Seibert v. City of San Jose

Court of Appeal of California, Sixth Appellate District

May 7, 2020, Opinion Filed

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Reporter
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GRANT SEIBERT, Plaintiff and Appellant, v. CITY OF SAN JOSE, et al., Defendants and Respondents.

Prior History: [*1] Santa Clara County Super. Ct. No. 1-11-CV-204096.

Judges: ELIA, ACTING P. J.; GROVER, J., DANNER, J. concurred.

Opinion by: ELIA, ACTING P. J.

Opinion

Grant Seibert, a firefighter and paramedic, was terminated for cause from his position as a fire engineer in the San Jose Fire Department (Department) in the City of San Jose (City). Seibert appeals from a trial court judgment denying his petition for a writ of mandamus, which challenged the decision of the City's Civil Service Commission (Commission) sustaining the disciplinary action. (See Code Civ. Proc., § 1094.5.)[1]

This court is considering this matter for the second time. We first considered it in *Seibert v. City of San Jose* (2016) 247 Cal.App.4th 1027 (*Seibert I*).[2] In *Seibert I*, this court reversed the first judgment of the trial court and remanded for further proceedings. (*Id.* at p. 1071.) This is an appeal from the second judgment.

The disciplinary action against Seibert was originally based on six charges, including two charges (charge Nos. 1 and 2) arising from his exchange of e-mails with a 16-year-old girl (N.C.), whom Seibert had recently met when she visited the fire station where he was working, first on Thanksgiving of 2008 and again on December 15, 2008. Seibert obtained N.C's e-mail address during her first visit, and they began exchanging e-mails [*2] on November 27, 2008. It was December 15, 2008 when Seibert's e-mail messages increasingly became of a sexual nature, involving double entendre and sexual innuendo related to Seibert's job as a paramedic in the Department. Several other charges (charge Nos. 3 to 5) arose from Seibert's subsequent conduct toward a female coworker (L.F.) while he was already under investigation for the e-mails and on administrative reassignment. The Commission did not sustain a sixth charge that Seibert was dishonest during the administrative investigation.

On appeal, Seibert now contends, among other things, that (1) the Commission failed to make adequate findings; (2) during the second review of the Commission's decision, the trial court failed to follow the law of the case established by *Seibert I*; (3) charge Nos.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

[2] On our own motion, we take judicial notice of this court's opinion in *Seibert I, supra*, 247 Cal.App.4th 1027 and the appellate record in that case (case No. H040268). (Evid. Code, §§ 452, subd. (d), 459.)

1 and 2 should be dismissed for multiple reasons; (4) charge Nos. 3 to 5 must be dismissed because of deficient charging and inadequate findings; and (5) the City failed to follow its policies of progressive and comparable discipline. We find substantial evidence to support the trial court's findings and no reversible error. Accordingly, we affirm the judgment.

I

*Factual and Procedural Background [*3]*

An amended notice of intended discipline (NOID), dated November 2, 2009 informed Seibert that it was the intent of the fire chief to take the disciplinary action of dismissal against him based on six charges of misconduct—five of which were subsequently sustained by the Commission. The notice stated the factual and legal bases for the proposed dismissal and informed Seibert of his right to request a pre-disciplinary "*Skelly* conference."[3]

After Seibert's *Skelly* conference, a notice of discipline (NOD)—from the City's director of employee relations and dated November 17, 2009—notified Seibert that he would be dismissed from his fire engineer position, effective November 18, 2009. The NOD repeated the charges stated in the NOID.

The NOD stated that the disciplinary action was based on the following conduct: "1. On or about and between November 27, 2008 and December 15, 2008, you exchanged emails with a female San Jose resident, during work hours, which became sexual in nature"; "2. On or about and between November 27, 2008 and December 15, 2008, you interacted inappropriately during work hours with the same female noted above, who[m] you either knew or should have reasonably known was [*4] a minor"; "3. About and between March 9, 2009 and April 6, 2009, you inappropriately touched a female coworker"; "4. About and between March 9, 2009 and April 6, 2009, you made inappropriate comments to a female coworker"; "5. About and between March 9, 2009 and April 6, 2009, you engaged in inappropriate conduct, including but not limited to[] unwelcome attention[] and/or leering/staring, towards a female co-worker"; and "6. On or about March 18, 2009, June 4, 2009 and July 28, 2009, you were dishonest during an administrative investigation and were not forthcoming with the investigator on several occasions."

The NOD specified that the conduct stated in charge No. 1 was cause for discipline pursuant to multiple provisions of the city's municipal code. (See S.J. Mun. Code, § 3.04.1370, subds. B. ["Misconduct"], D. ["Failure to satisfactorily perform the duties of his position"], E. ["Failure to observe applicable rules and regulations"], and V. ["Any other act, either during or outside of duty hours which is detrimental to the public service"].) The NOD specified that the conduct stated in charge No. 2 was cause for discipline pursuant to two provisions of the city's municipal code. (See S.J. Mun. Code, [*5] § 3.04.1370, subds. B. ["Misconduct"], E. ["Failure to observe applicable rules and regulations"].) The NOD further specified that the conduct stated in charge Nos. 1 and 2 violated the City's Code of Ethics policy (S.J. City Policy Manual, § 1.2.1)[4] and several of the Department's rules and regulations (S.J.F.D. Rules & Regs., §§ 25.10, 26.1, 26.2).[5]

The NOD specified that the conduct toward a coworker described in charge Nos. 3 to 5 was a cause for

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[3] As a matter of procedural due process, before a nonprobationary employee may be dismissed for cause, the employee is entitled to an opportunity to respond to the charges and proposed action. (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215 (*Skelly*).)

[4] The City's ethics policy stated in part that "City employees . . . are expected to demonstrate the highest standards of personal integrity, honesty and conduct in all activities in order to inspire public confidence and trust in City employees." It also provided: "Recognizing the special responsibilities of serving the City and its citizens and customers, City officials and employees are required to maintain the highest standards of integrity and honesty, and they are expected to treat all members of the public and fellow City employees with respect, courtesy, concern and responsiveness. The conduct of City officials and employees in both their official and private affairs should be above reproach to assure that their City position is not used for personal gain."

[5] Section 25.10 of the Department's rules and regulations required all members to "[b]e courteous and respectful to the public and other[s] with whom they have contact." Section 26.1 of those rules and regulations stated: "In matters of general conduct, members shall be governed by the ordinary and reasonable rules of behavior observed by law abiding and self-respecting citizens and shall not commit an act, either on or off duty, tending to bring reproach or discredit upon the Department or its members." Section 26.2 of those rules and regulations provided: "No member shall conduct [himself or herself] in a manner, or be party to [ ] any act[,] [that] would tend to impair the good order and discipline of the Department."

discipline pursuant to two provisions of the City's municipal code. (See S.J. Mun. Code, § 3.04.1370, subds. B. ["Misconduct"], E. ["Failure to observe applicable rules and regulations"].) The NOD stated that such conduct violated the City's discrimination and harassment policy (S.J. City Policy Manual, § 1.1.1) and the City's ethics policy (S.J. City Policy Manual, § 1.2.1).[6]

Upon Seibert's request, the Commission held a hearing on the disciplinary action. In its written decision, the Commission found that Seibert had engaged in the conduct stated in charge Nos. 1 to 5 and cited the same legal bases for disciplinary action specified in the NOD. The Commission did not sustain the sixth charge of dishonesty. The Commission sustained the disciplinary action of dismissal against Seibert.

Seibert [*6] sought review of the Commission's decision by filing a petition for a writ of administrative mandamus against the City, the Commission, the director of employee relations, and others. He sought a writ directing respondents to set aside the Commission's decision and reinstate him. In its amended statement and judgment, the trial court (Franklin E. Bondonno, J.) concluded that there was insufficient evidence to sustain charge Nos. 2 to 5. The court expressly refused to "consider the transcripts of the audio recordings and witness interviews conducted by the City's investigator[,] aside from those portions used to impeach witnesses pursuant to Evidence Code [section] 770."

While the trial court found that there was "sufficient evidence to sustain charge [No.] 1," it nevertheless concluded that Seibert's e-mails did not warrant termination. The court indicated that such conduct might "support some progressive disciplinary action" "[b]ecause of the risk of embarrassment to the City." However, the court also incongruously concluded that "even though the December 15 emails were becoming increasingly full of innuendo and sexualization, if they had been sent to an adult, they would not be actionable violations under the [*7] then-existing policies of the City of San Jose" and that the conduct had not been shown to violate "any written City or Fire Department policy." It granted the petition and ordered the issuance of a writ compelling respondents to set aside Seibert's termination and to reconsider the matter in light of its decision and judgment.

Both Seibert and respondents appealed the trial court's decision. In *Seibert I*, this court (Rushing, P. J.) held that "(1) the Commission was not deprived of jurisdiction by the belated filing of the notice of discipline on which the challenged dismissal was based; (2) the trial court properly concluded that the e-mail exchange as alleged in one charge, which made no reference to the recipient's age, could not be found to violate any applicable rule or policy; (3) the court permissibly found, on conflicting evidence, that Seibert lacked actual or constructive knowledge of the recipient's age; (4) the court erred by refusing to consider the contents of interview transcripts which constituted the chief evidence of misconduct toward a female coworker; and (5) the court should have directed that any further administrative proceedings be heard and determined by an [*8] administrative law judge." (*Seibert I, supra*, 247 Cal.App.4th at p. 1030.)

The City argued in that appeal that "the trial court failed to accord the Commission's decision the degree of deference to which it was entitled" (*Seibert I, supra*, 247 Cal.App.4th at p. 1042). In *Seibert I*, this court recognized that "Seibert's interest in his public employment status implicated a 'fundamental vested right[]' [citations]" (*ibid.*) and that "[a]s a result, the trial court was required to exercise its independent judgment

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[6] In addition, the City's ethics policy prohibited City's employees from discriminating against any person on a number of specified grounds, including sex and gender, and required them to "reinforce the [City's] commitment to . . . a work environment free of discrimination and harassment, including sexual harassment." The City's discrimination and harassment policy stated in part: "It is the policy of the City of San Jose to promote and maintain a work environment free of illegal discrimination and harassment in employment. [¶] The City . . . , as a public employer and a provider of services, WILL NOT TOLERATE NOR CONDONE DISCRIMINATION OR HARASSMENT from any employee, regardless of employment status." "Harassment" was defined to include three elements: (1) "[c]onduct that is based on a *protected category/status*"; (2) "[c]onduct that is unwelcome"; and (3) "[w]orkplace harm" that either "[c]reates a hostile work environment" or "[r]esults from a tangible employment action (quid pro quo)." (Italics added.) The policy explained that "sexual harassment" was a "form of workplace harassment" and could "occur in a variety of circumstances." The policy further explained that sexual harassment creating a hostile work environment could consist of physical, verbal, or visual conduct, and it provided some illustrations. It indicated that a hostile work environment could result from, among other behaviors, touching, comments about physical appearance, a discussion of a sexual nature, or leering/staring. The policy stated that sexual harassment "[m]ay be subtle and indirect or blatant and overt" and "[m]ay consist of repeated actions or may arise from [a] single incident if sufficiently severe."

in reviewing the Commission's findings. [Citations.]" (*Ibid.*) This court also understood that *Fukuda v. City of Angels* (1999) 20 Cal.4th 805 (*Fukuda*) mandated that the trial court "indulge a 'strong presumption of correctness' with respect to the Commission's findings." (*Seibert I, supra*, at p. 1042.) Ultimately, this court did not resolve the City's contention that the trial court did not sufficiently defer to the Commission's decision because we found it "necessary to reverse the judgment on other grounds." (*Id.* at p. 1043.) This court stated that reversal would "set the matter at large in the trial court" and directed the trial court upon remand "to give due regard to the *Fukuda* presumption in its reconsideration of the issues." (*Ibid.*)

With respect to Seibert's e-mails, this court stated in *Seibert I* that the "City made no attempt to show that Seibert's [*9] exchange of e-mails, at the time it occurred, had any effect on his work" (*Seibert I, supra*, 247 Cal.App.4th at p. 1047) and that "[i]ndeed the director acknowledged that interference with the performance of his duties played no part in the case . . . . " (*Ibid.*) This court concluded with respect to charge No. 1 that the "City failed to present substantial evidence that any of [the] provisions [relied upon] would be offended by a private exchange of salacious e-mails between a firefighter and a willing unmarried adult." (*Seibert I, supra*, at p. 1044, fn. omitted.) This court found "substantial evidence from which the trial court could conclude that there was no policy, written or otherwise, against engaging in social contacts with persons 'met . . . through the firehouse.'" (*Id.* at p. 1049.)

This court found "no fault in the trial court's conclusion that the evidence was insufficient to establish that the conduct described in charge [No.] 1 offended any existing rule or policy" (*Seibert I, supra*, 247 Cal.App.4th at p. 1050), but we "note[d] . . . that the trial court nonetheless *sustained* this charge . . . on the ground that that Seibert's conduct created a 'risk of embarrassment to the City' which 'support[ed] some progressive disciplinary action.'" (*Ibid.*) This court then remarked: "It may well be that indiscriminate [*10] exchanges of salacious messages with *relative strangers* on company time creates an undue risk of embarrassment or even scandal. Indeed this case illustrates the danger. . . . [A]s it turned out, [N.C.] was legally a child. Seibert was not prosecuted, but he was investigated, for what would be widely considered an extremely odious offense. We have no doubt, in short, that policies restricting such exchanges would be in order. We remain uncertain, however, that in the absence of such a policy, an abstract 'risk of embarrassment' furnishes a ground for discipline. However[,] the parties have not distinctly addressed this aspect of the trial court's judgment. Since we are reversing on other grounds, the court may elect to revisit this issue on remand." (*Ibid.*)

In *Seibert I*, this court concluded that the trial court had implicitly found with respect to charge No. 2 that the evidence was "insufficient to establish that Seibert possessed actual or constructive knowledge of the minor's age" (*Seibert I, supra*, 247 Cal.App.4th at p. 1050), and we could not "say that the court erred in finding that the weight of the evidence did not sustain the second charge." (*Id.* at p. 1053.) However, we had "little doubt that a firefighter-paramedic's exchange of [*11] sexually charged messages with a minor [could] expose the Department to disrepute." (*Id.* at p. 1050.) This court also saw "ample evidence" to "support a finding either that Seibert should have known, and perhaps did know, that N.C. was a minor, or that [contrariwise] he justifiably supposed her to be older." (*Id.* at p. 1053.) This court stated that "it will be open to the court on remand to reconsider these questions, applying the 'strong presumption' of correctness mandated by *Fukuda* . . . ." (*Ibid.*)

With respect to charge Nos. 3 to 5, this court concluded that the trial court committed reversable error "by refusing to consider [L.F.'s] prior statements in support of the Commission's findings" on those charges. (*Seibert I, supra*, 247 Cal.App.4th at p. 1065.) This court determined that any objection to the investigative interview transcripts "based on lack of authentication was forfeited for want of timely assertion" (*id.* at p. 1064, see *id.* at pp. 1057-1059) and that "the transcripts [of L.F.'s interview] were admissible over a hearsay objection." (*Id.* at p. 1062.)

In *Seibert I*, this court also considered Seibert's contention that the Firefighters Procedural Bill of Rights Act (FPBOR) governed "any remand from the trial court for reconsideration of the Commission's decision." (*Seibert I, supra*, 247 Cal.App.4th at p. 1066.) We observed that the FPBOR "requires [*12] that a disciplinary appeal such as his be heard by an administrative law judge (ALJ) or, if the employment is subject to a labor agreement so providing, a neutral arbitrator." (*Ibid.*) We determined that some of the charges fell "within the FPBOR, which mandate[d] that they, at least, be decided by an ALJ" (*id.* at p. 1069) and that consequently all the charges upon any remand from the trial court had to "be resolved in accordance with that act." (*Ibid.*)

Seibert I reversed the judgment and remanded "for further proceedings consistent with the views expressed in this opinion." (*Seibert I, supra*, 247 Cal.App.4th at p. 1071.) Upon remand, the trial court (Joanne McCracken, J.) reviewed the Commission's decision based on the same administrative record. This time the court found that the weight of the evidence supported the Commission's findings on charge Nos. 1 to 5. Exercising its independent judgment, the trial court sustained the five charges and upheld the decision to terminate Seibert. The court denied the petition for the writ of administrative mandamus, and Seibert again appealed.

II

Discussion

A. *Standard of Review*

Section 1094.5, subdivision (b), provides that "[t]he inquiry in [an administrative mandamus] case shall extend to the questions whether the respondent has proceeded [*13] without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any *prejudicial* abuse of discretion. Abuse of discretion is established if the respondent 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." (Italics added.) Section 1094.5, subdivision (c), states: "Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence."

"If the decision of an administrative agency will substantially affect [a fundamental vested] right, the trial court not only examines the administrative record for errors of law but also exercises its independent judgment upon the evidence disclosed in a limited trial de novo." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143 (*Bixby*), fn. omitted.) As indicated, when applying the independent judgment test to the evidence, "a trial court must accord a '"strong presumption of . . . correctness"' to administrative findings. . . . [Citations.]" (*Fukuda, supra*, 20 Cal.4th at p. 817.) "[T]he 'burden rests' upon [*14] the complaining party to show that the administrative '"decision is contrary to the weight of the evidence."' [Citations.]" (*Ibid.*) However, "[b]ecause 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.)

"Where a superior court is required to make such an independent judgment upon the record of an administrative proceeding, the scope of review on appeal is limited." (*Pasadena Unified Sch. Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 314 (*Pasadena Unified Sch. Dist.*).) "[T]the standard of review *on appeal* of the trial court's determination is the substantial evidence test. [Citations.]" (*Fukuda, supra*, 20 Cal.4th at p. 824, italics added; see *Bixby, supra*, 4 Cal.3d at p. 143, fn. 10 ["After the trial court has exercised its independent judgment upon the weight of the evidence, an appellate court need only review the record to determine whether the trial court's findings are supported by substantial evidence. [Citations.]"].) "An appellate court must sustain the superior court's findings if substantial evidence supports them. [Citations.] In reviewing the evidence, an appellate court must resolve all conflicts in favor of the party prevailing in the superior court and must give that party the benefit [*15] of every reasonable inference in support of the judgment. When more than one inference can be reasonably deduced from the facts, the appellate court cannot substitute its deductions for those of the superior court. [Citation.]" (*Pasadena Unified Sch. Dist., supra*, at p. 314.)

However, this court reviews questions of law de novo. (See *Anserv Ins. Services, Inc. v. Kelso* (2000) 83 Cal.App.4th 197, 204.)

B. *The Commission's Findings*

Seibert challenges the Commission's findings, claiming that in sustaining each of the five charges, it failed to set forth supporting evidentiary facts and make findings regarding credibility. Seibert argues that the Commission failed to proceed in a manner required by law because its decision did not comply with Government Code section 11425.50, subdivision (b) (11425.50(b)), a provision of the "Administrative Adjudication Bill of Rights" (Gov. Code, § 11425.10 et seq.). He also repeatedly and parenthetically cites *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 (*Topanga*) in support of his claim that the Commission's findings were "legally inadequate."

1. *The* Topanga *Standard*

Topanga stated that "implicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order" (*Topanga, supra*, 11 Cal.3d at p. 515), in this case, Seibert's disciplinary dismissal. While administrative "findings 'need not be stated with the formality [*16] required in judicial proceedings' [citation], they nevertheless must expose the [agency's] mode of analysis to an extent sufficient to serve the[ir] purposes . . . ." (*Id.* at p. 517, fn. 16.) Under *Topanga*, adjudicative administrative findings must "enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the [administrative] action." (*Id.* at p. 514; see *id.* at p. 517.)

In this case, the Commission expressly found that Seibert had engaged in certain conduct, which it described using the factual language of the NOD. Its factual findings did not repeat verbatim or paraphrase any cause for discipline under San Jose Municipal Code section 3.04.1370, any Department rule or regulation, the City's general ethics policy, or the legal elements of harassment stated in the City's policy on workplace discrimination and harassment. In its decision following remand, the trial court determined that "the Commission enumerated its findings with sufficient specificity to permit this court to review its decision." Accordingly, even assuming arguendo that the issue whether the Commission's findings met the *Topanga* standard was preserved, and adequately presented, for [*17] this court's review, we reject it.[7]

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[7] Seibert's petition for a writ of administrative mandamus did not allege that the Commission's findings were inadequate under the *Topanga* standard or seek to compel the Commission to provide findings that met that standard. (See *Temescal Water Co. v. Department of Public Works* (1955) 44 Cal.2d 90, 102 ["If in fact the findings are insufficient to allow a fair review of the decision, the defect may be corrected by a writ of mandate under section 1094.5. [Citation.]"].) Neither did his original trial brief in support of the petition make that argument. It appears that Seibert made that argument for the first time in his trial brief following *Seibert I*. In our view, Seibert forfeited any claim that the Commission's findings failed to meet the *Topanga* standard by not presenting it in his writ petition. (See *Noguchi v. Civil Service Com.* (1986) 187 Cal.App.3d 1521, 1540 (*Noguchi*).) In addition, Seibert has failed to provide any meaningful legal analysis on appeal to support such a claim, and therefore his conclusory contention was forfeited. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 (*Stanley*).)

2. *Government Code section 11425.50*(*b*)

Government Code section 11425.10, subdivision (a), provides in part: "The governing procedure by which an agency conducts an adjudicative proceeding is subject to all of the following requirements: [¶] . . . . [¶] (6) The decision shall be in writing, be based on the record, and include a statement of the factual and legal basis of the decision as provided in [Government Code] [s]ection 11425.50." Government Code section 11425.50(b) states: "The statement of the factual basis for the decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision. If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, [*18] or attitude of the witness that supports it."

Seibert asserts Government Code section 11425.50 applies by virtue of Government Code section 3254.5, a provision of the FPBOR. Subdivision (a) of Government Code section 3254.5 provides: "An administrative appeal instituted by a firefighter under this chapter shall be conducted in conformance with rules and procedures adopted by the employing department or licensing or certifying agency that are in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2."[8] Government Code section 11501, subdivision (c), states: "Chapter 4.5 (commencing with Section 11400) applies to an adjudicative proceeding required to be conducted under this chapter, unless the statutes relating to the proceeding provide otherwise."[9]

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[8] Government Code section 3254.5, subdivision (b), provides in pertinent part: "Notwithstanding subdivision (a), if the employing department is subject to a memorandum of understanding that provides for binding arbitration of administrative appeals, the arbitrator or arbitration panel shall serve as the hearing officer in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 and, notwithstanding any other provision, that hearing officer's decision shall be binding."

[9] Seibert fails to note that the "Administrative Adjudication Bill

As far as we can discern, Seibert never asked the Commission to make findings in compliance with Government Code section 11425.50(b).[10] In his petition for a writ of administrative mandamus, Seibert's petition did not allege that the Commission had failed to proceed in a manner required by law by not making the findings required by Government Code section 11425.50(b) (see § 1094.5, subd. (b)) or seek to compel the Commission to make such findings. Seibert did not make such an argument in his original trial briefs in support of the petition. It appears that Seibert raised Government Code section 11425.50 for the first time following remand, in his reply to respondents' [*19] supplemental brief. Even then, he merely argued that the section "applies to administrative hearings" and "requires findings" and that its subdivision (b) requires "a finding [that] turns on the credibility of a witness [to] '. . . identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination.'"

Issues that are not presented in the underlying petition for a writ of administrative mandamus are ordinarily forfeited for review on appeal from the trial court's decision. (See *Noguchi, supra*, 187 Cal.App.3d at p. 1540.) "Appellate courts generally will not consider matters presented for the first time on appeal. [Citations.]" (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143 (in bank).) Consequently, Seibert forfeited his claim that the Commission failed to make findings that complied with Government Code section 11425.50(b).

Further, Seibert overlooks the limited nature of this court's review. When "a fundamental vested right was involved and the trial court therefore exercised independent judgment, it is the trial court's judgment that is the subject of appellate court review. [Citations.]" (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1058 (*JKH*).) It is the trial court's "legal conclusions [that] are open to appellate review for errors of law. (*Green v. Board of Dental Examiners* (1996) 47 Cal.App.4th 786, 796.)" (*Robbins v. Davi* (2009) 175 Cal.App.4th 118, 124.)

In any case, even if we were to assume that [*20] the Commission was required to comply with Government Code section 11425.50(b), and conclude that we could and should reach the issue, we would also conclude that Seibert has failed to demonstrate that there was any prejudicial abuse of discretion requiring reversal. (See § 1094.5, subd. (b)). The Commission's decision could properly state the factual basis of each charge in the language of the pleadings *unless* the stated factual bases were "mere repetition or paraphrase of the relevant *statute or regulation*" (Gov. Code, § 11425.50(b), italics added). Since the Commission's factual findings did not merely repeat or paraphrase the underlying law, the Commission was *not* required to elaborate by providing "a concise and explicit statement of the underlying facts of record that support[ed] the decision." (*Ibid.*) Government Code section 11425.50(b) does require the statement of the factual basis to "identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination" but only *if* the factual basis

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of Rights" (Gov. Code, § 11425.10 et seq.) are contained in a chapter that expressly "does not apply to a local agency except to the extent the provisions are made applicable by statute." (*Id.*, § 11410.30, subd. (b).) Generally, "[l]ocal agencies are excluded because of the very different circumstances of local government units when compared to state agencies." (Cal. Law Revision Com. com., 32D pt. 1 West's Ann. Gov. Code (2018 ed.) foll. § 11410.30, pp. 368-369.) However, "[t]he administrative adjudication provisions of the Administrative Procedure Act are made applicable by statute to local agencies in a number of instances . . . ." (*Id.* at p. 369.) While the City and the Commission come within Government Code section 11410.30's definition of a "local agency" (Gov. Code, § 11410.30, subd. (a)), we assume for purposes of this appeal that the Commission was required to follow the "Administrative Adjudication Bill of Rights" (*Id.*, § 11425.10 et seq.) pursuant to Government Code sections 3254.5, subdivision (a), and 11501, subdivision (c). (But compare *id.*, § 3254.5, subd. (a) ["An administrative appeal instituted by a firefighter . . . shall be conducted in conformance with rules and procedures *adopted by* [italics added] the employing department . . . that are in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 [of the Government Code]" with Ed. Code, § 44944, subd. (b)(1)(B) [in dismissal or suspension proceedings against a permanent employee of a school district, "[t]he hearing shall be initiated and conducted, and a decision made, in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code"].)

[10] After the Commission announced its intended decision to terminate Seibert and the City prepared a proposed "Findings and Decision," Seibert requested a written decision setting forth "specific findings of fact" as to charge Nos. 3 to 5, citing San Jose Municipal Code section "3.04.1450, [subdivision A.]" In a subsequent petition for rehearing, Seibert asserted among other things that the "Commission did not make findings of fact as required by Municipal Code [section] 3.04.1500[, subdivision L.]" Both provisions allow findings to be stated in the language of the pleadings or by reference to the pleadings. (S.J. Mun. Code, §§ 3.04.1450, subd. A., 3.04.1500, subd. L.)

"includes a determination based substantially on the credibility of a witness."

Most significantly, "[u]nder general principles of appellate review and the specific language of [section] 1094.5, [a petitioner] must show a prejudicial abuse of discretion to prevail." [*21] (*Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1215; see Cal. Admin. Mandamus (Cont. Ed. Bar 3d ed. 2018) § 6.47, 6-37 ["reviewing court will deny the writ, despite abuse of discretion, if the agency's error did not prejudicially affect the petitioner's substantial rights"]; see also Cal. Const., art. VI, § 13.) We have already concluded that the Commission's findings met the *Topanga* standard and were adequate to allow meaningful judicial review. The Commission implicitly found L.F.'s statements to the City's investigator credible. In any case, a trial court that must exercise independent judgment review of an administrative decision is not bound by any administrative determinations of credibility.[11] (See *Fukuda, supra*, 20 Cal.4th at pp. 818-819.) Here, the trial court explicitly stated that it had carefully evaluated credibility, considering all the evidence before the Commission, applied *Fukuda's* strong presumption of correctness, and exercised its independent judgment. A prejudicial abuse of discretion has not been shown.

[11] Even under Government Code section 11425.50(b), findings of credibility are not binding. That section "adopt[ed] the rule of *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), requiring that the reviewing court weigh more heavily findings by the trier of fact (the presiding officer in an administrative adjudication) based on observation of witnesses than findings based on other evidence." (Cal. Law Revision Com. com., 32D pt. 1 West's Ann. Gov. Code (2018 ed.) foll. § 11425.50.) "However, the presiding officer's identification of such findings is not binding on . . . the courts, which may make their own determinations whether a particular finding is based substantially on credibility of a witness. Even though the presiding officer's determination is based substantially on credibility of a witness, the determination is entitled to great weight only to the extent the determination derives from the presiding officer's observation of the demeanor, manner, or attitude of the witness. Nothing in [Government Code section 11425.50(b)] precludes the . . . court from overturning a credibility determination . . . , after giving the observational elements of the credibility determination great weight, whether on the basis of nonobservational elements of credibility or otherwise. [Citation.]" (*Ibid.*; see Gov. Code, § 11405.80 [defining "Presiding officer" to mean "the agency head, member of the agency head, administrative law judge, hearing officer, or other person who presides in an adjudicative proceeding"].)

C. *Charge Nos. 1 and 2*

1. *Seibert's E-mails of an Escalating Sexual Nature*

The December 15, 2008 e-mail exchange, which followed N.C.'s second visit to the fire station and her disclosure by e-mail that she had injured her elbow during the visit, is fully set out in *Seibert I, supra*, 247 Cal.App.4th at pages 1031 to 1034. Seibert [*22] responded in part to that disclosure, "Too bad your [*sic*] not here, [sic] I would take care of you[.]" In an ensuing e-mail he said, "I think i [*sic*] would have to do a hands on [*sic*] evaluation." After Seibert asked whether she was using the family computer and N.C. said no, Seibert said, "[S]o as a paramedic, it is my job to 'asses' [*sic*] you and try to make you feel good. . . . [¶] A good 'hands-on' assesment [*sic*] begins at the head, and works down the body examining every inch of you to make sure you are okay . . . of course the body needs to be exposed [*sic*] that way I can see all injuries." In another e-mail, Seibert said, "I would have to evaluate you to see how healthy you are." In a further e-mail, he said, "I may have to do a very, very thorough hands on [*sic*] evaluation." He subsequently said, "I have a lot of equipment I can use to 'evaluate' you . . . we should start by taking your temperature with a 'thermometer' . . . ." In a further e-mail, he indicated that he "would have to look at [her] lips and mouth" and neck and that his exam would "involve exposing [her] chest (for medical purposes only)" and feeling her stomach. Also, he might "need to 'poke and probe' in [the [*23] hip] area." He "would take [her] temperature for a few minutes" and "move [her] body in different positions to see how flexible [she was]." In another e-mail, Seibert said, "[T]he more wet you are, the deeper I can probe to evaluate you," and "After probing you, and taking your temperature, I may have some 'medicine' to give you." In his final e-mail that night, Seibert stated in part, "I can start my evaluation from [sic] you in several different positions, and [I] can finish my evaluation from behind you . . . I like that :)." Apparently, the e-mail exchange stopped when N.C.'s father entered the room, saw the e-mails, and became upset.

2. *Doctrines of Res Judicata and Law of the Case*

Seibert argues that this court determined in *Seibert I* that the conduct alleged in charge No. 1 "could not support any discipline because the conduct did not violate any City policy, rule, or regulation cited in the NOD", that *Seibert I*'s determination "is res judicata," and that upon remand the trial court "failed to follow the law of the case." He further argues that charge No. 2 is

in essence the same as charge No. 1 since the City's policies that were the bases for the two charges did not address [*24] age. Res judicata and law of the case are separate doctrines.

a. *The Doctrine of Res Judicata*

Although in the past the California Supreme Court "frequently used 'res judicata' as an umbrella term encompassing both claim preclusion and issue preclusion" (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 823 (*DKN*)), the court now uses "the terms 'claim preclusion' to describe the primary aspect of the res judicata doctrine and 'issue preclusion' to encompass the notion of collateral estoppel. [Citation.]" (*Id.* at p. 824.) "Claim preclusion applies only when 'a second suit involves (1) the same cause of action (2) between the same parties [or their privies] (3) *after a final judgment on the merits in the first suit*.' [Citation.]" (*Samara v. Matar* (2018) 5 Cal.5th 322, 327, italics added.) Issue preclusion "applies only '(1) after *final adjudication* (2) of an *identical issue* (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party.' [Citation.]" (*Ibid.*, italics added.)

By not timely raising the res judicata or collateral estoppel claims in the superior court, Seibert forfeited them. (See *In re Reno* (2012) 55 Cal.4th 428, 506 (*Reno*); *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 945, fn. 14 (*Pacific Lumber Co.*).) In any case, the claims are without merit.

Since *Seibert I* was not a final [*25] judgment on the merits, the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) are not applicable here. This court entirely reversed the judgment and remanded the matter for further proceedings consistent with the views expressed in the opinion. (*Seibert I, supra*, 247 Cal.App.4th at p. 1071.) We also reject Seibert's further contention that under the doctrine of res judicata, Judge Bondonno's implicit findings regarding N.C.'s credibility precluded different credibility findings upon remand. The trial court's first judgment in this matter was not final and was reversed.

b. *The Doctrine of Law of the Case*

"'The doctrine of "law of the case" deals with the effect of the *first appellate decision* on the subsequent *retrial or appeal*: The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case.' [Citation.]" (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491.) "An unqualified reversal of a judgment on appeal vacates the trial court judgment and permits a retrial of all issues. [Citation.] Retrial of those issues is, however, limited by the law of the case established [*26] on the intervening appeal." (*Puritan Leasing Co. v. Superior Court* (1977) 76 Cal.App.3d 140, 146.)

"The [law-of-the-case] doctrine, as the name implies, is exclusively concerned with issues of law and not fact. [Citations.]" (*People v. Shuey* (1975) 13 Cal.3d 835, 842 (in bank) (*Shuey*), abrogated on another point as recognized in *People v. Bennett* (1998) 17 Cal.4th 373, 389, fn. 5.) The legal sufficiency of evidence is an issue of law. (*Ibid.*)

This court found in *Seibert I* that the cited provisions of the municipal code were "quite vague" and that the cited provisions of the code of ethics were, "if anything, even less specific." (*Seibert I, supra*, 247 Cal.App.4th at p. 1044.) This court found the Department's "somewhat more specific" rules and regulations to be "of doubtful relevance." (*Ibid.*) In the opinion, this court found "no fault in the trial court's [original] conclusion that evidence was insufficient to establish that the conduct described in charge [No.] 1 offended any existing rule or policy." (*Id.* at p. 1050.) This court did not engage in statutory construction of section 26.1 of the Department's rules and regulations or San Jose Municipal Code section 3.04.1370, subdivision V., and such construction was not an explicit ground of the decision in *Seibert I*.

Also, *Seibert I* did not find the evidence legally insufficient as a matter of law to sustain charge No. 1. Rather, *Seibert I* stated that the "City failed to present substantial [*27] evidence that any of these provisions would be offended by a private exchange of salacious e-mails between a firefighter and a willing unmarried adult." (*Seibert I, supra*, 247 Cal.App.4th 1044, fn. omitted.) As indicated, this court also recognized that "[i]t may well be that indiscriminate exchanges of salacious messages with *relative strangers* on company time creates an undue risk of embarrassment or even scandal." (*Id.* at p. 1050.) We did not decide whether "an abstract 'risk of embarrassment' furnishe[d] a ground for discipline." (*Ibid.*) We specifically stated that the trial court would be permitted to "elect to revisit the issue on remand." (*Ibid.*) Thus, *Seibert I* did not establish law of the case as to the sufficiency of the evidence.

Further, the law of the case doctrine is "merely a rule of

procedure and does not go to the power of the court, [the doctrine] has been recognized as being harsh, and it will not be adhered to where its application will result in an unjust decision. [Citations.]" (*Di Genova v. State Board of Education* (1962) 57 Cal.2d 167, 179.) "[T]he doctrine will not be adhered to where its application will result in an unjust decision, e.g., where there has been a 'manifest misapplication of existing principles resulting in substantial injustice' [citation]." (*Stanley, supra*, 10 Cal.4th at p. 787.)

It appears [*28] that this court in *Seibert I* might have assumed that (1) to prove that the e-mails violated section 26.1 of the Department's rules and regulations, there had to be evidence that Seibert's e-mails sexualizing his job as a paramedic actually brought reproach upon or discredited the Department or that (2) there had to be evidence that those e-mails actually caused harm to the public service to establish that they were "detrimental to the public service" under San Jose Municipal Code section 3.04.1370, subdivision V. However, application of any such implicit assumptions in this appeal would be "a manifest misapplication of existing principles resulting in substantial injustice." (*Shuey, supra*, 13 Cal.3d at p. 846.) Proper statutory construction is discussed below.

3. *The Commission's Decision as to Charge Nos. 2 and 6*

On this appeal, Seibert argues that the Commission's disposition of charge No. 6, which stated that on or about certain dates Seibert was dishonest during the administrative investigation, was inconsistent with its disposition of charge No. 2. He points to a pre-hearing e-mail from a deputy city attorney to Seibert's then counsel, which disclosed that charge No. 6 included Seibert's March 18, 2009 statements that indicated that he had no reason to [*29] believe that N.C. was younger than 18 years old. This e-mail, even if it can be considered on appeal despite being outside the administrative record, does not provide a basis for reversal.

First, trial courts exercising independent judgment must first accord a strong presumption of correctness to administrative findings but are ultimately free to make their own credibility findings. (See *Rodriguez v. City of Santa Cruz* (2014) 227 Cal.App.4th 1443, 1451; *Fukuda, supra*, 20 Cal.4th at pp. 816-819.) Second, as previously indicated, our scope of review on appeal is limited. (*Pasadena Unified Sch. Dist., supra*, 20 Cal.3d at p. 314.) It is our function to review the trial court's factual determinations under the substantial evidence test. (*Fukuda, supra*, 20 Cal.4th at p. 824; see *JKH, supra*, 142 Cal.App.4th at p. 1058.) Third, there was no fatal inconsistency. The Commission found that Seibert knew *or* should have reasonably known that N.C. was a minor. A finding that at a minimum Seibert should have reasonably known that N.C. was a minor was *not* based on his subjective knowledge of her age and *not* inconsistent with any implicit finding that Seibert did not lie about his subjective knowledge of her age.

4. *Remand of the Matter to the Trial Court*

Seibert claims that in *Seibert I*, this court "requested that Judge Bondonno indicate [that] he gave due regard to [*Fukada*] when considering [c]harge 2." He asserts that "this matter [*30] should have gone back to Judge Bondonno for him to confirm that his findings were made in conformity with [*Fukuda's*] critieria" and that "[i]t was error to send the case to a different judge who ignored Judge Bondonno's findings."

Seibert misdescribes *Seibert I* in asserting that as to charge No. 2, this court remanded the matter "merely for clarification of the criteria used by Judge Bondonno." This court stated that our reversal of the judgment would "set the matter at large in the trial court" (*Seibert I, supra*, 247 Cal.App.4th at p. 1043) and that it would "be open to the court on remand to reconsider [the questions of Seibert's knowledge], applying the 'strong presumption' of correctness mandated by *Fukuda*." (*Id.* at p. 1053.)

Seibert has failed to demonstrate that, based on *Seibert I* or other legal authority, charge No. 2 should have been reconsidered by Judge Bondonno.[12]

5. *Legal Bases for Disciplining Seibert's E-mail Conduct* (*Charge Nos. 1 and 2*)

Seibert contends discipline for his e-mails could not be predicated upon discredit to the Department, the risk of embarrassment, disrespect to the public, or disruption of the workplace. Specifically, he asserts there was no evidence of discredit to the Department in the administrative record. He [*31] argues that discipline could not be based on the risk of embarrassment posed by the e-mails because the trial court upon remand "did

[12] We deny respondents' request to take judicial notice of the truth of the contents of two unauthenticated documents, one of which is entitled "2017 Judicial Assignments" and the other of which is entitled "2018 Judicial Assignments." We find it unnecessary to address respondents' argument that it was reasonable to assign the matter to Judge McCracken on remand.

not address [whether the] 'risk of embarrassment' support[ed] discipline in the absence of a policy" that restricted salacious e-mail exchanges with relative strangers, an issue that the trial court could elect to revisit under *Seibert I*. (See *Seibert I, supra*, 247 Cal.App.4th at p. 1050.) Seibert insists that age was irrelevant to charge Nos. 1 and 2 because the City's "policies in question [did] not deal with a person's age." Seibert maintains that in *Seibert I* this court "ruled" that "the likelihood [that his e-mail conduct would bring] discredit to the [D]epartment . . . was insufficient to support discipline" and that this court acknowledged that N.C.'s age was irrelevant to charges Nos. 1 and 2. Seibert does not accurately describe this court's conclusions in our earlier opinion.

a. *Charge No. 1*

In *Seibert I*, this court stated in part with respect to charge No. 1: "The [Director of Employee Relations] suggested that the e-mail exchange warranted discipline because it consisted of sexual double entendres centered on Seibert's status as a paramedic. Asked to explain how a private off-color e-mail [*32] exchange could violate the policies cited in the notice of discipline, the director replied, '[T]hese email exchanges were being sent to a citizen where Mr. Seibert is *clearly identifying himself as a member of the fire department*. That's what it talks about, talks about when he's on duty, when he's not on duty, plus *the emails that became sexual were about his role as a paramedic and conducting examinations*. So he's talking about how he conducts—you conduct examinations and then it keeps going and becomes sexual and he engages in that email communication. You read those emails and you see, this is not just some separate communication with your girlfriend or your significant other. Here, *he's talking about his role as a firefighter/paramedic and starts to get into a sexual exchange with* [*N.C.*] *about examinations and what you would probe and all of those things*. You have to take the context to understand and I believe if you take that context, I think a reasonable person would understand why that is absolutely a discredit to the San Jose Fire Department and why we believe Mr. Seibert should be terminated for it.' (Italics added.)" (*Seibert I, supra*, 247 Cal.App.4th at p. 1049.)

The opinion continued: "Under cross-examination, [*33] Seibert did not deny that the exchange involved 'sexualizing the things you do as a paramedic and putting them in some sort of sexual context.' He acknowledged having taken his 'role as a paramedic, a San Jose paramedic and turn[ed] it into a sexual thing with somebody who is a member of the public.'" (*Seibert I, supra*, 247 Cal.App.4th at p. 1050.) Despite the foregoing evidence, we concluded as the reviewing court that "the *trial court* was entitled to find the evidence before the Commission *insufficient* to establish that this characteristic increased the likelihood or extent to which the [e-mail] exchange threatened to bring discredit upon the Department or City." (*Ibid.*, italics added.)

Addressing the fact that trial court incongruously sustained charge No. 1 "on the ground that that Seibert's conduct created a 'risk of embarrassment to the City' which 'support[ed] some progressive disciplinary action[]'" short of termination (*Seibert I, supra*, 247 Cal.App.4th at p. 1050.), this court suggested that "[i]t may well be that indiscriminate exchanges of salacious messages with *relative strangers* on company time creates an undue risk of embarrassment or even scandal." (*Ibid.*) We stated: "Indeed this case illustrates the danger. Assuming Seibert believed his correspondent [*34] to be a young adult, the fact is that *he did not know* and that, as it turned out, she was legally a child. Seibert was not prosecuted, but he was investigated, for what would be widely considered an extremely odious offense." (*Ibid.*)

This court expressed uncertainty in *Seibert I* whether in the absence of an express policy restricting exchanges of salacious messages with relative strangers on company time, "an abstract 'risk of embarrassment' furnishe[d] a ground for discipline." (*Seibert I, supra*, 247 Cal.App.4th at p.1050.) We noted that "the parties ha[d] not distinctly addressed this aspect of the trial court's judgment." (*Ibid.*) We declared that "the court may elect to revisit this issue on remand." (*Ibid.*) "[T]he general rule [is] that law of the case does not apply to arguments that might have been but were not presented and resolved on an earlier appeal. [Citations.]" (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1130.)

While no rule or policy *expressly* prohibited conduct that creates a "risk of embarrassment" to the Department, conduct "*tending to* bring reproach or discredit upon the Department or its members" (S.J.F.D. Rules & Regs., § 26.1, italics added) was expressly prohibited. The verb "discredit" is synonymous with "cast reproach upon" and "humiliate," for which the [*35] word "embarrass" is a synonym. (See Roget's Internat. Thesaurus (8th ed. 2019) §§ 137.4, 661.8, pp. 126, 496; see also Oxford Univ. Press, Lexico Online Dict. (2019) <https://www.lexico.com/synonym/embarrass > [as of May. 5, 2020], archived at: <https://perma.cc/Z8WF-URM9 >.) Thus, the Department's prohibition against

conduct "tending to bring reproach or discredit upon the Department or its members" (S.J.F.D. Rules & Regs., rule 26.1) is closely intertwined with the question whether an employee's conduct is liable to bring reproach or discredit upon or embarrass the Department. We do not find the trial court's decision flawed because it did not expressly "address the issue of 'risk of embarrassment' supporting discipline in the absence of a policy."

Insofar as Seibert argues that disciplinary action could not be predicated on his e-mails because "there was no evidence [in the record] of discredit to the [D]epartment", we see no basis for construing rule 26.1 to impose such a requirement. Such a construction would in effect negate the words "tending to" in the phrase "tending to bring reproach or discredit upon the Department or its members." (S.J.F.D. Rules & Regs., rule 26.1) "It is a settled principle of statutory construction [*36] that courts should 'strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous.' [Citations.]" (*In re C.H.* (2011) 53 Cal.4th 94, 103.) The trial court could reasonably find that Seibert's explicit sexualization of his role and actions as a Department paramedic in his e-mails sent to a female acquaintance, whom he had only recently met in his official capacity as firefighter and believed to be at the most a very young adult, tended to bring reproach or discredit upon the Department or its members.

Language very similar to rule 26.1 has been part of a law governing disciplinary proceedings applicable to state employees for decades. Government Code section 19572 provides in pertinent part: "Each of the following constitutes cause for discipline of an employee, or of a person whose name appears on any employment list: [¶] . . . [¶] (t) Other failure of good behavior either during or outside of duty hours, which is of such a nature that it *causes discredit* to the appointing authority or the person's employment. . . ."[13] (Italics added.)

In *Orlandi v. State Personnel Bd.* (1968) 263 Cal.App.2d 32 (*Orlandi*), an appellate court rejected the argument that "in order to be a cause for discipline under [former Government Code,] subdivision (t), [a state employee's [*37] conduct] must be publicized, known and communicated to such an extent that there is actual damage done to the reputation of the employing agency or to the employment of the employee." (*Id.* at p. 36.) The court explained: "To follow appellant's argument to an end result would be to indulge in an absurdity. Thus, in order to take punitive action against an employee under subdivision (t), the employing agency would in effect have to publicize the fact that it had in its midst an errant employee. Or viewed from another way, an offending employee could not be disciplined under subdivision (t) so long as his misdeeds were kept 'within the family' and no damage was proved to be done to the agency's 'image.' Such was surely not the intent of the Legislature." (*Id.* at p. 37.) The court stated that "[s]ubdivision (t) refers to conduct which would reflect discredit on the employing agency or the position held by the person engaging in such conduct, regardless of whether publicized or not." (*Ibid.*) This reasoning was cited with approval and adopted in *Nightingale v. State Personnel Board* (1972) 7 Cal.3d 507 (*Nightingale*) at pages 513-514.

The sound reasoning of *Nightingale* and *Orlandi* applies here to construction of section 26.1 of the Department's rules and regulations. A showing of actual discredit to the Department [*38] is not required. Further, in this case N.C.'s father, another member of the public, did learn of the e-mails. He became very upset and went to the fire station and reported Seibert's behavior to his superiors. N.C.'s father later told the City's investigator that he had told the fire captain who was present at the fire station when he showed up there that he believed that the Department had a predator in its midst. He told the investigator that his family's trust in the Department had been violated. Similar reasoning applies to construction of the language "act . . . detrimental to the public service." (S.J. Mun. Code, § 3.04.1370, subd. V; see S.J. City Policy Manual, § 2.1.3, subd. 2.v.) The word "detrimental" can be understood to mean "[t]ending to cause harm." (Oxford Univ. Press, Lexico Online Dict. (2019) <https://www.lexico.com/definition/detrimental > [as of May 5, 2020], archived at: <https://perma.cc/2AVS-7FGV >. This cause for discipline was addressed to the nature of an employee's conduct, not to the extent of actual harm caused to the public service. Requiring a showing of actual detriment to the public service to prove this cause of discipline would be an illogical construction and against public policy, [*39] precluding any proactive discipline before the public service had suffered concrete damage. (Cf. *Orlandi, supra*, 263

[13] Subdivision (t) was added to Government Code section 19572 in 1963. (Stats. 1963, ch. 1620, § 2.) A 1984 amendment substituted "the appointing authority" for "his agency" and "the person's" for "his" in subdivision (t). (Stats. 1984, ch. 1734, § 4.) In 2004, a nonsubstantive amendment added a comma. (Stats. 2004, ch. 788, § 8.)

Cal.App.2d at pp. 36-37; *Nightingale, supra*, 7 Cal.3d p. 513.)

It must be remembered that in this appeal, we are reviewing different trial court findings than were reviewed in *Seibert I*. The trial court upon remand found that Seibert's e-mails sexualizing his job brought discredit to the Department and were detrimental to the public service. Those findings were sufficient to sustain charge No. 1. Conduct tending to bring reproach or discredit upon the Department and its members in violation of section 26.1 of the Department's rules and regulations constituted a cause for discipline under several municipal code provisions specified in the charge. (See S.J. Mun. Code, § 3.04.1370, subds. B., E., V.; see also S.J. City Policy Manual, § 2.1.3, subds. 2.b., 2.e., 2.v.)

Although the trial court also stated that "Seibert's emails were devoid of the respect owed to members of the public," we do not agree with Seibert that the trial court improperly "created a new charge" (emphasis omitted) based on his "disrespect to the public." As mentioned, the former fire chief indicated that paramedics have "intimate contact with people." Insofar as Seibert sexualized his job, his actions reasonably could be found [*40] to be disrespectful to the general public, which is rightly entitled to expect professionalism from its public servants. In addition, insofar as those actions tended to undercut the public's trust of and respect for the Department and its members, the trial court could reasonably find that those actions were detrimental to the public service, which was a cause for discipline specified in charge No. 1.[14] (S.J. Mun. Code, § 3.04.1370, subd. V.; see SJ City Policy Manual, § 2.1.3, subd. 2.v.) Further, those e-mails also contravened the City's general ethics policy that required employees' conduct to be above reproach and to meet the highest standards to inspire public confidence and trust. (See *ante*, fn. 4.)

b. *Charge No. 2*

Contrary to Seibert's contentions on appeal, *Seibert I* did not make a determination that N.C.'s age was irrelevant to charge No. 2. Again, Seibert mischaracterizes this court's prior opinion.

In *Seibert I*, this court stated: "We have little doubt that a firefighter-paramedic's exchange of sexually charged messages with a minor can expose the Department to disrepute. Here, when the minor's father learned of the exchange he concluded that Seibert was a 'predator' who could not be trusted in dealing with [*41] members of the public. No doubt many members of the public would share that view." (*Seibert I, supra*, 247 Cal.App.4th at p. 1050.) We noted that the evidence on the factual issue of whether Seibert knew or should have known that N.C. was a minor was "sharply conflicted." (*Id.* at p. 1051.) We recognized that the trial court (Judge Bondonno) had implicitly found that "the evidence [was] insufficient to establish that Seibert possessed actual or constructive knowledge of the minor's age." (*Id.* at p. 1050.) But this court found "ample evidence" for a contrary finding as well. (*Id.* at p. 1053.) This court concluded in *Seibert I* that, given the scope of our review, we could not find that "the court erred in finding that the weight of the evidence did not sustain the second charge." (*Ibid.*) We expressly stated, however, that "it will be open to the court on remand to *reconsider* these questions, applying the 'strong presumption' of correctness mandated by *Fukuda, supra*, 20 Cal.4th at page 808." (*Ibid.*, italics added.)

Upon remand, the trial court found that "ample evidence support[ed] a conclusion that Seibert, at a minimum, should have known [N.C.] was underage." The court's determination only meant that Seibert's e-mails of a sexual nature tended to expose the Department to greater reproach or discredit than [*42] if he had no actual or constructive knowledge of her age. With this finding, the trial court could reasonably sustain charge No. 2 on the ground that Seibert's e-mails sexualizing his job as a paramedic for the Department, which he sent to a female whom he should have known was a minor, "tend[ed] to bring reproach or discredit upon the Department or its members" (S.J.F.D. Rules and Regs., § 26.1). Consequently, those e-mails were a cause for discipline because they constituted a failure to observe applicable rules and regulations and constituted

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[14] Seibert also complains that the trial court improperly determined that a charge "could be sustained because sending the emails resulted in a disruption of the workplace operations." After stating its conclusions with respect to charge No. 1, the trial court added, "Even if [N.C.] were not a minor, under these circumstances, the emails disrupted the operations of SJFD—Seibert had to be taken off the rig—because, as the [former fire chief] explained, paramedics 'just have too much intimate contact with people.'" The trial court's comment is not a basis for reversal because it was (1) an additive observation and (2) not a finding that Seibert's e-mails constituted a failure to satisfactorily perform his duties. The comment related to the detrimental effect of Seibert's e-mails on his ability to render trusted public service as a paramedic for the Department.

misconduct, as charged.[15] (See S.J. Mun. Code, § 3.04.1370, subds. B., E; see also S.J. City Policy Manual, § 2.1.3, subds. 2.b., 2.e.)

D. *Charge Nos. 3, 4, and 5*

1. *Adequacy of Charges Set Forth in the NOID and the NOD*

Seibert asserts that the NOID and the NOD violated Government Code section 11503, subdivision (a), because charge Nos. 3 to 5 "did not allege any specific conduct" and stated his alleged misconduct in the language of the City's discrimination and harassment policy. Government Code section 11503, subdivision (a), states in pertinent part: "The accusation . . . shall be a written statement of charges that shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to [*43] prepare his or her defense. It shall specify the statutes and rules that the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of those statutes and rules."

With respect to charge Nos. 3 to 5, Seibert has not shown by citation to the record that at the administrative level he timely raised an objection to the NOID or the NOD on the ground that it failed to comply with Government Code section 11503, subdivision (a). His petition for administrative mandamus did not allege that any respondent had failed to proceed in the manner required by law because the NOID or the NOD did not comply with Government Code section 11503, subdivision (a). (See § 1094.5, subd. (b).) Seibert raised Government Code section 11503 in his supplemental trial brief on remand following *Seibert I*.

Even if we were to assume that the forfeiture rule did not apply to an argument that Government Code section 3254.5 made Government Code section 11503, subdivision (a), applicable to the City's NOID and NOD, Seibert cannot prevail on a challenge to the adequacy of either notice based on Government Code section 11503, subdivision (a). As previously indicated, subdivision (a) of Government Code section 3254.5 provides: "An *administrative appeal* instituted by a firefighter under this chapter shall be conducted in conformance with rules and procedures adopted by the employing department . . . ." (Italics added.) The City points out, we think correctly, that [*44] Government Code 11500 et seq. apply only to an administrative appeal instituted by a firefighter, not a pre-appeal NOID or NOD.

Further, even if we were to accept the argument that Government Code section 3254.5 made Government Code 11500 et seq. applicable to the City's NOID and NOD, Government Code section 11506, subdivision (a), provides in part that "[w]ithin 15 days after service of the accusation . . . the respondent may file with the agency a notice of defense, or, as applicable, notice of participation, in which the respondent may . . . [¶] . . . [¶] "[o]bject to the form of the accusation . . . on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare a defense." A failure to timely object to the form of the accusation forfeits the objection. (*Collins v. Board of Medical Examiners* (1972) 29 Cal.App.3d 439, 444.) Seibert may not at this late date challenge the sufficiency of the NOID or the NOD based on Government Code section 11503, subdivision (a).

2. *Adequacy of the Commission's Findings on Charge Nos. 3 to 5*

Citing *Topanga* and Government Code section 11425.50(b), Seibert challenges the adequacy of the Commission's findings on charge Nos. 3 to 5 on the ground that the Commission failed to specify the evidence upon which it relied and make credibility findings. Those claims were thoroughly discussed above and rejected.

3. *Adequacy of the Trial Court's Findings on Charge Nos. 3 to 5*

a. *Trial Court's [*45] Findings Upon Remand*

In *Seibert I*, this court made clear that "our reversal on other grounds will permit the trial court to reevaluate its treatment of all of the charges, and will require it to do so with respect to the . . . charges" concerning L.F. (*Seibert I, supra*, 247 Cal.App.4th at pp. 1065-1066.) With respect to charge Nos. 3 to 5, the trial court expressly stated that it was exercising its independent

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[15] Even *if* we had found that the law of the case barred the trial court from sustaining charge No. 1, the trial court could properly find on remand that Seibert's e-mails of a sexual nature were sent when he reasonable should have known that N.C. was a minor and accordingly tended to bring reproach or discredit upon the Department and its members. (S.J.F.D. Rules & Regs., § 26.1) Consequently, we would have found that any failure to apply the law of the case to charge No. 1 was not prejudicial because charge No. 2 was properly sustained.

judgment and applying "*Fukuda*'s strong presumption of correctness concerning the Commission's findings." The trial court found that L.F.'s statements to an investigator were truthful. It sustained the charges, concluding that "Seibert violated the City's harassment policy and other codes, rules and policies cited by the Commission by inappropriately touching [L.F.] and by making inappropriate comments to her" and that "Seibert engaged in inappropriate conduct, including unwelcome attention and leering or staring at [L.F.], also in violation of the City's harassment policy."

In its statement of decision and judgment, the trial court described the factual basis for its conclusion. "On the first day [L.F.] was assigned to the training center, [L.F.] was greeted by other co-workers who shook her hand, but Seibert 'acting like he knew [*46] [her] for years' approached her from behind and pushed his index fingers into her waist as if to 'almost' tickle her. While he did this, Seibert made a little 'hehehe' sound. In response, [L.F.] said, 'Whoa. Back off. What are you doing?' About a week later in referring to a clerical error [L.F.] [had] made, Seibert said to [L.F.], 'Oh doll, that's okay. Don't worry about it doll.' [L.F] said, 'Do not call me that ever! Don't ever say that again.' According to [L.F.], Seibert apologized and acknowledged the remark as 'inappropriate.'"

The trial court's decision further described Seibert's behavior toward L.F. "The next week, while [L.F. was] sorting gear with Siebert and another firefighter, Seibert openly discussed his 'personal sex life with younger girls.' [L.F.] clarified that while Seibert did not actually use the word 'sex,' he said, 'I love being with younger girls, they're great and they're hot and they're beautiful.' Seibert made similar statements two or three times in her presence. [¶] [L.F.] interpreted his remarks about young girls being 'just the best' as implying that they are 'good in bed.' [L.F.] testified that Seibert asked her if she could get him a 'young girl . [*47] . . 25 and younger.' [L.F.] described herself as tolerant and having 'thick skin,' but [she] found this 'demeaning' to her."

The court's decision detailed other conduct by Seibert. "Seibert also asked [L.F.] questions about her personal life and her boyfriend. L.F. told him at least three or four times not to ask her about her personal life. Finally, she said[,] 'Listen. You need to stop. I'm not cool with this. Leave my personal life alone.' [¶] Next, [L.F.] testified that while she was working at a computer, Seibert walked up behind her and twisted her ponytail around his finger, saying 'ooooh' in a high-pitched tone. When [L.F.] said[,] 'Don't!' strongly, Seibert responded, 'Ooooh are you mad at me?' When [L.F.] insisted that she was not mad, Seibert said, 'Ooh well, you're acting like you're mad at me. If there's something I did, let me know.' Later, when another coworker commented that Seibert and [she] fought like a married couple, Seibert responded[,] 'I was just going to say how nice that would be to be married to you.' Shortly thereafter, [L.F.] reported Seibert's conduct to Captain Polverino, her supervisor."

The decision stated: "[L.F.] testified that as a firefighter, she [*48] work[ed] with 700 men and ha[d] never felt uncomfortable until her experiences with Seibert. She described his conduct as making it 'unbearable to work there. [She] didn't want to go to work if he was there. [She] didn't want to be in the same room as him.'"

b. *Analysis*

Although arguing that the findings on charge Nos. 3 to 5 were inadequate, Seibert mainly points to evidence in the administrative record from which inferences in his favor might have been drawn. However, this court is constrained by the substantial evidence standard of review. (See *Fukuda, supra*, 20 Cal.4th at p. 824; *Pasadena Unified Sch. Dist., supra*, 20 Cal.3d at p. 314; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 (*Foreman*).) "'Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.' [Citations.]" (*People v. Brown* (2014) 59 Cal.4th 86, 106.) This court is not required to find substantial corroborating evidence.

Without any citation to authority, Seibert asserts that "[t]he trial court's duty [was] to find evidence used by the Commission to support its findings" and that the "court may not substitute [its own] findings [for findings] that should have been made by the Commission." [*49] Those statements are incorrect.

In exercising its independent judgment, the strong presumption of correctness accorded administrative findings "provides the trial court with a starting point for review—but it is only a presumption, and [the presumption] 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." (*Fukuda, supra*, 20 Cal.4th at p. 818, italics added.) We repeat that "when, as here, the trial court is required to review an administrative decision under the independent

judgment standard of review, the standard of review on appeal of the trial court's determination is the substantial evidence test. [Citations.]" (*Id.* at p. 824.)

"On review of [a] decision [of a trial court exercising its independent judgment], an appellate court determines whether the independent 'findings and judgment of the [trial] court are supported by substantial, credible and competent evidence' in the *administrative record*. [Citations.]" (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd.* (2014) 59 Cal.4th 551, 562, italics added.) As the appellate court, we must resolve all evidentiary conflicts in favor of respondents, and if a finding is supported by substantial evidence, we cannot [*50] substitute our judgment even if the evidence might be reasonably reconciled with a contrary finding. (See *Pasadena Unified Sch. Dist., supra*, 20 Cal.3d at p. 314.)

Seibert has neither squarely argued nor affirmatively demonstrated that there is no substantial evidence to support the trial court's findings. "A recitation of only [an appellant's] evidence is not the 'demonstration' contemplated under the [substantial evidence] rule. [Citation.] . . . '[Appellants challenging the sufficiency of the evidence] are required to set forth in their brief *all* the material evidence on the point and not *merely their own evidence*. Unless this is done the error assigned is deemed to be waived.' (Italics added.) [Citations.]" (*Foreman, supra*, 3 Cal.3d at pp. 881-882.)

Seibert also repeatedly refers to the transcripts of the investigative interview of L.F. as "unauthenticated." As already stated, in *Seibert I* this court found that any objection based on lack of authentication had been forfeited since "no such objection was ever lodged before the Commission." (*Seibert I, supra*, 246 Cal.App.4th at p. 1057, see *id.* at p. 1059.) We found it to be judicial error not to consider L.F.'s prior statements in those transcripts. (*Id.* at p. 1065.) The trial court's findings upon remand cannot be deemed inadequate because they were based on L.F.'s prior statements contained [*51] in those transcripts.

Insofar as Seibert is claiming that the trial court's findings upon remand were inadequate because the trial court relied on evidence of conduct that was not specified in a pre-hearing e-mail from a deputy city attorney to Seibert's counsel, we reject the claim. Although the e-mail specified conduct for the purpose of clarifying some of the charges against Seibert, it also stated that "[t]he City reserves its right to support its charges with other facts or evidence not referenced . . . ."

Seibert suggests that "[e]ven the City's investigator could not support [the] allegation" that Seibert had referred to L.F. as "doll." Although the investigator could not corroborate the doll comment and consequently stated in a letter to the City that she had not "sustained" the allegation, the investigator also stated that "[r]eferring to someone as a 'doll' or 'girl' or 'babe' [was] an example of conduct that should be avoided under the City's discrimination and harassment policy." In addition, the investigator observed that despite denying that he had made the doll comment, Seibert had "referred to women as 'girls' during his initial interview" with her. L.F.'s statements [*52] to the investigator, including her report of Seibert's doll comments, were part of the administrative record before the Commission upon which the trial court could rely in exercising its independent judgment.

Seibert has not established any reversible defect in the trial court's findings with respect to charge Nos. 3 to 5.

4. *Hearsay Statements in Investigative Interview Transcripts*

Seibert I's conclusion that "Seibert forfeited any objection [that] he might have had that the transcripts lacked authentication" (*Seibert I, supra*, 246 Cal.App.4th at p. 1057, see *id.* at p. 1059) established law of case. Nevertheless, Seibert attempts to raise the claim again by refashioning it. He now contends that the trial court improperly used the hearsay contained in the unauthenticated transcripts despite his asking the court, following remand, to consider L.F.'s hearsay statements for a limited purpose. Seibert asserts that such a request for limitation was made to the trial court pursuant to San Jose Municipal Code section 3.04.1410 and Government Code section 11513, subdivision (d), as authorized by *Seibert I*. He mischaracterizes *Seibert I*.

San Jose Municipal Code section 3.04.1410, subdivision A.4., (hereafter 3.04.1410A.4.) provides that in a hearing before the Commission on a disciplinary action, "[h]earsay evidence may be used for the purpose [*53] of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding *unless it would be admissible over objection in a civil action*." (Italics added.) Government Code section 11513, subdivision (d), states: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding *unless it would be*

admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration." (Italics added.)

First, this court determined in *Seibert I* that Seibert had "forfeited his authentication objection by failing to raise it before the Commission" (*Seibert I, supra*, 247 Cal.App.4th at p. 1059) and that is law of the case. Seibert could not properly raise it in another guise in the trial court.

Second, *Seibert I* did *not* say that upon remand Seibert could request the trial court to consider the hearsay in the investigative transcripts only for the limited purpose of supplementing or explaining other evidence on the ground that those transcripts were unauthenticated. Rather, this court found that Seibert's hearsay objection before the Commission was timely because "it was made by motion to dismiss prior to [*54] the last hearing" and "reiterated in [his] motion for reconsideration [of the Commission's decision]." (*Seibert I, supra*, 247 Cal.App.4th at p. 1061.) We considered the hearsay objection, treating it "as a request [for limitation] under Evidence Code section 355 to consider the evidence only for the purposes authorized by [San Jose] Municipal Code section 3.04.1410A.4." (*Ibid.*)

Third, even under the provisions cited by Seibert, hearsay evidence may be used for all purposes if it would be "admissible over objection in a civil action." (S.J. Mun. Code, § 3.04.1410A.4; see Gov. Code, § 11513, subd. (d).) Those provisions implicitly refer to an objection on *hearsay grounds* since hearsay is ordinarily inadmissible in civil actions absent a hearsay exception. (Evid. Code, § 1200.)

Fourth, in *Seibert I* this court determined that L.F.'s hearsay statements were admissible under one or another of two hearsay exceptions. (*Seibert I, supra*, 247 Cal.App.4th at pp. 1062-1065.) That is law of the case as well.

The trial court correctly rejected Seibert's attempt to limit the court's consideration of L.F.'s hearsay statements for substantive purposes on the ground that the transcripts of the investigative interviews had not been properly authenticated before the Commission. Thus, L.F.'s hearsay statements contained in those transcripts constitute substantial evidence to support charge Nos. 3 to 5. [*55]

E. *Termination Rather than Progressive Discipline*

Seibert argues that the City failed to follow its own policies on progressive and comparable discipline. He asserts that "[n]either the Commission nor the trial court [following remand] set forth any evidence supporting termination over progressive discipline."

1. *Governing Policies*

The City's discipline policy is set forth in its "City Policy Manual." As to progressive discipline, section 2.1.3 of the manual states in part: "The City's discipline process is based on the concept of progressive discipline. Under progressive discipline, the City takes progressively more severe action if the employee has not responded to previous instructions, warnings, or other lower-level actions. However, progressive discipline does not mean that the City must progress through all discipline steps in all cases. Certain conduct may be serious enough that the first incident may warrant a higher level of discipline, up to and including termination without progressive discipline."

The Department's Disciplinary Procedures Manual stated: "Remedial action is required when an employee's behavior or performance falls below acceptable standards. Because discipline is intended [*56] to be corrective rather than punitive, our system is based on the concept of progressive discipline. Under this system, the supervisor takes progressively more severe action if the employee has not responded to previous instruction or warnings." It further explained that "[i]n progressive discipline the steps normally followed are: [¶] 1. Counseling[;] [¶] 2. Documented Oral Counseling[;] [¶] 3. Written Reprimand[;] [¶] [and] 4. Formal Discipline."

But the Department's manual also recognized: "[C]ertain offenses are serious enough that the first incident may call for immediate formal discipline or skipping some steps. For example, an employee could be dismissed for the first act of violence or theft." It summarized that progressively more severe discipline "[m]ay not be appropriate for" theft, fraud, violence, or "[o]ther serious misconduct." As to the appropriateness of particular discipline, the manual commented that "[d]eciding upon appropriate discipline is not an exact science" and that "[t]here are no hard and fast rules . . . ."

The manual specified that one of the considerations in deciding on the level of discipline was the "[c]omparable level of discipline given to other employee[s] [*57] for similar infractions." Other considerations included (1) job relevance, (2) the employee's length of service, (3) the seriousness of the offense, (4) any prior discipline, (5)

the current city or departmental polices with regard to corrective measures for that offense, and (6) the employee's past performance and work record.

2. *Standard of Review*

"Generally speaking, '[i]n a mandamus proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of its discretion.' [Citations.]" (*Skelly, supra*, 15 Cal.3d at p. 217.) "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.]" (*Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 404 (*Barber*).) "This rule is based on the rationale that 'the courts should pay great deference to the expertise of the administrative agency in determining the appropriate penalty to be imposed.' [Citation.]" (*Hughes v. Board of Architectural Examiners* (1998) 68 Cal.App.4th 685, 692, fn. omitted.)

If reasonable minds may differ as to the appropriateness of disciplinary action, there is no manifest abuse of discretion. (See *Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 46 (*Deegan*); *Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 218 (*Landau*).) "It is only in the exceptional case, when it is shown that reasonable [*58] minds cannot differ on the propriety of the penalty, that an abuse of discretion is shown. [Citations.]" (*Deegan, supra*, at p. 47.) Even if the discipline imposed appears to the reviewing court to be too harsh, the court cannot substitute its judgment if the administrative agency acted within its discretion. (See *Landau, supra*, at p. 221; *Macfarlane v. Department of Alcoholic Beverage Control* (1958) 51 Cal.2d 84, 91.)

3. *Unpublished Appellate Decision Involving Discharge of Different Employee*

Seibert argues that "[t]he City has already litigated the required use of progressive discipline" in *City of San Jose v. International Ass'n of Firefighters* (Nov. 5, 2010, H034726) [nonpub. opn.] (*Baldwin* case).[16] He claims that "the issue is res judicata" or "relevant as collateral estoppel" and therefore "[t]he City is estopped to abandon the use of progressive discipline."

California Rules of Court, rule 8.1115 restricts the citation of unpublished opinions, but "[a]n unpublished opinion may be cited or relied on" "[w]hen the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel." (Cal. Rules of Court, rule 8.1115(b).) Seibert forfeited his claims of res judicata and collateral estoppel by failing to timely raise them below. (See *Reno, supra*, 55 Cal.4th at p. 506; *Pacific Lumber Co., supra*, 37 Cal.4th at p. 945, fn. 14.)

In any case, Seibert was not a party in the *Baldwin* case. Seibert has not identified any issue specifically [*59] decided by this court in the *Baldwin* case that now may be asserted against the City. (See *DKN, supra*, 61 Cal.4th at p. 824.) '"[W]here the subsequent action involves parallel facts, but a different historical transaction, the application of the law to the facts is not subject to collateral estoppel.' [Citations.]" (*Chern v. Bank of America* (1976) 15 Cal.3d 866, 871-872 (in bank).) "In general it may be said that rulings of law, divorced from the specific facts to which they were applied, are not binding under principles of res judicata. [Citations.]" (*Id.* at p. 872.) Therefore, *Baldwin* has no collateral estoppel effect here.

4. *Sexual Harassment*

Seibert argues that the decision to terminate him was based on the then fire chief's "incorrect assumption" that he was charged with sexual harassment. The former fire chief, who had "signed off on the final discipline" in Seibert's case, testified at the hearing before the Commission that some of Seibert's misconduct "revolved around sexual harassment" and that the Department had "zero tolerance" for such violations. He confirmed that charge Nos. 3 to 5 related primarily to the

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[16] In the *Baldwin* case, "the City of San Jose challenge[d] the confirmation of a labor arbitrator's award, which ordered reinstatement of Michael Baldwin. The City had discharged Baldwin from his job as a fire inspector for sexually harassing co-workers. Baldwin grieved his discharge with the aid of his union, International Association of Firefighters, Local 230. The matter was arbitrated as provided in the labor agreement between the City and the Union. The arbitrator found the sexual harassment allegations true, but he nevertheless ordered Baldwin's reinstatement, based in part on the City's failure to impose progressive discipline as contractually required." This court observed in our opinion that "[u]nder the parties' labor agreement, the arbitrator was charged with determining whether the employee's 'conduct was so serious that progressive discipline was not warranted.' [Citations.]" This court found "no public policy basis for vacating the arbitrator's decision to reinstate Baldwin" and concluded that "[a]lthough there [was] a well-defined public policy against sexual harassment in the workplace, that policy [did] not mandate automatic discharge of an offending employee, particularly where, as here, the discharge violates progressive discipline principles reflected in the governing labor agreement and the employer's own policies. [Citation.]"

City's discrimination and harassment policy.

Seibert now insists that "there was no sexual harassment in this case, and [that] the Commission ruled that sexual harassment [*60] was not charged in the NOD and ordered the City to stop using the phrase 'sexual harassment.'" The portion of the administrative record to which Seibert cites does not support his assertion. Rather, it reflects that when the director of employee relations was asked whether he had "experience . . . investigating sexual harassment cases" at the hearing before the Commission, Seibert's counsel objected on the ground that none of the charges alleged sexual harassment. The deputy city attorney indicated that the second set of charges did involve sexual harassment. Seibert's counsel then indicated that the charges themselves did not use the word "sexual." The presiding officer told the City's counsel to rephrase the question, and the deputy city attorney then asked, "Do you have experience in investigating discrimination in harassment cases?" This exchange does not demonstrate that the Commission made a legal ruling that charge Nos. 3 to 5 did not arise from conduct that could be found to qualify as sexual harassment.

Seibert apparently understood that the City was charging him with violating its policy on harassment. However, he overlooks the fact that the City's discrimination and harassment [*61] policy encompassed sexual harassment. In addition, Seibert neglects the fact that his conduct underlying charge Nos. 3 to 5 was directed toward a female coworker and that no protected category or status other than sex or gender was implicated by those charges. Further, conduct does not need to be of a sexual nature or involve unwanted sexual attention or advances to qualify as sexual harassment. (See *ante*, fn. 6; cf. Gov. Code, § 12940, subds. (j)(1), (j)(4)(C).)

Seibert also claims that in *Seibert I*, this court "acknowledged [that] there was no evidence of sexual harassment." That claim is unfounded. After recognizing that the trial court had found the evidence before the Commission insufficient to support the charges against Seibert (*Seibert I, supra*, 247 Cal.App.4th at p. 1056), this court concluded that the trial court had erred by refusing to consider L.F.'s prior statements in support of the Commission's findings on charge Nos. 3 to 5. (*Id.* at p. 1065.)

In this case, the trial court upon remand found that Seibert had engaged in multiple incidents of harassing conduct toward L.F. On appeal, Seibert fails to specifically argue based on legal authority and by citation to the record that the evidence was insufficient as a matter of law to support a conclusion that he had engaged [*62] in sexual harassment creating a hostile work environment.[17] (See *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 278-279.) He does not assert based on the administrative record that his conduct was insufficiently pervasive as a matter of law to constitute sexual harassment. (Cf. *Hughes v. Pair* (2009) 46 Cal.4th 1035 (*Hughes*), 1043 ["There is no recovery 'for harassment that is occasional, isolated, sporadic, or trivial.' (*Lyle, supra*, 38 Cal.4th at p. 283.)"], 1044 ["Under California's FEHA [(California Fair Employment and Housing Act)], as under the federal law's Title VII, the existence of a hostile work environment depends upon 'the totality of the circumstances.' [Citation.]"].) Consequently, any such contentions are deemed forfeited. (See Cal. Rules of Court, rule 8.204(a)(1)(B); *Stanley, supra*, 10 Cal.4th at p. 793.)

In any event, even if Seibert's unwelcome conduct toward L.F. based on sex or gender was not sufficiently pervasive and long-standing to create a hostile work environment, the Department and the City could determine that it was misconduct. The City's discrimination and harassment policy gave nonexhaustive "[e]xamples of actions that may lead to workplace harassment complaints based on a Hostile Work Environment and *which are prohibited*." (Italics added.) The policy cautioned that "[e]ven if conduct

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[17] L.F. told the City's investigator that after Seibert's first week at the training center, she began to keep her distance from Seibert "because he was creeping [her] out." She indicated that her situation with Seibert progressed to the point where she had felt "totally uncomfortable" around him. After Seibert's doll comment, which L.F. had found inappropriate, L.F. had felt "totally on edge" and "pretty much avoided him the rest of the day." L.F. found it offensive and demeaning when Seibert had talked about preferring younger girls, described them as hot and beautiful, and asked for her help finding a female 25 or younger. L.F. understood Seibert to have been talking about "his personal sex life with younger girls." She felt like Seibert had "no barriers" when he pried into her personal life and asked about her boyfriend. She reacted strongly when he came up from behind her and twisted her pony tail around his finger, saying not to touch her hair ever again. She said that Seibert followed her, lingered around her, starred at her, and was "always in [her] personal space." Seibert's conduct distracted L.F. from her work with recruits. She indicated that Seibert "made it unbearable to work there," that she "didn't want to go to work if he was there," and that she "didn't want to be in the same room as him."

does not constitute a hostile work environment, it may still be misconduct [*63] that is cause for discipline." The City did not have to allow such behavior to persist until it created a hostile work environment and potentially exposed the City to liability before taking disciplinary action.

5. *Termination was Not a Manifest Abuse of Discretion*

Seibert contends that the Commission abused its discretion by not making findings to explain why it was abandoning the Department's policy of progressive and comparable discipline and why termination was appropriate in his case. He points to the following facts. He had successfully completed probation, and his performance appraisal for his first year as a firefighter, ending December 17, 2006, was "Above Standard." He had received an "Exceptional" rating in two categories in that appraisal. Seibert argues that he had received "exemplary performance reports," had no prior disciplinary record with the City, had no history of prior job misconduct, and had volunteered numerous hours to the city as a reserve police officer and paramedic. Seibert complains that he was not "given an opportunity to correct any behavior prior to termination." He does not, however, direct us to any law that required the Commission to make findings to [*64] support its selection of termination as the appropriate disciplinary action.

At the hearing before the Commission, Seibert acknowledged that in his 7:12 p.m. e-mail on December 15, 2008, he was "[s]exualizing the things [that he did] as a paramedic." He admitted that the e-mail exchange took his "role as . . . a San Jose paramedic and turn[ed] it into a sexual thing with somebody who [was] a member of the public." After sending e-mails of a sexual nature to a female minor (charge Nos. 1-2), whom he initially told the investigator appeared to be in her late teens or early twenties and with whom he was barely acquainted, Seibert was removed from emergency response duty and reassigned to the Department's training center. The former fire chief found Seibert's conduct to be reprehensible in that he was a representative of the Department and had brought discredit upon the Department. The director of employee relations indicated that Seibert's e-mails that "became sexual" were "absolutely a discredit" to the Department because Seibert was "talking about his role as a firefighter/paramedic" and "identifying himself as a member of the fire department."

Even if Seibert's e-mails of a sexual nature [*65] were welcome or invited by N.C., Seibert does not seem to fully appreciate that he barely knew her. Avoidance of harassing conduct requires sensitivity to the possibility that conduct based on sex or gender might be regarded as unwelcome and offensive. Seibert overlooks the fact that after being reassigned, he engaged in more misconduct (charge Nos. 3-5) toward L.F., a female coworker and firefighter. The former fire chief indicated that Seibert's "pattern of behavior at the training center" reflected "an overall inattention" to the sexual harassment policies and contributed to the decision to terminate Seibert. He stated that there was "zero tolerance" for sexual harassment. He indicated that it was "too big of a risk to keep [Seibert] as a member of the San Jose Fire Department" given that while Seibert was being investigated for those e-mails, Seibert engaged in inappropriate behavior toward a female coworker. Seibert's aggregate misconduct could properly be considered in deciding his appropriate discipline.

We do not discern any violation of the Department's policy on progressive discipline. First, the policy did not mandate progressive discipline under all circumstances, recognizing [*66] that progressive discipline may be inappropriate for serious misconduct. As indicated, the policy itself stated that "[d]eciding upon appropriate discipline is not an exact science." Second, the Department's general policy set forth *seven* factors to consider in deciding on the appropriate level of discipline, including the single factor emphasized by Seibert—namely, the "[c]omparable level of discipline given to other employee[s] for similar infractions."

Third, Seibert has not demonstrated that (1) the Department "abandoned" either its general policy of progressive discipline or disregarded the relevant factor of comparable conduct in deciding the appropriate level of discipline in Seibert's case or that (2) the Department was required to make express findings to support its decision *not* to impose corrective action less than termination. The Department's thinking may have evolved to reflect greater sensitivity to sexual harassment, even in its more subtle forms. The City's potential liability for sexual harassment was relevant in evaluating the "[s]eriousness of the offense," another specific factor to be considered in making a disciplinary decision.[18] "'The public is entitled to protection [*67]

[18] A newspaper article contained in the administrative record indicated that the City had paid $200,000 to settle a sexual harassment lawsuit against a San Jose firefighter. Government Code section 12923, subdivision (a), states: "The Legislature hereby declares that harassment creates a hostile,

from unprofessional employees whose conduct places people at risk of injury and the government at risk of incurring liability.' [Citation.]" (*Deegan, supra*, 72 Cal.App.4th at p. 52.)

Fourth and critically, an agency has great latitude to determine the appropriate penalty for misconduct. (See *Deegan, supra*, 72 Cal.App.4th at pp. 45-47.) "The appellate court uses the same standard as the superior court, reviewing the agency's penalty for manifest abuse of discretion. [Citations.] "'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.]" (*Id.* at p. 47; see *Barber, supra*, 18 Cal.3d at p. 404.) Although the penalty of termination is harsh, this is not an exceptional case in which reasonable minds cannot differ. (See *Deegan, supra*, at p. 47.) Seibert has not demonstrated that his termination was a manifest abuse of discretion.

DISPOSITION

The judgment is affirmed.

ELIA, ACTING P. J.

WE CONCUR:

GROVER, J.

DANNER, J.

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offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being." Section (j)(1) of Government Code section 12940, a provision of the FEHA, generally makes it an unlawful employment practice "[f]or an employer . . . because . . . sex [or] gender . . . to harass an employee" and states that "[h]arassment of an employee . . . shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." "Sexually harassing conduct need not be motivated by sexual desire." (Gov. Code, § 12940, subd. (j)(4)(C).) Harassment "because of sex" includes, among other things, sexual harassment and gender harassment. (*Ibid.*)