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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BYRON DREDD,

Plaintiff and Appellant,

v.

LOS ANGELES COUNTY CIVIL
SERVICE COMMISSION,

Defendant and Respondent;

COUNTY OF LOS ANGELES,

Real Party in Interest and
Respondent.

B279819

(Los Angeles County
Super. Ct. No. BS158652)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Amy D. Hogue, Judge. Reversed and
remanded with directions.

Rains Lucia Stern St. Phalle & Silver and Gidian R. Mellk
for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Liebert Cassidy Whitmore, Geoffrey S. Sheldon, David A.
Urban, and James E. Oldendorph for Real Party in Interest and
Respondent.

Byron Dredd appeals from the trial court's denial of his
petition for a writ of mandate challenging his dismissal as a
deputy sheriff for real party in interest and respondent
Los Angeles County (County) Sheriff's Department (Department).
The County Civil Service Commission (Commission) upheld
Dredd's dismissal based upon findings by a hearing officer after
an eight-day administrative hearing.

Dredd claims that: (1) the trial court applied the wrong
standard in reviewing the administrative findings; (2) the
evidence does not support the trial court's findings that Dredd
engaged in punishable misconduct; (3) the Department abused its
discretion in dismissing Dredd; and (4) the Department
interrogated Dredd in violation of his rights under the Public
Safety Officers Procedural Bill of Rights Act (POBRA) (Gov. Code,
§ 3300 et seq.) and his statements during the interview should
therefore have been suppressed.

We agree with Dredd's first argument. The trial court's
oral comments during the hearing on Dredd's petition raise a
serious question as to whether the trial court applied the wrong
standard in reviewing the administrative record.

The court stated during the hearing that it was not
permitted to "reassess credibility." That statement is
inconsistent with the independent judgment the trial court is

required to exercise where, as here, it reviews administrative findings that affect a vested property interest. Accordingly, we must reverse and remand for the trial court to evaluate the evidence of Dredd's alleged misconduct using the correct standard. Because the trial court's factual findings might also have affected its ruling upholding the Department's decision to discharge Dredd, we also reverse that ruling and remand for the trial court to reconsider its findings upholding the Department's punishment decision.

Unlike those decisions on the merits, the record shows that the trial court's use of an erroneous standard of review did not affect its ruling rejecting Dredd's argument that the Department violated his POBRA rights. The evidence supports that ruling, and we therefore uphold that portion of the trial court's order.

BACKGROUND

1. *Events Leading to Dredd's Discharge*¹

Dredd worked as a deputy sheriff with the Department from May 2009 until he was discharged in June 2013. During the relevant events he worked in the visiting unit at the Men's Central Jail (the Jail).

The Department's stated basis for discharging Dredd was his relationship with a particular Jail inmate (the Inmate). The Department characterized Dredd's relationship with the Inmate as improper fraternization. Dredd claimed that he was attempting to cultivate the Inmate as an informant.

¹ Because of our disposition, we summarize only those facts concerning Dredd's alleged conduct that are necessary for the context of the trial court's ruling.

The Inmate had previously provided Dredd with information about a homicide in the Jail that Dredd passed on to his superiors. In about March of 2012 the Inmate also gave Dredd information about potential narcotics smuggling by other Department employees that Dredd passed on to his supervisor, Sergeant Ray, and to his captain, Captain Ornelas.

Dredd had several discussions with Ornelas about the information he had passed on about narcotics smuggling. According to Ornelas, when he first spoke with Dredd about the topic, he told Dredd to stop investigating. Ornelas believed that it was clear from this instruction that Ornelas wanted Dredd to cease pursuing a relationship with the Inmate. Ornelas reiterated the instruction to Dredd to stop investigating in a follow-up conversation with Dredd less than a month later. Dredd denied that Ornelas ever told him to stop contact with the Inmate or to stop eliciting information from him.

The Department interviewed the Inmate on May 1, 2012. During that interview, the Inmate told the interviewers, Lieutenant Leavins and Sergeant Duarte, that Dredd often gave him extra visiting time and gave his visitors priority. He also told them that Dredd had given him the number of an “unregistered” cell phone for the Inmate to contact Dredd. The Inmate said that he believed Dredd “would bring contraband into the . . . Jail for him.” Following the interview the Department opened a criminal investigation of Dredd.

Based on the information from the Inmate, investigators enlisted the help of several undercover female police officers to pose as friends of the Inmate to set up a meeting with Dredd. One of the undercover officers texted Dredd, saying she had obtained his number from the Inmate. They exchanged a series of texts and arranged to meet at a restaurant in Brea.

Dredd met with the undercover officers for dinner and drinks at the Yard House restaurant in Brea on June 12, 2012. During the meeting, the undercover officers asked Dredd if he would bring some cigarettes to the Inmate, which Dredd refused to do. However, he did offer to get the women to the front of the line for visiting the Inmate and to arrange extra visiting time. Dredd prepared a memorandum concerning the meeting after it took place, which he sent to several lieutenants.

Duarte and Sergeant Cassidy interviewed Dredd on July 12, 2012. They told Dredd that they were with the Department's Internal Criminal Investigation Bureau (ICIB) and were investigating the introduction of contraband and drugs into the jails. They informed Dredd that he was the subject of the investigation. They also said that, because it was a criminal investigation, they could not compel Dredd to give them a statement and that he was free to stop talking and to leave at any time. Dredd agreed to speak with them. After addressing a number of questions, including questions about Dredd's meeting with the two women at the Brea restaurant, Dredd said he wished to speak with his attorney and the interview ended.

Duarte closed the criminal investigation file on Dredd on August 15, 2012, concluding that the investigation "did not reveal any criminal violations." However, his report noted that the investigation "appears to show an inappropriate relationship between Deputy Dredd, [the Inmate] and [the Inmate's] associates." The report stated that the investigation "will be forwarded to Internal Affairs Bureau . . . for administrative disposition."

Following the Internal Affairs Bureau (IAB) review, the Department decided to discharge Dredd. Among the grounds that the Department cited were that Dredd: (1) provided the Inmate

and his visitors preferential treatment in the form of preferred seating areas, priority access to avoid waiting in lines, and prescreening visitors' backgrounds; (2) provided the Inmate with Dredd's personal cell phone number; (3) spoke with an associate of the Inmate on his personal cell phone; (4) had personal discussions with the Inmate about Dredd's family and the "type of women" he dated; (5) met with two women he believed were associates of the Inmate at a restaurant in Brea without notifying the Department or "arranging contingencies" to ensure his safety; (6) obtained information for the Inmate about another deputy and another inmate; and (7) failed to keep his superiors informed about his contacts with the Inmate and his associates. The Department also cited as a ground for dismissal that Dredd continued to have contact with the Inmate and continued to investigate information that the Inmate provided to him "even after Captain Ornelas told [him] the information was being handled/or turned over to the appropriate bureau."

2. *The Administrative Findings*

Dredd requested a hearing, which took place before a hearing officer on eight days from April to October 2014. At the conclusion of the hearing, the hearing officer prepared written findings of fact. Among the hearing officer's findings were that: (1) Dredd granted the Inmate extra visiting time and gave or offered to give his visitors "preferential seating and reduced waiting time"; (2) at the Inmate's request, Dredd prescreened potential visitors using Department computers to make sure that they were "O.K. to visit"; (3) Dredd gave the Inmate and one of his associates Dredd's private "pay as you go" cell phone number and "communicated with them on this number regarding social issues, social conversation, and access to visiting"; (4) using his personal cell phone, Dredd communicated with an undercover

agent about personal topics; and (5) on June 6, 2012, Dredd met with two undercover agents he believed to be associates of the Inmate at the Yard House restaurant in Brea and talked with them about various personal topics.

The hearing officer also found that Dredd “was not trained by sanctioned LA Department training in cultivating informants nor was this part of his job description.” With respect to Dredd’s communications with Ornelas, the hearing officer found that Ornelas told Dredd on March 18, 2012 “not to investigate this any further and the information was being turned over to the appropriate bureau,” and Ornelas reiterated that order in person and by e-mail on April 16, 2012.

The hearing officer recommended to the Commission that “the Department be sustained in the discharge.” The Commission accepted the hearing officer’s findings and recommendations at a meeting on April 8, 2015.

3. *Dredd’s Petition for a Writ of Mandate*

Dredd filed his petition for a writ of administrative mandamus on October 20, 2015. The trial court heard arguments on the petition on October 5, 2016.

Prior to the argument, the trial court prepared a tentative decision which it ultimately adopted as its final ruling (the Order). The trial court’s Order stated that the administrative record “is replete with evidence, much of it admitted, supporting the finding that [Dredd] used poor judgment in undertaking investigatory activities that violated multiple rules and policies and that he persisted in this endeavor even after he was instructed to cease investigating.” Thus, the court concluded that the “weight of the evidence supports the Department’s and the Hearing Officer’s findings in that regard.” The court also concluded that the punishment—termination of employment—

was not “arbitrary or capricious given the number of violations, each of which demonstrated an exercise of poor judgment.”

DISCUSSION

1. *The Trial Court Applied the Wrong Standard of Review*

a. *The trial court was required to exercise its independent judgment in reviewing the administrative record.*

In deciding a petition for a writ of administrative mandate where a local agency has made a decision affecting a vested property interest, a trial court “‘not only examines the administrative record for errors of law but also exercises its independent judgment upon the evidence.’” (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 816, fn. 8.) Termination of public employment affects such a vested interest. (*Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 314.)

The exercise of independent judgment means that a trial court determines whether a local agency’s findings are supported by the “weight of the evidence.” (Code Civ. Proc., § 1094.5, subd. (c); *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32 (*Strumsky*).)² This standard is different from the substantial evidence standard that generally governs the review of factual findings by a lower court or judicial body. When applying the substantial evidence standard, the reviewing court’s task is limited to determining whether any rational finder of fact could have reached the decision below based upon the

² Subsequent undesignated statutory references are to the Code of Civil Procedure.

evidence presented. (*Alberda v. Board of Retirement of Fresno County Employees' Retirement Assn.* (2013) 214 Cal.App.4th 426, 435 (*Alberda*).) The reviewing court does not make credibility judgments or reweigh the evidence. In contrast, a trial court's exercise of independent judgment "does permit (indeed, it requires) the trial court to reweigh the evidence by examining the credibility of witnesses." (*Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 658 (*Barber*).)

The parties agree that the trial court should have applied the independent judgment standard here, including reexamining the credibility of witnesses. However, they have different views about which standard the trial court actually applied.

The County argues that the trial court's description of the governing standard in its Order was correct. The trial court stated in its Order that it "reviews this matter exercising its independent judgment to determine whether the weight of the evidence supports the Hearing Officer's determination." With respect to the decision upholding Dredd's discharge, the court stated that it "may not disturb the punishment imposed unless it determines that the Department acted in an arbitrary or capricious manner." Both of these are correct statements of the law governing the trial court's review. (See § 1094.5, subd. (c); *Alberda, supra*, 214 Cal.App.4th at p. 433; *Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 54 (*Kazensky*) ["Judicial interference with the agency's assessment of a penalty 'will only be sanctioned when there is an arbitrary, capricious or patently abusive exercise of discretion by the administrative agency'"], quoting *Lake v. Civil Service Commission* (1975) 47 Cal.App.3d 224, 228.)

Dredd does not claim that the trial court's Order was incorrect, but focuses on the trial court's statements at the

hearing on his petition. Thus, the issue we must decide is whether the trial court's comments during oral argument on Dredd's petition show that the court applied the wrong standard.

b. *The trial court repeatedly stated that it could not make its own credibility findings.*

At the hearing, the trial court several times referred to whether "substantial evidence" supported the hearing officer's findings and stated that it did not have the authority to reassess credibility. The trial court first referred to the substantial evidence standard in responding to an argument by Dredd's counsel that, if Dredd intended to "cultivate [the Inmate] as an informant" rather than to "meet women," then the events underlying the fraternization charge "would really be a training issue" rather than grounds for termination. The trial court responded: "Let me interrupt you. At that point you are quibbling—you are really asking the Court to address punishment imposed. As you know, I can't do that unless it's arbitrary and capricious. That's why, from my point of view, it's not very material what his motivation was. I am really looking for substantial evidence whether he violated policies and practices."

The trial court again referred to substantial evidence in discussing whether Dredd's "job description included cultivating informants." The court said that, "as I read the record, there was substantial evidence that if he learned anything from an inmate, certainly, he should pass it along, but I don't see anything in the record that suggests his job duties were man the visiting desk, you know, maintain order and cultivate informants."

Later in the hearing, Dredd's counsel argued that "the Department said [Dredd's] intention was to meet women, which

clearly wasn't his intention" The trial court responded, "I don't think it's clear at all. From my point of view, the question is is there substantial evidence, is the weight of the evidence that he violated Department policies. And I don't honestly see it as a close call." Then, in response to an argument by the County's counsel about Ornelas's instruction to Dredd "to not investigate this further," the trial court said, "On that point, you know, *I can't reassess credibility*. I mean, the Hearing Officer and the Commission actually listened to Captain Ornelas and others, and they believed that the communication was direct and understood that Mr. Dredd was to cease fraternizing, if you will, with [the Inmate], and cease the investigation. To me, I looked at that point and said, okay, this is a credible [*sic*] question. This is not appropriate for the Court to unwind because I don't have witnesses, *I can't assess credibility*. So is there substantial evidence that he violated the order, yes. That's what Ornelas said. That's what Duarte said." (Italics added.)

Finally, at the conclusion of the hearing, the trial court summed up the basis for its decision by explaining that "there is a lot of evidence in this record. And my level of review looking for substantial evidence, weight of the evidence, *can't judge credibility*, can't undue [*sic*] a penalty unless it's really out of bounds, I don't see much of a hook for this Court to take affirmative action and countermand what the Department has done." (Italics added.)

c. *The trial court's statements at the hearing show that it misunderstood the standard of review.*

Whether the trial court applied the correct standard in reviewing the administrative record is an issue of law to which we

apply the de novo standard of review. (*Rodriguez v. City of Santa Cruz* (2014) 227 Cal.App.4th 1443, 1452 (*Rodriguez*).)

Dredd argues that the trial court's comments show the trial court actually applied the substantial evidence standard rather than using its independent judgment in reviewing the administrative record. We do not agree that the trial court's oral comments during the hearing mean that the court applied the substantial evidence standard in reviewing the administrative record as a whole. The trial court's comments at the hearing concerning "substantial evidence" and the "weight of the evidence" were ambiguous, and in any event were superseded by the court's Order stating that the court applied its "independent judgment."

The trial court's references to "substantial evidence" must be viewed in the context of its other statements at the hearing. (See *Coastal Environmental Rights Foundation v. California Regional Water Quality Control Bd.* (2017) 12 Cal.App.5th 178, 189 (*Coastal*) [concluding that the trial court applied the correct standard of review based on "[r]eading the record and trial court's order as a whole"].) While the trial court occasionally referred to "substantial evidence," several of those references were combined with the term "weight of the evidence."

Moreover, the standard that a trial court applies can be inferred from what the court actually *does* as well as from the court's description of what it *should* do. (See *Coastal, supra*, 12 Cal.App.4th at p. 189; *Rodriguez, supra*, 227 Cal.App.4th at p. 1453.) Several of the trial court's oral comments indicate that the court actually used its own judgment in weighing the evidence. For example, in response to an argument by Dredd's counsel that "giving extra visiting time is really quite common" in cultivating an informant, the court said, "I will tell you, if the

only evidence I had was the giving of extra visiting time, I would not reach the same conclusion. It's cumulative. That's the problem." Again, in discussing the cumulative nature of the evidence the court stated that "[t]here may be explanations for everything. Once put [*sic*] brick after brick after brick on the scale, you can't ignore the weight of it."

Most important, the trial court's Order clearly states that the court considered the weight of the evidence rather than simply reviewing the record for substantial evidence. The court described the applicable standard as an exercise of "independent judgment to determine whether the weight of the evidence" supports the administrative decision. And the court applied that standard, concluding that the "weight of the evidence supports the Department's and the Hearing Officer's findings."

While a trial court's comments in oral argument may be helpful in some circumstances to interpret the court's written ruling, they "may never be used to impeach the final order." (*Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 633 (*Jespersen*)). This rule is based on the principle that a court may change its mind before issuing a final order, and also on the recognition that oral comments are often ambiguous and unclear. (*Silverado Modjeska Recreation & Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 300.)³ Applying this rule, the trial

³ The bases for this rule undermine Dredd's argument that the trial court's oral comments reflected the court's true state of mind because the trial court made those comments *after* it had already drafted the tentative ruling that became its final decision. While this timing perhaps reduces the likelihood that the trial court expressed views during the hearing that it later changed,

court's references to "substantial evidence" at the hearing may not be used to impeach the court's application of the "weight of the evidence" standard in its written decision.

However, the trial court's oral comments that it did not have the authority to reweigh credibility were *not* ambiguous and did not contradict anything in its Order. Those comments show that the trial court misunderstood the *nature* of an independent judgment review and incorrectly thought that such a review could not include examining the credibility of witnesses. Thus, the trial court's oral comments here explain, rather than contradict, the standard the court recited in its written decision. (See *Jespersen*, *supra*, 114 Cal.App.4th at p. 633.)

The trial court's oral comments concerning its authority to assess credibility were clearly wrong. The trial court reasoned that it must defer to the hearing officer on credibility issues because the hearing officer had the opportunity to see and hear the witnesses. That reasoning has been soundly repudiated in the context of a trial court's review of administrative findings where the independent judgment standard applies. For example, in *Guymon v. Board of Accountancy* (1976) 55 Cal.App.3d 1010

such a change of mind is certainly possible, as the Order was the court's final word. More important, for the sake of clarity, where a court's written decision directly contradicts its oral comments the written decision controls. (See *Whitlow v. Board of Medical Examiners* (1967) 248 Cal.App.2d 478, 487 ["Fortunately for the stability of judgments the findings of the court are those expressed in writing. What the judge said may be useful to explain the findings but it cannot overcome them, and if contradictory, must be disregarded"].)

(*Guymon*), the court rejected the argument that the trial court should defer to the administrative agency's credibility findings, explaining that, "[b]y reason of the importance of rights generally affected by administrative adjudications subject to the independent judgment test of review, California fixes responsibility for factual determination at the trial court rather than the administrative agency tier of the pyramid as a matter of public policy." (*Id.* at p. 1015.) The court observed that, in any event, the advantage of viewing live testimony was not particularly significant in modern administrative agency practice, which generally involves a decision by a board or agency based upon the cold record of findings by an administrative law judge or hearing officer. (*Ibid.*) The court recognized the existence of a contrary line of cases, but concluded that there was "no longer any reason to treat them as significant." (*Ibid.*)

In *Barber*, the court similarly held that the exercise of independent judgment requires a trial court to "reweigh the evidence by examining the credibility of witnesses," while observing that the contrary rule "has been rejected by numerous cases decided in the post-*Strumsky* era." (*Barber, supra*, 45 Cal.App.4th at p. 658, citing *Strumsky, supra*, 11 Cal.3d at pp. 44–45.) This court followed *Barber* in *Malibu Mountains Recreation, Inc. v. County of Los Angeles* (1998) 67 Cal.App.4th 359 (*Malibu*). We explained in that case that reversal ordinarily "would be mandated when the record showed that the trial court did not examine and weigh the losing party's evidence or exercise its independent judgment as to the *credibility of witnesses* and the overall weight of the evidence." (*Id.* at p. 370, italics added.)

The trial court's comments here are similar to statements that the trial court made in *Barber*. (See *Barber, supra*, 45 Cal.App.4th at pp. 658–659.) In that case, the trial court stated,

“I don’t believe I have the ability to reweigh credibility.” (Ibid.) The appellate court concluded that the trial court’s statement was “flatly wrong” and reversed. (*Id.* at p. 659.) Similarly, here, the trial court stated several times quite directly that it could not reassess credibility.

Rodriguez is also instructive. In that case, the trial court denied a petition for writ of mandate filed by a former Santa Cruz police officer seeking to overturn an administrative decision denying him disability retirement. (*Rodriguez, supra*, 227 Cal.App.4th at p. 1445.) In its statement of decision, the trial court identified the standard of review as “independent judgment review ‘to determine whether the finding of the Administrative Law Judge is supported by the weight of the evidence.’” (*Id.* at p. 1450.) However, each time the trial court “referenced the correct independent judgment standard, it also incorrectly stated that the ALJ’s decision was entitled to ‘deference.’” (*Id.* at p. 1453.) Moreover, the trial court did not make any independent finding concerning Rodriguez’s credibility, but stated only that “there is sufficient evidence to support *the ALJ’s finding* that he lacked credibility.” (*Id.* at p. 1454.) The appellate court reversed, concluding that the trial court’s “discussion of Rodriguez’s credibility suggests that, in reweighing the evidence, it may have disregarded Rodriguez’s testimony based solely on the ALJ’s credibility finding.” (*Ibid.*)

Similarly, here, the trial court’s statements suggest that it misunderstood its obligation to reweigh credibility in applying the independent judgment standard. Although the trial court in this case made its problematic statements orally during the hearing rather than in its written ruling, those statements were even more direct in describing an erroneous standard than the statements at issue in *Rodriguez*.

Thus, at a minimum there is a “serious question” here whether the trial court applied the incorrect standard. (See *Alberda, supra*, 214 Cal.App.4th at p. 435.) For the reasons discussed below, we therefore conclude that we must reverse and remand to permit the trial court to apply the correct standard to its review of the administrative record.

2. *The Trial Court’s Error Requires Reversal*

For different reasons, each party argues that there is no need to reverse and remand if we were to hold (as we now do) that the trial court applied the wrong standard of review. Dredd argues that, rather than remanding for the trial court to analyze the administrative record using the correct standard, this court should conduct such a review in the first instance using its own independent judgment. In contrast, the County argues that this court should affirm because there is no probability of a different result on remand. Neither of these alternatives is appropriate here.

Dredd’s suggestion that this court review the administrative record in the first instance is not supported by any authority and is contrary to this court’s role. The court in *Guymon* rejected a similar suggestion, observing that the “fact finding function is . . . that of the trial court, and we are bound by its determination.” (*Guymon, supra*, 55 Cal.App.3d at p. 1016.) This conclusion is consistent with the traditional role of appellate courts as arbiters of the law, not the facts. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 405 [“ ‘it is the province of the trial court to decide questions of fact and of the appellate court to decide questions of law’ ”], quoting *Tupman v. Haberkern* (1929) 208 Cal. 256, 262–263.)

None of the cases that Dredd cites applied the procedure that Dredd urges here. Dredd cites *Estate of Larson* (1980) 106

Cal.App.3d 560 for the proposition that an appellate court should not apply the substantial evidence standard of review to a trial court's decision if the trial court did not actually weigh the evidence. However, in that case, upon concluding that the trial court did not actually make factual findings, the Court of Appeal did not decide the facts in the first instance but rather "reversed with directions to weigh all relevant factors." (*Id.* at p. 568.) The court in *Kemp Bros. Construction, Inc. v. Titan Electric Corp.* (2007) 146 Cal.App.4th 1474 (*Kemp*) adopted the same approach upon finding that the trial court had not properly weighed the facts. (*Id.* at pp. 1478, 1485.)⁴ These cases merely support the conclusion that an appellate court cannot defer to factual findings that the trial court failed to make. As in *Kemp* and *McKnight*, that conclusion supports reversal and remand here.

The conclusion that we cannot review the trial court's ruling under the substantial evidence standard is also fatal to the Department's argument that we may affirm despite the trial court's error. As the court held in *Barber*, the "trial court's mistake goes to the heart of this case and precludes our ability to reach the merits of the appeal." (*Barber, supra*, 45 Cal.App.4th at

⁴ In *J. H. McKnight Ranch, Inc. v. Franchise Tax Bd.* (2003) 110 Cal.App.4th 978 (*McKnight*), the court concluded that it should apply the substantial evidence standard to the appeal, rejecting the argument that the trial court did not decide the facts because a party rather than the court had prepared an initial draft of the trial court's statement of decision. Thus, that case is simply an example of an appeal decided under the substantial evidence standard when the trial court actually did make appropriate factual findings.

p. 659.) That is because “on appeal from a judgment in a case where the trial court is required to exercise its independent judgment, our review of the record is limited to a determination whether substantial evidence supports the trial court’s conclusions and, in making that determination, we must resolve all conflicts and indulge all reasonable inferences in favor of the party who prevailed in the trial court.” (*Ibid.*) We cannot defer to credibility findings that the trial court declined to make.

The Department relies on this court’s decision in *Malibu*, but that case involved an unusual record different from the one that we now face. (See *Malibu*, *supra*, 67 Cal.App.4th at pp. 372–373.) In *Malibu*, we held that reversal and remand was not necessary even though the trial court had applied the wrong standard to its review of an administrative record. (*Ibid.*) However, that holding was based on a review of the record on appeal that led to the “unequivocal conclusion that no different result would ensue if this matter were to be remanded for review under the independent judgment test.” (*Id.* at p. 372.) The trial court’s statement of decision in that case showed that the trial court “did indeed consider *all* evidence in making the threshold findings that supported the ultimate decision.” (*Id.* at p. 371.) We noted in *Malibu* that the case was unusual, explaining that “[o]rdinarily, we would agree” that a “trial court’s use of the incorrect standard of review requires a per se reversal and a new hearing.” (*Id.* at p. 370.)

Here, in contrast, we cannot conclude that the trial court’s failure to reweigh credibility was irrelevant to the outcome of Dredd’s petition. One of the trial court’s statements that it could not reassess credibility specifically concerned Ornelas’s statements to Dredd that Dredd should stop investigating other deputies’ alleged narcotics smuggling. Those statements were the

subject of conflicting testimony and could have been significant in the trial court's ruling on Dredd's petition.

Ornelas testified that he met with Dredd and Sergeant Ray, Dredd's direct supervisor, concerning Dredd's efforts at "cultivating an informant" and getting "some information for Homicide." Ornelas testified he told Dredd he " 'did a good job here with Homicide, but now this part of it, no longer pursue. This is — there is now another bureau — appropriate bureau that will now investigate this.' " By "this" he meant "[a]nything regarding narcotics within the jail." Ornelas also testified, "When I said no more investigation, I believed it was clear to no longer pursuing regarding to interaction with this inmate too."

In contrast, Dredd disputed that Ornelas told him not to continue interactions with the Inmate. Dredd testified and argued to the trial court that "Ornelas never told him not to speak with or have contact with [the Inmate]; he never told him not to continue to elicit information from [the Inmate]."

As mentioned, the trial court concluded that this conflict raised a credibility question that was "not appropriate for the Court to unwind because I don't have witnesses, I can't assess credibility." The issue was potentially significant to the trial court's ruling. The trial court devoted an entire paragraph in its Order to Ornelas's instructions to Dredd to cease his investigation. The trial court cited Ornelas's testimony as evidence that Dredd went to the restaurant meeting in Brea with the two undercover agents "in violation of an order to cease any such 'investigation' activities." The trial court's analysis might have been different if it had independently assessed the credibility of the testimony bearing on this issue.

The credibility of the Inmate was also at issue. Dredd argues on appeal that there is "no credible evidence in the record

that [Dredd] provided [the Inmate] or any of his visitors with preferential seating,” and dismisses the Inmate’s testimony to the contrary as insufficient in light of the hearing officer’s conclusion that the Inmate’s testimony was “‘questionable.’” The County responds in part by arguing that “the Trial Court is not bound by the credibility determination of the Hearing Officer.” While this is true, if the trial court did not actually perform its function of reweighing credibility its authority to do so is irrelevant. Thus, remand is necessary for the trial court to consider in the first instance the merits of Dredd’s argument that he did not engage in sanctionable misconduct.

The trial court’s mistaken understanding of its role in assessing credibility also leads us to reverse and remand the trial court’s finding upholding the Department’s sanction of dismissal. The trial court’s review of the Department’s punishment decision is governed by an abuse of discretion standard rather than the independent judgment standard. (See *Kazensky, supra*, 65 Cal.App.4th at p. 54.)⁵ However, the facts concerning Dredd’s conduct could have affected the trial court’s determination of whether the Department acted arbitrarily in deciding to discharge Dredd rather than imposing some lesser sanction or no sanction at all. Because credibility judgments are intertwined with the trial court’s factual findings, we remand to permit the trial court to apply the correct standard of review to its decision

⁵ On appeal, “review of the degree of discipline imposed . . . remains the same as that appropriate to the trial court: The discipline imposed will not be disturbed unless it is shown to have been a manifest abuse of discretion.” (*Bailey v. City of National City* (1991) 226 Cal.App.3d 1319, 1325, fn. 4.)

upholding the Department's punishment decision as well as its misconduct findings.

3. *The Trial Court's Finding that the Department Did Not Violate Dredd's POBRA Rights Is Supported by Substantial Evidence*

In addition to his argument that he did not engage in misconduct, Dredd claims that Duarte and Cassidy of the ICIB interviewed him on July 12, 2012, without advising him of his rights under POBRA. He argues that the statements he made during that interview should therefore have been suppressed.

Dredd acknowledges that POBRA protections do not apply to an investigation that is "concerned solely and directly with alleged criminal activities." (Gov. Code, § 3303, subd. (i).) He also acknowledges that Duarte closed the ICIB investigation on August 15, 2012, after the July 12 interview, and that the administrative investigation by the IAB began after that. However, he argues that the ICIB investigation became a "de facto administrative investigation" when ICIB "determined that [Dredd] had not engaged in any criminal activity, yet nonetheless interrogated him." Citing testimony by Duarte, Dredd argues that, as of late June and early July 2012, ICIB had no evidence that he had engaged in any criminal activity. Thus, Dredd claims that, sometime before July 12, 2012, the ICIB investigation became a cover for a disciplinary investigation.

Whether a criminal investigation is actually a sham for the purpose of conducting a disciplinary investigation is a factual issue. (*Van Winkle v. County of Ventura* (2007) 158 Cal.App.4th 492, 497–498.) The trial court resolved that issue against Dredd.

The trial court's Order shows that it rejected Dredd's argument that his POBRA rights were violated based upon an independent review of the evidence. The trial court concluded

that “[n]othing in the record suggests that the investigation was undertaken for administrative rather than for purposes of a criminal investigation.” The court also observed that Dredd “cites no evidence, in the record, indicating that the IAB administrative investigation commenced before the criminal investigation was complete.” The trial court also cited testimony by Duarte that there was no administrative investigation pending as of June 26, 2012, the date that Duarte told the Inmate that “ ‘the Dredd thing did not turn up any criminal stuff, and turned out to be pretty much administrative stuff.’ ”

There is no indication in the trial court’s Order or in its comments at the hearing that the trial court relied on any credibility findings by the hearing officer in reaching its factual conclusions on this issue. Nor are there any credibility findings relating to the alleged POBRA violations in the hearing officer’s decision. Indeed, the hearing officer made few findings at all regarding those alleged violations, explaining that “we do not rely on evidence obtained from those interviews [of Dredd] as we had testimony of [Dredd] at the hearing.”

Thus, there is no reason to believe that a “different result would have been probable” on Dredd’s POBRA claim if the trial court had properly understood its role in assessing credibility. (See *Malibu*, *supra*, 67 Cal.App.4th at p. 372.) We therefore conclude that there is no need to remand for further findings on this issue.

We also conclude that the trial court’s findings concerning the alleged POBRA violations are supported by substantial evidence. (See *Malibu*, *supra*, 67 Cal.App.4th at p. 368; *Rodriguez*, *supra*, 227 Cal.App.4th at p. 1452 [“In reviewing the trial court’s denial of the petition for a writ of administrative mandate, we apply the substantial evidence test to the trial

court's factual findings"].) As mentioned, Duarte testified that he believed there was no administrative investigation as of June 26, 2012. He explained that his reference to "administrative stuff" in his statement to the Inmate on that date was just based on his own opinion. Duarte also testified that the criminal investigation did not end until within a week or two of the date of his team's last supplemental report on August 15, 2012, well after he and Cassidy interviewed Dredd on July 12, 2012.

The contemporaneous documentary record also supports the trial court's findings. According to a memorandum of the July 12, 2012 interview prepared by Cassidy, the interviewing officers advised Dredd that they were "sergeants for [ICIB], conducting a criminal investigation regarding the introduction of contraband and drugs into the jails, and he was the subject of the investigation." The memorandum also reflects that Dredd understood the difference between the criminal and administrative responsibilities of the ICIB and the IAB, respectively.

Adequate evidence supports the trial court's decision to reject Dredd's argument that his POBRA rights were violated. We therefore uphold the trial court's findings on this issue.

DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings consistent with this opinion. The parties are responsible for their own costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.