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Court of Appeal,
Second District, Division 4, California.

James KANG, Plaintiff and Appellant,

v.

CITY OF LOS ANGELES et al.,
Defendants and Respondents.

B264346

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Filed 12/21/2016

APPEAL from a judgment of the Superior Court of Los Angeles County, **Luis A. Lavin**, Judge. Affirmed. (Los Angeles County Super. Ct. No. BS148383)

Attorneys and Law Firms

Silver, Hadden, Silver & Levine, **Jacob A. Kalinski** and **Brian P. Ross**, for Plaintiff and Appellant.

Michael N. Feuer, City Attorney and **Paul L. Winnemore**, Deputy City Attorney, for Defendants and Respondents.

Opinion

EPSTEIN, P. J.

*1 Appellant James Kang was dismissed from the Los Angeles Police Department (LAPD) after allegedly engaging in misconduct during a road rage incident involving the complainant, Joseph McCabe (McCabe). The trial court denied appellant's petition for writ of administrative mandate (*Code Civ. Proc.*, § 1094.5) after exercising its independent judgment on the evidence and making its own credibility determinations. Appellant principally argues he was denied a fair administrative hearing because the LAPD Board of Rights (Board) permitted McCabe to testify telephonically and precluded questioning regarding McCabe's mental condition. Appellant also argues the trial court's findings of misconduct are not supported by substantial evidence. We conclude there was no due process violation and find

substantial evidence to support the trial court's factual findings. We accordingly affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Kang was employed by the City of Los Angeles (City) as an LAPD officer for approximately 18 years. He attained the rank of Police Officer II and was assigned to the Valley Traffic Division. On January 24, 2012, Kang was involved in an off-duty driving incident with McCabe in Santa Clarita, resulting in allegations that Kang engaged in road rage, unnecessarily identified himself as a police officer, and pointed his handgun at McCabe. Kang and McCabe provided conflicting accounts of these events.

A. Kang's Version of the Incident

According to Kang's testimony at the Board hearing, he was driving southbound on Whites Canyon Road on his way to the Van Nuys courthouse for a traffic subpoena. While driving in the middle lane, he noticed McCabe's vehicle approaching behind him at a high rate of speed in the right-hand lane. As the road's three lanes merged into two lanes, McCabe cut in front of Kang and slammed on his brakes, causing Kang to brake hard and swerve to the right to avoid a collision. Kang felt an impact, causing pain in his lower back where he had a previous injury, and thought he had hit McCabe's vehicle.

Kang decided to follow McCabe in order to take down his license plate number and notify the local authorities. He pulled up next to McCabe's car, but could not see the license plate number from the side. Kang rolled down his window and said: "Hey, you hit me back there." McCabe responded by squinting his eyes, giving Kang the middle finger, and stroking his finger as if masturbating. Kang started to pull in front of McCabe in an attempt to view McCabe's front license plate in his rearview mirror. However, McCabe pulled onto the shoulder, accelerated, merged back into Kang's lane, and slammed on his brakes again. McCabe then sped off downhill.

Kang saw McCabe's vehicle stopped in the right turn lane at a red light at the bottom of the hill. Instead of turning, McCabe rapidly accelerated when the light turned green and cut in front of the vehicles to his left. Kang then concluded McCabe knew they had collided and was trying to evade him. Kang did not have cell phone reception to dial 911, so he continued driving and approached McCabe's vehicle at a subsequent red light. Kang stopped behind a car next to McCabe's vehicle,

and said: “You hit me back there. Pull over.” McCabe squinted his eyes and gave Kang the middle finger again.

*2 Kang decided to identify himself as a police officer in order to end the confrontation. He pulled out his LAPD identification card and held it out of the window towards McCabe while stating “Police officer. Pull over to the side.” McCabe continued making offensive gestures. Kang decided to exit his vehicle, write down McCabe's license plate number, and call 911. He got out a silver pen and raised it to the steering wheel with his right hand. At this point, he looked up at McCabe, who had an expression “like he seen a ghost.” The light turned green and McCabe sped off before Kang could get out of his car.

Kang followed McCabe at the posted speed limit while calling 911. McCabe slammed on his brakes in front of Kang yet again, forcing Kang to swerve onto the shoulder. Kang finally got through to a California Highway Patrol (CHP) operator, and continued to follow McCabe while reporting the incident. Kang told the operator he was an off-duty officer and had just been run off the road twice by a speeder, and asked to be transferred to the local sheriff's station.

Kang caught up with McCabe at a traffic light further down the road. He got out of his car and walked over to McCabe's vehicle in order to get the license plate number for the 911 operator. Kang was holding his cell phone and LAPD identification when he approached McCabe's vehicle. He was also carrying a black and stainless steel semiautomatic handgun visibly holstered on his right hip. Kang did not provide the 911 operator with the license plate number, but instead decided to “resolve this thing soon as possible.” Kang tapped on McCabe's window with his identification and loudly said: “Pull over.” McCabe was on his phone. He looked at Kang, the identification card, and Kang's pistol; and then gave Kang the middle finger. Kang ordered him to get “out now,” but McCabe took off when the traffic cleared ahead.

Kang pulled into a nearby gas station and inspected his car, discovering a scuff mark on the right front tire. Sheriff's deputies arrived at the scene shortly thereafter and spoke with both Kang and McCabe, who was located a short distance away at a school.

At the Board hearing, Kang admitted it was inappropriate to identify himself to McCabe as a police officer. He testified that he was “surprised, not angry” at McCabe for cutting him off, but also admitted that he was “angry at the situation”

and “worried” that he would miss his court appearance. Kang testified that he did not remove his handgun from its holster at any point during the incident.

B. McCabe's Version of the Incident

McCabe testified at the Board hearing that the incident began when Kang, driving immediately behind McCabe, started flashing his headlights, apparently because McCabe was not driving fast enough. Kang passed McCabe on the right, giving him some “kind of a look.” McCabe then passed Kang on the left and made a “masturbation-type” gesture. Both McCabe and Kang were agitated and acting immaturely. Their vehicles did not collide, and McCabe saw nothing to indicate that Kang's vehicle collided with anything else.

Kang came “racing up behind” McCabe and began yelling out of his window as if he wanted to start a fight. McCabe definitely heard Kang yell: “I'm going to kick your ass.” McCabe testified that when the vehicles stopped near each other at a red light, Kang pulled out a pistol with a “silver barrel” using his right hand and pointed it at him. McCabe quickly accelerated but was pursued by Kang. Kang repeatedly maneuvered his vehicle close to McCabe's rear bumper and alongside his car, yelling at him to pull over. Kang also pulled ahead of McCabe and slammed on his brakes. Although Kang identified himself as a police officer, McCabe testified that “the way he was acting didn't show me he was a police officer of sound mind, let alone a real police officer at all.” McCabe called the sheriff's department and was just connecting with the dispatcher when Kang pulled in front of him and slammed on the brakes again, causing him to swerve.

*3 Kang continued to pursue McCabe, and they both ran a red light before coming to a stop at an intersection near the gas station. McCabe was on the phone with the sheriff's department when Kang got out of his vehicle. McCabe told the dispatcher: “This guy's got a gun.” He testified that Kang “came up to my window with a pistol strapped to his side and he was kind of moving it against—tapping it against the window.” McCabe could not recall whether the gun was in Kang's hand or in his holster. He also testified the gun was holstered on Kang's hip but pointed through the holster towards him. McCabe only saw the gun for a moment because he was “frantic” and looking to the right for an escape route. When traffic cleared ahead, he turned into the gas station, pulled a U-turn and drove away to a nearby school.

C. Investigations of the Incident

Sheriff's Deputy Javier Guzman was dispatched following the calls to law enforcement, and first conducted an interview with McCabe at the school. McCabe reportedly said the incident started when he needed to merge lanes and had to brake suddenly in front of Kang's car. McCabe also reportedly stated Kang pulled out a "silver handgun" and pointed it "towards his vehicle." Deputy Guzman went to the gas station and interviewed Kang, who denied brandishing a firearm and maintained that he was just trying to exchange insurance information with McCabe. Guzman saw no damage to either vehicle.

Kang reported the incident to LAPD Sergeant Edward Waschak, who dispatched Sergeants Kurt Smith and Stephen Egan to investigate. Waschak testified at the hearing that Kang said he had been struck by another vehicle, went off the road, struck the curb, and tried to exchange information with the other driver who had failed to stop. Egan arrived at the gas station and found no evidence of a collision but observed some "scrub marks" on the tire of Kang's vehicle. He took photos of Kang's handgun.

Sergeants Smith and Egan subsequently conducted a tape-recorded interview of McCabe. McCabe stated that the incident began when he merged in front of Kang, but denied cutting him off. He stated that when both vehicles were stopped at a light, Kang pulled out a gun with his right hand and pointed it at him, describing the handgun as having a "silverish black tip." Smith and Egan later testified that McCabe's description of the gun was consistent with the photograph taken by Egan. Smith testified that McCabe was an "odd duck" but nonetheless found his claim that Kang brandished a firearm to be credible.

Sergeants Jeff Hart and Reynaldo Perez of the LAPD Internal Affairs Group conducted an interview with McCabe in February 2012 to clarify his previous statement and reenact the brandishing incident. Regarding the moment when Kang approached on foot, McCabe said that he saw the handgun partially out of the holster on Kang's right hip, and that Kang used his hand to tap it against the window. Sergeant Hart later testified that he found McCabe to be credible and that his descriptions of Kang's firearm were largely consistent.

Kang's Internal Affairs interview was conducted in May 2012, during which he recounted his version of the events and was asked detailed questions. Kang described McCabe as "going [at] a high rate of speed" and said he followed McCabe. However, Kang stated that he himself "never went over the

speed limit" during the incident. Kang also denied pointing his handgun at McCabe, stating: "I didn't pull the gun on him." Kang did not say anything about a silver pen in relation to the incident.

D. Board of Rights Hearing and Decision

Following the investigation, LAPD issued a formal complaint against Kang charging him with four counts of misconduct: (1) becoming involved in a road rage incident, (2) pointing a handgun at McCabe, (3) unnecessarily identifying himself as a police officer, and (4) making false statements during an official investigation. Kang was directed to a Board hearing for adjudication and pled not guilty to each count. The hearing was held over 10 days between October 2013 and February 2014.

*4 McCabe testified at the hearing via telephone. He initially advised the LAPD's advocate that he "felt intimidated" following two phone conversations with Dennis Pelch (Pelch), a retired officer employed by the police union who was investigating the incident for Kang. During the second call, Pelch asked McCabe if he was bipolar after learning that information from a neighbor. McCabe responded that he was "a little bit" bipolar and was taking medication for anxiety.

Kang's attorney objected to the use of **telephonic** testimony at the hearing on due process grounds, and the Board initially agreed it wanted to see McCabe in person. McCabe agreed to appear, but on the third day of the hearing he left the LAPD's advocate a message indicating that he would not be able to attend. The Board chairperson noted "it appears as though he doesn't want to be here," and determined there was "no other option other than to conduct a **telephonic** interview."

McCabe was sworn and testified telephonically. He stated the reason he was not able to appear in person was that he was sick with the flu. During his examination, the chairperson noted that she had participated in several hearings using **telephonic** testimony. When Kang's attorney started questioning McCabe about his **bipolar disorder** and any medication he was taking that could affect his memory, McCabe said he would not answer questions about his medical history. The Board chairperson also sustained the LAPD's objections to these questions on relevancy grounds.

Over the course of the 10-day hearing, the Board also heard live testimony from Kang and several others including Deputy Guzman and Sergeants Egan, Smith, Waschak, J. Hart, and Perez. The Board deliberated and reached a

unanimous decision, finding Kang guilty on all four counts of misconduct.

Regarding count one for engaging in road rage, the Board found evidence that both Kang and McCabe engaged in unsafe driving. It determined Kang was angered by McCabe's insulting gestures, noting that the recording of McCabe's call to the sheriff's department captured Kang hitting McCabe's window and yelling at him to get out of the car. Kang also testified at the hearing that the incident met the Webster's Dictionary definition of "road rage." Accordingly, the Board found him guilty of the charge.

Regarding count two, the Board noted the seriousness of the charge that Kang pointed his firearm at McCabe, and its awareness that there was no other witness to corroborate either version of the incident. The Board weighed the credibility of both Kang and McCabe. It listened to the "powerful" recording of McCabe's call to the sheriff's department, finding that it "clearly demonstrated ... that McCabe feared for his life." It determined that despite some inconsistencies in McCabe's testimony, his initial description of Kang's handgun was accurate. The Board also doubted Kang's credibility. It questioned Kang's testimony that McCabe could have mistaken a silver pen for his handgun. The Board found McCabe credible and Kang guilty.

Regarding count three, the Board found Kang guilty based on his own testimony that it was inappropriate to identify himself as a police officer. It also noted Kang's own admissions that he should not have exited his vehicle. The Board reprimanded him for his "extremely poor" judgment and "very dangerous" conduct that could have escalated into an off-duty officer-involved shooting. As to count four, the Board concluded Kang made false statements during an official investigation by stating to Sergeant Hart that he did not draw his weapon during the incident and never went over the speed limit.

*5 After finding Kang guilty on all four counts and deliberating on the penalty recommendation, the Board unanimously recommended that Kang be removed from his position as an LAPD officer. LAPD Chief Charlie Beck (Chief Beck) adopted the penalty recommendation, and issued an order discharging Kang from the LAPD and terminating his employment with the City.

E. Trial Court Proceedings

Kang commenced this action against respondents the City and Chief Beck by filing a petition for writ of administrative

mandate ([Code Civ. Proc., § 1094.5](#)) in the superior court. Hearing on the petition was held in March 2015. At the hearing, the court noted that the recordings of Kang's 911 call and McCabe's call to the sheriff's department were not included in the administrative record nor was the court provided with transcripts. The judge described the recordings as "two crucial pieces of evidence" that appeared to be "very important" to the Board's determination. The deputy city attorney stated that it was "imperative" for the judge to listen to the recordings before issuing his ruling. The judge offered to continue the hearing to allow Kang's attorney to submit the recordings for review, but Kang's attorney declined the offer and submitted on the record.

After reviewing the administrative record, exercising its independent judgment on the evidence, and making its own credibility determinations, the trial court issued its statement of decision. The court found that the weight of the evidence supported the Board's findings of misconduct. Notwithstanding inconsistencies in McCabe's testimony, the court found McCabe to be credible. The court also found Kang not credible based on his implausible testimony that he remained calm during the incident, never exceeded the speed limit, and was pursuing McCabe merely to obtain his license plate number. The court also found that Kang's "unbelievable" testimony regarding the silver pen actually confirmed McCabe's claim that Kang did brandish a handgun. The court also concluded the Board did not err in allowing McCabe to testify by telephone. The court found that Kang's attorney was able to conduct an "extensive cross-examination" of McCabe, and "the Board was able to assess McCabe's demeanor over the telephone by listening to his tone of voice, cadence, hesitation or delay in answering, and other indicia of his reliability as a witness." Based on these findings, the court entered judgment denying Kang's petition for writ of mandate.

This timely appeal followed.

DISCUSSION

[Code of Civil Procedure section 1094.5](#) governs judicial review of a final decision by an administrative agency where, as in this case, the law requires a hearing, taking of evidence, and the discretionary determination of facts by the agency. (*Id.*, subd. (a).) To overcome the validity of an administrative decision, the petitioner must show that the agency acted without or in excess of jurisdiction, did not afford a fair

trial, or prejudicially abused its discretion. (*Id.*, subd. (b).) An agency abuses its discretion if it does not proceed in the manner required by law, its decision is not supported by the findings, or its findings are not supported by the evidence. (*Ibid.*)

Where a “fundamental vested right” is affected by the agency’s decision, such as a police officer’s right to continued employment, the trial court exercises its independent judgment on the evidence. (*Candari v. Los Angeles Unified School Dist.* (2011) 193 Cal.App.4th 402, 407.) The court must examine the administrative record for errors of law and conduct an independent review of the entire record to determine whether the weight of the evidence supports the agency’s findings. (*Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 313.) In doing so, the court may draw its own reasonable inferences from the evidence and make its own credibility determinations. (*Morrison v. Housing Authority of the City of Los Angeles Bd. of Comrs.* (2003) 107 Cal.App.4th 860, 868.) Nevertheless, the court must afford a strong presumption of correctness to the administrative findings, and the party challenging the administrative decision bears the burden of demonstrating that it is contrary to the weight of the evidence. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 811–812.)

*6 On appeal from a judgment denying a petition for writ of administrative mandate, we review the trial court’s factual findings for substantial evidence and its conclusions of law de novo. (*Crawford v. City of Los Angeles* (2009) 175 Cal.App.4th 249, 253 (*Crawford*).) Procedural issues concerning notice and due process are considered questions of law; thus we independently review due process challenges to the hearing procedures employed by an administrative agency. (See *Tafti v. County of Tulare* (2011) 198 Cal.App.4th 891, 896.)

I

Appellant contends the Board’s decision to allow McCabe to testify telephonically, rather than in person, violated his due process right to a fair hearing. The trial court rejected this challenge, finding that the **telephonic** hearing provided for both extensive cross-examination and a sufficient opportunity to assess McCabe’s credibility. We agree with the trial court that observation of McCabe’s physical demeanor was not necessary in this case and accordingly find no due process

violation. Appellant also has failed to demonstrate that the absence of an in-person hearing resulted in prejudicial error.

Respondents assert that the use of **telephonic** testimony in an administrative hearing does not violate due process where there is an opportunity for cross-examination and to rebut or explain unfavorable evidence. They rely on two cases: *Slattery v. Unemployment Ins. Appeals Bd.* (1976) 60 Cal.App.3d 245 (*Slattery*) and *C & C Partners, Ltd. v. Department of Industrial Relations* (1999) 70 Cal.App.4th 603 (*C & C Partners*). Appellant argues neither case is controlling, and maintains that both the trial court and respondents have failed to properly analyze and weigh the due process interests in this case.

We agree that *Slattery* and *C & C Partners* are not dispositive. *Slattery* involved simultaneous administrative hearings on an unemployment insurance claim—one for the claimant, and one for the employer—that were scheduled on the same day in different cities. (*Slattery, supra*, 60 Cal.App.3d at p. 247.) The court held the notice of hearing failed to inform the claimant of authorized teleconferencing procedures, and accordingly set aside the agency decision denying her unemployment insurance benefits. (*Id.* at pp. 248–251.) In a dictum, the court commented favorably on the use of **telephonic** hearings, referring to the practice as “a pragmatic solution ... which attempts to reconcile the problem of geographically separated adversaries with the core elements of a fair adversary hearing: the opportunity to cross-examine adverse witnesses and to rebut or explain unfavorable evidence.” (*Id.* at p. 251.)

In *C & C Partners*, the Division of Labor Standards Enforcement (DLSE) issued a citation to a garment manufacturer and imposed an assessment. (*C & C Partners, supra*, 70 Cal.App.4th at p. 606.) The hearing officer allowed the DLSE inspector to testify by telephone regarding the method he used to calculate the assessment. (*Id.* at p. 611.) The hearing officer upheld the assessment, but the trial court reversed in a mandate proceeding, concluding that use of **telephonic** testimony violated due process. (*Id.* at pp. 607, 611.) On appeal, the manufacturer conceded there was no error in the conduct of the administrative hearing. (*Id.* at p. 612.) The appellate court found no due process violation, noting DLSE regulations provided that hearings “need not be conducted according to the technical rules relating to evidence and witnesses.” (*Ibid.*) The court also noted that “administrative hearings are not necessarily infirm because of **telephonic** testimony.” (*Ibid.*, citing *Slattery, supra*, 60 Cal.App.3d at p. 251.)

*7 *C & C Partners* is procedurally and factually inapposite. First, the manufacturer in *C & C Partners* conceded on appeal that there was no error in the conduct of the hearing, while in this case appellant objected to the use of **telephonic** testimony on due process grounds at all stages of the litigation. (*C & C Partners, supra*, 70 Cal.App.4th at p. 612.) Second, and more important, the DLSE inspector's credibility as a witness was not at issue in *C & C Partners*. (*Ibid.*) The inspector was merely testifying about the calculation method for an assessment. (*Id.* at p. 611.) On the other hand, credibility is central in this case because there were only two percipient witnesses to the alleged misconduct, Kang and McCabe, and their accounts diverge sharply. *C & C Partners* offers little guidance where, as here, a testifying witness's credibility is material. The *Slattery* court's favorable comments on the use of teleconferencing in split hearings is similarly uninformative.

Appellant suggests that the Legislature has expressed concern regarding **telephonic** hearings, evidenced by California's Administrative Procedure Act (APA) provisions governing **telephonic** testimony. Subdivision (a) of **Government Code section 11440.30** provides that a "presiding officer may conduct all or part of a hearing by telephone, television, or other electronic means" However, subdivision (b) prohibits "conduct[ing] all or part of a hearing by telephone, television, or other electronic means *if a party objects*." (**Gov. Code, § 11440.30, subd. (b)**, italics added.) Although the APA applies only to state agencies and does not govern in local administrative hearings, "to the extent citizens generally are entitled to due process ... the provisions of the APA are helpful as indicating what the Legislature believes are the elements of a fair and carefully thought out system of procedure for use in administrative hearings. [Citation]" (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 91.) These provisions indicate that the Legislature—while generally approving of the use of **telephonic** testimony—recognized that a party should be allowed to object and demand an in-person hearing.¹

In the absence of controlling authority to the contrary, we agree with appellant that we must apply the prevailing three-part balancing test under *Matthews v. Eldridge* (1976) 424 U.S. 319, 335 (*Matthews*). However, we note that the robust procedural protections afforded to LAPD officers in disciplinary hearings are primarily statutory in nature and not necessarily required by constitutional due process. Under the Public Safety Officers Procedural Bill of Rights

Act (**Gov. Code, § 3300 et seq.**), a public agency must provide nonprobationary officers with an opportunity for administrative appeal before taking any punitive action. (**Gov. Code, § 3304, subd. (b)**.) Local agencies are free to develop their own rules and procedures governing such administrative appeals. (**Gov. Code, § 3304.5**.) Los Angeles City Charter section 1070 requires a "full, fair, and impartial hearing" by a Board of Rights before the LAPD may take punitive action against an officer. (L.A. City Charter, § 1070, subd. (a).) This full evidentiary hearing includes the right to cross-examine adverse witnesses under oath. (L.A. City Charter, § 1070, subd. (m); see also *Los Angeles Police Protective League v. City of Los Angeles* (2002) 102 Cal.App.4th 85, 92.)

*8 The scope of procedural protections required by constitutional due process in a board of rights hearing is less certain. It is well-settled that a public employee who holds a property interest in continued employment must be afforded a pre-termination hearing including notice of the proposed action and an opportunity to respond to the charges. (*Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 547–548 (*Loudermill*); *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215–216.) Federal and California cases also "make it clear" that such an employee has a "due process right to challenge the factual basis for the termination in a full evidentiary hearing at some point in the termination process." (*Townsel v. San Diego Metropolitan Transit Development Bd.* (1998) 65 Cal.App.4th 940, 949; but see *Holmes v. Hallinan* (1998) 68 Cal.App.4th 1523, 1531 [the United States Supreme Court "has never held that an employee, tenured or otherwise, must be given a full evidentiary hearing before or after being terminated"].) Some courts have noted that administrative hearings generally must meet minimum due process requirements such as adequate notice, the right to cross-examine adverse witnesses, the right to retain counsel, and a fair and impartial decisionmaker. (See, e.g., *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 577.)

Whether the use of **telephonic** testimony at the Board hearing in this case violated appellant's due process rights is properly analyzed under the *Matthews* balancing test. Doing so, we weigh three distinct factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or

substitute procedural requirement would entail.” (*Matthews, supra*, 424 U.S. at p. 335.)

As to the first of these factors, appellant has a “significant” property interest in his continued employment as an LAPD officer. (*Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 321, fn. 6 [“a public entity must accord constitutional procedural due process before depriving an officer of any significant property interest in his or her employment”]; see also *Loudermill, supra*, 470 U.S. at p. 543 [the “significance of the private interest in retaining employment cannot be gainsaid”].) Appellant’s claim that his private interest is “fundamental” conflates due process analysis with the independent judgment standard of review governing writs of administrative mandate implicating fundamental vested rights. (See *Code Civ. Proc.*, § 1094.5, subd. (c); see also *Wences v. City of Los Angeles, supra*, 177 Cal.App.4th at p. 313.)

The second factor, the risk of erroneous deprivation and probable value of additional safeguards, is the most salient. It involves two interrelated issues: (1) whether the use of **telephonic** testimony resulted in a risk that the Board erroneously terminated appellant’s employment; and (2) whether allowing appellant the opportunity to cross-examine McCabe in person would have reduced this risk. This inquiry boils down to the importance of observing demeanor in making an accurate credibility determination.

Courts have recognized that the opportunity to observe the demeanor of a witness while testifying is a valuable tool in assessing credibility. (See, e.g., *Mattox v. United States* (1895) 156 U.S. 237, 242–243; *Coy v. Iowa* (1988) 487 U.S. 1012, 1019–1020.) The Evidence Code places “demeanor while testifying” first in a list of matters that have a “tendency in reason to prove or disprove the truthfulness of” testimony. (*Evid. Code*, § 780.) However, several commentators have challenged this assumption based on social science research, concluding that observing demeanor is not a reliable method of determining credibility. (See, e.g., Wellborn, *Demeanor* (1991) 76 Cornell L.Rev. 1075, 1104; Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility* (1993) 72 Neb. L.Rev. 1157, 1200.)

*9 Observing demeanor is not the only way to assess a witness’s credibility. As the trial court noted, appellant was allowed to conduct an “extensive” cross-examination of McCabe during the **telephonic** hearing that probed

inconsistencies in his testimony. The content of McCabe’s answers to these questions, rather than just the manner of their delivery, allowed the Board to test McCabe’s credibility by comparing his testimony to statements previously made during three prior interviews with investigators. Furthermore, as the court noted, the Board “was able to assess McCabe’s demeanor over the telephone by listening to his tone of voice, cadence, hesitation or delay in answering, and other indicia of his reliability as a witness.” Most importantly, the Board listened to McCabe’s recorded emergency call to the sheriff’s department, which provided a real-time account of the incident from McCabe’s perspective. The Board expressly relied on this “powerful” recording in making its credibility determination, finding that it “clearly demonstrated ... that McCabe feared for his life.”

Because the Board employed several methods to evaluate McCabe’s credibility other than observing him at the hearing, we find that the risk of an erroneous deprivation was low. We also see limited additional value in requiring in-person testimony in this case.

Application of the third factor, the government’s interest in permitting McCabe to testify via telephone, is unclear. Respondents did not apply the *Matthews* balancing test in their appellate brief, and therefore have not articulated a government interest to the court. The City certainly has an important interest in expeditious removal of officers who engage in misconduct and pose a danger to public safety. The City also has an interest in maintaining flexible and efficient police disciplinary hearing procedures. However, the Board already conducts full evidentiary hearings, so the fiscal and administrative burdens of requiring in-person testimony are likely not substantial.

We also note that the Board could have made a stronger effort to secure McCabe’s attendance. After McCabe expressed his reluctance to appear in person and failed to appear on the third day of the hearing claiming that he was sick, the Board chairperson decided there was “no other option other than to conduct a telephone interview.” However, as appellant points out, the Board could have simply postponed McCabe’s interview until he recovered because the hearing stretched over 10 days between October 2013 and February 2014. Furthermore, if McCabe had refused to appear, the Board could have used its subpoena authority to compel his attendance. (See L.A. City Charter, § 1070, subd. (j) [“Each Board member shall have the power to ... compel the attendance of witnesses ... by subpoena.”].) We

accordingly find that the City's interest in examining McCabe telephonically was not substantial.

Balancing these factors, we conclude that allowing McCabe to testify telephonically did not deprive appellant of his due process right to a fair hearing. Although appellant's interest in continued employment outweighs the City's interest in expediting its police disciplinary hearings, we do not believe there was a significant risk of erroneous deprivation based solely on the fact that the Board did not observe McCabe's demeanor at the hearing. The Board had other sufficient means of evaluating his credibility, the most important of which was the "powerful" recording of his emergency call to the sheriff's department.

The absence of the audio recordings from the administrative record is conspicuous. As the trial court noted, the recordings are "two crucial pieces of evidence" that appeared to be "very important" to the Board's determination. The trial court offered appellant the opportunity to introduce the recordings at the petition hearing, but he declined the offer and submitted on the record. He chose not to introduce the recordings even though he has the burden of providing an adequate record for review. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.)

*10 Even if we were to find a due process violation, appellant has not met his burden to affirmatively demonstrate that allowing **telephonic** testimony constituted prejudicial error. "Under this standard, the appellant bears the burden to show it is reasonably probable he or she would have received a more favorable result at trial had the error not occurred." (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 308, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) It is speculative to suggest that the Board would have found McCabe not credible based solely on his physical appearance and demeanor while testifying. Moreover, the Board's determination was equally based on its finding that Kang's testimony was not credible. It is not likely that requiring McCabe to testify in person would have affected this finding. Because appellant has not established prejudice, his claim of error fails.

II

Appellant also maintains his due process rights were violated when the Board precluded questions during cross-examination about McCabe's mental health and use of medication. Although the trial court's statement of decision

did not address this argument, the court indicated at the petition hearing that excluding such evidence was not an abuse of discretion because the fact that he may be bipolar "doesn't mean that [he was] incapable of testifying truthfully."

Relying on *People v. Abel* (2012) 53 Cal.4th 891, appellant seeks de novo review on appeal, arguing that his inability to cross-examine McCabe about relevant evidence implicates fundamental fairness and therefore presents a pure question of law involving the application of due process. This is not the appropriate standard of review. First, *People v. Abel* involved a claim by a criminal defendant based on the Confrontation Clause (U.S. Const., 6th Amend.), which has no application in an administrative hearing. (See *Melkonians v. Los Angeles County Civil Service Com.* (2009) 174 Cal.App.4th 1159, 1171.) Moreover, an administrative agency is not required to follow the strict rules of evidence enforced in the courts. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1054.) Section 1070 of the Los Angeles City Charter simply provides that the Board may consider any relevant evidence to the charges. (L.A. City Charter, § 1070, subd. (m).)

On appeal from a judgment denying a writ of mandate involving a challenge to evidentiary rulings in an administrative hearing, we apply an abuse-of-discretion standard of review. (*Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, 1217.) Further, the improper admission or exclusion of evidence at an administrative hearing does not provide grounds for reversal unless the error has resulted in a miscarriage of justice, that is, we must be persuaded there has been a prejudicial abuse of discretion. (See *Thornbrough v. Western Placer Unified School District* (2013) 223 Cal.App.4th 169, 200; see also Code Civ. Proc., § 1094.5, subd. (b).)

Appellant fails to show that the Board's preclusion of questions regarding McCabe's mental condition constituted a prejudicial abuse of discretion. There is evidence that McCabe suffers from **bipolar disorder** and that he was taking medication for anxiety. But McCabe declined to testify about his medical issues because he believed they were not relevant to the incident. When Kang's attorney started to question McCabe about his **bipolar disorder** and any medication he was taking that could affect his memory, the Board sustained the LAPD's objections to these questions on relevancy grounds.

Relying on a series of criminal cases, appellant maintains that McCabe's mental issues and medication use were relevant to the issue of credibility, and therefore a proper subject of

cross-examination. (See, e.g., *People v. Samuels* (2005) 36 Cal.4th 96, 116–117; *People v. Gurule* (2002) 28 Cal.4th 557, 591–592; *People v. Anderson* (2001) 25 Cal.4th 543, 579.) Because McCabe's credibility was critical, appellant argues he was strongly prejudiced and denied a fair hearing by the exclusion of questions regarding his mental condition.

*11 We disagree. McCabe's credibility was not in question merely because he may be bipolar and takes medication for anxiety. (See *People v. Anderson, supra*, 25 Cal.4th at p. 579 [“It is a fact of modern life that many people experience emotional problems, undergo therapy, and take medications for their conditions.”].) Indeed, both the Board and the trial court expressly found McCabe to be credible. We find no reason to second guess these determinations.

III

Appellant argues, for the first time on appeal, that the standard of misconduct for “road rage” employed by the Board was impermissibly vague and therefore the imposition of discipline based on the charge violated due process. Because appellant failed to raise this theory before the trial court, he has forfeited the claim on appeal. (See *In re Marriage of Priem* (2013) 214 Cal.App.4th 505, 511 [failure to assert an argument at the trial court constitutes waiver, and appellant is estopped from raising the objection on appeal].) Appellant urges us to consider the merits of his claim, noting the limited exception to the waiver rule for pure questions of law. (See *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654–655, fn. 3). We decline to exercise our discretion to reach the merits of this new claim. (See, e.g., *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767.)

IV

Regarding the fourth count for making false statements during an official investigation, appellant argues the trial court committed legal error in upholding this finding of misconduct. Relying on *Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46 (*Alameida*), he argues that a police officer cannot be disciplined for making false statements to an investigator when he is merely denying the factual basis of the charges against him.

In *Alameida, supra*, 120 Cal.App.4th at page 50, a correctional officer was discharged for dishonesty after he

denied committing a sexual offense that was beyond the one-year statute of limitations under the Public Safety Officers Procedural Bill of Rights Act (POBRA) (*Gov. Code, § 3300 et seq.*). He was reinstated following an administrative appeal. (*Ibid.*) The administrative law judge (ALJ) determined the dishonesty charge could not serve as a separate basis for discipline because “it would defeat the purpose of [POBRA] to allow the employer to circumvent the one-year limitations period by allowing the agency to prove the underlying charges in order to demonstrate the employee was dishonest in denying the charges.” (*Alameida*, at pp. 51–52.) The employer's petition for writ of administrative mandate was denied by the trial court, and the appellate court affirmed the judgment. (*Ibid.*) Agreeing with the ALJ's analysis, the court concluded the denial of misconduct during an investigation “does not constitute separate actionable misconduct but in effect merges with or is derivative of the alleged underlying misconduct.” (*Id.* at p. 62.) The court held that “alleged dishonesty in denying an underlying charge does not start a new limitations period for discipline of peace officers under [POBRA].” (*Id.* at p. 63.)

Appellant contends *Alameida* is not limited to the situation where an agency seeks to circumvent the statute of limitations by charging an officer for making false statements relating to a time-barred underlying offense. Rather, he asserts *Alameida* stands for the proposition that an officer cannot be punished for making a false statement in denying allegations of misconduct. This expansive reading of *Alameida* was rejected in *Crawford, supra*, 175 Cal.App.4th 249, which held that false statements related to but made *before* the limitations period expired on another count may properly serve as the basis for a separate misconduct charge. (*Id.* at p. 257.) Under the facts presented in *Crawford*, the concerns underlying the “*Alameida* court's prohibition against reviving an already expired charge by questioning the officer about it” were nonexistent. (*Ibid.*) Similarly, because neither Kang's false statements nor the underlying conduct were time-barred, we find no reason to extend *Alameida* to the facts of this case. Doing so would improperly “deprive the City of the power to discipline an employee for making false statements during an investigation.” (*Crawford*, at p. 257.)

V

*12 Finally, appellant maintains there is no substantial evidence to support the trial court's findings as to each of the four counts of misconduct. Appellant points to

inconsistencies in McCabe's statements and argues that he was not credible. However, the scope of our review is limited under the substantial evidence standard. We do not reweigh the evidence or evaluate the credibility of witnesses, but rather defer to the trier of fact. (*City of Glendale v. Marcus Cable Associates, LLC* (2014) 231 Cal.App.4th 1359, 1385.) “We view the evidence in the light most favorable to the judgment and accept as true all evidence tending to support the judgment, including all facts that reasonably can be deduced from the evidence.” (*Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87, 99.) Under this standard, we find substantial evidence to support the trial court's findings of misconduct.

First, the trial court found the charge that appellant unnecessarily identified himself as a police officer to be fully supported by his own testimony. According to Kang, he pulled out his LAPD identification and extended it out of his car window towards McCabe while stating: “Police officer. Pull over to the side.” He further testified that he was displaying his identification when he exited his vehicle and approached McCabe on foot. At the hearing, Kang expressly admitted that it was against LAPD policy and “not appropriate” for him to have displayed his identification at that time. Appellant's own testimonial admission is certainly substantial evidence to support the finding of misconduct.

Appellant argues the evidence does not establish misconduct because he did not “unnecessarily” identify himself as a police officer. He maintains that it was appropriate to do so because he was visibly armed. For this proposition, he relies on the testimony of Sergeant Waschak, who commented that if he was “walking up on somebody” and had “a handgun readily visible,” he would identify himself as a police officer to reassure the individual. This argument does not aid appellant for two reasons. First, Kang admitted that he first identified himself as an officer while still driving. Accordingly, his justification based on the fact that he was armed has no application when he was still in his vehicle, unless of course the handgun was visible to McCabe. Further, LAPD policy requires officers to conceal their firearms while off duty. Appellant cannot justify inappropriately identifying himself as an officer merely because he happened to be violating LAPD policy against openly carrying a firearm while off duty.

Second, the court determined that the weight of the evidence supports the Board's findings that appellant became involved in a road rage incident, brandished his firearm, and subsequently made false statements about these events

during the investigation. The court recognized that “McCabe's testimony, if believed, fully supports the Board's findings.” McCabe testified that Kang was “racing up behind” him and yelling as if he wanted to start a fight. When they came to a stoplight, McCabe alleged that Kang pulled out a handgun and pointed it at him. McCabe testified that Kang subsequently followed him at high speed, at times getting extremely close to the rear bumper and side of his car. If McCabe's testimony is truthful, then Kang also made false statements to the investigating officer when he said: “I didn't pull the gun on him” and “I never went over the speed limit.” Because Kang and McCabe were the only witnesses, these findings necessarily were based on the determination that McCabe was credible and Kang was not. We find substantial evidence to support these determinations, notwithstanding some inconsistencies in McCabe's testimony.

*13 Substantial evidence supports the finding that McCabe's testimony was credible. The trial court found that “in testimony before the Board and in statements to the LAPD, McCabe consistently stated that [Kang] pointed his gun at him during the incident and accurately described the gun to the investigating officers.” Appellant attacks this determination by pointing to inconsistencies in McCabe's description of the gun and his statements regarding the alleged brandishing and how the incident began. These inconsistencies do not undermine the court's credibility determination.

McCabe's statements describing the firearm were imprecise but largely consistent. Kang was carrying a semiautomatic handgun with black pistol grips, a blue steel (black) frame, and a stainless steel (silver) slide covering the barrel. McCabe, who professed to know nothing about guns, provided several descriptions of the pistol. Deputy Guzman's testimony and incident report indicate McCabe said Kang brandished a “silver handgun.” McCabe told Sergeants Smith and Egan the gun had a “silverish black tip.” In the Internal Affairs interview, McCabe was reported to have accurately described the gun and then confirmed a photograph of the weapon. At the Board hearing, McCabe testified that the gun had a “silver barrel.” We agree with the trial court that although “McCabe may have used less than precise language to describe the weapon, this does not undermine his credibility in any meaningful way.”

Appellant also points to inconsistencies in McCabe's description of the manner in which brandishing occurred. Deputy Guzman testified that during the on-scene interview, McCabe stated Kang pointed the gun “towards his vehicle.”

But in later interviews and during the hearing, McCabe stated the gun was pointed “at him.” During reenactments with both Smith and Egan and at the Internal Affairs interview, McCabe consistently stated that Kang drew the pistol with his right hand and held it across his chest while pointing the weapon. Again, the record shows that McCabe's account of the event was generally consistent.

Finally, appellant argues that inconsistencies in McCabe's statements about how the incident began demonstrate the falsity of his testimony. According to Deputy Guzman's testimony and incident report, McCabe initially admitted he merged lanes and braked suddenly in front of Kang's vehicle. During the Internal Affairs interview, McCabe stated that as he was trying to merge lanes, he observed Kang flashing his headlights and speeding up behind him, but admitted “unintentionally cut[ting] off” Kang. McCabe testified at the hearing that he did not cut off Kang, but rather the incident started with Kang flashing his headlights at him for not driving fast enough. We agree with the trial court that these discrepancies are not significant enough to undermine McCabe's credibility. As the court noted, “even if McCabe started the incident by cutting [Kang] off, it does not matter. What matters is how [Kang], a police officer, reacted to McCabe's actions or provocation.”

Substantial evidence also supports the court's finding that Kang was not credible. The court noted Kang's testimony that he merely pulled out a silver pen, to which McCabe responded as if he had seen a ghost, “is not only unbelievable, but actually confirms McCabe's story that he had seen [Kang] brandish his gun during the altercation.” We tend to agree. The court also reasonably doubted Kang's testimony that McCabe was speeding, but he himself never exceeded the speed limit and was following McCabe for several miles in an effort

to take down his license plate number. We find no basis to question the court's credibility determinations.

*14 We also reiterate that appellant has failed to furnish an adequate record for review by declining to provide the trial court with audio recordings of the emergency calls made by Kang and McCabe. (See *Maria P. v. Riles, supra*, 43 Cal.3d at p. 1295.) As the trial court noted, these recordings were “crucial pieces of evidence” and were heavily relied upon by the Board in making its findings. Because appellant has precluded review of this evidence, it is entirely proper that we afford considerable deference to the Board's credibility determinations.

Based on our review of the administrative record, we conclude that substantial evidence supports all findings of misconduct by the trial court. Accordingly, appellant's petition for writ of administrative mandate was properly denied.

DISPOSITION

The judgment is affirmed. Costs are awarded to Respondents on appeal.

We concur:

[WILLHITE, J.](#)

[MANELLA, J.](#)

All Citations

Not Reported in Cal.Rptr.3d, 2016 WL 7387227, 2016 IER Cases 426,263

Footnotes

1 The Legislature added these **telephonic** hearings provisions as part of an overhaul and modernization of the APA in 1995 based on recommendations by the California Law Revision Commission. (See Sen. Bill No. 523 (1995–1996 Reg. Sess.) § 21.) The provision permitting **telephonic** hearings (*Gov. Code*, § 11440.30, *subd. (a)*) was based on the Model State APA (1981) (U.L.A.) § 4–211(4). (25 Cal. Law Revision Com. Rep. (1995) p. 179.) The 2010 Revised Model State APA provides that a hearing may be conducted telephonically “only if all parties consent” or “the presiding officer finds that this method will not impair reliable determination of the credibility of testimony.” (Revised Model State APA (2010) (U.L.A.) § 403, *subd. (e)*.) The comments section notes that “[d]ue process of law may require live in person hearings when there are disputed issues of material fact that require the fact finder to make credibility determinations” and noted a split of authority on this issue. (*Ibid.*; compare *Whitesides v. State of Alaska, Dept. of Public Safety, Div. of Motor Vehicles* (Alaska 2001) 20 P.3d 1130, 1135–1139 [use of **telephonic** testimony in driver's license revocation hearing violated due process when driver's credibility was material] with *Babcock v. Employment*

Div. (Or.Ct.App. 1985) 696 P.2d 19 [use of **telephonic** testimony in an unemployment compensation hearing where the credibility of a party was at issue did not violate due process because audible indicia of a witness's demeanor are sufficient for determining credibility].)

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