LYBARGER v. CITY OF LOS ANGELES

Court of Appeal, Second District, Division 7, California.

Michael LYBARGER, Appellant, v. CITY OF LOS ANGELES, et al., Respondents.

B004149.

Decided: September 27, 1984

Loew & Marr, Los Angeles, and Mary Ann Healy, Whittier, for appellant. Ira Reiner, City Atty., Frederick N. Merkin, Senior Asst. City Atty., Leslie E. Brown and Linda K. Lefkowitz, Deputy City Attys., for respondents.
Michael Lybarger appeals from judgment denying his peremptory writ of mandate (Code Civ.Proc., § 1094.5).

Lybarger was a police officer with the 77th Street Vice Unit of the Los Angeles Police Department. On March 26, 1980, he reported to work and was informed by an officer from the Internal Affairs Division that there was a major investigation involving 77th Vice. He and two other officers were transported to Parker Center for interrogation; Lybarger was the last of the three to be interviewed. His union provided him with an attorney for this interview. At the start of the interview, Lybarger was informed of the allegations being investigated, including false arrests, false imprisonment, false statements, acceptance of a bribe and conspiracy to commit the above. In response to his attorney's questions, the interrogating officers stated there was a criminal investigation pending, and that if Lybarger refused to cooperate in this administrative investigation, he could be charged with insubordination which could result in the loss of his job. Lybarger was then ordered to cooperate in the investigation. After conferring privately with his attorney, Lybarger stated that he did not want to say anything and that he would not cooperate in the investigation, even though he understood that this refusal would result in a charge of insubordination against him.

Appellant was charged with one count of insubordination, and a Board of Rights hearing was had on this charge. Appellant entered a plea of guilty with an explanation, and presented the defense that although he was disobedient to the Department, he was not being rebellious, but rather acted on poor advice of his attorney at the investigation. This defense was for the purpose of mitigation of penalty. Lybarger testified at the hearing that his attorney had advised him in private that the Department did not have anything "on him," that if he talked he could be giving the Department information that they could use, and that "if I were you, I wouldn't say a damn thing." He stated that his disobedience to the order to cooperate in the investigation was based on this advice from his attorney. The attorney was not present at the hearing and had reportedly refused to testify, claiming attorney-client privilege. The record does not indicate any attempt by Lybarger to subpoena the attorney to the Board of Rights hearing or to have the attorney waive this claimed privilege.

The Board found Lybarger guilty of the charge of insubordination basing its finding on his plea, the testimony of the interrogators, and the tape recording of the investigative interview. After deliberation on penalty, the Board recommended Lybarger be removed from his position with total loss of pay. This recommendation was affirmed by Police Chief Daryl Gates. Lybarger filed a petition in superior court for peremptory writ of mandate ordering respondents the City of Los Angeles, the Los Angeles Police Department and Daryl Gates to set aside the administrative decision removing him from his position as a police officer. He alleged his rights pursuant to the Public Safety Officers Procedural Bill of Rights were violated in that he was interrogated by more than two officers, that he was denied his due process rights for exercising his right to counsel, that the findings of the Board of Rights were not supported by a preponderance of the evidence, that the decision was not supported by adequate findings or rationale required by law, that the penalty meted out is excessive, and that there were "certain other flaws in the administrative proceeding." The trial court applied the independent judgment test and found that Lybarger was interrogated properly, in a proper manner at a proper time, and that the findings were properly supported. The court

saw no deprivation of Lybarger's due process rights and found in regard to the penalty that refusal to testify under the circumstances was a harm to the public service. The petition was denied, judgment was entered accordingly, and Lybarger appeals.

I

STATEMENT OF DECISION

Appellant contends the trial court erred in failing to state the factual and legal basis for its determination that respondents did not violate his Fifth Amendment rights. Such statement of decision may be required pursuant to Code of Civil Procedure section 632. "Upon the request of any party appearing at the trial, . the court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial." (§ 632.) In this action the trial court considered the transcript of the hearing, which lasted less than one day, to be the compliance with section 632. This is expressly authorized by the statute: "[W]hen the trial has been completed within one day, the statement of decision may be made orally on the record in the presence of the parties." (Code Civ.Proc., § 632.)

The "unexplained issue" about which appellant complains is the alleged violation of his Fifth Amendment rights. Our review of the pleadings reveals no allegations of a violation of Fifth Amendment rights, and the issue was not raised at the administrative hearing. The only reference to Fifth Amendment rights in the trial court was by appellant's counsel relative to the fact that there was no ongoing criminal investigation: "The man obviously had Fifth Amendment rights that were going to be—" The court interrupted at that point: "I am not persuaded by these arguments. I have read it and I am not persuaded." There was no elaboration by appellant on these "obvious Fifth Amendment rights," no request for clarification, no mention of any violation of these rights. This single mention of the Fifth Amendment would hardly seem to qualify as one of the "principal controverted issues at trial" for which an explanation is required under section 632.

Moreover, "[T]he request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision." (Code Civ.Proc., § 632.) The record contains no specification of this issue by appellant either at the hearing or at any time prior to this appeal. "[F]or a party to complain on appeal of the insufficiency of findings, the alleged deficiency must be 'brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663.' (Code Civ.Proc., § 634.)" (Tyler v. Norton (1973) 34 Cal.App.3d 717, 725, 110 Cal.Rptr. 307.) We find not even the remotest suggestion that appellant brought the alleged deficiency to the attention of the trial court. Appellant did not comply with Code of Civil Procedure section 634 and the trial court did not err in failing to make a specific finding as to that "issue."

II

NUMBER OF INTERROGATORS

Appellant contends the trial court erred in finding respondents did not violate his rights during the investigative interview under various subdivisions of Government Code section 3303, a part of the Public Safety Officers Procedural Bill of Rights Act. He argues that the court erroneously allowed respondents to rely on evidence improperly obtained at that interview. We begin with a consideration of the first contention. As the trial court properly exercised its independent judgment (Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, 32, 112 Cal.Rptr. 805, 520 P.2d 29) our review is limited to a determination whether there exists any substantial evidence in support of the trial court's judgment. (Harlow v. Carleson (1976) 16 Cal.3d 731, 739, 129 Cal.Rptr. 298, 548 P.2d 698.)

Section 3303 sets forth the conditions under which a public safety officer may be interrogated when he is the subject of an investigation, such as the one in the present case, which could lead to punitive action. Appellant's first claim of error involves subdivision (b) of this section, which states in pertinent part: "All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time." Appellant asserts this provision was violated in that there were five interrogators at the interview, and questions were asked by three of them. However, the trial court found there were only two people who did the interrogation, Sergeants Wontor and Seitz. Although the court noted Captain Fried participated, the court found his appearance on only one issue was not a violation of the two-interrogator limitation. We find substantial support for this determination in the transcript of the interview which was before the trial court.

At the opening of the interview the four officers present were identified to appellant as required under subdivision (b). Preliminary questions regarding his police background were then asked of appellant by Sergeants Wontor and Seitz, and appellant was informed of the specific nature of the investigation. Appellant and his counsel asked what the

consequences would be for failure to answer questions. In fact, counsel directly asked Captain Fried for information in this regard. Having been advised that he could face a charge of insubordination which could lead to his termination for failure to answer questions, appellant asked for time to confer with counsel.

When the interview resumed, an additional officer was identified, bringing the total number of Department personnel on the investigative team to five. Sergeant Wontor reviewed with appellant the potential for a charge of insubordination and resultant termination should he refuse to answer questions. He then asked appellant: "With all this you are refusing to participate in thisinvestigation?" Appellant responded: "With all due respect, yes, I am." Sergeant Seitz then asked whether appellant understood the seriousness of the charge of insubordination, and appellant answered in the affirmative. It was at this point—after appellant stated that he had made a decision, he did not want to say anything and he would not participate in the investigation—that Captain Fried spoke up. He asked counsel whether he was advising appellant not to cooperate; the attorney replied that he was not. Captain Fried then asked: "Mike, is your independent decision not to cooperate with us?" and Lybarger responded: "Yes, sir." Fried asked: "Are you sure?" and appellant said "Yes, sir." Fried continued: "You do understand. I felt earlier you didn't really understand what was going on. We're going to charge you with insubordination. And the chances are good that you will lose your job over that charge alone, no matter what else you're charged with." When Lybarger answered affirmatively, Fried went on: "I want you to be really certain—not your representative—it's your job. It's not his; it's your job. Now, you consider that. I want to make sure that before we walk out of this room, before we terminate this interview that you know that tomorrow we're going to write this up as insubordination." Lybarger replied: "Yes, sir, I understand what you're saying." Fried asked: "And you still refuse to cooperate in this investigation?" Lybarger said "Yes," and Fried said "Good enough." That is the entire extent of Fried's questioning.

Captain Fried's questions were not substantive questions as to the subject matter of the investigation, but were clarifying questions with regard to appellant's comprehension of the decision he was making and the consequences he would face as a result of his decision. This distinction between interrogation and clarification has been recognized in criminal case law determining whether police interrogation had improperly continued after an alleged invocation of Miranda rights. Clarifying questions with regard to a defendant's comprehension of his constitutional rights or the waiver of them have been permitted, whereas substantive questions which portend to develop the facts under investigation have been prohibited. (People v. Watson (1977) 75 Cal.App.3d 384, 394–395, 142 Cal.Rptr. 134; People v. Turnage (1975) 45 Cal.App.3d 201, 211, 119 Cal.Rptr. 237.) We find the same distinction applicable in considering whether the person asking the question is to be considered an "interrogator" in the present context. The record shows that Captain Fried did not ask substantive questions relating to the facts under investigation; he merely asked clarifying questions to ascertain whether appellant truly understood the decision he had made. There is substantial evidence to support the trial court's conclusion that Captain Fried's very limited participation in clarifying appellant's previously announced decision not to cooperate in the investigation did not make him an additional "interrogator" in violation of the "two-interrogator" limitation of section 3303, subdivision (b).

III

THREAT OF PUNITIVE ACTION

Appellant contends that respondents violated his rights under subdivisions (e) and (g) of section 3303 by threatening punitive action against him for failure to answer questions without first informing him of his constitutional rights. Subdivision (e) states in pertinent part: "The public safety officer under interrogation shall not be subjected to offensive language or threatened with punitive action, except that an officer refusing to respond to questions or submit to interrogations shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action." The transcript of the interview clearly shows respondents were neither offensive nor threatening to appellant. They did inform him that his failure to cooperate by answering questions would subject him to a charge of insubordination which could lead to termination of his employment. This information regarding punitive action is specifically authorized by subdivision (e).

IV

FAILURE TO ADVISE OF CONSTITUTIONAL RIGHTS

Subdivision (g) of section 3303 states: "If prior to or during the interrogation of a public safety officer it is deemed that he may be charged with a criminal offense, he shall be immediately informed of his constitutional rights." Appellant asserts a violation of this provision as he was not advised of his constitutional rights at the interview. We note at the outset that appellant did not complain at the administrative hearing that respondents failed to advise him of his rights. "In administrative mandamus action brought under section 1094.5 of the Code of Civil Procedure, appellate review is limited to issues in the record at the administrative level." (City of Walnut Creek v. County of Contra Costa (1980) 101 Cal.App.3d 1012, 1019, 162 Cal.Rptr. 224.) Nor was this alleged violation specifically raised either

in the pleadings or at the hearing in the trial court. All appellant can point to in this regard is a catch-all allegation in his petition that appellant was "entitled to the rights and benefits of the Public Safety Officers Procedural Bill of Rights Act (Gov.Code § 3300, et seq.)," and a vague allegation that "Respondents committed a prejudicial abuse of discretion because of certain other flaws in the administrative proceeding." It is the general rule that an issue or theory of the case that was not asserted in the trial court may not be raised for the first time on appeal. (Parker v. City of Fountain Valley (1981) 127 Cal.App.3d 99, 117, 179 Cal.Rptr. 351.) Appellant properly states that this limitation is subject to an exception where the newly raised issue involves only a question of law and is based entirely upon the facts appearing in the record. (Barton v. Owen (1977) 71 Cal.App.3d 484, 491, 139 Cal.Rptr. 494.) But his newly-raised claim of violation of subdivision (g) does not come within this exception. The transcript of the interview reveals only that there was a criminal investigation pending. There is no indication whether, prior to or during the investigation, it was deemed that appellant might be charged with a criminal offense so as to obligate respondents to inform him of his constitutional rights. By raising the issue for the first time on appeal, appellant not only has deprived respondents of the opportunity to present evidence on such issue but has deprived the trial court as well as the Board of Rights of ruling thereon. As the claimed violation relates to failure to advise of constitutional rights, we have also looked to criminal cases dealing with analogous claims of violation of Miranda rights; these cases hold that such claim may not be raised for the first time on appeal in the absence of a specific objection on that ground at trial. (People v. Crowson (1983) 33 Cal.3d 623, 628, 190 Cal.Rptr. 165, 660 P.2d 389; In re Dennis M. (1969) 70 Cal.2d 444, 462, 75 Cal.Rptr. 1, 450 P.2d 296.)

However, even were we to consider the issue properly before us on appeal, we would not find reversible error in appellant's claim. Assuming arguendo that at the time of the interview it had been determined that appellant might be charged with a criminal offense, respondents' failure to advise him of his constitutional rights would indeed have been a violation of section 3303, subdivision (g). Under Government Code section 3309.5, subdivision (c), "In any case where the superior court finds that a public safety department has violated any of the provisions of this chapter, the court shall render appropriate injunctive or other extraordinary relief to remedy the violation and to prevent future violations of a like or similar nature ." In a very recent case in which a police officer's right to be informed of his constitutional rights was violated during an internal investigative interview, the Fifth District Court of Appeal held that the testimony obtained as a fruit of the violation should be excluded from use either in a criminal case or in an administrative proceeding to discipline or discharge the officer. (Kelly v. City of Fresno (1984) 159 Cal.App.3d 110, 205 Cal.Rptr. 416.) But in the case before us, there were no fruits of the alleged violation. We reject appellant's argument that his "statements" which provided the grounds for the charge of insubordination were the fruits of the violation. Despite the failure of respondents to advise appellant of his right to remain silent, he invoked that very right and refused to testify. It was this invocation of his right to remain silent that provided the basis for the insubordination charge. That right was asserted despite respondents' violation of the statute, not because of the violation. There was no need for the trial court to fashion an appropriate remedy as appellant had suffered no harm from the failure to be advised of constitutional rights he obviously knew he had, chose to and in fact did invoke.

V

EFFECTIVE REPRESENTATION

Appellant claims the trial court erred in failing to find he was denied the right to effective representation under section 3303, subdivision (h), which provides in pertinent part: ". [W]henever an interrogation focuses on matters which are likely to result in punitive action against any public safety officer, that officer, at his request, shall have the right to be represented by a representative of his choice who may be present at all times during such interrogation." Appellant admits he was allowed representation, but argues it was so inadequate and ineffective that he was deprived of a potentially meritorious defense.

Respondents correctly argue that there is no recognized right to "effective counsel" in administrative actions. (White v. Division of Medical Quality Assurance (1982) 128 Cal.App.3d 699, 707, 180 Cal.Rptr. 516.) The right set forth in the applicable subdivision is merely for a "representative of his choice." Appellant's attorney was provided by his own union; appellant at no time prior to or during the interview indicated that this attorney was not an acceptable choice for him. The record supports a finding that appellant's right to representation was not violated.

There is also substantial evidence in the record to support a finding that appellant was not denied the right to effective representation. The transcript of the interview clearly shows appellant's attorney did not advise appellant that he should not testify, but did advise him as to the options he had available regarding cooperation with the investigation. Counsel inquired of respondents as to the pendency of a criminal investigation and the consequences appellant would face if he refused to testify. When asked by respondents, appellant specifically answered that it was his independent decision not to cooperate and that he understood what consequences he would face for refusing to do so. Although appellant later testified at the administrative hearing that his attorney had advised him privately not to say anything, we are bound by the rules of appellate review in considering the sufficiency of the evidence. We must

view the evidence in the light most favorable to the prevailing party and in support of the judgment, looking only at the evidence supporting the successful party and disregarding the contrary showing. (Campbell v. Southern Pacific Co. (1978) 22 Cal.3d 51, 60, 148 Cal.Rptr. 596, 583 P.2d 121.) There is substantial evidence to support a finding that appellant was not denied the right to effective representation. (See People v. Pope (1979) 23 Cal.3d 412, 424, 152 Cal.Rptr. 732, 590 P.2d 859.)

VI

EVIDENCE OF INSUBORDINATION

There is no merit to appellant's contention that there was not substantial evidence to support respondents' finding of insubordination. The charge brought by respondents was that appellant was insubordinate to Sergeants Wontor and Seitz in that he "failed to obey a direct order to answer questions regarding an official Department personnel investigation." This finding is supported by appellant's own plea of guilty with an explanation entered at the Board of Rights hearing, by which he admitted the refusal to obey the order but sought to mitigate the consequences of his disobedience with an explanation of the reasons for his action. Appellant is bound by this admission of guilt. (See Strode v. Board of Medical Examiners (1961) 195 Cal.App.2d 291, 300–301, 15 Cal.Rptr. 879.) The finding is also supported by the transcript of the investigative interview. Sergeant Wontor, who had the authority to do so, ordered appellant to cooperate in the investigation and to answer questions fully and truthfully. Appellant was informed that refusal to cooperate would subject him to a charge of insubordination which might result in job loss. Then, based on his independent judgment, appellant voluntarily refused to cooperate in the investigation. "Insubordination can be rightfully predicated only upon a refusal to obey some order which a superior officer is entitled to give and entitled to have obeyed." (Garvin v. Chambers (1924) 195 Cal. 212, 224, 232 P. 696.) Appellant refused to obey the order which the officer was entitled to give; the officer was also entitled to have the order obeyed, inasmuch as appellant had a duty to cooperate. California has long recognized the particular responsibilities of police officers. "Such officers are the guardians of the peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them. Among the duties of police officers are those of preventing the commission of crime, of assisting in its detection, and of disclosing all information known to them which may lead to the apprehension and punishment of those who have transgressed our laws. When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors and to testify freely concerning such facts when called upon to do so before any duly constituted court or grand jury. It is for the performance of these duties that police officers are commissioned and paid by the community, and it is a violation of said duties for any police officer to refuse to disclose pertinent facts within his knowledge even though such disclosure may show, or tend to show, that he himself has engaged in criminal activities." (Christal v. Police Commission (1939) 33 Cal.App.2d 564, 567–568, 92 P.2d 416.) This principle has been reiterated more recently with regard to a prison correctional officer in Szmaciarz v. State Personnel Bd. (1978) 79 Cal.App.3d 904, 915–916, 145 Cal.Rptr. 396: "Appellant as a peace officer had a duty to cooperate with the investigation being conducted by the Department. [¶] Appellant could have refused to answer the questions posed . but, had he chosen to do so, the Department would have been justified in terminating his employment for such a refusal. 'A public employee, of course, cannot be forced to give an answer which may tend to incriminate him, but he may be required to choose between disclosing information and losing his employment.' [Citations.]" Lybarger had a similar duty to cooperate with the investigation, yet he refused to obey the order to do so. There is substantial evidence to support the determination that appellant was insubordinate.

We further find the Board's statement that this was a case of "gross" insubordination to be sufficiently supported by the evidence. The adjective "gross" does not necessarily describe conduct that is rude, disrespectful, contumacious or mutinous, as appellant contends. "Gross" is defined in Black's Law Dictionary (Rev. 4th ed. (1968), p. 832) as "out of all measure; beyond allowance; not to be excused; ." The need for obedience and cooperation by police officers for effective law enforcement is well recognized. Disobedience to orders is a clear impediment to such an objective; disobedience to an order involving an internal investigation of serious charges may certainly be considered beyond allowance and not to be excused.

Appellant's argument that the order given was unlawful was not raised in the administrative hearing or in the trial court. Accordingly, that issue may not be raised for the first time on appeal. (See City of Walnut Creek v. County of Contra Costa, supra, 101 Cal.App.3d 1012, 1019, 162 Cal.Rptr. 224; Bohn v. Watson (1954) 130 Cal.App.2d 24, 37, 278 P.2d 454.)

VII

PUNITIVE ACTION FOR EXERCISE OF RIGHT TO REMAIN SILENT

The Public Safety Officers Procedural Bill of Rights does not prohibit an employer from taking punitive action against a police officer when he chooses to exercise his constitutional right to remain silent during an administrative interrogation. Section 3303, subdivision (g) expressly provides only the right to be advised of constitutional rights; it does not say those rights may be exercised without punitive action, and we do not add such additional language under the guise of statutory interpretation. (Bergin v. Portman (1983) 141 Cal.App.3d 23, 26, 190 Cal.Rptr. 81.) We must consider the meaning of subdivision (g) in the context of the statutory framework as a whole. (Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist. (1978) 21 Cal.3d 650, 659, 147 Cal.Rptr. 359, 580 P.2d 1155.)

Section 3304, subdivision (a) provides: "No public safety officer will be subjected to punitive action . because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights under the existing administrative grievance procedures." But the right to remain silent is a constitutional right, expressly described as such in section 3303, subdivision (g), and not a "right granted under this chapter." The "right granted under" subdivision (g) is the right to be advised of constitutional rights, not the right to remain silent; thus punitive action for exercising the constitutional right to remain silent during an investigation or interrogation is not prohibited by section 3304, subdivision (a). In fact, section 3303, subdivision (e) specifically contemplates punitive action against an officer who refuses to respond to questions or submit to interrogation. Neither section 3303, subdivision (e) nor subdivision (g) contains any exception from punitive action where an officer exercises his constitutional right to remain silent. In contrast to this, and a strong indication that this was the intent of the Legislature we note just such an exception from punitive action where an officer refuses to submit to a polygraph examination. (Gov.Code, § 3307.)

The conflict between the exercise of constitutional rights and the duties of police officers has long been recognized in California. In considering such conflict, the court in Christal v. Police Commission, supra, 33 Cal.App.2d 564, 568, 92 P.2d 416, explained: "Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers. They claim that they had a constitutional right to refuse to answer under the circumstances, but it is certain that they had no constitutional right to remain police officers in the face of their clear violation of the duty imposed upon them. [Citation.]" This very practical limitation on the exercise of a constitutional right by a public servant was quoted with approval by the California Supreme Court in Carsten v. Psychology Examining Com. (1980) 27 Cal.3d 793, 800, 166 Cal.Rptr. 844, 848, 614 P.2d 276, 280: "A similar rule has long prevailed in California. In Christal v. Police Commission (1939) 33 Cal.App.2d 564, 569, 92 P.2d 416, 419, the court declared 'There is nothing startling in the conception that a public servant's right to retain his office or employment should depend upon his willingness to forgo his constitutional rights and privileges to the extent that the exercise of such rights and privileges may be inconsistent with the performance of the duties of his office or employment.' " In the circumstances here appellant had neither statutory nor constitutional protection from termination based on his exercise of his right to remain silent.

VIII

EXCESSIVENESS OF PENALTY

Appellant contends the trial court erred in failing to find the penalty of termination was excessive. In a mandamus proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of discretion. In considering whether such abuse occurred in the context of public employee discipline, the overriding consideration is the extent to which the employee's conduct resulted in, or if repeated is likely to result in harm to the public service. Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 218, 124 Cal.Rptr. 14, 539 P.2d 774.) The subject matter of the investigation in the present case included serious charges of misconduct by appellant; the alleged wrongdoing not only threatened the internal operation of the police department, but effective law enforcement by this particular vice unit. By refusing to testify, appellant impaired the investigation, thereby causing harm to the public service. His refusal to cooperate was in direct violation of his duty as a police officer to aid in investigations of wrongdoing. (Christal v. Police Commission, supra, 33 Cal.App.2d 564, 567–568, 92 P.2d 416.) It was not until two months later, just four days before the Board of Rights hearing, that appellant came forward to testify. The Board of Rights had no obligation to accept such belated cooperation as undoing appellant's previous insubordination. Considering the seriousness of the wrongdoing, and the fact that appellant was advised that his refusal to obey the order could result in his termination, we do not find an abuse of discretion in the Board's recommendation that appellant be terminated from his position.

DISPOSITION

The judgment is affirmed.

LILLIE, Presiding Justice.

THOMPSON and JOHNSON, JJ., concur.

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