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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

ALBERT BEATTIE,

Plaintiff and Appellant,

v.

CITY OF ARROYO GRANDE,

Defendant and Respondent.

2d Civil No. B255067
(Super. Ct. No. CV120359)
(San Luis Obispo County)

Albert Beattie was a police sergeant with the City of Arroyo Grande (City). Following a series of events that raised concerns about Beattie's fitness for duty, the chief of the City's police department (Department) ordered Beattie to undergo a fitness-for-duty examination (Fitness Exam). Beattie failed to cooperate with this order. As a result, he was cited for discipline, afforded an administrative hearing and ultimately terminated for insubordination. He appeals the trial court's denial of his petition for writ of administrative mandate challenging his termination. (See Code Civ. Proc., § 1094.5.) We conclude substantial evidence supports the court's decision and that the City did not abuse its discretion in electing to terminate Beattie. We affirm.

FACTS AND PROCEDURAL BACKGROUND

For many years, Beattie was an effective and well-regarded police officer. He generally received positive performance evaluations and was named Officer of the Year in 2006. His behavior, however, began to change after an incident in which he

justifiably shot and killed an armed assailant. Beattie told the Department's police chief, Steven Annibali, that he had a "special bond" with the weapon used in that shooting because it had "delivered for him." Other officers noted that Beattie was becoming increasingly suspicious of others, displaying outward paranoia and hoarding stacks of papers in his home as "evidence." He also became "consumed" with his job.

Concerned about Beattie's behavior, Chief Annibali called Dr. Susan Saxe-Clifford, a highly experienced police psychologist. She had previously examined Beattie, declaring him fit for duty as a reserve officer in 1996 and as a full-time officer in 1998. Upon her recommendation, Chief Annibali met with Beattie in April 2008 and strongly encouraged him to seek counseling. Beattie declined, saying he could handle his problems on his own. During this period, Beattie received an "exceeds standards" performance rating.

A few months later, Beattie was assigned to a graffiti project. He set up a "covert operation" in which, among other things, he had officers don camouflage suits after midnight to catch middle school children writing on a sewer pipe. Chief Annibali described the military-style campaign as "over-the-top" given the nature of the problem. The situation became more serious, however, in November 2008 when Beattie and another officer, Erick Jensen, responded to a 911 hang-up call. Beattie, who had already arrived on the scene, ordered Jensen to force entry into the residence by "[k]icking in the door or breaking a window." Instead, Jensen appropriately knocked on the front door. He was greeted by a woman in her 80s who took him to speak with her elderly husband, who suffers from dementia. Jensen noted that "[h]e was just sitting there, looking pretty frail, and he was drooling." The husband admitted they had been arguing about his medicine. After Beattie entered the residence, he instructed the woman to place all of their knives in the freezer and to unplug all the phones.

As the officers were leaving, Beattie told Jensen he had been outside watching the couple through the window and had seen them struggling over something. Beattie said he did not think he had had a good shot because of the distance and because of having to shoot through the glass. Jensen understood that Beattie "was talking about

[taking] a shot at the elderly couple while he viewed them struggling." He did not think Beattie was joking and reported the incident to his superiors. Jensen did not report Beattie's instructions about the knives and phones because of concerns that "it would be over the top, and make [Beattie] look unfit for duty."

Consulting again with Dr. Saxe-Clifford, Chief Annibali placed Beattie on administrative leave and ordered him to participate in a Fitness Exam to assess his ability to safely and effectively perform essential job functions. Beattie appeared for the first evaluation with Dr. Saxe-Clifford on November 18, 2008, and started taking the Minnesota-Multiphasic-Personality-Inventory-2 (MMPI-2) test. Normally one day is sufficient for the test, but Beattie did not finish and was scheduled to complete it the following week. Dr. Saxe-Clifford scored the portion of the test Beattie did complete and determined the results were invalid because he did not cooperate in his responses. Dr. Yossi Ben-Porath, a renowned MMPI-2 expert, concurred with her assessment.

On November 20, 2008, Beattie's attorney sent Chief Annibali a letter stating that Beattie had undergone an independent psychiatric evaluation that day and had been found fit for duty. When Dr. Saxe-Clifford asked him on November 28, 2008, what tests he had taken in connection with that evaluation, "Beattie repeatedly refused to say if he had taken any tests or if any tests had been reviewed or discussed." Without knowing the types of tests that were administered, Dr. Saxe-Clifford could not determine whether her testing needed to be adjusted to address those tests. She therefore informed Chief Annibali that she could not perform a meaningful Fitness Exam.

On December 28, 2008, Chief Annibali again ordered Beattie to participate in a mandatory Fitness Exam, advising Beattie that his failure to fully participate "may lead to a charge of insubordination that could result in serious disciplinary action, up to and including termination." Chief Annibali's objective was to "hopefully get [Beattie] back to work."

Beattie spoke again with Dr. Saxe-Clifford on December 30, and 31, 2008. She reiterated the information she needed to complete the Fitness Exam, but Beattie

refused to provide it. On January 27, 2009, Dr. Saxe-Clifford advised Chief Annibali that she was unable to complete the Fitness Exam due to Beattie's overt lack of cooperation.

When Chief Annibali's informal efforts to resolve the matter failed, the Department conducted an internal affairs investigation to assess whether Beattie had failed to comply with the order to participate fully in the Fitness Exam. The independent investigator, Attorney Jeffrey Love, concluded that Beattie did fail to fully cooperate and thus was guilty of insubordination. Love's report noted that "Dr. Ben-Porath stated that in his expert opinion that the test taker intentionally attempted to prevent the evaluator from knowing his true personality profile by answering questions in a dishonest and intentionally skewed fashion. [He] stated that the [test] has been designed to intentionally and specifically identify test takers who attempt to engage in this form of behavior."

In November 2009, the Department served Beattie with a notice of intent to terminate employment. The notice charged him with (1) improper employee conduct (willful violation of rules, regulations or policies) based on his failure to cooperate in a series of tests and interviews assessing his fitness for duty; (2) violation of General Order 0216[1] for failure to comply with the Fitness Exam and to cooperate fully with the psychologist's clinical interview and MMPI-2 test; and (3) violation of General Order 0201 for failure to obey direct orders to cooperate with the Fitness Exam. Beattie waived his right to a pre-disciplinary *Skelly*[2] hearing.

A six-day contested advisory arbitration was held before C. Allen Pool (Arbitrator). Dr. Saxe-Clifford, Chief Annibali, Love and several City officers testified. Beattie did not testify. The Arbitrator concluded that no cause existed to require a Fitness Exam and that Beattie did not obstruct the evaluation proceedings. He found that Beattie's performance on the MMPI-2 was inconsequential, explaining "the reason I say forget the MMPI [is] because that's an instrument used by psychologists. That's all it is,

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[1] The General Orders cited in the opinion are set forth in the Department's Policy and Procedures Manual.

[2] *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 (*Skelly*).

an instrument, and whether one passes or fails does not determine whether they're going to be fired or whatever." The Arbitrator observed that occasionally he will find an "officer who . . . went beyond the pale, . . . and the discipline will be sustained. But those [cases] are few."

The City Manager rejected the Arbitrator's recommendation to reinstate Beattie, finding that the Department had a reasonable doubt of Beattie's abilities to perform his duties, that a Fitness Exam was necessary and that he had failed to cooperate with that evaluation, thereby warranting his termination. The City Manager concluded that "[b]ecause Chief Annibali determined that [a Fitness Exam] was necessary and because information identifying the tests was necessary to conducting the [Fitness Exam], the request for this information was reasonable and did not invade . . . Beattie's privacy."

The trial court upheld the City Manager's decision and denied Beattie's petition for writ of administrative mandate. Beattie appeals.

DISCUSSION

Standard of Review

It is undisputed that Beattie's discharge from employment affected a "fundamental vested right." (*McMillen v. Civil Service Com.* (1992) 6 Cal.App.4th 125, 129.) The trial court therefore must exercise its independent judgment to determine whether due process requirements were met and whether the agency's findings are supported by the weight of the evidence. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32; *Welch v. California State Teachers' Retirement Bd.* (2012) 203 Cal.App.4th 1, 16; *Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 51.) We must sustain the trial court's factual findings if substantial evidence supports them, resolving all conflicts in favor of the prevailing party and giving that party the benefit of every reasonable inference in support of the judgment. (*Kazensky*, at p. 52; *LaGrone v. City of Oakland* (2011) 202 Cal.App.4th 932, 940.)

"Judicial review of an agency's assessment of a penalty is limited, and the agency's determination will not be disturbed in mandamus proceedings unless there is an arbitrary, capricious or patently abusive exercise of discretion by the agency. [Citation.]

. . . If reasonable minds may differ with regard to the propriety of the disciplinary action, no abuse of discretion has occurred. [Citation.] An appellate court conducts a de novo review of the trial court's determination of the penalty assessed, giving no deference to the trial court's determination. [Citation.]" (*Flippin v. Los Angeles City Bd. of Civil Service Commissioners* (2007) 148 Cal.App.4th 272, 279 (*Flippin*).)

Substantial Evidence Supports the Trial Court's Findings

Due process requires notice and an opportunity to respond to charges of misconduct against a permanent civil service employee. (*Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1275-1276.) Under *Skelly, supra*, 15 Cal.3d at page 215, the minimum procedural due process protections required before disciplinary action include "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline."

Beattie does not challenge Chief Annibali's decision to order Beattie to undergo the Fitness Exam. A police chief does not have to wait until a perceived threat or behavior results in injury before requiring a fitness-for-duty assessment. (See, e.g., *Brownfield v. City of Yakima* (9th Cir. 2010) 612 F.3d 1140, 1146; *Watson v. City of Miami Beach* (11th Cir. 1999) 177 F.3d 932, 935.) Rather, Beattie contends he was denied procedural due process because the City Manager and the trial court made findings of misconduct that were not charged in the notice of intent to terminate. Beattie asserts he was not placed on notice that his employment could be terminated if he did not disclose the name of the professional who independently administered the Fitness Exam or the tests that were taken in connection with that examination.

As the City points out, Beattie was not disciplined for failing to disclose the name of the professional who purportedly conducted the independent Fitness Exam. That information, although requested by Chief Annibali, was not required. The three charges in the written notice apprised Beattie that he was being disciplined for failing to cooperate fully with Dr. Saxe-Clifford's clinical interview and MMPI-2 test and, as a

result, disobeying Chief Annibali's orders. The record confirms that Beattie had adequate and repeated opportunities to respond to these charges.

The City contends that Beattie could not shield himself from the administration of a meaningful Fitness Exam by invoking medical privacy. We agree. Government Code section 1031, subdivision (f) requires that all peace officers "[b]e found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer." (See *Furtado v. State Personnel Board* (2013) 212 Cal.App.4th 729, 746-747, fn. 5.) The officer's emotional or mental fitness must be determined by a California licensed psychiatrist or psychologist with the equivalent of five full-time years of experience in diagnosis and treatment of emotional or mental disorders. (Gov. Code, § 1031, subd. (f)(1), (2).) These standards are incorporated into every peace officer's job description and must be maintained throughout the officer's career. (*Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1059.) Because "officers must rely on each other during life-threatening situations, they must possess personal qualities conducive to building trust and cooperation." (*Id.* at pp. 1060-1061; see *Gray v. County of Tulare* (1995) 32 Cal.App.4th 1079, 1092 ["law enforcement agencies [are] essentially paramilitary organizations in which discipline and loyalty are especially important"].)

Thus, neither Chief Annibali nor the Arbitrator was qualified to assess Beattie's continued fitness for duty. That task was assigned to Dr. Saxe-Clifford, who had evaluated Beattie twice before. (See Gov. Code, § 1031, subd. (f)(1), (2).) As the trial court observed, "Dr. Saxe-Clifford's expertise is amply supported in the record. She has been a police psychologist for more than 40 years. As of the date of the administrative hearing, she had worked for the LAPD for 14 years and had consulted with law enforcement for the previous four years. At the time of the hearing, she was involved with the International Association of Police Chiefs in revising Fitness for Duty guidelines. Her curriculum vitae shows dozens of publications related to psychology, mental health and law enforcement. She has conducted hundreds of pre-employment evaluations and Fitness for Duty Evaluations utilizing the MMPI[-2] test and other tests."

Section III.E.1 of General Order 0216 provides that "[a]ny employee ordered to undergo a medical and/or psychological fitness-for-duty examination shall comply with the terms of said order and shall cooperate fully with the physician/psychologist with respect to any clinical interview conducted, any tests administered and any other procedures directed by the physician/psychologist." Section III.E.3 states that refusal to comply with the order "or with reasonable requests by the evaluator shall be deemed insubordination."

Dr. Saxe-Clifford determined that Beattie did not cooperate in taking the MMPI-2, the "granddaddy" of the tests used to assess an officer's fitness for duty. She confirmed this with a qualified colleague, Dr. Ben-Porath, who agreed that the test-taker had attempted to answer the multiple choice questions in a way that would mask his true profile and give a false profile to the examiner. Dr. Saxe-Clifford also believed that since Beattie was claiming that he had been declared fit for duty by another professional, she needed to discover what tests he had taken to receive that declaration. She opined that she could not complete the Fitness Exam without that information. The trial court found her opinion both credible and persuasive, stating that "Dr. Saxe-Clifford's expertise, her multiple interviews with Beattie, her personal administration and scoring of the MMPI[-2], and her professional assessment of Beattie's failure to cooperate based upon validity scales are well-established in the administrative record." Indeed, none of the actions by Dr. Saxe-Clifford or Chief Annibali appear unreasonable under the circumstances. Chief Annibali, Jensen and other fellow officers considered Beattie a good friend, "a great officer and a hard worker." Consequently, the Department gave Beattie numerous opportunities to cooperate, including delaying disciplinary action for a year, while Beattie was on paid leave, and requiring an extensive internal investigation as to his level of cooperation.

Beattie suggests that Dr. Saxe-Clifford improperly relied on Dr. Ben-Porath's hearsay assessment of Beattie's MMPI-2 test results. Generally, an expert may properly rely on hearsay in forming his or her opinion. (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 743.) But even if Dr. Saxe-Clifford was not permitted to rely on or to

testify regarding Dr. Ben-Porath's assessment, his opinion did nothing more than corroborate her own, independent expert opinion of Beattie's level of cooperation on the MMPI-2. As a reviewing court, our authority "begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . . If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.) The testimony of an expert witness alone is substantial evidence. (*Torres v. Xomox Corp*. (1996) 49 Cal.App.4th 1, 17; see *People v. Vega* (2005) 130 Cal.App.4th 183, 190.)

We reject Beattie's assertion that the trial court should have disregarded Dr. Saxe-Clifford's expert opinion because the Arbitrator did not allow her to testify regarding Beattie's MMPI-2 test results and how he had responded to the test. The lack of that information goes to the weight of her opinion testimony, not to its admissibility. (See *Sinaiko v. Superior Court* (2004) 122 Cal.App.4th 1133, 1142.) As the City points out, Beattie vehemently opposed the admission of any evidence regarding Dr. Saxe-Clifford's thought process and reasoning. He therefore cannot complain that her testimony failed to provide that detail.

Beattie also has not shown that Civil Code section 56.10 prevented Dr. Saxe-Clifford from asking him about the tests he had taken in connection with his independent evaluation. That section generally prohibits a medical provider from "disclos[ing] medical information regarding a patient of the provider of health care . . . without first obtaining an authorization." Dr. Saxe-Clifford asked Beattie -- not a medical provider -- what tests he had taken since he was the one claiming he had passed another Fitness Exam. By making that particular claim, he specifically placed the matter at issue. (See Civ. Code, § 56.10, subd. (c)(8)(A) [medical information may be disclosed in arbitration where employee "has placed in issue his or her medical history, mental or physical condition, or treatment"].) No privacy right was violated.

Section III.D.1(m) of General Order 0201 states that officers shall be subject to disciplinary action whenever "[t]hey refuse, fail to obey, or otherwise manifest an insubordinate attitude toward any lawful and proper order." Substantial evidence supports the trial court's finding that Beattie failed to comply with Chief Annibali's orders to participate fully and completely in a Fitness Exam. As the trial court aptly summarized, "Beattie cannot circumscribe the confines of the City's Fitness Exam. Given that the psychological fitness implicates a fundamental qualification to be a peace officer, it is simply unreasonable to maintain that a police department is powerless to require the officer's cooperation. No reported decision has adopted Beattie's line of reasoning. If followed to its logical conclusion, Beattie's reasoning would severely circumscribe, if not eliminate, an appointing authority's ability to discipline an employee for failure to participate in a Fitness Exam. This is not the law."

No Abuse of Discretion in Imposing Termination

Beattie contends that even if discipline was warranted, the City abused its discretion by terminating his employment instead of imposing a lesser penalty. He maintains the penalty was excessive given his positive performance evaluations and the nature of his misconduct. We disagree.

"Neither a trial court nor an appellate court is free to substitute its discretion for that of an administrative agency concerning the degree of punishment imposed. [Citations.]" (*California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, 1580; *Flippin, supr*a, 148 Cal.App.4th at p. 279.) The City Manager determined Beattie's insubordination in failing to cooperate in the Fitness Exam was sufficient to justify termination. Given the facts presented, it is understandable why the City Manager adopted the Department's decision rather than the Arbitrator's recommendation to reinstate Beattie. Not only are the risks in deploying an unfit police officer obvious, but a lesser penalty also could send the undesirable message that City officers can disobey direct orders with impunity.

Finally, even if reasonable minds could differ with regard to the propriety of Beattie's termination, the penalty must be upheld. (*Flippin, supra*, 148 Cal.App.4th at

p. 279; *County of Los Angeles v. Civil Service Com*. (1995) 39 Cal.App.4th 620, 634.) We conclude the trial court did not err by denying the petition for writ of mandate.

DISPOSITION

The judgment is affirmed. The City shall recover its costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Charles S. Crandall, Judge

Superior Court County of San Luis Obispo

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