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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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KIMBERLY A. CELAYA, *Plaintiff/Appellant*,

*v.*

ARIZONA PEACE OFFICER STANDARDS AND TRAINING BOARD,  
*Defendant/Appellee.*

No. 1 CA-CV 17-0160  
FILED 5-31-2018

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Appeal from the Superior Court in Maricopa County  
No. LC2015-000470-001  
The Honorable Patricia A. Starr, Judge

**AFFIRMED**

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COUNSEL

Kelly & McCoy, PLC, Phoenix  
By Matthew J. Kelly, Kevin C. McCoy  
*Counsel for Plaintiff/Appellant*

Arizona Attorney General's Office, Phoenix  
By Seth T. Hargraves  
*Counsel for Defendant/Appellee*

**MEMORANDUM DECISION**

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Jennifer M. Perkins joined.

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**C A T T A N I**, Judge:

¶1 Kimberly Celaya appeals from the superior court’s ruling affirming the disciplinary decision of the Arizona Peace Officer Standards and Training Board (“the Board”) to revoke Celaya’s certification as a law enforcement officer. For reasons that follow, we affirm.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 Celaya was a police lieutenant for the Goodyear Police Department. As of late 2013, she had been a police officer for around 16 years, and a certified peace officer in Arizona for almost 14 years. *See* Ariz. Rev. Stat. (“A.R.S.”) § 41-1823(B).

¶3 Celaya was fired from the Goodyear Police Department based on events beginning on November 23, 2013. Around 6:00 p.m. that day, Celaya and her on-again-off-again boyfriend, A.B., went to a sports bar in Goodyear to watch a fight. A.B. had recently moved out of Celaya’s house and was staying with mutual friends W.B. and K.M., who joined them at the sports bar. All four had multiple drinks.

¶4 Around 10:00 p.m., the four left the sports bar and A.B. drove them to a bar in Chandler. The drive and their time at the Chandler bar – where they resumed drinking – were largely uneventful.

¶5 The four left the Chandler bar together around 1:00 a.m. and drove to a different bar in Goodyear. A.B. was driving, with W.B. in the front seat; K.M. and Celaya were in the backseat, with Celaya sitting immediately behind the driver. During that drive, Celaya and K.M. were being loud and somewhat unruly in the backseat, and A.B. grew frustrated and yelled at Celaya to sit down and shut up. Celaya, in turn, felt that A.B. was being disrespectful and began to hit and slap him.

¶6 The four arrived at the Goodyear bar just before last call, and they each had at least one more drink. While they were there, another man showed interest in Celaya, and A.B. smacked the man’s hand away from

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her. Soon thereafter, the bouncer told them the bar was closing, and A.B. put his glass on the bar and went outside without waiting for the rest of the group. Celaya soon followed him out, and they began arguing about her belief that he had disrespected her by leaving the bar without her. When W.B. and K.M. joined them outside, the four got back into the same seats in the car to drive home.

¶7 During that drive, Celaya kicked A.B. in the head and neck while he was driving, injuring him. During interviews and at the resulting hearing, A.B., W.B., and K.M. all recounted that Celaya was angry and kicked A.B. multiple times, after which A.B. spun and punched her once in the face. Celaya admitted kicking A.B., but claimed she had done so only after A.B. punched her.

¶8 Celaya reported the incident to her police chief and to her immediate supervisor, and the department began an internal affairs investigation. The investigation confirmed multiple instances of misconduct by Celaya, including physical violence directed at A.B. and dishonesty during the investigation. The police department fired Celaya and reported her termination to the Board, which initiated peace officer disciplinary proceedings. In those proceedings, the Board similarly alleged that Celaya had hit A.B. and kicked him in the head and that she lied to investigators in the resulting internal affairs investigation. After a five-day evidentiary hearing, an administrative law judge (“ALJ”) found that Celaya had committed the acts as alleged and that her conduct constituted cause for discipline under Arizona Administrative Code (“A.A.C.”) R13-4-109(A)(7) (commission of an offense involving physical violence), (8) (malfeasance, misfeasance, or nonfeasance in office), and (12) (conduct disrupting, diminishing, or jeopardizing the public trust in law enforcement).<sup>1</sup> The Board adopted the ALJ’s decision and revoked Celaya’s certification. Celaya moved for rehearing or reconsideration, and the Board struck one paragraph but otherwise reaffirmed its decision.

¶9 Celaya timely appealed the Board’s decision to the superior court, which affirmed. *See* A.R.S. §§ 12-902, 41-1092.09(B). Celaya appealed to this court, and we have jurisdiction under A.R.S. § 12-913. *See Svendsen v. Ariz. Dep’t of Transp.*, 234 Ariz. 528, 533, ¶ 13 (App. 2014).

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<sup>1</sup> The subsections of this provision have been renumbered since the time of the underlying events. *See* A.A.C. R13-4-109(A)(7), (8), (9) (2014). Because the renumbering did not materially change the substance of the provisions, we cite the current version of the regulation.

## DISCUSSION

¶10 Celaya argues that the decision sustaining the violence and integrity allegations was not supported by substantial evidence. She further urges that the ALJ erred by relying on uncharged conduct (Celaya allegedly improperly contacted A.B. during the investigation) as an aggravating factor, and that even though the Board struck the provision concerning the uncharged conduct from its decision, the disciplinary decision remained irrevocably tainted. Celaya thus argues that the superior court erred by affirming the Board's decision.

¶11 On judicial review of the Board's decision, the superior court must affirm unless the decision "is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion." A.R.S. § 12-910(E); *see also* A.R.S. §§ 41-1092(7)(s), -1092.09(B); *Horne v. Polk*, 242 Ariz. 226, 230, ¶ 13 (2017). The Board's decision will be upheld if the evidentiary record supports the decision, even if the record would also support a different conclusion. *Horne*, 242 Ariz. at 230, ¶ 13; *see also DeGroot v. Ariz. Racing Comm'n*, 141 Ariz. 331, 336 (App. 1984).

¶12 On appeal, this court is not bound by the superior court's assessment and instead independently reviews the administrative record to determine whether a preponderance of the evidence supports the Board's decision. *See Parsons v. Ariz. Dep't of Health Servs.*, 242 Ariz. 320, 322, ¶ 10 (App. 2017). The court reviews legal determinations de novo. *McGovern v. Ariz. Health Care Cost Containment Sys. Admin.*, 241 Ariz. 115, 118, ¶ 8 (App. 2016).

### I. Sufficiency of the Evidence.

¶13 The Board is authorized to establish qualifications for peace officer certification and to suspend or revoke certification for failure to comply with such requirements. A.R.S. § 41-1822(A)(3), (D)(1). Here, the Board alleged and later concluded that Celaya's conduct in hitting A.B. and kicking him in the head (the "violence allegation") and thereafter lying to internal affairs investigators about the incident (the "integrity allegation") met three grounds for suspension or revocation of her peace officer certification: (1) committing an offense involving physical violence; (2) committing malfeasance, misfeasance, or nonfeasance in office; and (3) engaging in conduct that diminishes public trust in the law enforcement profession. A.A.C. R13-4-109(A)(7), (8), (12). Celaya challenges the sufficiency of the evidence to support the Board's conclusions regarding these allegations.

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**A. Exhaustion of Administrative Remedies.**

¶14 Preliminarily, the Board argues — as the superior court held — that Celaya failed to contest the sufficiency of the evidence supporting the Board’s decision in her motion for rehearing, and that she thus failed to exhaust administrative remedies as to that issue and waived any challenge to that issue on judicial review. The Board does not dispute that Celaya contested the violence and integrity allegations during the administrative proceedings generally, and it acknowledges that Celaya properly filed a motion for rehearing from the Board’s initial decision as required for exhaustion under A.R.S. § 41-1092.09(B). *See also* A.R.S. § 12-902(B); A.A.C. R13-4-118(E)-(F). The Board asserts, however, that because Celaya did not directly argue sufficiency of the evidence in her motion for rehearing (and instead argued that the decision was tainted by consideration of allegedly improper evidence), she waived any judicial review of sufficiency.

¶15 Even assuming the scope of judicial review is limited to the issues raised in a motion for rehearing, Celaya’s motion, read broadly, encompassed a challenge to the sufficiency of the evidence substantiating both sets of allegations. Her motion directly argued that the ALJ considered improper evidence reflecting on Celaya’s character and truthfulness. Her motion further asserted that, absent the allegedly improper evidence, the remaining evidence was insufficient to sustain the integrity allegations. *See* A.A.C. R13-4-118(G)(6).<sup>2</sup> Although her motion did not expressly challenge the sufficiency of the evidence underpinning the violence allegations, it directly implicated conclusions regarding Celaya’s truthfulness in asserting that she kicked A.B. only after he punched her, which in turn implicated the evidence supporting the violence allegations. Accordingly, Celaya preserved her challenge to the sufficiency of the evidence.

**B. Violence Allegation.**

¶16 The record supports the Board’s conclusion that Celaya’s conduct constituted an offense involving physical violence. *See* A.A.C. R13-4-109(A)(7).

¶17 Celaya admitted that she hit and slapped A.B. in the car, although she testified she only tapped him lightly to get his attention

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<sup>2</sup> This subsection was renumbered after the administrative proceedings at issue here, *see* A.A.C. R13-4-118(F)(6) (2015), but because the renumbering did not materially change the substance of the provision, we cite the current version of the regulation.

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because she was angry that he had disrespected her. A.B. recounted that Celaya had hit his arm, slapped his face, and covered his eyes while he was driving. K.M. did not see the slap, but held Celaya's hand to prevent additional conflict after A.B. told Celaya to stop hitting him.

¶18 Celaya also admitted kicking A.B., although she claimed that she did so only in response to A.B. punching her in the face. The other witnesses, however, uniformly reported that Celaya had kicked first. Celaya acknowledged that A.B. was injured as a result of being kicked.

¶19 This sustained course of violent acts supported a finding that Celaya committed disorderly conduct by engaging in violent behavior intending to (or at least knowing it would) disturb A.B.'s peace and quiet. *See* A.R.S. § 13-2904(A)(1). And the kicks by which Celaya injured A.B. supported a finding that she committed assault. *See* A.R.S. § 13-1203(A)(1).

¶20 Celaya argues that the decision accepted as true her testimony that she kicked A.B. reflexively only after he punched her in the face, and she thus urges that the kicks were a justified use of physical force in self-defense, which would not support the conclusion that she had committed an offense involving physical violence. But the decision did not credit Celaya's version of events. Instead, the Board accepted the other witnesses' contrary statements, concluding that "the greater weight of the evidence presented established that [Celaya] kicked [A.B.] at least twice *before* he punched her and then once after he punched her." (Emphasis added).

¶21 The statement in the decision on which Celaya relies – "Even assuming that [Celaya] did not kick [A.B.] until after he had punched her in the face, that does not negate that [Celaya] physically attacked [A.B.]" – did not adopt Celaya's version of events but rather assumed that version for the sake of argument, and in any event, it reasonably reflected that Celaya had physically attacked A.B. by hitting and slapping him while he was driving even before the kicks. Accordingly, and even assuming Celaya's version of the events would support a justification defense for her kicking A.B. after he punched her, substantial evidence supported the Board's conclusion sustaining the violence allegation. *See Horne*, 242 Ariz. at 230, ¶ 13.

**C. Integrity Allegation.**

¶22 Celaya also challenges the sufficiency of the evidence that she was untruthful during the internal affairs investigation. The Board's decision relied on three specific falsehoods: (1) Celaya initially incorrectly claimed that she picked up A.B., W.B., and K.M. (and that their night

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together began at the Chandler bar), whereas the evidence showed that A.B. had picked up Celaya and they had met W.B. and K.M. at the Goodyear sports bar; (2) Celaya claimed A.B. slammed his glass to the counter when leaving the last bar, whereas video showed him sliding the glass and tapping his hand or fingers on the bar; and (3) Celaya claimed she did not kick A.B. until after he punched her, whereas A.B., W.B., and K.M. recounted that Celaya had kicked first.

¶23 Celaya contests the finding of dishonesty as to who picked up whom because the police chief exonerated her of that allegation in the departmental investigation leading to her termination. The chief reasoned that Celaya may have misinterpreted the question that led to her inaccurate answer, and noted that she admitted the misstatement in her second interview. But the Board is not bound by the chief's conclusion. *See* A.A.C. R13-4-109(F) ("Action by an agency or a decision resulting from an appeal of that action does not preclude action by the Board to deny, cancel, suspend, or revoke the certified status of a peace officer."). Moreover, the questioning that led to Celaya's initial answer was:

Q: . . . Were you picked up at your house to go to Chandler or did you . . .

A: No. I picked them up 'cause it was my car.

. . . .

Q: Okay. So you drove to pick up [W.B.], [K.M.], and [A.B.] and [A.B.] took over driving?

A: Yes.

Based on these relatively specific and direct questions, the Board could conclude that Celaya's false answers (even though later corrected in the second interview) reflected dishonesty rather than misunderstanding.

¶24 Celaya next claims that, given the acknowledgment in the Board's decision that each person's "perceptions and recollections" of the evening may have been influenced by alcohol, no evidence supported that she was lying (rather than truthfully recounting her perhaps-inaccurate recollection) about A.B. slamming his glass on the bar top just before he left the last bar. But A.B. denied slamming his glass down, neither W.B. nor K.M. thought he had slammed it, and the surveillance video from the bar (as viewed by the investigating detectives as well as the ALJ) showed him placing the glass down rather than slamming it down. Moreover, the video

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showed that Celaya was looking away from A.B. when he put the glass down, contrary to her claim that she saw him slam it. The record thus supports the conclusion that Celaya's statement was not truthful.

¶25 Celaya further contends the conclusion that she was dishonest in claiming to have kicked A.B. only after he punched her was arbitrary and not supported by substantial evidence. Although Celaya consistently maintained that A.B. punched her first, A.B., W.B., and K.M. all recounted that Celaya had kicked A.B. before he punched her, providing ample support for the Board's conclusion. *See DeGroot*, 141 Ariz. at 336.

¶26 Celaya again argues that, at most, the record reflects a mistaken, alcohol-clouded recollection rather than dishonesty. But this remains at its core a credibility determination, which rests "peculiarly within the province of the trier of facts." *Anamax Mining Co. v. Ariz. Dep't of Econ. Sec.*, 147 Ariz. 482, 486 (App. 1985). Celaya again suggests that the decision accepted her account of the kicking as true with regard to the violence allegation, and thus should have accepted its truth with regard to the integrity allegation as well. But as noted above, that portion of the decision did not find Celaya to be truthful and instead simply assumed for the sake of argument that her version was accurate; the decision instead expressly credited the contrary statements from A.B., W.B., and K.M. Celaya urges that the Board improperly ignored the long-standing friendship among A.B., W.B., and K.M. and the potential that these witnesses might be biased in favor of A.B. But evidence of the various relationships was in the record, so the Board had the opportunity to assess potential bias and permissibly found their statements credible. *See id.* Finally, Celaya asserts that, given that she was seated immediately behind A.B. in the car, it would have been impossible for her to kick him in the head and neck as he and the other witnesses recounted. But she admitted kicking A.B. from her position in the back seat (although she contested the order of events). Accordingly, substantial evidence supported the Board's conclusion sustaining the integrity allegation. *See Horne*, 242 Ariz. at 230, ¶ 13; *see also* A.A.C. R13-4-109(A)(8), (12) (authorizing discipline based on malfeasance and conduct diminishing public trust in law enforcement).

## II. Scope of Discipline.

¶27 Celaya argues that the Board's decision was tainted by improper reliance on uncharged conduct (Celaya contacting A.B. during the investigation) as an aggravating factor weighing on her integrity. She asserts that removing the uncharged conduct from consideration should at



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least have led to a lesser punishment than revoking her peace officer certification.

¶28 Before participating in interviews during the internal affairs investigation, Celaya received a comprehensive warning regarding her obligations and rights during the investigation. The first portion of the warning reflected the holding of *Garrity v. New Jersey*, 385 U.S. 493, 499–500 (1967), that if the State requires a police officer to answer questions (as in an internal affairs investigation) as a condition of keeping her job, the officer’s compelled statements cannot be used in subsequent criminal proceedings. The warning given to Celaya also included non-*Garrity* advisements, including an order that Celaya not communicate with anyone about the investigation (with a few exceptions not relevant here):

8. You are ordered not to discuss this investigation, including your interview, with anyone other than the investigator(s), your attorney, minister, employee representative, healthcare professional or spouse.

¶29 The Board’s complaint against Celaya alleged, as described above, that she was dishonest with the internal affairs investigators. It did not, however, allege that Celaya had violated the warning by communicating with A.B. during the investigation. The police chief nevertheless testified, over Celaya’s objection, that after those warnings, Celaya called A.B. and said words to the effect of “do you know what you’re doing to me.” The chief testified that communicating with A.B. after being directed not to do so reflected negatively on Celaya’s integrity. The ALJ noted this uncharged conduct in the decision (incorrectly characterizing it as a *Garrity* violation) and relied on it as an aggravating factor reflecting negatively on Celaya’s character and integrity.

¶30 Celaya urges that the ALJ’s reliance on this evidence of uncharged conduct violated her right to due process and undermined the assessment of the integrity allegations. But even assuming the initial use of this information was improper, the Board granted Celaya’s request for reconsideration and struck the conclusion regarding the uncharged conduct from its final decision.

¶31 Celaya nevertheless argues that the Board’s decision on the integrity allegations and its decision to revoke her certification (rather than imposing lesser discipline) remained irrevocably tainted by its earlier exposure to and consideration of the uncharged conduct. She claims that the State relied heavily on that conduct to argue for revocation. The

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argument she cites, however, was directed to the actual *Garrity* violation, that is, lying after the warning that she was required to answer all questions truthfully (and the advisement that such answers could not be used in a criminal prosecution). The State's attorney argued that Celaya was dishonest in the internal affairs interviews, and that the Board has "traditionally revoked certification when there's a determination that an officer lies after receiving a *Garrity* warning." The attorney did mention the uncharged conduct violation, but then reiterated that "you traditionally revoke for *lying* after a *Garrity* warning" (emphasis added) and urged that "[b]oth allegations" (violence and integrity) warranted revocation. Thus, Celaya has not shown that the allegedly improper matter so infused the proceedings that the Board's final decision (which omitted consideration of the uncharged evidence) was tainted.

¶32 Celaya further argues that disparity in discipline imposed in her case and another heard the same day illustrates that improper weight was given the uncharged conduct evidence. In the other case, the Board imposed a six-month suspension on an officer who spoke to the target of an ongoing workers' compensation investigation in violation of an admonishment not to discuss the investigation with anyone. Celaya asserts that the "only distinction" between the two cases was that the other officer was not the target of the investigation, but that ignores the different nature and scope of her misconduct (including lying after receiving an actual *Garrity* warning). Simply put, the record does not show that she and the other officer were similarly situated so as to warrant similar discipline.

¶33 The Board struck from its decision the conclusion that Celaya now challenges and nevertheless expressly reaffirmed the balance of the findings and conclusions and its disciplinary decision. Accordingly, Celaya has not shown that the Board's final decision was tainted by prior reference to an allegedly improper matter or was contrary to law, arbitrary and capricious, or an abuse of discretion. *See* A.R.S. § 12-910(E).

### III. Attorney's Fees.

¶34 Celaya requests an award of attorney's fees under A.R.S. § 12-348(A)(2) and of costs under § 12-331. Because she has not prevailed, we deny both requests.

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**CONCLUSION**

¶35 The superior court judgment upholding the Board's final disciplinary decision is affirmed.



AMY M. WOOD • Clerk of the Court  
FILED: AA