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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

GIBRAN CHAVEZ,

Plaintiff and Respondent,

v.

THE CALIFORNIA STATE  
PERSONNEL BOARD, State of  
California, et al.,

Defendants and Respondents.

THE DEPARTMENT OF  
CORRECTIONS AND  
REHABILITATION, DIVISION OF  
ADULT INSTITUTIONS, State of  
California, et al.

Real Parties in Interest and  
Appellants.

B233997

(Los Angeles County  
Super. Ct. No. BS126084)

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

Department of Corrections and Rehabilitation, Office of Legal Affairs, Rose E. Mohan, Assistant Chief Counsel, Stephen A. Jennings, Staff Counsel IV, for Appellant California Department of Corrections and Rehabilitation, State of California.

California Correctional Peace Officers Association, Legal Department, Dan Lindsey, Rudy Jansen and Sonia Garcia, for Respondent Gibran Chavez.

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The California Department of Corrections and Rehabilitation appeals from the trial court's judgment in this administrative mandate action, which reversed the California State Personnel Board's decision to uphold the department's termination of prison guard Gibran Chavez after finding that he tried to cover up another guard's improper use of force on an inmate. Because there was substantial evidence to support the personnel board's findings, we reverse the judgment and direct entry of a new judgment in favor of the corrections department.

### **FACTS AND PROCEDURAL HISTORY**

On December 14, 2007, Prison Guard John Hierro pepper-sprayed and then kicked an inmate at the state prison in Los Angeles County. There is no dispute that both actions were unjustified and improper. The incident took place after Hierro responded to a call for assistance from fellow guard Gibran Chavez when the inmate said he would not return to his cell because of problems with his cellmate.

Prison Guard Gildardo Guevara witnessed these events from a control booth that allowed him to monitor the inmate housing unit where the incident took place. According to Guevara, after Hierro kicked the inmate, Chavez signaled him to sound an alarm that would summon more guards and their supervisor, Sgt. Paul Carranza. Chavez and Hierro told Carranza and Lt. David Foote about Hierro's use of pepper spray, but neither mentioned the kick. As Hierro and Chavez walked to another area to write up incident reports, Hierro told Chavez that he had "fucked up" because he kicked the inmate. A few hours later, Hierro told his supervisors that he kicked the inmate. Chavez never mentioned the kick, claiming that he had turned around to deal with other nearby inmates when the kick took place.

Based on Guevara's report that Chavez had been standing right by the inmate when Hierro kicked him, the Department of Corrections fired Hierro and Chavez. Hierro's termination was based in part on his improper use of force for having pepper-sprayed and kicked the inmate. Both were fired for attempting to conceal the fact that Hierro kicked the inmate. The department's termination notice against Chavez also noted

regulations that required him to intervene and stop any unnecessary use of force, and alleged that he failed to do so after seeing Hierro kick the inmate.

Guevara told his supervisors that both men called him several times in the hours following the incident to ask him what his report would say. According to Guevara, Chavez asked him to report that he sounded the alarm on his own, not because Chavez signaled him to do so. Based on this, Chavez and Hierro were also fired in part for attempting to intimidate Guevara into not reporting the kick.

Chavez and Hierro appealed their terminations, and a hearing on the charges was held before an administrative law judge. The undisputed facts from that hearing are as follows: The inmate was seated on a bench attached to a metal table, with his back to the table, facing toward the inmate bunk area. Hierro stood in front of the inmate, while Chavez stood to the inmate's right. When the inmate refused to go into his cell, Hierro pepper-sprayed him. The inmate fell to the floor in a prone position, and Hierro kicked him. Hierro testified that he was about to go off duty when Chavez summoned him, and was therefore angry and frustrated when he dealt with the inmate. He also contended that his anger had dissipated, and that he kicked the inmate because the inmate spat at him and thrashed his legs about.

The disputed facts arise from whether Chavez saw Hierro kick the inmate. According to both Chavez and Hierro, Chavez had turned around to check on other inmates when the kick was delivered. As a result, Chavez contended he did not see the kick, and therefore did not lie when his supervisors asked if he had seen it.<sup>1</sup>

Guevara testified that he had a clear view of the incident from about 50 feet away. He did not take his eyes off the area where the inmate was located until after Hierro kicked the inmate. According to Guevara, Chavez was standing just to the right of the

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<sup>1</sup> Due to a transcription error, Chavez's testimony was not reported. The parties did not raise that as an issue either below or on appeal, and the trial court relied on the administrative law judge's description of Chavez's testimony. Accordingly, we do the same.

inmate when the inmate fell to the floor and did not move from there until after Hierro kicked the inmate.

The administrative law judge devoted an entire section of his decision to resolving this conflict in the evidence, and expressly found that Guevara was more credible than Chavez. Undermining Chavez's credibility was his assertion that he did not know he needed to report Hierro's confession that he had kicked the inmate. The State Personnel Board adopted the administrative law judge's proposed decision as its own. The board upheld the department's decision to fire Hierro for his improper use of force and initial attempts to conceal that he had kicked the inmate. The board upheld the department's decision to fire Chavez for two reasons: (1) although he was not in a position to stop Hierro from pepper spraying the inmate, he "merely stood by and observed" while Hierro kicked the inmate, and therefore engaged in an improper use of force by assisting Hierro's wrongful use of force; and (2) he violated his duty to report a use of force. According to the board, this conduct violated several provisions of the Government Code concerning neglect of duty, dishonesty, willful disobedience, and other failures of good behavior. (Gov. Code, § 19572, subds. (c), (d), (f), (m), (o), & (t).)

Chavez brought a petition for writ of administrative mandate (Code Civ. Proc., § 1094.5), alleging that the board's findings were not supported by substantial evidence.<sup>2</sup> The trial court used its independent judgment to review the evidence from the administrative hearing and found that Guevara's testimony was insufficient because it did not establish that Chavez saw the kick, only that he was in a position to do so. As a result, the trial court found, the board's conclusion that Chavez in fact witnessed Hierro kicking the inmate was purely speculative. According to the trial court, once that finding by the administrative law judge collapsed, so did all the other findings made against

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<sup>2</sup> The petition is not in the clerk's transcript, so we have based our summary of the allegations on the issues raised in Chavez's memorandum of points and authorities to support his writ petition. The petition named the personnel board as respondent, but the real party in interest at trial and on appeal is the Department of Corrections.

Chavez during the administrative proceeding. The trial court then entered judgment for Chavez.

## STANDARD OF REVIEW

In many cases concerning fundamental, vested rights such as employment, the trial court in an administrative mandate action – as the trial court did here – exercises independent judgment when reviewing the administrative record, drawing its own inferences and making its own credibility determinations from the evidence. When the judgment in such a case is appealed, we review the record to determine whether the trial court’s factual findings are supported by substantial evidence. (*Candari v. Los Angeles Unified School Dist.* (2011) 193 Cal.App.4th 402, 407-408.)

Because this case involves a decision by the State Personnel Board, however, a different standard of review applies. The personnel board is created by, and derives its adjudicatory powers from, the state Constitution. (Cal. Const., art. VII, §§ 2, 3.) When it reviews disciplinary actions within its purview, it acts in an adjudicatory capacity much the same as a trial court does. (*California Youth Authority v. State Personnel Board* (2002) 104 Cal.App.4th 575, 584 (*California Youth Authority*).) As a result, even when fundamental vested rights are involved, both the trial court and the reviewing court must uphold the board’s findings if those findings are supported by substantial evidence. (*Coleman v. Dept. of Personnel Administration* (1991) 52 Cal.3d 1102, 1125-1126; *Cate v. State Personnel Board* (2012) 204 Cal.App.4th 270, 281; *California Youth Authority*, *supra*, 104 Cal.App.4th at p. 584.)<sup>3</sup>

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<sup>3</sup> Although the trial court incorrectly applied the independent judgment standard of review, the department notes this error, but does not expressly ask us to reverse solely on that basis. Instead, the department argues that substantial evidence supports the board’s decision. Chavez agrees with the substantial evidence standard of review but argues the evidence was insufficient. Because we stand in the trial court’s shoes and independently assess whether the record contains substantial evidence to support the board’s decision, we consider the trial court’s error harmless.

## DISCUSSION

Both parties agree that the primary issue on appeal, as it was during the administrative proceedings and the trial below, is whether there was substantial evidence that Chavez actually saw Hierro kick the inmate. The department contends that such an inference can be drawn from: (1) Guevara's testimony that Chavez had not yet moved away from the inmate when Hierro kicked him, but was instead standing to the inmate's side; and (2) the consciousness of guilt demonstrated by Chavez's phone call to Guevara asking Guevara to alter his account of the events. Chavez responds that Guevara's testimony shows no more than the fact that he had not yet moved from the inmate's side, but is not evidence of, and does not allow an inference that, he in fact saw the kick.

Guevara testified that Chavez was standing alongside the inmate when Hierro kicked the inmate, and had not yet moved away to check on other inmates as he contended. If this evidence is believed, then Chavez was in a position to see the kick, allowing the board to draw the inference that he in fact did so. (See *Wechlo v. Winyard* (1973) 33 Cal.App.3d 990, 994; *Deshew v. Rhodes* (1969) 1 Cal.App.3d 733, 747, disapproved on another ground in *Hollister Convalescent Hospital, Inc.* (1975) 15 Cal.3d 660, 670-671.) That inference supports the board's findings that Chavez was guilty of inexcusable neglect of duty for failing to intervene when Hierro kicked the inmate, and was guilty of various forms of dishonesty for failure to report the kick.

As for Hierro's admission to Chavez that he had kicked the inmate, Chavez contends that his termination was based on rules that required him to report a misuse of force that he actually saw. Based on Chavez's view of the evidence, his supervisors only asked if he had seen the kick, and he therefore answered truthfully when he said he had not seen it. Although our holding that there was evidence Chavez in fact saw the kick makes this issue irrelevant, we feel it necessary to point out that Chavez's contention rests on both a myopic view of the board's stated reasons for upholding his termination, and on an incomplete recitation of the evidence from the administrative proceeding.

The department's termination notice listed its code of silence policy, which states that employees must report conduct that violates department policy. The notice also stated that Chavez not only failed to report what he saw, but Hierro's admission to Chavez that he kicked the inmate as well. The board's decision also relied on Chavez's failure to report what he had been told by Hierro. Chavez attempted to justify his silence because his supervisors only asked him if he saw the kick. Although his supervisors testified that they asked Chavez if he had seen the kick, Sgt. Carranza also testified that after the inmate told him about the kick, he asked Chavez about the allegations, and Chavez said the kick did not happen and the inmate was lying. That question did not call for Chavez's observations, and his knowledge of Hierro's admission should have led him to reveal that fact to Carranza.

Under Government Code section 11425.50, we must give great weight to the board's and the administrative law judge's credibility findings to the extent they are based on observations of a witness's demeanor, manner, or attitude. (*California Youth Authority, supra*, 104 Cal.App.4th at p. 592.) Chavez contends that rule is inapplicable here because the findings concerning his and Guevara's credibility were not based on such observations. Not so. The administrative law judge found Guevara credible in part because he "testified in a straightforward and consistent manner, and he had no known motive to implicate [Hierro and Chavez]. His testimony that . . . Hierro kicked Franks 'soccer style' in the upper body was business-like and believable." That was an assessment based on Guevara's demeanor, manner, or attitude, requiring us to give great weight to that finding. Alternatively, we conclude that even without giving any extra weight to the credibility findings, for the reasons set forth above, Guevara's testimony provided substantial evidence concerning Chavez's observation of the kick.

Chavez also contends that inconsistencies and conflicts in Guevara's testimony require us to disregard Guevara's version of events. These include phone records that show a discrepancy between the number of calls made to Guevara by Chavez and Hierro and the number actually made (eight versus two), Guevara's statement that he saw Hierro kick the inmate in the ribs, when Hierro testified he kicked the inmate's thigh (a finding

that Chavez contends was corroborated by a medical report), Guevara's testimony that Hierro and Chavez helped the inmate to his feet (when another guard testified that he helped the inmate get up), and Guevara's motive to lie because he was angry at Chavez and Hierro for placing him in an awkward position.

These inconsistencies and conflicts were for the administrative law judge and the board to resolve, however. (*California Department of Corrections v. State Personnel Board* (2004) 121 Cal.App.4th 1601, 1611 [on review of decision by the board, we do not reweigh the evidence, but instead indulge all presumptions and resolve all conflicts in favor of the decision].)<sup>4</sup>

Finally, Chavez contends the evidence does not support findings that he attempted to minimize or cover-up Hierro's misconduct, or that he tried to intimidate Guevara into not reporting the use of force. As to the first, as we have already discussed, there is evidence that Chavez saw the kick and was told about the kick, but did not tell his supervisors about it when asked, and did not mention it in his report. As to the second, although attempting to intimidate Guevara was a part of the department's decision to fire Chavez, it was not mentioned at all in the board's determination to uphold the termination. Accordingly, it is not at issue on appeal.

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<sup>4</sup> We also note that even though Hierro claimed he kicked the inmate in the thigh, Lt. Foote testified that the inmate said he had been kicked "in the side" but he was not kicked very hard. A department investigative report that was placed in evidence recounts an interview with the inmate, who reported that he been kicked in "the left side torso" and that there was mild redness on the "left torso-ribcage area," but nothing definitive in the medical report. The medical report itself is ambiguous. Although it indicates a reddened area on the left thigh, a large circle is drawn to indicate a reddened area from the top of the head down to the top of the chest. The board apparently saw no significance in these inconsistencies, and neither do we.



## **DISPOSITION**

The judgment is reversed, and the matter is remanded to the superior court with directions to enter a new and different judgment for the personnel board and for real party in interest, the corrections department. Appellant shall recover its appellate costs.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.