Filed 12/21/16 Sainz v. City of Los Angeles CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| STEVE SAINZ,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>CITY OF LOS ANGELES et al.,<br><br>Defendants and Respondents. | B262118<br><br>(Los Angeles County Super. Ct. No. BS145959) |

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

Silver, Hadden, Silver & Levine, Jacob A. Kalinski and Brian P. Ross for Plaintiff and Appellant.

Office of the Los Angeles City Attorney, Michael N. Feuer, City Attorney and Paul L. Winnemore, Deputy City Attorney for Defendants and Respondents.

Plaintiff and appellant Steve Sainz (Sainz), a Los Angeles Police Department (LAPD or Department) officer, appeals a judgment denying his petition for writ of administrative mandamus. (Code Civ. Proc., § 1094.5.)[1] In the petition, Sainz sought to overturn a five-day suspension without pay imposed by Chief of Police Charles Beck (Chief) for Sainz's unauthorized use of force on a handcuffed suspect.

Sainz's principal contentions are that he was denied a fair hearing because the Chief acted as both the initial decisionmaker and the final decisionmaker on his administrative appeal, Sainz was improperly assigned the burden of proof at the administrative hearing, the Chief's decision did not sufficiently set forth his rationale for rejecting the hearing officer's decision, substantial evidence did not support the Chief's finding that Sainz tased the suspect after he was brought under control by other officers, and the penalty of a five-day suspension was excessive. For the reasons discussed below, we conclude Sainz's contentions lack merit and affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *The underlying incident*.

Sainz had been employed by the Department as a police officer since 2004, and was working patrol in the 77th Division at the time of the February 21, 2012 incident. Sainz and his partner, Officer Rothemich, responded to a domestic violence call. Near the scene, they encountered Larry Brooks, who was unconnected to that call. Brooks appeared to be smoking a marijuana cigarette and was crossing against a red light. His

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

height was about 6'1" or 6'2" and he weighed about 240 pounds. When the officers attempted to detain him, he resisted, and it took five or more officers to put him into a police vehicle for transport to the station.

While at the station for booking, Brooks was placed in a holding tank, where he kicked the doors, screamed, and punched the walls. A supervisor directed Sainz and Rothemich to assist with the booking process. They sought to put a booking bracelet on Brooks; he was already handcuffed. Department protocol is to have the suspect face away from the officers, because the suspect might kick, spit on, bite, or headbutt them. Brook refused to turn around and aggressively turned on the officers. Officer McLaughlin told the others, " 'Hey, just take him down.' " Rothemich tried to grab Brooks's legs in order to bring him down. Brooks used a railing by the countertop to brace himself, so Rothemich had to pull harder to bring him down. Brooks then lunged and tried to headbutt McLaughlin. Rothemich punched Brooks and they went to the ground. McLaughlin used his body weight to control Brooks. However, Brooks continued to struggle. At that point, Sainz used a five-second contact tase, finally subduing Brooks.

2. *Administrative proceedings.*

a. *The charge against Sainz.*

On January 24, 2013, Sainz was served with a Complaint and Relief from Duty, wherein the Chief imposed a five-day suspension without pay on the ground that "[o]n February 21, 2012, Officer Sainz, while on-duty, used unauthorized force when he used a five-second contact tase of a handcuffed suspect (Brooks)."

b. *Administrative appeal; hearing officer recommends that penalty be reduced to zero days of unpaid suspension*.

Following the Chief's imposition of discipline, Sainz had two review options under the Memorandum of Understanding (MOU) between the City of Los Angeles and the Los Angeles Police Protective League. First, Sainz could have exercised his right to appeal to a Board of Rights. (L.A. Charter, § 1070; *Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 317.) At a Board of Rights hearing, the Department would have had the burden to prove the allegations of the complaint by a preponderance of the evidence (*Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87, 100); however, the Board of Rights also would have had the authority to prescribe the degree of penalty, either decreasing *or increasing* the severity of the penalty imposed by the Chief. (L.A. Charter, § 1070(n).) Alternatively, Sainz had the right to an administrative appeal pursuant to Article 9.1B of the MOU. Pursuing an administrative appeal requires the officer to *admit* guilt; the appeal is limited to the degree of the penalty, "with the understanding that the original penalty cannot be increased." At the conclusion of the administrative appeal, the Chief has the option to "adopt or reject, in whole or in part, the proposed findings of the hearing officer."

Sainz pursued the second option, electing an administrative appeal.[2] Sainz's appeal hearing commenced on July 25, 2013, at which live testimony was presented from eight witnesses, including the three officers who were involved in the

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[2] As for Rothemich, who also faced a five-day suspension, he elected a Board of Rights hearing, which is considered a de novo hearing (L.A. Charter, § 1070(f)), was found not guilty, and therefore no suspension was imposed against him.

use of force. The hearing officer also reviewed the videotape of the incident, as well as the Department's Use of Force Policy (revised July 2009), and its Electronic Control Device Taser policy.[3]

The hearing officer concluded, "In the circumstances of this case, it is my opinion that Officer Sainz acted consistently with objectively reasonable standards as described in *Graham v. Connor* [(1989) 490 U.S. 386, 396].[4] He was forced to make a split-second judgment in circumstances that were 'tense, uncertain, and rapidly evolving.' At the time that he deployed the TASER, it reasonably appeared to Officer Sainz that Brooks would continue to resist and would possibly succeed in his effort to roll over on the floor at which point he would pose an even greater physical threat to the officers and others in the vicinity. Consequently, I have determined that there is insufficient evidence to support the recommended penalty of five days'

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[3] The Department's TASER policy states the following protocol for deploying a TASER: "The TASER may be deployed on suspects who are violent, or who pose a threat to themselves or others, when an officer believes: [¶] Attempts to subdue the suspect with other tactics have been, or will likely be, ineffective in the situation; or [¶] There is a reasonable belief that it will be unsafe for officers to approach within contact range of the suspect."

[4] The proper application of the test of reasonableness under the Fourth Amendment "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham v. Connor*, *supra*, 490 U.S. at p. 396.)

suspension without pay. I recommend, instead, that the penalty be reduced to zero days of unpaid suspension."

c. *The Chief's decision rejecting the hearing officer's recommendation that the penalty be reduced.*

On August 29, 2013, after reviewing the matter, the Chief rejected the hearing officer's recommendation that the penalty be reduced, and instead, imposed a five-day suspension without pay. The Chief set forth his rationale as follows:

"This incident occurred in a Department facility and was recorded on video. The video shows that Officer Sainz tased Brooks when he was on the ground, handcuffed, and was controlled by Officers Rothemich and McLaughlin. The use of the Taser under such circumstances was not objectively reasonable and was correctly determined to be OUT OF POLICY-ADMINISTRATIVE DISAPPROVAL.

"Officer Sainz waived his right to appeal the merits of the allegation at a Board of Rights and opted to bring this appeal pursuant to Article 9.1 (B), Memorandum of Understanding No. 24. Such an appeal requires the employee to admit guilt and is limited to the degree of penalty. Accordingly, at the hearing, Officer Sainz admitted to the above allegation. The Hearing Officer conducted a hearing and issued a 6-page Memorandum in which he recommended that the penalty be reduced to 'zero days of unpaid suspension.'

"In his Memorandum, the Hearing Officer discussed the facts and evidence of the case in detail, including the testimony of three officers who were not present during the use of force, the three officers who were involved in the use of force, and the opinion of Sergeant Batts, who was not present during the use of force, but reviewed the video. The Hearing Officer then

concluded that the use of force was objectively reasonable. The Hearing Officer's Memorandum failed, however, to note that Officer Sainz admitted to guilt and that his appeal was limited to the degree of penalty. In addition, the Hearing Officer's Memorandum provided no compelling reason to reduce the penalty imposed in this case from a 5-day suspension to a zero days of unpaid suspension.

"Having considered the recommendation of the Hearing Officer in this Administrative Appeal, I still believe a 5-day suspension is appropriate and warranted given all the facts and circumstances of this case. Therefore, I am rejecting the Hearing Officer's recommendation to reduce the penalty."

3. *Superior court proceedings*.

a. *Sainz's petition for writ of administrative mandate*.

On November 19, 2013, Sainz filed a petition for writ of administrative mandamus, seeking to overturn his five-day unpaid suspension. Sainz contended the failure to assign the burden of proof to the Department in an administrative appeal challenging the degree of penalty deprived him of due process; the Department's findings were not supported by the evidence; and the hearing officer *did* provide reasons why the penalty should be reduced.

b. *Trial court's ruling*.

The trial court denied Sainz's petition, indicating it had reviewed the Chief's "findings by exercising its independent judgment. [¶] Following oral argument, review of pleadings and [review of the videotape of the incident], the Court's ruling is as follows: [¶] 1. Petitioner was not denied a fair hearing. Here there were no charges that needed to be proven. Petitioner

admitted to an out-of-policy use of force. The sole issue is the appropriate level of punishment. It does not violate due process to require an officer to introduce sufficient evidence of mitigating circumstances once the underlying charges have been proven. While Petitioner submitted mitigating circumstances[,] it is a fact he used a taser on a suspect in the circumstances described by Chief Beck. [¶] 2. The findings are supported by the evidence. The hearing [officer] did not determine whether use of force was within policy. Petitioner admitted that it was not. [¶] 3. The five-day suspension is not a manifest abuse of discretion. A reviewing court cannot interfere with the imposition of a penalty by an administrative tribunal even if it feels the penalty is too harsh."

Sainz filed a timely notice of appeal from the judgment.

## CONTENTIONS

Sainz contends his due process rights were violated, denying him a fair hearing, in that: the Chief authorized his five-day suspension and also served as the final decisionmaker; the burden of proof regarding the appropriateness of the penalty was improperly placed on Sainz; the Chief's decision did not sufficiently set forth the evidence relied upon and the reasons for rejecting the hearing officer's decision; and the combination of due process violations denied him a fair hearing.

In addition, Sainz asserts there is no substantial evidence in the record for the Chief's finding that Brooks was under the control of Officers Rothemich and McLaughlin at the time Sainz used the Taser, and the penalty of a five-day suspension was excessive.

## DISCUSSION

1. *Standard of appellate review*.

"Section 1094.5 of the Code of Civil Procedure provides the basic framework by which an aggrieved party to an administrative proceeding may seek judicial review of any final order or decision rendered by a state or local agency." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 137, fn. omitted.) Section 1094.5, subdivision (a) applies to review of "any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer."

The validity of a final administrative decision of a public entity employer, such as the LAPD, is reviewable by a petition for administrative mandamus under section 1094.5. (See *Gales v. Superior Court* (1996) 47 Cal.App.4th 1596, 1603 [holding Pasadena police officer was required to file mandamus petition pursuant to § 1094.5 to challenge final administrative decision to demote him].)

This court reviews the fairness of the administrative proceeding de novo. "A challenge to the procedural fairness of the administrative hearing is reviewed de novo on appeal because the ultimate determination of procedural fairness amounts to a question of law." (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 482; accord *Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 239.)

2. *No merit to Sainz's arguments that he was denied a fair hearing.*

a. *Fair and impartial decisionmaker.*

Sainz asserts he was denied a fair and impartial decisionmaker because the Chief initially authorized the five-day suspension and thereafter also served as the final decisionmaker on his administrative appeal. The argument lacks merit.

In "an administrative proceeding, . . . the combination of adjudicating functions with prosecuting or investigating functions will ordinarily not constitute a denial of due process." (*Griggs v. Board of Trustees* (1964) 61 Cal.2d 93, 98.) The right " 'to a fair and impartial tribunal is not violated by permitting the official who makes the initial disciplinary decision to have the final say in the matter.' (*Burrell v. City of Los Angeles* [(1989)] 209 Cal.App.3d 568, 579 [(*Burrell*)].) There is no due process violation inherent in the fact that the chief of police imposes the initial discipline and renders the final decision whether to uphold the decision." (*Los Angeles Police Protective League v. City of Los Angeles* (2002) 102 Cal.App.4th 85, 93; accord *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1811 [due process not offended by city manager's retention of final decisionmaking authority]; *Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 178 (*Brown*) [decisionmaker's mere involvement in ongoing disciplinary proceedings does not per se violate due process principles].)

The party seeking to show bias or prejudice on the part of an administrative decisionmaker has the burden to prove the same with concrete facts. (*Burrell*, *supra*, 209 Cal.App.3d at p. 582.) Sainz has not done so. He has not shown that the Chief "ha[d] a personal or financial stake in the matter, or that he

harbored any animosity toward [Sainz]." (*Binkley*, *supra*, 16 Cal.App.4th at p. 1810.) The mere circumstance that the Chief initially authorized the discipline and also served as the final decisionmaker on the administrative appeal does not show that Sainz was denied a fair and impartial decisionmaker.

b. *No merit to Sainz's claim of prejudicial error with respect to the assignment of the burden of proof at the administrative hearing.*

The transcript of the administrative hearing reflects that the hearing officer placed the burden of proof on Sainz "to mitigate the penalty." Sainz contends the burden of proof regarding the appropriateness of the penalty was improperly placed on him to justify a reduction in the penalty, instead of requiring the Department to establish that the five-day suspension was warranted. Sainz relies on the principle that "where the administrative appeal hearing is the first evidentiary inquiry into the facts giving rise to the punitive action, '[i]t is axiomatic, in disciplinary administrative proceedings, *that the burden of proving the charges* rests upon the party making the charges.' " (*Brown*, *supra*, 102 Cal.App.4th at p. 175, italics added.)

Sainz's claim of error overlooks the procedural posture of the instant case. By opting for an administrative appeal, rather than a Board of Rights hearing, Sainz *admitted* his guilt. There thus was no need for the Department to prove the charges against Sainz. In any event, even if the burden of proof had been assigned erroneously to Sainz, any error did not prejudice him because *he prevailed at the administrative hearing*. Any error in assigning the burden of proof, therefore, is not a ground for reversal.

For these reasons, Sainz cannot show prejudicial error with respect to the handling of the burden of proof in the administrative appeal.

c. *The Chief's decision adequately set forth his rationale for rejecting the hearing officer's recommendation.*

Sainz contends the Chief's decision failed to set forth the evidence he relied upon and his reasons for rejecting the hearing officer's recommendation. We disagree.

The Chief clearly based his decision on having viewed the video, which led the Chief to conclude that Sainz had used unauthorized force. As indicated, the Chief's decision stated in relevant part: "This incident occurred in a Department facility and was recorded on video. *The video shows that Officer Sainz tased Brooks when he was on the ground, handcuffed, and was controlled by Officers Rothemich and McLaughlin*. The use of the Taser under such circumstances was not objectively reasonable and was correctly determined to be OUT OF POLICY-ADMINISTRATIVE DISAPPROVAL." (Italics added.) The Chief also noted that Sainz had admitted his guilt, and on the ultimate issue, the Chief found no compelling reason had been shown to reduce the suspension from five days to zero days of unpaid suspension.

We conclude the Chief's decision adequately set forth the basis of his decision as well as his rationale for rejecting the hearing officer's recommendation.

3. *No merit to Sainz's challenge to the sufficiency of the evidence to support the Chief's finding that Sainz tased Brooks after Brooks was already controlled by Rothemich and McLaughlin.*

Sainz challenges the sufficiency of the evidence to support the following finding by the Chief: "The video shows that Officer Sainz tased Brooks when he was on the ground, handcuffed, *and was controlled by Officers Rothemich and McLaughlin*." (Italics added.) Sainz contends he did not admit that Brooks was "controlled by Officers Rothemich and McLaughlin," and Sainz asserts there is no substantial evidence in the record for that finding.

The Chief's decision indicates the Chief based his finding that Sainz tased Brooks after Brooks was "controlled by Officers and McLaughlin" on having viewed the video of the incident. This court has viewed the video, which was lodged with us after oral argument. The video clearly supports the Chief's determination that Sainz tased Brooks after he was already under the control of the other two officers. Therefore, this contention must be resolved against Sainz.

4. *No abuse of discretion in the penalty selected by the Chief.*

In contending the five-day suspension was excessive, Sainz asserts: (1) his misconduct did not result in any actual harm to the Department, (2) he is unlikely to commit similar misconduct in the future, (3) the penalty is inconsistent with the penalty given to Rothemich, and (4) he did not intend to commit misconduct.

a. *Standard of review as to the propriety of the penalty*.

As this court stated in *Pegues v. Civil Service Com*. (1998) 67 Cal.App.4th 95, 106-107 (*Pegues*): " 'It is well 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 decision will not be disturbed unless there has been an abuse of discretion.' (*Szmaciarz v. State Personnel Bd*. (1978) 79 Cal.App.3d 904, 921.) In reviewing the penalty imposed by an administrative body which is duly constituted to announce and enforce such penalties, ' " 'neither a trial court nor an appellate court is free to substitute its own discretion as to the matter; nor can the reviewing court interfere with the imposition of a penalty by an administrative tribunal because in the court's own evaluation of the circumstances the penalty appears to be too harsh." ' (*Ibid*.) However, if the penalty imposed, under all the facts and circumstances, clearly was excessive, this will be deemed an abuse of discretion and the reviewing court is not powerless to act. (*Ibid*.)"

Further, "[i]f reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion the administrative body acted within the area of its discretion. (*Harris v. Alcoholic Bev. etc. Appeals Bd*. (1965) 62 Cal.2d 589, 594; *Szmaciarz v. State Personnel Bd., supra*, 79 Cal.App.3d at p. 922.)" (*Pegues*, *supra*, 67 Cal.App.4th at p. 107.)

b. *Penalty of five-day suspension without pay was within the bounds of the Chief's discretion*.

In considering whether the Chief acted within his discretion, we note " 'the overriding consideration . . . is the

extent to which the employee's conduct resulted in, or if repeated is likely to result in, "[h]arm to the public service." [Citations.] Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. [Citation.]' (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 218.)" (*Pegues*, *supra*, 67 Cal.App.4th at p. 107.) Discipline is also justified "in order to protect the public fisc and preserve the [agency's] image in the community." (*Pegues*, *supra*, at p. 107.)

As the Department argues, Sainz's violation of policy exposed the Department to potential civil liability. In addition, Sainz's conduct could undermine the Department's image in the community which it serves. Therefore, we reject Sainz's assertion that his conduct did not result in any harm to the Department.

Sainz errs in relying on the favorable disposition in Rothemich's appeal to the Board of Rights to show the Chief abused his discretion in suspending Sainz for five days without pay. There is " 'no requirement that charges similar in nature must result in identical penalties.' " (*Pegues*, *supra*, 67 Cal.App.4th at p. 106.) Moreover, the two officers' circumstances were quite different -- Rothemich punched Brooks before he went to the ground, while Sainz applied the Taser to Brooks after Brooks was already controlled by Rothemich and McLaughlin.

Sainz's assertions that he "did not intend" to commit the misconduct and that the misconduct is unlikely to recur are essentially an invitation to this court to second-guess the Chief's determination as to the appropriate penalty. We decline to do so. On the record presented, we cannot say the penalty of a five-day suspension was excessive as a matter of law.

## DISPOSITION

The judgment denying Sainz's petition for writ of administrative mandate is affirmed. Respondents shall recover their costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EDMON, P. J.

We concur:

ALDRICH, J.

STRATTON, J.*

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