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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

VICTOR PEREZ,

Plaintiff and Appellant,

v.

CIVIL SERVICE COMMISSION OF
THE COUNTY OF LOS ANGELES,

Defendant and Respondent;

COUNTY OF LOS ANGELES,
PROBATION DEPARTMENT,

Real Party in Interest and
Respondent.

B271765

(Los Angeles County
Super. Ct. No. BS149101)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joanne B. O'Donnell, Judge. Affirmed.

Law Office of George H. Jones and George H. Jones for Plaintiff and Appellant.

Law Offices of William Balderrama and William
Balderrama for Respondents.

Real party in interest and respondent Los Angeles County Probation Department (the Department) fired plaintiff and appellant Victor Perez (plaintiff) for sexually assaulting a probationer under his supervision. Plaintiff appealed the discharge to respondent Civil Service Commission of the County of Los Angeles (the Commission), which sustained the decision to terminate plaintiff's employment. Plaintiff then filed a petition for writ of mandate in Los Angeles County Superior Court challenging the Commission's decision on the ground that it was not supported by the evidence. The superior court denied the petition after an independent review of the administrative record. We consider whether substantial evidence supports the superior court's decision to uphold plaintiff's discharge.

I. BACKGROUND¹

A. *Two Probationers Accuse Plaintiff of Inappropriate Conduct*

Plaintiff was hired by the Department in 2001 as a crew instructor, and in that position, he was entrusted with responsibility for overseeing probationers on work assignments. In June 2010, two probationers, Sylvia A. (Sylvia) and Iris P. (Iris), submitted affidavits to the Department stating plaintiff

¹ The copy of the administrative record plaintiff lodged with this court was missing over one hundred pages. We asked plaintiff to provide the missing pages. Plaintiff submitted some of the pages we requested, but not all. Nonetheless, we have those portions of the administrative record necessary to review the superior court's judgment.

had made comments to them of a sexual nature and approached them physically in a manner that made them uncomfortable.

Iris stated in her affidavit that plaintiff told her “he could kiss [her] all day” and she “could be his woman on the side.” Iris also reported that plaintiff came up from behind her and held her, “like a back hug.”

Sylvia stated plaintiff said “he could just kiss [her] for hours,” asked her (using more explicit terms) if she liked to perform oral sex on men, and told her (again in more explicit terms) that he would love to have sex with her. Sylvia also reported that after plaintiff took her into an office, he “touched [her] shoulders to bring [her] closer and went for [her] breast.”

Plaintiff signed an affidavit in which he denied Sylvia’s and Iris’s allegations while also apologizing and stating, “We all know that at times, things can be misunderstood and taken out of context.”

Roughly a month after making her initial complaint, Sylvia submitted a second affidavit to the Department disclosing that plaintiff forced her to perform oral sex on him. She described the incident in some detail, including what he said to her; the kind of underwear he wore; a description of his penis; and how disgusted, embarrassed, and shocked the incident made her feel. She acknowledged the forced oral copulation occurred before she submitted her first complaint, but stated she had not described it earlier because she was embarrassed and feared plaintiff could use his authority to send her back to jail.

B. The Department Investigates and Discharges Plaintiff

In response to the three complaints, the Department conducted an administrative investigation. The investigator

interviewed plaintiff, Sylvia, Iris, other Department staff, other probationers, and Ryan Stanaford (Stanaford), Sylvia's ex-boyfriend who was also a Los Angeles County Sheriff's Department Deputy. Following the investigation, and citing the allegations in Iris's and Sylvia's first affidavits, the Department suspended plaintiff for thirty days without pay. Several months later, citing Sylvia's allegations about plaintiff sexually assaulting her, the Department gave plaintiff notice he was being discharged from employment. The basis of the discipline in both instances was "[i]nappropriate and unprofessional conduct of a sexual nature" and "[f]ailure to exercise sound judgment," which violated several departmental policies.

C. Civil Service Commission Hearing

Plaintiff appealed his discharge to the Commission, which held a three-day hearing. The Department called several witnesses to testify, including Sylvia, and we will recount the pertinent details. Plaintiff opted not to testify at the hearing, but he did submit for the Commission's consideration copies of his performance evaluations, commendations, and awards.

1. Sylvia's testimony

Sylvia testified she met plaintiff in May 2010 on her first day working as a probationer in the Department's work release program. She was vacuuming a car at the time and plaintiff, who was standing a couple of feet behind her, said, "You shouldn't bend down like that in front of me." She got up and turned around, and he introduced himself as her supervisor. Plaintiff commented on a "sexy tattoo" on her lower back and then asked about a second tattoo running from her neck to the middle of her

back. Then plaintiff grabbed Sylvia's shirt so that he could take a look at the tattoo. Plaintiff also asked Sylvia if she was married or had children.

The second time plaintiff and Sylvia met, plaintiff told her that she needed to clean an upstairs office. They took an elevator to the second floor and she did not see anyone else there. He took her to a small office and opened the door. She went in first and noticed the office was already clean. Plaintiff followed her in, locked the door, and closed the blinds. He then unzipped his pants, took out his penis, began rubbing it, and said, "Come on, baby." She shook her head in a "no" gesture. Plaintiff put his hand on Sylvia's shoulder to push her down on her knees, grabbed the back of her head, put his penis in her mouth, and ejaculated. Sylvia believed it was "[p]robably like 15 minutes" from the time she and plaintiff started to walk to the elevator until the time they came back down the ramp. Afterwards, she felt shocked, nervous, and uncomfortable.

That was not the last troubling interaction with plaintiff that Sylvia described. On a subsequent occasion, Sylvia arrived late for her probation work detail. Plaintiff told her not to let it happen again, but then asked if she wanted to "fool around." As he asked the question, plaintiff grabbed Sylvia's shirt and felt her breast. In response, Sylvia said "no" and backed away from him. On yet another occasion, while they were standing next to a Department van, plaintiff asked if Sylvia wanted to fool around later on. She backed away from him and did not give a verbal response. Sylvia also testified that plaintiff followed her into a restroom once and tried to kiss her, but she moved her head away.

Embarrassed by these incidents and afraid people would not believe her or that she would be sent back to jail, Sylvia initially did not mention the incidents to other members of the crew or the Department. Sylvia did contact her ex-boyfriend Stanaford and told him about what happened when plaintiff sexually assaulted her in the upstairs office. Stanaford told Sylvia that she should “report him [i.e., plaintiff].” Sylvia did not report what plaintiff did to the Department, however, until Sylvia realized she was not plaintiff’s only victim because Iris told her plaintiff had been flirting and trying to kiss her (Iris).² Sylvia explained she did not mention the oral copulation in her first complaint to the Department because she was scared, was embarrassed, and thought the Department would not believe her. Sylvia did later file a civil lawsuit against the Department, which settled in her favor for an undisclosed sum.

2. Terrence Vallejo’s (Vallejo’s) testimony

Vallejo began working for the Department in 1990 and has been in the position of supervising crew instructor since 2002. He supervised plaintiff in the early 2000s, but not at the time of the incident with Sylvia. Vallejo was filling in for a crew instructor one day and noticed Sylvia and Iris whispering to each other, looking concerned. He pulled them aside to ask if they had any concerns with the crew members. They responded they had a problem with a crew instructor. Vallejo told the two woman that

² Sylvia never contacted the police about plaintiff’s sexual assault. When asked why, she said she thought plaintiff was part of the police department and she was scared to report the incident.

there would be no retaliation and he would take care of any problems in an appropriate manner. Iris told Vallejo about plaintiff being inappropriate with her and giving her a hug. Sylvia said that she had experienced similar incidents.

Vallejo asked them both to fill out affidavits and warned them to be truthful or they could be in trouble. Vallejo took the affidavits and gave them to his director, James Johnson (Johnson), who was also plaintiff's supervisor at the time. (These affidavits are the Iris affidavit and the first of the Sylvia affidavits described *ante*.) Vallejo admitted he found the accusations Sylvia and Iris leveled against plaintiff surprising because plaintiff "seemed to be professional." But Vallejo also conceded he was aware of two instances in the past where female probationers had complained plaintiff was "harassing them," as well as another instance in which a female employee alleged plaintiff had "groped" her.

In addition to Iris and Sylvia, Vallejo asked other probationers on the crew to prepare affidavits addressing whether they had seen or heard any inappropriate comments. Luke Steinhaus (Steinhaus) was among the three probationers who submitted an affidavit alleging misconduct. Steinhaus stated he had overheard plaintiff saying to Iris "you could be my lady on the side."

3. *James Johnson's (Johnson's) testimony*

At the time of his testimony, Johnson had been a Probation Director with the Department for five years. Vallejo called Johnson to relate Sylvia's allegations against plaintiff. Johnson later that day received and reviewed the affidavits Vallejo had collected from Sylvia, Iris, and other probationers. Afterwards,

he called plaintiff to his office to hear plaintiff's "side of the story." Plaintiff denied the allegations that he was "flirtatious" with Sylvia and Iris. Johnson asked plaintiff to submit an affidavit, and plaintiff complied.³ Johnson packaged up the documentation and forwarded it to his bureau chief for review.

After Johnson received Sylvia's second affidavit (describing the coerced oral copulation) and the affidavit from Steinhaus, Johnson met with plaintiff a second time. He asked plaintiff to submit another affidavit in response to Sylvia's additional allegations, which plaintiff did,⁴ and Johnson forwarded the

³ The affidavit is part of the administrative record. It states: "I truly believe that the statements being said are not all true. I . . . never talked or asked for any kind of sexual intent. I . . . feel that I am a very nice and friendly person. I talk to males and the females in a friendly conversational way. [¶] I did not intend to make any one person feel uncomfortable[.] If I have been misunderstood in any way I truly apologize for that. We all know that at times, things can be misunderstood and taken out of context. Then that person is assuming the wrong thing."

⁴ Plaintiff's second affidavit is also part of the administrative record. It states: "I am writing this in correspondence to the second affidavit by [Sylvia]. I . . . never touched [Sylvia] or asked for any of those inappropriate sexual gestures that she is claiming. There were several times that I have seen this probationer . . . on the work crew. [¶] Mr. Bernard was requesting that the upstairs office be cleaned. Mr. Coronado gave me [Sylvia] and some cleaning suppl[ies]. [¶] Mr. Coronado . . . and Mr. Bernard had seen me take [Sylvia] with cleaning suppl[ie]s to clean upstairs office[.] At the time [Sylvia] was vacuuming a vehicle. [Sylvia] and I went upstairs and came right back down. The office was clean. Mr. Coronado and Mr. Bernard seen me come right back down. [Sylvia] returned to her

second set of affidavits to internal affairs, which had responsibility for investigating the allegations.

Johnson also testified he had served as plaintiff's supervisor for a period of time and did not "know[] him to be an individual who is disrespectful to women." Johnson's performance evaluations of plaintiff were "[v]ery good to outstanding." Johnson conceded, however, that during the time he supervised plaintiff, he had heard from a female employee who complained that plaintiff had hugged her and "grabbed her buttocks," but she told Johnson she did not want to make a formal complaint. When Johnson spoke to plaintiff about the incident, plaintiff denied groping the woman and said "his hand slipped [and] it crossed her buttocks."

4. *James France's (France's) testimony*

France was a crew instructor for eleven years and worked with plaintiff supervising probationers. Sylvia approached France, advised him that she was "involved in a situation," and asked him for an affidavit form. After she filled out the affidavit, Sylvia gave it to France and asked him to read it. (This was the second affidavit Sylvia submitted.) France contacted his supervisor, who arrived, asked to see Sylvia, and advised France that he (the supervisor) would "handle it from there." France had not previously heard of any similar allegations against plaintiff, but he had personally observed plaintiff looking at female

work assignment. [¶] On another day I saw [Sylvia] at the Pasadena pick up site. [¶] On this morning the entire probation crew were all sent home with credit and all the probationers left at the same time. I got in my vehicle and left."

employees of the Department, “sizing them up and down” in a sexual manner.

5. *Steinhaus’s testimony*

Steinhaus was a probationer who was in the same group as Sylvia and Iris. In addition to the affidavit he had prepared at Vallejo’s request, Steinhaus later signed an affidavit at Sylvia’s request reporting that he “was witness to [plaintiff] pulling [Sylvia] away from the rest of the work crew.” On cross-examination, Steinhaus stated it was not a physical pull, and he acknowledged that he did not like plaintiff.

6. *David Grkinich’s (Grkinich’s) testimony*

Grkinich is a bureau chief (and formerly a senior director) at the Department, with responsibility over professional standards and employee discipline. Grkinich, in consultation with performance management staff, executive staff, and probation, made the decision to impose discipline on plaintiff, including plaintiff’s discharge from the Department. Plaintiff received the 30-day suspension based on the comments and inappropriate behavior toward female probationers that is documented in the notice of suspension. The Department subsequently discharged plaintiff based on the facts documented in the notice of discharge, which include plaintiff’s sexual assault of Sylvia in addition to the comments and inappropriate behavior already documented in the notice of suspension. Grkinich believed Sylvia’s story remained consistent and that she was credible.

Asked what he thought of Sylvia’s failure to make the sexual assault allegation until later, Grkinich stated it was

“understandable that she was reluctant . . . to come forward with this type of information” because she was a probationer on a work crew. “Also, it’s common knowledge that victims of sexual assault sometimes are reluctant to give the details. It’s embarrassing and humiliating. . . . [T]hat’s kind of what we gather from [Sylvia], that she was somewhat reluctant [to report the assault to the Department] initially.” Grkinich also testified, “Given the nature and the gravity of these allegations, the discharge is the only remedy.”

7. *Other witness statements submitted to the Commission*

In addition to the testimony taken at the hearing, the hearing officer admitted into evidence transcribed statements of witnesses interviewed as part of the investigation. Relevant here, because plaintiff cites them and the superior court would later consider them, are the statements of Efraim Coronado (Coronado), Bernard Brown (Brown), and Stanaford.

a. *Coronado’s statement*

Coronado is a crew instructor employed by the Department. Plaintiff approached Coronado one day and asked if he could borrow a probationer to assist him with some work. Coronado pointed at a female probationer and asked her to assist plaintiff. Plaintiff returned “maybe a couple of minutes” later, handed back cleaning supplies he had borrowed, and told Coronado nothing needed to be done because everything was clean. Prior to this interview, Coronado had at plaintiff’s request prepared an affidavit summarizing the same events, which identified Sylvia as the probationer he had directed to assist plaintiff.

b. Brown's statement

Brown is a contractor working with Department crew instructors. Brown asked plaintiff to have the office cleaned. He observed plaintiff go up to the office with a probationer. According to Brown's statement, plaintiff and the probationer returned "maybe less than five minutes" later, and plaintiff told Brown the office had already been cleaned. Brown had earlier prepared an affidavit at plaintiff's request that included a similar summary of his recollection, though it did not specify the number of minutes after which plaintiff returned.

Brown also sat for a deposition in the civil case Sylvia filed against the Department. The parties stipulated the deposition transcript could be admitted into evidence in lieu of testimony at the hearing. At deposition, Brown testified that from the time he saw plaintiff and Sylvia go up to the office to the time he saw them return was "[f]ive, ten minutes." Asked how he arrived at that estimate, Brown responded, "Just guessing." Brown was then asked, "You really don't know?" Brown responded, "Really don't."

c. Stanaford's statement

Stanaford stated he dated Sylvia for several weeks "a couple of years back." Sylvia "called [Stanaford] out of nowhere" the day or day after plaintiff assaulted her. She told Stanaford a probation officer started flirting with her while she was cleaning cars, the probation officer told her to go upstairs and clean an office, and once there, the officer followed and closed the blinds and locked the door. According to Stanaford, Sylvia said the officer then "grabbed her by the hair[,] forced her to her knees[,] . . . masturbated in front of her[,] and then . . . ejaculated

on her face”⁵ Stanaford told Sylvia she needed to report the assault to the police. Stanaford believed Sylvia’s account because she was crying during the phone conversation and seemed genuinely upset—“going from sad to mad[,] sad to mad when . . . telling [him] this story”

D. The Commission’s Decision

The hearing officer issued proposed findings of fact and conclusions of law that ultimately recommended the Commission sustain the Department’s decision to fire plaintiff. The hearing officer implicitly rejected plaintiff’s challenge to Sylvia’s credibility and specifically found plaintiff had made sexually suggestive comments to Sylvia and Iris, touched Sylvia’s shoulders to bring her closer to him and touch her breast, and forced Sylvia to perform oral sex. The Commission adopted the findings and recommendation of the hearing officer as its final decision.

E. The Superior Court Denies Plaintiff’s Request for Writ Relief

Plaintiff filed a petition for writ of mandate under Code of Civil Procedure section 1094.5 seeking reversal of the Commission’s decision. Plaintiff contended that the Commission abused its discretion in making findings not supported by substantial evidence in the administrative record, and that it erred in relying on Grkinich’s testimony as expert opinion.

⁵ Sylvia did not tell Stanaford whether plaintiff put his penis in her mouth, and Stanaford did not ask her.

After hearing argument from the parties and taking the matter under submission, the superior court denied the petition for writ of mandate in a sixteen-page minute order. The superior court applied the independent judgment standard of review in coming to its decision, aspects of which we will revisit in the discussion that follows. But to summarize here, the superior court rejected plaintiff's contention that the Commission disregarded evidence in his favor and concluded, in any event, that the evidence (principally the witness statements from Brown and Coronado) did not undercut Sylvia's testimony. In addition, the superior court found no basis to disturb the Commission's implicit conclusion that Sylvia was credible, writing: "The Court is empowered to revisit [the Commission's] implicit determination that [Sylvia] testified credibly; however, the presumption of correctness applies to [the Commission's] credibility determinations. . . . Because Plaintiff, as [Sylvia's] crew trainer, had some power to influence her continued liberty, both her reticence to accuse him of a sexual assault while he still held such power and her increased willingness to tell the truth about the assault as her probation period came to an end are understandable. [The Commission] did not apparently regard the affidavits as sufficiently inconsistent to impeach [Sylvia's] credibility and the Court will not disturb that finding."

II. DISCUSSION

Under the applicable standard of review, this is not a close case. The superior court's denial of plaintiff's mandate petition is supported by substantial evidence. Only two people were in the room when the sexual assault occurred: plaintiff and Sylvia. Plaintiff opted not to testify about the incident, but Sylvia did.

The superior court accepted the Commission's implicit determination that Sylvia was a credible witness and found the evidence cited by plaintiff did not undermine Sylvia's account of what happened. We see no basis to second-guess the superior court's credibility observations, and we agree Sylvia's account of what happened and the corroborating testimony amply demonstrate plaintiff did what he was accused of doing. In addition, we hold the superior court did not err in rejecting plaintiff's argument that the Commission improperly relied on Grkinich's testimony as expert opinion. We accordingly affirm the superior court's denial of the petition for writ of mandate.

A. *The Superior Court's Judgment is Supported by Substantial Evidence*

Because the discharge of plaintiff affects his fundamental, vested right to employment, the superior court properly applied its independent judgment when ruling on his petition for writ of mandate. (*Candari v. Los Angeles Unified School Dist.* (2011) 193 Cal.App.4th 402, 407.) On appeal, we therefore apply the substantial evidence test to review the superior court's determination. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 824; *LaGrone v. City of Oakland* (2012) 202 Cal.App.4th 932, 940-941; see also *Ogundare v. Department of Industrial Relations, Division of Labor Standards Enforcement* (2013) 214 Cal.App.4th 822, 828-829 [if the superior court exercised independent judgment, the superior court's judgment is the subject of appellate court review]; *Norasingh v. Lightbourne* (2014) 229 Cal.App.4th 740, 753 ["On appeal from a decision of a trial court applying its independent judgment, we review the trial court's findings rather than those of the administrative agency."].)

In carrying out our review, the “scope of review on appeal is limited. We must sustain the trial court’s findings if they are supported by substantial evidence. In reviewing the evidence, we resolve all conflicts in favor of the party prevailing at the trial court level and must give that party the benefit of every reasonable inference in support of the judgment. When more than one inference can be reasonably deduced from the facts, the appellate court cannot substitute its deductions for those of the superior court. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. It is sufficient if any reasonable trier of fact could have considered it reasonable, credible and of solid value.” (*San Diego Unified School District v. Commission on Professional Competence* (2013) 214 Cal.App.4th 1120, 1141-1142, internal quotation marks and citations omitted.)

Plaintiff contends the superior court abused its discretion by making findings not supported by substantial evidence. Specifically, plaintiff takes issue with the way the superior court accepted Sylvia’s testimony, but “disregarded” other evidence that plaintiff believes supports his case.

1. Testimony by Johnson and France

Plaintiff complains the superior court erred because it “dismissed,” “ignored,” or “disregarded” certain testimony by Johnson and France. Specifically, plaintiff points to Johnson’s testimony that during the time he supervised plaintiff, he received no complaints about plaintiff being disrespectful to women and plaintiff had good to outstanding performance reviews. Plaintiff also highlights France’s testimony that he had

not heard any allegations of sexual comments or harassment involving plaintiff.

Contrary to plaintiff's protestations, the superior court did acknowledge that aspects of testimony from both Johnson and France were positive for plaintiff. But the court explained why that testimony was inadequate to warrant reversal of the Commission's decision. The testimony, the superior court observed, was "merely general character evidence that has no direct bearing on [plaintiff's] conduct," and did "not controvert [Sylvia]'s factual testimony regarding her encounter with" plaintiff. The superior court also cited Johnson's testimony about the female employee who reported to Johnson that plaintiff had grabbed her buttocks and found, "[c]onsidering its mix of positive and negative elements, Johnson's testimony is not particularly favorable to" plaintiff. The superior court could also have pointed to similarly negative testimony from France (e.g., France observing plaintiff sizing up female employees in a sexual manner) that similarly undercut the positive aspects.

2. *Statements by Coronado and Brown*

Plaintiff asserts the superior court "misunderstood Brown and Coronado's evidence." The superior court found the "apparent import of the Brown and Coronado affidavits is that they suggest that [plaintiff] and [Sylvia] left for the upstairs office for a shorter period of time than [Sylvia] testified."⁶

⁶ Although the superior court's conclusion refers only to the affidavits, the witness statements provided by Coronado and Brown during the Department's investigation are not any more favorable.

Brown's affidavit states plaintiff and Sylvia came back down stairs "within minutes," and Coronado's affidavit states they returned "within a couple of minutes." The superior court found that nothing "in the Brown or Coronado affidavits exonerates [plaintiff] or significantly undercuts [Sylvia]'s testimony." Indeed, the superior court found that the evidence from the two men corroborated Sylvia's account that plaintiff "took her with him to an upstairs office out of the view of the remainder of the work crew." This reflects no misunderstanding on the superior court's part, but rather an entirely appropriate view of the evidence.

Moreover, the Brown deposition testimony admitted into evidence at the hearing undermines the evidentiary value his affidavit could have in assessing how long Sylvia and plaintiff were in the office. Brown testified that it was "[f]ive, ten minutes" from the time Sylvia and plaintiff left him until the time they returned downstairs. This is not so far off from the "[p]robably like 15 minutes" estimate Sylvia gave at the administrative hearing. Furthermore, when questioned on this estimate, Brown admitted he was "[j]ust guessing." Plaintiff's reliance on Brown's statements to undermine Sylvia's time estimate and her credibility fails and provides no basis for reversal.

3. *Sylvia's credibility*

Plaintiff argues that prior to the hearing, Sylvia presented three different versions of the incident and that the variance in the accounts undermines Sylvia's credibility. We observe at the outset "that the trial court is entitled to substitute its own credibility determinations [citations], but it cannot ignore its

statutory obligation to defer to the Commission's considered credibility findings in doing so." (*San Diego Unified School District v. Commission on Professional Competence*, *supra*, 214 Cal.App.4th at p. 1148.) The superior court applied this standard faithfully, and the record provides no basis to question the superior court's decision to credit the Commission's favorable view of Sylvia's credibility.

When Sylvia first reported the incident to Stanaford a day or two after it occurred, Stanaford recalls Sylvia telling him that plaintiff forced her to her knees, masturbated in front of her, and ejaculated on her face. In her first affidavit, about a month after the incident, Sylvia reported plaintiff "touched [her] shoulders to bring [her] closer and went for [her] breast," but did not report Sylvia being forced to her knees or plaintiff exposing his penis or ejaculating. In her second affidavit and as she later testified at the hearing, Sylvia stated plaintiff forced her to her knees, put his hands on the back her head, pushed his penis into her mouth, and ejaculated in her mouth after a couple of minutes.

The superior court found the account of the sexual assault Sylvia gave to Stanaford to be "generally consistent" with the account she gave at the hearing (and in the second affidavit) "apart from the specifics of the sex acts at issue, which are sufficiently similar that the variation does not compel the conclusion that [Sylvia] was not credible." The superior court also found the context relevant to its conclusion: "Information related in an excited and emotional state to an ex-boyfriend is likely to be somewhat different from a statement made months later in an official affidavit. . . . The inconsistencies do not give rise to a negative inference sufficient to destroy the credibility of

[Sylvia]’s account of events.” Substantial evidence supports the superior court’s view of the testimony.

As to the discrepancy between the first affidavit and the second affidavit, the superior court found credible the explanation Sylvia gave in the second affidavit—i.e., that she feared being sent back to jail in retaliation. “Because [plaintiff], as [Sylvia]’s crew trainer had some power to influence her continued liberty, both her reticence to accuse him of a sexual assault while he held such power and her increased willingness to tell the truth about the assault as her probation period came to an end are understandable.” The delay in reporting the extent of plaintiff’s sexual assault, the court found, “does not suggest that [Sylvia]’s account is dishonest. [Sylvia] attributed the delay to fear [the Department] would not believe her and would send her back to jail.”

Plaintiff also points to Sylvia’s failure to file a complaint with the police department and her decision to file a civil action as raising doubt about her motives and credibility. The superior court did address Sylvia’s failure to file a complaint with the police department in its decision. The superior court characterized this argument as “mere innuendo and does not compel the conclusion that [the Commission’s] credibility was erroneous.” Although the superior court did not address plaintiff’s suggestion that the allegations of sexual assault were intended only to inure to Sylvia’s financial benefit (due to the settlement she received), we conclude it too is nothing more than “mere innuendo”; it does not constitute evidence, and it does not undermine Sylvia’s credibility.

Lastly, the superior court included in its weighing of the evidence that plaintiff did not “deny the assault under oath.”

Although the superior court acknowledged plaintiff's silence was not an admission, it found "his failure to deny the assault at a hearing where he would be subjected to cross-examination buttresses [Sylvia]'s credibility as she was willing to take those risks."

It is, of course, undisputed that plaintiff and Sylvia were the only two people in the room when the assault occurred. The superior court found the only percipient witness testimony in the record—Sylvia's—attests to the sexual assault. The Department, the hearing officer, the Commission, and superior court all found her credible, at least implicitly. Plaintiff had a chance to rebut that testimony by offering his own account of the incident at the hearing, and it was not improper for the superior court to rely on the absence of testimony from the one party who could directly contradict Sylvia's account to consider the credibility of her testimony more favorably. (See Evid. Code, § 413 ["In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case"].)

B. The Superior Court Properly Rejected Plaintiff's Argument for Reversal Based on the Hearing Officer's Consideration of Grkinich's Testimony

Plaintiff contends the superior court should have reversed the Commission's decision because the hearing officer wrongly accepted Grkinich's testimony as that of an expert witness. Specifically, plaintiff faults the hearing officer for relying on the

following testimony by Grkinich regarding his understanding of why Sylvia did not immediately report the sexual assault: “I think it was understandable that she was reluctant, given her situation as a—basically a probationer on a crew [¶] Also, it’s common knowledge that victims of sexual assault sometimes are reluctant to give the details. It’s embarrassing and humiliating.”

The superior court correctly recognized plaintiff forfeited this contention by failing to object to Grkinich’s testimony during the administrative hearing. It is well established that “[c]ourt review ‘is limited to issues in the record at the administrative level.’ (*City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019[].)” (*Manufactured Home Communities, Inc. v. County of San Luis Obispo* (2008) 167 Cal.App.4th 705, 715.) Furthermore, even if the contention had been properly preserved, we agree with the superior court that the record does not establish the hearing officer, and thus the Commission, considered this testimony by Grkinich as expert testimony. Grkinich testified as the individual who (in consultation with others) made the decision to discharge plaintiff from employment with the Department, and when he testified about Sylvia’s reluctance to testify, he did so merely in response to a question about how he considered Sylvia’s delay in filing her complaint in deciding to discharge plaintiff. The hearing officer did nothing more than quote the testimony in her “Summary of Relevant Testimony.”

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

RAPHAEL, J.*

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