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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SAMUEL MCKENZIE, Plaintiff and Appellant, v. CITY OF LONG BEACH et al., Defendants and Respondents.	B237769 (Los Angeles County Super. Ct. No. NS023597)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joseph E. Di Loreto, Judge. Affirmed.

Law Office of James E. Trott and James E. Trott for Plaintiff and Appellant.

Robert E. Shannon, City Attorney, Christina L. Checel, Senior Deputy, for Defendants and Respondents.

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Appellant Samuel McKenzie was fired from his job as a police officer for the City of Long Beach ("the City"), after a hearing before the Long Beach Civil Service Commission ("the Commission"). He petitioned the trial court for a writ of mandamus (Code Civ. Proc., § 1094.5), naming as respondents the City, the Commission, and City Manager Patrick West, who are also respondents herein. Appellant asked for an order that the City and the Commission set aside his discharge and reinstate him with back pay and benefits. The trial court denied the petition.

On this appeal, he contends that the trial court erred in finding that there was sufficient evidence for the Commission's findings, and also contends that the penalty was excessive. We affirm the trial court judgment.

Standard of Review

On the sufficiency of the evidence contention, because the decision affected appellant's interest in his employment, the trial court was required to, and did, examine the entire administrative record, beginning its review with a presumption of the correctness of the administrative findings, then exercising its independent judgment. The burden was on appellant to show that the administrative decision was contrary to the weight of the evidence. (Code Civ. Proc., § 1094.5, subd. (c); *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143-144; *Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 658.)

In contrast, "[w]e review the trial court's independent assessment of the administrative record and not the findings of the administrative agency." (*Spitze v. Zolin* (1996) 48 Cal.App.4th 1920, 1925.) Our task is to determine whether there is any substantial evidence in the record on appeal to support the trial court's judgment. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 823; *Moran v. State Bd. Of Medical Examiners of the State of California et. al.* (1948) 32 Cal.2d 301, 308-309.)

As to appellant's contentions concerning penalty, a "trial court may overturn an administratively imposed penalty only when the penalty is found to be grossly excessive or a manifest abuse of discretion." (*Richardson v. Board of Supervisors* (1988) 203 Cal.App.3d 486, 494.)

We conduct a de novo review of the penalty, giving no deference to the trial court's determination. However, "[n]either the trial court nor the appellate court is entitled to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed." If reasonable minds can differ with regard to the propriety of the disciplinary action, we find no abuse of discretion. (*Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 45.)

Facts

Background

On March 24, 2010, the City sent appellant an official letter of discharge, setting out as grounds acts of misconduct and past discipline.

As to misconduct, the letter stated that:

-- In June of 2009, appellant had engaged in unprofessional conduct while on duty by attempting to convert an on-duty contact with a woman named Patricia Castanon into an off-duty relationship.

-- On October 30, 2009, about 5:00 a.m., while off duty, appellant drove under the influence of alcohol, with a blood alcohol level of .22, resulting in his arrest by the Los Angeles County Sheriff's Office. This conduct violated the Vehicle Code, specified sections of the Long Beach Police Department ("the Department") manual, and specified sections of the Civil Service Rules and Regulations.

-- On October 30, 2009, about 5:00 a.m., while off duty, appellant engaged in unprofessional conduct by failing to follow directions of the Los Angeles County Sheriff's Office Sergeant Thomas Vernola and fleeing in his vehicle, after he was found asleep behind the wheel. This conduct violated the Vehicle Code, specified sections of

the Department's manual, and specified sections of the Civil Service Rules and Regulations.

-- On October 30, about 5:00 a.m., while off duty, appellant engaged in unprofessional conduct by driving on a public street without license plates. This conduct violated the Vehicle Code, specified sections of the Department's manual, and specified sections of the Civil Service Rules and Regulations.

The letter then stated that "these acts do not stand alone," a disciplinary category used by the Department, and described three earlier incidents of discipline:

-- In September 2004, appellant engaged in conduct unbecoming an officer when he attempted to convert a traffic stop into a personal relationship by asking the driver for her telephone number, inviting her out for coffee, and providing her with his cell phone number. The charge was sustained and appellant received a disposition to be terminated from service.

-- In August 2004, appellant engaged in conduct unbecoming an officer when he improperly converted an on-duty contact into an off-duty dating relationship. Further, between August and October 2004, appellant was negligent in his duties by sleeping on the couch at that woman's house, while on duty. The charges were sustained and appellant received a disposition to be terminated from service.

-- In March 2005, while off duty, appellant engaged in inappropriate conduct by becoming involved in a dispute between an ex-girlfriend and her current boyfriend, at their residence, resulting in a call to the California Highway Patrol and a criminal investigation by the Department. This charge was sustained and appellant received a two-day suspension.

The letter further recited that in March 2006, a settlement was reached at the Commission, in part because appellant did not intend to be employed by the City indefinitely. Under the negotiated agreement, dismissal was reduced to a 20-day suspension, appellant was to attend six months of counseling, be assigned to a two-man car, and to withdraw his appeal. However, in April 2008, appellant experienced a change

of heart and decided to remain with the Department. He was allowed to end the two-man car assignment, in concurrence with the Department's 2009 deployment.

Appellant sought review by the Commission, which conducted a hearing.

Evidence at the hearing

Sergeant Thomas Vernola of the Los Angeles County Sherriff's Office testified to the events of October 30, 2009. In the early morning hours, the sheriff's office received a call about an SUV parked in the left-turn lane of Del Amo at Bellflower Boulevard, with a man sleeping inside.

Sergeant Vernola was dispatched to the scene. He saw the SUV, which did not move when the light changed. The brake lights were on. This was about 5:00 a.m.

Sergeant Vernola parked in back of the SUV, and approached it. He stood to the rear of the driver's side post and illuminated the interior with his flashlight. He saw appellant in the driver's seat. Appellant's head was on his shoulder, his hands were in his lap, and the gear selector was in drive. No one else was in the car.

Sergeant Vernola leaned forward so that appellant could see his badge and patches, shined his flashlight on his badge and patches, and pounded on the window several times, saying "Sheriff's department. Open the door. Roll the window down," and "Hey, it's the police department. Open the door, police department." Sergeant Vernola testified that in addition to the lights from his car and his flashlight, the area was illuminated with streetlights and the lights from a near-by gas station.

He got no response for 10 or 20 seconds, then appellant looked at him, looked straight ahead, then looked back and waved for Sergeant Vernola to go away. Sergeant Vernola told him to roll the window down. Appellant did not do so, but looked around, then put his hand on the gear shift. Sergeant Vernola said, "Don't do that. Don't try to move the car." Appellant smiled at Sergeant Vernola, moved his hand back, and again gestured for him to go away. Sergeant Vernola believed that appellant recognized him as law enforcement, basing this opinion on the fact that he had illuminated his uniform and

patches, the way appellant looked at him, sizing him up, and the way appellant gestured for him to go away.

Sergeant Vernola then looked away to direct deputies who had arrived at the scene. When he looked back, appellant looked at him, "got a surprised look on his face," looked forward, and accelerated. He drove through the intersection (Sergeant Vernola could not say whether the light was green or red), going through the left turn lanes and into a painted median. His top speed was about 60 miles an hour.

Sergeant Vernola followed, with his overhead lights and red forward facing lights on. He also transmitted an emergency traffic call, then turned on his siren. Appellant passed two cars going west on Del Amo. Then, suddenly, his brake lights went on and he veered out of the center median and went across two lanes at a 45 degree angle until his right front tire hit a curb. He then continued westbound about 25 to 30 miles an hour, stopping once at a red light. When appellant stopped, Sergeant Vernola, who was in pursuit, drew his gun, got out of his car, and told appellant to turn the car off. Appellant did not comply. When that light turned green, he continued westbound at a slower rate of speed, finally slowing to a stop.

Sergeant Vernola stopped behind him. It took some time for appellant to comply with Sergeant Vernola's commands that he turn the car off, roll down the window, throw his keys on the ground, put his hands out the window.

Appellant was arrested. He pled guilty to a charge of driving under the influence, and was put on probation. The parties stipulated that appellant had a .22 blood alcohol count at the time of his arrest.

Deputy Sheriff Martin Keffer also responded to the call about appellant's SUV. He was present when appellant fled from Sergeant Vernola, and was part of the pursuit. He used both lights and siren. Deputy Keffer was the arresting officer, and testified that he retrieved a loaded pistol from appellant's waistband, and a loaded magazine from a front pocket. He also testified to some conversation with appellant during the arrest, largely concerning blood alcohol testing.

Sergeant Vernola also testified that the license plates were missing from the rear of appellant's SUV, and appellant admitted that he did not have license plates.

Department Deputy Chief Robert Luna was appellant's supervisor. He testified that the first disciplinary matter which came before him involved the events of October 30. Based on that event, he recommended dismissal.

Deputy Chief Luna also considered the Castenon incident, which he believed was sustained. Given that incident, appellant's history of discipline, and the October 30 events, he again recommended dismissal. He believed that appellant had a history and pattern of poor judgment.

He was cross-examined on, inter alia, the Department's treatment of other officers arrested for driving under the influence, and agreed that some other officers had not been fired, but had received 10 to 15-day suspensions. Deputy Chief Luna also testified that each individual case had to be judged on its individual facts, and that he knew of no other case in which an officer had driven under the influence and fled from police officers. In appellant's case, he considered the level of intoxication, the fact that appellant fled from police and drove dangerously while doing so, the fact that appellant was armed, and all the other circumstances. Further, appellant's pattern of attempting to date women whom he met on duty constituted a pattern, so that Deputy Chief Luna believed that there might well be other incidents, in which the woman did not contact the Department to complain.

The City also introduced a letter from the Los Angeles County District Attorney to the Department's Chief, stating that the misdemeanor charges filed against appellant meant that he, and information about the charges, would go into the District Attorney's *Brady* Alert System, a database of information about peace officers which must be disclosed to the defense in certain criminal cases.

Finally, the City presented evidence in support of the charge that appellant engaged in conduct unbecoming an officer in June of 2009. We do not detail that evidence, because the Commission found that the charge was not proven.

For the defense, appellant testified that on the night of October 30, he remembered going to a bar after work and ordering a pitcher of beer, and a shot. His next clear memory was waking up in a cell. On cross-examination, he was questioned about his testimony, before Internal Affairs, that his next memory was of being in the backseat of the sheriff's car, handcuffed and trying to focus. He testified that he did remember being in the patrol car, but that it was not a clear memory.

He had personal knowledge of eight Department officers who had been arrested for driving under the influence, some of whom had left the scene of an accident causing property damage or injury. None had been fired.

Stephen James, a Long Beach police lieutenant and president of the Long Beach Police Officers Association, testified that the Department's traditional practice when an officer was arrested for DUI was a 20-day suspension, lowered to 10 days if the officer attended an alcohol program. He was aware of six to ten officers who had been involved in DUI cases, some of which included property damage or injuries. None of them had been fired for driving under the influence.

Commission findings

The Commission found that the charges related to the events of October 30 were proved, and that, as the City had determined, appellant had violated the Vehicle Code and specified provisions of the Department's manual. In its decision, the Commission summarized the evidence of the events of October 30, 2009, noting in particular that it found appellant's testimony that he did not remember anything which took place before he woke up in his cell "not credible." The decision also summarized Deputy Chief Luna's testimony and the evidence concerning the *Brady* Alert System.

The Commission "considered that Mr. McKenzie had a concerning [sic] history involving what appeared to be poor judgment with respect to his off duty relationships. The Commission considered that there were three independent cases which all involved poor decision making and bad judgment with unrelated women and that Mr. McKenzie did not learn to correct his behavior or make good choices despite his past disciplinary

action. The Commission determined that Mr. McKenzie was not fit to be a police officer because of his prior misconduct coupled with the egregious nature of the instant misconduct." By unanimous vote, the Commission agreed to dismiss appellant.

Discussion

1. The findings

Appellant challenges the sufficiency of the evidence for finding that he engaged in unprofessional conduct by failing to follow directions of law enforcement. He presents this argument as a question ("did Sam McKenzie know it was a law enforcement officer he was driving from?"), and argues that the Commission failed to take into account the evidence that Sergeant Vernola shined his flashlight into the SUV, the evidence that Sergeant Vernola did not use his siren during the initial part of the pursuit, and the evidence that appellant was disoriented. Appellant contends that that evidence negates his intent to flee law enforcement. He also argues that the Commission's findings noted that Sergeant Vernola testified that McKenzie was driving at 60 miles an hour, but that that was merely an estimate.

We note first that to some extent, these arguments are based on speculation. For instance, appellant argues that the light shining in his car reflected back at him, making it difficult for him to see. There is no evidence to that effect. Appellant testified that when he executed a traffic stop, he put his lights in the driver's rearview mirror and side view mirror, because the glare blinded the driver, and gave the officer a technical advantage, but there is no evidence that that happened in this case. Indeed, Vernola testified that he shined his flashlight into the rear window of the SUV, not at one of the mirrors.

Elsewhere in his brief, appellant argues that he drove away "because in his mind at the time it was time to leave," and that he was not fleeing law enforcement "because he did not even know that they were there," but there is no evidence on appellant's state of mind, other than the facts summarized above, which reasonably lead to the conclusion that appellant was fleeing law enforcement.

We note, too, that the fact that the Commission found against appellant, or failed to mention a bit of evidence in its findings, does not mean that it did not consider all the evidence which appellant cites herein. It certainly does not mean that the trial court failed to do so.

Our task on review is to determine whether there is substantial evidence for the trial court's decision, and we find such evidence in the evidence that Sergeant Vernola drove up to appellant's SUV in a patrol car, approached the SUV and repeatedly identified himself as a police officer, and illuminated his badge and patches, then pursued him in the patrol car, with lights, and ultimately, the siren.

2. The penalty

Appellant makes several arguments on this issue. We begin with his contention that the decision to fire him was based on incorrect information. He makes the argument in reliance on Deputy Chief Luna's testimony on cross-examination. During that examination, Deputy Chief Luna agreed that appellant had had only one suspension prior to the October 30 incident, then testified that "I'd have to look at the history again, because for some reason I thought there was another suspension other than the 20 days . . . ." He was then asked, "Did that influence you in reaching your decision, thinking that there was another suspension?" and answered, "I'd have to look at the history."

From this testimony, appellant concludes that Deputy Chief Luna was confused about his discipline history when he decided on a penalty recommendation. We do not draw that conclusion. Deputy Chief Luna was unsure of the facts during the examination, but that does not tell us that he had the wrong impression when he made his recommendation. Moreover, the record does not reflect that Deputy Chief Luna alone made the decision to fire appellant.

Appellant next argues that the City "overemphasized" his disciplinary history. He again cites Deputy Chief Luna's testimony on cross-examination, arguing, inter alia, that

Deputy Chief Luna testified that he could not identify a specific Department policy which was violated when an officer converted a traffic stop into a request for a date.

Deputy Chief Luna did, as appellant argues, testify that each case had to be considered on its individual facts, but he did so when asked about an officer meeting a court reporter or a nurse during the course of his or her duties, very different facts that those which appellant was disciplined for. We thus reject appellant's argument that there was no policy against an officer attempting to start a personal relationship with someone pulled over for a traffic stop, but that this "is only a problem if down the line . . . something is needed to hold over a person's head . . . ."

Deputy Chief Luna testified that "if you're pulling over somebody on traffic stops and you're asking them for personal information because you're asking them out, there is something fundamentally wrong with that," which is obviously true, and that the conduct violated Department policy. Deputy Chief Luna's testimony supported the Commission finding that appellant's past history of discipline was serious, and does not support the argument that the conduct was inoffensive, and a pretext.

Nor are we persuaded by appellant's argument that his history of discipline is irrelevant because the offenses are factually dissimilar to those of the driving under the influence offense. The City and the Commission were entitled to look at appellant's record, as a whole.

Finally, appellant argues that the penalty was grossly excessive, relying on large part on the evidence that other officers were not fired because they were in the *Brady* Alert System and on the evidence that other officers arrested for driving under the influence were not fired, even though some of those officers had been involved in traffic accidents causing injury. Appellant argues the Commission overlooked this evidence. He also cites the evidence that he received good evaluations during his years with the Department, and served honorably in the Marines, the evidence that he was off duty when he was driving under the influence, and the evidence that he had sought counseling. He

argues that although he lost his driver's license for a period of time, the arrest did not otherwise prevent him from providing service to the public.

We see no abuse of discretion. Appellant was involved in a very serious incident, in which he endangered himself and the public by driving while under the influence, at a high blood alcohol level, then fled from law enforcement, endangering those officers, too. Further, he had a history of policy violations arising from his interactions with the public, despite having been disciplined. "When it comes to a public agency's imposition of punishment, 'there is no requirement that charges similar in nature must result in identical penalties.' [Citation.]" (*Talmo v. Civil Service Com.* (1991) 231 Cal.App.3d 210, 230.)

Disposition

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.