that you would stop and help a black kid?" Goines had no racial motive; he simply did not believe that Kemmerling stopped to help Harris. Goines thought Harris looked "street wise," and that, based on his experience, Kemmerling did not stop out of the kindness of his heart.

The Hearing Officer's Decision

The hearing officer issued a written decision following the hearing. Preliminarily, she noted that the change in count two from "improper" to "ethnic" was "extremely tenuous as a basis for seeking relief on appeal." The hearing officer also found that Goines lost his ability to serve the public in a professional manner by making assumptions about the ethnicity of the persons involved. She recommended the appeal should be denied and the proposed penalty be affirmed. Chief Beck adopted the hearing officer's decision, and imposed a 10-day suspension penalty.

Trial Court Proceedings

Goines filed a verified petition for writ of administrative mandate challenging the validity of the department's finding of misconduct and corresponding punishment. Goines also sought a traditional writ of mandate to compel the department to provide him a Board of Rights hearing, and injunctive or other extraordinary relief pursuant to Government Code section 3309.5.[8]

At the hearing on the petition, the trial court noted that Goines "knew what he said. He knew what the contentions were. . . . it was not a new charge. It was a wa[y] of describing it slightly differently." After hearing argument from counsel, the court took the matter under submission. Later that day, the court denied the petition in a 17-page statement of decision. Judgment was entered on April 6, 2017.

DISCUSSION

Judicial review of a final administrative decision is governed by Code of Civil Procedure section 1094.5.[9] If the decision substantially affects a fundamental vested right, as it does in this case, the trial court must exercise its independent judgment on the evidence. (*Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 313–314.) Specifically, "[t]he trial court

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[8] That statute imposes certain rights and protections for public safety officers, and allows the court to render appropriate injunctive or other extraordinary relief to remedy any violation. (Gov. Code, § 3309.5, subds. (a)-(d).)

[9] All undesignated section references are to the Code of Civil Procedure.

must not only examine the administrative record for errors of law, but must also conduct an independent review of the entire record to determine whether the weight of the evidence supports the administrative findings." (*Ibid*.)

We then review the record to determine whether the trial court's findings are supported by substantial evidence. (*Candari v. Los Angeles Unified School Dist.* (2011) 193 Cal.App.4th 402, 408.) Any challenge to evidentiary rulings is reviewed for abuse of discretion. (*Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, 1217.) Whether a petitioner received due process in an administrative proceeding is a pure legal question nsubject to de novo review. (*Mednik v. State Dept. of Health Care Services* (2009) 175 Cal.App.4th 631, 639.)

1. *There Was No Violation of Goines's Due Process Rights Under Skelly*

Goines contends that: (1) his second *Skelly* hearing was defective because, even though the new complaint and proposed discipline form reflected the new charge of making an ethnic remark, he was told by Captain Solano that the increased penalty was based on something else and (2) he was denied his opportunity to request a Board of Rights hearing because the new, 10-day penalty decision was already final when issued. We disagree.

1.1 Applicable Law

The California and United States Constitutions compel the government to afford persons due process before depriving them of any property interest. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a).) "'The essence of due process is the requirement that "a person in jeopardy of serious loss [be given]

notice of the case against him and opportunity to meet it.'" [Citations.]" (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 212.) Yet, "the precise dictates of due process are flexible and vary according to context. [Ciation.]" (*Ibid*.; accord, *Haas v. County of San Bernadino* (2002) 27 Cal.4th 1017, 1037 [requirements of due process are flexible, especially when it concerns an administrative procedure]; see also *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1276 [same].)

In *Skelly*, *supra*, 15 Cal.3d 194, a physician sought a writ of mandate to compel the reversal of his allegedly wrongful termination from his position as a medical consultant for the state. Skelly argued the statutory scheme regulating punitive action against civil service employees violated his due process rights. (*Id*. at p. 200.) The California Supreme Court held that punitive disciplinary action against an employee cannot properly be taken by simple notification. (*Id*. at p. 215.) Relying heavily on *Arnett v. Kennedy* (1974) 416 U.S. 134, our high court determined that the minimum procedural due process protections required before disciplinary action became effective included "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (*Skelly,* at p. 215.)

However, due process does not require that a suspended employee be afforded the same pre-disciplinary procedures under *Skelly* as terminated employees. (Ci*vil Service Assn. v. City and County of San Francisco* (1978) 22 Cal.3d 552, 562–564; *Townsel v. San Diego Metropolitan Transit Development Bd*. (1998) 65 Cal.App.4th 940, 952.) Instead, a suspended employee is entitled

to no more than a *Skelly*-type hearing during or within a reasonable time after the suspension. (*Townsel*, at p. 952.) The purpose of notice under the due process clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing. (*Gilbert v. City of Sunnyvale*, *supra*, 130 Cal.App.4th at p. 1279.)

1.2. Right to Administrative Appeal

Government Code section 3304 provides that no punitive action may be taken against a public safety officer without providing him or her with an opportunity for an administrative appeal. (Gov. Code, § 3304, subd. (b).) Los Angeles City Charter, article X, section 1070, governs the disciplinary procedures for employees of the department. It provides that each member's right to hold his or her position is "a substantial property right of which the holder shall not be deprived arbitrarily or summarily, nor other than as provided in this section." (L.A. Charter, art. X, § 1070(a).)

Pertinent here, the chief of police may suspend a member for up to 22 working days, with loss of pay, subject to the right of the member to request a hearing before a Board of Rights. (L.A. Charter, art. X, § 1070(b)(2).) An order of suspension must be accompanied by a verified complaint containing a statement of the charges, and the chief shall serve a copy of the statement of charges upon the accused employee. (L.A. Charter, art. X, § 1070(d).) The employee may, within five days after personal service of the verified complaint, request a hearing before a Board of Rights. (L.A. Charter, art. X, § 1070(f).)

Additionally, the Memorandum of Understanding (MOU) between the City of Los Angeles and the Los Angeles Police Protective League provides a mechanism for a member to

challenge the degree of a disciplinary penalty through an administrative appeal.[10] An administrative appeal is only available to an employee who: (1) waives a Board of Rights hearing, (2) admits guilt, and (3) limits the appeal to the degree of the penalty.

1.3 Analysis

The record establishes that on November 3, 2013, Goines first received notice of Captain Solano's adjudication of the complaint and his recommendation of a three-day suspension. On November 21, 2013, Chief Beck "militarily endorsed" the recommended penalty by increasing the proposed suspension to 10 days. Five days later, Goines was personally served with a copy of the revised complaint and investigation materials. The complaint alleged that, with respect to count 2, "you, while on duty, made an *ethnic remark* to C. Kemmerling." (Emphasis added.) Goines admitted at the hearing that "another *Skelly* happen[ed]" sometime in December of 2013.

Goines had until December 1, 2013—five days after personal service of the verified complaint—to request a hearing before the Board of Rights. (L.A. Charter, art. X, § 1070(f).) He did not do so within the deadline; instead, he requested an administrative appeal. Having failed to submit a timely request for a Board of Rights hearing, Goines's only option under the MOU was to challenge the degree of the penalty in an administrative appeal.

Goines concedes he received the revised complaint on

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[10] "Once a local government approves an MOU, it becomes a binding and enforceable contract that neither side may change unilaterally. [Citations.]" (*City of Los Angeles v. Superior Court* (2013) 56 Cal.4th 1086, 1092–1093.)

November 26, 2013, and was informed that Chief Beck had increased the penalty from three days to 10 days. Goines contends, however, that the notice did not comply with the requirements set forth in *Skelly* because he was not specifically told that Chief Beck had changed the wording of the charge in count 2.

Goines cites no authority supporting his contention that the department had to verbally inform him of the change in wording when the revised complaint reflected that change. The department provided Goines notice of the proposed suspension, the reasons therefor, and a copy of the charges—exactly what *Skelly* requires. (*Skelly*, *supra*, 15 Cal.3d at p. 215.) This procedure gave Goines notice of the charges sufficient to provide a reasonable opportunity to respond to the purported misconduct. (*Gilbert v. City of Sunnyvale*, *supra*, 130 Cal.App.4th at p. 1279; *Ferguson v. City of Cathedral City* (2011) 197 Cal.App.4th 1161, 1170–1171.)

That Goines did not notice the change to the complaint from "improper remark" to "ethnic remark," and thus did not timely request a Board of Rights hearing, does not render the revised complaint invalid. The revised notice was based on the same alleged misconduct; thus, a second *Skelly* meeting was not required. (*Ferguson v. City of Cathedral City*, *supra*, 197 Cal.App.4th at p. 1171 [second notice containing additional violations which were based on same misconduct did not require second *Skelly* meeting].) Following *Skelly*, courts "have repeatedly recognized that due process is a flexible concept." (*Gilbert v. City of Sunnyvale*, *supra*, 130 Cal.App.4th at p. 1276; accord, *Ferguson*, *supra*, at p. 1170.) The pre-determination rights afforded to Goines were constitutionally sufficient.

Finally, Goines's contention that the chief's decision to increase the penalty because Goines had made an ethnic remark was already final is not supported by the record.

Multiple documents within the packet that Goines received referred to the 10-day suspension for making an ethnic remark as a proposed disciplinary action. One form stated that Goines had 10 days to respond to the notice, and Goines acknowledged that he received that form and expressed his intention to respond. Instead, sometime afterward, Goines elected to forego a Board of Rights hearing and challenge only the penalty by way of an administrative appeal.

In short, Goines waived his right to respond to the newly-proposed discipline and chose instead to proceed by way of an administrative appeal, thereby forfeiting his other option—a Board of Rights hearing.

2. *Goines Was Not Denied His Right to a Fair Hearing*

Goines contends he was denied a fair hearing on the following grounds: (1) he was entitled to a hearing before a Board of Rights on the merits of the charges, rather than an administrative appeal limited to the degree of the penalty; (2) the hearing officer erroneously placed the burden of proof on Goines; and (3) the hearing officer abused her discretion by considering audio recordings that were not introduced into evidence.

2.1. Goines Failed to Submit a Timely Request for a Board of Rights Hearing

Goines argues he was denied a fair hearing because he should have been afforded a Board of Rights hearing. We disagree.

As explained *ante*, Goines had until December 1, 2013 to request a Board of Rights hearing. (L.A. Charter, art. X, § 1070(f).) Even though he received written notice of the amended charge, he failed to request a Board of Rights hearing, and instead elected to pursue an administrative appeal.

The MOU provides that when a member elects to appeal a one-to-22-day suspension to either a Board of Rights or an administrative appeal, "[t]he election of either procedure shall constitute a *binding election* of the appeal procedure chosen and an *absolute waiver* of the alternate appeal procedure." (Emphasis added.) Goines was bound by terms of the MOU (*City of Los Angeles v. Superior Court*, *supra*, 56 Cal.4th at pp. 1092–1093), and he provides no evidence that he would have pursued a Board of Rights hearing if the revised notice used the word "ethnic" instead of "improper." Counsel's unsubstantiated assertions at the hearing are not evidence.[11] (*Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1173.) Thus, Goines was limited to an administrative appeal challenging the degree of the penalty.

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[11] At the administrative appeal, counsel indicated that he only discovered the amended charge one week before the hearing, and that the commander denied his request for a Board of Rights hearing. The record contains no evidence that Goines submitted a *written* application for a Board of Rights hearing at any time prior to the administrative appeal hearing. (L.A. Charter, art. X, § 1070(f) [request for hearing must be in writing].) Moreover, it appears Goines could have asked Chief Beck to order a hearing, notwithstanding his failure to make a timely request. (L.A. Charter, art. X, § 1070(i) [chief may independently order a Board of Rights hearing].)

2.2. Supposed Misapplication of the Burden of Proof

Goines contends he was denied due process because the administrative appeal hearing officer improperly placed the burden of proof on him with respect to his challenge to the degree of the penalty.[12] Not so.

Article 9.3(B)(1) of the MOU provides: "For an administrative appeal of discipline that is *not* subject to a hearing before a Board of Rights (paper penalty) . . . *the Department* shall bear the burden of proof to establish by a preponderance of evidence that the Department's action should remain." (Emphasis added.) This provision is inapplicable because it only applies to situations involving a so-called "paper penalty," which means no penalty at all. Goines was, of course, subject to a 10-day penalty.

The relevant portion of the MOU is Article 9.3(B)(2), which does not expressly articulate the burden of proof. Instead, the MOU states: "The purpose of an administrative appeal hearing for discipline of a one-to-22-day suspension . . . is to provide the employee an opportunity to challenge the degree of the penalty,

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[12] This argument is based on a prefatory statement in the hearing officer's written decision stating, "[t]here was no burden for the Department," before reciting the documentary evidence presented by the department. The record contains no other reference regarding the allocation of the burden of proof in the administrative appeal. Respondents concede the hearing officer "placed the burden of proof on him [Goines]," but we are not convinced that the hearing officer's statement was a reference to the burden of proof. As set forth next, we conclude in any event that Goines bore the burden of proof and, if not, the error was harmless.

with the understanding that the original penalty cannot be increased."

Goines contends the burden was improperly shifted to him because Article 9.3(B)(1) specifically places the burden of proof on the department, whereas Article 9.3(B)(2) does not articulate a unique standard. Goines relies on various case law to support his argument that the department automatically bore the burden to prove both the charges and the penalty.

Reliance on these cases is inapposite because they overlook the posture of this case—that Goines admitted the truth of the charges leveled in the complaint. (E.g., *Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 175 [in disciplinary proceedings, burden of proving charges rests on party making the charges]; *Los Angeles Police Protective League v. City of Los Angeles* (2002) 102 Cal.App.4th 85, 92 [requiring employee to bear the burden of proof is "plainly inconsistent with the due process requirement that the Department bear the burden of proving the charges"]; *Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113 [in disciplinary administrative proceedings, "burden of proving the charges rests upon the party making the charges"]; *Layton v. Merit System Commission* (1976) 60 Cal.App.3d 58, 66 [same]; *Martin v. State Personnel Bd.* (1972) 26 Cal.App.3d 573, 582 [same].)

By contrast, Goines elected to forego a Board of Rights hearing—in which the department would have held the burden of proof—by pursuing an administrative appeal. In doing so, Goines admitted he was guilty of the charges and limited his challenge to the degree of the penalty. Goines fails to cite any case supporting his claim that he was deprived of due process based on the assignment of the burden of proof.

In any event, even if the hearing officer erroneously assigned the burden of proof to Goines, he fails to allege any resulting prejudice. "'"A writ of administrative mandamus will not be issued unless the court is persuaded that an abuse of discretion was prejudicial."' [Citation.]" (*Quintanar v. County of Riverside* (2014) 230 Cal.App.4th 1226, 1236.) In other words, it must be reasonably probable that a more favorable result would have been achieved absent the purported error. (*Thornbrough v. Western Placer Unified School District* (2013) 223 Cal.App.4th 169, 200.) "'[T]he appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice.' [Citation.]" (*Ibid*; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.)

Goines does not explain how he would have achieved a more favorable result with respect to the degree of the penalty if the burden of proof had been assigned to the department. The record reflects that the hearing officer conducted a thoughtful, independent analysis of the entire record before concluding that the administrative appeal should be denied. This included credibility findings concerning each party's evidence. Goines fails to explain, and we do not see how the result would have differed had the department borne the burden of proof. Accordingly, under the limited circumstances before us—Goines's waiver of a Board of Rights hearing, guilty plea, and hearing limited to challenging the degree of the penalty—we find there has been no miscarriage of justice.[13]

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[13] As articulated by our high court, "[w]e note in passing that historically the state has treated suspensions of 10 days or less as being somewhat minor with less procedural safeguards

2.3. No Reversible Error Stemming From the Hearing Officer's Reliance on Non-Admitted Evidence

Goines contends his due process rights were violated when the hearing officer reviewed audio recordings from the Harris and Kemmerling interviews, which were not offered into evidence.

The department offered into evidence the Complaint Review Report and the Complaint Adjudication Report, which included a transcription of the recorded interviews of Harris and Kemmerling. The hearing officer asked the department to provide recordings from the interviews of Harris and Kemmerling, saying she wanted to listen to them. The hearing officer relied on the contents of the tapes in her decision, concluding that Goines's testimony did not coincide with the witness statements.

First, Goines forfeited this contention by failing to object at the hearing. (*Chrisman v. City of Los Angeles* (2007) 155 Cal.App.4th 29, 42 [appellant forfeits issue by failing to raise it at Board of Rights hearing]; *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1449 [contention waived based on failure to object at administrative hearing].)

Second, "'[t]echnical rules of evidence do not apply to administrative hearings.' [Citation.]" (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 859.) Government Code section 11513, which governs administrative hearings, provides: "The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which

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offered." (*Civil Service Assn. v. City and County of San Francisco, supra,* 22 Cal.3d at p. 562.)

responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions." (Gov. Code, § 11513, subd. (c).) Thus, the hearing officer was not constrained by the evidence introduced by the parties.

Third, even assuming error, Goines fails to identify any prejudice resulting from the hearing officer's reliance on the audio recordings, especially when considering that transcriptions of the interviews were admitted into evidence. Not every legal mistake at an administrative hearing compels the finding to be set aside; instead, procedural due process violations are subject to a harmless error analysis. (*Thornbrough v. Western Placer Unified School District*, *supra*, 223 Cal.App.4th at p. 200.) "And it is well-settled that the improper admission or rejection of evidence at an administrative hearing does not provide 'grounds for reversal unless the error has resulted in a miscarriage of justice.'" (*Ibid*.) We find no probability that Goines would have received a more favorable result below if the hearing officer had declined to review the audio recordings.

3. *The Determination as to Whether Goines's Comments Violated the Department Policy is Not Subject to De Novo Review on Appeal*

Goines asserts: (1) the determination as to whether his comments violated the department policies is subject to de novo review, (2) his descriptions of Harris's ethnicity when addressing Kermmerling cannot serve as the basis for discipline, and (3) the department failed to provide any evidence that he violated an established policy or standard.

The fatal flaw to these contentions is that Goines waived a hearing on the merits of the charges by electing to pursue an administrative appeal limited to the degree of the penalty. "Generally, where an adequate administrative remedy is provided by . . . rule of an administrative agency, 'relief must be sought from the administrative body and this remedy exhausted before the courts will act.' [Citation.] The requirement of exhaustion of the administrative remedy is 'a jurisdictional prerequisite to resort to the courts.' [Citations.]" (*Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 722.)

"'The policy reasons behind the two doctrines are similar and overlapping. The exhaustion doctrine is principally grounded on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary). [Citations.] . . . [T]he primary jurisdiction doctrine advances two related policies: it enhances court decisionmaking and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws. [Citations.]" (*Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 932.)

Given this "'"clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties"'" Goines's remedy to challenge the sufficiency of the department's factual findings was to seek a Board of Rights hearing in a timely fashion. (*Bockover v. Perko* (1994) 28 Cal.App.4th 479, 487.) We

decline Goines's invitation to conduct a de novo review of his claims.

4. *The Penalty Was Not an Abuse of Discretion*

Goines contends that even if he was guilty of the allegations as framed, the 10-day suspension was excessive given that he "was not concerned with Kemmerling's race when he made the comment and given that he did not utilize Kemmerling's race for any enforcement action."

"We review the penalty imposed by an administrative body for an abuse of discretion. [Citation.] This court cannot 'substitute its discretion for that of the administrative agency concerning the degree of punishment imposed.' [Citation.] Moreover, '[i]t 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.' [Citation.]" (*Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1106.) An administrative penalty will not be disturbed on mandamus unless the agency "patently abused its exercise of discretion by acting arbitrarily, capricious[ly], or beyond the bounds of reason. [Citation.]" (*Fisher v. State Personnel Board* (2018) 25 Cal.App.5th 1, 21.)

The penalty guide drafted by department's Internal Affairs Group governs discipline for department employees. This guide was adopted "in an effort to set expectations and enhance the perception of fairness and consistency." The penalty range for making an improper remark showing an "ethnic/culture bias" is five to nine days of suspension for the first occurrence, and 10 to 14 days for the second occurrence. The penalty for making a discourteous remark to a member of the public is up to a four-day

suspension. Under these guidelines, Goines was subject to up to 18 days suspension for the two sustained counts of misconduct. However, this guide is only a recommendation, and the chief of police is the ultimate arbiter of the appropriate punishment.

The hearing officer considered all the relevant evidence before concluding the proposed 10-day suspension was proper. The penalty, while undoubtedly significant for Goines, fell well within the applicable guidelines, and we are not free to substitute our discretion for that of the department. (*Doe v. Regents of University of California*, *supra*, 5 Cal.App.5th at p. 1106.) "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." (*Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 46–47.) We conclude the suspension imposed by Chief Beck fell well within the applicable guidelines and, therefore, did not constitute an abuse of his discretion.

DISPOSITION

The judgment is affirmed. Respondents shall recover their appellate costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MICON, J.*

We concur:

WILLHITE, Acting P.J. COLLINS, J.

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