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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SALVADOR ALATORRE,

Plaintiff and Appellant,

v.

THOMAS MODICA et al.,

Defendants and Respondents.

B339237

(Los Angeles County
Super. Ct. No.
23LBCP00261)

APPEAL from an order of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed.

Mastagni Holstedt, David E. Mastagni, Melissa M. Thom and Alexander J. Hastings for Plaintiff and Appellant.

Dawn McIntosh, City Attorney, and Gary J Anderson, Assistant Deputy City Attorney, for Defendants and Respondents.

The City of Long Beach (City) discharged Officer Salvador Alatorre from the Long Beach Police Department (LBPD; Department) based on his failure during a traffic stop on September 19, 2018 to take control of and properly search a suspect and his subsequent use of unreasonable force on the suspect. The Long Beach Civil Service Commission (Commission) sustained the charges and affirmed the discharge, and the trial court denied Alatorre's petition for writ of mandate seeking to reverse the Commission's decision. On appeal, Alatorre challenges the court's findings and contends the court misapplied legal standards for determining reasonable use of force. He further contends the court abused its discretion in upholding his discharge. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Alatorre's Employment*

Alatorre began working as a police officer for the Department in 2007. In January 2018 Alatorre struck a suspect with a flashlight multiple times, leading to a 12-day suspension. The chief of police found that Alatorre had used unreasonable force, the force caused a significant injury, and Alatorre's actions violated the public's trust. Alatorre was also the subject of three lawsuits regarding his use of force in which a judgment was entered against the City or Alatorre. In September 2018 Alatorre was serving as a member of the Department's Directed Enforcement Team (DET), a unit focused on gang enforcement.

B. *The September 19, 2018 Incident*¹

1. *The traffic stop*

At around 8:00 p.m. on September 19, 2018, Alatorre and his partner, Long Beach Police Officer Alfredo Chairez, were patrolling a residential area in their patrol car when they observed a parked SUV that had been driven by felony suspect Alexander Escobar the night before. Alatorre and Chairez informed two members of their DET unit, Long Beach Police Officers Fernando Archuleta and Amanda Aknin, who were in a separate patrol car. The four officers formulated a plan to conduct surveillance on the SUV, and they positioned their patrol cars so they could view the vehicle. Shortly thereafter, Alatorre and Chairez saw a man who matched the physical description of Escobar walking next to the SUV, but the man continued walking southbound and entered a truck parked nearby. An unidentified woman entered the truck's front passenger seat.

Alatorre and Chairez followed the truck in their patrol car as the truck drove westbound, and the officers observed the truck slow down but fail to make a complete stop at a stop sign. The officers continued to follow the truck and planned to conduct a traffic stop. According to Alatorre, at one point he saw the truck's driver's side door begin to open, and he advised Chairez of this and that the driver might try to flee.

¹ Our summary of the facts is taken from the police reports prepared by the four officers involved, a videotape showing the traffic stop played at the administrative hearing, and a diagram of the parking lot where the traffic stop was made. On our own motion, we augment the record to include the one minute and eight second parking lot surveillance video lodged by Alatorre in the trial court. (Cal. Rules of Court, rule 8.155(a)(1)(A).)

Alatorre activated his patrol car's lights and sirens to initiate a traffic stop. The truck quickly turned south down an alley and pulled into a parking lot on Santa Fe Avenue between a market and a restaurant. The truck parked facing south on the far south side of the lot. Alatorre and Chairez pulled their patrol car up behind and to the left of the truck, and Archuleta and Aknin parked their patrol car just to the left, also behind the truck.

Alatorre and Chairez exited their patrol car; Alatorre approached the truck's driver's side window with his gun drawn as Chairez approached the front passenger's side window (with the female in the front seat). Aknin then approached the left side of the truck to assist, followed by Archuleta. Aknin stood directly behind and to the left of Alatorre, and Archuleta stood a short distance behind Aknin. At this point, Alatorre and Archuleta believed the driver was Escobar, although it turned out to be Jose Encinas.

Alatorre stated in his police report that he saw Encinas moving around in the truck as if he was attempting to hide something underneath the front seat. He added that based on his training and experience, gang members take time to pull completely over in order to hide possible weapons or drugs. As Alatorre approached the truck, he ordered Encinas to show his hands. Encinas then turned his body toward the driver's side door, and his entire torso and head were sticking out of the car window.

Encinas handed his identification card to Alatorre while Alatorre holstered his gun. Alatorre looked at Encinas's identification card and asked him to remove his hat to observe his face and head (to confirm his identity), and Encinas complied.

Alatorre removed his gun from his holster and ordered Encinas to step out of the truck with his hands up. Encinas exited the truck and walked between Alatorre and Akinin toward the patrol cars with his hands down; Archuleta was standing behind Akinin. Alatorre then stepped away from Encinas, and started to move toward the driver's side of the truck. Alatorre stated in his report that he looked at Encinas's hands and did not see any "obvious weapons," and he "kept lethal cover on Encinas." However, Alatorre explained, "[b]elieving Encinas possibly hid a weapon underneath the driver's seat when he was reaching around just before he stopped his vehicle, I drew my attention to the open driver's door to quickly look inside."

As Alatorre turned his back to Encinas, Encinas immediately started running northwest, away from the officers toward three cars parked adjacent to each other on the north side of the parking lot. Archuleta and Akinin shouted at Encinas to stop. Alatorre stated he heard an officer behind him yell "really loud," but he did not hear what the officer said. He looked behind him and saw that Encinas was running away from the officers, while "reaching for his waist the entire time." The other officers did not state in their reports that they saw Encinas reaching for his waist as he initially ran away, nor can this be seen in the surveillance video.

2. The foot pursuit and use of force

The officers began running after Encinas, with Alatorre behind the others. Alatorre stated he saw Encinas's "right hand on his waist and it appeared as if he was pulling an object out of his waist." Alatorre reholstered his gun and followed the other officers, while Encinas ran toward the three parked cars on the

northern end of the parking lot. Encinas stumbled and rolled, then got up and continued toward the three cars. Alatorre stated Encinas “never moved his right hand from his waist,” despite bumping into one of the cars.

Archuleta ran directly behind Encinas, followed by Chairez, who had his gun drawn. Chairez observed Encinas’s right hand was “down towards his waistband,” as did Archuleta. Alatorre and Chairez stated, based on their training and experience, that waistbands were a common place to hide weapons. Encinas ran between the far-left and middle parked cars on the north side of the parking lot, then turned right and headed toward the east side of the parking lot. Archuleta followed Encinas between the cars, Chairez ran parallel to Encinas to the left of the parked cars, and Alatorre and Aknin ran to the right of the parked cars toward the east side of the parking lot to prevent Encinas from escaping on east side. As Encinas reached the front of the cars (on the north side of the parking lot), Archuleta saw him remove a handgun from his waistband with his right hand and drop it on the ground. Fearing for the safety of himself and the other officers, Archuleta yelled “Gun!” as Encinas began running eastbound in front of the parked cars. Chairez recalled hearing “Gun!” yelled twice; Alatorre stated he heard it three times. Alatorre recounted hearing Archuleta’s warning while simultaneously running approximately six feet from Encinas’s right side while Encinas looked directly at him and reached toward his waist.

Alatorre, who at this point had his gun holstered and his flashlight in his left hand, collided with Encinas at full sprint against a wall in an open area of the parking lot (on the northeast side), and both he and Encinas fell to the ground.

Alatorre stated in his report that he again “heard an [o]fficer yell in a very loud and clear voice, ‘Gun! Gun!’” Further, he lost sight of Encinas’s hands because of the collision. Alatorre observed Encinas’s left knee on the ground and his left arm on the wall, and it appeared to Alatorre as if Encinas was attempting to push himself off the wall to stand up. Alatorre stated Encinas’s right hand was still on his waist, and Encinas turned and looked at Alatorre.²

Alatorre explained in his police report that he feared Encinas was armed with a firearm and had already removed it or was removing it, and Alatorre was in close proximity to Encinas and had heard the other officers yelling “Gun! Gun! Gun!” According to Alatorre, “I felt I had no other option, but to strike Encinas with my flashlight in an area where I would prevent Encinas from shooting or possibly killing me and other officers attempting to detain him.” Further, “[i]f I attempted to transition to my duty weapon, I knew I would lose valuable seconds and give Encinas the opportunity to use the firearm against me.” Alatorre described the moment as a “deadly force situation.”

Alatorre struck Encinas’s head with his flashlight. Encinas immediately fell to the ground face down, and Alatorre observed Encinas’s hands were now underneath him. Alatorre stated he ordered Encinas to pull his hands out from underneath him and to place them on his back. Fearing that Encinas was now lying on a weapon and still trying to use it, Alatorre attempted (while

² Alatorre was the first officer to reach Encinas. None of the other three officers at the scene described (or likely saw) Alatorre’s collision with Encinas or subsequent flashlight strikes to Encinas’s head.

still on his knees) to move away from Encinas's right arm, and Alatorre swung his flashlight toward Encinas's right shoulder area. Alatorre stated his strike "grazed off [Encinas's] right shoulder and possibly struck his face." Alatorre observed his strike had little to no effect, and he warned Encinas he would shoot him unless Encinas let go of whatever he had in his hands and placed his hands on his back. Encinas began rolling onto his left side, and Alatorre ordered Encinas to place his hands on his back, but Encinas refused and continued to roll onto his left shoulder.

Aknin, Chairez, and Archuleta caught up to Encinas when he was on his stomach with his arms beneath him. Aknin stated in her report that Encinas appeared to be reaching his arms downward toward his waistband, which Aknin perceived as an attempt to reach for a gun. Alatorre, Chairez, and Archuleta yelled at Encinas to put his hands behind his back, but he did not comply. Alatorre then struck Encinas in the ribs with his flashlight, and Chairez observed it had no effect. Chairez stated in his report that he believed Encinas could easily grab a weapon and injure Alatorre because Encinas was on his left side, was close to Alatorre, had already dropped a gun, and had not been searched. Alatorre then struck Encinas in the ribs (again) with his flashlight, and Encinas rolled back onto his stomach but still did not place his hands on his back. Around this time, Archuleta struck Encinas's right calf with his flashlight four times to gain his compliance and prevent him from retrieving another weapon, and Chairez used his right leg to press the back of Encinas's right shoulder to roll him over, both without success. Aknin then deployed her taser on Encinas twice, and Alatorre and Chairez

were able to pull Encinas's arms out from under him and handcuff him.

C. *The Department's Internal Affairs Investigation*

The September 19 incident was initially reviewed by the Department's chain of command, including Sergeant Dominick Scaccia, Lieutenant Robert Woods, Lieutenant Megan Zabel, and Commander Jeff Birkencamp, and ultimately by then-Deputy Chief Wally Hebeish. Scaccia, Woods, Zabel, and Birkencamp all found Alatorre's use of force complied with Department policy, although Zabel took exception to Alatorre's conduct during the traffic stop in removing Encinas from the truck.

In January 2019 Deputy Chief Hebeish recommended there be an internal affairs (IA) investigation of the incident, looking into all four officers who were involved. On January 24 or 25 Lieutenant Eric Fernandez was assigned to lead the investigation.³ All four officers were interviewed as part of the IA investigation.

D. *Alatorre's Discharge and Appeal to the Commission*

On September 10, 2019 the Department served Alatorre with a letter of intent to discharge him. The Department asserted six charges, including negligence during the traffic stop and the unreasonable and/or unnecessary use of force. After a

³ At the time of the IA investigation, Fernandez was a sergeant, but he was promoted to lieutenant by the time of the Commission hearing, so we refer to him as Lieutenant.

*Skelly*⁴ hearing conducted by Commander Birkencamp, on November 22 the City served Alatorre with a dismissal letter notifying Alatorre he was discharged from the Department effective December 18 based on four sustained charges: (1) negligence in conducting Encinas's traffic stop; (2) negligence for not taking control and properly searching Encinas during the stop; (3) negligence for not ensuring a proper post-handcuffing search of Encinas for a weapon; and (4) unreasonable and/or unnecessary force for striking Encinas's head with a flashlight.⁵ The dismissal letter cited violations of the Civil Service Rules and Regulations, LBPD Manual, and LBPD Training Bulletin. The letter also cited Alatorre's prior 12-day suspension for unreasonable force on January 28, 2018 and a previous letter of reprimand he received for conducting a warrantless search without legal justification. Alatorre appealed his discharge to the

⁴ In *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215, the Supreme Court held a permanent civil service employee has a due process right to certain pre-removal safeguards, including "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline."

⁵ The dismissal letter and minutes from the subsequent Commission hearing make clear the three sustained charges for negligent conduct were for Alatorre's violation of Civil Service Rules and Regulations Article VII, section 84(4), which articulates a standard based on intentional or grossly negligent conduct. The dismissal letter dropped two of the initial charges, including filing a false police report and making false statements during the IA investigation.

Commission, and the Commission held a hearing commencing on September 14, 2022.

E. *Testimony Before the Commission*

1. *Commander Lance's Testimony*

Commander Lance testified on behalf of Chiefs of Police Robert Luna and Hebeish.⁶ Lance explained the vehicle stop should have been handled as a high-risk traffic stop. A traffic stop is high risk where the officers believe the person in the car is dangerous or a felon, and both criteria were met before Encinas's stop. Alatorre stated in his police report and IA interview that prior to the stop Encinas did not immediately pull over, opened his door twice, turned down an alley, and moved around in the truck's cab. Alatorre also stated his belief that Encinas was a gang member and a wanted felon, that wanted felons were dangerous and may attempt to flee, that gang members typically carried guns, and that he believed prior to the stop that Encinas had a weapon.

Alatorre's charge for not taking control and properly searching Encinas during the traffic stop was sustained based on the totality of circumstances. The Department had a policy of always treating subjects "with a contact cover philosophy." As the driver of the primary police unit, Alatorre was the contact officer for Encinas's traffic stop, which meant he was the person in control of the stop. Chairez was the cover officer until Akin and Archuleta arrived and assumed that role. Once Alatorre

⁶ Luna was the chief of police at the time the City made the decision in 2019 to discharge Alatorre; it appears Hebeish had become chief of police by the time of the October 2022 Commission hearing.

approached the vehicle, he should have taken physical control of Encinas as soon as reasonably possible and directed him to the patrol car, with Akin and Archuleta providing cover. Lance described this as “basic academy training.” Alternatively, Alatorre could have directed Akin or Archuleta to take immediate control of Encinas. Alatorre’s failure to do either led to Alatorre’s use of deadly force, which likely would not have otherwise been necessary. Alatorre’s conduct also endangered the public and the other officers on the scene by enabling Encinas to flee.

Alatorre’s unreasonable force charge for striking Encinas’s head twice with a flashlight was likewise sustained based on the totality of circumstances viewed from the standpoint of “a reasonable officer of the same amount of experience and . . . training” as Alatorre. Alatorre’s flashlight strikes to the head constituted lethal force. Under Department policy at the time of the incident, “lethal force [wa]s only authorized if there [wa]s an imminent threat,” and “[a]n imminent threat mean[t] . . . [s]omebody is going to kill me . . . one of my fellow officers or . . . a citizen immediately.” “Just because a suspect possesses a gun doesn’t make them a lethal threat.” Rather, Encinas “[had] to do something that [made] [Alatorre] believe [he was] going to be an imminent threat.”

In addition, Alatorre had included “embellishments” in his police report, and there were “inconsistencies in [his] police report and . . . IA interview.” Further, “[t]he Chief believed that Officer Alatorre had justified his use of force after the fact,” and the Chief “did not ultimately believe . . . [Alatorre’s] justification for the use of lethal force” or his “justification that it was an

imminent threat.”⁷ For example, “Alatorre’s . . . statement related to who yelled gun, and when they yelled gun, and where Encinas was when gun was yelled [wa]s inconsistent with everybody else’s recollection.” Specifically, Alatorre said he was six feet away from Encinas when he heard someone shout “gun,” but the other officers said the warning occurred when Encinas reached the front of the parked cars (much further away). None of the other officers who heard “gun” treated the situation as an imminent threat by using lethal force, and Alatorre deescalated to nonlethal force after the head strikes without articulating why Encinas was no longer an imminent threat. In addition, Alatorre did not search Encinas after he was handcuffed despite believing he had a gun.

With respect to Alatorre’s dismissal, Lance testified Chief Luna believed Alatorre had used unreasonable lethal force on a subject in violation of Department policy and training, and the conduct violated the public’s trust and did not uphold the standards and values of the Department. In recommending dismissal, Chief Luna also considered Alatorre’s January 2018 use of force suspension, his history of using force 26 times in a five-year period (16 of which involved flashlight strikes), and the multiple civil lawsuits filed against Alatorre alleging use of force, which resulted in “significant financial pay offs.” The chief determined that the Department had done everything possible to change Alatorre’s behavior, but it was not going to change.

⁷ We assume given the timing of the 2019 finding that Lance was referring to Chief Luna (at the time Hebeish was deputy chief).

2. *Lieutenant Fernandez's Testimony*

Lieutenant Fernandez recounted based on the IA investigation what happened during the traffic stop and use of force and the statements made by Alatorre in his IA interviews. Fernandez confirmed Alatorre, as the driver of the patrol car, was the contact officer in charge of the stop. Alatorre should have conducted a high-risk vehicle stop, but he stated in his interview that he “d[id]n’t like to do the high-risk vehicle stops” and that he and his DET team commonly walk up to vehicles, even if the suspect is potentially armed and felonious.

Alatorre received “high-risk vehicle stop training” in the academy and later in advanced officer training. The Department taught officers that in a high-risk stop, the officer should walk up to the vehicle and “physically remov[e] [drivers and passengers] from the vehicle . . . [with] a control twist lock removal technique,” under which the officer gains control of the driver’s left arm by applying pressure to the left wrist and ordering the driver to place his or her right hand behind the head, then orders the suspect to step out of the vehicle. Alternatively, as taught in field training, the officer should order the suspect to interlace his or her fingers behind the suspect’s head, then the officer opens the vehicle door and grabs control of the suspect’s hands.

Fernandez noted conflicts between Alatorre’s account of the traffic stop and his use of force and those of the other officers. Alatorre described suspicious movements by Encinas that led to his use of force, but Chairez did not state there were any such movements. Alatorre also claimed he was six feet from Encinas when he heard “gun” being called three times (near where Alatorre collided with Encinas), and therefore he had no time to switch from his flashlight to his gun before pushing Encinas into

the wall. But according to the testimony of Archuleta and Aknin, Alatorre ran 47 feet from the time “gun” was yelled (from behind the third vehicle parked on the north side of the parking lot) until his use of deadly force. In addition, Alatorre claimed he heard “gun” yelled three times, then two more times, justifying his use of deadly force, but the other officers recalled hearing the word “gun” yelled only once (and Chairez, twice). Alatorre also acknowledged he did not search Encinas for a gun after Encinas had been handcuffed because he “was stressed out with everything that was going on.”

Fernandez characterized Alatorre’s 28 use-of-force incidents⁸ as “up there” and 16 flashlight incidents as “in the higher end.”⁹

3. *Alatorre’s Testimony*

Alatorre testified he approached the truck (instead of ordering Encinas out) because Encinas had complied with Alatorre’s order to show his hands. Alatorre acknowledged he stated during his IA interview that “our job is to walk up to the cars and . . . be friends with th[e] guy in front of his lady.”

⁸ As noted, Lance testified there were 26 prior use-of-force incidents. The Commissioners asked Fernandez about the “28” prior incidents. The precise number does not affect our analysis.

⁹ Lieutenant Boshnack, who was Alatorre’s supervising sergeant at the time of the incident, stated that it would have been “advantageous” for Alatorre to have taken control of Encinas sooner, but Boshnack would have conducted the stop “the same.” Boshnack acknowledged, though, that having the suspect walk out of the vehicle with his or her hands up (and no hold) would not stop the suspect from running. Boshnack did not “have a problem with the force that was used.”

Alatorre “never knew 100 percent” whether the driver was Escobar or Encinas, or that he had a weapon, but he knew Escobar was a gang member and had a no-bail warrant. He thought the driver “probably stashed the gun, like, underneath the seat.”

Alatorre stated he was the “lethal cover officer” during the traffic stop, but was not “in charge of the stop.” He had been taught the twist lock removal technique while in the police academy, but he preferred approaching with his gun instead of “twist[ing] the guy up, because then it feels like I started the fight,” and “the twist lock on a gangster in front of his lady . . . it’s almost disrespectful.” Alatorre admitted he made a mistake in not taking physical control of Encinas during the stop and he did not instruct Akinin or Archuleta to do so either. He did not know whether Encinas possessed a gun as he walked toward the patrol cars. Alatorre admitted that ordering Encinas out of the vehicle with his hands behind his head and grabbing him would have been a better option.

With respect to his use of force, Alatorre acknowledged he stated during the IA interview, “When I heard gun, gun, gun, I was already pretty much on top of him,” meaning a second away, and he pushed Encinas against the wall. He did not have time to pull out his gun during the second or less between the first two strikes. After the two lethal-force strikes, Alatorre opted for intermediate force (flashlight strikes to the ribs) because “I didn’t want to get killed” before “transition[ing] to my gun and shoot[ing] him.” After Encinas was handcuffed, Alatorre assumed the other officers would search him, and Alatorre did not instruct the officers to do so.

4. *Aknin's Testimony*

Aknin testified Alatorre was in charge of the stop as “the primary contact officer.” Alatorre and Chairez had advised her they were going to conduct a traffic stop on a person believed to be a felon, and she therefore approached the truck with her gun out. Aknin assumed Alatorre would take control of Encinas, explaining, “My experience with traffic stops was to have the suspect interlace his fingers behind his head while in the car. If they obey, I then open the door for them and have them get out and face the car. I then grab their hands right away and walk them to my car.” She felt uncomfortable when Alatorre did not order Encinas to intertwine his fingers behind his head given that Encinas had not yet been searched for weapons.

Aknin heard “gun” yelled once, when Encinas was running to the north of the second parked car. As she was running, she was approximately 10 feet behind Alatorre. When she came within two feet of Encinas, who was by then on the ground, she transitioned from her gun to a taser “[b]ecause I could not view the firearm, and it was not known to me if he had it. I was just assuming that he had it, and it was in his waistband.” She stated in her IA interview, “I didn’t feel comfortable using my firearm without seeing an immediate threat to me.” She used the taser to immobilize Encinas and take control of his arms and handcuff him, explaining, “I’m assuming the gun is still on him. However, the biggest aim was to take his arms into custody, rather than having to shoot him.”

5. *Archuleta's Testimony*

Archuleta confirmed he yelled “gun” once, and he did not remember anyone else yelling the word. Archuleta did not see

how Encinas and Alatorre ended up on the ground, nor did he see Alatorre's strikes to Encinas's head.

6. *Meyer's Expert Testimony*

Greg Meyer, a retired officer with 30 years of experience with the Los Angeles Police Department and a former police academy captain, testified as an expert witness on Alatorre's behalf. Based on his training and experience and his review of the investigative file, LBPD Manual, and state law, Meyer concluded "under the totality of the circumstances . . . there would have been an imminent deadly threat that needed to [be] countered with deadly force." Meyer did not assess Alatorre's credibility in reaching his conclusion.

F. *The Commission's Decision*

On October 21, 2022 the Commission found by a preponderance of the evidence that Alatorre committed the acts alleged in charges 2 and 4. Regarding Alatorre's failure to take control of Encinas, the Commission found Alatorre violated Civil Service Rules and Regulations Article VII, section 84, subsections (1) and (4) (section 84(1) and (4)); LBPD Manual sections 3.1 and 3.2; and LBPD Training Bulletin Nos. 67, 145, and 170. With respect to the unreasonable force charge, the Commission found Alatorre violated Civil Service Rules and Regulations sections 84(1), (4), and (5); LBPD Manual subsections 3.1, 3.2, 3.7, 7.1.2, and 7.1.3; and LBPD Training Bulletin No. 67. The Commission concurred with the City's decision to terminate Alatorre. It noted Alatorre's conduct did not "stand alone," citing his suspension for using unreasonable

force in January 2018 and his prior letter of reprimand for conducting a warrantless search.

G. *The Trial Court's Decision*

On June 28, 2023 Alatorre filed a verified petition for writ of mandate under Code of Civil Procedure section 1094.5 in the superior court challenging his termination. At a hearing on April 5, 2024 the trial court heard argument from counsel, then denied the petition. The court stated in its minute order: “After hearing oral argument and incorporating all briefs into the parties’ arguments . . . [¶] [t]he Court finds that the 2 findings made by the commission met the standard of preponderance of evidence. The court also finds the petitioner had prior discipline actions and that the commission did not abuse its discretion.”¹⁰

Alatorre timely appealed.¹¹

¹⁰ There was no court reporter at the hearing. We deny Alatorre’s March 6, 2025 motion to augment the record with his proposed settled statement of the April 5, 2024 hearing filed in the trial court on November 21, 2024. Alatorre’s proposed settled statement has not been agreed upon by the parties or certified by the court. (See Cal. Rules of Court, rules 8.137 (a) [a “settled statement is a summary of the superior court proceedings approved by the superior court”] & 8.155(a)(1)(B) [reviewing court may augment the record to include a “certified transcript-or agreed or settled statement-of oral proceedings”].) Nor does the proposed separate statement provide any information not reflected in the court’s minute order.

¹¹ Although “an appellate court generally lacks jurisdiction to decide an appeal from an order unless the order is one that is expressly made appealable by statute,” “reviewing courts, including [the California Supreme Court], have deemed orders

DISCUSSION

A. *Standard of Review*

“Section 1094.5 of the Code of Civil Procedure governs judicial review by administrative mandate of a final decision or order rendered by an administrative agency.” (*Johnson v. Housing Authority of City of Oakland* (2019) 38 Cal.App.5th 603, 612; accord, *Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 313.) “A trial court’s review of an adjudicatory administrative decision is subject to two possible standards of review depending upon the nature of the right involved.” (*Wences*, at p. 313.) “If the administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence.” (*Ibid.*; accord, *Johnson*, at p. 612.) “Where, as here, a case involves a police

and other rulings to be the ‘judgments’ under certain circumstances, such as when the ruling is sufficiently final to constitute the one judgment in the case.” (*Meinhardt v. City of Sunnyvale* (2024) 16 Cal.5th 643, 652, 654.) The court in *Meinhardt* observed that “[a]ppellate courts have followed this practice in the context of administrative mandate proceedings.” (*Id.* at p. 655; see *Sandlin v. McLaughlin* (2020) 50 Cal.App.5th 805, 820 [“Although the trial court never entered a formal judgment on the petition for writ of mandate, its order denying the petition in its entirety ‘constitutes a final judgment for purposes of an appeal.’”]; *Tomra Pacific, Inc. v. Chiang* (2011) 199 Cal.App.4th 463, 481-482 [order denying petitions for writ of mandate, although not titled a judgment “constitutes an appealable final judgment as it left no issue for further consideration”].) We construe the trial court’s minute order as an appealable final judgment.

officer's vested property interest in his employment, the trial court is required to exercise its independent judgment." (*Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 658; accord, *Wences*, at p. 314 ["It repeatedly has been held that . . . when a public employee challenges an employer's disciplinary action in a mandamus proceeding, the trial court is required to exercise its independent judgment on the evidence."].) "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.)

"After the trial court has exercised its independent judgment upon the weight of the evidence, an appellate court need only review the record to determine whether the trial court's findings are supported by substantial evidence." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143, fn. 10.) "[I]n making that determination, we must resolve all conflicts and indulge all reasonable inferences in favor of the party who prevailed in the trial court." (*Barber v. Long Beach Civil Service Com.*, *supra*, 45 Cal.App.4th at p. 659; accord, *Cassidy v. California Bd. of Accountancy* (2013) 220 Cal.App.4th 620, 627.) "[O]ur function on appellate review is solely to decide whether credible, competent evidence supports [the] court's judgment," and "[i]f the record contains facts to support that judgment, we must affirm." (*Shenouda v. Veterinary Medical Bd.* (2018) 27 Cal.App.5th 500, 512, citing *Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 69.)

Alatorre contends we should review the trial court's findings de novo because the relevant facts are undisputed. They are not. There are multiple disputed facts in the record, including whether Alatorre heard the word "gun" yelled multiple times during the incident, and where Alatorre was when "gun" was first yelled. Alatorre's testimony was contradicted by testimony from the other police officers. In light of these factual discrepancies and questions regarding Alatorre's credibility, substantial evidence review is appropriate. (See *M.A. v. B.F.* (2024) 99 Cal.App.5th 559, 570 ["where trial court's determination involves disputed facts or inferences drawn from undisputed facts, findings are reviewed for substantial evidence"]; *CADC/RADC Venture 2011-1 LLC v. Bradley* (2015) 235 Cal.App.4th 775, 792 [same].)

B. *Substantial Evidence Supports the Trial Court's Finding That Alatorre Engaged in Inexcusable Neglect of Duty by Failing To Take Physical Control of Encinas*

Alatorre contends he did not violate section 84(4) of the Civil Service Rules and Regulations for "Inexcusable Neglect of Duty—Intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty." He argues that section 84(4) did not require that he take physical control of Encinas, and he did not act contrary to the Department's rules and regulations. Neither contention has merit.

"Gross negligence" long has been defined in California and other jurisdictions as either a 'want of even scant care' or 'an extreme departure from the ordinary standard of conduct.'" (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 754.) "Gross negligence" falls short of a reckless disregard of

consequences, and differs from ordinary negligence only in degree, and not in kind.”” (*Brown v. El Dorado Union High School Dist.* (2022) 76 Cal.App.5th 1003, 1028; accord, *Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 881.)

Substantial evidence supports a finding that Alatorre acted with gross negligence in failing to exercise due diligence in the performance of a known official duty when he failed to take physical control of Encinas during the traffic stop. Lance and Fernandez stated the criteria for a high-risk vehicle stop is a belief that an occupant is armed or dangerous, poses a serious threat, or is a suspected felon. LBPD Training Bulletin No. 146 similarly states that “[h]igh-risk vehicle stops are made when officers believe that any occupants of a vehicle are a serious threat, armed, or have committed a felony.” Alatorre admitted he had been trained on high-risk vehicle stops in the academy, and he believed that Encinas had a weapon and was a suspected felon (Escobar) when he made the stop. Alatorre also described in his police report that just before the stop, Encinas had opened and closed the driver’s side door, causing Alatorre to advise Chairez that “Encinas might try to flee from the vehicle.” And at the beginning of the stop, Alatorre saw Encinas moving around the vehicle “as if he was attempting to hide something underneath the front seat,” which Alatorre believed could be a weapon.

Despite the indicia that this was a high-risk vehicle stop, Alatorre decided to approach the truck without giving any instructions to Aknin on how to back him up. LBPD Training Manual No. 145 on vehicle stops describes an approach to a vehicle during a traffic stop as “***the most dangerous portion of any car stop***” and lists “perceived officer safety risk” and “driver/occupant actions” as “[a]pproach [c]onsiderations.”

Fernandez testified that once Alatorre approached the truck with the belief that an occupant was armed or dangerous, he should have followed what the Department taught officers with respect to high-risk vehicle stops—to physically remove the occupant from the vehicle (using the “twist lock removal” technique or ordering occupants to interlace their fingers behind their heads), which Lance described as “basic academy training.” Lance further described a “contact cover” method for approaching the vehicle, and both he and Fernandez confirmed that Alatorre was the contact officer who was in control of the stop as the driver of the primary patrol car.

Aknin similarly testified that she assumed Alatorre, as the contact officer, would take control of Encinas and that she used the finger interlacing approach in removing a suspect to ensure she had control of the suspect’s hands. Further, she felt uncomfortable when Alatorre ordered Encinas out of the truck without using one of the removal techniques, given that Encinas had not yet been searched for weapons. It is undisputed that Alatorre did not take physical control of Encinas, and he did not order Aknin or Archuleta to do so. Further, video footage of the stop shows Alatorre turning his back on Encinas as Encinas walks away from the truck and starts running. In addition, Alatorre admitted during his IA interview that he made a mistake by not taking control of Encinas during the stop and that using the finger interlacing approach would have been a better option.

Moreover, Alatorre made a conscious decision to depart from the Department’s procedures. Alatorre acknowledged he did not like to use the control twist lock on suspects because it upset them and “it feels like I started the fight.” He also stated he did

not like applying the twist-lock hold on a gang member in front of “his lady” because “it’s almost disrespectful” and “[DET’s] job is to walk up to the cars and . . . be friends with th[e] guy in front of his lady.” Accordingly, Alatorre knew he had a duty to take physical control over Encinas and was aware of the proper techniques for doing so, but he intentionally substituted his own preferences for conducting the stop based on his desire not to upset or disrespect the suspect.

C. *Substantial Evidence Supported the Trial Court’s Finding That Alatorre Used Unreasonable Force on Encinas*¹²

At the time of the incident, LBPD Manual section 7.1.2 stated the Department’s “use of force” policy as follows: “Department personnel will attempt to achieve control through direction, forewarning, or reasonable physical force. Officers are permitted to use only that force necessary, based on reasonableness and the totality of circumstances” to effect a lawful detention or arrest; control a resistive, combative, or threatening subject; protect themselves, the suspect, or another person from death or destruction of property; or “[s]top a subject who is attempting to flee or escape a lawful detention/arrest.”

Under section 7.1.2, the “‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer possessing the same information, and faced with the same circumstances as the officer who actually used force.”

¹² Because we conclude the trial court’s findings were supported by substantial evidence, we do not reach Alatorre’s contention that the Commission inappropriately relied on Alatorre’s negligent conduct during the traffic stop to determine his use of lethal force was unreasonable.

Section 7.1.2 provides further, “When making an arrest, Officers shall strictly observe the laws of arrest and adhere to the following . . . : The arresting officer shall use only the amount of restraint necessary to assure the safe custody of the prisoner and his/her own safety.” LBPD Training Bulletin No. 67 (in effect at the time of the incident) addressed “[d]eadly force” with respect to the use of firearms, stating “firearms . . . shall be used by an officer only in the absence of reasonable alternatives,” and the presence of an immediate threat or substantial risk.¹³

“[P]eace officers have a duty to act reasonably when using deadly force,” and “[t]he reasonableness of an officer’s conduct is determined in light of the totality of circumstances.” (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 629.) “[A]n officer may reasonably use deadly force when he or she confronts an armed suspect in close proximity whose actions indicate an intent to attack.” (*Villalobos v. City of Santa Maria* (2022) 85 Cal.App.5th 383, 389; accord, *Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 345.) “[P]reshooting conduct is included in the totality of circumstances surrounding an officer’s use of deadly force, and therefore the officer’s duty to act reasonably when using deadly force extends to [such] conduct.” (*Hayes*, at p. 632.) “Because the reasonableness of a particular use of force is judged from the perspective of a ‘reasonable officer’ on the scene, department policies, prevailing

¹³ Fernandez testified that a flashlight can be an intermediate force option, but it can turn into a “lethal weapon” (like a firearm) when used in a certain manner, including how it was used in this incident. Lance likewise stated that Alatorre hitting Encinas in the head with a flashlight was “[l]ethal force, which is the same as shooting him with his gun.”

standards, and training protocols addressing how a reasonable officer should act in similar circumstances are often relevant to determining whether force was excessive.” (*A.B. v. County of San Diego* (2025) 112 Cal.App.5th 404, 422.)

Substantial evidence supported the trial court’s finding that Alatorre’s flashlight strikes to Encinas’s head were unreasonable under the circumstances. Because none of the other officers at the scene witnessed the flashlight strikes to Encinas’s head (and it is not shown in the video), the Commission and the trial court needed to evaluate Alatorre’s credibility in providing an account of his encounter with Encinas. Alatorre described an exigent scene during which he saw Encinas reach toward his waist multiple times as he ran; heard “gun” yelled three times while Encinas was running approximately six feet away from him; and heard “gun” yelled twice more while he was on the ground with Encinas, after losing sight of Encinas’s hands and observing Encinas trying to stand with his right hand still on his waist.

Alatorre’s credibility in recounting what happened was significantly undermined by the police reports (including his own), other testimony, and evidence in the case. Fernandez detailed multiple inconsistencies in Alatorre’s narrative. These included that Alatorre holstered his gun during the traffic stop and took his eyes off Encinas (turning away from him) despite believing Encinas was armed; other officers described Alatorre and Encinas as being almost 50 feet apart when “gun” was yelled; and the word “gun” was only yelled once (or twice), well before Alatorre and Encinas collided. Fernandez also noted that Chairez did not confirm Alatorre’s reports of Encinas’s suspicious pre-stop movements. Lance confirmed many of these

“embellishments” and “inconsistencies” and stated they led the chief of police to discredit Alatorre’s stated belief he faced an imminent threat and his justification for using deadly force, stating the chief’s belief that Alatorre “had justified his use of force after the fact.” Further, Alatorre testified at the Commission hearing (contrary to his police report) that he did not know when “gun” was yelled or where Encinas was at that moment. He also stated he was able to reassess the situation between his two strikes to Encinas’s head, although only a second or less passed between them. Although Alatorre believed the lethal threat persisted after his two strikes to the head, he nevertheless deescalated to intermediate force (flashlight strikes to the ribs) as a strategy to “stay in the fight” before switching to his gun and shooting Encinas.

Further, the three other officers at the scene employed only intermediate force on Encinas despite catching up with Encinas just seconds after Alatorre struck Encinas with the flashlight. Archuleta hit Encinas four times on the calf with a flashlight; Chairez pressed his leg against Encinas’s right shoulder to roll him over; and Akin used her taser two times on Encinas. The officers used intermediate force despite Akin believing Encinas still possessed a firearm, Chairez believing Encinas could easily have grabbed a weapon to injure Alatorre while Encinas was still on the ground, and Archuleta seeking to prevent Encinas from retrieving a weapon. Akin further justified her use of intermediate force because she could not see any gun, although she assumed Encinas had one, and she stated the “biggest aim” was to take Encinas into custody.

Finally, despite his belief that Encinas possessed a gun throughout the encounter, Alatorre took no steps as the primary

officer in control of the stop to ensure that Encinas was searched once he was handcuffed. Lance reported that Chief Luna and the command staff were “flabbergasted” that Alatorre did not make sure Encinas was searched for a weapon given his stated fear Encinas would have a second gun. On these facts, there was substantial evidence that Alatorre’s use of lethal-force flashlight strikes on Encinas was unreasonable.

Alatorre contends the trial court misapplied the factors articulated in *Graham v. Connor* (1989) 490 U.S. 386 for evaluating whether an officer’s use of force is objectively reasonable. *Graham* and its progeny, however, address the “constitutional standard govern[ing] a free citizen’s claim that law enforcement officials used excessive force . . . under the Fourth Amendment” in actions brought by a citizen under 42 United States Code section 1983 to recover damages for a government official’s violation of the citizen’s constitutional rights. (*Graham*, at p. 388.) Alatorre has not cited any authority, nor are we aware of any, to support his contention that an officer’s use of force is only unreasonable under the Department’s policy if it violates the Fourth Amendment.

Alatorre also faults the Commission for considering irrelevant evidence in finding his use of force unreasonable, including that Fernandez stated he had never hit a suspect over the head with a flashlight. However, as discussed, the trial court conducted an independent review of the evidence presented to the Commission and made its own findings regarding the charges sustained against Alatorre. Because we review only the trial court’s findings on appeal, we review the record for substantial evidence, and not the specific facts relied on by the Commission in making its decision.

D. *The Commission Did Not Abuse Its Discretion by Upholding Alatorre's Termination*

“[In] a mandamus proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of its discretion.” (*Skelly v. State Personnel Board*, *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 217 (*Skelly*); accord, *Pasos v. Los Angeles County Civil Service Com.* (2020) 52 Cal.App.5th 690, 700 (*Pasos*); *County of Los Angeles v. Civil Service Com. of County of Los Angeles* (2019) 40 Cal.App.5th 871, 877 (*County of Los Angeles*).) “Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed.” (*Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 404; accord, *Pasos*, at p. 700; *County of Los Angeles*, at p. 877 [“The court may not substitute its own judgment for that of the Commission, nor ‘disturb the agency’s choice of penalty absent “an arbitrary, capricious or patently abusive exercise of discretion” by the administrative agency’ [citation], but must uphold the penalty if there is any reasonable basis to sustain it.”].)

“[I]n a mandamus proceeding, an appellate court vis-a-vis *the trial court*, conducts a de novo review concerning possible abuse of discretion by the administrative agency.” (*Pollak v. State Personnel Bd.* (2001) 88 Cal.App.4th 1394, 1404; see *Pasos*, *supra*, 52 Cal.App.5th at p. 700 [“[t]he appellate court conducts a de novo review of the penalty assessed”].) “Only in an exceptional case will an abuse of discretion be shown because reasonable minds cannot differ on the appropriate penalty.” (*County of Los Angeles*, *supra*, 40 Cal.App.5th at p. 877; accord, *Pasos*, at p. 700.)

“In considering whether . . . abuse occurred in the context of public employee discipline, . . . the overriding consideration in these cases is the extent to which the employee’s conduct resulted in, or if repeated is likely to result in, ‘[harm] to the public service.’” (*Skelly, supra*, 15 Cal.3d at p. 218; accord, *Pasos, supra*, 52 Cal.App.5th at p. 701; *Kolender v. San Diego County Civil Service Com.* (2005) 132 Cal.App.4th 716, 721 [“‘The public is entitled to protection from unprofessional employees whose conduct places people at risk of injury and the government at risk of incurring liability.’”].) “Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence.” (*Skelly*, at p. 218; accord, *County of Los Angeles, supra*, 40 Cal.App.5th at p. 877.) “Whether an employee’s conduct has resulted or is likely to result in harm to the public service if repeated requires consideration of the nature of the employee’s profession, because ‘some occupations such as law enforcement, carry responsibilities and limitations on personal freedom not imposed on those in other fields.’” (*County of Los Angeles*, at p. 878; accord, *Pasos* at p. 701.) Law enforcement officers “‘are the guardians of the peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them.’” (*Hankla v. Long Beach Civil Service Com.* (1995) 34 Cal.App.4th 1216, 1224; accord, *Pasos*, at p. 702.)

The Commission did not abuse its discretion in determining that Alatorre’s conduct harmed the public service, supporting his discharge. Lance testified that Alatorre was discharged because he used unreasonable lethal force on a suspect in violation of

Department policy and training, his prior 12-day suspension for using unreasonable force involving flashlight strikes, his history of frequently using force (26 times according to Lance, 16 of which involved flashlight strikes), and his prior involvement in multiple civil lawsuits regarding his use of force, which resulted in “significant financial pay offs,” all of which violated the public trust.

The Commission was also entitled to consider the City’s possible future liability from Alatorre’s use of force and to find he would continue to use unreasonable force given his repeated use of force in the past, most recently resulting in a 12-day suspension, which did not deter his use of force in the current incident. As discussed, Lance testified that Chief Luna believed in light of Alatorre’s history that the Department would not be able to change his behavior in using unreasonable force. (See *Schmitt v. City of Rialto* (1985) 164 Cal.App.3d 494, 503 [“It was certainly appropriate for the city council to consider the potential legal liability of the city in assessing the actual or potential harm to the public service that might result from the future conduct of plaintiff if based on the same bad judgment.”].) On this record, the Commission did not abuse its discretion in upholding Alatorre’s discharge.

DISPOSITION

The judgment is affirmed. The City is to recover its costs on appeal.

FEUER, J.

We concur:

MARTINEZ, P. J.

SEGAL, J.