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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

CAESAR D. GONZALEZ, Petitioner and Appellant, v. CITY OF LOS ANGELES et. al. Respondents.	B264349 (Los Angeles County Super. Ct. No. BS145766)

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

Stone Busailah, Michael P. Stone, Muna Busailah and Travis M. Poteat, for Petitioner and Appellant.

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

INTRODUCTION

Petitioner and appellant Caesar Gonzalez was terminated from his position as a sergeant in the Los Angeles Police Department (LAPD) after a board of rights found him guilty of three counts of misconduct. Gonzalez filed a petition for writ of mandate against the City of Los Angeles and its police chief, Charlie Beck, (collectively, the City) seeking reinstatement. After the trial court granted Gonzalez's request to file an oversized opening brief but limited the brief to 20 pages, his attorney filed two documents—an 18.5-page opening brief and an amended writ petition. The brief contained numerous factual allegations, but only a handful of citations to the administrative record; instead of citing the record directly, counsel referred readers to the amended petition, which contained the necessary citations. Although counsel subsequently filed a 19-page amended opening brief containing the citations, the court struck that brief as procedurally defective, considered only the original brief, and concluded the original brief did not provide sufficient record cites to satisfy Gonzalez's burden of proof.

On appeal, Gonzalez contends the court improperly responded to his attorney's violations of the prior court order and a local rule by effectively imposing a terminating sanction without notice or an opportunity to be heard. We agree. While we are sympathetic to the court's position, the court had ways to punish counsel for these violations short of denying Gonzalez's writ petition. Accordingly, we reverse the judgment and remand the matter for further proceedings.

PROCEDURAL BACKGROUND

After 18 years with the LAPD, Gonzalez was discharged from his position as a sergeant after a board of rights found him guilty of three counts of misconduct. Among other things, the LAPD alleged that while off-duty, he provided alcohol to and had sexual intercourse with a minor.[1] Based on its findings, the board

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[1] Because the sole issue on appeal is a matter of law unrelated to the facts of the underlying conduct, a lengthy recitation of those facts is unnecessary.

recommended the penalty of discharge. Beck adopted the board's penalty recommendation and issued an order discharging Gonzalez from the LAPD.

In response, Gonzalez filed a verified petition for peremptory writ of mandate under Code of Civil Procedure sections 1085 and 1094.5.[2] The petition sought to set aside the discharge decision and restore Gonzalez to his former position as a sergeant.

After reviewing the administrative record, which was more than 2,000 pages long, Gonzalez's attorney filed an ex parte application for leave to file an oversized opening brief. On December 12, 2014, the court granted the application and entered an order allowing both parties to file briefs of no more than 20 pages—rather than the 40 pages counsel had requested.

On December 15, 2014, Gonzalez filed two documents—a first amended verified petition for writ of administrative mandamus and an opening brief. The amended petition provided citations to the administrative record to support its factual allegations. The 18.5-page opening brief,[3] on the other hand, contained few citations. Instead of citing to the administrative record, the brief primarily referred the court to the amended petition: "The statement provided herein is generally found in the First Amended Verified Petition, including appropriate citations to the Administrative Record, and in the interest of brevity generally will not be specifically cited or quoted in this statement of the case." The brief contained eight citations to approximately 100 pages of the administrative record. The citations directed the court to only the most critical documents and testimony.

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[2] All undesignated statutory citations are to the Code of Civil Procedure.

[3] Contrary to the parties' conclusion, the brief was not 20 pages. While the brief ended halfway down the page labeled 20, that page was mislabeled; it was actually page 19. It seems counsel erroneously included the cover page in the total page count and started the brief on page two. (See Cal. Rules of Court, rule 3.1113(h) [caption page must not be numbered; pages of text must be numbered consecutively, starting on the first page of text].)

On January 30, 2015, the City filed an opposition brief and request for a written statement of decision. The City asked the court to strike the facts presented in Gonzalez's amended petition and incorporated by reference in his opening brief. It argued that Gonzalez's amended petition and opening brief failed to comply with California Rules of Court rule 3.1113 (requirements for written motion) and rule 3.231(i)(2) of the Local Rules of the Superior Court of Los Angeles County (hereafter, "Local Rules") (opening brief must include statement of facts; each material fact must be supported by citation to the administrative record), and that Gonzalez circumvented the court's page limit by incorporating facts from the amended petition. The City then responded substantively to the arguments in Gonzalez's brief, however, and argued the weight of the evidence supported the board's findings and suggested punishment.

On February 11, 2015, Gonzalez filed both a reply brief and an amended opening brief. In the reply brief, counsel acknowledged that the original opening brief lacked sufficient citations; he explained that he was concurrently filing an amended brief in an attempt to "comply with the relevant local rule[.]" Counsel noted, however, that the City was able to produce a "comprehensive opposition brief" despite the procedural error. The 19-page amended opening brief included citations to the administrative record, but was otherwise identical to the original brief.[4]

The court held a hearing on the petition on March 6, 2015. Before the hearing began, it provided counsel with a written tentative decision denying the petition and striking Gonzalez's amended opening brief. Gonzalez's attorney argued that his actions were the result of incompetence, not deceit. He explained, "I do

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[4] The City contends the amended opening brief does not contain a citation for every material fact alleged in the original opening brief. The City does not point us to any particular fact that remains unsupported, however, and does not dispute the trial court's conclusion that the amended brief contains "the record citations that are missing" from the original brief or its conclusion that the amended brief, "if it were considered by the Court, would cure the errors in the original brief because it contains the necessary citations to the administrative record."

a lot of trial attorney work. I seldom am involved in a writ or an appellate proceeding." Indeed, he had only taken three such cases in the previous decade. Accordingly, he spoke with a writs and appeals expert in his office. Despite the rules of court, counsel "talked with [that attorney] about this and was guided by his greater experience in the area and chose to do it the way I did it. I concede it was procedurally improper."

Counsel urged the court not to visit "[m]y inadvertence, my neglect, my errors . . . upon" Gonzalez. "Courts have long wanted cases decided on the merits. I think penalizing my client for my errors, my mistakes, is not in the best interest of justice. And since nothing in the opening [brief] was changed whatsoever except to include the citations, I do think the Court should in this case continue the matter and give the respondent time to respond to those citations, but nothing substantively was changed."

Counsel for the City replied, "[t]his is my first writ with [Gonzalez's attorney] so I can't give the Court any guidance as to my experience with him." He argued the initial citation procedure was "egregious here only because I didn't object to the extension of the 15-page limit because if they need more pages and if the Court deems it reasonable, I didn't object." Counsel did not argue that the procedural violation prejudiced him or his client.

Finally, Gonzalez's attorney concluded by reiterating that his error stemmed from inexperience, not deceit. He asked the court to continue the matter to allow the City to respond to the citations.

The court denied counsel's request and adopted its tentative ruling. It concluded that the amended petition was "a deceitful attempt to place the requisite citations to the administrative record before the Court without running afoul of the 20-page limitation." While the court acknowledged that it could, as counsel requested, continue the matter to allow the City to respond to the amended brief, it held that "such exercise of the Court's discretion would reward Petitioner for the deceitful procedural maneuvers that have characterized his approach to these writ proceedings: (1) attempting to circumvent the Court's 20-page limitation on the

parties' opening and opposition briefs by placing the requisite record citations in an Amended Petition; (2) filing an 'Amended Opening Brief' without leave of [the] Court and after Respondents had filed their opposition, thus prejudicing Respondents; and (3) attempting to shift his burden of proving Respondents' error to the Court." Accordingly, the court struck the modified opening brief and refused to consider the record citations contained therein and in the amended writ petition. The court considered the original opening brief, but concluded Gonzalez failed to meet his burden of proof because he did not provide sufficient citations to the administrative record.

On March 24, 2015, the court entered judgment denying the petition. Gonzalez filed a timely notice of appeal.

DISCUSSION

On appeal, Gonzalez contends the court abused its discretion by responding to his attorney's violations of the prior court order and local rule by effectively imposing a terminating sanction without notice or an opportunity to be heard. In turn, the City argues the court did not deny the petition as a sanction for the violations, but rather because Gonzalez failed to meet his burden of proof, and that in any event, the court's actions were appropriate.

1. Standard of Review

Every trial court has the "inherent power . . . to exercise its discretion and control over all proceedings relating to the litigation before it." (*Johnson v. Banducci* (1963) 212 Cal.App.2d 254, 260.) " ' "The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown." ' " (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 695–696.) In other words, judicial discretion must be measured against the governing law and must be exercised in a way that best effectuates the law's purposes. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393–394.) "Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we

call such action an 'abuse' of discretion." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.) " 'Inherent in our review of the exercise of discretion in imposing . . . sanctions is a consideration of whether the court's imposition of sanctions was a violation of due process. [Citation.]' " (*Conservatorship of Becerra* (2009) 175 Cal.App.4th 1474, 1482.)

2. Trial Courts' Authority to Enforce Rules and Orders

" 'Local court rules and policies have the force of procedural statutes, so long as they are not contrary to legislative enactments. [Citations.]' " (*Kapitanski v. Von's Grocery Co.* (1983) 146 Cal.App.3d 29, 32 (*Kapitanski*); see § 575.1, subd. (a) [superior court may adopt "local rules designed to expedite and facilitate the business of the court"].) The California Rules of Court require parties to abide by certain page limits (Cal. Rules of Court, rule 3.1113(d)), "unless the parties seek, and the court grants, an order for oversized briefs." (Local Rules, *supra*, rule 3.231(i) [briefs in writ proceedings are subject to rule 3.1113(d)].) An overlong brief "must be filed and considered in the same manner as a late-filed paper"—i.e., the court, in its discretion, may refuse to consider it. (Cal. Rules of Court, rules 3.1113(g), 3.1300(d).) Whatever its length, however, a brief "must contain a statement of facts which fairly and comprehensively sets forth the pertinent facts, whether or not beneficial to that party's position, and each material fact must be supported by a citation to a page or pages from the administrative record as follows: (AR 23)." (Local Rules, *supra*, rule 3.231(i)(2).)

Trial courts have the authority to enforce both the local rules and their own orders. (§ 177 ["Every judicial officer shall have power . . . To compel obedience to his lawful orders"]; § 575.2, subd. (a) [court may impose sanctions for violation of local rules, including striking "any pleading"].) By placing most of the citations to the administrative record in an amended writ petition rather than in the brief itself, Gonzalez's attorney technically complied with the court's December 12, 2014 order limiting the opening brief to 20 pages but violated the local rule requiring him to cite the administrative record in the brief itself. That is, considering the amended petition alongside the original opening brief would have effectively increased the

brief's length beyond the 20-page limit; therefore, the court, in strict adherence to its prior order and the local rules, had the authority to refuse to consider the supplemental citations. (Cal. Rules of Court, rules 3.1113(g), 3.1300(d).) It also had the authority to punish *counsel* for these violations by imposing sanctions against him, including dismissing the action. (§ 575.2, subd. (a).)

But the fact a court *can* take these actions does not always mean that it should. Rules of procedure exist for a purpose—to promote the just resolution of cases on their merits. (*Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242, 1246.) Accordingly, decisions about whether and how to enforce those rules " 'must be made in an atmosphere of substantial justice. When the two policies collide head-on, the strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency.' " (*Ibid.*) "Judges . . . generally prefer to avoid acting as automatons and routinely reject requests by counsel to function solely in a ministerial capacity. Rigid rule following is not always consistent with a court's function to see that justice is done. Cognizant of the strong policy favoring disposition of cases on their merits [citations], judges usually consider whether to exercise their discretion in applying local court rules and frequently consider documents" that violate the rules. (*Kapitanski*, *supra*, 146 Cal.App.3d at p. 32, quoted with approval in *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 29–30 and *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1364 (*Elkins*).)

The Code of Civil Procedure contemplates such flexibility. For example, section 473 provides that the court may, "in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding . . . . " (§ 473, subd. (a); see Local Rules, *supra*, rule 3.231(f) ["The rules of practice governing civil actions are generally applicable to writ proceedings"].) To ameliorate any prejudice to the opposing party, if "the amendment renders it necessary, the court may postpone the trial, and may, when the postponement will by the amendment rendered necessary, require, as a condition to the amendment, the payment to the adverse party of any costs as may be just." (§ 473, subd. (a)(2).) On the other hand, our research has not revealed any

basis for the court to impose terminating sanctions without prior notice where a party fails to seek advance permission to file an amended pleading or brief.

In short, "[a]lthough authorized to impose sanctions for violation of local rules (§ 575.2, subd. (a)), courts ordinarily should avoid treating a curable violation of local procedural rules as the basis for crippling a litigant's ability to present his or her case." (*Elkins*, *supra*, 41 Cal.4th at p. 1364.) In the absence of a demonstrated history of litigation abuse, an "order based upon a curable procedural defect . . . [that] effectively results in a judgment against a party, is an abuse of discretion." (*Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152, 1161, quoted with approval in *Elkins*, *supra*, at p. 1364; see *Del Junco v. Hufnagel* (2007) 150 Cal.App.4th 789, 799 [discussing "extreme situations" in which in which court may dismiss an action]; *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 762 [courts have inherent power to dismiss an action with prejudice where "plaintiff's deliberate and egregious misconduct in the course of the litigation renders any sanction short of dismissal inadequate to protect the fairness of the trial."].)

3. The Court Abused Its Discretion.

With these principles in mind, we review the trial court's ruling striking the amended opening brief and its refusal to reach the substance of Gonzalez's claims. While trial counsel's initial effort was plainly inadequate, he ultimately provided a complying opening brief.[5] The court conceded the amended brief contained sufficient citations to cure the defect in the original brief. Yet while the court acknowledged it had "discretion to consider the 'Amended Opening Brief,' continue the hearing on the petition and permit Respondent to file a response to the 'Amended Opening Brief,' " it nevertheless concluded that "such exercise of the Court's discretion would reward Petitioner for the deceitful procedural maneuvers

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[5] We note, however, that Gonzalez's original opening brief cited to approximately 100 pages of the administrative record. It does not appear that the court considered any of those record references before denying his petition.

that have characterized his approach to these writ proceedings"—namely, failing to cite to the administrative record in the opening brief, "attempting to circumvent" the page limit "by deceitful[ly] attempt[ing] to place the requisite citations to the administrative record before the Court" in an amended petition, and filing a corrected brief without the court's advance permission. Because the court believed its duty was "to curtail such abuses, not condone them[,]" it declined to exercise its discretion as Gonzalez requested.

Instead, the court struck the modified opening brief and refused to consider the record citations contained therein or in the amended petition. It then concluded Gonzalez failed to meet his burden of proof because he did not provide sufficient citations to the administrative record in his original opening brief. Even assuming these were sanctionable offenses, we conclude that the court effectively imposed a terminating sanction on Gonzalez for his attorney's misconduct; that it did so without sufficient notice or opportunity to be heard and without considering alternative measures or lesser sanctions; that the record contains no evidence counsel had a history of litigation abuse; and that counsel committed a curable procedural error. Accordingly, we hold that the "sanction was disproportionate and inconsistent with the policy favoring determination of cases on their merits." (*Elkins*, *supra*, 41 Cal.4th at pp. 1364, 1365.)

The City insists Gonzalez's argument that "the court abused its discretion by imposing the 'sanction' of dismissal for his counsel's noncompliance with local rules . . . is misguided because it relies upon inapposite authority involving fast track rules." To the extent the City argues section 575.2 only applies in fast track cases, the City is mistaken. (See *Garcia v. McCutchen* (1997) 16 Cal.4th 469 [§ 575.2 is a general provision that also applies in fast track cases].) The City also argues the court did not deny Gonzalez's petition as a sanction for the violation but instead because he failed to satisfy his burden of proof. Be that as it may, Gonzalez failed to satisfy his burden of proof *because* the court struck the amended opening brief *as a sanction* for his failure to obtain permission before filing it, or because consideration of the original brief and the amended writ petition exceeded the

20-page limit imposed by the court. The fact that the court struck the amended opening brief and ruled on the petition's merits at the same hearing is irrelevant, except as an indication that the court failed to provide counsel with notice and opportunity to be heard, as discussed below.

3.1 The court failed to provide either Gonzalez or his attorney with notice and an opportunity to be heard.

Section 575.2 allows superior courts to promulgate local rules that give them the authority to strike a pleading, dismiss an action, or "impose other penalties of a lesser nature as otherwise provided by law" for failure to comply with other local rules. The statute cautions, however, that "[n]o penalty may be imposed under this section without prior notice to, and an opportunity to be heard by, the party against whom the penalty is sought to be imposed." (§ 575.2, subd. (a).)

Under this statutory authority, the Superior Court of Los Angeles County enacted local rules 3.10 and 3.37, which authorize the imposition of "appropriate sanctions" such as "dismissal, striking of pleadings, vacation of trial date, and monetary sanctions" for the failure or refusal (1) to comply with the local rules, (2) to comply with any order made under the local rules, or (3) to meet the time standards or deadlines established by the local rules. Read together, these statutes and rules authorize the trial court to impose appropriate sanctions on parties or attorneys who violate local rules—but only after providing notice and an opportunity to be heard. (See also § 177.5 [court may impose monetary sanctions for violation of a court order after notice and opportunity to be heard].)

The California Rules of Court, in turn, specify the required notice and opportunity to be heard: "The court on its own motion may issue an order to show cause that must (1) state the applicable rule that has been violated, (2) describe the specific conduct that appears to have violated the rule, and (3) direct the attorney . . . to show cause why sanctions should not be imposed against them for violation of the rule." (Cal. Rules of Court, rule 2.30(c); see *O'Brien v. Cseh* (1983) 148 Cal.App.3d 957, 961–962 [due process requires notice and opportunity to be heard].) The record before us contains no evidence that the court provided the

parties with any such notice before striking Gonzalez's amended opening brief at the conclusion of the hearing. (See *Bergman v. Rifkind & Sterling, Inc.* (1991) 227 Cal.App.3d 1380, 1387 ["notice must be given *before* findings are made and at a time preceding the trial judge's decision whether, in fact, to impose sanctions."].) In light of the "court's lack of compliance with the legal standards and purposes authorized by sections 177.5 and 575.2, the orders are legally erroneous, unsupported by the record, and a prejudicial abuse of discretion." (*Conservatorship of Becerra*, *supra*, 175 Cal.App.4th at p. 1485; see *Le v. An* (2008) 168 Cal.App.4th 558, 565 [abuse of discretion to strike answer and enter default for failure to attend case management conference where notice did not state these penalties for failure to attend].)

3.2 The court improperly punished Gonzalez for his attorney's errors.

Even if the court had satisfied these due process protections, however, section 575.2 "sharply limit[s] penalties in instances of *attorney* negligence." (*Garcia v. McCutchen*, *supra*, 16 Cal.4th at p. 475.) "Basically, the restriction is: If it's solely the lawyer's fault and not the client's, any penalty for violation of local rules must be structured so as not to 'adversely' affect the client's cause of action (or defense).

"Section 575.2 is divided into two subdivisions, (a) and (b). While subdivision (a) does indeed allow for local rules to provide for the dismissal of a case for failure to comply with local rules, subdivision (b) cautions that 'any penalty' arising from the dereliction of counsel, as distinct from a client, must be visited only on counsel. The clear implication of subdivision (b) is that in cases where failure to comply with some local rule is not attributable to the client, then dismissal of the *client's* case is off limits. The court may hit the attorney with penalties, perhaps even severe penalties (see also Bus. & Prof. Code, § 6103 [failure of attorney to obey court order is grounds for discipline with state bar]) but, like the devil being allowed to afflict Job but only up to a point, there is one area that is off limits—the *client's* cause of action or defense. The client's case may not be adversely affected by

malfeasance solely attributable to the attorney." (*Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187, 211–212.)

There is no indication in the record before us that Gonzalez knew about, approved, or assisted in counsel's violations. To the contrary, counsel took full responsibility for his errors. He argued, "[m]y inadvertence, my neglect, my errors should not be visited upon my client" and asked the court to grant a continuance to allow the City time to respond to the amended brief. Counsel urged that "penalizing my client for my errors, my mistakes, is not in the best interest of justice. And since nothing in the opening brief was changed whatsoever except to include the citations, I do think the Court should in this case continue the matter and give the respondent time to respond to those citations, but nothing substantively was changed." By, in essence, imposing a terminating sanction on *Gonzalez* for his attorney's violations of the court's page-limit order and the local rules, the court violated section 575.2, subdivision (b).

3.3 Lesser sanctions were available.

Finally, we note that the court had options to punish counsel short of striking the amended opening brief and denying the writ petition. While the court was understandably troubled by counsel's violations, it could have resolved the issue by continuing the writ hearing and scheduling a new hearing directing Gonzalez's counsel to show cause why sanctions should not be imposed against him. Given the dispositive effect of its actions, the court elevated strict adherence to rules of procedure over just resolution of Gonzalez's case on the merits.

We also note that the usual elements of prejudice that typically attend the denial of a continuance simply are not present here. This is not a case where a party has made an unexpected request to continue an impending dispositive motion or trial date under circumstances that could thwart months of an opponent's preparation or unnecessarily delay resolution of a long-pending dispute. Although the City asked the court not to consider the administrative record citations contained in the amended writ petition, it responded substantively to Gonzalez's claims in its brief. Even if the court needed to continue the hearing to allow the

City additional time to respond to the citations presented in the amended opening brief, that inconvenience to the court and the City was outweighed by the need to avoid a total forfeiture of Gonzalez's vested employment rights.

DISPOSITION

The judgment is reversed. The matter is remanded for further proceedings consistent with this opinion. No costs are awarded on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. 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.