Marsden v. City of Los Angeles

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

INGRID MARSDEN,	B214668

Plaintiff and Appellant,	(Los Angeles County
v.	Super. Ct. No. BC113884)
CITY OF LOS ANGELES et al.,	
Defendants and Respondents.	

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Lawrence J. Hanna for Plaintiff and Appellant.

Carmen A. Trutanich, City Attorney, Claudia McGee Henry, Senior Assistant City Attorney, and Gregory P. Orland, Deputy City Attorney for Defendants and Respondents.

Appellant Ingrid Marsden, a police officer employed by respondent City of Los Angeles (City), received a suspension of 15 days for failing to report misconduct by a fellow officer. The superior court denied her petition for a writ of mandate commanding the City to set aside the suspension. We affirm.

RELEVANT FACTUAL AND PROCEDURAL

BACKGROUND

The Los Angeles Police Department (LAPD) hired Marsden as an officer in the early 1990s. She was assigned to the Devonshire Division, where she supervised the LAPDs Explorer program. The program is aimed at young people 14 to 21 years old who are interested in law enforcement and military careers. After attending an academy for three months, Explorer members participate in various activities, including security details, ride-alongs during police patrols, parking enforcement, and community events. Each Explorer post has two LAPD officers as Youth Services Officers (YSOs), one male and one female. Marsden became the female YSO of the Devonshire Division Explorer post in 1995 or 1996, and LAPD Officer George Stan, who had long served as an advisor to the post, became the male YSO in 2004.

In February 2005, LAPDs Internal Affairs Division began investigating allegations that Stan had engaged in misconduct with Explorer members. On July 5, 2005, Stan was arrested. He eventually pleaded guilty to 15 counts of sexual abuse of a minor.

Marsden was charged with two administrative counts of misconduct related to Stans criminal activity. Under count 1, it was alleged that between November 1, 2003, and June 26, 2005, she failed on numerous occasions to notify a supervisor about misconduct of which she became aware; under count 2, it was alleged that on or about October 17, 2006, she made false statements while on duty to a supervisor conducting an official investigation.

On May 16, 2007, the charges against Marsden came on for hearing before an administrative Board of Rights (Board). Following the presentation of the LAPDs case, the Board granted Marsdens motion for a directed verdict on count 2. After the close of the presentation of evidence, the Board identified three instances in which Marsden had failed to report potential misconduct by Stan, found her guilty as charged in count 1, and recommended that she be suspended for 15 days. On December 27, 2007, respondent William Bratton, then the LAPD Chief of Police, accepted the recommendation.

On March 20, 2008, Marsden filed a petition for writ of administrative mandate in superior court (Code Civ. Proc., 1094.5). Following a hearing, the trial court denied her petition, and entered judgment accordingly on January 12, 2009. This appeal followed.

DISCUSSION

Marsden contends (1) that there is insufficient evidence to support the trial courts findings regarding count 1; (2) that the charge alleged in count 1 against her was untimely under the applicable limitations periods; (3) that the charge in count 1 was inadequately alleged; and (4) that the Boards findings with respect to counts 1 and 2 are inconsistent. For the reasons explained below, we discern no error in the judgment.

A. *Standards of Review*

Suspensions imposed on public employees affect their fundamental vested right to their employment. (*McMillenv. Civil Service Com*. (1992) 6 Cal.App.4th 125, 128-129 [12-day suspension].) When addressing a petition for administrative mandamus regarding such rights (Code Civ. Proc., 1094.5), the superior court exercises its independent judgment upon the evidence disclosed in a limited trial de novo. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143, fn. omitted; see *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 816-817 & fn. 8.) However, [i]n exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence. (*Id*. at p. 817.) [W]hen, 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 courts decision is the substantial evidence test. [Citations.] (*Fukuda v. City of Angels*, *supra*, 20 Cal.4th at p. 824.) Under this standard of review, we consider the evidence in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference and resolving conflicts in support of the judgment. [Citation.] (*Nordquist v. McGraw-Hill Broadcasting Co*. (1995) 32 Cal.App.4th 555, 561.)

Generally, substantial evidence is not synonymous with any evidence. It must be reasonable . . . , credible, and of solid value . . . . [Citation.] (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) Furthermore, the determination whether there was substantial evidence to support a finding or judgment must be based on the whole record. (*Rivard v. Board of Pension Commissioners* (1985) 164 Cal.App.3d 405, 412.) Nonetheless, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination [of the trier of fact], and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [trier of fact]. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.)

B. *Count 1*

Marsden contends there is insufficient evidence to support the superior courts determination that she failed to report Stans misconduct, as alleged in count 1. We disagree. Under sections 210.46 and 3/813.05 of the LAPD Manual, when an [LAPD] employee, at any level, becomes aware of possible misconduct by another member of [LAPD], the employee shall immediately report the incident to a supervisor or directly to Internal Affairs Group. As explained below, the evidence presented to the Board established that Marsden violated this requirement.

1. *Proceedings Before the Board*

The Board heard testimony regarding Marsdens failure to report Stans misconduct from Sergeant James Richard Leiphardt, Marsdens immediate supervisor, and Captain Joseph Curreri, commander of the Devonshire Division. Leiphardt testified as follows: From May 2004 to May 2005, he served as the officer in charge for community relations at the Devonshire Division, and supervised Marsden and Stan. During his tenure, he held a high opinion of Stan and Marsden, who appeared to perform well. According to Leiphardt, Marsden was obliged to notify him or Captain Curreri about problems in the Explorer program, but she never reported any misconduct by Stan to him.

Curreri testified that he became the commanding officer of the Devonshire Division in 1998. While Marsden served as YSO, Curreri generally regarded her as very good in her position. In March 2004, Curreri learned that she suffered from depression. After she underwent treatment for depression, her performance deteriorated, and Curreri appointed LAPD Officer Amie Guardado as a YSO, while retaining Marsden as a third YSO.

Regarding Stan, Curreri testified that in 1999, when Stan was an adjunct instructor for the Explorer program, Curreri learned that he had allowed participants to sleep overnight in his home. Curreri confronted Stan, who said that the sleepovers occurred only after late-night details or trips, and only when Stans parents were present. When Curreri ordered Stan to stop the sleepovers, Stan agreed to do so.

Curreri heard no further complaints about Stan until February 2005, when Detective Joe Telles, an officer in LAPDs Internal Affairs Division, told Curreri about an investigation into Stans conduct. Telles informed Curreri that the investigation began when a female Explorer, posing as a male Explorer, engaged in e-mail communications with Stan, and didnt like what she was hearing. At the request of Internal Affairs, Curreri refrained from removing Stan from the Explorer program, although he felt uncomfortable leaving Stan in control of youths.

According to Curreri, [t]he first and only time Marsden reported Stans misconduct occurred between February and May 2005, when Marsden and Guardado told Curreri that youths associated with the Explorer program may have been spending nights at Stans house. Curreri passed the information to Telles, but did not tell Marsden and Guardado about Telless investigation.

Guardado provided additional testimony about this report by Marsden. According to Guardado, she began working with Marsden in the Devonshire Division Explorer program in January 2005. Near the beginning of May 2005, Charles Kalyn, an Explorer member, told her and Marsden that other members may have gone to Stans house, where they had ingested alcohol and spent the night.[1] When Guardado and Marsden informed Curreri about Kalyns remarks, he responded that the matter would be taken care of and handled. Stan was removed from his responsibilities for the Explorer program in late May or early June 2005, and was arrested on July 5, 2005.

The principal witnesses regarding misconduct Marsden failed to report were Kalyn and Juan Sirri. Kalyn testified as follows: He belonged to the Devonshire Division Explorers from 2001 to 2005. He rose to the cadre - that is, achieved the rank of corporal - and became a captain in 2004. Kalyn was close friends with Sirri, another Explorer.

According to Kalyn, Stan often invited Explorers to his house to watch movies and look at his collection of toy action figures. Some Explorers, including Sirri, slept overnight at Stans house. Stan often talked about preparing sex kits - collections of condoms and sex toys - for Explorers, and he gave sex kits to some Explorers. The kits were ostensibly for Explorers with girlfriends. Kalyn knew that Stan made a sex kit for Christopher Rivera, an Explorer member, because the kit was openly discussed in the Explorer office. Kalyn also learned from Sirri that Stan intended to make a kit for Sirri.

Kalyn testified that Marsden knew about potential misconduct by Stan. In early 2005, Kalyn noticed that Stan spent considerable time in the company of a youth named Charles Keller. When he told Marsden about Stan and Keller, Marsden responded that it was being taken care of.

According to Kalyn, Marsden also knew about the sex kits. In late May 2005, while the Explorers attended a Greek festival, Kalyn spoke to Marsden by phone. During the conversation, he told Marsden that he had learned Stan was going to make a sex kit for Sirri. Kalyn then passed the phone to Stan, who talked to Marsden about the sex kit. Phone records later admitted by the Board showed that Marsden had phoned Kalyn during the Greek festival.

Additional evidence regarding Marsdens knowledge of Riveras sex kit was provided by Telless interview with Kalyn, which was admitted without objection. During the interview, Kalyn stated that in April 2005, when Stan spoke openly about making a sex kit for Rivera, Marsden told Stan that his plan was really inappropriate.[2]

Sirri testified that he participated in the Explorers from 2001 to 2005, when he joined the United States Marines. Much of his testimony concerned a conversation he had with Marsden in a restaurant in June 2005, shortly before he joined the United States Marines. During the hearing, he testified that he could recall little regarding the conversation. He nonetheless acknowledged that he had been interviewed about the conversation and other events by LAPD investigators. He also testified that he could not recall many of the events he had related during the interviews, and that the investigators had put words in [his] mouth.

Interviews of Sirri by LAPD and FBI investigators were admitted into evidence. During the interviews, Sirri stated that on June 26, 2005, he had dinner with Marsden in a restaurant, during which they discussed Sirris experiences in the Explorers and his future in the Marines. Also present were Sirris girlfriend, Sara Voyles, and Marsdens boyfriend. Sirri noted that Stan had been keeping close company with Keller, and asked Marsden whether she thought Stan and Keller were shaboinking it, by which he meant having oral sex or other sexual activity. Marsden answered that Stan wouldnt do that, and asked whether Sirri thought otherwise. He said, No, but added that he had concerns about Stan. Although Marsden shared his concern, she said, [I]ts not worth my job.[3] Toward the end of the dinner, Marsden told Sirri that internal affairs had been watching her for a long time, and that investigators might be present in the restaurant parking lot.

Although Voyles did not testify, the Board admitted a summary of her LAPD interview. Voyles stated that at the restaurant, Sirri and Marsden talked about whether Stan had been having sex with an Explorer. According to Voyles, although Marsden was worried about Stans activity, she said that she would not risk her job.[4]

Telles testified as follows: In February 2005, he was assigned to investigate Stan. During the investigation, numerous Explorers and other individuals were interviewed, including Kalyn, Sirri, and Voyles. The investigation led to the arrest of Stan, who was charged with 30 counts of sexual abuse involving a minor. Stan pleaded guilty to 15 counts, and was sentenced to state prison. The investigators also began to examine Marsdens conduct when their interviews disclosed misconduct she had failed to report.

Marsden testified that she began supervising the Explorer program in 1995 or 1996. She was hospitalized three times in 2004 after she developed severe depression. Her treatment included medication and electroconvulsive therapy (ECT) that impaired her memory.[5]

According to Marsden, she reported everything she knew about Stans possible misconduct, and ultimately made several such reports. However, she could recall few of the underlying events. Although she remembered that Kalyn told her that Keller might be sleeping overnight at Stans house, she had no memory of discussions regarding sex kits and could not recall her restaurant conversation with Sirri in June 2005.[6]

The Board found, on the preponderance of the evidence, that on three occasions Marsden did not report possible misconduct by Stan: in April 2005, when Marsden learned about Stans preparation of a sex kit for Rivera; in May 2005, when she learned about Stans preparation of a sex kit for Sirri; and in June 2005, when Sirri told her about Stans possible sexual relations with Keller.

2. *Analysis*

The trial court concluded that the Boards findings were supported by the weight of the evidence. In our view, there is ample evidence to support the trial courts conclusion. Kalyns testimony and interview statements, coupled with the record of Marsdens phone call to Kalyn in May 2005, establish that Marsden knew about the sex kits Stan intended to give to Rivera and Sirri. Although in his testimony before the Board Sirri appeared to repudiate the content of his earlier interviews with Telles, those interview statements - viewed in conjunction with Voyless interview statements - demonstrate that Sirri conveyed to Marsden his worry that Stan was engaged in sexual activity with Keller.[7] The testimony from Curreri and Leiphardt establishes that Marsden never reported these instances of suspected misconduct.

Pointing to evidence that conflicts with the trial courts conclusion, Marsden contends that the conclusion is unsupported. In so arguing, Marsden misapprehends our role as an appellate court. Review for substantial evidence is not trial de novo. [Citation.] On review for substantial evidence, all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed. (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp*. (2007) 157 Cal.App.4th 835, 866, quoting *Estate of Teel* (1944) 25 Cal.2d 520, 527.) Under these principles, the resolution of conflicts in the evidence is consigned to the trial court. (*Peoplev. Huston* (1943) 21 Cal.2d 690, 693, disapproved on another ground in *People v. Burton* (1961) 55 Cal.2d 328, 352 [Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge . . . to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.].)

Marsden contends the record is devoid of evidence that she understood the term shaboinking on June 26, 2005, when Sirri used it to convey his suspicions about Stans sexual activity with Keller. We disagree. According to Telless interview with Sirri, Sirri asked Marsden, Do you think . . . theyre going at it, like you know, shaboinking it? The following colloquy occurred:

Detective Telles: Shaboinking it[,] meaning what?

[] Sirri: Like, oral sex or having, like, any kind of

Detective Telles: - right.

[] Sirri: - sexual contact. And . . . she just gave me . . . the [] look like . . . George wouldnt do that. [] . . . []

Nothing in the interview transcript otherwise suggests that Marsden misunderstood whether shaboinking meant sexual contact. On the contrary, according to the transcript, Marsden told Sirri said that she wasnt going to risk her job to report her concerns about Stan. That Marsden comprehended Sirris suspicions is corroborated by Voyles, who told LAPD investigators that Sirri and Marsden discussed whether Stan had been having sex with an Explorer. Accordingly, there is substantial evidence that Marsden fully understood Sirris concerns about Stans sexual misconduct.

Marsden also contends that she had no duty to report Sirris suspicions because he conveyed none. Marsden argues that the reported conversation shows only that neither she nor Sirri believed that Stan had engaged in sexual misconduct, as both overtly agreed at one point during the conversation that Stan was unlikely to do so. Nonetheless, Sirris interview establishes that Marsden also said that she was worried about Stan, and that she knew there was an ongoing internal investigation regarding him. As she told Sirri that she would not risk her job to report Sirris suspicions, the trial court could properly infer that she appreciated their gravity.

Finally, Marsden contends there is an irreconcilable conflict between Kalyns testimony regarding the sex kit for Rivera and Kalyns LAPD interview. She argues that the Board heard direct testimony from Kalyn that [Marsden] knew nothing of the planned Rivera sex kit, which contradicted Kalyns statements during the LAPD interview.

The record discloses no such contradiction. Before the Board, Kalyn testified that Stan openly talked about making a sex kit for Rivera; in addition, he testified that he did not report any sex kit to Marsden until late May 2005, when he learned that Stan was making a sex kit for Sirri. However, Kalyn said nothing regarding Marsdens knowledge of the sex kit for Rivera. During Kalyns LAPD interview, Kalyn stated that in April 2005, Marsden *heard* Stan talk about a sex kit for Rivera, and told Stan that his conduct was really inappropriate. Kalyns testimony and LAPD interview are thus consistent.[8] In sum, the record contains sufficient evidence to support the trial courts determinations.

C. *Statute of Limitations*

Marsden contends that the trial court erred in concluding that the administrative action was not barred by the applicable statutes of limitations. For the reasons explained below, we disagree.

Government Code section 3304, subdivision (d)(1) imposes a one-year limitations period on administrative disciplinary actions against police officers. Unless the period is tolled, a public agency has no more than one year to investigate and charge an officer with misconduct following the public agencys discovery of potential misconduct. (*Id.*, 3304, subd. (d)(1).) The running of the statutory period ends when the public agency determines that discipline may be taken, . . . complete[s] its investigation[,] and notif[ies] the public safety officer of its proposed discipline by a Letter of Intent or Notice of Adverse Action articulating the discipline. (*Ibid.*) However, the period is tolled [i]If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution. (*Id.*, subd. (d)(2)(A).)

Similarly, section 1070(c) of the City of Los Angeles Charter (Charter) requires that the filing of the complaint against the [LAPD] member must occur within one year from the discovery of misconduct, but tolls the one-year period when there is a criminal investigation.[9] Sections 1070(d) and 1070(e) of the Charter provide that the complaint against the LAPD member must be filed with the Board and served on the member.

The principles that governed our review of the trial courts determinations regarding count 1 (see pt. A., *ante*) also control our examination of the trial courts ruling regarding the statutes of limitation. Generally, when the trial court exercises its independent judgment concerning an administrative decision, the party challenging the decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence. (*Fukuda v. City of Angels*, *supra*, 20 Cal.4th at p. 817.) This principle encompasses administrative determinations regarding the tolling of limitations periods. In *Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th 1064, 1075-1076 (*Breslin*), a commission found that the one-year period stated in Government Code section 3304, subdivision (d)(1), was tolled while a criminal investigation was conducted into the misconduct of four police officers. The appellate court explained: In the trial court, the officers had the burden of proof to show that the commissions decision was not supported by the weight of the evidence. (*Breslin,* at p. 1077.) As the appellate court further noted, the trial courts factual findings are reviewed for the existence of substantial evidence. (*Id.* at pp. 1077-1078.)

Here, the Board determined that the action against Marsden was not time-barred because a criminal investigation had tolled the one-year limitations period. In rejecting Marsdens challenge to this determination, the trial court concluded that she had not carried her burden of proof to show that the Board erred. As explained below, there is substantial evidence to support the trial courts conclusion.

On May 16, 2007, prior to the presentation of evidence to the Board, Marsden requested that the action be dismissed on the ground that it was time-barred. Marsdens counsel contended that the LAPD had known about her alleged misconduct since July 7 or July 9, 2005, and that no criminal investigation had ever occurred. In support of this contention, Marsdens counsel pointed to a form complaint signed by LAPD Captain John F. Egan on August 3, 2005. Under the caption Preliminary Case Screening, the complaint disclosed a check mark in a box with the accompanying notation: The complaint, as stated, would not amount to the commission of a felony or misdemeanor crime.

The LAPD advocate responded that soon after LAPD learned about Marsdens potential misconduct in July 2005, Telles discovered that Marsden may have failed to report child abuse, a misdemeanor under Penal Code section 11166, subdivision (c).[10] The advocate argued: When that was found out, [] Telles then submitted the case to Deputy Attorney Mark Ashen[, a]nd that was on August 12, 2005. [] Telles then submitted a toll letter on August 16, 2005. . . . He continued to work on this case . . . . [] . . . [H]e didnt get an actual answer from D.A. Mark Ashen until September 14, 2006, whe[n] the case was actually rejected. Thats when the [statutory period] starts. . . . In support of this argument, the advocate directed the Boards attention to Telless chronological log for the investigation regarding Marsden. The logs entry dated August 12, 2005 stated: I spoke to DA Ashen [and] advised I would be handling criminal investigation; in addition, the entry dated August 16, 2005 stated: completed toll letter and submitted to Lt. Yarbrough for review. In concluding that the action was not time-barred, the Board admitted the complaint and log into evidence with no objection from Marsden.

Before the Board, Telles testified that the initial investigation into Stans misconduct started very small, but led to other investigations. He stated: [A]s witnesses were interviewed and allegations of misconduct surfaced regarding other employees of the [LAPD], I was tasked with handling all of the investigations. The Board admitted a January 16, 2007 memorandum by Telles that summarized his investigation regarding Marsden. The memorandum stated: The statute date for this case was tolled from the inception date of July 9, 2005, due to the ongoing criminal investigation. At the conclusion of the criminal investigation, the case was presented to the Los Angeles County District Attorneys (DA) Office on April 6, 2006. On September 14, 2006, the DAs Office rejected the case. The new administrative statute date was September 14, 2007.[11]

Following the presentation of evidence, Marsden renewed her contention that the action was time-barred. The Board, in rendering its findings, stated that it had revisited the contention in its deliberations and determined that its initial ruling was correct.

Before the trial court, Marsden maintained that the action was time-barred, pointing to the complaint signed by Captain Egan on August 3, 2005 and Telless January 16, 2007 memorandum. The trial court noted that the parties had presented considerable argument but little pertinent evidence: The court does not have the [c]omplaint, any written submission to the District Attorney, a toll letter, a District Attorney rejection, or any testimony about any of those matters. All the court has is the January 16, 2007 Telles [memorandum] . . . stating that the limitations period was tolled from July 9[, 2005] until the District Attorneys rejection on September 14, 2006. The trial court found that the January 16, 2007 memorandum established that LAPD learned about Marsdens potential misconduct on July 9, 2005, but otherwise concluded that Marsden had failed to carry her burden of proof.

We conclude that substantial evidence supports the trial courts findings. To show that the action was time-barred, Marsden was obliged to establish three facts: (1) the date LAPD discovered her alleged misconduct; (2) the date LAPD notif[ied her] of its proposed discipline (Gov. Code, 3304, subd. (d)(1)) or fil[ed] [] the complaint against [her] (Charter, 1070(c)); and (3) the absence of a criminal investigation that tolled the limitations period. Before the trial court Marsden asserted that the date pertinent to item (2) was April 13, 2007, but pointed to no evidence supporting this date. Although she has renewed this contention on appeal, she has identified no evidence to support it, and our examination of the record has disclosed none. The record does not contain the complaint against Marsden that was filed with the Board (Charter, 1070(d)) or any other formal accusation (Gov. Code, subd. (d)(1).)[12] In addition, Marsden failed to carry her burden regarding item (3), the absence of a criminal investigation. The January 16, 2007 memorandum, coupled with the entries in the investigation logs, constitute sufficient evidence that there was a criminal investigation into her conduct.[13]

Marsden contends that the record establishes that no criminal investigation occurred. She argues that the August 3, 2005 complaint shows that respondents never reasonably contemplated criminal charges against [her] (italics deleted); in addition, she argues that Telles testified that LAPDs criminal investigation focused solely into Stans misconduct. However, the August 3, 2005 complaint cannot establish error in the trial courts ruling because other evidence demonstrates the existence of a criminal investigation; as explained above (see pts. A. & B.2., *ante*), on review for substantial evidence, we disregard conflicts in the evidence regarding a finding. Marsdens remaining contention fails in light of the full record: although Telles testified that several agencies, including the LAPD, conducted a single or joint criminal investigation into Stans misconduct, he also stated that there were several investigations, including one into Marsdens conduct.

Marsden also contends the trial court overlooked a key item of evidence, namely, the August 3, 2005 complaint. She notes that the trial court stated it [did] not have the [c]omplaint. In our view, this remark does not demonstrate that the trial court erred in its determinations. As Marsden expressly directed the trial courts attention to the August 3, 2005 complaint, the trial courts remark appears to mean only that it lacked the complaint against Marsden filed with the Board.

Moreover, even were we to assume the trial court neglected the August 3, 2005 complaint, we see no material defect in its finding that Marsden did not carry her burden regarding the absence of a criminal investigation. Although the complaint may suggest that a criminal investigation into Marsdens conduct had not been undertaken in early August 2005, the record otherwise establishes that by mid-August 2005, Telles was inquiring into potential criminal conduct. According to the log for Telless investigation into Marsdens conduct, Telles was handling [the] criminal investigation on August 12, 2005, and completed [a] toll letter on August 16, 2005. This evidence is uncontradicted. In sum, the action against Marsden was not time-barred.

D. *Notice of Alleged Misconduct*

Marsden contends that she received insufficient notice of the specific misconduct alleged against her under count 1. Section 1070(d) of the Charter provides that the complaint against an LAPD member must contain a statement of the charges assigned as causes and a statement in clear and concise language of all the facts constituting the charge or charges. According to Marsden, she was informed only as follows regarding count 1: Between November 1, 2003, and June 26, 2005, on numerous occasions, you failed to notify a supervisor when you became aware of misconduct.[14] She argues that this statement failed to apprise her of the facts underlying the charge. For the reasons explained below, she has forfeited this contention.

Generally, a party facing administrative charges must challenge the adequacy of the allegations in a timely manner prior to or during the administrative proceeding. (*Salyer v. County of Los Angeles* (1974) 42 Cal.App.3d 866, 871-872 [deputy sheriff who raised no objection to commission regarding disciplinary allegations forfeited contention]; *Vaughn v. Board of Police Commrs.* (1943) 59 Cal.App.2d 771, 778 [licensee who failed to object to allegations at license revocation hearing forfeited contention]; Gov. Code, 11506, subd. (a)(3) [in administrative proceedings subject to Government Code, party must challenge sufficiency of accusation within 15 days of its filing].) Here, during the opening statements before the Board, the LAPD advocate identified several specific instances of Stans misconduct that Marsden allegedly failed to report, including the sex kits for Rivera and Sirri, and Stans potential sexual relationship with Keller, as disclosed by Sirri to Marsden in June 2005. Marsden first objected to the adequacy of the complaint after the Board announced its findings. On these facts, the trial court concluded that she had forfeited her contention. We agree.

E. *Duty to Report*

Marsden contends that the trial court erred in determining that Marsden had a duty to report possible misconduct by Stan on each occasion that an instance of misconduct came to her attention. For the reasons explained below, we disagree.

Generally, the interpretation of a statute or regulation presents an issue of law. (See *Breslin*, *supra*, 146 Cal.App.4th at p. 1076.) On such issues, the trial court was required to exercise its independent judgment, while examining the administrative record for any errors of law committed by the [Board]. (*Ibid*.) Although the interpretation of regulations is ultimately consigned to the courts, they ordinarily defer to an agencys interpretation of a regulation within its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the [] provision [Citation.]. (*County of Sacramento v. State Water Resources Control Bd.* (2007) 153 Cal.App.4th 1579, 1586-1587 (*County of Sacramento*), quoting *Divers Environmental Conservation Organization v. State Water Resources Control Bd.* (2006) 145 Cal.App.4th 246, 252; see *Stolman v. City of Los Angeles* (2003) 114 Cal.App.4th 916, 928.) Error in the agencys interpretation may also be shown by extrinsic facts, such as the agencys failure to apply the interpretation consistently. (*Slocum v. State Bd. of Equalization* (2005) 134 Cal.App.4th 969, 974.)

Here, the Board admitted section 210.46 of the LAPD Manual, which states: The reporting of misconduct and prevention of the escalation of misconduct are areas that demand an employee to exercise courage, integrity, and decisiveness. [] Manual [s]ection 3/813.05 requires that when an employee, at any level, becomes aware of *possible misconduct* by another member of [LAPD], the employee *shall immediately report the incident* to a supervisor or directly to Internal Affairs Group. . . . [] . . . [] . . . Employees must respect and be aware of their responsibility to freely and truthfully report *all acts of misconduct* and to act, if necessary, to prevent the escalation of those acts. (Italics added.)

Before the trial court, Marsden suggested that she fully discharged her duty to report by advising Curreri about some misconduct by Stan in February 2005, before the occurrence of the three instances of misconduct the Board found that she had failed to report. The trial court concluded that she had not carried her burden of proof regarding the duty to report, as she identified no provisions of the LAPD manual or other evidence establishing that the Boards interpretation of the duty was erroneous.

On appeal, Marsden contends the trial court erred in imposing upon her the burden of proving the existence of an LAPD policy that required her to only report misconduct once. She maintains that this burden amounted to an arbitrary and impossible condition (italics deleted); in addition, she argues that the burden of proof regarding the nature of her duty should have been imposed upon respondents. We disagree. Because section 210.46 of the LAPD Manual, by its clear language, (*County of Sacramento*, *supra*, 153 Cal.App.4th at p. 1587), obliges officers to report *every* instance of possible misconduct, the trial court properly accepted the Boards interpretation in the absence of extrinsic facts showing that it was incorrect. For the reasons explained above (see pt. C., *ante*), Marsden bore the burden of proof regarding extrinsic facts of this kind. As she failed to carry the burden, we see no error in the trial courts ruling.

F. *Findings*

Marsden contends that the Boards findings regarding count 1 cannot be reconciled with its determination regarding count 2, which charged Marsden with making false statements to an investigator on October 17, 2006. In granting a directed verdict on count 2, the Board concluded that she was not guilty, pointing to overwhelming evidence that she had suffered significant memory loss. Marsden argues that this determination is inconsistent with the Boards findings that she failed to report three instances of potential misconduct, as charged in count 1.

Marsden has forfeited the contention by failing to present it to the trial court. (*Noguchi v. Civil Service Com.* (1986) 187 Cal.App.3d 1521, 1540.) Nonetheless, the contention would fail on the merits, were we to consider it. In granting a directed verdict on count 2, the Board apparently concluded that Marsden had suffered significant impairment to her long-term memory, that is, in October 2006, she could not adequately recall the pertinent events prior to Stans arrest in 2005. However, the record discloses considerable evidence that she retained sufficient short-term memory to make prompt reports about Stans misconduct. Marsden testified that in early 2005, she reported misconduct to Curreri when she learned about it. There was no error in the Boards findings.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.

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[1] Kalyns surname is sometimes stated as Kaylan in the record. We employ the surname he provided when he testified.

[2] Kalyn also testified regarding other misconduct by Stan that Marsden failed to report. According to Kalyn, in 2004, Kalyn told Marsden that Stan changed his clothes in the Explorers office after Stan exercised, and that Stan engaged in horseplay at cadre meetings.

[3] During the interviews, Sirri also said that in late 2003, while assigned to the Northridge Mall, he told Marsden that Stan had grabbed his balls while participating in a game some Explorers played that involved the slapping of testicles. According to Sirri, Marsden acknowledged the remark and seemed surprised, but did not question Sirri about the incident.

[4] Aside from Kalyn and Sirri, the Board heard testimony from two other Explorers, Luis Barrios and Jerry Maestas. Each stated that Stan had engaged in misconduct, but that to their knowledge Marsden seemed to be unaware of it. The Board also received a

summary of Telles interview with Barrios, who told Telles that Marsden knew that Stan sometimes participated in the genital slapping game that the Explorers played (see ft. 3, *ante*).

[5] Dr. Stephen Klevens, a physician and psychiatrist who treated Marsden, testified that Marsdens depression, ECT, and medication could have affected her memory. In addition, Dr. Karen McDonald, a psychologist employed by the City of Los Angeles, testified that Marsden suffered from major depression. According to McDonald, depression patients who undergo medication and ECT often report that their memory and concentration is totally . . . screwed up. The Board also heard similar testimony from Dr. Azadeh Famili, an LAPD clinical psychologist who treated Marsden.

[6] The Board also received tape recordings of interviews with Marsden by LAPD and FBI investigators.

[7] We recognize that Kalyns and Sirris interviews constitute hearsay. As Marsden raised no objection to the admission of the interviews before the Board and does not challenge their admission on appeal, we may properly view them as substantial evidence to support the trial courts judgment. (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, 393-394, pp. 484-485 [Material and relevant evidence that is technically incompetent and inadmissible under the exclusionary rules, if offered and received without a proper objection or motion to strike, will be considered in support of the judgment.]; *Dibble v. Gourley* (2002) 103 Cal.App.4th 496, 503, disapproved on another ground in *MacDonald v. Gutierrez* (2004) 32 Cal.4th 150, 159 [timely hearsay objection before administrative board is ordinarily required to preserve issue for appeal].)

We also recognize that Voyless interview statements constitute hearsay. Although Marsden asserted a hearsay objection regarding these statements before the Board, her briefs on appeal neither challenge that Boards admission of *any* item of evidence nor suggest that the items cannot support the judgment. She has thus forfeited all such contentions. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4.)

[8] On a related matter, Marsden contends that the Board erred in finding that Kalyns testimony and interview contain the same account regarding Marsdens knowledge of the Rivera sex kit. The Board, in announcing its findings, asserted: Ka[yl]n, both in his testimony before the Board and his internal affairs interview[,] stated that during [] April 2005, he, Officer Stan, and [appellant] were in the Explorer office, and Officer Stan discussed out loud that he was making a sex kit for [] Rivera. . . . [Appellant] overheard Officer Stans comments and voiced her displeasure . . . . To the extent the Board may have misdescribed Kalyns Board testimony, the error is immaterial, as Kalyns interview discloses ample evidence that Marsden knew about the Rivera sex kit. (See *Nelson Valley Bldg. Co. v. Morrisey* (1955) 135 Cal.App.2d 738, 741 [technical error in trial courts findings regarding administrative decision was surplusage and immaterial to correctness of decision].)

[9] Section 1070(c) of the Charter provides: No member shall be . . . suspended . . . for any conduct that was discovered by an uninvolved supervisor of the department more than one year prior to the filing of the complaint against the member, except in any of the following circumstances: [] (1) If the act, omission, or allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period.

[10] Subdivision (c) of Penal Code section 11166 provides in pertinent part: Any mandated reporter who fails to report an incident of known or reasonably suspected child abuse or neglect as required by this section is guilty of a misdemeanor punishable by up to six months confinement in a county jail or by a fine of one thousand dollars ($1,000) or by both that imprisonment and fine.

[11] In addition, the Board admitted the chronological log for the LAPD investigation regarding Stan, which discloses the following entry by Telles dated July 25, 2005: I updated Det. Martin and Lt. Yarbrough separately about Langrehr criminal case. In 2005, Marsdens surname was Langrehr.

[12] The complaint dated August 3, 2005 discloses no sign that it was ever filed with the Board or served upon Marsden; it appears to have been employed solely to initiate or facilitate an investigation into potential misconduct by Marsden.

[13] Although the Board admitted the January 16, 2007 memorandum over a hearsay objection from Marsden, her briefs on appeal neither challenge its admission nor argue that it does not constitute substantial evidence to support the trial courts ruling; on the contrary, her briefs cite the memorandum to establish the date that the LAPD discovered her potential misconduct. Marsden has thus forfeited any contention of error regarding the memorandum. (*Tiernan v. Trustees of Cal. State University & Colleges*, *supra*, 33 Cal.3d at p. 216, fn. 4.)

[14] This charge was provided orally to Marsden at the inception of the Board hearing. As noted above (see pt. C., *ante*), the record lacks a copy of the complaint filed against Marsden.