Officer Who Lies About Grave Matter Forfeits Public's Trust

After a government agency disciplines a public employee, like a police officer, the employee has a right to appeal the discipline to an administrative agency, a Civil Service Commission for county employees, or the State Personnel Board for state employees. At the hearing on the appeal, conducted by a hearing officer who makes a recommendation to the administrative agency, the public employee may present evidence to contradict the employer's factual basis for discipline, as well the propriety of discipline. As to fact finding, courts grant much deference to the hearing officer's credibility determination. A hearing officer, like a trial judge, is in a unique position to observe a witness's demeanor, and consistency or lack thereof. See County of Los Angeles v. Civil Service Commission, (1995) 39 Cal. App. 4th 620, 633 (administrative record reviewed for substantial evidence to support the judgment); County of Los Angeles v. Civil Service Commission, (1997) 55 Cal. App. 4th 187, 198-99 (reviewing court cannot substitute its judgment when two different inferences can be reasonably deduced from the facts). On appeal a court will usually defer to a hearing officer on credibility findings, and will reverse only where the findings are inherently improbable or incredible. Oldham v. Kizer, (1991) 235 Cal. App. 3d 1046, 1065; Kolender v. San Diego County Civil Service Commission, 2005 DJDAR 11605 (affirming where hearing officer drew reasonable inference that police officer was disorganized rather than untruthful).

When reviewing the propriety of the discipline, however, the hearing officer's (and the administrative body's) discretion while broad, is not unlimited, where the hearing officer has found that serious misconduct occurred. Thirty years ago, the California Supreme Court held: "While the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, it does not have absolute and unlimited power. It is bound to exercise legal discretion, which is in the circumstances, judicial discretion." Skelly v. State Personnel Board, (1975) 15 Cal.3d 194, 217-18. Recently, the Court of Appeal reaffirmed this notion, when it held "the agency's discretion [in reviewing discipline] is not unfettered, and reversal is warranted when the administrative agency abuses its discretion, or exceeds the bounds of reason." Kolender v. San Diego Civil Service Commission, (2005) 34 Cal.Rptr. 1, 4 . Kolender stands for the proposition that when an administrative agency, here a Civil Service Commission, finds a public employee committed serious misconduct, but nevertheless reinstates an employee previously fired by his employer, the agency will likely have abused its discretion.

In Kolender, the San Diego Sheriff's Department fired a deputy sheriff for lying to cover up a fellow deputy's physical abuse of an inmate. Kolender, 34 Cal.Rptr. at 2. The deputy appealed to the Civil Service Commission, which reduced the discipline to a ninety-day suspension. The Court of Appeal reversed the decision. The Court found the Commission abused its discretion in reinstating the deputy sheriff, and rebuked the Commission for ignoring the "controlling principles" set forth in Hankla v. Long Beach Civil Service Commission, (1995) 34 Cal. App. 4th 1216.

Hankla involved an off-duty Long Beach police officer who pointed his gun, with his finger on the trigger and the hammer cocked, at a motorist with whom he had an argument. The officer's gun accidentally discharged striking the motorist in the chest. The police department fired the officer, finding that he violated procedures and training by cocking the hammer, which increased the likelihood of accidental discharge. The officer appealed his discipline to the Civil Service Commission, which reinstated him. The Court of Appeal, however, reversed and strongly admonished the Civil Service Commission holding that its decision manifested "an indifference to public safety and welfare." Id. at 1222. The Court explained that "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." The Court further stated that because police officers are in a position of significant public trust, mandating that a department keep "an officer who is unable to handle competently either his emotions of his gun poses too great a threat to the public service to be countenanced." Id. at 1226. Previous cases had found that serious public employee misconduct that had "a deleterious effect upon public service," or was likely to cause "impairment or disruption of public service," constituted "harm to the public service," and should result in significant discipline, including termination. Blake v. State Personnel Board, (1972) 25 Cal. App. 3d 541, 550-51; Skelly v. State Personnel Board, (1975) 15 Cal.3d 194, 218; Talmo v. Civil Service Commission, (1991) 231 Cal. App. 3d 210, 214-15, 229-31.

The Kolender Court reasoned that because the case involved harm to the public service "this was not a case where reasonable minds can differ with regard to appropriate disciplinary action," even though the deputy eventually told the truth. Kolender, 34 Cal. Rptr. at 4. The deputy lied to his sergeant about a partner's assault of an inmate. A week later, when investigators had information contrary to his lie and confronted him challenging his account, he then admitted he lied to protect his partner, and told the truth. Id. at 3. The deputy subsequently testified truthfully at an administrative hearing against his partner. Id. at 5. The Court of Appeal, however, was not moved to give the deputy his job back. Rather, the Court faulted the hearing officer's rationale for reducing the discipline – that the deputy "ultimately" told the truth, and "risked everything" when he testified. Id. at 5. The Court found that the deputy "did nothing special by testifying truthfully." Id. In fact, the Court reasoned that the case against his partner "would have been easier and more quickly proved if [he] had simply responded honestly to investigators when he was first asked." Id. The Court criticized the hearing officer's reasoning finding that "logically extended, [reinstating officers who lie, but later tell the truth] encourages sheriff's deputies to play cat-and-mouse games with investigators and only tell the truth when they determine the moment is opportune to do so, of if they are cornered to do so because their lie has been found out." Id. In essence, an officer who lies about abuse he has witnessed cannot later undo the damage he has caused to the public service. An officer who lies "about a grave matter" forfeits "the trust of his office and the public," regardless whether he makes subsequent efforts to mitigate the lie. Id. at 4-5.

The Kolender Court also made clear that in serious cases involving harm to the public service hearing officers should not be persuaded by arguments to reduce discipline from discharge to something less. The Court summarily rejected the deputy's argument that the sheriff's department "did not have an established policy requiring the termination of sheriff's deputies who were untruthful, and investigators typically did not terminate those who eventually told the truth." Id. at 5. The Court found "While at common law, every dog was entitled to one bite, we know of no rule of law holding every deputy is entitled to tell one lie before he or she can be discharged." Id. The Court also held that "there is no requirement" that a public agency must impose "identical penalties" in all administrative cases "similar in nature." Id.; citing Talmo, 231 Cal. App. 3d at 230.

In sum, Kolender reaffirmed prior caselaw establishing that where administrative agencies adopt a hearing officer's finding that an officer engaged in serious misconduct constituting harm to the public service, if they reverse the officer's discharge, they will likely themselves be reversed on appeal.

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