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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

CITY OF LOS ANGELES et al., Defendants and Appellants, v. DERWIN HENDERSON, Plaintiff and Respondent.	B264342 (Los Angeles County Super. Ct. No. BS148061)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Office of the Los Angeles City Attorney, Michael N. Feuer, Carlos De La Guerra and Bruce Monroe for Appellants.

Fullerton & Hanna LLP and Lawrence J. Hanna for Respondent.

INTRODUCTION

Respondent Derwin Henderson is a tenured officer with the Los Angeles Police Department (LAPD). Appellants the City of Los Angeles (the City) and its Chief of Police sustained three counts of misconduct against Henderson and ordered him to serve a 10-day suspension with an attendant loss of pay. Henderson sought and received an administrative appeal pursuant to a provision of a Memorandum of Understanding (MOU) between the City and the Los Angeles Police Protective League. The provision authorizes a tenured officer to challenge a suspension of 22 days or less without risk that the penalty may be increased, upon an admission of guilt to the sustained charges. The appeal resulted in a civilian hearing officer issuing a report recommending that the penalty be reduced to a five-day suspension. The Chief of Police rejected the recommendation and adopted the original 10-day suspension as the City's final disciplinary decision.

Henderson filed a petition for a peremptory writ of mandate challenging the final decision. The trial court granted the writ, concluding that the hearing officer's report failed to articulate the basis for the recommendation as required by the MOU, and that the Chief of Police should have remanded the matter to the hearing officer to complete his duty with respect to the administrative appeal. We conclude, as did the trial court, the hearing officer's report did not satisfy the requirements of the MOU and the Chief of Police, acting on behalf of the City, abused his discretion in adopting the original 10-day suspension on the basis of a report he believed to be analytically inadequate. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Henderson is a tenured LAPD officer. In February 2011, he was hired as the varsity football coach for Southeast High School in the City of Southgate.

On August 29, 2012, several varsity football team members grabbed a junior varsity player, Jonathan G., placed a football helmet on his head, and carried him into the varsity locker room where they punched, slapped and kicked Jonathan all over his body. When Henderson was advised of the alleged "hazing" incident, he interviewed Jonathan. Jonathan maintains he told Henderson and the other coaches what happened; Henderson testified that Jonathan did not want to discuss the incident, and only said his elbow hurt.

The next day, Jonathan received treatment at a medical center after complaining of stomach pains. Jonathan's father called Henderson to discuss the incident later that day. According to Jonathan's father, Henderson acknowledged that Jonathan told him about the incident. Henderson also told Jonathan's father that he spoke to the players involved in the incident and made them apologize to Jonathan. Henderson later admitted that his players had not apologized to Jonathan and that all denied there had been a hazing incident when he questioned them that day.

After discussing the incident with Jonathan's father, Henderson notified the proper authorities. Thereafter, the school district initiated an investigation.

On September 4, 2012, Dr. James Noble, a Southeast High School administrator, notified Henderson by phone that the school had decided to discharge him from his coaching position. Two days later, Henderson sent an email to Noble requesting a clarification of "the reason behind the dismissal." He wrote that the reasons given over the telephone were "pretty vague," amounting to an ambiguous assertion that he "didn't follow protocol," and explained that he needed the clarification in writing for his "upcoming and future legal actions." Henderson added that, in addition to being a football coach, "I am also a Sergeant with the Los Angeles Police Department and I take pride in doing things the correct way."

On September 9, 2012, Noble responded with an email refuting Henderson's assertions about their telephone conversation. Noble wrote that there had been no discussion of a failure to follow "protocol" and that he had no obligation to furnish a written reason for the decision to terminate Henderson's "at-will employment as a volunteer coach."

Henderson responded with another email, dated September 13, 2012, wherein he claimed to have a recording of the telephone conversation with Noble, stating "the telephone line at my job . . . records all conversations[;] [t]hat is why my recollection of the conversation is this way." In a subsequent telephone conversation on September 18, 2012, Henderson again told Noble that all calls on his work line were recorded. Henderson later admitted that he knew the telephone line did not record all conversations.

The LAPD initiated an administrative investigation regarding Henderson's conduct. In addition to the facts surrounding the hazing incident, the investigators learned that Henderson had worn his LAPD uniform to a state interscholastic sports meeting in March 2012, while he was off-duty. The meeting's purpose was to decide whether Henderson's football team would be stripped of a championship title due to Henderson fielding an ineligible player during a 2011 playoff game. Henderson wore his uniform without following LAPD protocol or obtaining the required approval. Henderson admitted this was a "mistake."

As a result of the investigation, the Chief of Police charged Henderson with the following misconduct:

"Count 1: On or about March 20, 2012, you, while off duty, inappropriately used your position as a police officer to influence the status of your off duty employment.

"Count 2: On or about September 13, 2012, you, while off duty, displayed conduct unbecoming an officer when you told Doctor J. Noble that you had recorded a telephone conversation with him without his consent.

"Count 3: On or about August 29, 2012, you, while off duty, displayed conduct unbecoming an officer when you failed to notify the proper authorities after you became aware that a juvenile had been battered on school grounds."

On August 29, 2013, the acting Chief of Police sustained the three charges and suspended Henderson for 10 days.

Henderson appealed his suspension pursuant to Section 9, Article 9.1 of the MOU. That MOU provision authorizes an LAPD officer to initiate an administrative appeal of a suspension of 22 days or less, with the understanding that the penalty cannot be increased, if the officer (1) admits guilt to the sustained charges, and (2) limits the appeal to the degree of the penalty. The administrative appeal is conducted before a civilian hearing officer selected from the Police Commission's approved list (the Hearing Officer). The police officer has the right to appear at the hearing in person and present information specifically related to the degree of the penalty. The Hearing Officer must consider this information and issue a written report setting forth his recommendation and findings. Article 9.6 of the MOU provides: "At the conclusion of the hearing, after reviewing all information presented, the hearing officer shall prepare a report recommending that: (1) the charge(s) be sustained or not sustained (paper penalty); (2) the penalty remain the same or be reduced; or (3) the appeal be denied or granted. The hearing officer shall articulate in the report the basis for the findings."

After receiving the Hearing Officer's recommendation, the Chief of Police retains discretion to make a final determination regarding the degree of the penalty, subject to the limitation that the penalty cannot be increased following the administrative appeal. Article 9.7 states: "The Chief of Police shall make a final decision in the matter within 60 days of receiving . . . the hearing officer's report . . . . The Chief of Police may adopt or reject, in whole or in part, the proposed findings of the hearing officer, as appropriate under the circumstances. The decision of the Chief of Police shall be final."

Following the administrative appeal hearing, the Hearing Officer issued a six-page report recommending that Henderson's suspension be reduced to five days. In his report, the Hearing Officer acknowledged that the appeal's "only subject is penalty," but observed that his determination could not "be made intelligently without reference to the admitted misconduct." In that regard, the Hearing Officer emphasized that though the "conduct did not occur squarely within the ambit of professional police work," it

nevertheless "reflects upon Sergeant Henderson's judgment, which this disciplinary process exists to inform, and where necessary even to alter." With respect to mitigating factors, the Hearing Officer recognized that "no varsity coach can control every action of every thirteen- or fourteen-year old freshman player" and that "fights happen often enough" in high school football that some reasonably might "not raise alarms, at least as presented here." Further, the Hearing Officer expressed some sympathy for Henderson's explanation that Jonathan's "story changed," while stressing that "Sergeant Henderson did make [a] report, evidently in timely fashion, once presented with [Jonathan's] father's version" of the events.

Notwithstanding these mitigating factors, the Hearing Officer found it "troubling" that Henderson failed to "express some remorse" for his inaction concerning the reported hazing incident. Further, based on the evidence, the Hearing Officer reasoned that Henderson "chose not to apply his investigative skills to [Jonathan's] claim, even though that claim evidently encompassed an injury, and even though Sergeant Henderson himself recognized some impediments to [Jonathan's] willingness to speak candidly." In the view of the Hearing Officer, this was a critical failure because "the large[r] issue here is student safety." Lastly, the Hearing Officer concluded that Henderson failed to demonstrate that "he sees anything to 'fix' [with respect to his conduct], or that he would not handle the matter in the same way now—but for this disciplinary process."

As for the other two counts, the Hearing Officer suggested Henderson's admitted misconduct did not warrant a harsh punishment because "[n]o actual damage appears to have been caused by either act."

With respect to his penalty recommendation, the Hearing Officer explained that if he were simply assessing whether to " 'uphold' a penalty finding absent 'abuse of discretion,' " he would "not reject the ten-day penalty." But, insofar as his "obligation" required an "independent assessment of the facts [and] the testimony" to determine "the fairest and most proper penalty," the Hearing Officer recommended, "after careful reflection," that Henderson should serve "a five-day suspension, with attendant loss of pay, as a result of his admitted misconduct."

After receiving the report, the Chief of Police rejected the Hearing Officer's recommendation. The Chief acknowledged that "[t]he Hearing Officer took into consideration justice to the accused officer and the Department, and the need to demonstrate that the Department 'treats misconduct seriously but with fairness.' " Nevertheless, the Chief remarked that the "Hearing Officer did not articulate or explain why a 5-day suspension would be more appropriate or fair than a 10-day suspension in this case." With respect to his express "Rationale" for rejecting the recommendation, the Chief wrote: "As for the penalty, the Hearing Officer provided no compelling reason to reduce the penalty imposed in this case. Having considered the recommendation of the Hearing Officer, I believe a 10-day suspension is appropriate and warranted given all the facts and circumstances of this case."

Henderson filed a petition for peremptory writ of administrative mandamus, seeking a writ directing the City to rescind the 10-day suspension and reimburse Henderson for all withheld salary. The petition asserted the Chief of Police abused his discretion by rejecting the Hearing Officer's recommendation, citing the Chief's alleged "failure to proceed in the manner required by law."

The trial court granted Henderson's petition. While acknowledging that the Hearing Officer's report identified certain mitigating factors, including "that fights happen all the time at football practice and that Henderson reported the incident once presented with Jonathan's father's version," the court found the report "did not articulate why" Henderson's suspension should be reduced to five days. In the court's view, the report did not satisfy Article 9.6 of the MOU because it "failed to link [the Hearing Officer's] findings and the recommendation of a reduced penalty."

As for the Chief of Police, the trial court determined the Chief should have remanded the matter to the Hearing Officer to explain why a reduced penalty was warranted, rather than simply "reject[ing] the Hearing Officer's recommendation as unsupported by reason or analysis." In declining to do so, while "adopt[ing] the original penalty," the court ruled the Chief "fail[ed] to follow the Department's own rules" and abused his discretion. The court nevertheless found that "[t]he ten-day penalty would not

be a manifest abuse of discretion" based on the evidence in administrative record, but concluded that the MOU required the penalty to be determined "in the first instance after a recommendation from the Hearing Officer tying his findings to the recommended penalty and a final decision by the Chief of Police."

The court issued a writ directing the City to "comply with the M.O.U." by returning the matter to the Hearing Officer to "provide a more specific rationale for his recommendation that a five day penalty was more appropriate than a ten day penalty." The writ continued, "Once this is done then the Chief of Police can properly consider this rationale and take what action he deems appropriate based on the evidence and the Hearing Officer's rationale and recommendation." This appeal by the City followed.

DISCUSSION

1. *Standard of Review*

Administrative mandamus is available to obtain judicial review of a public agency "decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer." (Code Civ. Proc., § 1094.5, subd. (a).)[1] Because the City's disciplinary action resulted from an evidentiary proceeding required by the Public Safety Officers' Procedural Bill of Rights Act (Gov.

[1] Subsequent statutory references are to the Code of Civil Procedure, unless otherwise indicated.

Code, § 3300, et seq.) and the MOU (see Gov. Code, § 3304.5), Henderson properly sought judicial review of the decision by administrative mandate.[2]

In a proceeding for administrative mandate, the judicial inquiry extends to whether the public agency "has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (§ 1094.5, subd. (b).) An abuse of discretion is established if the public agency "has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (*Ibid.*)

Where the public agency's decision affects a fundamental vested right—such as a tenured police officer's employment—the trial court exercises independent judgment in assessing whether the evidence is sufficient to support the agency's findings. (*Molina v. Board of Admin., California Public Employees' Retirement System* (2011) 200 Cal.App.4th 53; see also *Zink v. City of Sausalito* (1997) 70 Cal.App.3d 662, 665 (*Zink*).) In such cases, the court conducts a limited trial de novo and "abuse of discretion

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[2] The Public Safety Officers' Procedural Bill of Rights Act mandates that "[n]o punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any [tenured] public safety officer . . . without providing the public safety officer with an opportunity for administrative appeal." (Gov. Code, § 3304, subd. (b).) Administrative appeals under the Act are to "be conducted in conformance with rules and procedures adopted by the local public agency." (*Id.*, § 3304.5.) In this case, those rules and procedures are established by the MOU.

Citing section 9.8 of the MOU, the trial court observed that "[a]t least one version of the MOU . . . expressly states that the administrative appeal is advisory to the Chief of Police only, and is not a 'hearing' for purposes of administrative mandamus under . . . section 1094.5." As the parties did not include section 9.8 in the administrative record, we have no cause to consider its effect on the form of mandamus available. Regardless, because this appeal exclusively concerns a legal question—whether the City complied with the MOU's terms in fixing the penalty for Henderson's admitted misconduct—the form of mandamus does not affect our standard of review. (See *Katosh v. Sonoma Cty. Employees' Ret. Ass'n* (2008) 163 Cal.App.4th 56, 62, fn. 4 ["There are subtle differences between the scope of judicial review applied to ordinary mandamus and that used for administrative mandamus. (Citation.) Regardless of the writ involved, however, where the facts are undisputed, the reviewing court faces a question of law. 'On questions of law arising in mandate proceedings, we exercise independent judgment.' "].)

is established if the court determines that the findings are not supported by the *weight of the evidence*." (§ 1094.5, subd. (c), italics added; *Mann v. Dep't of Motor Vehicles* (1999) 76 Cal.App.4th 312, 320 (*Mann*).) "In all other cases, abuse of discretion is established if the court determines that the findings are not supported by *substantial evidence* in the light of the whole record." (§ 1094.5, subd. (c), italics added.)

Critically, in proceedings challenging a disciplinary employment action, the court exercises independent judgment concerning the weight of the evidence "only [with respect] to the issue of guilt or innocence of the charges." (*Zink, supra,* 70 Cal.App.3d at p. 665.) This is because "[d]iscretion in fixing the penalty for infractions is not vested in the trial court." (*Ibid.*) Rather, "[t]hat discretion remains in the administrative body, and will not be disturbed unless there has been a manifest abuse of its discretion." (*Ibid.*; § 1094.5, subds. (b) &(c); *Mann, supra,* 76 Cal.App.4th at p. 320.)

Because Henderson admitted guilt of the charges in seeking administrative review of the original penalty, the City's decision was not subject to the trial court's independent assessment of the evidence and no limited trial de novo was authorized. On mandamus review of an administrative decision in such cases, both the trial court and the appellate court exercise an essentially appellate function in that only errors of law appearing on the administrative record are subject to their cognizance, and the function of the appellate court, like that of the trial court, is to determine whether that record is free from legal error. (*Merrill v. Dep't of Motor Vehicles* (1969) 71 Cal.2d 907, 915-16.) Accordingly, to decide whether the City abused its discretion—specifically, whether the City complied with the terms of the MOU—we apply our independent review without deference to the trial court's conclusions. (See *Santa Clara Valley Transportation Authority v. Rea* (2006) 140 Cal.App.4th 1303, 1313; see also *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 677; *County of Santa Cruz v. Civil Service Com'n of Santa Cruz* (2009) 171 Cal.App.4th 1577, 1582.)

2. *The City Failed to Comply with the Terms of the MOU; Manifest Abuse of Discretion Warrants Mandamus Relief*

The trial court determined that the City abused its discretion by failing to comply with the MOU in two respects: First, the court concluded the Hearing Officer's report did not satisfy the MOU's finding requirements because it "failed to link [the Hearing Officer's] findings and the recommendation for a reduced penalty." Second, the court concluded the Chief of Police failed to comply with the MOU by "decid[ing] to reject the Hearing Officer's recommendation as unsupported by reason or analysis," rather than remanding the matter to the Hearing Officer to "complete his duty." We conclude the City did not comply with the MOU and that the writ was correctly granted.

Where a police officer admits guilt and challenges the severity of a proposed penalty, Article 9.6 of the MOU requires the Hearing Officer to "prepare a report recommending that . . . the penalty remain the same or be reduced . . . [and to] articulate in the report the basis for the findings." The report in this case fails to meet those requirements. The report lists the following mitigating factors: (1) Henderson's understandable inability to "control every action of every thirteen- or fourteen-year old freshman player"; (2) the reality that "fights happen often enough" in high school football that some reasonably might "not raise alarms"; (3) Henderson's explanation that Jonathan's "story changed"; (4) the fact that Henderson made a report "in timely fashion, once presented with [Jonathan's] father's version" of the events; (5) and the Hearing Officer's view that Henderson's admitted misconduct with respect to Counts 1 and 2 did not cause any "actual damage." While the Hearing Officer indicated the evidence was sufficient to "uphold" the 10-day suspension under a deferential "abuse of discretion" standard, he explained that his "obligation" required an "independent assessment of the facts [and] the testimony" and, under this standard, "the fairest and most proper penalty" was a reduced five-day suspension.

Listing these factors without more, however, does not comply with Article 9.6's directive to "articulate in the report the basis for the findings." As both the trial court and the Chief concluded, the report articulated no further account of the "link" between the mitigation findings and the recommended reduced penalty. (See *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 (*Topanga*) [Implicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order].) The Hearing Officer's failure to bridge the analytic gap was further confused by his off-the-cuff opinion approving the original 10-day penalty as a proper exercise of discretion.

With respect to the ultimate agency action challenged by Henderson's writ petition, the trial court concluded the City, acting through the Chief of Police, abused its discretion by rejecting the Hearing Officer's recommendation as "unsupported by reason or analysis," while failing to "reman[d] to the Hearing Officer to complete his duty." The trial court was understandably concerned, as are we, by the Chief's suggestion that the Hearing Officer's report "did not articulate or explain why a 5-day suspension would be more appropriate or fair than a 10-day suspension in this case." We understand the Chief's comments to mean that he, too, felt the Hearing Officer's report was an inadequate basis upon which to reconsider the initial penalty. In effect, the Chief ended up adopting his original decision in the absence of an adequate agency analysis explaining *why* the facts warranted a reduced penalty. By re-imposing the penalty without consideration of an adequate analysis, the Chief violated the MOU. The Chief is, of course, permitted to disagree with a reasoned report; he cannot, however, act on his own, rejecting the agency report because it does not competently bridge the analytic gap.

In determining whether the Chief abused his discretion under the MOU and Public Safety Officers' Procedural Bill of Rights Act (see fn. 2, *ante*) our function is to determine whether his decision was free of legal error and supported by the evidence. In making this determination, "all legitimate and reasonable inferences must be indulged" in support of the administrative decision's propriety. (*Morell v. Dep't of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504, 508; *Topanga, supra,* 11 Cal.3d at p. 514 [in reviewing agency decisions, "the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision"].) The "Rationale" section of the decision suggests the Chief determined the Hearing Officer failed to state why a reduced five-day suspension was preferable to a 10-day suspension—the precise issue the Hearing Officer was tasked with deciding. Without an analytic "bridge," the Chief should have insisted on an adequate analysis before he acted. Accordingly, we conclude there was a manifest abuse of discretion by the City. The writ was correctly granted.

DISPOSITION

The judgment is affirmed.

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STRATTON, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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