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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JOSEPH CLAY,

Plaintiff and Appellant,

v.

CITY OF LOS ANGELES et al.,

Defendants and Respondents.

B228605

(Los Angeles County
Super. Ct. No. BS122625)

APPEAL from a judgment of the Superior Court of Los Angeles County, David P. Yaffe, Judge. Affirmed.

Gary Orville Ingemunson for Plaintiff and Appellant.

Carmen A. Trutanich, City Attorney, Claudia McGee Henry, Senior Assistant City Attorney, and Brian I. Cheng, Deputy City Attorney, for Defendants and Respondents City of Los Angeles and William J. Bratton, Chief of Police.

Los Angeles Police Officer Joseph Clay was suspended by the Los Angeles Police Department (Department) for 12 days after a board of rights concluded he had used excessive force in violation of Department policy while engaged in crowd control during a rally in MacArthur Park on May 1, 2007. Clay unsuccessfully petitioned the superior court for mandamus relief under Code of Civil Procedure section 1094.5 to set aside the findings of the Department's board of rights.¹ On appeal he contends the Department's use-of-force policy did not provide fair notice of what constituted misconduct and substantial evidence does not support the findings he used excessive force during two charged incidents at the rally. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The May 1, 2007 Rally

On May 1, 2007 thousands of people marched through the streets of Los Angeles in support of immigrant rights. The march ended at 3:00 p.m. with a rally on the south lawn of Los Angeles City Hall. There were no reports of violence or arrests.

Following the downtown march and rally, a separate march toward a rally in MacArthur Park took place. At 5:00 p.m. police officers estimated the crowd in MacArthur Park and on South Alvarado Street, which borders the east side of the park, was between 5,000 and 7,000 people. Officers tried to direct marchers from South Alvarado Street into the park so the street could be opened for traffic, but a small group of demonstrators, described by police as "anarchists" wearing camouflage pants and bandanas to cover their faces and carrying backpacks, refused to clear the street. Additional police units were called.

After squads of officers on foot, bicycles and motorcycles had been placed on both sides of South Alvarado Street, some demonstrators began yelling obscenities and throwing objects at them. The group then began to move toward the opposite end of the park, where an officer had been knocked off his motorcycle, inciting others as they went.

¹ Statutory references are to the Code of Civil Procedure.

Ten minutes later the group ran back, still throwing rocks and bottles. The scene became chaotic.

Just after 6:00 p.m. Department command personnel declared the rally an unlawful assembly, and the crowd was ordered to disperse. Metropolitan Division Platoon B, comprised of six sergeants, one lieutenant and 35 officers, including Officer Clay, were deployed to clear the park using a moving skirmish line. Almost immediately officers fired less-lethal impact munitions² because a portion of the crowd remained hostile and was not responsive to police commands. As the skirmish line moved through the park, several officers used their 36-inch batons to clear the crowd out of the park. A small number of demonstrators continued throwing objects; and Clay was struck several times, sustaining a small contusion to his left index knuckle. By the time the park was cleared, the skirmish line had stopped 11 times to adjust and to allow people to leave the park. Portions of the skirmish line's movement were captured on video by network news cameras.

2. The Complaint and Board of Rights Proceedings

On August 29, 2008 Officer Clay was served with a personnel complaint issued by then-Chief of Police William J. Bratton charging him with seven counts of the unauthorized use of force during the May 1, 2007 deployment and ordering his actions be reviewed by a board of rights. Counts two and three alleged a "forward baton thrust" and subsequent "two-handed baton strike" to Antonio Lopez were unauthorized. Count six alleged "a baton strike" to Patricia Ballaz, which caused her to fall, was unauthorized.

The three-member board of rights convened on December 8, 2008, heard testimony from eight witnesses over five days and examined more than 20 exhibits. The exhibits included video clips of the alleged incidents of unauthorized use of force, Department use-of-force policy bulletins and a power point presentation of a review of

² Department-approved physical force techniques are grouped into three categories: lethal (deadly force), less-lethal (TASER, bean bag and other projectile devices) and non-lethal (for example, firm grip and takedown).

the May 1, 2007 events conducted by an internal task force convened by Chief Bratton to analyze police actions and offer recommendations to improve Department service.

a. *Officer Clay's testimony*

i. *Permissible uses of the baton*

Officer Clay testified it is critical on a skirmish line to maintain line integrity by preventing people from impeding the line: “Basically, your line is moving forward, and you will have individuals that will come up and walk slowly in front of the line, passively resisting, trying to impede the movement of the line so that anybody behind there can rearm themselves with rocks or bottles, try to slow down the movement of whatever line or whatever type of skirmish line we have going forward. And if you have a few individuals impeding this part of the line, the middle of the line, then you will have the right and left sides moving too fast, and that overburdens on the linebackers [i.e. officers behind the line responsible for supervision, arrests and dealing with people on the ground] to pull these guys back. So it’s a technique that demonstrators will utilize to actually interfere with police operations to thwart our actual operation to actually clear the park.”

Pursuant to a 1996 Department training bulletin regarding crowd management and control, officers may use their batons to push “uncooperative” people—that is people who are passively impeding the line, whether purposely or carelessly, and who do not respond to verbal orders to move—using a “forward thrust” generally to the center mass of the body.³ Once the baton makes contact the officer is to use his or her body weight to

³ The October 1996 training bulletin provides, “During crowd control situations, police officers may be required to physically engage numerous individuals who exhibit unlawful or hostile behavior. In these situations, it may be necessary for officers to utilize physical force to control or move crowd members who do not respond to verbal directions. [¶] When officers are confronted by this type of behavior, the baton may be used to push individuals who do not respond to verbal commands to disperse. It may also be used as an impact weapon depending upon the degree of active resistance or combative behavior demonstrated by crowd members. [¶] There are no exceptions to the Department’s Use of Force Policy. When the use of force is justified during a crowd control situation, only reasonable force shall be employed. Officers must only use

lean into and push the suspect back. Employing the baton in this manner is considered a “compliance technique.”

The baton may only be used as an “impact device” on “aggressive/combative” suspects. Officer Clay testified that one impact technique is the “two-handed baton strike” in which the officer steps forward and uses “a baseball swinging motion” to “drive [the] baton into one of the primary target areas,” such as the arm, shoulder, hips and legs. Another impact technique is the “forward strike” in which the baton is quickly jabbed into the suspect’s ribcage and pulled back.⁴ Clay explained under Department policy the baton cannot be used as an impact or striking tool on someone who is merely uncooperative. Rather, “it’s another level of force. If they were uncooperative, you have to start at the bottom and then gauge their actual actions and reassess. Now, at some time, if they become aggressive/combative, you will take it to the next level as an impact device.”

reasonable force to overcome resistance and effect control. Verbalization should be used throughout the duration of the operation to gain compliance and reduce the necessity for further physical force.”

The training bulletin concludes by emphasizing the importance of reasonableness: “Should force become necessary, the amount of force necessary to overcome a suspect’s resistance is dependent on a variety of factors. When a baton is utilized, even during confrontations with hostile crowds, reasonableness is the key to determining the amount of force and the type of compliance techniques which are most appropriate for the circumstances. Officers should attempt to de-escalate confrontations by utilizing verbalization techniques prior to, during, and after any use of physical force. Effective crowd management techniques oftentimes precludes the necessity to employ physical force and are a deterrent to unlawful behavior.”

⁴ The sometimes contradictory testimony before the board of rights did not clearly define the dividing line between a “forward thrust,” a baton push that is a compliance technique, and a “forward strike,” which is a baton impact technique, notwithstanding the attempt by the Department’s use-of-force expert, Captain John Incontro, to explain the difference. Any lack of clarity on this point, however, does not affect our analysis: There is no dispute the two-handed baton strike in count 3 was an impact strike, and the finding of an unauthorized use of force in count 6 is supported by substantial evidence whether Officer Clay used a compliance push or impact strike.

ii. *Use of force against Lopez (counts 2 and 3)*

Officer Clay explained his actions as the board of rights viewed, frame by frame, a video clip of the incident shot from an angle in front of and slightly to the side of Lopez. Clay initially observed Lopez carrying a large flagpole and shouting into a bullhorn while the skirmish line was stopped to give the crowd time to disperse. Clay believed Lopez was trying to incite the crowd. The skirmish line began to move forward again, while objects continued to be thrown by some of the protesters. Clay ordered Lopez to move. Clay testified, “At one point, he actually looks back at me, turns back, and continues to yell into the bullhorn, at which point I come in from behind him and deliver a forward push, pushing him forward to clear him from the area based on the fact he is in violation and the fact that he has failed to disperse as I am telling him to disperse.” In response to questions whether Clay sincerely believed Lopez, who was facing the opposite direction of the skirmish line, actually saw the approaching officers, Clay acknowledged, “On this video, it does appear he is looking at a particular object that is flying past him on the ground. But, in my perception of this incident, I believed he looked back at me acknowledging the fact that we were behind him.”

Officer Clay then hit Lopez with a two-handed baton strike to the back of the legs. Clay explained to the board he had noticed the flagpole coming down toward his head and believed Lopez had become aggressive and was intentionally attempting to strike him. Clay, however, could not actually see what Lopez was doing because his vision was obscured by the flag. Clay testified, “As the pole was coming down, the flag blurred my vision. Actually, I couldn’t see what he was doing, where he was going, or where he was, you know, looking actually. . . . So I duck down to avoid being struck with the flagpole, believing that’s what his intentions are, and deliver the two-handed strike to his leg.” Clay acknowledged that, in hindsight, he could have handled the situation differently: “After being able to view this video over and over again, there were some things I could have done differently. I could have stepped sideways and let it come down. I could have actually done a high block to stop it from coming down. At that time, in the split second that I had, I actually thought I was being under attack by

Mr. Lopez. Initially, the first thing I could think of was duck under and deliver a two-handed power strike to actually halt his actions to stop him.”

iii. *Use of force against Ballaz (count 6)*

The skirmish line was moving forward when Officer Clay saw Christina Gonzalez, a reporter, and Ballaz, a camera operator, standing in front of the line. Clay repeatedly directed them to move back, but they lingered. Clay testified, “I come upon them, at which point I push Ballaz with the baton very lightly, just basically nudge her to get her moving. . . . At that point, Gonzalez begins to verbally assault me by saying, ‘You can’t do this shit.’” “And I’m telling her, ‘You need to move back. Move back. Go that way. Leave this area.’ At that point I go ahead again and kind of like just give them a light nudge to push them to facilitate their movement of out the park, at which point Gonzalez and Ballaz move backwards and appear to trip over their own feet. I believe Ballaz falls to the ground.”

Officer Clay did not see the microphone Gonzalez was carrying but did see a camera on Ballaz’s shoulder. He thought they may have been “citizen paparazzi” or members of an immigrant rights organization recording the demonstration because, among other reasons, they did not identify themselves as members of the news media and he did not think legitimate journalists would be verbally abusive as Gonzalez had been or would disobey police orders. Clay also thought any legitimate members of the media would be within a designated safe media zone.⁵

b. *Other officer testimony and documents regarding the Department’s use-of-force policy*

Captain John Incontro testified as the Department’s expert witness on its policies, practices and procedures for the use of batons and crowd control techniques. The Department also introduced into evidence an excerpt from the Manual of the Los Angeles Police Department regarding use of force. Section 115.30 provides, “The police should

⁵ Captain John Incontro testified members of the media are to be treated in the same manner as other members of the public when an assembly has been declared unlawful and the crowd has been ordered to disperse.

use physical force to the extent necessary to secure observance of the law or to restore order when the exercise of persuasion, advice, and warning is found to be insufficient to achieve police objectives; and police should use only the reasonable amount of physical force which is necessary on any particular occasion for achieving a police objective.”

Officer Clay presented the testimony of Sergeant Terry Ruppel, a Metropolitan Division supervisor, or “linebacker,” during the May 1, 2007 MacArthur Park deployment; Officer Carlos Flores, an officer on the skirmish line who was the primary instructor for crowd management training and had trained Clay in the use of the 36-inch baton; and Sergeant Randy Minini, a retired officer who had supervised numerous instructors in the use of force and was involved in drafting the 1996 training bulletin. These three officers’ testimony was largely consistent with Clay’s on the essential points at issue: As of May 1, 2007 the baton could be used to push an uncooperative person, but could not be used to strike a person unless the person had become aggressive/combative.

c. The board of rights decision

The board of rights found Officer Clay guilty only on two of the counts alleged, counts 3 and 6. The board concluded Clay’s initial forward baton thrust to Lopez (count 2) was consistent with the Department’s use-of-force policy because Lopez had been uncooperative. However, the board found the video evidence did not support Clay’s contention Lopez was an aggressive/combative suspect warranting the subsequent two-handed baton strike: “[I]t appears that the forward push applied in count 2 caused A. Lopez to move forward, and the top of the flag pole dipped in the direction of Officer Clay. There was not an overt act by A. Lopez to cause the pole to move toward Officer Clay. Also, Officer Clay was aware of the pole when he pushed A. Lopez as described in count number 2. Clay remained in a position under the flag instead of sidestepping to his left or right after the push in count number 2. Based on the testimony of Officer Clay and the video evidence viewed by this Board, it is the Board’s finding that the use of force was unauthorized as the actions of A. Lopez did not constitute an aggressive/combative suspect authorizing this level of use of force. . . . The Board concludes that the actions of A. Lopez as they relate to count 3, were uncooperative as oppose to

[aggressive/combative], and therefore the two-handed baton strike delivered by Officer Clay was unauthorized.”

Regarding count 6 the board found, “When Officer Clay approached Ballaz, Ballaz had her right side turned toward Officer Clay. Officer Clay used a baton to push on P. Ballaz at which time the camera she was carrying dropped to the ground, and P. Ballaz attempted to retrieve it. While Ballaz was picking up the camera this is when Officer Clay again used a second forward baton push[/]strike on Ballaz. After the first baton push by Officer Clay, Ballaz had no opportunity to react and move away and did not appear to present any sign of [being] passively resistant. She appeared to be merely picking up the camera and attempting to comply with Officer Clay’s direction.” Thus, the board found Clay’s initial baton thrust/push was authorized because Ballaz was passive and uncooperative when he first encountered her, but the second use of force was not authorized because “Officer Clay should have taken the time to determine the status of the events, assess Ballaz and to give Ballaz an opportunity to withdraw.”

The board of rights recommended Clay be suspended for 12 days. Chief Bratton adopted that recommendation.

3. Proceedings in the Superior Court

On September 1, 2009 Officer Clay petitioned for a peremptory writ of mandate in the superior court seeking an order compelling the City of Los Angeles to set aside the decision sustaining allegations of misconduct against him and to restore with interest the cost of his 12-suspension-day penalty. In his memorandum in support of the petition, Clay argued there was insufficient evidence he had violated Department policy. Clay further argued Department policy regarding what officers on a *moving* skirmish line should do and how to use the baton as a pushing instrument was unclear as demonstrated by the fact officers were retrained on a new pushing technique after the events of May 1, 2007.

After a hearing on August 20, 2010 the court affirmed the board of right's finding Officer Clay had engaged in the unauthorized use of force. The court explained, "The findings of the Board of Rights come to this court with a strong presumption of correctness. [Clay] has the burden to convince this court that those administrative findings are wrong. [Clay] has failed to carry that burden in this case. The court is not convinced that the two uses of the baton for which [Clay] was disciplined were necessary, or were reasonably perceived by [Clay] to be necessary. [¶] The court is also not convinced that L.A.P.D. policy on the use of the baton was so unclear as to mislead [Clay] to believe that he was acting properly in the two instances in which he was held guilty of misconduct."

DISCUSSION

1. *Standard of Review*

Discipline imposed on city employees substantially affects their fundamental vested right in employment. (*Jackson v. City of Los Angeles* (2003) 111 Cal.App.4th 899, 902; *McMillen v. Civil Service Com.* (1992) 6 Cal.App.4th 125, 129.) Accordingly, when ruling on a petition for administrative mandamus, the superior court examines the administrative record and exercises its independent judgment to determine if the weight of the evidence supports the findings upon which the agency's discipline is based or if errors of law were committed by the administrative tribunal. (*McMillen*, at p. 129.) On appeal we must sustain the superior court's factual findings if supported by substantial evidence (*Jackson*, at p. 902; *Evans v. Department of Motor Vehicles* (1994) 21 Cal.App.4th 958, 967, fn. 1),⁶ but we review de novo all questions of law (*Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219; *Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1057).

⁶ "Evidence is substantial if any reasonable trier of fact could have considered it reasonable, credible, and of solid value." (*Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 53.) In making that determination, we must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision. (*Valiyee v. Department of Motor Vehicles* (1999) 74 Cal.App.4th 1026, 1031; *Kazensky*, at p. 52.)

2. *The Department's Policy on the Use of Force for a Moving Skirmish Line Was Not Unclear*

A rule of conduct violates an employee's due process rights only when it fails to provide a person of ordinary intelligence with fair notice whether his or her conduct could result in disciplinary action. (See *San Diego Police Officers Ass'n v. City of San Diego* (2002) 98 Cal.App.4th 779, 786.) Officer Clay contends he did not have clear notice his conduct could result in disciplinary action because the 1996 training bulletin with its limitations on the use of the baton as an impact technique applied only to the appropriate use of force on a static skirmish line. He also contends Officers Ruppel, Flores and Minini's testimony as to the training for a moving skirmish line supports his position.

Officer Clay, however, clearly testified he understood Department policy permitted him to use his baton while on the moving skirmish line to push uncooperative people and to strike only combative/aggressive suspects. With respect to the force used on Lopez, therefore, there is no question about the clarity of the Department's policy or notice to Clay. The issue was simply whether Clay's determination Lopez was combative/aggressive was objectively reasonable. The board of rights and superior court concluded it was not. As discussed in the following section, there was substantial evidence supporting that determination.

As to Ballaz, Officer Clay appears to suggest he was trained in the field that maintaining the integrity of the skirmish line trumps any requirement an officer's use of force be reasonable or, at least, colors the lens through which reasonableness is measured. He argues, "The problem that presented itself was that there was no written policy [by the] LAPD that addresses what the Department's policy was for an officer in a moving skirmish line when confronted with those that would impede the line. A moving skirmish line is a very different thing than a static skirmish line or a contact with a suspect in a field situation such as a traffic stop."

Officer Clay's argument ignores section 115.30 of the Manual of the Los Angeles Police Department, admitted into evidence at the board of rights hearing, which

unambiguously mandates any use of force must be the minimum necessary to restore order. Whether on a static skirmish line, a moving line or any other situation, the use of force greater than needed is misconduct. Indeed, although the 1996 training bulletin includes a hypothetical based on a static skirmish line, it repeatedly emphasized any use of force for crowd management and control must be reasonable, with verbalization employed “to reduce the necessity for further physical force.”

To the extent there may have been any uncertainty as of May 1, 1997 whether in dealing with someone who was merely uncooperative, rather than aggressive/combative, the baton had to be placed against the person before being pushed forward or could be thrust into the person with an actual impact,⁷ that issue is simply irrelevant to our review of the disciplinary action against Officer Clay. Regardless of the precise definition or dividing line between these crowd control techniques, the board of rights and superior court found Clay’s second push/strike of Ballaz was unreasonable because she had not been permitted sufficient time to respond to the first push. Clay had fair notice that this conduct was unreasonable and subject to discipline under established Department policy.

3. *Substantial Evidence Supports the Superior Court’s Findings Officer Clay Used Unauthorized Force*

a. *Lopez*

Officer Clay testified he used a two-handed strike to Lopez’s legs because he believed Lopez had become aggressive/combative and was attempting to hit him with the flagpole. Yet Clay admitted his vision was obscured by the flag and he could not see what Lopez was doing or where he was going. Both the board of rights, viewing the video clips of the incident frame by frame, and the superior court concluded Lopez did not present as an aggressive/combative suspect; the flag was simply dipping down as a result of Clay’s initial baton push, causing Lopez to propel forward with his back to Clay.

⁷ The Department reevaluated and clarified its policy regarding these techniques following its review of the May 1, 2007 melee.

Officer Clay contends the video recording cannot constitute substantial evidence because it was shot from an angle different from his own perspective of the encounter. Clay argues, “An analysis of Mr. Lopez’[s] intention from a 90 degree angle may be correct, but is irrelevant. The analysis should be from someone standing in Officer Clay’s shoes. The view is much different. . . . [¶] . . . [¶] From Officer Clay’s vantage point, his state of mind was reasonable.”

Officer Clay’s effort to discount the video recording is misguided whether the trier of fact is assessing the credibility of Clay’s testimony he believed Lopez was acting in an aggressive manner or the reasonableness of that subjective perception. (Cf. *Graham v. Connor* (1989) 490 U.S. 386, 396-397 [109 S.Ct. 1865, 104 L.Ed.2d 443] [in civil rights action for damages based on alleged excessive use of force in violation of Fourth Amendment, reasonableness of officer’s conduct must be viewed from perspective of a reasonable officer; inquiry is objective].) A different perspective does not make the evidence irrelevant; at most, it simply affects the weight properly given to it. The board of rights and the court were permitted to put themselves in Officer Clay’s shoes without being limited to viewing video clips shot from exactly where he was standing. The video recording is substantial evidence supporting the finding Lopez, who had his back to Clay, did not present a credible threat and the two-handed baton strike was not justified.

To be sure, as Clay argues, the 1996 training bulletin states an officer may classify an individual’s behavior as either uncooperative or aggressive/combative “based on an individual officer’s subjective viewpoint.” But, read in context, the statement does not vitiate the fundamental standard of objective reasonableness by which an officer’s use of force must be evaluated.

Following two hypothetical scenarios, the bulletin states, “In the first scenario, for example, police officers on a skirmish line [presumably a static skirmish line] with batons drawn in the ‘Long Extended Position,’ are confronted by individuals being pushed from the rear of the crowd into the skirmish line. The crowd is ordered to disperse but refuses to move and continues to push into the officers. These individuals’ actions, as described on the Department’s Situational Use of Force Options Chart may be categorized as

UNCOOPERATIVE or AGGRESSIVE/COMBATIVE based on an individual officer's subjective viewpoint."

This reference to the officer's subjective viewpoint or perspective means only there is no checklist or definitive, measurable criteria by which the classification is made and must necessarily depend on the officer's assessment of dynamic circumstances in the moment. It does not mean, as Officer Clay suggests, the officer's subjective assessment is not itself subject to evaluation using an objectively reasonable standard. Indeed, it is repeatedly emphasized in the training bulletin that only reasonable force should be used to overcome resistance. Similarly, the Situational Use of Force Options chart, which was also introduced into evidence before the board of rights, prominently states, "POLICY [¶] FORCE MUST BE: [¶] A Last Resort [¶] Reasonable and Necessary [¶] With Minimum Force [¶] Known Facts at the time [¶] Defensive or Reactive." It also states "FORCE CAN ONLY BE USED TO: Effect an Arrest [¶] Prevent Escape [¶] Overcome Resistance."

b. *Ballaz*

Officer Clay contends the second baton push to Ballaz was not out-of-policy because close examination of the video recording of the incident demonstrates Clay was confronted not only with Ballaz, but also with the "presence and interference" of Gonzalez, who together were causing a large bend and gap in the skirmish line. Clay argues the board of rights and superior court "did not take into consideration the training of Officer Clay as to his duties when the skirmish line is being breached. The evidence that is relevant is the breaching of the line, not the particular actions of Ballaz in relation to the officer examined in terms of a personal threat. A breached line is the threat . . . that Officer Clay was duty bound to prevent."

Officer Clay essentially asks us to reweigh the evidence. That is not our function. (See *Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th 1064, 1078 ["[a]pplying the substantial evidence test on appeal, we may not reweigh the evidence, but consider that evidence in the light most favorable to the trial court, indulging in every reasonable inference in favor of the trial court's findings and resolving all conflicts in its

favor”].) Nothing in the record supports Clay’s contention the board of rights or the court failed to consider his testimony or that of any other officer that the integrity of a moving skirmish line is paramount. Rather, in addition to their testimony the board and court were also informed the skirmish line had stopped 11 times to adjust and to permit people to disperse. That information, coupled with the video-based evaluation that Clay did not give Ballaz time to react to Clay’s initial baton push, constitute substantive evidence supporting the conclusion the second baton push exceeded the minimum amount of force necessary for achieving compliance.

DISPOSITION

The judgment is affirmed. The City of Los Angeles is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.