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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LOS ANGELES COUNTY  
SHERIFF'S DEPARTMENT,

Plaintiff and Respondent,

v.

LOS ANGELES COUNTY CIVIL  
SERVICE COMMISSION,

Respondent;

STEVEN STROBLE,

Real Party in Interest  
and Appellant.

B268599

(Los Angeles County  
Super. Ct. No. BS152848)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
James C. Chalfant, Judge. Reversed and remanded with directions.

Law Office of Michael A. Morguess, Michael A. Morguess for Real Party  
in Interest and Appellant.

Hausman & Sosa, Jeffrey M. Hausman, Larry D. Stratton for Plaintiff  
and Respondent.

No appearance for Respondent.

Steven Stroble appeals from the superior court's order granting a petition filed by the Los Angeles County Sheriff's Department (Department). The petition challenged the decision by the Los Angeles County Civil Service Commission (Commission) that a 30-day suspension without pay or benefits was the appropriate discipline for Stroble, a sheriff's deputy who committed misconduct while on duty. The original discipline imposed by the Department was discharge from employment. The superior court held that the Commission abused its discretion in reducing Stroble's discipline to a 30-day suspension without pay, and that the only appropriate discipline was his discharge. Stroble contends the Commission did not abuse its discretion. In the alternative, Stroble contends that even if the Commission abused its discretion, the superior court has no authority to decide Stroble's discipline. We hold that the Commission abused its discretion in reducing Stroble's discipline. We set aside the superior court's order directing the Commission to reinstate the discharge and remand the matter to the trial court with directions to further remand the matter to the Commission for reconsideration in light of this opinion.

### **BACKGROUND**

On June 14, 2011, Stroble was working in the Alhambra Courthouse. When Stroble's assigned courtroom was not in session, he walked around the courthouse as a "rover" security bailiff. While Stroble was in the Clerk's Office, court reporter Samantha Paoletto observed him bend over and place his cell phone under the skirt of C. Zamora, who was waiting in line at one of the windows in the office. Paoletto reported the incident, and an investigation ensued.

On February 19, 2013, the Department sent Stroble a letter informing him that he was discharged from his position of deputy sheriff with the

Department. The letter identified three sets of rules violations which supported the discharge: (1) attempting to take a surreptitious photograph of Zamora; (2) making false statements when interviewed by investigators from the Department's Internal Criminal Investigation Bureau (ICIB); and (3) attempting to obstruct an investigation by making post-interview telephone calls to an ICIB investigator. As the letter noted, in March 2012, Stroble had pled nolo contendere to a charge of violating Penal Code section 647, subdivision (j)(2), which makes it a misdemeanor to take a photograph "under or through the clothing being worn by [another] person, for the purpose of viewing the body of, or the undergarments worn by, that other person" for purposes of sexual gratification.

On February 25, 2013, Stroble filed a request for an evidentiary hearing to appeal the discipline imposed by the Department. He denied that he committed the violations specified in the Department's discharge letter, and also denied there were sufficient grounds for the discipline imposed by the Department.

A Hearing Officer held two days of hearings on November 21 and 22, 2013, and then recessed the hearing. In February 2014, a court granted Stroble's motion made pursuant to Penal Code section 1203.4 to set aside his conviction for violating Penal Code section 647 and dismiss the criminal complaint. The Hearing Officer held one additional hearing day, on March 20, 2014, and issued his report on June 25, 2014.

The Commission adopted the Hearing Officer's findings and recommendations.

## **1. Summary and Discussion of Evidence and Findings of Fact**

The parties have not challenged the Report's findings of fact. Accordingly, we set forth the Report's summary and discussion of evidence,

findings of fact, conclusions of law and recommended modification to discipline.

*A. Summary and Discussion of Evidence and Findings of Fact*

The Report contains a summary of the testimony at the hearing, and the documentary, audio, and video evidence introduced. The underlying evidence is part of the administrative record on this appeal, but because the parties have not challenged the Hearing Officer's findings of fact, we rely on his summary of the evidence.

(1) Surreptitious Photograph Incident

The incident began “[a]t approximately 1:20 p.m. on June 14, 2011, [when Stroble] saw Zamora enter the Clerk’s Office on the second floor of the Alhambra Courthouse, and decided to take a surreptitious photograph of the woman with his cellular phone.” (Finding of Fact No. 6.)

Zamora “was wearing a knee-length summer dress.” The Hearing Officer summarized her testimony: “Zamora testified that a deputy, later identified as [Stroble], came up behind her while she stood in the cashier line, tapped her on the shoulder, and asked her if a paper on the floor was hers.” She replied that it was not. “The deputy asked her one more time if the paper was hers and she repeated that it was not. Zamora then turned away from [Stroble] to attend to her business with the cashier.”

The Hearing Officer also summarized eyewitness Paoletto’s testimony: She “saw [Stroble] approach a woman standing in the cashier line. Paoletto had worked with [Stroble] in another courthouse and recognized him as a bailiff, but did not know the woman, who turned out to be Zamora. Paoletto was standing about 20 to 25 feet away and had an unobstructed view of [Stroble] and Zamora. Paoletto saw that [Stroble] bent down behind Zamora and appeared to be picking up papers with his left hand. He had a cellular

phone in his right hand, which he ‘deliberately’ placed under Zamora’s skirt. She did not hear a ‘click’ or see a flash to indicate a picture had been taken. [Stroble] then had a brief verbal exchange with Zamora before leaving.”

Video recordings from three cameras inside the Clerk’s Office were received in evidence. The Hearing Officer summarized the contents of the videos. All three show that Stroble entered the Clerk’s Office twice. When he returned the second time, he walked to the window where Zamora was standing. “He carried papers in his left hand and what appeared to be a cellular phone in his right hand. He bent down behind Zamora, to her left.” The video recordings do not show his right hand. Stroble stood up. He “then approached Zamora on her right and spoke to her. He appeared to have the documents on his left hand as he spoke to her. He left after a brief conversation.”

Stroble testified on his own behalf, and the Hearing Officer summarized his testimony describing the incident: “[Stroble] testified that he noticed Zamora standing in line and thought it would be ‘funny’ to take a picture of her leg. His brother and others had been sending him different pictures they thought were funny and [Stroble] wanted to send a picture to them. He had papers in his left hand and ‘leaned over’ toward Zamora to take the photograph. Before he could take a picture, [Stroble] testified, he realized the immaturity of his planned act and stopped. [Stroble] denied actually placing the phone under Zamora’s skirt and denied taking a picture of her. He did ask Zamora if the papers he had in his hands were hers, to which she provided a negative reply.”

The Hearing Officer recognized that parts of Paoletto’s testimony conflicted with Stroble’s testimony and that “Paoletto’s testimony is credited when in conflict with [Stroble’s]. She had an unobstructed view and

witnessed the entire incident. Paoletto was a disinterested and very reluctant witness . . . . Significantly, Paoletto's testimony establishes that [Stroble] placed the cell phone under Zamora's skirt."

The Hearing Officer summarized the photograph incident in Finding of Fact No. 7: "[Stroble] approached Zamora while the woman was standing in line in the Clerk's Office. He bent down behind Zamora and pretended to pick up papers with his left hand. As he did so, [Stroble] placed the cellular phone in his right hand under Zamora's skirt. [Stroble] then stood up and briefly spoke with Zamora, asking her if she had dropped some papers. [Stroble's] actions constituted an attempt to take a surreptitious photograph of Zamora."

The Hearing Officer considered Stroble's mental state in Finding of Fact No. 8: "[Stroble] realized that his conduct was wrong and did not actually take a picture of Zamora."

## (2) Investigation

Paoletto told one of the clerks that "she thought a deputy had taken a surreptitious picture of a person at the Clerk's Office, and the clerk reported it to Department personnel." ICIB Sergeant Scott Craig was assigned to investigate the matter on June 15, 2011.

Stroble subsequently underwent what are described as three interviews with the ICIB, all on June 15, 2011. All three interviews were recorded. In the first "interview," investigators told Stroble that his personal cell phone was being seized, and asked if Stroble would consent to a search of the phone. Stroble consented. A search of the phone did not uncover any photographs of Zamora.

The Hearing Officer found that, in the second interview, Stroble "initially denied being in the Alhambra Courthouse. He then [falsely] denied

entering the Clerk's Office on two separate occasions." Stroble described his "one" visit to the Clerk's Office to the investigators. The Hearing Officer summarized the visit: "[Stroble] told the investigators that he walked into the Clerk's Office and that after engaging in small talk with one of the clerks he noticed a folded piece of paper next to a woman standing in line. He asked the woman if the paper was hers. She replied that it was not. A clerk then stated that the paper may have belonged to a woman who was previously in line. [Stroble] said he quickly picked up the note, read it and later threw it away. He recalled that the paper said 'call,' but did not remember if it had a number. In response to follow-up questions, [Stroble] said that he had a phone in his right hand and that he was texting his wife." The investigators "repeatedly urged [Stroble] to tell the truth because the incident was on video. [Stroble] did not change any of his statements and the interview ended at 2:15 p.m."

A third interview, requested by Stroble, started at 2:35 p.m. The Hearing Officer summarized the interview: "[Stroble] told the ICIB investigators that he wanted to clarify his prior statement. [Stroble] stated that he went to the Clerk's Office on [the] second floor to check on things and saw Zamora. He decided to take a picture of her leg, at the skirt area. His plan was to send it to his brother, who at times sent him 'stupid' pictures. He got close to her, leaned over to take the picture, and then stopped, realizing what a stupid thing he was about to do. He did ask Zamora if she had dropped a piece of paper. He had some papers in his left hand, but did not pick up any papers from the floor. He denied using the papers he had as a ruse to approach her or engage her in conversation. He denied attempting to take a picture under Zamora's skirt or between her legs, and denied that such

was his intention. He denied taking any picture of the woman. He described his actions as stupid, immature, and a ‘temporary poor thought process.’”

The Hearing Officer summarized Stroble’s testimony about his mental state: “[Stroble] testified that he figured that it would not be a crime as long as he did not take the picture up the woman’s skirt.” Stroble also testified that “he was not truthful during his second recorded interview because he was humiliated and embarrassed about his actions on June 14, 2011. However, after the conclusion of the interview, he decided to provide a truthful account of the incident, and asked the investigators to allow him to tell the truth.”

The Hearing Officer found that the Department had established that Stroble made several false statements in his ICIB interviews. He specified those falsehoods in Finding of Fact No.10: “[Stroble] initially denied being in the Alhambra Courthouse. He then denied entering the Clerk’s Office on two separate occasions. [Stroble] did not pick up the paper next to Zamora or read its contents, as he claimed in the second interview. Nor was he texting his wife at or about the time he approached Zamora. He positioned the cell phone underneath Zamora’s dress, which he denied in the second and third interviews.”<sup>1</sup> In Finding of Fact No. 11, the Hearing Officer made it clear that “[e]xcept as set forth in Finding of Fact number 10, it was not established that [Stroble] made any other false statement alleged in the Department’s letter of February 19, 2013.”<sup>2</sup>

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<sup>1</sup> These false statements correlated with the false statements described in subparagraphs (a), (b), (c), (d), (e) and (g) of the Department’s discharge letter.

<sup>2</sup> The Department alleged two false statements which the Hearing Officer indirectly found were not established: Stroble’s statement that he “provided a different version of events since [he] worked with Sergeant Scott



### (3) Post-Interview Events

The Hearing Officer found that Stroble made telephone calls to Sergeant Craig on June 16 and 22, 2011. Both calls were recorded. In both calls, Stroble made inquiries about the progress of the investigation. He also offered personal information, such as his need for a new cell phone to keep in contact with a girls' softball team in his capacity as its president, and his decision to enroll in a sexual addiction group.

On August 26, 2011, Zamora filed a claim for damages pursuant to Government Code section 910 with the Los Angeles County Board of Supervisors. In November 2011, the claim settled and Zamora received a \$10,000 payment.

#### *B. Conclusions of Law*

The Hearing Officer found that the Department established some but not all of the allegations in its February 19, 2013 discharge letter to Stroble.

The Hearing officer concluded that “[Stroble] violated Manual sections 3-01/000.10, 3[-]01/030.05, 3-01/030.07, 3-01/050.10, 3-01/030.15, 3-01[/]030.10 . . . by engaging in the conduct set forth in Finding of Fact numbers 6, 7, 16 and 17.” Nos. 6 and 7 concern Stroble’s conduct with Zamora. No. 16 concerns his plea to a violation of Penal Code section 647, subdivision (j)(2). No. 17 finds that Stroble’s conduct was “contrary to the highest standards of law enforcement and brought discredit to himself and to the Department.” This conclusion related to numbered paragraph 1 of the Department’s letter, which identified violations of those same sections in connection with the photograph incident.

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Craig and did not respect or trust him” and his statement that “the piece of paper [he] either retrieved from the floor or had was a note for [himself] to call a job applicant.”

The Hearing Officer also concluded that “[Stroble] violated Manual sections 3-01/040.70 and 3-01/040.75 in that he made false statements during a departmental investigation, as set forth in Finding of Fact No.10.<sup>3</sup> This conclusion related to numbered paragraph 2 of the Department’s letter which identified violations of those same sections for the same conduct.

The Hearing Officer concluded, “It was not established that [Stroble] obstructed or interfered in the conduct of the Department’s investigation during his conversations with Craig on June 16 and 22, 2011.” This conclusion related to numbered paragraph 3 of the Department’s letter, which identified violations of sections 3-01/040.76 and 3-01/040.85 in connection with Stroble’s post-interview conversations with ICIB.

### *C. Recommended Discipline*

In his Conclusion of Law No. 6, the Hearing Officer stated that the “Department did not establish by a preponderance of the credible evidence that discharge was the appropriate discipline. Rather, a 30-day suspension is the appropriate discipline for the established violations.”

The Hearing Officer explained his conclusion that the appropriate level of discipline was a 30-day suspension. He acknowledged that “[Stroble’s] misconduct is serious, may lead others to question his credibility in future hearing testimony, brought discredit to the Department, and resulted in a financial settlement against the Department.” The Hearing Officer added, that “not all allegations were established at the hearing and there are

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<sup>3</sup> The Hearing Officer also concluded that in making the false statements identified in Finding of Fact No. 10, “[Stroble] failed to cooperate in the Department’s criminal investigation, in violation of Manual section number 3-01/040.85” The Department did not list such a violation in Stroble’s discharge letter, however. The only violation of section 3-01/040.85 identified in the Department’s letter is Stroble’s post-interview contact with ICIB personnel.

mitigating circumstances that make repetition unlikely. Thus, despite his plan to take a surreptitious photograph of Zamora, [Stroble] realized his planned action was wrong and did not actually carry out his plan. While he made false statements to ICIB investigators, he realized his error within minutes and provided truthful statements. His criminal probation terminated early and the conviction was set aside. [Stroble] has not engaged in any prior actions remotely related to those of June 14, 2011, and he has a very good work record.” The Hearing Officer pointed out that the “Department does not always discharge employees who have made false statements or who have engaged in conduct that warrants criminal investigation.”

## **2. Post-Hearing Proceedings**

On July 8, 2014, the Commission gave notice that it would consider its proposed decision in this matter at its July 30, 2014 meeting. At that meeting, the Commission announced its proposed decision to accept the findings and decisions of the Hearing Officer to reduce Stroble’s discharge to a 30-day suspension.

The Department filed objections to the Commission’s recommended decision. The Department expressly stated that it was “not requesting the Commission to change any Findings of Fact or read the transcript of the hearing.” The Commission maintained that “based on Findings of Fact 4, 6, 7, 9, 10, 15, part of 16 and 17 and Conclusions of Law 1, 2, 3 and 4, there is more than a sufficient basis for the Commission to sustain the Department’s Objections and impose discharge on [Stroble].”

The Department challenged the reduction in discipline, asserting that “the Hearing Officer’s professed reasons for changing the level of discipline . . . do not withstand scrutiny. In this regard, the Hearing Officer emphasizes

that [Stroble] provided truthful statements to investigators minutes after his initial false statements . . . . However, the Hearing Officer expressly found that [Stroble] continued to be untruthful in his third interview with the investigators and specifically about whether he put his cell phone under Ms. Zamora's dress . . . . [¶] Moreover, the Hearing Officer rejected [Stroble]'s testimony at the hearing on this crucial point . . . . Therefore, [Stroble] was not truthful in both the criminal investigation *and* . . . at the hearing. [¶] Accordingly, this is *not* a case where a Deputy Sheriff was initially untruthful and thereafter told nothing but the truth and accepted genuine responsibility for his behavior. . . . [¶] Therefore the basis for the Hearing Officer finding mitigating factors simply does not exist."

On October 1, 2014, the Commission "overruled the Department's objections and adopted as its final decision the findings and recommendations of the Hearing Officer . . . to reduce the discharge to a thirty (30) day suspension, but awarded no back pay. The Department did not sufficiently prove that the discipline was appropriate."

The Department filed a petition for writ of administrative mandate in the superior court. The court granted the Department's petition. The court found that Stroble's "minimization and repeated false statements, including under oath, mandate his dismissal." The court stated, "A Writ of Mandate shall issue from this court, remanding the proceedings to Respondent, Los Angeles County Civil Service Commission, and commanding Respondent to set aside its Final Decision, dated October 8, 2014, reducing [Stroble's] discharge to a thirty-day suspension from the Sheriff's Department in the administrative proceedings . . . ."

Stroble appealed from the trial court's judgment.

## DISCUSSION

### **I. Abuse of Discretion**

Stroble contends the Commission did not abuse its discretion in reducing his discipline to a 30-day suspension without pay and the superior court's judgment holding to the contrary must be reversed. The Department maintains the Commission's reduction in discipline is an abuse of discretion because it manifests an indifference to public safety and welfare. The Department argues that no reasonable person could disagree that discharge is the only appropriate penalty for Stroble's misconduct and the superior court's judgment should stand.

#### *A. Standard of Review*

When a party appeals following a trial court's determination of abuse or nonabuse of discretion by an administrative agency, the "appellate court gives no deference to the trial court's determination. It makes its own determination, de novo." (*Pollak v. State Personnel Bd.* (2001) 88 Cal.App.4th 1394, 1404.) This does not mean that the appellate court "independently or "de novo" determine[s] penalty." (*Ibid.*) The court "cannot substitute its discretion for that of the administrative agency on the degree of punishment to be imposed." [Citation.]' [Citation.]" (*Ibid.*)

"An administrative agency abuses its discretion if it modifies or revokes the discipline imposed by the appointing entity if the agency's findings are not supported by substantial evidence. [Citation.]" (*Cate v. State Personnel Bd.* (2012) 204 Cal.App.4th 270, 284.) Thus, the question before us is "whether the Commission's penalty-reducing decision was supported by substantial evidence in light of the whole record.' [Citation.]" (*Hankla v. Long Beach Civil Service Com.* (1995) 34 Cal.App.4th 1216, 1222.)

An administrative decision to reduce a penalty is not supported by the record as a whole and is an abuse of discretion if it “manifests an indifference to public safety and welfare.” (*Hankla v. Long Beach Civil Service Com.*, *supra*, 34 Cal.App.4th at p. 1222.)

“In considering whether such abuse occurred in the context of public employee discipline, we note that 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, “[h]arm to the public service.” [Citations.] Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence.’ (*Skelly v. State Personnel Bd.* [1975] 15 Cal.3d [194,] 218.)” (*Hankla v. Long Beach Civil Service Com.*, *supra*, 34 Cal.App.4th at p. 1223.)

#### B. *Analysis*

There is no dispute that Stroble’s conduct resulted in harm to the Department. The Hearing Officer made a specific finding of fact that Stroble’s conduct “brought discredit to himself and to the Department.” (Finding of Fact No. 17.) The Hearing Officer recognized that Stroble’s conduct resulted in a settlement payout by the Department. In addition, as the Hearing Officer also found, Stroble’s misconduct “may lead others to question his credibility in future hearing testimony.”

The Hearing Officer found, however, that “there are mitigating circumstances that make repetition unlikely.” The likelihood of repetition is a significant factor to be considered in determining the appropriate level of discipline. The Hearing Officer identified two primary circumstances that he believed made repetition unlikely: (1) “despite his plan to take a surreptitious photograph of Zamora, [Stroble] realized his planned action was wrong and did not actually carry out his plan;” and (2) “[w]hile he made false

statements to ICIB investigators, he realized his error within minutes and provided truthful statements.”<sup>4</sup>

The Department contends the Commission’s statements minimize the amount of harm to the public service, understate the likelihood of repetition of the misconduct and are unsupported by the record as a whole. The Department asserts the Commission’s decision to reduce Stroble’s discipline thus manifests an indifference to public safety and welfare and is an abuse of discretion.

1. Harm to public service

The Hearing Officer found that Stroble’s misconduct “may lead others to question his credibility in future hearing testimony.” The Department claims the record as a whole shows that Stroble will not be able to testify effectively in criminal proceedings and so will no longer be able to carry out his duties as a deputy sheriff.

As the cases provided by Stroble to the Hearing Officer show, not all law enforcement personnel who are found to make false statements are discharged from employment. The Department asserts that if Stroble attempted to testify, his prior conviction would have to be disclosed to defense counsel pursuant to *Brady v. Maryland* (1963) 373 U.S. 83. Even assuming for the sake of argument that *all* of Stroble’s misconduct would have to be disclosed under *Brady*, this fact alone does not require discharge. It is

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<sup>4</sup> We recognize that the Hearing Officer also believed that repetition was unlikely because Stroble’s “criminal probation terminated early and his conviction was set aside” and he had never previously attempted to take a surreptitious photograph or engage in any similar activity. These circumstances are supported by substantial evidence and are consistent with the record as a whole and do indicate that it is unlikely Stroble will repeat his attempt to take a surreptitious photograph. They are not indicative of whether he will make false statements in the future, however, and we do not consider them further.

undisputed that there are law enforcement officers who remain employed and involved in criminal investigations even though they are on a “*Brady* list” which requires disclosure of their misconduct. (The existence of the state law *Pitchess*<sup>5</sup> procedure also shows that not all law enforcement personnel are discharged or removed from criminal investigative work when they commit misconduct which must be disclosed to the defense.)

Thus, the record as a whole shows at least some law enforcement officers remain employed after committing misconduct and continue to testify in court, including after making false statements. There are practical difficulties with proving Stroble’s attempt to violate section 647,<sup>6</sup> and, so far, only one finding that Stroble made false statements as part of one incident. The Hearing Officer’s finding that this misconduct “may lead others to question his credibility in future hearing testimony” is not contradicted by this record and does not manifest an indifference to the public safety and welfare.

## 2. Likelihood of repetition

The Department contends that the Hearing Officer’s statement of mitigating circumstances presents Stroble’s making of false statements as an extremely brief and isolated event and implies that he has credibly accepted

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<sup>5</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

<sup>6</sup> Stroble’s Penal Code section 647 conviction was set aside and so cannot be used to impeach him. With exceptions not applicable here, “a felony conviction dismissed pursuant to Penal Code section 1203.4 is not admissible to attack a witness’s credibility. (Evid. Code, § 788, subd. (c).)” (*Sanders v. Walsh* (2013) 219 Cal.App.4th 855, 872.) While proof of the underlying conduct would not be barred, it is questionable how effective such evidence would be, given the Hearing Officer’s finding that Stroble chose not to go through with his plan to take the surreptitious photograph and the lack of any finding of a sexual intent on Stroble’s part.



responsibility for his behavior. The Department argues the record as whole does not support this characterization of Stroble's misconduct.

a. False statements

The Hearing Officer stated, "While [Stroble] made false statements to ICIB investigators, he realized his error within minutes and provided truthful statements." This is a reference to Stroble's request for the third interview to clarify matters and to the statements he made during that interview. This characterization of Stroble's behavior is contradicted by the record as a whole, however, including Finding of Fact No. 10, in which the Hearing Officer specifically found that in the third interview Stroble falsely denied positioning the cell phone underneath Zamora's dress. Thus, even after Stroble supposedly realized the error of his ways, he made a false statement about a key aspect of his conduct involving Zamora.

The Hearing Officer's characterization is also contradicted by his discussion of the testimony at the hearing in this matter. According to the Hearing Officer, when Stroble testified, he "denied actually placing the phone under Zamora's skirt." This is the same false statement Stroble made in the third interview.<sup>7</sup> While this falsehood had not yet occurred when Stroble was discharged, and cannot provide support for the discipline imposed by the Department, it was made at the hearing on that discipline and was relevant to assessing the likelihood of repetition of the misconduct of making false statements.

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<sup>7</sup> Stroble's testimony on this issue conflicted with Paoletto's testimony that Stroble "had a cellular phone in his right hand, which he 'deliberately' placed under Zamora's skirt." The Hearing Officer specifically credited Paoletto's testimony when it conflicted with Stroble's testimony, finding her to be a disinterested witness.

Stroble contends the Hearing Officer was free to put more focus on his truthful admissions in the third interview than on “those matters he genuinely disputed but of which he later found himself on the losing end.” We do not agree.

There is nothing to indicate that the Hearing Officer viewed Stroble’s statements about the position of the camera as a manifestation of a genuine dispute about what happened in the Clerk’s Office. The Hearing Officer repeatedly characterized Stroble’s denial as false. Further, the Hearing Officer found that Paoletto had an unobstructed view of the incident and was a disinterested witness, and credited her account that Stroble deliberately placed his cell phone under Zamora’s skirt. These statements are not consistent with a belief on the Hearing Officer’s part that the two parties genuinely disagreed about what happened.

More important, where Stroble positioned the camera was the key element of his wrongdoing: the position determined whether he intended to commit the “stupid” and “immature” act of photographing Zamora’s exposed leg or the criminal act involving moral turpitude of photographing up under her skirt. It would have been arbitrary, capricious and irrational for the Hearing Officer to give more weight to Stroble’s truthful admissions on other peripheral matters than to his falsehood on this key issue. (See *Cate v. State Personnel Bd.*, *supra*, 204 Cal.App.4th at p. 284 [it is an abuse of discretion to act arbitrarily, capriciously or beyond the bounds of reason].)

b. Realization of wrongdoing

The Hearing Officer stated that Stroble “realized his planned action was wrong and did not actually carry out his plan.” Not only was the Hearing Officer’s finding contradicted by the record as a whole, that record

shows that Stroble's "realization" that his planned action was "wrong" was actually part of another, albeit uncharged, false statement.

The Hearing Officer acknowledged early in his report that the "Department established that [Stroble] intended to take a photograph of parts of Zamora's leg not covered by her dress as well as of parts covered by the dress. [Stroble] admitted his intent to take a surreptitious photograph of Zamora's exposed leg." Taken in the abstract, this sounds like Stroble made a partial admission. Under the facts found by the Hearing Officer, however, Stroble's "admission" is a falsehood. The Hearing Officer found that Stroble bent down and placed his camera "under" Zamora's skirt. This movement is not consist with an intent to take a photograph of only the exposed portion of Zamora's leg. Stroble's partial "admission" was thus coupled, by necessity, with the direct falsehood discussed above: Stroble denied positioning his cell phone under Zamora's skirt or dress.

The difference in what the Department proved happened and what Stroble "admitted" is significant. Taking a photograph of the parts of a person covered by a skirt is a crime of moral turpitude; taking a photograph of a publicly visible leg is not a crime. Not surprisingly, Stroble's "realization" that his planned conduct was "wrong" related to his false admission. Thus, in the third interview, Stroble stated that he "decided to take a picture of [Zamora's] leg, at the skirt area." He moved close to her, "leaned over to take the picture, and then stopped, realizing what a stupid thing he was about to do." At the hearing, he testified that he "thought it would be 'funny' to take a picture of her leg." He moved near Zamora "and 'leaned over' toward Zamora to take the photograph. Before he could take a picture, Stroble testified, he realized the immaturity of his planned act and stopped."

Stroble's false "admission" at the third interview was not listed in the Department's letter of discharge, and his false "admission" at the hearing had not yet occurred when the Department sent its letter, and so those "admissions" do not provide support for the Department's discipline. The Hearing Officer was aware of both statements, however, and the statements were relevant to assessing the likelihood that Stroble would repeat his misconduct of making false statements.

### *C. Abuse of discretion*

Two of the primary "mitigating circumstances that make repetition unlikely" were not supported by the whole record. The Commission abused its discretion in modifying the Department's discipline on the basis of those circumstances. It is clear throughout the Hearing Officer's Report that, as of the date of that report, Stroble continued to falsely deny he intended to take a photograph with his camera pointing up Zamora's skirt and attempted to give the false impression that he did not intend to commit any criminal activity and would not even follow through on a plan that was stupid and immature. The Commission acted arbitrarily and capriciously in relying on two mitigating circumstances which were so clearly and directly contradicted by its own specific findings of fact and its summary and discussion of the evidence.

## **II. Remedy**

The Department agrees the Commission abused its discretion, but maintains that *any* reduction in discipline would be an abuse of discretion because reasonable minds cannot disagree that Stroble's misconduct is so serious that it requires his discharge. Stroble contends that only the Commission can determine the appropriate level of discipline, and this matter must be remanded for further proceedings.

### A. *Appropriate discipline*

We do not agree with the Department that no reasonable person could disagree that Stroble's misconduct requires discharge. The Department argues that discharge is the only penalty for making false statements of material facts in the course of a criminal investigation and for knowingly giving false testimony under oath regarding a material matter, in violation of Manual section 3-01/030.10. However, the Department did not list such a violation in its discharge letter.<sup>8</sup>

The Department charged Stroble with a number of different rules violations, all of which provide a range of discipline. These violations were grouped into three sets. The Hearing Officer found that the Department only established two sets of violations. Further, the Hearing Officer found that Stroble did not violate Penal Code section 647 because he did not actually take a photograph. Thus, the appropriateness of the Department's original discipline was certainly open to re-examination by the Hearing Officer and the Commission.

The Department nevertheless maintains that discharge is required because Stroble will not be able to testify effectively in criminal proceedings and so will no longer be able to carry out his duties as a deputy sheriff. As we discuss, *ante*, the Hearing Officer found that Stroble's misconduct "*may lead others to question his credibility in future hearing testimony.*" (Italics added.) Reasonable minds could differ as to the appropriate discipline in this situation.

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<sup>8</sup> The Department did state that Stroble violated Manual section 3-01/030.10 but specified that violation "pertains to 647 (j)(2) P.C., Disorderly Conduct, Unauthorized Photography."

*B. Remand*

The Commission abused its discretion in treating Stroble’s limited truthful statements at the third interview, including his partial “admission,” as a circumstance in mitigation which showed that Stroble was unlikely to repeat his misconduct of making false statements. Code of Civil Procedure section 1094.5, subdivision (f) permits us to set aside the trial court’s judgment and order reconsideration by the Commission “in light of the court’s opinion and judgment.” We conclude that it is appropriate to do so. On the record before us, we cannot say that it would be an abuse of discretion to select any discipline other than discharge.

**DISPOSITION**

We reverse the superior court’s judgment and remand the matter to the superior court with directions to remand the matter to the Commission for reconsideration in light of this opinion.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

GOODMAN, J.\*

We concur:

CHAVEZ, Acting P.J.

HOFFSTADT, J.

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