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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

DONALD HERMANS, Petitioner and Appellant, v. STATE PERSONNEL BOARD, Respondent.	B236832 (Los Angeles County Super. Ct. No. BS128639)
CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Real Party in Interest.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Ann I. Jones, Judge. Affirmed.

Michael P. Calof for Petitioner and Appellant.

Alvin Gittisriboongul, Chief Counsel, and Chian He, Senior Staff Counsel, for Respondent State Personnel Board.

Debra L. Ashbrook, Chief Counsel, and Stephen A. Jennings, Staff Counsel, for Real Party in Interest California Department of Corrections and Rehabilitation.

Donald Hermans appeals from a judgment denying his petition for a writ of mandate seeking to overturn the decision of California State Personnel Board sustaining the decision by California Department of Corrections and Rehabilitation ("CDCR") to dismiss him as a correctional officer for misconduct. Appellant assails several of the trial court's legal determinations—namely violations of his right to representation and to have charges brought against him within one year under the Police Officers Bill of Rights Act ("POBRA") and violations of his right to have sufficiently detailed allegations in the Notice of Adverse Action pursuant to which he was dismissed. Appellant also challenges the sufficiency of the evidence before the Board and trial court. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 7, 2007, appellant was working the third shift at the California State Prison in Los Angeles ("CSP-LA") and was assigned to B-5, Floor I. On that day and on certain days before then, he worked with Correctional Officer Palacios. Appellant's duties on that day included providing security on the roadway adjacent to the dining hall during the evening meal, which required him to stand in front of their building and watch the inmates walking to "chow."

During September 2007, inmates Tony Smith and George White were housed in Building B-3, Cell 249 at CSP-LA. On September 7, 2007, during the evening meal period, White was asked by appellant why he had toilet paper with him. After White refused to answer, appellant and Officer Palacios took White's identification, searched, and cuffed him and returned him to the B-3 housing unit.

Upon returning White to B-3, appellant and Officer Palacios asked Correctional Officers Phan and Camacho where White "lived." Appellant and Palacios then placed White in a shower and appellant proceeded to enter and search White's cell. After searching the cell for approximately five minutes, appellant left the building with a bag full of papers and other items obtained from the cell. Appellant did not document the search in the unit cell search log, nor did he or his partner leave a receipt for any items of personal and authorized state issued property removed from the cell.

When White was returned to his cell, it had been thoroughly searched. White complained that his cell had been trashed and that certain authorized items had been taken from the cell and that no cell search receipt had been provided to him. White and Smith later filed separate Inmate Appeal Form 602s concerning the incident.[1]

On September 7, 2007, appellant was aware of the CSP-LA's policy concerning cell searches. That policy required officers to leave inmate's quarters in good order upon completion of a search and to leave a receipt for any items of personal and authorized state-issued property removed from the cell. CSP-LA policy also required officers to document the cell search in the housing unit cell search log. The Department Operation Manual also indicated that cell searches were not permitted as a punitive measure or to harass an inmate.

Appellant was questioned regarding the incident during internal investigations. Initially, he denied ever having entered building 3—or any unit to which he was not assigned—to conduct a cell search. He later changed his testimony to admit that he was aware of the practice of entering units other than those to which he was assigned, but disclaimed any personal involvement in the search at issue. However, appellant's partner, Palacios, admitted during the internal investigation that he and appellant routinely removed disruptive inmates from the chow line, returned them to their housing units, and conducted cell searches. Although Palacios was less forthcoming during the administrative hearing, he confirmed these facts.

Appellant was served with a Notice of Adverse Action ("NOA") on September 19, 2008. It specifically alleged that appellant's conduct in searching White's cell in September 2007 amounted to "incompetency, inefficiency, inexcusable neglect of duty, discourteous treatment of the public and other failure of good behavior." The NOA also stated that appellant had made dishonest and/or misleading statements to investigators

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[1] An administrative appeal by a prisoner is initiated by filing CDC Form "602." White's 602 form indicates he withdrew his appeal, but he testified that the signature on that part of the form was not his and that he had not withdrawn his 602.

when he denied that he conducted cell searches in housing units to which he was not assigned and when he denied having searched the unit in question. The NOA further contained allegations that appellant's misstatements constituted insubordination, willful disobedience, and other failure of good behavior.

On October 1, 2008, a *Skelly* hearing was conducted at appellant's request. After reviewing the *Skelly* Officer's recommendation, and with appellant and his attorney present, the Warden of CSP-LA sustained the action of dismissal.

Thereafter, on October 7, 2008, appellant filed an appeal with the Board, seeking to overturn his dismissal. He also brought a motion to dismiss the adverse action, asserting a number of procedural defects in CDCR's disciplinary process and arguing that the charges lacked factual support. The motion was heard and ultimately dismissed, and the case proceeded to an evidentiary hearing in October 2009. (1 AR 180-87.)~

At the conclusion of the hearing, the administrative law judge prepared a Proposed Decision upholding appellant's dismissal. The Board adopted the Proposed Decision at its May 18, 2010 meeting, after deliberation in a closed session. Appellant then filed a petition for rehearing with the Board, which was summarily denied at its August 3, 2010 meeting.

Appellant filed a verified petition for writ of mandate in the superior court on September 30, 2010 pursuant to Code of Civil Procedure[2] section 1094.5. Judgment denying appellant's writ of mandate was entered on September 1, 2011. Appellant filed this timely appeal on October 21, 2011.

DISCUSSION

Appellant filed his writ petition pursuant to section 1094.5, contending the Board's decision to sustain his dismissal constituted legal error insofar as it violated his POBRA and due process rights by failing to notify him of the charges within one year

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[2] All further statutory references are to the Code of Civil Procedure, unless otherwise noted.

and denying him right to counsel. He also assailed the Board's factual findings, arguing they were not supported by the evidence and consequently that the Board abused its discretion in dismissing him.

Before this court, appellant challenges the same legal and factual findings.[3] He also contends that CDCR failed to comply with the specificity requirements of a NOA as described in *Leah Korman* (1991) SPB Dec. No. 91-04. For its part, CDCR argues the trial court's decision correctly applies controlling law and is supported by substantial evidence.[4] As we explain below, we agree with CDCR.

The Board's decision, and the penalty imposed, affects appellant's fundamental vested right in his employment; therefore, the trial court correctly exercised its independent judgment in reviewing the administrative record and rendering judgment on the petition. (*Davis v. Los Angeles Unified School Dist. Personnel Com.* (2007) 152 Cal.App.4th 1122, 1130 [agency decision impacting employee's fundamental vested right in his or her job requires exercise of trial court's independent review].) The independent judgment test required the trial court to not only examine the administrative record for errors of law, but also exercise its independent judgment upon the evidence in a limited

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[3] In the trial court, appellant also argued the Board failed to comply with the open meeting requirements of the Bagley-Keene Act and POBRA's "speedy trial" requirement. The trial court resolved these issues in favor of the Board. As appellant does not raise these issues on appeal, we do not address them.

[4] In its Opposition Brief, CDCR contends that appellant has not provided an adequate record on appeal and that the appeal should be dismissed. It is well established that an appellant has the burden of demonstrating prejudicial error, which is never presumed. Where an appellant fails to provide an adequate record on appeal, he cannot meet this burden and a reviewing court must resolve any challenge to an administrative decision against him. (See *Foust v. San Jose Construction Company, Inc.* (2012) 198 Cal.App.4th 181, 187.) Here, however, appellant provided the clerk with three volumes of Clerk's Transcripts when he filed his Opening Brief and proceeded to file two volumes of the Administrative Record with his Reply Brief. The record before us is sufficient to render a decision on the merits and we proceed accordingly.

trial de novo. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143.) The trial court was permitted to draw its own reasonable inferences from the evidence and make its own credibility determinations. (*Morrison v. Housing Authority of the City of Los Angeles Bd. of Comrs.* (2003) 107 Cal.App.4th 860, 868.) At the same time, it had to afford a strong presumption of correctness to the administrative findings and require the challenging party to demonstrate that such findings were contrary to the weight of the evidence. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.)

Our task is to review the record and determine whether the *trial court's* findings (not the administrative agency findings) are supported by substantial evidence. (*Bixby, supra,* 4 Cal.3d at p. 143, fn. 10; accord, *Davis, supra,* 152 Cal.App.4th at pp. 1130–1131; *Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 52 [where superior court required to exercise independent review of administrative record, "the scope of review on appeal is limited"].) We resolve all evidentiary conflicts and draw all legitimate, reasonable inferences in favor of the trial court's decision. (*Valiyee v. Department of Motor Vehicles* (1999) 74 Cal.App.4th 1026, 1031.) "Where the evidence supports more than one reasonable inference, we are not at liberty to substitute our deductions for those of the trial court." (*Morrison, supra,* 107 Cal.App.4th at p. 868.)

I. Appellant's Claim For Insufficient Notice Under Korman Fails

Appellant asserts that CDCR failed to comply with the specificity requirements of *Leah Korman* (1991) SPB Dec. No. 91-04 (*Korman*) by refusing to amend their NOA to state the specific date of September 7, 2007, as the date of the incident, as opposed to September 2007 generally. Although appellant objected to the sufficiency of the notice before the Board, he did not raise the issue in the trial court.

Administrative agency decisions are not controlling precedent in California courts, although we accord deference to such decisions. (See, e.g., *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 6–11; *California Dept. of Corrections v. State Personnel Bd.* (2004) 121 Cal.App.4th 1601, 1618 ["Of course, the SPB precedents are not binding on this court. [Citation.]"].)

Moreover, as a general rule, an appellate court will not review an issue that was not raised by some proper method by a party in the trial court. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, p. 444.) "It is important to remember, however, that the purpose of this general rule is to give the trial court and parties an opportunity to correct an error that *could* be corrected by some means short of an opposite outcome in the trial court. A 'noncurable defect of substance where the question is one of law' is not an error that falls within the rule. A 'matter involving the public interest or the due administration of justice' also is not. [Citations]." (*Woodward Park Homeowners Ass'n, Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 712-713, italics in original.) Here, appellant's claim concerning the sufficiency of NOA falls within both of these exceptions; consequently, we will reach its merits.[5]

Under *Korman*, a charging NOA must list the offenses in a manner sufficient to allow the defending party to mount a focused defense. There, the Board revoked an employee's suspension because the employer had failed to specify the acts on which the action was based in the notice given to the employee or in the other documents provided to the employee with the notice.

Here appellant contends he could not defend himself because the NOA did not specify the exact date of the incident, but instead indicated that it occurred in September 2007. We are unconvinced.

While it is true that appellant's NOA did not specify the date, apparently because White's and Smith's 602 appeals identified different dates,[6] the NOA did contain other detailed information which apprised appellant of the substance of the allegations against him. The NOA identified the cell and inmate involved; it included four pages describing

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[5] As we affirm the Board's denial of the motion to dismiss, CDCR are not prejudiced in our decision to proceed to the merits.

[6] White's 602 alleged that the date of appellant's misconduct was September 7, 2007. Smith's 602 appeal indicated that the date of the purported misconduct was September 17, 2007. However, Smith's 602 was marked received on September 14, 2007, consequently the date of September 17 given by Smith could not be correct.

the conduct at issue and indicated that the incident occurred in September 2007. Smith's 602 form (containing the erroneous date of September 17, 2007) was attached to the NOA as was a work log indicating that Palacios and Hermans *did not* work together on September 17, 2007. The dates in September in which the incident could have occurred were limited to a couple of dates in the work log; thus, appellant could not possibly have been confused by the September 17, 2007 date. In view of all of these circumstances, we are not persuaded that appellant was unable to mount a defense to the charges against him because the NOA did not specify the date of the incident.

In addition, appellant provided no citations to, nor did our independent review uncover any authority indicating that a failure to provide an exact date is sufficient, standing alone, to warrant dismissal. Consequently, in view of the foregoing, we find that the NOA contained sufficient specificity to comply with the requirements of *Korman*.

II. Appellant's Statute of Limitations Defense Lacks Evidentiary Support

Appellant avers the NOA should have also been rejected because it failed to comply with POBRA's one-year statute of limitations under Government Code section 3304. He points out that the misconduct alleged in the NOA (dated September 19, 2008) occurred on September 17, 2007, but the NOA was not served on appellant until October 1, 2008. He asserts that because he was not served with the NOA within one year after the alleged incident occurred, the NOA is invalid. This argument misses the point, and in any case is simply without any evidentiary support.

Government Code section 3304, subdivision (d) provides that the investigation of an allegation of police officer misconduct under the Civil Service Act must be completed within one year of the public agency's discovery of the incident "by a person authorized to initiate an investigation of the allegation." The issue is not when the acts in question occurred, but rather when a person authorized to initiate an investigation *discovers* the purported misconduct. Relying on *Benefield v. CDCR* (2009) 171 Cal.App.4th 469, 476-477, the trial court determined that the warden was the person authorized to initiate such

an investigation. Whether or not the lower court correctly determined that the warden was the *only* person who can initiate such investigations, we nevertheless find that appellant failed to demonstrate[7] that anyone who could have been authorized to initiate the investigation *discovered* the incident more than one year before he received notice, and thus find no prejudicial error.

Even assuming appellant's supervisor received White's 602 appeal more than one year before appellant was served with the NOA, there is no evidence that his supervisor was the proper person to initiate an investigation. Appellant failed to shoulder his burden of providing evidentiary support that someone authorized to initiate an investigation discovered the misconduct in question more than one year from the time he was served with the NOA on October 1, 2008. Consequently, appellant's statute of limitations argument fails.

III. Appellant's Right to Counsel Claim Lacks Evidentiary Support

Appellant claims that the trial court erred in finding that his POBRA and due process right to counsel had not been violated when the Board refused to continue the investigative interview for two hours to allow time for his counsel to arrive.

Government Code section 3303, subdivision (i) provides, "[u]pon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters that are likely to result in punitive action against any public safety officer, that officer, at his or her request, shall have the right to be represented by a representative of his or her choice who may be present at all times during the interrogation."

The trial court noted that appellant first raised this issue as part of a motion to dismiss before the administrative law judge ("ALJ"), who informed him that he had not

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[7] To the extent appellant sought to rely on the statute of limitations in Government Code section 3304, subdivision (d), he was required to assert and prove the defense below. (See *Moore v. City of Los Angeles* (2008) 156 Cal.App.4th 373, 382-383 [holding that appellant forfeited the defense in Government Code section 3304, subdivision (d) when he failed to raise it before the appropriate administrative body].)

established a sufficient factual basis for the claim of a denial of the right to counsel. The ALJ pointed out that appellant did not disclose to what the interview pertained, the date he was advised of the interview, or whether he timely attempted to obtain counsel before the interview. Nevertheless, the ALJ indicated that appellant could adduce additional evidence to support the claim during the evidentiary hearing.

Appellant never presented additional evidence in support of this claim. In addition, appellant cites no authority to support his argument that Government Code section 3303, subdivision (i) ensures that the subject of an interview has an absolute right to have the representative of his choice present at a time convenient for counsel. In fact, the authority supports the opposite conclusion. (See *Upland Police Officers Association v. City of Upland* (2003) 111 Cal.App.4th 1294, 1306 ["The officer must choose a representative who is reasonably available to represent the officer, and who is physically able to represent the officer at the reasonably scheduled interrogation. But it is the officer's responsibility to secure the attendance of his or her chosen representative at the interrogation. If he or she is unable to do so, the officer should select another representative so that the interrogation may proceed 'at a reasonable hour.'"]; accord *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625, 1636.) Accordingly, the trial court correctly determined that appellant's due process claim for right to counsel lacked evidentiary support.

IV. The Trial Court's Findings Were Supported By Substantial Evidence

Appellant identifies a number of arguments in support of his contention that insufficient evidence supports the trial court's decision. Not one of these arguments is persuasive.[8] A review of the record evinces ample evidence in support of the trial court's

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[8] Appellant argues that the trial court's reference (in a footnote in its decision) to a prior incident in which he received discipline is prejudicial and in violation of POBRA's one-year statute of limitations. However, he cites no authority for the proposition that such a reference violates POBRA. Regardless, because we find that substantial evidence supports the trial court's determination without regard to this passing reference, we find that appellant suffered no prejudice from it.

determination to affirm the Board's decision to dismiss petitioner.

"'Substantial evidence has been defined as relevant evidence that a reasonable mind might accept as adequate support for a conclusion. [Citation.]'" (*Bhatt v. State Dept. of Health Services* (2005) 133 Cal.App.4th 923, 928.) A review of appellant's answers in the investigative interviews and his later attempt to explain those responses before the administrative law judge reasonably supports a finding that he made false and misleading statements when he denied to investigators that he had entered White's cell to conduct a punitive and unauthorized search.

Appellant's claim of prejudice regarding the date of the occurrence being September 7, 2007, and not September 17, 2007, also fails. Not only did the *Skelly* packet include a sign-in sheet bearing appellant's name from September 7, 2007, his responses during the investigation simply do not comport with such a contention. Appellant did not merely deny searching the cell in question on September 17, 2007; he denied *ever* searching any inmate's cell in Building B-3 without direct orders to do so. Thus, any claim that he detrimentally relied on the date of September 17, 2007, is simply unsupported by the evidence.

Finally, White and Office Phan provided evidence that appellant entered White's cell and conducted an unauthorized and undocumented search. The same evidence supports the conclusion that non-contraband items, including legal papers and prison-issued books were confiscated from White's cell without a receipt for that property being issued. During this time, appellant was aware that this type of punitive, unauthorized, and undocumented search and seizure was prohibited.

The substantial evidence of appellant's misconduct supports the conclusion that he was guilty of inexcusable neglect of duty by failing to leave a cell receipt and failing to document the search in the B-3 logbook. It also supports the conclusion that he was guilty of dishonesty for lying to investigators by claiming that he never searched inmate's cell and that he never entered a housing unit to conduct a search unless ordered to do so. All appellant's arguments to the contrary are unavailing. The trial court had discretion to

make credibility determinations and was entitled to reject appellant's self-serving testimony and afford great deference to the credibility determinations of the Board. (*Morrison, supra*, 107 Cal.App.4th at p. 868; *Dairy v. ALRB* (2009) 168 Cal.App.4th 598, 604.) Our standard of review does not allow us to reweigh the credibility determinations of the trial court. (*Morrison, supra*, 107 Cal.App.4th at p. 868.) Accordingly, appellant has failed to show the trial court's decision lacks substantial evidence.

DISPOSITION

The judgment is affirmed. Each party to bear its own costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **JACKSON, J.**