Filed 8/15/12 Cheathem v. LA Unif. School Dist. Pers. Dist. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

TERRYE L. CHEATHEM, Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT PERSONNEL COMMISSION et al., Respondents.	B234686 (Los Angeles County Super. Ct. Nos. BS128288, BS128822)

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

Law Offices of Alvin L. Pittman and Christie E. Webb for Appellant.

Fagen Friedman & Fulfrost, Melanie A. Petersen and Kerrie E. Taylor for Respondent Los Angeles Unified School District Personnel Commission.

Liebert Cassidy Whitmore, Mary L. Dowell and Jeffery E. Stockley for Respondent Los Angeles Unified School District.

Terrye L. Cheathem appeals from the judgment entered by the trial court in this employment dispute with the Los Angeles Unified School District (LAUSD). After appellant was terminated from her employment as an assistant general counsel for LAUSD, she appealed to the Los Angeles Unified School District Personnel Commission (Commission). The Commission found that appellant was not given sufficient notice of her performance deficiencies and ordered that she be reinstated, without back pay and with a plan for improvement. LAUSD and appellant both filed petitions for administrative writs of mandamus, seeking to overturn the Commission's decision. The trial court granted LAUSD's petition, denied appellant's petition as moot, vacated the Commission's decision, and entered judgment in favor of LAUSD. We reverse and remand for the trial court to reinstate the Commission's decision as to reinstatement of appellant, and to adjudicate the appellant's petition as to back pay.

FACTUAL AND PROCEDURAL BACKGROUND[1]

In July 2005, appellant was hired by LAUSD as an assistant general counsel in the Office of the General Counsel and assigned to the Human Resources team, which was headed by Kathleen Collins.

In November 2006, Collins told her supervisor, Jess Womack, the Deputy General Counsel, that she had difficulty with appellant's accountability. Collins explained that appellant did not communicate with Collins or use the office's document management system, Time Matters. Collins gave Womack copies of her email exchanges with appellant and a spreadsheet indicating that appellant's workload was lighter than that of other attorneys on the team.

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[1] The facts are taken from the testimony and evidence presented at the hearing held by the Commission after appellant appealed her dismissal.

On March 30, 2007, appellant told Collins in an email that she had spoken with another team leader about transferring to a different team when an opening arose. Collins asked appellant if there was an issue she could address, but she said that she would support appellant's decision.

In April 2007, Collins sent appellant several emails, raising issues such as appellant's failure to let others know where she was, respond timely to messages, and prepare adequately for hearings. Collins tried to set up a meeting with appellant to discuss her concerns, but she felt that appellant was avoiding the meeting.

Collins prepared a written agenda and met with appellant on April 19, 2007 to discuss her concerns. The concerns included appellant's failure to complete specific matters in a timely manner, communicate with clients, and sign in at work. Collins also spoke with appellant about professionalism and ethics, and she offered appellant training or seminars to help her because she wanted appellant to succeed at her job. According to Collins, appellant's performance did not improve after this meeting.

Collins testified that this meeting was a form of disciplining or "verbally counseling" appellant, although she found it difficult as a general matter to discipline an attorney. Collins did not issue a formal written reprimand or a notice of unsatisfactory acts to appellant.

In July 2007, Womack decided to transfer appellant to the Facilities team as part of a reorganization of the office and because of the difficult relationship between appellant and Collins. Before the transfer, Womack spoke with the head of the Facilities team, Michelle Meghrouni, to explain that appellant had had some problems on the Human Resources team but had the skills set to work on the Facilities team. Womack told appellant that her litigation skills could be used on

the Facilities team and that this would be an opportunity for a fresh start for her. He also told her that Meghrouni was a different type of manager than Collins and had very high standards.

On August 29, 2007, Collins completed a performance evaluation of appellant for the period of July 1, 2006 to June 29, 2007. On a scale of 1-5, appellant received mostly 2's (Acceptable), some 3's (Good) and one 4 (Strong). According to the instructions, if the evaluator gives a score of 1 (Limited), the performance objective must include a statement of the problem or concern, the desired improvement, suggestions as to how to improve, and assistance to be provided.

When appellant was transferred to the Facilities team, she was assigned to assist Mark Miller and Mark Fall with construction and labor matters. Fall assigned matters to Miller and kept track of the attorneys' assignments and deadlines. Miller trained appellant, gave her assignments, and monitored those assignments.

One of appellant's responsibilities was to review evidence and make it available for contractors in labor compliance proceedings. Miller testified that, after he had trained appellant in labor compliance procedures, he became concerned when appellant subsequently asked him a hypothetical question about what would happen if the evidence was not made available to a contractor within the requisite 20-day window. He stated that appellant did not make evidence available until the final day in a project involving the West Vernon and Parmelee Elementary Schools. He also said that, in a case involving the 96th Street Elementary School, appellant did not make the evidence available until 1:00 p.m. on the date it was due. He had emailed her several times to check on the status of these cases.

Numerous emails in August and September 2007 indicate that Miller repeatedly asked appellant about the status of her cases and reminded her of deadlines. Miller forwarded some of the emails to Meghrouni and Fall to let them know he was concerned about appellant's performance.

About six weeks after appellant transferred to the Facilities team, Meghrouni told Womack that appellant had not been following through with work, had allowed some things to "drop[] through the cracks," and was not communicating. Meghrouni and Womack began to discuss how to address these issues, raising options such as counseling, probation, suspension, and termination. Womack also spoke with Kevin Reed, the General Counsel.

Womack believed that by transferring appellant to a different team, telling her this was a second chance, and telling her Meghrouni would not tolerate the things that happened before, he had used "code words" sufficient to apprise a professional that she needed to "get the job done." He did not think a suspension would have worked well because it would have created a bad work environment. Womack thought that the missteps appellant had made would have resulted in dismissal at any private law firm because they were very basic.

On September 12, 2007, Miller wrote a memo to Meghrouni and Fall, listing two charges against appellant regarding her untimeliness in making the evidence available in the West Vernon/Parmelee and 96th Street Elementary School cases. The memo also contained a section entitled "Assistance and Guidance," in which Miller enumerated four instances of assistance provided to appellant: (1) on July 19, 2007, Miller met with appellant and discussed the handling of labor compliance matters, including the statutory requirement of making evidence available for review within 20 days; (2) on August 9, 2007, Miller and appellant met with the Labor Compliance Manager and two senior labor compliance officers

to discuss the handling of labor compliance cases; (3) on August 22, 2007, appellant attended training on labor compliance; and (4) on August 24, 2007, Miller and appellant reviewed evidence in several matters, and appellant indicated that she understood the importance of making evidence available in a timely manner and the consequences of failing to do so.

On September 19, 2007, Meghrouni sent appellant an email, copied to Fall, Miller, and Womack, admonishing appellant for contacting opposing counsel to negotiate an extension of time in a matter to which she was not assigned. Meghrouni reminded appellant that she previously had been warned not to mix up cases. Meghrouni expressed concern that appellant did not "seem to have a handle" on her cases and reminded her to prepare a list of her pending matters and give it to Meghrouni, Miller, and Fall immediately.

On October 26, 2007, Meghrouni filed a Notice of Unsatisfactory Service with a recommendation for dismissal against appellant, based on conduct from August 6, 2007 to September 19, 2007. The notice made the following charges:

- Appellant failed to file Case Management Conference statements that were due on August 8, 9, and 28, 2007 in three different cases: *Budlong v. JPL Architects*; *Trustee of So. Cal. IBEW v. Zolman*; *Trustees of the So. Cal. IBEW-NECA v. Construction Concepts, Inc*.
- Appellant failed to appear at a Case Management Conference on August 22, 2007 in the case of *Budlong v. JPL Architects*.
- On August 6, 2007, LAUSD was required to respond to a complaint in *California Ironworkers v. Clark Construction*. Appellant failed to send a timely tender letter to the contractor, even though LAUSD was entitled to be defended and indemnified. On August 10, 2007, appellant failed to send

a confirming letter in the case, establishing that the contractor agreed to assume LAUSD's defense.

- On August 8, 2007, LAUSD was served with a complaint in *Board of Trustees of the Sheet Metal Workers v. Hensel Phelps*, and appellant failed to send a timely tender letter to the contractor.
- On September 6, 2007, appellant failed to timely appear at an administrative hearing in the matter of *BOE Enterprises*.
- On September 19, 2007, appellant obtained an extension of time to answer a complaint in a matter not assigned to her and without consultation with the assigned attorney.
- Appellant failed to timely produce evidence in matters involving Parmelee, West Vernon, and 96 Street Elementary Schools, as required by California Labor Code, section 1742, subdivision (b), which requires that evidence be made available for review for the contractor within 20 days of the receipt of a written request for a hearing. Appellant made the evidence available on the afternoon of the day it was due, giving the contractor's counsel only four to five hours to review the evidence.

The notice recommended that appellant be placed on suspension pending dismissal effective November 8, 2007. A conference was scheduled on November 7, 2007, pursuant to *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 (*Skelly*), for appellant's oral response. Womack was the designated reviewer of appellant's response. Appellant filed an appeal and prepared a written answer. Appellant objected to Womack serving as the *Skelly* officer because he allegedly had predetermined the outcome of the hearing. She expressed the belief that the dismissal was in retaliation for complaints she had made, and she set forth responses to each specific charge.

At the conclusion of the November 7, 2007 hearing, Womack made an offer of settlement, which appellant declined. Womack agreed with the recommendation of dismissal and gave appellant the opportunity to resign before being dismissed. Appellant was dismissed effective December 12, 2007.

Appellant appealed the action to the Commission. Hearing Officer Mark Burstein held an eight-day hearing on various dates from September 10, 2008 to November 24, 2009. Burstein found that appellant failed to perform her duties and that her failure to perform her work placed LAUSD at risk. He detailed the numerous occasions on which appellant failed to perform her duties in a timely manner, as well as her failure to acknowledge any wrongdoing or ask for any assistance, and he concluded that her repeated failures to perform her duties constituted a basis for discipline. Nonetheless, Burstein found that LAUSD failed to provide progressive discipline because appellant had not been given an opportunity to improve her performance. Although "her supervisors communicated with each other about her poor performance, none of them counseled her or gave her notice that she needed to improve her performance." Burstein further found that back pay was not warranted or appropriate because of both her poor work performance and her continued failure, demonstrated at the hearing, to take responsibility for or acknowledge her inadequate work. He thus recommended that appellant be reinstated with no back pay, placed on a plan for improvement with specific goals, and given guidance and assistance to help improve her performance. After hearing argument from LAUSD and appellant, the Commission adopted Burstein's findings and recommendations.

LAUSD filed a petition for a writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5, seeking to overturn the Commission's order that appellant be reinstated. Appellant filed a petition, seeking an order to

reinstate her with full back pay, with restoration of seniority, and without being placed on a plan for improvement.

The trial court found "overwhelming evidence" in the record that appellant "completely abdicated her professional duties and failed to perform in a number of different matters at a minimal level of competence." The court cited specific examples of appellant's failings, described her performance as "malpractice," and reasoned that her failures exposed LAUSD to liability. The court stated that appellant's errors could not be attributed to inexperience, pointing out that her failings involved "[c]oming to work, attending to the work in a timely and competent way, being responsive to clients and co-workers and timely performing tasks." As to the punishment imposed, however, the court found that the Commission abused its discretion in ordering appellant reinstated because reinstatement with a plan for improvement would have been futile and "dangerous," in light of appellant's consistent failure to perform her work competently and in a timely manner, despite repeated warnings.

The court disagreed with the argument that appellant should have received written progressive discipline, stating that appellant was "indifferent to [LAUSD's] efforts to improve her performance and avoid further malpractice by her." The court also found that, even if appellant had not received formal progressive discipline, she "was subject to discipline and to instructions to improve during her brief tenure with the Facilities team." The court characterized formal written discipline as "the completion of a particular form or the checking of one box" and reasoned that protecting the public was more important than such formalities, especially in light of the repeated warnings, admonishments, and opportunities for improvement appellant was given. The court thus found that the Commission abused its discretion in ordering appellant reinstated, vacated the Commission's

decision, and granted LAUSD's petition. Appellant's petition was denied as moot. Appellant filed a timely notice of appeal.

DISCUSSION

"Termination of a nonprobationary public employee substantially affects that employee's fundamental vested right in employment. [Citations.] Accordingly, when ruling on a petition for a writ of administrative mandamus seeking review of procedures that resulted in the employee's termination, the trial court examines the administrative record and exercises its independent judgment to determine if the weight of the evidence supports the findings upon which the agency's discipline is based or if errors of law were committed by the administrative tribunal. [Citations.]" (*Bautista v. County of Los Angeles* (2010) 190 Cal.App.4th 869, 874-875.)

"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 trial de novo. [Citation.] The trial court was permitted to draw its own reasonable inferences from the evidence and make its own credibility determinations. [Citation.] 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. [Citation.]" (*Candari v. Los Angeles Unified School Dist.* (2011) 193 Cal.App.4th 402, 407 (*Candari*).)

Our task on appeal is "to review the record and determine whether the *trial court's* findings (not the administrative agency findings) are supported by

substantial evidence. [Citations.]"[2] (*Candari, supra*, 193 Cal.App.4th at pp. 407-408.) "'Evidence is substantial if any reasonable trier of fact could have considered it reasonable, credible and of solid value.' [Citations.]" (*Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 52-53 (*Kazensky*).)

Appellant challenges the trial court's finding that the charges against her constituted grounds for termination. She also contends that the trial court erred because there is no evidence in the record that LAUSD gave appellant progressive discipline before dismissing her. We conclude that substantial evidence supports the trial court's finding that appellant did not perform her assignments adequately. However, the record does not support the finding that appellant received progressive discipline because there is no evidence that she received notice that she was subject to dismissal.

As to the finding that the charges constituted grounds for termination, appellant first contends that there is no evidence that she made the evidence available late in three labor compliance matters. Appellant's argument is that she made the evidence available within the statutory time period. However, the record indicates that appellant's supervisors were concerned because appellant waited until the last minute to make the evidence available, and the delay could have jeopardized their cases.

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[2] Appellant contends that the standard of review is de novo, citing *Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95 (*Bostean*). We disagree with appellant. The court in *Bostean* exercised de novo review because "the issue presented is on undisputed facts and one of law," and because the court was "called upon to interpret statutes or rules dealing with employment of public employees," involving "pure questions of law." (*Id.* at pp. 107-108.) The issues presented here do not involve pure questions of law.

Appellant also challenges the finding that she sent an untimely tender letter in a case involving Clark Construction, but her contention is not supported by the record. The record indicates that appellant's delay in sending the letter required LAUSD to expend resources to file an answer and cross-complaint.

Finally, appellant contends that she had a valid reason for failing to timely file case management conference statements, arguing that a pop-up blocker on her computer prevented her from completing the forms. Her reason does not mitigate the fact that she did not timely complete her work.

The record thus contains substantial evidence to support the trial court's finding that appellant did not perform adequately. However, the trial court's finding that appellant received adequate notice prior to dismissal is not supported by the record.

Appellant relies on the Commission's disciplinary rules.[3] Rule 903 sets forth the procedures for disciplinary actions. The rule provides, in part, as follows:

"The purpose of this Rule is to provide orderly procedures for processing disciplinary actions. The procedures listed provide protections and guidelines for both the District and the employee with established law and personnel practice. In most cases, discipline should be viewed as a positive experience, used to modify behavior, rather than penalize an employee; therefore, discipline should be progressive. The employee should be informed of the work standards required and warned of offenses prior to the imposition of discipline.

"For any of the causes for disciplinary action listed in Rule 902, Causes for Disciplinary Actions, any employee may be suspended immediately for not more than 30 days or may be demoted or dismissed.

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[3] We grant the Commission's request to take judicial notice of the Commission's Rules. (Evid. Code, §§ 452, subds. (b), (c), (h), 453.)

"Prior to recommending a disciplinary action (suspension, demotion, dismissal) against an employee, the responsible administrator shall advise the employee that disciplinary action may be taken and schedule a meeting to discuss the matter provided it is in accordance with the appropriate bargaining unit contract. . . .

"A notice of unsatisfactory service shall be given to a regular employee whose services are held to be unsatisfactory. This notice must be given to a permanent employee not less than fourteen nor more than 126 days before the effective date of demotion or dismissal, or in the case of suspension, not more than 126 days before the effective date of the suspension, when the demotion, dismissal or suspension is based upon a cause or causes listed in Rule 902, Causes for Disciplinary Actions, Paragraph A. 1 through 6, 8, 10, 14, 15, 19, 20, 21, or 23."

In rejecting the Commission's finding that appellant did not receive sufficient warning of her inadequate performance, the trial court characterized the requirement to provide written progressive discipline as the need to complete a certain form or check a certain box. However, as set forth above, Rule 903 requires that "[p]rior to recommending a disciplinary action (suspension, demotion, dismissal) against an employee, the responsible administrator shall advise the employee that disciplinary action may be taken and schedule a meeting to discuss the matter provided it is in accordance with the appropriate bargaining unit contract."

Although the record contains emails indicating that Meghrouni and Miller reminded appellant about deadlines, checked on the status of cases, and admonished her on her performance several times, there is nothing in the record indicating that Meghrouni, Miller, or any other supervisor advised appellant that disciplinary action such as suspension or dismissal might be taken against her.

LAUSD quotes from several emails sent by Meghrouni to appellant. In one email, Meghrouni told appellant that, if she had not filed case management statements after being asked three times, "this is a big problem and we need to talk as soon as possible." In the second email, Meghrouni told appellant she was "baffled" by appellant's response to her first email and reminded her that she had been told to check with Fall every day to keep track of her cases. LAUSD does not, however, point to any meeting or communication with appellant advising her that disciplinary action in the form of dismissal might be taken against her if she did not improve her performance.

LAUSD also cites the performance evaluation completed by Collins as evidence that appellant was advised that disciplinary action may be taken against her. This evaluation did not, however, provide appellant any notice that she was subject to dismissal.[4]

Appellant received mostly scores of 2 on the evaluation, a score that is described as Acceptable. She did not receive any scores of 1 (Limited), which would have required Collins to explain her concerns and the desired improvements. This evaluation thus told appellant that her performance was acceptable and gave her no warning that her performance made her subject to dismissal.

LAUSD relies on the trial court's comments that the evaluation was "grossly deficient" and "unsatisfactory" for an attorney of appellant's experience. The trial

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[4] LAUSD emphasized at the hearing that appellant's termination was based only on conduct after her transfer to the Facilities team, not her conduct when Collins was her supervisor. We therefore question LAUSD's reliance on this evaluation, which concerned only appellant's performance on the Human Resources team.

court's characterization of the evaluation, however, is not supported by the record. The LAUSD evaluations rated appellant's performance as "Acceptable."

LAUSD also argues that Rule 903's statement that "discipline should be progressive" is permissive or advisory rather than mandatory. However, this argument fails to acknowledge the statement in paragraph B of Rule 903 that, "[p]rior to recommending a disciplinary action (suspension, demotion, dismissal) against an employee, the responsible administrator *shall* advise the employee that disciplinary action may be taken." (Italics added.) The requirement that the employee be advised beforehand of potential disciplinary action is mandatory, not permissive. No such advisement was given to appellant.

We conclude that the trial court's finding that appellant received progressive discipline is not supported by substantial evidence. As Burstein, the hearing officer, stated, the record clearly indicates that, during appellant's tenure on the Facilities team, "her supervisors communicated with each other about her poor performance," but none of them warned her that she faced dismissal if she did not improve her performance.

Unlike the independent judgment test applied by a trial court to an agency's findings of fact, a trial court must not disturb the penalty imposed by that agency unless there is a manifest abuse of discretion. (*Kazensky, supra*, 65 Cal.App.4th at p. 53; see also *Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 772 ["'It is settled that the propriety of a penalty imposed by an administrative agency is a matter resting in the sound discretion of the agency and that its discretion will not be disturbed unless there has been an abuse of discretion.'"].) "When the superior court has conducted its review and has concluded that the agency properly found misconduct, the imposition of the appropriate penalty for that misconduct is left to the sound discretion of the agency." (*Kazensky, supra*, 65 Cal.App.4th at p. 53.)

"'"'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.' [Citations.]" [Citation.]' [Citation.] Thus, if reasonable minds may differ as to the propriety of the penalty, there is no abuse of discretion. [Citation.]" (*County of Siskiyou v. State Personnel Bd.* (2010) 188 Cal.App.4th 1606, 1615 (*Siskiyou*).)

The penalty imposed by the Commission was reinstatement without back pay and with a plan for improvement. The decision to reinstate was based on the finding that, despite appellant's poor performance, she did not receive notice and was not given the opportunity to improve. The imposition of no back pay was based on appellant's poor work performance and failure to acknowledge the inadequacy of her work.

The trial court found that the penalty constituted an abuse of discretion because reasonable minds could not differ that reinstating appellant would pose a danger to LAUSD because her performance and her failure to acknowledge the need to improve would expose LAUSD to liability. The court also found that reasonable minds could not differ that appellant had been sufficiently warned of the need to improve her performance.

We disagree with the trial court's finding that reasonable minds could not differ as to the propriety of the penalty imposed by the Commission. As discussed above, although the record contains emails sent by Meghrouni and Miller asking appellant about the status of her cases, reminding her of deadlines, and admonishing her to keep track of her cases, neither Meghrouni nor Miller advised appellant that she would be dismissed if she did not improve. Thus, in finding that appellant did not receive progressive discipline and should be reinstated, the Commission did not "abuse[] its exercise of discretion by acting arbitrarily,

capriciously, or beyond the bounds of reason. [Citations.]" (*Siskiyou*, *supra*, 188 Cal.App.4th at p. 1615.)

In her reply brief, appellant challenges the Commission's penalty of no back pay as "draconian." "A reviewing court ordinarily should not consider an argument raised for the first time in a reply brief. [Citation.]" (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 362, fn. 18.) "To withhold a point until the closing brief deprives the respondent of the opportunity to answer it or requires the effort and delay of an additional brief by permission. [Citation.]" (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.)

Moreover, the trial court did not address appellant's petition challenging the Commission's decision, but denied it as moot. We therefore remand for the trial court to consider in the first instance whether the Commission abused its discretion in ordering her reinstated without back pay and with the other conditions for improvement.

Appellant's final contention is that the Commission's decision was not subject to review by the governing board, citing Education Code section 45306.[5] Appellant appears to be arguing that this statute prohibited LAUSD from seeking review of the Commission's decision. However, there is no doubt that LAUSD was entitled to file a petition for writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5.

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[5] The statute provides as follows: "The commission shall investigate the matter on appeal and may require further evidence from either party, and may, and upon request of an accused employee shall, order a hearing. The accused employee shall have the right to appear in person or with counsel and to be heard in his own defense. The decision shall not be subject to review by the governing board." (Ed. Code, § 45306.)

DISPOSITION

The judgment in favor of LAUSD and against appellant vacating the Commission's August 4, 2010 decision is reversed. The matter is remanded to the trial court to enter a new judgment denying LAUSD's petition for writ of administrative mandamus and to address the merits of appellant's petition for writ of administrative mandamus. Each party shall bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.