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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MARK CHISOM,

Plaintiff and Appellant,

v.

STATE PERSONNEL BOARD,

Defendant and
Respondent;

DEPARTMENT OF
CORRECTIONS AND
REHABILITATION,

Real Party in Interest.

B271885

(Los Angeles County
Super. Ct. No. BS150960)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert O'Brien, Judge. Affirmed.

Ferguson Case Orr Paterson, Wendy C. Lascher and John A. Hribar for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Paul Kopf and Michael P. Doelfs for Real Party in Interest.

* * * * *

Appellate review does not encompass a retrial or review of credibility findings. In this case, the administrative law judge (ALJ) found that appellant Mark Chisom, a peace officer who was terminated as a parole agent,¹ was not credible. The ALJ concluded that Chisom was negligent and dishonest, and that respondent Department of Corrections and Rehabilitation properly terminated him. The ALJ's conclusions subsequently were adopted by the State Personnel Board (Board).

On appeal, Chisom challenges the sufficiency of the evidence. It is "very difficult for a complaining employee to have the board's adverse factual findings overturned." (*State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963, 977.) To show insufficiency of the evidence is a " 'daunting burden.' " (*Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 678.) Under the substantial evidence test, this court must affirm if there is substantial evidence supporting the decision even if this court may have reached a different determination. (*Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1246.)

¹ In the operations manual from the Department of Corrections and Rehabilitation, a parole agent is defined as "[a] departmental peace officer employee who is assigned to supervise those persons released from incarceration to serve a period of parole." A peace officer may be held to a higher standard than other employees. (*Cate v. State Personnel Bd.* (2012) 204 Cal.App.4th 270, 285.)

Under the appropriate standard of review, the Board's decision (which was the same as the ALJ and trial court) was supported by substantial evidence and cannot be disturbed on appeal. We therefore affirm the denial of Chisom's petition for writ of administrative mandate.

BACKGROUND

Chisom received notice that he was terminated for incompetence, inexcusable neglect of duty, dishonesty, willful disobedience, and poor behavior outside of duty. It is undisputed that Chisom had no prior adverse actions.

It also is undisputed that Chisom's job responsibilities included supervising Jesus Diaz (also known as Felipe Acosta Diaz) and that he failed to adequately perform that obligation. Diaz had not reported to parole since his release from prison April 24, 2011, and Chisom did not complete mandatory paperwork. For about a year, Chisom did not supervise Diaz at all. Instead, he incorrectly reported every month on his caseload roster (a document that may be admitted in court) that Diaz was incarcerated.

Chisom characterizes his deficiency as a mere mistake, and describes it as an isolated incident in an otherwise stellar 13-year career. In contrast, the Department of Corrections and Rehabilitation found Chisom to be dishonest in his reports and in an internal affairs interview regarding his supervision of Diaz. Chisom was terminated in April 2013. The only real dispute was whether Chisom acted dishonestly or mistakenly when he misreported Diaz's status and failed to supervise him.

In a hearing before an ALJ, Chisom's supervisor Sheila Green-Beck testified that in April 2012, she reviewed Chisom's file regarding Diaz and discovered a Post-it note indicating either

that Diaz had been arrested or that a police report had been filed.² Green-Beck also observed a notice of Diaz's release date from state prison.³ The notice of release from WASCO State Prison, which was admitted as an exhibit, indicated that Diaz had a scheduled release date of April 24, 2011. Green-Beck confronted Chisom, and he denied having the Post-it note. Despite Chisom's denial, Green-Beck saw the Post-it note on the ground in his office.

Green-Beck also testified that Chisom's work performance was not satisfactory. His reports often were untimely and deficient, requiring Green-Beck's revisions. An incomplete report was problematic because it could undermine the court proceedings against a parolee. Green-Beck had reported these deficiencies to the acting administrator for the district.

Chisom did not recall the conversation with Green-Beck about the Post-it note when interviewed by internal affairs investigator Tracy Hutchinson. Chisom told Hutchinson that "he wrote the Post-It note . . . after Ms. Green-Beck met with him and said that the parolee was not in custody, and she was directing him to find out what his status was." According to Hutchinson, Chisom indicated that "he prepared the information on the sticky note when he was prompted by Ms. Green-Beck to do some research on the status of this parolee." During cross-examination, Hutchinson conceded that her question described a

² A copy of the Post-it note was admitted into evidence and stated, "Look out, Pipe Meth., 2/29/12, LAPD, D120107274, High Drug Area, K 704.5."

³ Although Green-Beck described Chisom's performance as unsatisfactory, other supervisors testified that he performed well.

Post-it note mentioning an alias, and the Post-it note did not identify an alias.⁴

Chisom testified at the hearing before the ALJ. He explained that he mistakenly believed Diaz was incarcerated until confronted by Green-Beck about Diaz's status. Chisom acknowledged that he made errors on his reports, and that he should have known Diaz had been released. Chisom did not dispute that Green-Beck advised him he needed to correct deficiencies in his reports, and testified that he corrected all of the deficiencies she had identified.

Chisom indicated that in 2011, he had been named agent of the year and two supervisors testified that he was a good employee.

Chisom's counsel argued that Chisom acted based on a mistaken belief regarding Diaz's status, but did not act dishonestly. Counsel argued: "Was Agent Chisom negligent? Of course he was. Is there inexcusable neglect of duty in this case? Of course there is. . . . Mr. Chisom has owned that from the beginning. When it was brought to his attention that he had let parolee Diaz fall through the cracks, he immediately accepted responsibility and tried to do what he could do." Counsel argued that Chisom accurately described the Post-it note in his internal affairs interview and that the interview had not been admitted as

⁴ The transcript of the internal affairs interview was not admitted as evidence before the ALJ, and although Chisom provides it in the record on appeal, he fails to show that it can be considered in the first instance at this stage of the proceedings. (*State Bd. of Chiropractic Examiners v. Superior Court*, *supra*, 45 Cal.4th at p. 977 ["Writ review under Code of Civil Procedure section 1094.5 is limited to the record compiled by the administrative agency . . ."].)

evidence. Counsel further argued that there was no evidence Chisom was dishonest (as oppose to negligent) when he completed his reports. Counsel argued that Chisom's "caseload roster entries were wrong and inaccurate" but were not "deceitful."

In a 17-page opinion, the ALJ concluded that Chisom's conduct involved both negligence and dishonesty and that dismissal was proper. With respect to the Post-it note, the ALJ found Green-Beck's testimony credible and Chisom's testimony lacked credibility.

The ALJ explained: "Green-Beck testified that she discovered the post-it note on April 25, 2012, in Parolee Diaz's Field File, when she was conducting a [review]. In contrast, Appellant [Chisom] testified that he created the post-it note after Green-Beck directed him to research Parolee Diaz's whereabouts. Appellant told OIA the same." "Green-Beck's testimony was clear, direct, and comprehensive. She methodically explained how she came to discover each element of Parolee Diaz's status and her directions to Appellant. Green-Beck was confident in her manner and tone and recited a concise account of the events that occurred, without wavering. When questioned, Green-Beck acknowledged that she saw deficiencies in Appellant's work product on a number of occasions over the years"

In contrast, the ALJ found Chisom lacked credibility. "Appellant's testimony appeared calculated. Appellant remembered that Green-Beck directed him to find Parolee Diaz on April 25, 2012." Appellant remembered most of the discussion, but "could not recall whether Green-Beck asked him about a post-it note that she had found in Parolee Diaz's Field File on April 25, 2012. Taken together, Appellant's memory

appeared selective and his motivations became apparent: Appellant hopes to extricate himself from the charge of dishonesty and thereby the penalty of dismissal, because any lesser penalty would put him back to work.” “Overall, Appellant’s testimony was not credible or believable.”

The Board adopted the findings and conclusions of the ALJ. The trial court reviewed the record and concluded that substantial evidence supported the determination that Chisom lied during his internal affairs interview. The trial court also rejected Chisom’s argument that his case reports reflected a mistake, not dishonesty. The trial court explained that Chisom “exhibited untrustworthiness and a lack of integrity, both definitions of dishonesty.” The court found that dishonesty was incompatible with the public trust and supported Chisom’s discharge. On appeal, Chisom again challenges the ALJ’s finding of dishonesty, which was adopted by the Board.

DISCUSSION

I.

In reviewing the Board’s decision, we apply the substantial evidence test—the same test applied by the trial court. (*California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 584.) “We do not reweigh the evidence; we indulge all presumptions and resolve all conflicts in favor of the board’s decision. Its findings come before us “with a strong presumption as to their correctness and regularity.” [Citation.] We do not substitute our own judgment if the board’s decision “ “is one which could have been made by reasonable people. . . .” ’ ’ ’ ” (*Ibid.*) In reaching this determination, we review all of the evidence. (*Id.* at p. 586.)

Chisom argues that no substantial evidence supported the finding that he was dishonest. According to him, “[t]his is a case about poor work performance, not dishonesty.” Chisom argues that the ALJ misunderstood the evidence when she found that Chisom was not credible, and that her reasoning was “absurd.” Therefore, according to Chisom, her credibility determination is not entitled to any weight.

Chisom’s arguments lack merit. The standard of review is dispositive. The ALJ’s conclusion that Chisom’s testimony lacked credibility was supported by the conflict in Chisom’s statement to Hutchinson and Green-Beck’s testimony regarding when the Post-it note was drafted. The information on the note was important because crediting Green-Beck’s testimony indicated that Chisom had information that should have triggered an investigation of Diaz’s status before Green-Beck confronted him. Hutchinson testified that Chisom reported he drafted the note *after* Green-Beck confronted him, which cannot be reconciled with Green-Beck’s testimony.

“Credibility, or lack thereof, is for the factfinder, not the reviewing court, to determine. The trier of fact’s determination will be interfered with on appeal only when it appears that the witness’ testimony is inherently so improbable as to be unworthy of belief.” (*Wilson v. State Personnel Bd.* (1976) 58 Cal.App.3d 865, 877.) Putting aside the ALJ’s finding with respect to Chisom’s credibility, the ALJ found Green-Beck’s testimony credible. Nothing in the record indicated that Green-Beck’s testimony was so inherently improbable such that it could be challenged under the appropriate standard of review. Although Chisom points out that his credibility was based on Hutchinson’s account of his statements rather than his own testimony,

Hutchinson testified before the ALJ and no error was alleged or shown in the admission of her testimony. “[W]e do not assess credibility or reweigh the evidence” (*Camarena v. State Personnel Bd.* (1997) 54 Cal.App.4th 698, 703.)

II.

Chisom also fails to show that the penalty was clearly excessive, such that the Board abused its discretion in dismissing him. “Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed.” (*Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 404.) We review the penalty for abuse of discretion. (*Martin v. State Personnel Bd.* (1982) 132 Cal.App.3d 460, 464.) “In considering whether an abuse of discretion occurred in the discipline of a public employee, the overriding consideration is the extent to which the employee’s conduct resulted in, or if repeated is likely to result in, harm to the public service. [Citation.] Other factors include the circumstances surrounding the misconduct and the likelihood of its recurrence.” (*Kelly v. State Personnel Bd.* (1979) 94 Cal.App.3d 905, 917.) This court may not substitute its discretion for that of the Board. (*Fout v. State Personnel Bd.* 1982) 136 Cal.App.3d 817, 821; see *Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 834 [This court has “limited authority to interfere with the discretion of the Board in its assessment of the appropriate penalty”].)

Chisom’s counsel argued: “. . . I don’t deny that having a parolee who is not correctly supervised is a danger to the community. Of course it is.” “The fact that reasonable minds may differ as to the propriety of the penalty imposed fortifies the conclusion that the administrative body acted within the area of

its discretion.’ ” (*Cate v. State Personnel Bd.*, *supra*, 204 Cal.App.4th at p. 284.) What Chisom characterizes as a simple mistake added up to a year of unsupervised release by Diaz, not a single month. Moreover, Chisom’s argument that his penalty was excessive was premised on his claim that no substantial evidence supported the finding that he acted dishonestly, a claim we have rejected. But even if we concluded that the dishonesty charges were unsupported, the other charges were undisputed, and Chisom does not demonstrate that the penalty would be unwarranted absent dishonesty.

DISPOSITION

The judgment denying Chisom’s petition for writ of mandate is affirmed. The parties shall bear their own costs on appeal.

FLIER, Acting P. J.

WE CONCUR:

GRIMES, J.

SORTINO, J.*

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