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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

IMELDA CANOVAS et al.,
Plaintiffs and Appellants,
v.
STATE PERSONNEL BOARD,
Defendant and Respondent,
DEPARTMENT OF INDUSTRIAL
RELATIONS,
Real Party in Interest and
Respondent.

A151156

(Alameda County
Super. Ct. No. RG16819291)

Appellants Tess Vical, Cristina Cornell, and Imelda Canovas (collectively, Appellants) appeal the superior court’s denial of their petition for a writ of mandate. They claim the court (1) applied the wrong standard of review, (2) together with the State Personnel Board (SPB), whose decision it was reviewing, made a number of reversible evidentiary errors, and (3) denied them a fair administrative proceeding. For the reasons discussed below, we shall affirm the judgment.

I. BACKGROUND

A. The Investigation

Vical, Cornell, and Canovas were long-term employees of the Department of Industrial Relations (DIR). Vical worked as a supervisor under manager Cora Lee at times relevant to this appeal. Vical supervised Cornell and Canovas who were

employed as Workers' Compensation Consultants (WCCs). WCCs have the authority to settle workers' compensation claims up to \$75,000 and select third-party vendors to handle the claims. DIR has policies against gifts received by a DIR employee from vendors with whom the DIR employee regularly does business if the gift is intended to reward the DIR employee for doing business with the gift giver. DIR trains its employees on this policy every other year and annually requires employees to report gifts of \$50 or more on Form 700. This policy was not strictly enforced until Lee became manager in November 2012. Since the policy was not strictly enforced, vendors would sometimes take DIR employees to lunch, give gift cards, and bring edible treats to DIR offices.

Lee met with Vical in late 2012 to remind Vical of the gift policy and instructed Vical to relay the message to the WCCs under her supervision, but Vical failed to do so. Vical and the WCCs continued to attend lunches and accept promotional gifts, and vendors continued to bring food to DIR offices. Lee again reminded Vical of the gift policy and sent her a confirming memorandum in early March 2013. A week or so later, Vical finally held a meeting with the WCCs, reminding them of the gift policy and instructing them not to accept gifts from vendors. However, this did not seem to stop Vical and the WCCs from attending lunches, and Canovas from handing out vendor gift cards. Additionally, in mid-March 2013, Canovas, Vical, and Cornell did not disclose vendor gifts in their signed Forms 700.

On March 21, 2013, Vical lodged a complaint that Lee had threatened to kill her if Vical leaked confidential information. An investigation was launched by DIR's human resources division, but the record does not indicate the outcome of the investigation.

On June 18, 2013, DIR received an anonymous letter stating that Vical required vendors to bring food and gifts. An investigation was launched by DIR's human resources division. In early interviews, another employee talked about vendor lunches at local restaurants and receiving \$50 gift cards from vendors. However, Canovas, Vical, and Cornell denied knowledge of the lunches and gift cards.

In early 2014, DIR heightened its investigation by conducting investigatory interviews and advising those interviewed that failure to provide accurate, honest, and thorough answers could result in discipline, up to and including dismissal. On April 3, 2014, Canovas, Cornell, and Vicerai were interviewed by DIR's Assistant Chief Counsel Vanessa Holton and retired Workers' Compensation Judge George Mason, Jr. Again, Canovas, Cornell, and Vicerai each denied, in their separate interviews, knowledge of the vendor lunches and gift cards. As a result, on August 28, 2014, Canovas, Cornell, and Vicerai received notices of adverse action terminating their employment for improperly accepting gifts, falsifying their statements of economic interest, falsifying timesheets, and being dishonest in their investigatory interviews. Other WCCs involved either were not disciplined or had their terminations revoked after admitting dishonesty and settling for suspensions.

B. The Administrative Proceeding

On October 3, 2014, Canovas, Cornell, and Vicerai appealed their terminations to the SPB. They defended against their terminations, saying they were terminated because Vicerai complained about Lee's threats. Their cases were consolidated. Appellants were represented by attorneys Paetkau and Savage, and DIR was represented by Holton. A lengthy discovery process and hearing followed, where the parties fought over discovery issues, admissibility of evidence, and witness lists in prehearing settlement conferences.

In late 2014, Appellants requested "[a]ll investigation notes, summaries and reports prepared by DIR Assistant Chief Counsel Vanessa Holton" referring to Appellants. DIR declined to produce these documents. Administrative Law Judge (ALJ) Monfross denied Appellants' motion to compel discovery of Holton's investigation notes on March 3, 2015.

On January 15, 2015, Appellants filed their first amended prehearing settlement conference statement as requested by the ALJ. However, Appellants filed a second amended statement on January 23, 2015, stating that on January 5, DIR produced approximately 1,350 pages of additional discovery documents which prompted the second amendment. Appellants claim the newly produced documents contain evidence

of retaliation. The ALJ accepted the first amended statement on February 9, 2015. ALJ Friedman issued an order denying Appellants permission to file the second amended statement for lack of good cause on February 27, 2015.

A few weeks after losing their motion to compel discovery of Holton's notes, Appellants issued a subpoena duces tecum to Holton. DIR filed a motion to quash based on attorney-client privilege and the attorney work product doctrine. ALJ Friedman granted the motion to quash, agreeing with DIR's reasoning.

The administrative proceeding culminated in a hearing conducted by ALJ Krestoff, which was held from May 19, 2015 to May 29, 2015, and continued on December 1, 2015 through December 4, 2015. In ALJ Krestoff's proposed decision, issued on March 9, 2016, he found that Appellants were dishonest and that retaliation was not the primary basis for the termination, and he upheld the termination as proper. The SPB adopted the decision on April 12, 2016.

C. The Petition for a Writ of Mandamus

Appellants filed a petition for a writ of mandate, appealing the SPB decision to the superior court on June 13, 2016. After a February 9, 2017 hearing, the court issued an order denying Appellants' petition for a writ of mandate. Appellants filed this timely appeal.

II. DISCUSSION

A. The Superior Court's Writ of Administrative Mandamus Review

Under Code of Civil Procedure section 1094.5, subdivision (b), courts can only review three areas of adjudicatory administrative proceedings: "whether the [agency] has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." A prejudicial abuse of discretion is found when the agency "has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (*Ibid.*) "Where it is claimed that the findings are not supported by the evidence . . . abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence." (Code Civ. Proc., § 1094.5, subd. (c).)

When a trial court reviews an administrative agency's decision, the trial court will use one of two possible standards of review, depending on the nature of the right involved. (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1056–1057 (*JKH Enterprises*)). If the agency's determination involved a fundamental right, then the trial court will review the administrative record for errors of law and exercise independent judgment on the evidence. (*Id.* at p. 1057.) When no fundamental vested right is involved, the trial court reviews "the administrative record to determine whether the adjudicatory decision and its findings are supported by substantial evidence in light of the whole record." (*Ibid.*)

Depending on whether the trial court exercised independent judgment (because the agency determination involved a fundamental right) or the substantial evidence test in its review, the appellate court's review will focus on either the trial court's findings or the agency's findings. (*JKH Enterprises, supra*, 142 Cal.App.4th at p. 1058.) If the trial court exercised independent judgment review, the appellate court must determine whether the trial court's findings are supported by substantial evidence. (*Ibid.*) If the trial court exercised substantial evidence review, the appellate court reviews the agency's findings under the substantial evidence standard. (*Ibid.*) Here, the trial court exercised substantial evidence review. Accordingly, we too will review the agency's findings under the substantial evidence standard.¹

1. *The Evidentiary Rulings*

Appellants argue that three evidentiary rulings were erroneous and warrant reversal: (1) the SPB decision denying Appellants' request to file a second amended prehearing statement listing as exhibits certain internal DIR emails that Appellants claim provide evidence of the DIR's intent to retaliate against them (a ruling that apparently had the effect of precluding Appellants from introducing those emails into evidence at the

¹ Appellants also appeal the entire trial court ruling on the ground that the trial court applied the wrong standard of review. That portion of their argument is addressed in section B of the Discussion.

administrative hearing); (2) the SPB's decision to exclude lead investigator Holton as a witness; and (3) the SPB's decision to deny production of Holton's notes.

First, Appellants argue that the ALJ erred by not allowing them to amend, for the second time, their prehearing/settlement conference statement to include emails that Appellants believe provided irrefutable proof of retaliation. The SPB based its decision on an interpretation of California Code of Regulations, title 2, section 57.1, subdivision (i) providing that the amendment should be filed within 10 days of learning the proffered information, absent good cause. ALJ Friedman found that Appellants filed the amendment more than 10 days after receiving the documents. Additionally, ALJ Friedman did not find good cause for the delay because Appellants failed to show how these documents were " 'new information' " and not the result of Appellants' " 'further investigation.' " This conclusion was within ALJ Friedman's discretion. While DIR may have given Appellants' counsel many pages of documents in response to Appellants' discovery requests, we see no indication that anything new and of material import was provided or that DIR was attempting to hide evidence.

Next, Appellants attack the SPB's exclusion of lead investigator Holton as a witness on the ground of attorney-client privilege. We see no error here. Holton is listed as counsel on many of the SPB's reply briefs or motions, always followed by her title of Assistant Chief Counsel. Additionally, she was sent emails by Appellants' attorneys regarding meet-and-confer meetings or discovery requests. It would appear that even Appellants' attorneys understood Holton was acting as an attorney for DIR. Whatever information she had, therefore, she gained as counsel of record for a party. We see no basis to conclude she was a percipient witness to any information that falls outside of the attorney-client privilege or the attorney work product doctrine.

Last, Appellants contend that the SPB erred in refusing to order production of Holton's notes. We reject that argument as well. The record indicates that Appellants requested production of all notes, summaries, and reports prepared by DIR Assistant Chief Counsel Vanessa Holton regarding Canovas, Vicerai, and Cornell during Holton's investigation. But the record evidence supports ALJ Monfross's order denying

Appellants' motion because the motion to compel production of evidence was late under California Code of Regulations, title 2, section 60.3, subdivision (c). And ALJ Friedman subsequently granted DIR's motion to quash Appellants' subpoena for Holton's notes because it sought production of material covered by the attorney-client privilege and the work product doctrine. (Evid. Code, § 952; Code Civ. Proc., § 2018.030, subd. (a).)

In a declaration submitted in connection with the motion to quash, DIR attorney Michael Drayton stated he reviewed Holton's files and her notes included her thoughts, impressions and legal theories and thus were protected attorney work product. Appellants provided declarations by other employees interviewed by Holton tending to suggest that there were irregularities in the process and that acceptance of gifts was widespread and of long standing, but these declarations do not supply any basis for exploring work-product protected information. The ALJ's decision to give more weight to Drayton's declaration, who was in a better position to know the nature of the legal role Holton was carrying out, is supported by the evidence. The ALJ also noted that, at all interviews where Holton was present, another DIR employee was present, and Appellants received any notes taken by persons other than Holton.

2. The SPB's Retaliation Decision

Appellants also argue the trial court and the SPB failed to properly analyze the retaliation evidence. We conclude that substantial evidence supports the SPB's finding that Appellants were not terminated because of retaliation. ALJ Krestoff found that Appellants were terminated because of dishonesty during the investigation and that their termination was not related to Vicerál's complaint about Lee's threatening to kill her. The timing between Vicerál's complaint and the investigation arguably provides some support for the notion the investigation might have been retaliatory, but there is also substantial evidence supporting ALJ Krestoff's finding of no retaliation. First, it appears that Lee was already on notice that some of the employees were violating the gift policy prior to Vicerál's late March 2013 complaint. As early as late 2012, Lee was already reminding Vicerál that gifts were inappropriate under the incompatible activities policy. Additionally, Lee did not initiate or take any significant part in the investigation of the

employees' compliance with the gift policy. The ALJ pointed out that it was an anonymous letter forwarded to the human resources division by another employee that triggered the investigation. All of this evidence is sufficient to support ALJ Krestoff's finding that although the timing of the investigation and the complaint arguably was suspicious, there was no causal connection between the complaint and the investigation.

B. The Superior Court's Standard of Review

On appeal, Appellants argue the superior court applied the wrong standard of review. Application of the correct standard of review is a question of law that is reviewed de novo by the Court of Appeal. (*Alberda v. Board of Retirement of Fresno County Employees' Retirement Assn.* (2013) 214 Cal.App.4th 426, 434.)

Appellants contend the trial court erred by incorrectly applying the substantial evidence standard. Appellants claim the SPB decision ignored undisputed evidence, thus violating their due process rights—a claim that Appellants insist should have been reviewed de novo. In a similar vein, Appellants appear to argue that all of the issues on appeal—the right to present “smoking gun” emails, and the right to discovery of exculpatory evidence—should have been reviewed by the trial court independently because the sheer number of erroneous evidentiary rulings denied Appellants due process. They rely heavily on *Sinaiko v. Superior Court* (2004) 122 Cal.App.4th 1133 (*Sinaiko*), which they believe holds, very broadly, that an erroneous evidentiary ruling can render an administrative hearing so fundamentally unfair that the petitioner is denied due process.

It is true that determination of fundamental vested rights is adjudicated on a case-by-case basis, and among the rights deemed fundamental are the individual rights guaranteed under due process. (*JKH Enterprises, supra*, 142 Cal.App.4th at p. 1059.) But we view *Sinaiko* as distinguishable. In *Sinaiko*, the petitioner lost his appeal to the Medical Board of California (Board) after the Board rejected testimony offered by his expert witness. (*Sinaiko, supra*, 122 Cal.App.4th at pp. 1136–1137.) On writ review in the trial court, the court found the Board's legal analysis of the admissibility of the proffered expert witness testimony was incorrect, but the court upheld the Board's

decision on the merits after concluding it was supported by the weight of the evidence. (*Id.* at pp. 1139–1140.) The Third District reversed, holding that the Board’s legal error rendered the proceeding unfair, an issue on which the appellate court exercised independent judgment. (*Id.* at pp. 1136–1137, 1140.) We are not persuaded that *Sinaiko* applies here. The trial court found no underlying legal error nor do we see one. Absent such an error, the trial court correctly denied writ relief.

In this case, the superior court applied the correct standard of review. The court did review Appellants’ due process argument using its independent judgment and found no violation. The trial court stated that the “[p]etitioners received notice and the opportunity to be heard and to present their cases before an impartial hearing officer and Board.” It would appear that the trial court found no due process violation because the SPB’s decisions and procedure were fair and did not have the cumulative effect of denying Appellants their due process rights. Characterizing the court’s explanation of its analysis as “lip service,” in our view, is simply another way of stating that Appellants disagree with the court’s legal conclusion. And in any event, we too see no due process violation, exercising our own independent judgment.

C. The Administrative Proceeding Was Fundamentally Fair

Appellants argue, finally, that they did not receive a fair hearing from the SPB. The ultimate determination of whether the administrative proceeding was fundamentally fair is a question of law that is reviewed de novo. (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 87.) If there are conflicts in the evidence, then we will apply the substantial evidence test to the findings that support the trial court’s factual determinations. (*Ibid.*)

Appellants raise a plethora of complaints, most of which are barely coherent. First, they appear to complain that they were denied due process when ALJ Friedman rejected their second amended prehearing/settlement conference statement. We do not believe this affected the fairness of the proceeding because Appellants had the chance to amend once before, and they were allowed to present evidence supporting their retaliation defense. Furthermore, Appellants submitted their first amended statement on

January 15, 2015, after receiving the new documents on January 5, 2015. Thirteen hundred and fifty new documents may be a lot to analyze, but Appellants could have asked the ALJ for an extension instead of filing their first amended statement knowing it was incomplete and they were going to amend for a second time. Because Appellants' second amended statement was rejected by ALJ Friedman, appellants argue they were not allowed to present critical evidence, and the trial was rendered unfair. Again, we fail to see how a ruling that was not in Appellants' favor necessarily causes the entire proceeding to be unfair. Courts and administrative decisionmakers, obviously, must abide by rules governing timelines and admissible evidence. Attaching adverse consequences to Appellants' failure to file on time and lack of good cause did not render the proceeding unfair.

Second, Appellants argue that the proceeding was unfair because they were not able to discover Holton's investigation notes or subpoena her for the hearing. We reject the argument that it was unfair to Appellants for ALJ Monfross to deny as untimely Appellants' motion to compel production of Holton's notes. Appellants should have followed the regulation and cannot argue the ruling was unfair because they did not meet the required deadline. Additionally, as discussed above, we conclude that Holton was acting as an attorney and that, as a result, her investigation notes were privileged. Attorney-client privilege allows the withholding of confidential communications between a client and its lawyer. (*Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 119.) The work product doctrine also protects writings that reflect an attorney's thoughts or strategies from discovery to preserve the adversarial system. (*Id.* at p. 120.) Appellants cite to an aspect of the *Wellpoint* opinion explaining that to determine if notes prepared by an attorney as part of a pre-litigation employment discrimination investigation merely reflect fact-gathering, uninfluenced by legal judgment, the court must look at the subject matter of each document and not just at the attorney's role in the investigation. (*Id.* at p. 122.) That guidance was directed to a situation in which there was a dispute about whether the "predominant purpose" of an

attorney's role was "primarily legal" or was merely as an investigator. (*Id.* at pp. 123–124.) There is no such dispute on this record, at least not a genuine one.

We see nothing unfair in the decision to quash the subpoena directed to Holton. Appellants had transcripts of Holton's interviews with DIR employees, and they fail to show how an examination of Holton would have furthered the search for the truth, rather than the sport of targeting opposing counsel with hostile questioning in retaliation for doing her job. If Appellants wanted to elicit testimony about what happened in Holton's interviews with DIR employees, they were free to call the DIR employees to testify about unprivileged matter—if any—that was discussed with her. Absent a credibility contest over some specific unprivileged statement in those interviews, good cause was lacking to call counsel to the stand.

Appellants' argument of last resort is that ALJ Krestoff was biased. We see no evidence of bias. Judges, of course, have the sometimes difficult job of maintaining discipline and running an orderly proceeding, and in doing so, litigants may sometimes confuse the exercise of a firm hand with a display of bias or intemperateness. We think Appellants make that mistake here. In the instances of alleged judicial bias cited in Appellants' brief, it appears to us that ALJ Krestoff was merely trying to keep order in a tense proceeding where even the Appellants' attorneys were, at times, rude. There is no instance cited by Appellants in the record where ALJ Krestoff disregarded existing law. It was not "unfair" of ALJ Krestoff to credit the testimony of DIR's witnesses during the fact finding process. We also reject Appellants' final, rather remarkable claim that DIR's witnesses were biased against them. Every witness is, in some sense, biased, in that he or she, by definition, has a bias toward his or her own point of view. It was up to Appellants, on cross-examination, to expose those biases. They had no due process right to face only witnesses "biased" in their favor.

III. DISPOSITION

The judgment is affirmed.

Streeter, J.

We concur:

Pollak, P.J.

Tucher, J.