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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THOMAS CHRONISTER,

Plaintiff and Appellant,

v.

CITY OF OXNARD, et al.,

Defendants and Respondents.

2d Civil No. B267929
(Super. Ct. No. 56-2013-00435899-CU-OE-VTA)
(Ventura County)

Thomas Chronister retired after a long career as a police officer with the Oxnard Police Department (OPD). OPD denied non-monetary retirement benefits that an officer in his position would have received upon an honorable retirement. They did so because he had violated OPD policy by maintaining a concealed, intimate relationship with a woman whom he knew to be under indictment for murder. Seeking redress, appellant sued respondents: OPD; the City of Oxnard (City); the former Oxnard Chief of Police, Jeri Williams; and the former Interim City Manager, Karen Burnham. The trial court sustained a demurrer as to one cause of action and granted a motion for summary adjudication as to an issue raised in another cause of action. After a court trial, judgment was entered in respondents' favor.

Appellant claims that OPD unlawfully interrogated him, failed to afford him an opportunity for an administrative appeal, violated its rules and regulations, and refused to grant his request for a statutorily required hearing on its denial of a concealed weapons permit. Finally, appellant argues that the trial court erroneously sustained the demurrer. We affirm.

Facts

"As [respondents] were the prevailing parties at trial, we view the evidence . . . in a light most favorable to them, resolving all conflicts in their favor. [Citations.]" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 787.)

In 1983 OPD hired appellant. In 2000 he was promoted to the rank of Commander. In April 2012 appellant gave notice to OPD that he was going to retire. On July 1, 2012, after 29 years of service, he left OPD on a service retirement.

At the time of trial in October 2014, appellant was married to Kelly Soo Park. He met her in October 2011, and they were engaged two months later. They started living together in April 2012. After their first date, appellant did a Google search on Park. He discovered that she had been indicted for a murder committed in 2008 and was free on bail. During their second date, appellant learned that Park was required to wear an ankle monitor as a condition of her bail release. The monitor was not visible because Park always wore long pants.

Appellant's relationship with Park was contrary to Department Policy section 1050.2(e), which provided, "Except as required in the performance of official duties or, in the case of immediate relatives, employees shall not develop or maintain personal or financial relationships with any individual they know or reasonably should know is under criminal investigation."

In December 2011 appellant informed his roommate, OPD Officer Edward Kasaba, of his dating relationship with Park and the criminal charges against her. He asked Kasaba not to tell anyone at OPD about the charges.

Commander Scott Herbert, who was in charge of professional standards at OPD, learned that on several occasions appellant had taken Park inside the police station. She "spent a considerable amount of time with [appellant] in the watch commander's office." She went on "ride-alongs" with police officers. Contrary to OPD policy, Park did not fill out an application to go on a ride-along. Had she filled out an application, her criminal history would have been checked. The murder charge would have disqualified her from going on a ride-along.

Pursuant to OPD's retirement policy, officers such as appellant who receive a service retirement after 20 years are entitled to purchase their service weapon for one dollar and to be issued a retirement badge as well as a retirement identification card "reflecting the member is a Retired Officer from the Oxnard Police Department." "[U]pon honorable retirement," such officers are entitled to a "'CCW Approved'" (approved to carry concealed weapons) endorsement on the identification card. Before June 28, 2012, appellant had processed the paperwork necessary to purchase his service weapon. He had been issued a retirement badge and a retirement identification card with CCW endorsement. Chief Williams approved the CCW permit on June 7, 2012.

On June 28, 2012, OPD officials became aware of the charges against Park. Appellant was still engaged to her and "was still [a] full-time sworn peace officer." OPD officials were

concerned that, because of his relationship with Park, appellant may have committed a "policy violation," i.e., a violation of Department Policy section 1050.2(e). But "the prevailing thought" was that appellant "was not aware of Kelly Soo Park's status." Commander Herbert "didn't believe that [appellant] would put himself in that type of situation." Herbert "was concerned for [appellant's] safety."

On June 28, 2012, Assistant Chief Scott Whitney contacted the Santa Monica Police Department, which was investigating the murder for which Park had been indicted. Santa Monica investigators wanted to interview appellant about the murder. That same day, they drove to Oxnard.

Appellant was not working on June 28, 2012. Commander Herbert contacted him and asked him to come to Herbert's office. Herbert did not inform appellant of the purpose of the meeting. He wanted "to allow [the Santa Monica investigators to have] the first opportunity to speak with [appellant] and get what they may need for their case."

After their arrival at the police station, the Santa Monica investigators questioned appellant inside Herbert's office. The interview was recorded. Appellant said he knew Park had been charged with murder, but was "not privy to any of the details of . . . the case." Appellant further stated, "I know what I've read in the paper," and "I've been to court with her on several occasions." His relationship with Park was "one of the reasons why . . . I've decided to leave this organization now." An investigator said: "[Park's] DNA is all over the [victim's] apartment, it's on the neck of the deceased person who was strangled. . . . [T]here's a lot . . . of damning evidence against her

that she's the actual perpetrator of the homicide."[1] The investigator informed appellant that he was not a suspect and that they would like to proceed with the interview. Appellant replied, "I'd like to call an attorney." At that point, the interrogation ceased. The investigators drove back to Santa Monica.

Except for appellant, Commander Herbert was the only OPD officer present during the interview. Herbert did not ask appellant a single question. All of the questions were asked by the Santa Monica investigators. Herbert's sole remark during the interview was to state his name.

Immediately after the interview, Herbert served appellant with notices of administrative leave and administrative investigation. Appellant's placement on administrative leave meant that "[h]e was suspended with pay." Herbert removed from appellant's possession his retirement badge, retirement identification card with CCW endorsement, and service weapon. OPD notified the Department of Justice that appellant's CCW permit had been cancelled.

Herbert would not have taken any action against appellant if he had denied knowing that Park was under indictment for murder. Appellant told Herbert that he was not aware of Department Policy section 1050.2(e) and "had he known about this section . . . he would have retired sooner."

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[1] Commander Herbert testified that Park "was acquitted of all charges." Pursuant to Evidence Code section 452, subdivision (h) and section 459, we take judicial notice that in June 2013 Park was acquitted after a jury trial.
(See https://www.pressreader.com/usa/los-angeles-times/20130605/282480001342586.)

Herbert wrote a report in which he concluded that appellant had violated Department Policy section 1050.2(e). He also concluded that appellant had "violated the policy regarding conduct unbecoming . . . an officer because of [Park's] station visits, [appellant's] bringing [her] to [OPD] functions where other officers were also present, taking her to officers' homes, [and] not disclosing to the officers her status." Finally, Herbert concluded that appellant had violated OPD's ride-along policy.

Chief Williams upheld Herbert's findings. Had appellant not retired, he would have been subject to termination. But he retired three days after the June 28, 2012 interview with the Santa Monica investigators. He did not retire "in lieu of termination."

Because of appellant's policy violations, OPD did not allow him to purchase his service weapon. In addition, it denied him a retirement badge and a CCW endorsement on his retirement identification card. Chief Williams found that appellant had not retired in good standing.

In November 2012 appellant requested "the required hearing" on the "denial/revocation of a CCW permit." When the trial began approximately two years later in October 2014, he had not received a hearing.

The Complaints

The original complaint was filed in May 2013. The operative first amended complaint was filed three months later. It consists of four causes of action. The first is against City and OPD. It claims that they violated particular provisions of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code,

§ 3300 et seq., hereafter POBRA).[2] They allegedly interrogated appellant in violation of section 3303 and failed to afford him an opportunity for an administrative appeal in violation of section 3304. Pursuant to section 3309.5, the first cause of action seeks damages and "appropriate injunctive or other extraordinary relief to remedy the violation(s) as found and to prevent future violations."

The second, third, and fourth causes of action are against all respondents. The second cause of action alleges that they failed to comply with applicable policies, rules, and regulations concerning disciplinary investigations, implementation of disciplinary or punitive action, and appeals from such action. Pursuant to Code of Civil Procedure section 1085, the cause of action seeks "a Writ of Mandate . . . to compel [respondents] to comply with" applicable policies, rules, and regulations. It also seeks the "award [of] damages ancillary to the mandamus relief pursuant to [Code of Civil Procedure] § 1090 and 1095."

The third cause of action alleges that, without affording appellant a hearing as required by law, respondents refused to issue a CCW endorsement on his retirement identification card. Pursuant to Code of Civil Procedure section 1085, the cause of action seeks "[m]andamus relief commanding [respondents] . . . to issue" the endorsement "or hold [a] hearing in compliance with" Penal Code section 26320. It also seeks the "award [of] damages ancillary to the mandamus relief pursuant to [Code of Civil Procedure] § 1090 and 1095."

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[2] Unless otherwise stated, all statutory references are to the Government Code.

The fourth cause of action alleges that respondents deprived appellant of his constitutional rights under color of state law in violation of section 1983 of Title 42 of the United States Code. The fourth cause of action seeks general, special, and punitive damages.

Demurrer

Respondents demurred to the fourth cause of action on the ground that it was uncertain and failed to state a cause of action. The trial court sustained the demurrer with leave to amend, but appellant did not file an amendment.

Motion for Summary Adjudication

As to the three remaining causes of action, respondents filed a motion for summary judgment or, in the alternative, summary adjudication. With the exception of the second cause of action, the motion was denied. As to the second cause of action, the trial court granted summary adjudication in respondents' favor on appellant's claim that respondents had denied him the right to an evidentiary appeal under City's rules. The trial court did not grant summary adjudication on the issue whether appellant had been denied retiree privileges in violation of OPD policies.

Statement of Decision

In its statement of decision, the trial court declared: "[T]he second cause of action was dismissed by way of motion for summary adjudication of issues. Accordingly, at the time of trial, only the first and [third] causes of action remained viable." The second cause of action, however, was not dismissed. The trial court granted summary adjudication on only one of the issues raised in the second cause of action - the right to an evidentiary appeal under City's rules. In his objections to the proposed

statement of decision, appellant protested: "The Second Cause of Action was not dismissed in its entirety as the Court did not summarily adjudicate the entire cause of action. As such[,] the Second Cause of action remained viable."

As to the first cause of action, the trial court concluded that the interrogation of appellant did not violate POBRA because it "was focused on determining if [appellant] had information that would assist in either proving or disproving that Ms. Park committed the crime of murder." "POBRA does not apply to investigations which are conducted solely and directly with alleged criminal activities." The court found that "Commander He[r]bert's presence during the interview between [appellant] and the [Santa Monica] detectives was in no way[] a violation of POBRA; He[r]bert did not ask any questions or participate in the interview in any way."

As to the third cause of action, the court concluded that appellant was not entitled to relief because he had failed to exhaust his administrative remedies.

Standard of Review

"'"In reviewing the trial court's ruling on a writ of mandate (Code Civ. Proc., § 1085), the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. [Citation.] However, the appellate court may make its own determination when the case involves resolution of questions of law where the facts are undisputed. [Citation.]" [Citation.]' [Citations.]" (*Morris v. Harper* (2001) 94 Cal.App.4th 52, 58-59.)

Under the substantial evidence test, "[w]e must . . . view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and

resolving all conflicts in its favor . . . ." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.) "The substantial evidence standard applies to both express and implied findings of fact made by the superior court in its statement of decision rendered after a nonjury trial. [Citation.] . . . [We] presume that the trial court made all factual findings necessary to support the judgment so long as substantial evidence supports those findings . . . ." (*SFPP, L.P. v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462.)

Appellant's Interrogation (First Cause of Action)

Appellant contends that his interrogation on June 28, 2012, violated section 3303, which specifies conditions that must be met "[w]hen any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action . . . ." (*Ibid.*)

Substantial evidence supports the trial court's finding that section 3303 was inapplicable to appellant's interrogation. He was not "subjected to interrogation by his . . . commanding officer, or any other member of the employing public safety department . . . ." (§ 3303.) He was interrogated by investigators from the Santa Monica Police Department. Commander Herbert, the only OPD officer present, remained silent throughout the interrogation.

Appellant asserts, "By directing [him] to appear and submit to interrogation, an order that could result in additional disciplinary action if he refused, Respondents subjected [him] to an interrogation." But Commander Herbert testified that he did not direct appellant to cooperate with the Santa Monica investigators or answer their questions. (See *Gregory v.*

Hamilton (1978) 77 Cal.App.3d 213, 220-221 ["The testimony of a single witness will constitute substantial evidence for the purpose of appeal"].)

Moreover, at the time of the interrogation appellant was not "under investigation" within the meaning of section 3303. "Section 3303 prescribes protections that apply when a peace officer is interrogated in the course of an *administrative investigation* that might subject the officer to punitive action." (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 574, italics added.) According to Commander Herbert, appellant was not interrogated in the course of an administrative investigation. Appellant "was going to be placed under administrative investigation" if he told the Santa Monica investigators that he knew about the criminal charges against Park. "[T]he prevailing thought" was that appellant "was not aware of Kelly Soo Park's status." Herbert served appellant with a notice of administrative investigation after the interrogation had concluded and he had admitted knowing about Park's status.

Herbert testified that he had merely "coordinated" an interview of appellant to assist the Santa Monica investigators in their criminal investigation of Park. Section 3303 does not "apply to an investigation [such as the one conducted by the Santa Monica investigators] concerned solely and directly with alleged criminal activities." (*Id.* subd. (i).) Pursuant to section 3304, subdivision (a), Chief Williams could have ordered appellant to cooperate with the Santa Monica investigators. Section 3304, subdivision (a) provides: "Nothing in this section shall preclude a head of an agency from ordering a public safety officer to cooperate with other agencies involved in criminal investigations.

If an officer fails to comply with such an order, the agency may officially charge him or her with insubordination."

Administrative Appeal (First Cause of Action)

Appellant claims that respondents failed to afford him an opportunity for an administrative appeal in violation of section 3304, subdivision (b) (3304(b)), which provides, "No punitive action . . . shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required by his or her employing agency without providing the public safety officer with an opportunity for administrative appeal." As used in section 3304(b), "*punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment*." (§ 3303, italics added.) "Although section 3304 specifies that the officer must be provided an opportunity for an administrative appeal, it does not specify how the appeal process is to be implemented. At a minimum, section 3304 has been held to require that the officer be afforded an evidentiary hearing before a neutral fact finder. [Citations.]" (*Giuffre v. Sparks* (1999) 76 Cal.App.4th 1322, 1329.)

Appellant was not entitled to an administrative appeal. Respondents took no action against appellant that may have led to his "dismissal, demotion," or "reduction in salary." (§ 3303.) Before they could take such action, appellant voluntarily retired. Immediately after the June 28, 2012 interview, appellant was placed on administrative leave, which meant that he was suspended with pay. But the suspension was rendered moot by his retirement three days later. OPD's denial of a retirement badge, a CCW permit, and permission to purchase

his service weapon did not qualify as "punitive action" within the meaning of section 3303.

The only relevant "punitive action" was OPD's "written reprimand" of appellant after he had retired. (§ 3303.) Pursuant to *Haight v. City of San Diego* (1991) 228 Cal.App.3d 413, appellant was not entitled to an administrative appeal on the written reprimand. Haight was a police officer who voluntarily resigned while an investigation of a citizen's complaint for using excessive force was pending against him. Haight's supervising officer prepared a Separation Report that was critical of his performance. Haight claimed that, pursuant to section 3304(b), "he was denied his right to an administrative hearing on derogatory material contained in the Separation Report placed in his personnel file after he voluntarily resigned from City's police department." (*Id*. at p. 416.) The appellate court concluded that, because of his resignation, Haight was not entitled to an administrative appeal: "By [its] terms, The Act [i.e., POBRA] . . . pertain[s] to actively employed police officers or officers whose employment is being or has been terminated by the police department. [It does] not refer to persons, like Haight, who have voluntarily resigned from employment." (*Id*. at pp. 417-418.) The same reasoning applies to persons such as appellant who have voluntarily retired while a disciplinary investigation was pending against them.

Respondents' Alleged Failure to Comply with OPD Policies and Regulations (Second Cause of Action)

Appellant claims that he "met all requirements for the benefits established in the [OPD] Retirement Protocols and Respondents should have bee[n] ordered to provide them to [him]." Appellant asserts, "The trial court['s] reading into the

[OPD] Retirement Protocols an 'honorable service' and 'good standing' requirement was in error." We disagree. OPD Policy section 220.2 provides that, "upon honorable retirement," an officer is entitled to a "'CCW Approved'" endorsement on his retirement identification card. The OPD Retirement Protocol provides that it "is intended to assure that all Oxnard Police Department employees who have attained retirement status or are separated *and are in good standing* with the Oxnard Police Department transition into retirement . . . in a smooth and *honorable* fashion." (Italics added.)

In his reply brief, appellant argues that the "good standing" language in the Retirement Protocol applies only to OPD employees who "are separated," not to employees like himself who "have attained retirement status." If this had been the intent of the drafters, the Retirement Protocol would have provided, "all Oxnard Police Department employees who have attained retirement status or are separated *and in* good standing," instead of the current version, "all Oxnard Police Department employees who have attained retirement status or are separated *and <u>are</u> in* good standing." (Italics and underlining added.) The drafters' insertion of the italicized "are" shows that the "good standing" language was intended to apply to both retired and separated employees.

Appellant contends that he was entitled to a CCW endorsement because, by receiving a service retirement, he automatically received an "honorable retirement" within the meaning of OPD Policy section 220.2. Appellant relies on OPD Policy section 220.2(a), which provides, "For the purpose of this policy, honorably retired *includes* all peace officers who have qualified for, and accepted, a service or disability retirement,

however [it] shall not include any officer who retires in lieu of termination." (Italics added.)

We do not construe OPD Policy section 220.2 as requiring OPD to issue a CCW endorsement to any officer who has received a service retirement, irrespective of whether the officer retired in good standing. (Chief Williams found that appellant had not retired in good standing.) OPD Policy section 220.2 should be considered together with Penal Code section 26305, subdivision (d), which authorizes the permanent denial of a CCW permit "upon a showing of good cause," and subdivision (b), which authorizes the denial of a CCW permit for "violating any departmental rule . . . that, if violated by an officer on active duty, would result in that officer's . . . removal from the agency." Commander Herbert testified that, if appellant had remained on active duty, his violations of OPD policy would have subjected him to termination.

Appellant states, "It is undisputed and conceded by Respondents that [appellant] qualified [as honorably retired] under that definition [i.e., the definition in OPD Policy section 220.2(a)]." No such concession was made. In support of the alleged concession, appellant cites page 82 of the first volume of the reporter's transcript. At page 82 Commander Herbert was asked by appellant's counsel, "He [appellant] was honorably retired as he qualified and accepted a service or disability retirement, correct?" Herbert responded, "I don't know about honorably retired, but he retired on a service retirement."

CCW Hearing (Third Cause of Action)

The third cause of action alleges that respondents failed to grant appellant's request for a formal hearing on the denial of a CCW endorsement. Appellant was entitled to such a

hearing pursuant to OPD Policy section 220.6 and Penal Code section 26305, subdivision (d), which provides that a CCW endorsement "may be permanently revoked or denied by the issuing agency only upon a showing of good cause" that "shall be determined at a hearing, as specified in Section 26320." The third cause of action seeks a writ of mandate requiring respondents to issue the CCW endorsement "or hold [a] hearing in compliance with" Penal Code section 26320.

The trial court declined to grant relief because appellant had failed to exhaust his administrative remedies. In its statement of decision the court declared: "The evidence at trial established that the Oxnard Police Department has offered, and continues to offer [appellant] a hearing pursuant to Penal Code section 26300, et seq., regarding Chief Williams' decision not to issue [him] a CCW permit."

""The exhaustion doctrine "is . . . a fundamental rule of procedure" [citation] under which "relief must be sought from the administrative body and this remedy exhausted before the courts will act" [citation].' [Citation.]" (*Unnamed Physician v. Board of Trustees of Saint Agnes Medical Center* (2001) 93 Cal.App.4th 607, 620 (*Unnamed Physician*); accord, *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321 (*Campbell*).) "'Under this rule, an administrative remedy is exhausted only upon "termination of all available, nonduplicative administrative review procedures." [Citations.]' [Citations.]" (*SJCBC, LLC v. Horwedel* (2011) 201 Cal.App.4th 339, 346.) """"The basic purpose for the exhaustion doctrine is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to

provide the wanted relief."'" (*Action Apartment Ass'n v. Santa Monica Rent Control Bd.* (2002) 94 Cal.App.4th 587, 611.)

Appellant claims that the exhaustion doctrine does not apply here because "[t]he pertinent statutes . . . do not provide for any administrative remedy." The claim is forfeited because it is not supported by meaningful argument and citations to pertinent authority. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) The only authority cited is *Campbell*, *supra*, 35 Cal.4th at pp. 321-322. There, our Supreme Court noted that the exhaustion doctrine applies "'where an administrative remedy is provided by statute.'" (*Id*. at p. 321.) Appellant fails to offer any explanation why a good cause hearing conducted pursuant to Penal Code section 26320 is not an administrative remedy provided by statute.

Appellant argues that the "'exhaustion of administrative remedies' is an affirmative defense" that was waived because respondents did not raise it prior to trial. It is not an affirmative defense because the third cause of action seeks a writ of mandate, and exhaustion of administrative remedies is a prerequisite for such extraordinary relief. "When seeking relief under traditional mandamus, the exhaustion requirement speaks to whether there exisst an adequate legal remedy. If an administrative remedy is available and has not yet been exhausted, an adequate remedy exists and the petitioner is not entitled to extraordinary relief." (*Unnamed Physician*, *supra*, 93 Cal.App.4th at p. 620.) Appellant "must plead facts showing [he has] no other plain, speedy, or adequate remedy at law. [Citation.]" (*Pich v. Lightbourne* (2013) 221 Cal.App.4th 480, 491.)

In *Westinghouse Elec. Corp. v. County of Los Angeles* (1974) 42 Cal.App.3d 32, 37, the court rejected appellants' contention that the exhaustion of administrative remedies is an affirmative defense: "Contrary to appellants' contention, it is their burden to plead and establish as a part of their case in chief that they exhausted their administrative remedy." Moreover, there is authority that the exhaustion of administrative remedies is jurisdictional. (*Campbell*, *supra*, 35 Cal.4th at p. 321 ["We have emphasized that 'Exhaustion of *administrative* remedies is "a jurisdictional prerequisite to resort to the courts"'"].)

The facts are not in dispute as to whether appellant exhausted his administrative remedies. "We therefore apply the de novo standard of review and give no deference to the trial court's ruling. [Citations.]" (*Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist.* (2001) 87 Cal.App.4th 878, 883; see also *Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 873 ["We apply a de novo standard of review to the legal question of whether the doctrine of exhaustion of administrative remedies applies in a given case"].)

We agree with the trial court that appellant failed to show that he had exhausted his administrative remedies. OPD and City made clear their willingness to provide him with the required hearing. On four occasions in July 2013, before the filing of the first amended complaint, City's and OPD's counsel (James N. Procter II) sent emails to appellant's counsel (Corey W. Glave) offering a hearing pursuant to Penal Code section 26320. Procter asked Glave to contact him so they could make arrangements for the hearing. The first email was sent on July 15, 2013. Procter testified, "My goal was to try to get [the hearing] done as soon as possible after July 15, 2013."

On August 27, 2013, Procter emailed Glave: "[Y]ou have never responded to my inquiries regarding the protocol and conduct of the CCW hearing. . . . In the absence of any response from you, I can only assume that you and/or your client are declining the City of Oxnard's offer to conduct the hearing." In response to the email, Glave wrote, "[I]n regards to the CCW hearing . . . we requested, over 120 days ago (and in fact, last year), a CCW hearing. We have no idea why you assert that we must continue to confirm that request." Penal Code section 26315, subdivision (d) provides that, "[i]f a hearing is requested," it "shall be held no later than 120 days after the request by the retired officer for a hearing is received."

On October 3, 2013, Procter wrote a letter to Glave "regarding the hearing that will be conducted with respect to [appellant's] CCW permit pursuant to Penal Code Section 26320." The letter stated that City and OPD had appointed Assistant Chief Scott Whitney to the hearing board and that appellant "may appoint anyone he wishes to be his designated hearing officer." Penal Code section 26320 provides: "Any hearing conducted under this article shall be held before a three-member hearing board. One member of the board shall be selected by the agency and one member shall be selected by the retired peace officer or his or her employee organization. The third member shall be selected jointly by the agency and the retired peace officer or his or her employee organization."

The letter of October 3, 2013, ended with the following paragraph: "Please let me know at your earliest convenience who [appellant] will be appointing to the hearing board so that the third member can be selected. Once the hearing board is in place, we will send formal notice of the

hearing." Appellant has not cited any evidence in the record showing that, in response to the letter, he informed City or OPD of his selection to the hearing board.

More than one year later, on September 24, 2014, OPD wrote a letter to appellant notifying him that a hearing on the CCW permit had been set for October 15, 2014, 13 days before the trial began. OPD requested that appellant email the name of the hearing member he had selected. It listed the names of "three people as suggestions for the third hearing member." The letter continued, "If you do not wish to use one of the persons we have suggested, please e-mail . . . the names of five persons as suggestions for the third hearing member as soon as possible but no later than October 10, 2014. We will then schedule a meeting to discuss the selection of the third hearing member and to establish guidelines for the hearing process."

In response to this letter, Glave "provide[d] names of potential third-person panel members." He suggested "using state mediation and conciliation to provide a list of third parties." City "suggested maybe coming up with a list of hearing officers from surrounding cities that had conducted administrative hearings." Procter testified: "My recollection is that we agreed that we'd look into it. This was shortly before trial, and it was clear that we weren't going to have a hearing before the trial. So, frankly, it had to take kind of a back burner to the trial."

At trial Procter stated in open court: "We've already agreed to give [appellant] his CCW hearing." "[T]he only impediment to the CCW hearing at this point is selecting this third party," i.e., the third member of the hearing board to be selected jointly by OPD and appellant. The court stated, "It is

clear that the City of Oxnard is offering to provide a hearing." Appellant did not dispute these statements.

Based on the above facts, we cannot credit appellant's claim that he "did everything in his power to invoke his rights to . . . a CCW hearing" and that "[he] did everything possible and necessary to . . . seek a CCW hearing." It is reasonable to infer that, for more than one year, i.e., from July 2013 until October 2014, appellant delayed entering into meaningful discussions with City and OPD to make the necessary arrangements for the hearing.

We reject appellant's contention that "[r]espondent[s] waived defense of failure to exhaust administrative remedies when respondent[s] conceded that Appellant had exhausted remedies." Respondents made no such concession. City and OPD conceded that appellant had "appropriately made" a request for a CCW hearing. They further conceded that, "but for the data received [by the OPD] on June 28th," appellant "had complied with every requirement imposed by the state and the city to qualify" for a CCW permit.

In any event, because of City's and OPD's willingness to provide a CCW hearing pursuant to section 26320, the trial court properly denied a writ of mandate as unnecessary. "Because equitable principles apply in mandamus proceedings, we may properly consider all relevant evidence, including facts which arose after [appellant] filed [his] petition for writ of mandate. [Citation.] If such evidence demonstrates [City's and OPD's] 'willingness to perform without coercion, the writ [of mandate] may be denied as unnecessary . . . .'" (*State Bd. of Education v. Honig* (1993) 13 Cal.App.4th 720, 742.)

Demurrer (Fourth Cause of Action)

Appellant claims that the trial court erroneously sustained respondents' demurrer to the fourth cause of action for violation of section 1983 of Title 42 of the United States Code (section 1983). "'Our only task in reviewing a ruling on a demurrer is to determine whether the complaint states a cause of action. . . .'" (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.) "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." (*West v. Atkins* (1988) 487 U.S. 42, 48 [108 S. Ct. 2250, 101 L.Ed.2d 40].)

The fourth cause of action alleges that, without due process of law, respondents denied him "retirement benefits." The only specified benefit is his "vested" interest in a CCW endorsement. The interest was vested because respondents "could only den[y] or remove [appellant's] CCW permit for good cause." Due process was violated because respondents "have not provided [appellant] with any hearing to review the denial/rejection of the CCW permit."

The fourth cause of action goes on to state, "[E]ven if [appellant] is not entitled to due process, he does have a liberty interest and right to a hearing" before respondents make "stigmatizing charges against [him] implicating [his] reputation and/or that have belittled his worth and dignity as an individual." Respondents also allegedly violated appellant's First Amendment right to freedom of association by penalizing him for his relationship with a woman who had not been convicted of a crime.

The trial court sustained respondents' demurrer to the fourth cause of action with "[l]eave to amend . . . only for [the] intimate associations prong[] of the freedom of associ[]ation provision." Appellant did not file an amendment.

"'[T]he state courts of California should apply federal law to determine whether a complaint pleads a cause of action under section 1983 sufficient to survive a general demurrer.' [Citation.]" (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 891.) "The rules to be applied in evaluating a demurrer on a section 1983 cause of action were laid out in *Bach v. County of Butte* (1983) 147 Cal.App.3d 554 . . . (*Bach*)." (*Ibid*.) "[T]he allegations of the complaint are generally taken as true. [Citation.]" (*Bach*, *supra*, 147 Cal.App.3d at p. 563.) Where, as here, the complaint has been prepared by counsel, "'[t]he controlling standard . . . is that an action may be dismissed for failure to state a claim only if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Furthermore, a pleading is insufficient to state a claim . . . if the allegations are mere conclusions. [Citations.] Some particularized facts demonstrating a constitutional deprivation are needed to sustain a cause of action under the Civil Rights Act. [Citations.]'" (*Id*. at p. 564.) The sustaining of a demurrer "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. [Citation.]" (*Balistreri v. Pacifica Police Dept.* (9th Cir. 1988) 901 F.2d 696, 699 (*Balistreri*).)

We review de novo the trial court's ruling. (*Balistreri*, *supra*, 901 F.2d at p. 699.) Its ruling is presumed

correct, and the burden is on appellant to affirmatively show error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Due Process of Law

As to his section 1983 claim that he was denied a CCW permit without due process of law, appellant "must, as a threshold matter, allege a liberty or property interest within the protection of the Fourteenth Amendment. [Citation.] A property interest is defined as 'a legitimate claim of entitlement to [a benefit].' [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 319.)

Appellant's allegedly "vested" interest in a CCW permit is not a constitutionally protected property interest pursuant to *Association of Orange County Deputy Sheriffs v. Gates* (9th Cir. 1983) 716 F.2d 733 (*Gates*). There, retired deputy sheriffs filed a section 1983 action "alleging they had been denied certificates allowing them, after retirement, to carry concealed and loaded weapons." (*Id*. at p. 733, fn. omitted.) At the time of the denial, subdivision (a) of former Penal Code section 12027 provided, "The agency from which a peace officer is honorably retired may, upon initial retirement of the peace officer, or at any time subsequent thereto, deny or revoke, *for good cause*, the retired officer's privilege to carry a weapon as provided in this subdivision." (*Id*. at p. 733, fn. 3, italics added.)

The Court of Appeals affirmed the trial court's order granting the defendants' motion for summary judgment. The appellate court concluded that "[t]he right of a retired deputy sheriff to carry concealed weapons is not so fundamental as to warrant constitutional protection apart from its status under state law." (*Gates*, *supra*, 716 F.2d at p. 734, fn. 4.) As to state law, the court held that "the requirement of 'good cause' prior to

the denial of a weapons certificate does not create a constitutionally protected interest, because it is not a '*significant substantive restriction* on the basis for [the] agency's action.' [Citations.]" (*Id*. at p. 734, italics added.) In support of its holding, the *Gates* court cited *Jacobson v. Hannifin* (9th Cir. 1980) 627 F.2d 177. There, the Court of Appeals reasoned: "The only *substantive restriction* imposed upon the [Nevada Gaming] Commission's exercise of authority [to deny a gaming license] is the requirement that the basis for its decisions be reasonable. [Citation.] This wide discretion resting with the Gaming Commission negates Jacobson's claim to a protectible property interest created by the State." (*Id*. at p. 180, italics added.)

Appellant argues that *Gates* is no longer viable authority because in 1988, after *Gates* was decided, the statutory scheme was amended "by adding [former Penal Code] section 12027.1, which required hearings, before an impartial three-member panel, on the good cause to revoke or deny a CCW endorsement, unless the officer retired because of a psychological disability." (Stats. 1988, ch. 1212, § 2; see *Unland v. Block* (1997) 59 Cal.App.4th 1537, 1539, 1543-1544; *Knapp v. City of Gardena* (1990) 221 Cal.App.3d 344, 347-348.) "Although procedural requirements ordinarily do not transform a unilateral expectation into a protected property interest, such an interest is created 'if the procedural requirements are intended to be a "significant substantive restriction" on . . . decision making.' [Citation.]" (*Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz.* (9th Cir. 1994) 24 F.3d 56, 62.) Appellant fails to explain why the procedural requirement of a hearing on good cause before a three-member panel was "'intended to be "a significant substantive restriction"'" on the decision whether to deny or

revoke a CCW permit. (*Ibid.*) "[T]he 'good cause' requirement contemplates flexibility. . . ." (*San Jose Police Officers Assn. v. City of San Jose* (1988) 199 Cal.App.3d 1471, 1481.)

The *Gates* court noted: "Appellants were denied the privilege as contrasted to it being revoked. The court does not express an opinion with respect to the latter situation." (*Gates*, *supra*, 716 F.2d at p. 734, fn. 6.) Appellant claims that *Gates* is distinguishable because "the matter at hand involves the taking and/or revocation of a permit that had already been issued." Chief Williams approved the issuance of a CCW permit on June 7, 2012. On June 28, 2012, before appellant retired, Commander Herbert removed from appellant's possession his retirement identification card with CCW endorsement. At that time, appellant could not have had a constitutionally protected interest in the CCW permit because he "was still [a] full-time sworn peace officer." Only an honorably retired officer is entitled to a retirement identification card with CCW endorsement. OPD Policy section 220.2 provides that an officer "shall be issued an identification card with a 'CCW Approved' endorsement *upon honorable retirement*." (Italics added.) Penal Code section 26300, subdivision (b) provides, "Any peace officer . . . who *retired* after January 1, 1981, shall have an endorsement on the officer's identification certificate stating that the issuing agency approves the officer's carrying of a concealed and loaded firearm." (Italics added.)

Thus, OPD's issuance to appellant of a retirement identification card with CCW endorsement was premature. It would not become final and effective until he retired. It did not become final and effective because OPD repossessed the card before he retired. OPD's post-retirement decision not to reissue a

CCW permit constituted a denial rather than a revocation. Because Herbert had taken the card before appellant retired, there was nothing to revoke.

Even if appellant had a constitutionally protected interest in receiving a CCW permit upon retirement, it "'"appears beyond doubt that [he] can prove no set of facts in support of his [section 1983 due process] claim which would entitle him to relief.". . ."' (*Bach*, *supra*, 147 Cal.App.3d at p. 564.) The due process claim is based on respondents' alleged failure to provide a "hearing to review the denial/rejection of the CCW permit." The facts proved at trial show, and the trial court found in its statement of decision, that OPD "has offered, and continues to offer [appellant] a hearing pursuant to Penal Code section 26300, et seq., regarding Chief Williams' decision not to issue [him] a CCW permit." We therefore uphold the sustaining of the demurrer as to appellant's section 1983 due process claim.

Appellant's Reputation

The allegedly "stigmatizing" effect of OPD's accusations on appellant's reputation and the "belittl[ing of] his worth and dignity as an individual" do not implicate a constitutionally protected liberty interest. "[I]njury to reputation by itself [is] not a 'liberty' interest protected under the Fourteenth Amendment. [Citation.]" (*Siegert v. Gilley* (1991) 500 U.S. 226, 233 [111 S.Ct. 1789, 114 L.Ed.2d 277].) The *Gates* court rejected the retired deputies' argument that the denial of a CCW permit "cause[d] a loss of liberty without due process of law in that their reputations were damaged . . . ." (*Gates*, *supra*, 716 F.2d at p. 734; see also *Higginbotham v. King* (1997) 54 Cal.App.4th 1040, 1045 ["'Slander is not . . . a constitutional tort,

because a person's interest in his reputation is neither "liberty" nor "property" for purposes of the due process clause'"].)

In arguing that he stated a section 1983 cause of action based on the stigmatizing effect of OPD's accusations on his reputation, appellant cites *Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340. There, the court concluded that a probationary civil service employee is deprived of a liberty interest when his employment is terminated without a hearing and the termination "is based on charges of misconduct which 'stigmatize' his reputation, or 'seriously impair' his opportunity to earn a living [citation], or which 'might seriously damage his standing or associations in his community' [citations]." (*Id.* at p. 346, fn. omitted.)

Lubey is of no assistance to appellant because he was not terminated. He voluntarily retired. Furthermore, OPD has been willing to provide a hearing in compliance with Penal Code section 26320.

First Amendment Right to Freedom of Association

In their reply to appellant's opposition to the demurrer, respondents alleged for the first time that appellant had failed to state a claim for violation of his First Amendment rights. Appellant contends that the trial court should not have sustained the demurrer as to the First Amendment issue "when it was not raised in Respondents['] moving papers." Appellant complains that the trial court failed to "afford[] [him] any opportunity to brief the [First Amendment] issue[]." Appellant has not cited any portion of the record showing that he objected to respondents' raising the First Amendment issue in their reply or that he asked the trial court for an opportunity to brief the

issue. Appellant's contention, therefore, is forfeited. (See *People v. Simon* (2001) 25 Cal.4th 1082, 1103.)

In any event, the First Amendment issue is properly before us because it is a legal issue that the parties have briefed. "We may exercise our discretion to consider legal questions for the first time on appeal, provided that the parties are afforded a reasonable opportunity to address those questions [citation] . . . ." (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 205; see also *Harris v. Wachovia Mortg., FSB* (2010) 185 Cal.App.4th 1018, 1022 ["Because a demurrer raises only questions of law, "'an appellate court can affirm or reverse the ruling on new grounds.'"].)

The trial court did not err in sustaining the demurrer on the First Amendment issue. It is well established that there is no constitutional impediment to police department rules prohibiting officers from maintaining close personal relationships with persons charged with felonies such as murder. (*See Bautista v. County of Los Angeles* (2010) 190 Cal.App.4th 869, 871 [termination of peace officer "for engaging in a personal relationship with a known prostitute and heroin addict in violation of the Department's prohibited-association policy" did not "violate[] his right to freedom of association under the First and Fourteenth Amendments"]; *Bailey v. City of National City* (1991) 226 Cal.App.3d 1319, 1328 [courts have recognized that "a narrowly tailored prohibition enjoining police officers from maintaining close personal relationships with the criminal underside of society" passes constitutional muster as "a prohibition [that] validly balances the employee's interest in freely associating against the employer's interests in the efficiency of the public service"].)

Improper Joinder in Demurrer

The demurrer was filed by City and OPD. Respondents Burnham and Williams joined in the demurrer. Appellant claims that the trial court should not have sustained the demurrer as to Burnham and Williams because they "did not, themselves, demur." The trial court "should have construe[d] their [joinder] merely as cheerleading." The claim is forfeited because it is not supported by reasoned argument and citations to pertinent authority. (*Badie v. Bank of America*, *supra*, 67 Cal.App.4th at pp. 784-785.) The only cited authority is inapposite: *Haah v. Donghyuk Kim* (2009) 175 Cal.App.4th 45. There, D. Kim "filed a document in which he purported to join in the Kehs' demurrer. The trial court found there was no provision in the Code of Civil Procedure for a 'joinder' to a demurrer, and treated D. Kim's document as 'a cheerleading effort.' It then overruled the Kehs' demurrer." (*Id*. at pp. 52-53.) On appeal, "D. Kim's argument . . . addresse[d] only the merits of the Kehs' demurrer; it [did] not address the [trial] court's rejection of D. Kim's 'joinder' in the demurrer." (*Id*. at p. 53.) The appellate court concluded, "Because D. Kim does not contend on appeal that the court's rejection of his 'joinder' was error, he has forfeited any claim of error with regard to the court's ruling on the demurrer. [Citation.]" (*Ibid*.) Thus, the appellate court never decided the joinder issue.

Leave to Amend

Appellant's final contention is that the trial court should have granted leave to amend the fourth cause of action because it "could easily be amended to address any and all of the Court's concerns." But the trial court granted leave to amend as to the First Amendment issue. As to the other issues for which

leave to amend were not granted, appellant has not met his burden of showing that the fourth cause of action could be amended to state a cause of action. (See *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44.)

Disposition

The Judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Kent M. Kellegrew, Judge

Superior Court County of Ventura

Corey W. Glave, for Plaintiff and Appellant.

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