Jones v. City of Loma Linda

Court of Appeal of California, Fourth Appellate District, Division Two

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Reporter
2019 Cal. App. Unpub. LEXIS 1049 *

STEVE JONES, Plaintiff and Appellant, v. CITY OF LOMA LINDA, Defendant and Respondent.

Opinion

[*1] APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge. Reversed with directions.

Castillo Harper and Michael A. Morguess for Plaintiff and Appellant.

Grossberg & Hoehn, Scott J. Grossberg and Laurel A. Hoehn for Defendant and Respondent.

Plaintiff and appellant Steve Jones (Jones) was employed by defendant and respondent City of Loma Linda (the City) as a firefighter. The City terminated Jones's employment. In an administrative appeal, the City Council affirmed the termination of Jones's employment. Jones petitioned the trial court for an administrative writ of mandate directing the City to reinstate his employment. (Code Civ. Proc., 1094.5.) The trial court denied Jones's writ petition.

Jones contends the trial court erred by denying his petition. First, Jones asserts the Loma Linda City Council (City Council) applied an incorrect standard of review. Second, Jones contends the findings against him are not supported by substantial evidence. Third, Jones asserts the record does not support selecting termination as the form of discipline. We reverse the judgment with directions.

FACTUAL AND PROCEDURAL HISTORY

A. BACKGROUND

1. *JONES'S EMPLOYMENT*

Jones began working as a firefighter in 1991. [*2] Jones was hired by the City in 2008. Jones was hired as a battalion chief for B-shift. B-shift worked a 48-hour shift, from 8:00 a.m. to 8:00 a.m., with 96 hours off. Jones's duties included responding to emergencies, requesting grants, and supervising the emergency medical services (EMS) program. If Jones learned that a paramedic or firefighter violated departmental policy then, depending upon the severity of the violation, Jones would handle the matter himself or "pass it up to [his] supervisor."

2. *SCOTT TOPPO*

Scott Toppo was employed by the City as a fire captain. Toppo was hired in 2003. Toppo worked on the B-shift. Captains report to battalion chiefs. On January 1, 2014, at approximately 7:00 p.m., an emergency call was received concerning a person (the patient) at an apartment complex who, as a result of a mental health disorder, was a danger to himself or others. (Welf. & Inst. Code, 5150.) Toppo responded to the call along with engineer Mike Atchison and firefighter/paramedic Mike Sepulveda.

Upon arriving at the apartment complex, Toppo saw three sheriff's deputies standing around the patient, who was seated in a grassy area; the patient was handcuffed, bloody, red-faced, and screaming profanities. [*3] Toppo and Atchison cleaned the lacerations and blood off the patient's face. The patient calmed while they cleaned him, but resumed screaming when they stopped. Toppo smelled alcohol on the patient and the patient complained that his wife "was cheating on him." A deputy told Toppo that they were called because the patient "wanted to commit suicide by cop."

An ambulance arrived with two personnel (the medics). The medics placed the patient on a gurney, without handcuffs. The medics and Atchison then began restraining the patient on the gurney. The restraints were soft restraints, made of nylon and Velcro. The patient cooperated and was loaded onto the ambulance to be taken to a hospital for a Welfare and Institutions Code section 5150 evaluation. Toppo told the medics that if the patient became belligerent to stop the ambulance and the firefighters would assist them, because the firefighters would be following the ambulance. Sepulveda rode in the ambulance with the medics.

As the ambulance and firetruck approached the apartment complex's gate, the ambulance stopped, the back door of the ambulance opened, and the medic driving the ambulance ran to the back of the ambulance. Atchison and Toppo exited the firetruck and ran toward [*4] the ambulance. Toppo saw the patient had freed his right arm from the restraint and was "trying to kick" with his legs. Sepulveda was leaning over the patient, trying to restrain him. The gurney was positioned so the patient was sitting up-not lying flat. The patient was approximately five feet nine inches tall and 175 to 200 pounds.

Toppo entered the back of the ambulance through a side door and moved behind the patient-facing the rear doors. The patient was attempting to break free from the restraints, and he was screaming. Atchison held the patient's feet down. Toppo placed his left hand on the patient's forehead, and cupped his right hand under the patient's chin, so as to keep the patient's mouth closed to prevent the patient from spitting on the firefighters and the medics. Toppo had seen patients spit on personnel in other situations. There was a harness on the patient attaching him to the gurney, but the straps were not tight. Toppo's hand placement on the patient's face lasted five to 10 seconds, then Toppo focused on tightening the straps of the patient's harness, leaving his left hand on the patient's forehead.

The patient spat toward Sepulveda, who was trying to restrain [*5] the patient's arm. The record reflects the following as to what happened next:

"[Investigator]: What happens then?

"Toppo: I reflexed. I . . . yeah, I reflexed. I was worried about my guys and I brought my hand up and I remember starting to come at him and thinking, don't do this, Don't do it and I hit the back of my hand.

"[Investigator]: Okay. And I'm just going to describe what you did for the record. You held your right hand up with a clenched fist, kind of rearing back. You still appeared to have your left hand on the [patient's] head?

"Toppo: I think I had kind of pulled off just a little bit.

"[Investigator]: Okay.

"Toppo: So I had a little bit of space. I think my fingertips were still touching.

"[Investigator]: Okay. And then, at that point, kind of describing having reflexed, you indicated that you kind of punched forward and hit your . . . the top of your left hand.

"Toppo: Top of my left hand, yeah.

"[Investigator]: Okay. And did that contact the patient?

"Toppo: Never. And I never . . . I actually slowed down. I held up. I just . . . I couldn't get my hand to stop and the only thing I could think of was to hit myself."

Toppo's striking of his own hand made a slapping sound. [*6] Toppo believed his left hand was slightly raised from the patient's forehead, so when his right hand struck his left hand, his left hand made a slapping noise as it came in contact with the patient. After Toppo struck his hand, "[t]he ambulance went silent," and the personnel were able to restrain the patient. Toppo believed the ambulance went silent "because of the slap." Toppo explained that the patient had been screaming immediately before the slap, but the slap was loud enough for all the personnel in the ambulance to hear it. Approximately 30 seconds after the strike, the patient asked, "[W]ho punched me[?]" Nobody responded to the patient's question. Toppo exited the ambulance.

3. *REPORT TO JONES*

On the night of January 1, 2014, Toppo spoke to Jones. Jones was in a dorm room at the fire station. Jones had finished showering and was changing clothes when Toppo knocked on the door. Toppo told Jones that the patient had been combative and spitting, and that they struggled with the patient. Toppo said to Jones, "I reflexed came down on my hand." Jones asked if Toppo and the crew were okay, and if there was anything that needed to be documented related to the "possible exposure" due [*7] to the patient's spitting. Toppo said, " 'No, we're all good but the guy upset me.' " According to Jones, the conversation with Toppo lasted 15 to 20

seconds. According to Toppo, the conversation with Jones lasted three to five minutes.

4. *SHIFT CHANGE*

On January 2, at 8:00 a.m., the C-shift started work. Jeff Gillette was the fire captain for the C-shift. During the shift change, the captain of the departing shift gives an update to the captain of the incoming shift. On January 2, Toppo spoke to Gillette during the shift change. Toppo and Gillette were in the kitchen seated at the table. Jones was also at the kitchen table.

Toppo told Gillette about the patient being combative. Toppo told Gillette that he put his hand next to the patient's head and struck his hand. Gillette did not "initially understand what he was describing." Gillette asked Toppo to again describe what happened, i.e., to repeat "how he placed his hand next to the patient." Gillette was shocked by what happened. Gillette understood that Toppo's palm was facing up, when it was struck by Toppo's fist. Jones did not participate in the conversation.

B. INVESTIGATING THE INCIDENT

1. *SUPERVISORS LEARN OF THE INCIDENT*

[*8] Jeffrey Roddy was a division chief for operations, which is above a battalion chief. James Gray was the fire marshal. A fire marshal is a specialty position, so Gray did not report to Roddy. On January 13, 2014, Roddy and Gray were at the administrative secretary's office. Gray asked to speak with Roddy. Gray and Roddy spoke in Gray's office. Gray asked if Roddy was "aware of the incident involving Toppo and a restrained patient." Roddy said he was not aware of the incident. Gray told Roddy, "[A]pparently Toppo struck a restrained patient because he was spitting." Roddy said he would speak with Jones.

At 8:30 that morning, Roddy went to the fire station to speak with Jones. Roddy spoke to Jones in Jones's office. Roddy asked if Jones was aware that Toppo "slugged a combative patient." Jones said he recalled Toppo telling him about a combative patient that was spitting, but that Toppo did not report striking the patient. Roddy was surprised that Jones reacted so calmly to the information from Roddy because Roddy had been shocked by the allegation that a fireman hit a patient. Due to Jones's calm demeanor, Roddy believed Jones was lying. Roddy told Jones there would be an official investigation [*9] into the incident of Toppo striking the patient. Roddy reported the incident to Fire Chief Jeff Bender who, along with Roddy, decided to order an official investigation.

2. *INVESTIGATION*

As part of the investigation into the incident, Jones was interviewed on February 6. The investigator was an attorney retained by the fire department to conduct the investigation. The investigator "found Jones to have little to no credibility and [that Jones] was by far the least credible person interviewed throughout the entirety of the investigation."

The investigator found Jones lied when he said that Toppo did not inform him of Toppo striking the patient. Jones had claimed that he was not present in the kitchen during the January 2 shift change update between Gillette and Toppo. The investigator found Jones's claim of not hearing the shift update between Gillette and Toppo was not credible. The investigator also found that Jones was dishonest on January 13 when Jones told Roddy that Toppo had not told Jones about striking the patient. The investigator found that Jones made false and misleading statements during his interview with the investigator on February 6.

The investigator sustained the [*10] following allegations against Jones: (1) "Jones was dishonest in the performance of his duties related to the reporting of the events of January 1, 2014"; (2) "Jones displayed a lack of cooperation and courtesy with the ongoing investigation into the events of January 1, 2014, when he made false and misleading statements during the investigation"; (3) "Jones willfully concealed pertinent information from supervisors related to the events of January 1, 2014"; (4) "Jones was insubordinate during his interview on February 6, 2014"; (5) "Jones failed to maintain job performance standards for the [Loma Linda Fire Department]"; and (6) "Jones violated City policies, ordinances, rules, and regulations through his conduct."

C. NOTICE OF TERMINATION

On April 24, 2014, the City served Jones with notice of its intent to terminate his employment effective May 9, 2014. The causes for dismissal included (1) violations of personnel rules and regulations, such as failing to maintain job standards, insubordination, and willful concealment of information from supervisors; (2) violations of the fire department operations manual, such as not acting in a positive, productive, and mature way; (3) violating [*11] Health and Safety Code section 1798.200, which requires the employer of emergency medical technicians to report certain acts of misconduct.

The City asserted that, on January 1, 2014, Toppo informed Jones that Toppo struck the patient. The City contended that Toppo spoke to Jones for three to five minutes, and described how "he placed his left hand on the patient's face and then punched down on the back of his left hand with a closed right fist striking the patient in the face. Despite Captain Toppo advising [Jones] of this serious misconduct on the evening of January 1, 2014, [Jones] failed to report the misconduct to [his] supervisors."

The City alleged that, on January 2, Jones was present at the kitchen table when Toppo told Gillette about striking the patient. Jones again failed to report Toppo's act of violence. On January 13, Roddy spoke to Jones about Toppo striking the patient, and Jones denied knowing about the violence. The City asserted Jones lied to Roddy. The City contended Jones did not act surprised when hearing of the violence, and therefore, Jones already knew of the violence. On February 6, Jones was interviewed as part of the investigation into the violence. During the interview, Jones lied to the investigator [*12] about the events of January 1 and 2.

D. *SKELLY* HEARING

On May 7, a *Skelly*[1] hearing was held. Jarb Thaipejr, the city manager for the City, presided over the hearing. On May 14, Thaipejr sent Jones a notice of intent to terminate. The termination was effective at 5:00 p.m. on May 14. The notice reflected that the causes of Jones's termination were Jones's violations of (1) the City's personnel rules and regulations; (2) the fire department operations manual; and (3) Health and Safety Code section 1798.200.

Thaipejr found (1) on January 1, Toppo informed Jones that Toppo struck a patient; (2) on January 2, Jones was present while Toppo told Gillette that Toppo struck a patient; (3) Jones did not report Toppo's conduct; (4) on January 13, Jones lied to Roddy about not knowing of Toppo's act of violence; (5) on February 6, Jones lied to the investigator about not having been informed of Toppo's act of violence on January 1 and 2.

E. APPELLATE ADVISORY OPINION

Jones appealed from the decision to terminate his employment. Jones agreed to have his appeal heard by an advisory hearing officer.[2] The hearing officer was selected from a list provided by the "California State Mediation and Conciliation Service." A two-day evidentiary [*13] hearing was held in December 2014. Witnesses testified during the hearing, including Gillette, Toppo, Roddy, Jones, Thaipejr, Bender, and others.

The hearing officer issued a written opinion. The issue before the hearing officer was whether there was just cause to terminate Jones's employment. The City argued there was plenty of evidence reflecting Jones was aware of Toppo's act of violence, failed to report the violence, and then lied about his knowledge of the violence.

Jones argued there was a miscommunication or misunderstanding when Toppo told Jones about striking the patient, in that Jones understood that Toppo struck his own hand-he did not understand that Toppo struck the patient. Jones contended he had no reason to lie about the incident. Jones asserted the City was using the incident as a pretext for terminating his employment. Jones contended the true reason for terminating his employment was that, after Loma Linda and Colton merged their fire departments, they needed to eliminate a battalion chief position. Jones noted that Toppo was not terminated for punching the patient, rather, he was demoted. Jones argued that the allegations of dishonesty should be found untrue, [*14] and that termination was an excessive punishment.

The hearing officer found Jones and Toppo were credible witnesses. The hearing officer concluded that Jones incorrectly assessed the severity of what had occurred between Toppo and the patient. The hearing officer noted that Jones's work evaluations reflected he performed at levels of competent, commendable, or outstanding. The hearing officer explained, "[Jones] may have fallen out of favor with top Management. However, his work ability and organizational abilities are noted. If Chief Jones has faults at all, it is the fact that he apparently does not relate well to Department higher Management and to what is happening in the future of the organization."

The hearing officer found there was just cause to discipline Jones, but not to terminate Jones. The hearing officer recommended a written admonishment be placed in Jones's employment file concerning ignoring subordinates' beliefs regarding the severity of incidents. The hearing officer recommended that Jones be reinstated to his position as battalion chief.

F. CITY COUNCIL DECISION

On July 14, 2015,[3] the City Council held a closed session meeting concerning Jones's appeal. The City [*15] Council rejected the recommendation of the hearing officer and affirmed the termination. The City

Council issued a written decision.

The City Council wrote, "The Council finds that to the extent his findings and recommendation are inconsistent with this decision, the Hearing Officer failed to fully consider the evidence in an objective manner, made statements and findings contrary to the credible evidence in the record, and drew conclusions not based on evidence presented. Accordingly, the Council rejects the Hearing Officer's Opinion and Award, and makes its own findings and conclusions as follows:

"The Council finds that the facts and evidence support the charges of serious misconduct against Jones as stated in the Confidential Investigation Report, in the Notice of Intent to Terminate and in the Notice of Termination. The findings of facts and conclusion set forth in the attached Notice of Termination [citation], and its supporting exhibits, including the Confidential Investigation Report [citation], are hereby sustained, adopted and incorporated herein. The Council specifically notes that both the independent investigator and the hearing officer concluded that the incident between [*16] the paramedic (Toppo) and the patient did occur and that it was reported by Toppo to Jones, but that Jones failed to follow up or report the matter to his own superior as required. This was a serious and inexcusable dereliction of Jones' duties."

G. WRIT PETITION

1. *JONES'S PETITION*

On August 21, 2015, Jones petitioned the trial court for an administrative writ of mandate. Jones asserted the City failed to meet its burden of proof against Jones because (A) it failed to show Jones had knowledge that Toppo struck the patient; and (B) it failed to show there was a policy requiring Jones to report Toppo's conduct. Jones asserted the City violated his rights under the firefighter's procedural bill of rights (Govt. Code, 3253) by not providing Jones with information about the investigation against him prior to Roddy questioning Jones.

Jones asserted his pretermination *Skelly* hearing was not fair and impartial. Jones asserted Thaipejr had no experience conducting *Skelly* hearings. Thaipejr did not read the investigative packet prior to the hearing. Instead, Thaipejr spoke with Bender before the hearing, which tainted Thaipejr against Jones. Thaipejr did not consider Jones's argument about mitigation, as shown by Thaipejr's [*17] "cut and paste replica of the *Notice of Intent to Terminate* signed by Chief Bender."

Jones contended the disparate discipline showed that termination was inappropriate. Jones asserted that Sepulveda witnessed Toppo's act of violence and failed to report it. Jones alleged that Sepulveda was disciplined, but continued to work for the City's fire department. Jones contended Atchison was present during Toppo's act of violence and failed to report it. Jones alleged that Atchison was not disciplined. Jones contended Gillette delayed reporting Toppo's conduct until January 13. Jones asserted Gillette was not disciplined for the delay in reporting. Jones contended that Toppo was demoted for his act of violence. Jones contended the evidence that no one else involved in the matter was terminated showed that termination was inappropriate.

Jones asserted terminating his employment was an abuse of discretion. Jones contended the miscommunication that occurred between Toppo and Jones was unlikely to reoccur, and therefore, there was no need to terminate Jones's employment.

2. *THE CITY'S OPPOSITION*

The City opposed Jones's petition. The City asserted Toppo told Jones that he struck the patient, [*18] and Jones understood that Toppo struck the patient. The City contended that Jones's assertion that there was a miscommunication with Toppo was "simply implausible." In regard to Jones's argument that the City does not have a policy requiring a battalion chief to report misconduct, the City asserted that Jones was not found to have violated a City policy, rather, the notice of intent to terminate reads, " 'Your failure to report to your supervisors that a patient had been struck in the face by a Captain during an emergency call is a serious failure on your part.' "

The City contended Jones was not treated disparately. The City contended Sepulveda and Atchison were not supervisors and therefore "had no obligation to report" Toppo's conduct. The City further asserted that Jones's dishonesty about his failure to report Toppo's conduct compounded the findings against Jones. The City asserted termination was the appropriate form of discipline because Jones was dishonest and could not be trusted.

The City asserted Jones's rights pursuant to the firefighters procedural bill of rights (Gov. Code, 3253) were not violated because Roddy was speaking to Jones about Toppo-not about Jones. The City contended there was not [*19] a *Skelly* violation. The City asserted Jones failed to provide authority reflecting

that a *Skelly* hearing officer must read an investigative report prior to the hearing, rather than after the hearing.

3. *HEARING*

The trial court held a hearing on Jones's writ petition. The trial court said its tentative ruling was to deny the petition because "the weight of the evidence supports the [C]ity's decision." Jones argued that there was insufficient evidence Jones understood that Toppo struck the patient.

The City asserted Toppo testified that, while speaking with Jones, he demonstrated the act of punching his own hand, which then struck the patient. The City asserted that Jones witnessed Toppo reenact the punching movement for Gillette. The City contended, "Jones had an obligation at that point in time to make further inquiry as opposed to ignoring it." The City contended no other personnel were terminated because "[n]obody else was in a position of management and lied about the incident." The City contended, "The issue here is one of integrity."

Jones contended the evidence reflected Jones never made eye contact with Toppo during the first discussion, so it could not be shown that Jones [*20] saw Toppo demonstrate the punch. In regard to the conversation with Gillette, Jones contended the evidence was unclear as to whether Jones was present at the table when Toppo demonstrated the punch for Gillette. Jones asserted he had no reason to avoid investigating Toppo, i.e., if he understood what had happened, then he would have investigated it.

The trial court found (1) the weight of the evidence supported the City terminating Jones's employment; (2) there was no requirement that Jones's conduct violate a City policy in order for Jones to be terminated; (3) the City did not violate the firefighters procedural bill of rights because there is an exception for routine communications, which applied to Roddy speaking with Jones; (4) there was no showing of bias in the *Skelly* hearing; and (5) it was not shown that the City abused its discretion by selecting termination as the form of discipline. The trial court denied the writ petition.

DISCUSSION

A. CITY COUNCIL'S STANDARD OF REVIEW

1. *CONTRACT TERMS*

Jones waived his right to an administrative appeal before the office of administrative hearings. (Gov. Code, 3254.5.) Jones agreed to proceed via an "evidentiary hearing conducted by an advisory hearing officer." The [*21] Contract provided, "The hearing officer shall determine [the] relevancy, weight, and credibility of [the] testimony and evidence, and the hearing will be treated as a de novo proceeding."

In regard to the City Council, the Contract provides, "Within ninety (90) days of the receipt of the hearing officer's findings and recommendation and transcript, the City Council shall adopt, amend, modify or reject the recommended findings, conclusions, and/or opinions of the hearing officer. Prior to making a decision, the City Council shall order and read the record of the Administrative Hearing. The City Council shall not conduct a de novo hearing." (Fn. omitted.)

2. *CONTENTION*

Jones contends the City Council erred by applying the de novo standard of review when considering his appeal. Jones asserts the City Council should have applied a deferential standard when reviewing the hearing officer's findings of fact and credibility.

Under the de novo standard of review, an appellate body is not bound by the finder of fact's conclusions. (*Shaoxing County Huayue Import & Export v. Bhaumik* (2011) 191 Cal.App.4th 1189, 1196.) Under a deferential standard of review, an appellate body cannot substitute its own findings of fact and credibility for those made by the trier of fact. (*People v. Brown* (2014) 59 Cal.4th 86, 106.)

We [*22] apply the de novo standard when determining whether the City Council applied an incorrect standard of review. (See *People v. Brunette* (2011) 194 Cal.App.4th 268, 276 [de novo review applies when determining whether a lower court applied an incorrect legal standard].)

The hearing officer found that (1) Toppo and Jones were honest in their testimonies; (2) Toppo told Jones about punching the patient; and (3) Jones determined the matter was not so severe that it needed to be reported to Jones's supervisor. The hearing officer concluded, "To some extent [Jones] was wrong in not at least describing the issue to his superiors, since Toppo took the effort and considered his dealing with the patient as being more serious. It should have been reported in writing, not only by Toppo, but by his superior." The hearing officer determined, "Jones may well have been protecting Toppo by not reporting it, but nonetheless, that is a dereliction of duty."

In the City's findings, it wrote, "[T]he hearing officer concluded that the incident between the paramedic (Toppo) and the patient did occur and that it was reported by Toppo to Jones, but that Jones failed to follow up or report the matter to his own superior as required. This was a serious and inexcusable [*23] dereliction of Jones' duties." The City's findings reflect that it deferred to the hearing officer's finding of fact. Specifically, the City relied on the hearing officer's findings that Toppo reported the incident to Jones and that Jones failed to report the matter to Jones's supervisor. Based upon the finding that Jones failed to report the matter, the City concluded Jones committed "a serious and inexcusable dereliction of Jones's duties."

The City also wrote, "The hearing officer stated that Jones, '. . . was wrong in not at least describing the issue to his superiors . . . 'and that, 'It should have been reported in writing . . .' [Citation.] The hearing officer further stated, 'Jones may well have been protecting Toppo by not reporting it, but nonetheless, that is a dereliction of duty.' [Citation.] . . . When the patient incident later came to light within the fire department, Jones attempted a cover up by denying any knowledge that a patient had been struck by a City paramedic under his supervision."

The City's factual findings are consistent with those of the hearing officer. The City relied upon the hearing officer's conclusions that (1) Toppo told Jones about the incident, [*24] (2) Jones failed to report the incident to Jones's supervisor, and (3) Jones should have reported the incident to Jones's supervisor. Based upon those findings by the hearing officer, the City concluded that Jones lied when he denied knowing about Toppo striking the patient.

In sum, the record reflects that the City deferred to the hearing officer's findings of fact and credibility. Therefore, we conclude the City Council did not err by applying a de novo standard of review.

B. SUBSTANTIAL EVIDENCE

1. *CONTENTION*

Jones contends the following findings are not supported by substantial evidence: (1) that he was dishonest during the investigation into Toppo's act of violence; (2) that Jones violated a City policy by not reporting Toppo's act of violence; and (3) that Jones violated Health and Safety Code section 1798.200.

2. *STANDARD OF REVIEW*

"Discipline imposed on city employees affects their fundamental vested right in employment. [Citation] When an administrative decision substantially affects a fundamental vested right, the trial court . . . exercises its independent judgment upon the evidence. The appellate court must sustain the trial court's factual findings if substantial evidence supports them. [Citations.] This court's [*25] review must resolve all conflicts in the evidence and must draw inferences in support of the judgment." (*Jackson v. City of Los Angeles* (2003) 111 Cal.App.4th 899, 902.)

3. *DISHONESTY*

Jones contends that substantial evidence does not support the finding that he was dishonest during the investigation.

When Toppo was questioned before the hearing officer concerning his January 1 report to Jones, the following exchange occurred:

"[The City's Attorney]: Did you have a conversation with him?

"[Toppo]: I proceeded to tell him what occurred on the call.

"[The City's Attorney]: And what did you tell him?

"[Toppo]: Everything.

"[The City's Attorney]: Did you demonstrate what you had done, physically?

"[Toppo]: Yes, I did."

When Toppo was questioned by the investigator about his January 1 report to Jones, the following exchange occurred:

"[Investigator]: Alright and what did you tell him about this incident[?]

"Toppo: Basically what had happened[.]

"[Investigator]: Ok. Specifically as it pertains with the struggle with the patient in the ambulance[.]

"Toppo: Yes[,] the entire struggle[.]

"[Investigator]: Ok. Specifically concerning you contacting with your left hand the patient[']s head[.]

"Toppo: Yes.

"[Investigator]: What did you tell him about that[?] [*26]

"Toppo: I told him exactly that[.]

"[Investigator]: Ok. Did you tell him that your hand struck the patient, not your fist the hand[?]

"Toppo: Ok, yes I told him my hand was on the patient[.]

"[Investigator]: Tell me exactly what you told him at point how [*sic*] you described it to him[.]

"Toppo: I just told him that we had to struggle with the patient and that he jerked up, spit that whole portion and I reflexed came down on my hand."

Toppo's statements reflect he informed Jones that he struggled with the patient, that his hand was on the patient, and that he "came down on [his] hand." Toppo also demonstrated the act for Jones. Toppo said the conversation with Jones lasted for three to five minutes.

Toppo's statements support a finding that Jones was aware of Toppo's act of violence because the conversation lasted long enough for Jones to gain an awareness of what Toppo was discussing. Toppo explained that his hand was on the patient, and that he struck his hand, thus informing Jones that he indirectly struck the patient. Toppo also reenacted the violence for the sake of better explaining what occurred. Accordingly, substantial evidence reflects Jones was aware of Toppo's actions. [*27] Therefore, when Jones denied having an awareness of Toppo's actions, it can reasonably be concluded that he was dishonest.

Jones contends the issue "comes down to credibility," in particular, Toppo's lack of credibility. We resolve all "questions of credibility in favor of the prevailing party." (*Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762.) Accordingly, we do not reevaluate whether Toppo was a credible witness.

4. *POLICY*

Jones contends substantial evidence does not support the finding that he violated a City policy by not reporting Toppo's conduct because there is no evidence of a policy mandating such a report. The City concedes there was no policy requiring Jones to report Toppo's conduct.

The pretermination notice of intent to terminate and the post-*Skelly* hearing notice of intent to terminate list the same causes for Jones's termination. The first cause for termination consists of violations of the City's personnel rules and regulations. There are six sub-violations listed within that category. The first among that list of six is: "Violation of City *policies*, ordinances, rules, and regulations." (Italics added.) The City Council found "each of the charges" against Jones were true. The trial court found, "[T]he weight [*28] of the evidence supports the [C]ity's decision." The trial court said, "The argument is raised that this failure to report the misconduct doesn't violate a statute or a written policy. There isn't any requirement that that be the case."

Jones was charged with violating City policies. The City found that charge to be true. The City concedes that there is not a specific policy that Jones violated. Because this is an issue of substantial evidence, we interpret the City's concession as acceding there is no evidence reflecting Jones violated a City policy. Accordingly, we conclude the finding that Jones violated a City policy is not supported by substantial evidence.

5. *HEALTH AND SAFETY CODE SECTION 1798.200*

Jones contends substantial evidence does not support the finding that he violated Health and Safety Code section 1798.200.[4]

Section 1798.200, subdivision (a), provides, "[A]n employer of an EMT-I or EMT-II may conduct investigations, as necessary, and take disciplinary action against an EMT-I or EMT-II who is employed by that employer for conduct in violation of subdivision (c). The employer shall notify the medical director of the local EMS agency that has jurisdiction in the county in which the alleged violation occurred within three days when an allegation has been validated as a potential violation [*29] of subdivision (c)."[5]

Section 1798.200, subdivision (c)(12), provides, "Any of the following actions shall be considered evidence of a threat to the public health and safety and may result in the denial, suspension, or revocation of a certificate or license . . . The mistreatment or physical abuse of any patient resulting from force in excess of what a reasonable and prudent person trained and acting in a similar capacity while engaged in the performance of his or her duties would use if confronted with a similar circumstance."

In sum, section 1798.200 requires, among other things, that an employer notify the medical director of the County's EMS agency of a validated allegation of an

EMT abusing a patient. We interpret the statute by giving the words their ordinary and plain meanings. (*Riverside County Sheriff's Dept. v. Stiglitz* (2014) 60 Cal.4th 624, 630.) "Validate" means "to make legally valid" or "to confirm the validity of."[6]

The record reflects that, on January 13, 2014, Roddy informed Jones the Department would be opening an investigation into whether Toppo struck the patient. Jones did not assist in conducting the investigation into Toppo's conduct. On April 24, 2014, the City served Jones with notice of its intent to terminate his employment effective May 9. On December 1, when Toppo testified before the [*30] hearing officer, Toppo had been demoted from captain to engineer. Toppo retained his paramedic status.

We are unable to locate evidence reflecting when the investigation into Toppo's conduct concluded. We are also unable to locate evidence reflecting on what date Jones ceased supervising the EMS program. For example, it is unclear if Jones continued to supervise the EMS program until Jones was terminated, or if Jones's duties changed during the investigation. As a result, we cannot locate evidence to support a finding that Jones was in charge of the EMS program at the time the investigation into Toppo's conduct ended, i.e., the allegation was validated. Accordingly, the evidence does not support a finding that Jones was Toppo's employer at the time the allegations against Toppo were validated.

Further, the statute requires that the report be made to the medical director of the "county" emergency medical services agency. (1797.94, 1798.200.) The City's medical director testified, but we see no indication in the record that the County of San Bernardino's medical director testified. As a result, we are unable to find evidence in the record reflecting Jones failed to contact the County [*31] of San Bernardino's medical director. In sum, substantial evidence does not support the finding that Jones violated section 1798.200.

The City contends Jones was not terminated due to violating section 1798.200. Both notices of intent to terminate list the causes for termination. The third cause for termination is a violation of section 1798.200, subdivision (c)(12)(A). The City Council found "each of the charges" against Jones were true. The trial court found, "[T]he weight of the evidence supports the [C]ity's decision." Accordingly, we are not persuaded by the City's argument that a violation of section 1798.200 was not one of the findings supporting Jones's termination.

C. DISCIPLINE

Jones contends selecting termination as the form of discipline was an abuse of discretion.

" 'It is well settled, of course, that in cases involving the imposition of a penalty or other disciplinary action by an administrative body, when it appears that some of the charges are not sustained by the evidence, the matter will be returned to the administrative body for redetermination in all cases in which there is a "real doubt" as to whether the same action would have been taken upon a proper assessment of the evidence.' " (*Poliak v. Board of Psychology* (1997) 55 Cal.App.4th 342, 364)

We have concluded *ante* that the findings Jones violated a City [*32] policy and section 1798.200 are not supported by substantial evidence. Because two of the findings against Jones are not supported by substantial evidence, it is a reasonable possibility that the City Council will select a different form of discipline. Because the form of discipline may change, we do not address the propriety of selecting termination as the form of discipline.[7] (See *Costa Serena Owners Coalition v. Costa Serena Architectural Com.* (2009) 175 Cal.App.4th 1175, 1205-1206 [courts cannot give opinions on abstract propositions]; *Deutsch v. Masonic Homes of California, Inc.* (2008) 164 Cal.App.4th 748, 784 [declining to address issue rendered moot by the court's holding that an instructional error occurred].)

DISPOSITION

The judgment denying the petition for writ of mandate is reversed. The superior court is directed to enter an order granting a writ of mandate directing the City Council to: (1) set aside the portion of its July 14, 2015, decision that upholds the termination of Jones's employment, i.e., the portion that reads "we . . . uphold the termination of Battalion Chief Steven Jones"; (2) permit oral and/or written argument by the parties on the subject of the proper discipline to impose; (3) determine the discipline, if any, to be imposed; and (4) issue a new or amended decision reflecting (a) the record does not support findings that Jones violated (i) [*33] a City policy, and (ii) Health and Safety Code section 1798.200; and (b) the form of discipline, if any, selected or upheld by the City. (See generally, *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 766-767 [providing instructions for the trial court's writ of mandate]; see also *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1187 [same].) Jones is awarded his costs on appeal. (Cal. Rules of Court, rule

8.278(a)(1).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER

Acting P. J.

We concur:

SLOUGH

J.

RAPHAEL

J.

[1] *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194.

[2] On June 19, 2014, Jones signed a contract wherein Jones waived his right to an administrative appeal before the office of administrative hearings (the Contract).

[3] The record reflects the City Council met on July 14, 2014. However, given the chronology of the case, we conclude this is a typographical error, and the City Council met on July 14, 2015.

[4] All subsequent statutory references will be to the Health and Safety Code unless otherwise indicated.

[5] " 'Director means the Director of the Emergency Medical Services Authority.' " (1797.68.) " 'Local EMS agency' means the agency, department, or office having primary responsibility for administration of emergency medical services in a county and which is designated pursuant to Chapter 4 (commencing with Section 1797.200)." (1797.94.)

[6] Merriam-Webster Dictionary Online: &ttps://www.merriam-webster.com/dictionary/validate&(as [*34] of Feb. 13, 2019)

[7] In this opinion, nothing we have written is intended to express a view on the form of discipline, if any, to be imposed.