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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

COURT OF APPEAL – SECOND DIST.
FILED
Jul 25, 2017
JOSEPH A. LANE, Clerk
ccassidy Deputy Clerk

CHARLES CUNNINGHAM, Plaintiff and Appellant, v. CITY OF LONG BEACH et al., Defendants and Respondents.	B271380 (Los Angeles County Super. Ct. No. BS153405)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joanne B. O'Donnell, Judge. Affirmed.

Joshua E. Lynn for Plaintiff and Appellant.

Charles Parkin, City Attorney, and Gary J. Anderson, Principal Deputy City Attorney, for Defendants and Respondents.

Charles Cunningham (Cunningham) petitioned the superior court for a writ of administrative mandamus to set aside a decision by the City of Long Beach Civil Service Commission (Commission) denying his appeal from the City of Long Beach's (City) decision to terminate his employment as a security officer at the Long Beach Airport (Airport). The trial court denied Cunningham's petition; he appeals its ruling.

On appeal, Cunningham contends that substantial evidence supports neither the Commission's findings nor the trial court's independent determination of his guilt based on the record. He further asserts that the discipline imposed was excessive and the result of disparate treatment. We have reviewed the record and conclude that substantial evidence supports the findings of guilt. We further conclude that the discipline imposed was appropriate. Accordingly, we affirm.

BACKGROUND

On August 26, 2013, the Long Beach Aviation Association sent a letter to Airport management that contained what the Airport deemed to be "sensitive security information" (SSI). In response, the Airport conducted an internal investigation that included a search of Cunningham's work emails. The search revealed that in July 2013 he had sent several emails from his work computer to Kandi Hobelman (Hobelman). At the time, Hobelman was Cunningham's fiancée and the general manager of the Skywest facility at the Airport. Attached to

the emails from Cunningham to Hobelman were documents that contained, inter alia, lease information regarding other airline tenants of the Airport, landing reports and worksheets for other airline tenants, and the entire 2013 work schedule for of the airport security detail.

On August 30, 2013, the Airport placed Cunningham on summary suspension. On October 10, 2013, the Airport advised Cunningham that he faced possible termination due to certain alleged misconduct, including sending the emails and attached information to Hobelman and for being dishonest about the emails in an internal affairs interview on September 5, 2013.

By a letter dated November 8, 2013, the City notified Cunningham that he was terminated from his position with the Airport. In its termination letter, the City identified five separate counts of misconduct: (1) sending emails to Hobelman on July 1, 2, and 6, 2013, which transmitted work schedules for Airport security personnel; (2) being dishonest with regard to how he obtained certain Airport billing information;[1] (3) sending emails to Hobelman on July 16, and 29, 2013, which contained the results of Airport customer satisfaction surveys and information regarding the promotion of another Airport employee; (4) sending emails to Hobelman on July 21, 2013, which included leasing information and landing reports for Airport tenants; and (5) being dishonest during his internal affairs interview with

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[1] The City subsequently dismissed this charge.

regard to his reasons for sending the leasing information and landing reports to Hobelman.

Cunningham appealed his termination.

I. The Commission's decision

At an administrative hearing on October 15 and 22, 2014, the Commission considered Cunningham's appeal.

Cunningham testified at the hearing and, among other things, admitted the following: (1) when he sent the emails at issue to Hobelman, he knew that Airport policy prohibited using work computers for non-work-related purposes; and (2) he violated that policy when he sent the emails at issue to Hobelman. As to the security force work schedules, Cunningham further admitted that he had previously received training with respect to the proper handling of SSI. With respect to the leasing information and landing reports, Cunningham acknowledged that he had no reason to be in possession of such information and that he did not ask any Airport supervisor's permission to send that information to Hobelman.[2]

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[2] In addition, Cunningham admitted that when forwarding to Hobelman information regarding employee promotions and the results of customer satisfaction surveys he used unprofessional language. Specifically, in those emails, Cunningham wrote "WTF" to signal his disagreement with the promotions and the survey results. Cunningham testified that the abbreviation stood for "[w]hat the fuck."

At the hearing, several Airport employees testified, including Carolyn Carlton-Lowe (Carlton-Lowe), the Airport's bureau manager, responsible for operations security and facilities management, and Claudia Lewis (Lewis), the Airport's manager of finance and administration.

Carlton-Lowe testified that the Airport considers security force work schedules to be SSI due to the importance of not publicizing the number of security officers working at any given time. Carlton-Lowe also testified that the Transportation Security Administration (TSA) and the Department of Homeland Security (DHS) also considers those work schedules to be SSI. She explained that security officers, such as Cunningham, are expected to know that such information is to be closely held. In addition, Carlton-Lowe testified that Cunningham had no business purpose for sending to Hobelman either the security work schedules or the landing reports and lease information. According to Carlton-Lowe, such information is regarded as confidential; if Cunningham had asked permission to release such information to Hobelman, the Airport would have denied authorization.

Lewis also testified that the Airport considers the lease agreement information—a spreadsheet that contained for each lessee information on the terms of the respective lease, including rent paid, and the Airport's "Notes" about the parties' performance under the lease and the status of any negotiations on adjustments to the lease—to be confidential

information because such information provided the City with an advantage when negotiating with Airport tenants. Lewis further stated that the Airport's tenants also consider such information to be confidential.

Following the hearing on October 22, 2014, the Commission denied Cunningham's appeal, finding him guilty of the four operative charges and upholding his disciplinary termination.

II. The trial court's decision

In January 2015, Cunningham petitioned the trial court for a writ of administrative mandamus to set aside the Commission's decision. Cunningham advanced three principal arguments: First, he contended that the work schedules that he forwarded to Hobelman were not SSI because they were not marked as such. Second, Cunningham argued that the landing reports and lease information were not confidential because such information could be obtained through a public records request and through the City's website. Third, Cunningham argued that his punishment was excessive, especially in light of Carlton-Lowe's testimony that although City employees are not supposed to use their work computers for personal business, " 'it happens,' " and that she herself had used her work computer to email coworkers invitations to her wedding.

Cunningham's arguments failed to persuade the trial court. On January 13, 2016, the trial court denied the amended petition for three principal reasons. The trial court reasoned that the City's failure to mark the work schedules

as SSI did "not vitiate their status as sensitive security information; it merely means that the documents were not appropriately marked." Moreover, the trial court found Carlton-Lowe's testimony that the release of such information " 'would be detrimental to the security of transportation' " to be consistent with the pertinent federal regulations.

Further, the trial court concluded that while the landing reports might hypothetically be shared with the public, the Airport considers such information as confidential and no one outside of the Airport or the City has ever requested or been given such a report. The trial court emphasized that Cunningham had not adequately established at the hearing that the information in the landing reports could in fact be reconstructed from other publicly available documents. As for the lease information, the trial court noted that while some of the information contained in the spreadsheet might be gleaned from publicly available sources, other information, especially information contained in the " 'Notes' " section of the spreadsheet, could not be obtained through public sources.

Finally, the trial court found that termination was not an excessive punishment, but an appropriate one. The record, according to the trial court, showed that Cunningham released SSI and was dishonest. "Dishonesty is incompatible with a career as a peace officer. [Citation.] Moreover, [Cunningham] is a security officer charged with maintaining the security of an aviation facility; yet he failed

to observe federal regulations and to maintain the security of specific sensitive security information—conduct that is inimical to his job duties and training. These violations provide a reasonable basis for [Cunningham]'s termination, which is all that the Commission must show to satisfy the deferential standard the Court must apply to disciplinary determinations."

Judgment in favor of the City was entered on January 27, 2016. Cunningham timely appealed.

DISCUSSION

I. The trial court's findings are supported by the law and by substantial evidence

Cunningham argues that reversal is required because the trial court made three critical errors in its deliberations.

First, with regard to the count charging him with misconduct in connection with the emails transmitting the work schedules, the trial court purportedly misinterpreted and misapplied the applicable federal regulations on SSI.[3]

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[3] Cunningham also argued that the trial court misapplied those same federal regulations to the count charging him with misconduct in connection with the emails transmitting information about promotions and customer surveys. This claim is without merit for several reasons. First, unlike the work schedule emails, the City did not charge Cunningham with violating any federal regulations in connection with these emails. Moreover, the Commission did not find him guilty of misconduct related to those nonwork schedule-related emails on the ground that he violated any federal regulation; instead, its finding was

Second, Cunningham argues that with regard to the count charging him with misconduct in connection with the emails transmitting financial and accounting information (the lease spreadsheet and the landing reports), the evidence was insufficient to establish that the information was in fact confidential. Third, Cunningham maintains that the evidence was insufficient to establish that he was dishonest in his internal investigation interview.

As discussed below, we disagree with each argument.

A. STANDARD OF REVIEW

A trial court reviews the validity of a public agency's quasi-judicial decision by way of writ of administrative mandate under section 1094.5 of the Code of Civil Procedure. (*Jefferson Street Ventures, LLC v. City of Indio* (2015) 236 Cal.App.4th 1175, 1196; *Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 313.) If the administrative decision substantially affects a "fundamental vested right," the trial court must exercise its independent judgment on the evidence, "conduct[ing] an independent review of the entire record to determine whether the weight of the evidence supports the administrative findings." (*Wences*, at p. 313.) "Where . . . a case involves a police officer's vested property interest in his employment, the trial court is required to

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limited to a violation of local rules and policies only. Finally, the trial court, in light of the City's charges and the Commission's findings, did not interpret or apply any federal regulations in its independent analysis of that particular count.

exercise its independent judgment." (*Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 658 (*Barber*).)

"In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817 (*Fukuda*).) Our Supreme Court, however, further explained that "the presumption provides the trial court with a starting point for review—but it is only a presumption, and may be overcome. Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings." (*Id.* at p. 818.) An agency determination may be disturbed by the trial court if the petitioner shows an abuse of discretion. (*Id.* at p. 814.)

Consistent with *Fukuda*, *supra*, 20 Cal.4th 805, this Division held in *Barber supra*, 45 Cal.App.4th 652, "[A]n exercise of independent judgment does permit (indeed, it requires) the trial court to reweigh the evidence by examining the credibility of witnesses." (*Barber*, at p. 658.) "[I]n exercising its independent judgment 'the trial court has the power and responsibility to weigh the evidence at the administrative hearing and to make its own determination of the credibility of witnesses.' " (*Ibid.*, italics omitted; *Alberda v. Board of Retirement of Fresno County Employees'*

Retirement Assn. (2013) 214 Cal.App.4th 426, 433 (*Alberda*) [court may disagree with agency as to witness credibility].)

"On appeal from a decision of a trial court applying its independent judgment, we review the trial court's findings rather than those of the administrative agency. [Citation.] Specifically, we review the trial court's factual findings for substantial evidence. . . . [W]e cannot reweigh the evidence. Thus, we do not determine whether substantial evidence would have supported a contrary judgment, but only whether substantial evidence supports the judgment actually made by the trial court. [Citations.] In sum, '[t]he question on appeal is whether the evidence reveals substantial support—contradicted or uncontradicted—for the trial court's conclusion that the weight of the evidence supports the [agency's] findings of fact.' " (*Duarte v. State Teachers' Retirement System* (2014) 232 Cal.App.4th 370, 383–384 (*Duarte*).)

Moreover, " ' "[w]e must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision. [Citations.] Where the evidence supports more than one inference, we may not substitute our deductions for the trial court's. [Citation.] We may overturn the trial court's factual findings only if the evidence before the trial court is insufficient as a matter of law to sustain those findings." ' " (*Lake v. Reed* (1997) 16 Cal.4th 448, 457.) Put a little differently, " '[w]e uphold the trial court's findings unless they so lack evidentiary support that they

are unreasonable.' " (*Duarte*, *supra*, 232 Cal.App.4th at p. 384.)

In short, "[o]ur task is to determine whether substantial evidence in the administrative record supports the trial court's ruling [citation], except when the appellate issue is a pure question of law." (*Alberda*, *supra*, 214 Cal.App.4th at p. 433.)

B. THE TRIAL COURT DID NOT MISINTERPRET OR MISAPPLY THE APPLICABLE FEDERAL REGULATIONS

Cunningham correctly notes that a federal regulation provides that any paper records containing SSI must be "conspicuously" marked as such. (49 C.F.R. § 1520.13(a) (2017).) Cunningham further correctly notes that it is undisputed that the work schedules that he forwarded to his fiancée were not marked—conspicuously or otherwise—as containing SSI.

From these two facts, Cunningham makes a logical leap—since the works schedules were not marked as SSI, they were, ipso facto, not SSI. In fact, Cunningham goes so far as to argue that "all" of the evidence at the hearing "confirmed" that the work schedules were not SSI.

Cunningham's argument is unavailing for two reasons: first, there was evidence at the hearing—uncontradicted opinion evidence—disputing Cunningham's reasoning; and second, the federal regulation upon which Cunningham relies is inapposite; it is not the regulation that defines what is and is not SSI (Protection of Sensitive Security Information Regs., 49 C.F.R. § 1520.5(a)(3), (b)(8) (2017) (the

Regulation)), which is the regulation he was charged with violating.

1. *There was uncontradicted evidence that the works schedules, regardless of marking, constituted SSI*

At the hearing, Carlton-Lowe directly contradicted Cunningham's assertion that the work schedules were not SSI because they were not marked as such. She testified that both the Airport and the relevant federal agencies (TSA and DHS) consider work schedules for airport security personnel to be SSI.

Carlton-Lowe's opinion was based, in part, on her extensive experience in the air transportation industry. For 18 years she worked for a major airline (American Airlines). For the 12 years preceding the hearing (all of which occurred after the terrorist attacks on September 11, 2001), she worked in airport management. Among her duties as the Airport's bureau manager, a position she has held since 2011, is oversight of airport security. As a result, she interacts with a number of federal agencies concerned with airport and airline security, including TSA, the Federal Aviation Administration, and the Federal Bureau of Investigation.

In addition, Carlton-Lowe based her opinion on the TSA's reaction to Cunningham's disclosure of the work schedules to Hobelman. She testified that the Airport received two letters of investigation from the TSA as a result of Cunningham's disclosure of the work schedules to his

fiancée. She opined further that the Airport was fortunate not to be cited by the TSA for a security violation.

At the hearing, Cunningham did not present any evidence (neither documents nor expert testimony) contradicting Carlton-Lowe's opinion, other than to point to the fact that the work schedules at issue were not marked as SSI.

2. *The works schedules fall within the Regulation's definition of SSI*

The trial court found that Carlton-Lowe's opinion about what constitutes SSI— regardless of whether it is marked as such—was consistent with the Regulation. The Regulation, in pertinent part, broadly defines SSI as "information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would [¶] . . . [¶] . . . [b]e detrimental to the security of transportation." (49 C.F.R. § 1520.5(a)(3) (2017); *In re September 11 Litig*. (S.D.N.Y. 2006) 236 F.R.D. 164, 169.)

The Regulation further provides that, among other things, the following information and records constitute SSI: "*Specific details of aviation . . . security measures, both operational and technical, whether applied directly by the Federal government or another person,* including—[¶] (i) Security measures or protocols recommended by the Federal government; [¶] (ii) Information concerning the deployments, numbers, and operations of Coast Guard personnel engaged in maritime security duties and Federal

Air Marshals, to the extent it is not classified national security information; and [¶] (iii) Information concerning the deployments and operations of Federal Flight Deck Officers, and numbers of Federal Flight Deck Officers aggregated by aircraft operator, [¶] (iv) Any armed security officer procedures issued by TSA under 49 CFR part 1562." (49 C.F.R. § 1520.5(b)(8) (2017), italics added.) "Only persons with a 'need to know,' or granted conditional access by the TSA . . . are allowed access to SSI." (*In re September 11 Litig.*, *supra*, 236 F.R.D. at p. 169.)

Here, the work schedules forwarded by Cunningham to Hobelman fall easily within the Regulation's broad definition of SSI. The work schedules disclosed how many officers the Airport would have on duty at any one time throughout all three shifts of every day of the week for an entire year. In addition, the schedules identified each officer by name. Such information is reasonably and properly connected to the conduct of security activities at the Airport and contains specific details of the Airport's operational security measures. (49 C.F.R. § 1520.5(b)(8) (2017).) Moreover, the disclosure of such detailed information beyond those persons with a need to know could easily prove to "[b]e detrimental to the security of transportation." (49 C.F.R. § 1520.5(a)(3) (2017).) As Carlton-Lowe explained at the hearing: "[I]t's common sense. If you're a terrorist and you can find out how many officers are working and what time of day they're working, it make us much more vulnerable to someone doing something terrible."

In short, the trial court did not misinterpret or misapply the applicable federal regulations. We are not aware of (and Cunningham has not directed us to) any case law or agency interpretation of the Regulation (or any other related regulation) that supports Cunningham's position that SSI is confined to only those materials that are expressly marked as such. The regulation upon which Cunningham mistakenly relies (49 C.F.R. § 1520.13(a)) does not define what is and is not SSI; it merely provides how paper records and other types of records containing SSI should be marked. Cunningham's argument rests on suspect reasoning—he rigidly equates an object's form with its essence. However, as Juliet explained long ago to Romeo, how things are named or marked does not affect what they really are: "What's in a name? That which we call a rose [b]y any other word would smell as sweet." (Shakespeare, Romeo and Juliet, act II, scene 2, lines 46–47.) SSI that is not marked as such still contains sensitive security information.

On a related note, Cunningham argues that because the work schedules were not marked as SSI, he had no notice that the work schedules constituted SSI. We are not persuaded. "A person has notice of a fact if the person knows the fact, has reason to know the fact, has received an effective notification of the fact, or should know the fact to fulfill a duty owed to another person." (Rest.3d Agency, § 1.04, subd. (4).) Here, Cunningham admitted that he was required to know what constituted SSI and that he had

received training on SSI. Moreover, Cunningham made this admission only after first denying ever having any training on SSI, and then being impeached with his training records. In addition, as discussed above, Carlton-Lowe testified that both the Airport and the TSA regarded the work schedules as SSI. As result, Cunningham, a 13-year veteran airport security officer who was at the time of the alleged misconduct a watch commander, either had actual or implied notice that the work schedules were SSI.

Accordingly, we hold that the trial court correctly upheld the Commission's finding with respect to the count charging Cunningham with misconduct with regard to the work schedule emails.

C. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS

1. *Substantial evidence supported the finding that the financial and accounting information was confidential*

Cunningham argues that the trial court erred, in part, in denying his petition because the confidential nature of the financial/accounting information at issue was not supported by substantial evidence. In particular, Cunningham argues that the testimony by Lewis and other Airport employees that the leasing and landing information was confidential was undermined by testimony from those same individuals that the information at issue was publicly available, either through a public records request or through the City's website.

Cunningham's argument fails, in part, because it rests on a flawed understanding of the substantial evidence standard. Under the deferential substantial evidence standard, our analysis unfolds in two steps. "First, one must resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all *reasonable* inferences. [Citation.] Second, one must determine whether the evidence thus marshaled is substantial." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632–1633.) " 'The testimony of a witness, even the party himself, may be sufficient' " to constitute substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 201; Evid. Code, § 411.) Moreover, a trier of fact may accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted. (*Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 67–68.) "The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record." (*Kuhn*, at p. 1633.)

Here, based on the whole record, we hold that there was sufficient evidence for the trial court to reasonably find that the financial/accounting information Cunningham forwarded to Hobelman was confidential.

First, with regard to the lease information, Lewis, the Airport's manager of finance and administration, testified that both the Airport and its tenants considered the lease

information to be confidential. Cunningham objects to Lewis's testimony because her statements were purportedly made "without any evidence to support her contentions." (Italics omitted.) Cunningham misses the point—Lewis's testimony is evidence, evidence arguably rendered credible by Lewis's extensive experience. At the time of the hearing, Lewis had worked for the City for 18 years, and had done so in a variety of financial/administrative roles and with a variety of departments, including public works, water, and harbor. Moreover, at the time of the hearing she had served for five years as the administrative officer and manager at the Airport. Lewis's testimony about the confidential nature of the leasing information was supported by the "Notes" section on the spreadsheet that contained the Airport's internal comments on the parties' performance under each lease and the status of negotiations to amend/adjust the leases.

Second, an accounting clerk, who had worked for the City for seven years, and his supervisor, who had worked for the City for 21 years, testified that they considered the landing reports to be confidential information and would not disclose them to the public without prior management approval.

Based on such evidence, we cannot say that the trial court's decision to uphold the Commission's findings with regard to the financial and accounting-related count was in any way unreasonable.

2. *Substantial evidence supported the finding that Cunningham was dishonest in his interview*

Cunningham contends that in upholding the Commission's finding that he was dishonest in his internal affairs interview about his reasons for sending the financial and accounting information to his fiancée, the trial court failed to conduct an independent review of the evidence. Specifically, Cunningham argues that the Commission's finding was based solely on Carlton-Lowe's testimony that she believed he was dishonest in his interview when he claimed he could not remember why he sent the lease and landing report information to his fiancée, and that the trial court improperly deferred to the Commission's finding. Cunningham's argument is not persuasive.

Although the Commission did cite to Carlton-Lowe's testimony in its written statement of decision, it did not base its finding solely or even principally on that testimony. Instead, the Commission stressed a number of other factors including the fact that Cunningham had no professional reason for possessing that information and, unlike the other emails he sent Hobelman, Cunningham sent the leasing and landing report documents, not to her work email, but to her personal email. In addition, the Commission found Cunningham to be a less than credible witness, pointing to the fact that he at first flatly denied ever receiving any training on SSI, only to later admit when shown his training records that he had in fact received SSI training. Based on these facts, the trial court, after independently evaluating

the evidence, could reasonably conclude that the weight of the evidence supported the Commission's findings.

Second, although, as discussed above, a trial court may substitute its own credibility determinations for those of the administrative agency, the burden of proof rests on the complaining party to convince the court that the agency's decision is contrary to the weight of the evidence. (*Fukuda*, *supra*, 20 Cal.4th at pp. 817, 820; *Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th 1064, 1077.) Moreover, it is improper for a trial court to ignore "the Commission's considered credibility findings," especially when they are, as here, based on "thoughtful reasoning and analysis as to the witnesses' credibility." (*San Diego Unified Sch. Dist. v. Commission on Professional Competence* (2013) 214 Cal. App.4th 1120, 1148.)

As discussed above, the Commission's findings with regard to Cunningham's dishonesty are rooted in a number of undisputed facts that were established at the hearing, and not as Cunningham would have us believe on the views of one witness. Although Cunningham argues the trial court erred, he fails to support his argument with any facts or reasonable inferences drawn from the evidence before us. Cunningham does not, for example, direct our attention to any relevant evidence the trial court should have, but did not, consider with respect to his honesty/dishonesty during the internal affairs interview.

Accordingly, because Cunningham did not meet his burden, we hold that the trial court's decision to uphold the

Commission's dishonesty finding was supported by substantial evidence.

II. Termination was not an excessive penalty

Cunningham argues that his termination was excessive, arbitrary and capricious. His principal contentions are twofold: first, that neither the work schedules nor the financial and accounting information were labeled, respectively, as either SSI or confidential information; and second, other Airport employees who used their work computers to send non-work-related emails (such as Carlton-Lowe who used her work computer to send out wedding invitations) were either not punished or not punished as harshly as he was. Cunningham's argument is without merit.

A. STANDARD OF REVIEW

"[W]e review de novo whether the agency's imposition of a particular penalty on the petitioner constituted an abuse of discretion by the agency," focusing on " 'the correctness of the agency's decision rather than that of the trial court.' " (*Cassidy v. California Bd. of Accountancy* (2013) 220 Cal.App.4th 620, 627, 633.) "[W]e will not disturb the agency's choice of penalty absent ' "an arbitrary, capricious or patently abusive exercise of discretion" ' by the administrative agency." (*Id.* at pp. 627–628.) " ' "Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed. [Citation.]" [Citation.] [¶] "In reviewing the exercise of this discretion we bear in

mind the principle 'courts should let administrative boards and officers work out their problems with as little judicial interference as possible. . . . Such boards are vested with a high discretion and its abuse must appear very clearly before the courts will interfere.' " ' [Citation.] 'The policy consideration underlying such allocation of authority is the expertise of the administrative agency in determining penalty questions.' " (*Id*. at p. 633.) "In considering whether such abuse occurred in the context of public employee discipline, we note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, '[h]arm to the public service.' [Citations.] Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence." (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 218.)

In sum, "the penalty imposed by an administrative agency will not be disturbed in a mandamus proceeding absent a manifest abuse of discretion. [Citation.] 'It is only in the exceptional case, when it is shown that reasonable minds cannot differ on the propriety of the penalty, that an abuse of discretion is shown.' " (*Flippin v. Los Angeles City Bd. of Civil Service Commissioners* (2007) 148 Cal.App.4th 272, 283.) "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion the administrative body acted within the area of its discretion." (*Pegues v. Civil Service Com*. (1998) 67 Cal.App.4th 95, 107 (*Pegues*).)

B. THE COMMISSION DID NOT ABUSE ITS DISCRETION

The Commission did not abuse its discretion for several reasons. First, Cunningham's misconduct resulted in harm to the public service. He disclosed sensitive information that could have fatally compromise the security of the Airport and the safety of its employees, its tenants and their employees, and the passengers who depart from or arrive at the Airport. In addition, he disclosed confidential information that could have disadvantaged the Airport in its commercial relations and negotiations with both existing and prospective tenants. Moreover, he was found to be dishonest in responding to an internal affairs investigation. "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." (*Hankla v. Long Beach Civil Service Com.* (1995) 34 Cal.App.4th 1216, 1223.)

Second, Cunningham's misconduct, as summarized above, does not rise to the same level as Carlton-Lowe using her work computer to send out wedding invitations—in so doing, she did not potentially comprise the Airport's security or weakened its commercial bargaining power. Moreover, there was no evidence that Carlton-Lowe, unlike Cunningham, was dishonest in any way with regard to her non-work-related emails. " 'A [peace officer]'s job is a position of trust and the public has right to the highest standard of behavior from those they invest with the power and authority of a law enforcement officer. Honesty,

credibility and temperament are crucial to the proper performance of an officer's duties. Dishonesty is incompatible with the public trust.' [Citation.] Dishonesty is not an isolated act; it is more a continuing trait of character. False statements, misrepresentations and omissions of material facts in internal investigations, if repeated, would result in continued harm to the public service." (*Kolender v. San Diego County Civil Service Com.* (2005) 132 Cal.App.4th 716, 721.)

Third, even if Cunningham's and Carlton-Lowe's misuse of their work computers were somehow comparable, there is a general rule that Cunningham ignores completely: "[*m*]*ere disparity in punishment is not grounds for reinstatement*" and that " '[w]hen it comes to a public agency's imposition of punishment, "there is no requirement that charges similar in nature must result in identical penalties." ' " (*Pegues, supra*, 67 Cal.App.4th at p. 106.)

In short, after thoroughly reviewing the administrative record, we conclude the Commission did not abuse its discretion. On the evidence before us, we cannot conclude that upholding Cunningham's termination constituted an arbitrary, capricious, or patently abusive exercise of discretion by the Commission.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.