Filed 11/3/09 Frey v. City of Palo Alto CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

TRACY FREY, Plaintiff and Appellant, v. CITY OF EAST PALO ALTO, Defendant and Respondent.	A123765 (San Mateo County Super. Ct. No. 459821)

Tracy Frey, an officer with the East Palo Alto Police Department (the department), appeals a judgment affirming the city manager's decision to suspend him for 30 days and demote him from the rank of sergeant to police officer. Having reviewed the administrative and trial court records, we conclude that substantial evidence supports the trial court's findings that the weight of the evidence presented in the administrative proceeding establishes that Frey violated the department's policies and procedures and that the disciplinary penalty imposed by the city was not an abuse of discretion. Accordingly, we shall affirm the judgment.

BACKGROUND[1]

Frey has been a member of the East Palo Alto police force for approximately 20 years and a sergeant since February 2002. On May 14, 2004, Police Chief Wesley

[1] The factual and procedural history is taken largely from our unpublished opinion in a prior appeal in these proceedings in which, as discussed below, we reversed the trial court's initial order issuing a writ of mandate. (*Frey v. City of East Palo Alto* (March 12, 2008, A118500) [nonpub. opn.].)

Bowling notified Frey by letter that "this command intends that you be terminated from your position as a Police Sergeant effective May 31, 2004." As a basis for termination the letter listed nine alleged violations of the City of East Palo Alto's personnel policies and procedures. On June 21, 2004, a hearing was held in accordance with *Skelly v. State Personnel Bd*. (1975) 15 Cal.3d 194 to consider the allegations against Frey.

On July 8, 2004, Bowling notified Frey by letter that "having carefully considered all that was offered by you and your attorney . . . at the June 21, 2004, Skelly conference, it is my decision that you be suspended without pay for a period of 40 hours. This suspension shall be effective on July 25, 2004 . . . . [¶] This decision is based on my final conclusion that you committed the acts of misconduct set forth below . . . ." The letter detailed eight findings of misconduct: that Frey "improperly cancelled back up units who had responded to the termination of a vehicular pursuit, thereby leaving the primary pursuit officer, Carson, tactically exposed and without adequate support and protection"; had "on repeated occasions . . . deployed and displayed both the Less-Lethal Shotgun and the 40 mm weapon in a rude and threatening manner and without proper cause for doing so"; "unnecessarily deployed your firearm and your chemical spray in a situation involving the car stop by other officers of a known parolee"; while on duty as a supervisor, "directed discourteous and discriminatory remarks to Officer Torres when you chastised him by saying that he might end up back in the kitchen with his people and/or by referring to 'your people' causing disturbance all night, and/or by using the knowingly discriminatory and offensive plural pronoun of 'you people' and 'your people' "; while acting as a supervisor, "directed discourteous and discriminatory remarks to Officer Khoury, i.e., staring at him pointedly while reading bulletins about terrorism and/or by using the knowingly discriminatory and offensive plural pronoun of 'you people' and 'your people' "; while acting as a supervisor "directed discourteous and discriminatory remarks to Officer Zaidi when you referred to his people pulling knives out of their turbans and cutting throats"; "while in attendance at the Christmas Breakfast and toy distribution, you made the statement, audible to those around you, 'fuck Christmas, I hate Christmas, I hate kids' and, when called to account for that remark . . . ,

you put your food plate down and abruptly left the room"; and "that, consistently over a period of months, you, in your capacity a[s] the Team Supervisor, refused to allow officers on your Team to come to the station while on duty for the purpose of completing their official reports on the computers expressly provided for that purpose." The letter stated that Frey had "the right to appeal this decision in writing to the City Manager within seven (7) calendar days of your receipt of this Notice."

On July 19, 2004, Frey's attorney wrote the city manager to request reconsideration of the suspension. The letter disputed the factual accuracy of the police chief's findings and argued that Frey should not be disciplined for making racially derogatory remarks because "racially discourteous and discriminatory remarks are routinely made by officers in the department from the Chief to the patrol officers and in fact, has become part of the culture of East Palo Alto Police Department." The letter ended by expressing the "hope that this disciplinary action can be equitably resolved by your reconsideration. If, however, you should resolve not to address these issues, this letter should also act as a notice to the City that we intend to pursue our right to appeal to advisory arbitration."

The city manager responded on July 27 that Bowling had retired effective July 9, and that "it is my intent to have the incoming interim Police Chief to review the facts and allegations related to Sgt. Frey's case, including the arguments set forth in your letter, and to determine if it is appropriate for the city to maintain or reconsider its' position."

On November 8 the interim police chief sent Frey a letter informing him that "this command intends that you be terminated from your position as a Police Sergeant effective November 22, 2004." This letter repeated the eight adverse findings made in the July 8 letter, made an adverse finding with respect to the ninth allegation included in the original charging letter that had not been made by the prior police chief (but finding the misconduct less severe than originally charged[2]) and made adverse findings with respect

[2] The May 14, 2004 letter accused Frey of having made untruthful statements when interviewed during the department's investigation, while the interim police chief found only that Frey had not been forthcoming in his statements.

to three new allegations that had not been included in the original charging letter. Frey was again informed of his right to appeal the decision to the city manager within seven days. Frey objected to the termination decision and pursuant to the city's policies and procedures the matter proceeded to nonbinding arbitration before a mutually agreed upon arbitrator.

The evidentiary arbitration hearing extended over six days between March 2005 and February 2006. In a lengthy and detailed opinion, the arbitrator set forth the parties' positions, the evidence presented at the hearings, and his conclusions. He found that the department had carried its burden of proving certain of the alleged violations and had not carried its burden regarding others. He found that the department had carried its burden of proof that Frey inappropriately displayed less-lethal weapons, violated department use of force policy in display of his firearm and use of pepper spray during a traffic stop, "made discriminatory and patently offensive statements on the basis of national origin toward" two officers in his command, and refused to let officers use the department's computers to write required reports. With respect to the charge that Frey had not been candid during the course of the department's investigation, the arbitrator noted that Frey "was originally charged [with] making 'untruthful statements.' Chief Bowling, in dropping the originally proposed termination to a suspension, specifically dropped the original charge 9 which included 'untruthful statements.' Then [the] Interim Chief . . . revised charge 9 to include [Frey] being 'not forthcoming' when interviewed about, among other things, discriminatory comments. Accordingly, the Arbitrator does not address 'untruthful statements' (i.e. dishonesty) in this decision. . . . [A]bsent the untruthful statement charge, it cannot be concluded that preponderant evidence demonstrates that just cause exists for [Frey's] discharge. However, the Arbitrator recommends the most severe discipline short of discharge. [Frey] is on notice that, should he choose not to retire, almost any proven rule violation will likely cost him his job with the Department." The arbitrator did not make any findings with regard to the three additional charges that first appeared in the interim chief's recommendation. The arbitrator's advisory award concluded, "The Department, through a preponderance of the

evidence, has not demonstrated that just cause exists for [Frey's] discharge. Preponderant evidence, however, exists for a thirty (30) working-day suspension as a Sergeant beginning on the date [Frey] is taken off paid administrative leave; and, at the end of the thirty (30) working-day disciplinary suspension, [Frey] shall be demoted to patrol officer."

On July 12, 2006, the city manager issued a final decision that adopted "the thoughtful and well-reasoned findings of the arbitrator, who concludes the department met its burden in establishing a preponderance of the evidence to support allegations relative to use of force, less-lethal weapons, discriminatory treatment of subordinates and the ban on use of departmental computers for report-writing. Particularly troubling are the findings relative to unnecessary show of force in the community and the use of racial comments towards your subordinate officers, which conduct is inconsistent with the expectations of a Sergeant. [¶] Based on these findings, I adopt the arbitrator's recommendation, which involves a 30 working-day suspension as a Sergeant, followed by your demotion to the rank of Police Officer."

On December 27, 2006, Frey filed a petition for writ of mandate under Code of Civil Procedure section 1094.5. The petition alleged that the city abused its discretion by adopting findings of the advisory arbitrator not supported by the weight of the evidence, "by imposing an excessive penalty in relation to the allegations sustained against" Frey, and in failing to comply with the city's personnel policies and procedures and the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). The single violation of that act alleged in the petition is that the city "unlawfully retaliated against . . . FREY by increasing the discipline originally imposed when exercising his statutory right to appeal." Frey asked the court to issue a writ of mandate ordering the city to set aside the July 12 order, and for sanctions, attorney fees and costs.

The trial court found that the city had retaliated against Frey for exercising his right to appeal, and ordered the city to rescind the discipline and to pay attorney fees, costs and a sanction of $25,000. In the prior appeal, we reversed the court's judgment finding that there was no evidence in the record to support the trial court's finding that

the more severe discipline imposed on Frey was the result of retaliation for exercising his right to appeal or that Frey was denied due process. The matter was remanded for consideration of other issues not reached previously by the trial court. (*Frey v. City of East Palo Alto* (March 12, 2008, A118500) [nonpub. opn.].)

On remand, the trial court denied the petition for writ of mandate as follows: "The court reviewed the administrative record in its entirety and used its independent judgment in that review. The court finds that the evidence adduced at the advisory arbitration hearing, which was accepted by the East Palo Alto city manager, supported the findings made at the administrative level and that those findings supported the decision to impose a suspension and demotion upon petitioner." Frey filed a timely notice of appeal.

Discussion

1. *Standard of Review*

"The applicable standards of review at the superior court and appellate court levels differ depending upon which issues are under review. With respect to culpability, i.e., whether [Frey] in fact committed the misconduct alleged, the superior court has extensive powers of review. The trial court examines whether the decision of the Administrative Board is supported by the findings and whether the findings are supported by the evidence in the administrative record. [Citation.] The trial court exercises its independent judgment on the evidence and examines the entire administrative record and reviews evidence both in support of, and in conflict with, the administrative agency's findings. [Citations.] The trial court resolves evidentiary conflicts and is required to assess witnesses' credibility and to arrive at its own independent findings of fact." (*Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 45; citing Code Civ. Proc., § 1094.5, subd. (b).) Where the trial court resolves factual and evidentiary conflicts, "the superior court's determination of culpability is conclusive and binding on the reviewing court. On appeal, we review the record to determine whether substantial evidence supports the trial court's conclusions, and we resolve all conflicts and indulge all reasonable inferences in favor of the prevailing party." (*Deegan v. City of Mountain View*, *supra*, at p. 45.)

"With respect to the question of penalty, the superior court's powers of review are quite limited, and are exercised only with great deference to the administrative agency's findings. [Citation.] Neither the trial court nor the appellate court is entitled to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed. [Citation.] . . . The appellate court conducts a de novo review of the penalty assessed, giving no deference to the trial court's determination. Again, the appellate court reviews the agency's selection of penalty and, if reasonable minds can differ with regard to the propriety of the disciplinary action, it finds no abuse of discretion." (*Deegan v. City of Mountain View*, *supra*, 72 Cal.App.4th at p. 45-46.)

2. *Substantial evidence supports the trial court's factual findings.*

Frey contends that there is no substantial evidence to support three of the policy violations relied on by the city in imposing discipline.[3] We consider the evidence in support of each violation in turn.

a. Less Lethal Weapons

The trial court found that the weight of the evidence supported the city's finding that Frey violated the department's policy concerning the use of less lethal weapons. According to the department's policies, "A less lethal weapon is a device not intended to inflict permanent injury or cause intentional death." "Less lethal weapons are to be deployed as an alternative to other means of controlling violent or potentially violent situations when simple, unaided methods are inadequate." With regard to the deployment of a less lethal weapon, the policy advises, "Less lethal munitions may be used in an effort to compel an individual to cease his or her violent, potentially violent or non-compliant actions when the individual officer reasonably believes that they represent a viable option for resolving the situation at hand, due to the potential for harm to police employees or the public." The use of a less lethal weapon "is authorized after an evaluation of the tactical situation by personnel on scene, taking into consideration

[3] Notably, Frey does not challenge the evidence in support of the finding that he made ethnically discriminatory remarks to his subordinate officers, one of two charges that the city manager found "particularly troubling."

available circumstances, including, but not limited to: (1) The presence of a weapon, whether visible or reported to be in possession of the subject; (2) The subject's stated or exhibited intent to resist being taken into custody or refusal to comply with the officer's lawful orders; 3. The credibility of that threat as evaluated by the officers present; 4. Additional information immediately available to officers, such as knowledge of the subject's expertise in martial arts or other unarmed defensive tactics; 5. Indications of drug use or alcohol intoxication; 6. Availability of other force options and their possible effectiveness/appropriateness; 7. Other actions by the subject that appear to dictate the need for a use of force response . . .; 8. The officer's versus the subject's physical factors i.e.: age, size, relative strength, skill level, injury, exhaustion and the number of officer(s) versus the subject(s). . . ." At the time, the department had two "less lethal" weapons. The less lethal shotgun looks like a typical shotgun but has orange markings to differentiate it. The less lethal shotgun shoots "a projectile that [is] basically a beanbag." The department's other less lethal weapon is a "grenade launcher" or "cannon" that shoots a rubber pellet.

The arbitrator found that the city established by a preponderance of the evidence that Frey violated the policies and/or rules on the use of less lethal weapons. The arbitrator explained that "multiple incidents were related, namely the two truck incident in which [Frey] displayed a less-lethal weapon when the other officers could not discern a need to do so. The Less-Lethal policy permits officers to display the weapon as a means of controlling 'violent or potentially violent situations'; [Frey's] heavy reliance on the weapon, however, led to at least one situation where he jeopardized the other officers' control of a potentially violent situation. Further, his admitted display of the less-lethal weapon 40 and 60 times in six months (as compared to Sergeant Zamora, who displayed the weapon 3 times in 2 years), in circumstances in which other officers questioned the need for the display, clearly violates the requirement that the use of less-lethal weapons appear appropriate for the circumstances."(Bold omitted.) The arbitrator added that Frey's use of the less-lethal weapons also violated the policy insofar as it provides that "a supervisor should avoid being the deploying officer as such 'hands on' involvement may

limit his/her ability to supervise and coordinate the activities of other involved personnel." (Underscoring omitted.) The trial court found that the weight of the evidence presented at the arbitration hearing supported the administrative findings. Frey contends that there is no substantial evidence that he violated the department's policy regarding the use of less lethal weapons.

The following testimony was given at the arbitration hearing regarding Frey's use of less lethal weapons:

Officer David Carson testified regarding an incident involving a domestic dispute to which he and Frey responded. Carson testified that when he arrived he was told that "there was a male subject in his bedroom acting sort of strange . . . and that there was possibly some knives concealed in the room." Throughout the incident, Frey had his shotgun slung behind his shoulder. Around the same time, Carson responded with Frey to a call involving the inspection of an empty car that had been in a high speed chase. Again, Frey had the shotgun slung over his shoulder. Carson did not find anything odd about his display of the shotgun in the first instance, but did not see the need for it in the second.

Officers Paul Norris and Jerry Alcarez testified to an incident involving a fee dispute between a tow-truck driver and a the owner of a towed vehicle during which Frey also displayed his less lethal shotgun. Norris and Alcaraz testified that the dispute had calmed down and they were waiting for the driver to collect his fee and leave when Frey removed his shotgun from his trunk and "stirred things up." The officers testified that they did not perceive any threat or reason to get the shotgun out. Frey claimed that he had his shotgun out during the incident because they "were facing 40 to 60 hostile subjects." The other officers did not remember seeing a crowd of that size. Norris remembered seeing maybe 3 or 4 other people, 2 of which came to the scene with the owner of the car.

Norris testified regarding a call that involved reported gunshots. He and Alcarez were attempting to locate a probationer who lived in the area when Frey arrived carrying his shotgun. The probationer's family was already upset with the officers for being on their property and trying to contact their son. When Frey arrived they became more upset.

"[T]hey thought that [the less lethal weapon] was a shotgun; they didn't know that it was less lethal. So they were upset with us, the police pulling a shotgun on them for no reason at all."

Alcaraz testified that he had once observed Frey standing beside his patrol car displaying his less lethal grenade launcher. Frey had displayed the weapon to disperse a crowd. Officer John Norden testified that Frey "had a tendency to take [the less lethal weapons] out of the car all the time, for everything, just to get out and walk up the street." Norden explained, "We have a lot of streets where people like to loiter, sell drugs, just hang out, maybe drink. There's a lot of pedestrian traffic out here, on some of our streets. And officers will frequently get out of their cars and do what they call a dispersal, just get the people cleared out of the area. And [Frey] would do it with the less-than-lethal gun." A third officer testified that he had seen Frey use less lethal weapons to disperse a crowd and believed it was inappropriate "[b]ecause whenever we usually disperse people, we don't carry weapons or pull out our [baton] or our pepper spray." Frey explained, "On a number of occasions, I took the weapon out when confronting groups of gang members and drug dealers . . . where the complaint was they were selling drugs. There were groups of eight or more. [¶] And I would park my car a distance away. And I would take out the less lethal weapon, sometime without even loading it, and I would put it over my shoulder, on the sling, and take a position usually on the other side of the street, and tell the subjects that they needed to disperse, that they were in violation of the 'no loitering' ordinance."

Overall, Frey estimated that he had removed his less lethal weapon from his car 40 to 60 times over a six month period . In contrast, Sergeant Zamora, who was also a sergeant, estimated that she had only displayed her less lethal weapon on three occasions in approximately two years.

Officer Thomas Alipio, Frey's supervisor, testified that he had instructed his officers to deploy the less lethal weapons if they know the situation to which they are responding is hostile. He did not instruct the sergeants to display the weapons in a nonviolent situation, such as when the officer is dispersing loiterers.

Taken as a whole, the above evidence amply supports the trial court finding that Frey violated the department's policy by repeatedly displaying his less lethal weapons in nonviolent, not hostile circumstances.

b. Use of Force

The trial court also found that there was substantial evidence that Frey violated the department's use of force policy by displaying his firearm and pepper spray during a traffic stop of a parolee. The department's use of force policy states that "officers shall use only that amount of force which appears necessary, given the facts and circumstances perceived by the officer at the time of the event, to effectively bring an incident under control."The policy recognizes that "each officer must be entrusted with well-reasoned discretion in determining the appropriate use of force in each incident" and that consideration of the reasonableness of the officer's exercise of discretion is "limited to what reasonably appears to be the facts known or reasonably inferred by an officer at the time the decision is made to employ deadly force."

At the arbitration hearing, Alcarez testified that after making the traffic stop and determining that the driver was on parole, he asked the driver to wait on the curb while the officers searched his car. The driver was cooperative and complied with his instructions. Alcarez noted that while the parolee was going towards the curb, Frey had his gun drawn and held toward his side. Once the parolee sat down, Frey holstered his gun but got out his pepper spray, shook it and held it in front of himself. Alcarez, as well as the other officer present, thought Frey's behavior was strange and that there was no need to display his weapons because the parolee was complying fully with the officers' instructions. Frey testified that he displayed his firearm during the traffic stop even after being given the okay sign by Alcarez because he believed the parolee was driving an unreported stolen vehicle. The car was described at the hearing only as a blue Oldsmobile Cutlass Supreme. He explained, "Several days prior to that car stop, I had seen this vehicle being driven by . . . a Black male while I was on my way into work. What struck me about this vehicle was that it was one owned by an elderly woman [who] lived three houses down from me whose son had recently been incarcerated for an assault against a

neighbor. And I believe the mother was hospitalized up in Woodland or Woodland Hills." He claimed that he "put that information out at briefing that night, that [he'd] seen the vehicle, it was being driven by someone other than the owners, and that we should stop it and identify the people, at the very least, as this may be an unreported, stolen vehicle." He also claimed that he told his officers over the radio to keep an eye out for the car that evening.

The arbitrator found that Frey's display of his firearm and O.C. spray during a parolee traffic stop violated the department's use of force policy. He explained, "[Frey's] purported reason for the display was that he believed the parolee was driving a stolen vehicle that belonged to his neighbor. None of the officers, however, recalled that [Frey] communicated this belief to them during the stop or at a briefing. Clearly this is information that, if known at the time, should have been shared with his subordinate officers who were participating in the stop and subject to the same dangers as [Frey]."

Frey argues that there was no evidence he acted outside the scope of discretion afforded by the policy when he displayed his gun and spray because "[n]o evidence was presented that the facts known to Frey did not exist." While Frey is correct that an individual officer has broad discretion in determining the proper use of force in any situation based on the facts known to him or her at the time, under the department's policy that exercise of discretion must nonetheless be reasonable. Frey's unsubstantiated and uncommunicated belief that the car might have been stolen, based on the fact that a car that looked similar to his neighbor's car was being driven by someone other than his neighbor, was justifiably found not to be a reasonable basis on which to justify his display of force.

c. Computer Policy

Witnesses testified that Frey prohibited officers under his supervision from returning to the station during their shifts to complete their reports on departmental computers. Alipio testified that in 2003, the department had three or four computers available in the station "for officers to use in composing their reports." He acknowledged that as the patrol commander, he instructed Frey and other supervising officers to prohibit

patrol officers from loitering at the station. However, he denied ever telling Frey or any other sergeant that "officers were not allowed in the station to use the computers to prepare police reports." The arbitrator found that Frey's "rule that his officers were not permitted to use departmental computers for report writing is a violation of policy. Common sense leads to the conclusion that the department provided computers so that its officers could complete their work, including the critical task of documenting activity and arrests, in an efficient and uniform manner. [Frey's] refusal to balance this obvious departmental need with the equally important obligation of having a police presence on the streets was deliberately obtuse and ill-intentioned." The trial court found that the weight of the evidence supported the arbitrator's finding.

Frey acknowledges that "[w]hile the arbitrator and the trial court may have had justification to question Frey's personal policy on the use of computers by his patrol team for report writing as 'obtuse and ill-intentioned,' there was no evidence that this practice violated any actual policy of the [department]." He argues that in prohibiting his officers from using the department computers he was "simply exercise[ing] his discretion as [his] supervisor did not want his patrol officers lingering around the department when they should be working in the community." Contrary to Frey's suggestion, it is not necessary that there be an official written policy to conclude that the rule imposed by Frey on the officers under his supervision was contrary to the clear intention of the department that the computers provided be used for completing reports. His strict prohibition was unreasonable and an abuse of his discretionary responsibility to balance his officers' ability to effectively complete reports and police the community.

3. *The disciplinary penalty imposed by the city does not reflect an abuse of discretion.*

The arbitrator balanced Frey's "performance deficiencies," including his discriminatory comments, improper use of force and of the less lethal weapons and the arbitrary restrictions he imposed on his officers regarding the use of departmental computers, against his years of service to the department in determining that a 30 day suspension and a demotion was an appropriate penalty. The city manager adopted the

arbitrators findings and recommended penalty. As noted above, he found particularly troubling "the findings relative to unnecessary show of force in the community and the use of racial comments towards [Frey's] subordinate officers."

Frey contends that the penalty imposed was excessive and should have been set aside as an abuse of discretion. He argues that the discriminatory comments he was found to have made, "although supported by substantial evidence, did not support the disciplinary penalty [because] there was substantial evidence that such comments were accepted within the department and, as a result, not considered at the time allegedly made to be a violation of policy but, rather, conformed to the then-practice within the [d]epartment." Frey describes the "culture" of the department during Bowling's tenure as one in which it was "commonplace for officers to make offensive remarks towards each other, and to verbally banter in insensitive ways, including commenting on a person's ethnicity." The fact that some inappropriate comments among the officers were tolerated, does not justify Frey's discriminatory comments to his subordinate officers. Moreover, there was testimony that Frey's comments went beyond what was customary at the time and could not be considered banter or joking.

Relying on *Blake v. State Personnel Board* (1972) 25 Cal.App.3d 541, Frey argues that the penalty is excessive because "[t]he city has not shown that its services were interrupted, reduced or otherwise negatively affected as a result of . . . Frey's conduct." Frey's excessive display of force in the community, including his use of his less lethal weapons, however, had a negative impact on the community's perception of the police, which in at least one instance was shown to have impacted officer safety. The penalty imposed does not reflect an abuse of discretion.

Disposition

The judgment is affirmed.

_____
Pollak, Acting P. J.

We concur:

_____
Siggins, J.

_____
Jenkins, J.