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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

COUNTY OF SONOMA PROBATION
DEPARTMENT,

Plaintiff and Respondent,

v.

CIVIL SERVICE COMMISSION OF THE
COUNTY OF SONOMA,

Defendant and Appellant;

DOUG HERON,

Real Party in Interest.

A128798

(Sonoma County
Super. Ct. No. SCV-246704)

I.

Real party in interest Doug Heron (Heron) was terminated by respondent County of Sonoma Probation Department (the Department). Heron appealed that decision to appellant Civil Service Commission of the County of Sonoma (the Commission). Following an administrative hearing, the Commission reduced the discipline from termination to suspension without pay for 240 hours, and demoted Heron to Juvenile Correctional Counselor II, step 1.

The Department filed a petition for writ of mandamus in the Sonoma County Superior Court seeking to set aside the Commission's decision. That petition was granted, and the Commission was ordered to vacate its decision and issue an new decision "consistent with the findings of this Court."

The Commission has filed this appeal challenging the trial court's issuance of the writ, claiming the court erred in concluding that there was no substantial evidence to support the Commission's decision to reduce the discipline. We agree with the trial court that the Commission's decision to reduce the discipline based on a finding that Heron was not dishonest is not itself supported by substantial evidence.¹ Therefore, we affirm.

II.

A. Factual and Procedural History

On May 21, 2009, Heron was formally notified that Sonoma County Chief Probation Officer Robert Ochs proposed to take disciplinary action against him, which could include termination (the May 21 notice). The action arose out the following facts alleged in the May 21 notice: "On December 31, 2008[,] without coordinating an entry plan with your subordinate staff, you entered the flooded room of [the resident], who was creating a disturbance. You verbally taunted, challenged and swore at [the resident]. You assumed an aggressive physical stance relative to [the resident] and then, without justification or excuse, you shoved [the resident] into the cement block wall of his room. As a result, [the resident] suffered a split mouth requiring stitches and broken teeth. [¶] You lied to Juvenile Hall Director Kim King regarding the incident. [¶] You falsified the Department Incident Report regarding the incident. [¶] You lied and were deliberately evasive during the course of the underlying administrative investigation interview."

¹ The decision by the Department to terminate Heron was based on eight separate findings that Heron violated county civil service rules. Three of the findings related to Heron's dishonesty in reporting about an incident which occurred at the Sonoma County Juvenile Hall (Juvenile Hall) on December 31, 2008 (the December 31 incident). The Commission's decision to reduce the discipline was based on its disagreement with the Department's conclusion that Heron was dishonest in reporting and in giving statements about the December 31 incident. The only issues raised in the trial court in connection with the petition for writ of mandamus, and on this appeal, relate to the Commission's conclusion that the Department had not met its burden of proof in proving Heron's dishonesty. Therefore, we have limited our discussion of the facts, and our legal analysis, to the single issue of whether the trial court properly found there was no substantial evidence to support the Commission's finding that Heron had not been dishonest.

Thereafter, an order of dismissal was sent by Ochs to Heron on June 15, 2009, advising him that he had been dismissed as a result of the circumstances described in the May 21 notice. The order advised Heron that he could appeal his dismissal to the Commission.

Heron appealed to the Commission. After exchanging witness and exhibit lists, case summaries, and briefs on the standard of proof, a hearing before the Commission commenced on October 29, 2009. The hearing continued over three days. On January 7, 2010, the Commission issued its “Decision and Findings Partially Upholding Appeal, Reducing Discipline by Overturning Termination From Employment” (the Commission’s decision). As is material here, the Commission found that the Department had failed in its burden of proving that Heron was dishonest in his report and in official statements made concerning the December 31 incident. As a result of that finding, the Commission reduced the discipline against Heron from termination to a 240-hour suspension without pay and demotion to “Juvenile Correctional Counselor II, step 1,” the position he held before his last promotion.

The Department filed a petition for writ of mandamus in Sonoma County Superior Court² seeking to set aside the Commission’s decision, and to reinstate the Department’s dismissal of Heron. A hearing on the petition was held on May 7, 2010, before the Honorable Mark Tansil. Following the hearing, Judge Tansil issued a Judgment on May 27, 2010, by which a peremptory writ of mandamus was issued ordering the

² Other than the administrative record, the only pleadings contained in the record on appeal pertaining to the mandamus proceeding are the judgment and notice of entry of judgment (filed under seal), certain notices pertaining to this appeal, and a transcript of the hearing on the petition.

Commission to set aside its decision, and to issue a new order “consistent with the finding of this Court.”³ This appeal followed.

B. Evidence Presented Upon Appeal to the Commission

As we have already noted, the hearing appealing Heron’s termination took place before the Commission over three days; October 29 and 30, and November 17, 2009. The following evidence was presented to the Commission which formed the basis for its decision that the Department had failed in its burden of proving Heron was dishonest in connection with the December 31 incident.

The first witness called was Juvenile Hall supervisor Giovanni Barbieri. At the time of the December 31 incident, Barbieri was a correctional counselor and was working in Juvenile Hall security on that day. Earlier that day, he had contact with one of the residents who was unhappy that he had been confined to his room for committing an infraction and could not join the other residents in recreation. Barbieri received a call later that day to return to that resident’s room because the resident had flooded it.

Barbieri met Heron on his way to the resident’s room, and the two proceeded there together. Barbieri asked Heron if he minded if Barbieri talked to the resident because he had had contact with him earlier; Heron responded that he would take care of it himself. Barbieri was outside the resident’s room making a telephone call when Heron first entered it. Barbieri heard raised voices while on the telephone, so he hung up and went into the room. The situation was “controlled” when the officers first got to the room because the door was closed and the resident was inside. It immediately became an “uncontrolled” situation once Heron opened the door and stepped inside the room.

³ The judgment was prepared by counsel for the Department. The original order stated: “A Peremptory Writ of Mandamus shall issue from the Court commanding the Commission to set aside its decision dated January 7, 2010, and to issue a new decision *upholding the Department’s termination of his employment.*” (Italics added.) The trial court struck the italicized words and wrote by hand, “consistent with the findings of this court.” Nevertheless, in reaching this result, the court found no substantial evidence supported the Commission’s findings, the reduction of discipline was an abuse of discretion, and the Department’s decision to terminate Heron was “fitting and proper.”

As Barbieri entered the room, the resident was removing clothing he had wrapped around his head and face to protect himself from possible pepper spray. Heron was giving him directions to turn around and be cuffed. Both the resident and Heron were “taunting each other like children” and using profanity, saying things to each other such as “[w]hat the fuck are you going to do about it?” According to Barbieri, the resident was facing the wall of his room and standing about six inches away from it with his hands to his sides. Heron pushed the resident into the wall using two hands, causing the resident’s face to hit the wall. When he bounced off, he was grabbed and taken down on his bed, where he was restrained by other officers.

Barbieri was familiar with a control hold called a reverse wristlock. He was certain that Heron intentionally pushed the resident into the wall, and was not attempting to apply a reverse wristlock on him. There was an effort to apply that hold, but it was not until after the resident was on his bed.

Also in the room was juvenile correctional officer Andy Rosas, who had been in law enforcement for 20 years. Both Barbieri and Rosas were “blown away” by what had happened. Barbieri testified Rosas told him that in his entire law enforcement career he had never seen such a blatant push by an officer.

Barbieri also testified that if Heron said he did not swear at the resident, it would not be the truth. Similarly, if he denied “talking smack”⁴ to the resident, that too would not be the truth, and that if Heron denied pushing the resident and instead claimed to apply a reverse wristlock, that also would not be truthful.

On cross-examination, Barbieri admitted that in his experience people sometimes perceive or remember things differently. He had never seen Heron push a resident before, but testified that Heron was a very vocal person and could intimidate some of the residents due to his size. Barbieri estimated Heron weighed about 250 pounds.

Officer Andy Rosas was called as the second witness. Rosas had worked at Juvenile Hall for about eight years. In addition to his work as a counselor, Rosas also

⁴ Talking smack is slang for negative taunts.

worked fulltime as a City of Belvedere police officer, where he had been employed for the past 19 years.

Rosas was working in Juvenile Hall on December 31, 2008. While on shift, he became aware of a disturbance in a resident's room. He went to the room and tried unsuccessfully to calm the resident down. He heard the toilet flush several times, and Rosas then knew the resident was trying to flood his room. Rosas called security and several more counselors arrived, including Heron, Barbieri, Lowry, and Peiper.

As the group got to the room, Heron indicated that he would take over. He looked into the room and told the resident, "[y]ou look fuckin' ridiculous." Heron then unlocked the door and entered the room. This surprised Rosas, because the situation was still volatile. Rosas testified that when Heron went into the room, his behavior towards the resident was aggressive, forceful, and assertive. He was "in the [resident's] face." Heron was "a big strong man," and the resident was "just a small, mouthy kid."

At first it looked like this "unconventional . . . tactic" was working because the resident started to comply by taking off his extra clothes and putting the mattress—which he had been using as a shield—down. The resident turned around and put his hands behind his head. Heron then pushed the resident "hard" at about the shoulder blade level. According to Rosas, the resident was about one and a half or two feet from the wall, and he hit the wall face first, causing a "definite sound of flash hitting concrete." The push was not an attempt to use a reverse wristlock hold on the resident.

When the resident hit the wall, Rosas grabbed him and helped him down to his bed, where he then "cuffed him up real quick." The resident was bleeding profusely from his mouth, spitting up blood, and was very upset. Rosas did not see the resident do anything threatening that could have justified the push. Up to the time of the push, it looked like the resident was going to comply. Heron was not trying to apply a reverse wristlock on the resident. He pushed him into the wall. The injury to the resident occurred when he hit the wall, not when he was down on his concrete bed slab. There was a distinct spot of blood on the wall where he hit it. After that, there was blood

everywhere, including the bed. Rosas had “zero doubt” in his mind that the injury to the resident occurred when he hit the wall after Heron pushed him into it.

Rosas testified that if Heron said that he did not swear at the resident, it would not be the truth. Similarly, if Heron denied “talk[ing] smack” to the resident, that would not be the truth; if Heron denied pushing the resident and instead claimed to have applied a reverse wristlock, that too would not be truthful; and if Heron said the injuries to the resident occurred on the bed slab and not when he hit the wall, nor would that be truthful. Heron might lie about not using profanity on an inmate because it would make him look bad given what happened. According to Rosas, the residents “use a lot of profanity” at Juvenile Hall, but it is “very, very rare” for staff members to use it. In his two decades as a police officer, Rosas had never seen an officer use as much force against someone as Heron did during the December 31 incident.

Rosas testified that when Heron got to the resident’s room, he told the other officers to back off because he was going to handle the situation. Officer Courtney Peiper was already at the door when they arrived. Police officers use intimidation to control suspects, and Heron was an intimidating looking person. Rosas saw the resident put his hands on, or behind, his head. If Barbieri said the resident’s hands were at his sides, it may be that that they remembered the incident differently. Although Heron pushed the resident, Rosas did not think Heron wanted to hurt the resident. Nevertheless, in the opinion of Rosas, Heron used excessive force against the resident under the circumstances.

Kim King testified that she was the director of Juvenile Hall, and had held that position since May 2007. She first became aware of the December 31 incident when she heard it on the Juvenile Hall radio. Heron came into her office to tell her about it. He told King about the resident flooding his room and how the resident was injured as Heron placed him on the concrete bed slab. After checking on the nature of the resident’s injuries, Heron informed King that he had a cut lip and a chipped tooth, and was going to be transferred to the hospital.

Later in the day, King learned that Rosas reported that the resident had been pushed or thrown against the wall by Heron, and that was what caused his injuries. This was different from what King had been told by Heron, who had never mentioned the resident having hit the wall of his room.

After learning this information, King called Barbieri, who she knew had been present during the incident. He confirmed that excessive force had been used. She then called Rosas, who also confirmed what happened in the resident's room. King then called Heron and told him he was being placed on administrative leave, and he should remove his badge and leave Juvenile Hall.

Heron was terminated by Robert Ochs, the chief probation officer. As an instance supporting the charge that Heron lied or was dishonest, Ochs concluded that Heron was dishonest in failing to put in his narrative report that he shoved the resident into the cement wall. Another specific instance of dishonesty was that, rather than reporting the shove into the wall, Heron reported the injury occurred when the resident was being placed in the concrete bed. Based on his report and what the eyewitnesses said, Ochs concluded it was more probable than not that Heron was not being truthful about what happened. Ochs also concluded that Heron was being dishonest when he reported that the resident turned towards him and it appeared that he was going to strike Heron. The other witnesses clearly stated that no such threatening action by the resident had occurred.

The first witness who testified for Heron was Anthony Hunter, a juvenile security officer and friend who had known him for 10 years. During that time Hunter formed the opinion that Heron was a truthful person. He had never known him to lie, either with regard to his work or personal life. While the two worked together, Hunter had never seen Heron treat a juvenile in a physically improper manner.

Another witness was a Sonoma County probation officer, Armando Carranza, who had known Heron for about 12 years. They sometime worked together at Juvenile Hall. In Carranza's opinion, Heron was a very truthful and honest person. He also had never

seen Heron physically mistreat a juvenile. These same opinions were offered by Coryann Nelson who worked with Heron at Juvenile Hall for about eight years.

Heron also testified at the hearing. He described what happened during the December 31 incident. He walked up to the resident's room and saw that it was flooded. The resident had a hygiene bag and a wet t-shirt around his chin. He was also holding the room's mattress as a shield. When the resident saw Heron, his shoulders slumped and he dropped the mattress. Heron then opened the door so he could talk to the resident without shouting. Heron told the resident that he looked ridiculous, in an effort to build rapport with him. He had a smirk on his face and was not yelling at the resident. Heron stepped forward to move the mattress that the resident had been holding. The resident then took off what he had wrapped around his face. The resident was cussing at Heron. The resident made a threat about how he could stab Heron except he did not want to get an assault charge filed against him. Heron then asked the resident to stand by the wall to be handcuffed. The resident was told to put his hands behind his back. Instead, the resident put his hands over his head, and made a move to his right that Heron perceived as a threat.

Heron did not remember the resident hitting the wall, or hearing the resident hitting the wall. He grabbed him and placed him on the bed. Heron stayed on top of the resident until he was cuffed. When he got up, he saw a four-inch pool of blood on the bed. Heron then called "Intake" and related that the resident was hurt.

Heron started to walk the resident down to Intake, but the resident started making death threats against him. Heron decided to go see King because the resident was so mad at him. Heron told King that a resident had to be restrained and that he had done so, but the resident had gotten hurt. He did not intend this brief discussion with King to be a complete report about what happened. Heron then went to write his report. He was almost done with the narrative portion when he was called away on another emergency. Later that day he completed a rough draft of his narrative report, but did not consider it finished because of the press of other business that same day.

Heron believed the resident was injured while they were on his bed slab. The first time he became aware of the possibility that the resident could have received his injuries at any other time was during his administrative interview with Linda Tripoli, who asked Heron if he slammed the resident against the wall in his room.

Heron did not intentionally slam the resident against the wall. The only way he could account for the testimony of the other witnesses was that perhaps his body blocked the other officers' view. Heron stated that rather than push the resident, he was trying to apply an "open hand restraint" hold, and that may have appeared to the witnesses as a push. The only thing he was focusing on at the time was the resident and getting control over him. Heron also denied using profanity with the resident. It was uncommon for staff to use profanity because using profanity, raising one's voice, and taunting a resident can escalate the situation.⁵

A number of exhibits were admitted into evidence, including Heron's taped administrative interview, which took place on February 27, 2009, during the investigation of the December 31 incident. At the commencement of the interview, Heron was advised that he was being ordered to answer all questions truthfully under threat of disciplinary action if he did not.

During that interview, Heron said that when he first opened the door of the resident's room, "I stood by the door in a calm, non-threatening way, told, you know, talked to him about why this is not necessary, you know, try to use all of my verbal skills that I have to, to not make it a restraint, not to make it a spray incident, you know, this is, you know, just try to remove him from the situation without it being anything physical."

Heron stated that as a result of his talking to the resident, the resident dropped the mattress he was holding as a shield, removed the clothing he had wrapped around his head, and started to comply. Heron then described what happened next: "[The resident] started to face the wall. He was turning towards his right. He, what I noticed and what I

⁵ Heron also called David Rose, an expert in the use of force, as a witness. However, this witness's testimony concerned other issues raised in the dismissal order besides dishonesty. Accordingly, we have omitted a summary of his testimony.

perceived at that point he kept turning towards his right like he was and his hands were clenched together in a fist, both hands. It appeared to me that he was going to make a strike at me. I then stepped forward towards [the resident]. It was about maybe one, one and a half steps towards him. I put him in a reverse wrist lock on his right arm. I placed my, my left arm on his left tricep and I placed him on the concrete slab where the, his bed, you know, his bed, and at that point I noticed that he had blood coming from his lip.”

Heron confirmed that after the incident, he made an oral report to Director King and told her exactly what he stated above at the interview. When asked directly, Heron denied making an open-handed strike into the resident’s back. He claimed his hands were never open anywhere on the resident’s back. Several times when asked directly, Heron denied shoving or pushing the resident into the wall of his room.

Heron also denied “talk[ing] smack” to the resident. He repeated several times during the interview that he spoke to the resident at all times in a calm, nonthreatening manner designed to deescalate the situation. Heron denied taunting or challenging the resident during the incident. He also denied that he used any profanity while he was talking to the resident. In fact, Heron stated that he never used profanity when talking to the “children.”

C. The Commission’s Decision

The Commission’s decision was filed on January 7, 2010. As is material to the issue raised on appeal, the Commission summarized the testimony outlined above indicating that the “facts of the incident which occurred on December 31, 2008 are in dispute.”

In addition to the above facts, the Commission also referred to the sworn statement of Juvenile Correctional Counselor Courtney Peiper, which was introduced into evidence. In her statement, Peiper indicated that once Heron entered the resident’s room, the tone and demeanor of the situation began to escalate, that “it was testosterone,” and she wanted to “grab his (Heron’s) ass out of there.” Peiper also confirmed that Heron pushed

the resident into the wall with two hands, that the resident hit the wall, and that it “did not sound pretty.”

Based on all the evidence, the Commission concluded that Heron did use profanity and an aggressive verbal demeanor when he entered the resident’s room. The Commission also found that Heron pushed the resident into the wall causing him physical injuries.

As to the facts supporting the charge of dishonesty, the Commission summarized the falsehoods identified by the Department in support of its decision to terminate Heron. These included: (1) Heron’s denial that he pushed the resident into the wall; (2) his denial of hearing the resident hit the wall; (3) his statement that the resident turned toward him in a threatening way; (4) his statement that he used a reverse wristlock on the resident rather than pushing him into the wall; (5) his belief that the resident sustained his injuries when he was placed on the concrete bed rather than at the wall; (6) his denial that he taunted the resident or swore at him while in the room; and (7) his statement that he had no reason to maintain a distance from the resident once he entered the room.

The Commission concluded that the preponderance of the evidence did not establish dishonesty as to any of these allegations. Specifically, the Commission found that there was a failure by the Department to prove that Heron: (1) lied to King on the day of the incident, (2) falsified his report, or (3) gave false or misleading statements during his interview to investigating personnel. The bases for these conclusions were the following: “. . . The majority of the Commissioners find that Heron could have been mistaken about where the injury to the resident occurred and that in the heat of the moment could have not heard or seen the resident strike the wall. Further[,] the majority of the Commissioners believe that Heron also could not have been aware of his use of profanity or aggressive demeanor when confronting the resident of Room 6. The Commission further finds that Heron could have reasonably believed that the resident was being aggressive and resisting when the resident began to turn towards Heron at the wall and that such reasonable belief resulted in Heron’s further actions in making contact with the resident in a manner which resulted in the resident striking the wall.”

Later in the decision, the Commission addressed the allegations of dishonesty once more: “The Commission finds that the Department did not establish by a preponderance of the evidence that Heron lied to King regarding the incident. The evidence presented did not establish that Heron knew that the resident had been injured on the wall rather than the bed when Heron made his verbal report to King on the day of the incident. The Commission believes that Heron’s testimony as to what Heron believed to be true at the time he make his verbal report to King was credible and that it is equally possible that Heron could have been mistaken in his belief regarding how the injury to the resident occurred. Further, the Commission finds that the Department did not establish by a preponderance of the evidence that Heron falsified the Department Incident Report in that Heron had not finalized the report upon leaving the Department and because of his suspension on the date of the incident, did not have the opportunity to finalize said Incident Report. Similarly, the Commission finds that the Department did not establish by a preponderance of the evidence that Heron lied during his administrative interview during the investigation of the incident. The Commission finds that while Heron’s statements during the interview were not an accurate depiction of the events on the day of the incident, the Commission believes that it is equally possible that Heron was mistaken rather than lying regarding said events. Thus, the Commission does not sustain the Department’s determination that Heron violated any Civil Service Commission Rules by lying.”

D. The Trial Court’s Decision

The trial court’s judgment granting the Department’s request for a writ of mandamus noted that the Commission found both that Heron’s conduct escalated the encounter on December 31 by using profanity and by showing an aggressive demeanor, and that Heron pushed the resident into the wall as detailed by the eyewitnesses. Nevertheless, the Commission “gravely undercut” these findings by speculating that Heron might have been “an unwitting victim of some mistake in perception or memory.”

The trial court emphasized in its judgment that Heron did not equivocate in any of his denials “on these subjects.” After noting that there was an absence of any evidence

that Heron's memory of the incident was in any way impaired, the court concluded that the Commission's finding that Heron did not lie about these events, was "speculat[ion]." To the contrary, the trial court found that, not only was there no factual basis for the Commission's finding, but the only reasonable inference to draw from Heron's firm denials was "a desire to avoid the strong discipline of termination." Therefore, the court concluded that substantial evidence did not support the Commission's finding that Heron was not being dishonest in his interviews and statements following the December 31 incident, and that the Commission's reduction in discipline was "a clear abuse of discretion."

E. Standard of Review

Code of Civil Procedure Section 1094.5 (section 1094.5) applies to judicial review by administrative mandate of any final decision or order rendered by an administrative agency. 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. (§ 1094.5, subd. (c).) The parties disagree as to which standard of review is applicable to the review of the Commission's decision.

If the administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32 (*Strumsky*); *Duncan v. Department of Personnel Administration* (2000) 77 Cal.App.4th 1166, 1173.) In such a case, the trial court must not only examine the administrative record for errors of law, but must also conduct an independent review of the entire record to determine whether the weight of the evidence supports the administrative findings. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143.) If, on the other hand, the administrative decision does not substantially affect a fundamental vested right, the trial court's review is limited to determining whether the administrative findings are supported by substantial evidence. (*Strumsky, supra*, at p. 32.)

A public employee's right to continued permanent employment is a fundamental right. (*Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 316; *Goggin v. State*

Personnel Bd. (1984) 156 Cal.App.3d 96, 103, disapproved on other grounds in *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1123, fn. 8.) This includes suspensions imposed on public employees which also affect their fundamental vested right to their employment. (*McMillen v. Civil Service Com.* (1992) 6 Cal.App.4th 125, 128-129 [12-day suspension].)

However, in discipline cases where the appealing party is the employing agency, and not the public employee, no fundamental right is involved. For example, in *Carpenter v. Civil Service Com.* (1985) 173 Cal.App.3d 446, a petition for writ of mandamus was filed by the county sheriff after the Civil Service Commission reduced discipline imposed by the sheriff from termination to suspension of a deputy. (*Id.* at p. 449.) The appellate court concluded that, while the matter involved a fundamental vested right of the employee, the employer did not have such an interest in the matter. Accordingly, the proper standard of review was whether the Commission's decision was supported by substantial evidence. (*Id.* at pp. 450-452.)

Similarly, in *Lowe v. Civil Service Com.* (1985) 164 Cal.App.3d 667, the county sheriff appealed from the Commission's decision to set aside the sheriff's dismissal of a deputy and instead impose a suspension. The court rejected the sheriff's contention that, like the deputy sheriff who was the subject of the disciplinary action, he too had a fundamental vested interest in hiring and retaining only competent law enforcement personnel, and in avoiding potential liability for misfeasance by his deputies. (*Id.* at p. 675.) Therefore, the proper standard of review on mandamus was "whether the Commission's penalty-reducing decision was supported by substantial evidence in light of the whole record," and not independent judgment by the trial court based on the weight of the evidence. (*Id.* at p. 674.)

Where the substantial evidence test is applicable in the trial court on mandamus, the appellate court also focuses on the findings made by the agency rather than on findings made by the superior court. (Cal. Administrative Mandamus (Cont.Ed.Bar 3d ed., Feb. 2011 supp.) Scope of Review Under CCP § 1094.5, § 6.35, p. 184, §§ 6.170-6.175, pp. 297-300; *id.*, *supra*, Appeal From Superior Court Judgment, § 16.51, pp. 639-

640.) Therefore, on appeal, we “answer[] the same question as the trial court . . . whether the agency’s findings were based on substantial evidence. . . .” (*Id.*, *supra*, § 16.56, pp. 642-643.)

As to the degree of employment discipline imposed, the standard of review on appeal remains the same as it was in the trial court. Any discipline imposed by the Commission may not be disturbed absent a manifest abuse of discretion. (*Talmo v. Civil Service Com.* (1991) 231 Cal.App.3d 210, 228 (*Talmo*).)

F. Analysis

First, we reject Heron’s contention that the trial court erroneously relied on de novo review in reaching its decision to issue the writ of mandamus. While the trial judge may have included several unnecessary rhetorical flourishes and questions in his judgment, it is clear that the substantial evidence standard was used to review the evidence supporting the Commission’s conclusion that Heron did not acted dishonestly.

As to the merits, we begin as did the trial court, noting that the Commission found Heron’s conduct escalated the hostile environment during the December 31 incident by: (1) using profanities directed at the resident, (2) showing an aggressive demeanor while in the resident’s presence, and (3) pushing the resident into the wall as detailed by the eyewitnesses. In order to make those findings, the Commission had to believe the eyewitnesses who testified to these occurrences, and to disbelieve Heron who testified directly to the contrary. Indeed, the Commission acknowledged as much when it concluded that “Heron’s statements during the interview were not an accurate depiction of the events on the day of the incident”

Nevertheless, the Commission found that Heron’s discredited recollection of events was not the result of dishonesty, but instead that he was simply “mistaken” about what happened. We must examine the record to determine if this conclusion is based on substantial evidence; that is evidence which is “reasonable . . . , credible, and of solid value” [Citation.]” (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) In so doing we are mindful that “the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial

evidence, contradicted or uncontradicted, which will support the determination [of the Commission], and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [Commission].” (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.)

There is no direct evidence to support the finding that Heron was mistaken in his recitation of what happened during the December 31 incident. Nor is there any circumstantial evidence to support a reasonable inference that Heron was simply mistaken. Certainly, the Commission’s decision does not shed any light on why it concluded Heron was mistaken and not dishonest.

To the contrary, Heron’s repeated denials that he used profanity against the resident, that he acting aggressively, or that he pushed the resident into the wall were unequivocal, emphatic, and consistent each time Heron was asked about the incident. This is not consistent with faulty memory. In addition, there was nothing vague about his recollections. Heron gave virtually a second-by-second account of his version of events in the resident’s room. This too is not consistent with faulty memory. Also, a review of his interview transcript demonstrates that Heron readily qualified his responses when he was uncertain about his recollections. Lastly, one would reasonably expect that being a law enforcement officer, Heron was professionally trained to recollect events accurately, even about incidents where emotions might be “ramped-up.”

In his appellate brief, Heron attempts to construct a justification for the Commission’s finding that he was not being dishonest, by pointing out that the testimony of several eyewitnesses concerning some of the details about the December 31 incident differed, and therefore if the eyewitnesses misperceived events, it was reasonable for Heron to have done so as well. While the eyewitness accounts may have differed as to several minor details, the witnesses were remarkably consistent about the key events.⁶

⁶ Again, because these witnesses were all law enforcement personnel, one would expect their specialized training would enhance their recollection of events as compared with the average untrained person.

They were unanimous in their testimony and statements that Heron used profanities against the resident, assumed a hostile demeanor towards him that escalated the situation, and unnecessarily pushed the minor unexpectedly against a concrete wall.

Therefore, we agree with the trial court that there is an absence of reasonable, credible evidence of solid value to support the Commission's finding that Heron was not dishonest in his statements made in connection with the December 31 incident.

Therefore, we affirm the trial court's judgment vacating the Commission's decision.

As to the reduction of discipline imposed by the Commission, as already noted we review the administrative determination under the same abuse of discretion standard applied by the trial court. (*Talmo, supra*, 231 Cal.App.3d at p. 227.) Reversal is warranted when the administrative agency abuses its discretion, or exceeds the bounds of reason. While the agency has discretion to act, that discretion is not unfettered. (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 217-218.)

The Commission's penalty reduction from termination to suspension and demotion was premised on its finding that Heron was not dishonest in reporting what happened during the December 31 incident. However, we have concluded that there was no substantial evidence to support this finding, and that instead, the Department had produced a preponderance of evidence supporting its conclusion that Heron was dishonest. Termination of a law enforcement officer under those circumstances is entirely appropriate, and is consistent with case law.

For example, in *Kolender v. San Diego Civil Service Comm.* (2005) 132 Cal.App.4th 716 (*Kolender*), a deputy sheriff was terminated for lying during an administrative investigation in an attempt to cover up another deputy's physical abuse of an inmate. Like the Commission here, the San Diego commission reduced the discipline from termination to a suspension. The appellate court reversed, finding it was an abuse of discretion to reduce the sheriff's discipline for dishonesty: " 'An abuse of discretion occurs where, as here, the administrative decision manifests an indifference to public safety and welfare. 'In considering whether such abuse occurred in the context of public employee discipline, we note that 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, '[h]arm to the public service.' [Citations.] Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence." [Citation.] 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.' (*Hankla v. Long Beach Civil Service Com.* (1995)] 34 Cal.App.4th [1216,] 1222-1223 (*Hankla*).) Accordingly, this is not a case where reasonable minds can differ with regard to the appropriate disciplinary action. (*Lowe v. Civil Service Commission* (1985) 164 Cal.App.3d, 667, 677)" (*Kolender, supra*, at p. 721.)

The court went on to emphasize the need to protect the public from dishonesty particularly by law enforcement personnel: " 'A deputy sheriff's job is a position of trust and the public has a right to the highest standard of behavior from those they invest with the power and authority of a law enforcement officer. Honesty, credibility and temperament are crucial to the proper performance of an officer's duties. Dishonesty is incompatible with the public trust.' (*Talmo, supra*, 231 Cal.App.3d at p. 231 [sheriff's deputy abused jail inmates and lied about it to his superiors].)" (*Kolender, supra*, 132 Cal.App.4th at p. 721.)

The court in *Hankla, supra*, 34 Cal.App.4th 1216 expressed the same sentiment about the importance of the trait of honesty for law enforcement personnel. The court observed that 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.' [Citation.]" (*Id.* at p. 1224.)

Other cases also have held that a finding of dishonesty merits termination, especially when the lying employee is engaged in law enforcement. (See *Paulino v. Civil Service Com.* (1985) 175 Cal.App.3d 962, 972 [sheriff's deputy falsely reported his illness to obtain sick leave]; *Nicolini v. County of Tuolumne* (1987) 190 Cal.App.3d 619 [deputy sheriff altered a prescription for Valium and was not candid during investigation]; *Ackerman v. California Personnel Bd.* (1983) 145 Cal.App.3d 395

[Highway Patrol officer misappropriated state property for personal use and denied it during investigation].) Given these authorities, the Commission abused its discretion in reducing the discipline imposed on Heron by the Department.

III.

DISPOSITION

The judgment of the trial court is affirmed. The matter is remanded for further proceedings consistent with this opinion.

RUVOLO, P. J.

We concur:

REARDON, J.

SEPULVEDA, J.