Giusto v. City of San Mateo Personnel Bd.

Decided Dec 16, 2008

ANTONIO GIUSTO, Plaintiff and Respondent, v. CITY OF SAN MATEO PERSONNEL BOARD, Defendant and Appellant, CITY OF SAN MATEO, Real Party in Interest and Appellant.

A120144 California Court of Appeal, First District, Third Division December 16, 2008

NOT TO BE PUBLISHED

San Mateo County Super. Ct. No. 444666

Jenkins, J.

Appellants City of San Mateo Personnel Board (Board) and City of San Mateo (City) seek review of the judgment entered following the issuance of a peremptory writ of mandate directing the Board to set aside its decision to terminate the employment of respondent Antonio Giusto. For reasons discussed below, we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND [1]

[1] This is the second appeal arising out of the suspension and termination of Giusto's employment. On August 26, 2004, Giusto filed a petition for writ of mandate directing the City to pay him for a seven-month period during which he remained on unpaid leave status, and to credit him for the discretionary leave credits he expended during that period. In support of his petition, Giusto argued, among other things, that the City had deprived him of a property right in his continued paid employment without constitutional due process. The trial court agreed, and granted the petition. We affirmed in a nonpublished opinion. (Giusto v. City of San Mateo, A109567 (March 30, 2006) 2006 Cal.App. Unpub. Lexis 2683.) Some of the facts set forth herein are taken from our previous opinion.

The City's Police Department (Department) hired Giusto as a police officer on April 20, 1989. Giusto was promoted to police sergeant in December 1998. For both positions, he satisfactorily completed a probationary period and, thus, attained permanent employee status.

In January 2003, Giusto filed a worker's compensation claim on the basis of stress and depression following a non-disciplinary counseling session with his supervisor. The counseling session resulted from a vehicle pursuit involving one of Giusto's officers which, according to Lieutenant Pollett, Giusto should have called off earlier to avoid unnecessary damage and injury. During the counseling session, which Lieutenant Pollett later described as "amicable," Giusto declined to sign the record of discussion, explaining that he disagreed with its contents. Later, Giusto complained of a racing heart and shaking hands, and requested permission to leave work due to stress and anxiety stemming from the counseling session.

Based on Giusto's stress-related worker's compensation claim, the Department's Chief, Susan Manheimer, placed him on paid administrative leave pending a fitness-for-duty evaluation. Upon the recommendation of three other police agencies, Chief Manheimer hired

psychiatrist Norman Reynolds, M.D., to conduct Giusto's evaluation. Dr. Reynolds was a board-certified, licensed psychiatrist who specialized in fitness-for-duty evaluations for law enforcement personnel and physicians, having performed over 2,000 of them in his 30-plus years of practice.

In her letter referring Giusto to Dr. Reynolds, Chief Manheimer provided background information regarding the Department's relationship with Giusto. Specifically, she advised that Giusto "appears at times to be extremely angry, hostile and antagonistic;" that, "when disagreements arise, he threatens to go to the press, or alleges a cover-up, or . . . conspiracy;" and that he "has isolated himself from his peers, his supervisors, and many of the others within the organization." Chief Manheimer's letter further stated that "[Giusto's] subordinates, his peers, and his supervisors have all said that his lack of ability to accept coaching and constructive criticism has impacted his performance as well as his effectiveness and his judgment."

Chief Manheimer also gave Dr. Reynolds Giusto's personnel file. The file contained Giusto's past performance evaluations, in which his work was generally described as satisfactory or better. Giusto's file also contained, however, examples of his unacceptable past conduct. For example, documents reflected that Giusto repeatedly reacted to minor criticisms in his performance evaluations by submitting lengthy, defensive and angry rebuttal letters.[2] Additionally, Giusto was observed making an obscene gesture during a City Council meeting while a Council member was speaking. When someone later reported the incident to the Department, Giusto wrote a letter to the reporter, "warn[ing] you, your staff and your organization to stop contacting my public employer unless you have reason for doing so under the law or when my employer's jurisdiction allows you to do so."

[2] Specifically, in response to a comment in his 2001 evaluation that Chief Manheimer had observed him sleeping and unprepared in a training session, Giusto submitted a 6-page, single-spaced rebuttal letter denying the accusations and providing his own explanation of what occurred. Giusto's letter concluded: "I refuse to be bullied, insulted, or made to feel that I am less than the dedicated and involved employee that I am for no justifiable reason and with no substantiated evidence." Similarly, in response to a comment in Giusto's 1999 evaluation that his peers were concerned he was not communicating with them, Giusto submitted another 6-page, single-spaced rebuttal denying that was true and complaining that other sergeants were harassing and retaliating against him.

In January 2003, Dr. Reynolds interviewed Giusto in person for approximately ten and a half hours. In addition, Dr. Reynolds conducted a series of psychological tests and self-assessment questionnaires on Giusto, and reviewed extensive documents, including correspondence from Giusto's supervisors regarding his employment history. Following these steps, Dr. Reynolds concluded Giusto was "provisionally fit" to return to work, but recommended two follow-up evaluations, the first of which was to occur in two months.[3]

[3] Dr. Reynolds explained that his "provisionally-fit" opinion was rendered because he was not convinced Giusto was fit for duty and wanted another opportunity to evaluate him.

Giusto thus returned to work on March 3, 2003, under the supervision of Lieutenant Barbara Hammerman, with whom Giusto had worked well in the past. According to Chief Manheimer, Lieutenant Hammerman was chosen as Giusto's supervisor in the hope that it would enhance his chance to succeed.

On May 2, 2003, at Dr. Reynolds's request, Lieutenant Hammerman summarized in writing Giusto's performance during the two-month provisional period. Lieutenant Hammerman noted

that the first few days had been problematic, likely due to Giusto's anxiety about returning to work. In particular, Lieutenant Hammerman noted that, on his first day back, Giusto refused to read his performance evaluation for 2002 when she and Lieutenant Pollett asked him to. Further, in refusing to read the evaluation, Giusto "le[ft] no room for discussion," even after Lieutenant Hammerman told him it was "crucial" that he do so. In addition, Giusto was "upset" that he had been assigned a new work schedule due to the effect it would have on his family, yet refused Lieutenant Hammerman's offer to help by making adjustments to his schedule.

On his second day back, Giusto "appeared angry" at the police lineup, and told Lieutenant Hammerman that his anger was because Chief Manheimer had not provided him a letter he had requested earlier in the day. "He demanded that [Chief Manheimer] produce the document before the end of his shift." He then conducted the lineup for his team in a monotone voice without making eye contact with his officers. Later, in the presence of Lieutenant Hammerman, another sergeant and an officer, Giusto, in an angry tone, demanded the Chief give him the document.

Lieutenant Hammerman thereafter confronted Giusto in the parking lot, advising him that "his attitude was not acceptable and was inappropriate in the workplace. I told him that I needed him to be a police sergeant and to set a good example for his officers, that includes providing the highest level of customer service to those around him. I told him he had fallen well short of that with his remarks and his lineup." Later in the day, Giusto left a "sincere" voicemail message for several people, including Lieutenant Hammerman and Chief Manheimer, in which he stated, according to Lieutenant Hammerman, that he "no longer wanted to pursue anything against anyone, but has decided to carry on the next few months in an acceptable manner so he could return to his original team . . . ."

During the next six weeks, Giusto performed "satisfactory to above-average," exhibiting "appropriate behavior" and "act[ing] in accordance with the expectations [Lieutenant Hammerman] . . . set for him." Then, during the last week before he was scheduled to return to Dr. Reynolds for further evaluation, Giusto engaged in four days of unsatisfactory conduct. Among other things, Giusto came to work "angry," "upset," "stressed" and "isolated;" conducted short lineups without allowing for any interaction with his officers; expressed frustration regarding the time of his meeting with Dr. Reynolds, insinuating more than once that Dr. Reynolds and Chief Manheimer were working together to get him fired; and made "demeaning" and "negative" comments regarding his supervisors when preparing his officers for an upcoming test.

Based on this behavior, Lieutenant Hammerman concluded her review by expressing "deep[] concern[]" for Giusto's "glaring mood swings," which, she said, had led to inappropriate, unsatisfactory conduct. Specifically, she noted "Giusto has been angry, resistant to reason, and critical, and has displayed this in front of others in the workplace."

In May 2003, Dr. Reynolds conducted another evaluation of Giusto, interviewing him in person for three hours, administering another self-assessment questionnaire, and evaluating the above-described review submitted by Lieutenant Hammerman. Afterward, Dr. Reynolds concluded Giusto was not fit for duty, and that no further evaluations would be needed. Based on Giusto's failure to provide consent for further disclosure, Dr. Reynolds did not specify a reason for Giusto's unfitness. Dr. Reynolds did, however, identify six significant functional limitations that rendered Giusto unfit: (1) inaccurate self-appraisal; (2) inconsistent performance; (3) problems with emotional self-control; (4) problems with adaptability; (5) problems with teamwork; and (6)

failure to benefit from supervision and corrective feedback. The City thus placed Giusto on paid administrative leave on May 16, 2003.

On or about August 7, 2003, Giusto signed a limited waiver to permit Dr. Reynolds to release to Giusto's attorney information relating to the medical cause of his lack-of-fitness determination. Dr. Reynolds issued a report to Giusto's attorney that concluded "there is no medical/psychiatric causation for this finding that Sgt. Giusto is not fit-for-duty." Giusto's attorney sent the City a copy of the report on August 22, 2003. The parties then agreed to pose three questions to Dr. Reynolds, and Giusto agreed to sign another limited waiver, to obtain more details about Dr. Reynolds's conclusion.

After evaluating Giusto again for nearly two hours, Dr. Reynolds issued a 32-page report that found him unfit for duty due to "an underlying Personality Disorder Not Otherwise Specified," or, "[i]n common parlance, . . . an attitude problem." Dr. Reynolds explained that Giusto had difficulty accepting supervision, and in fact believed his supervisors were wrong about his behavioral problems. Dr. Reynolds further explained that Giusto's behavioral problems escalated, becoming significant after his promotion to sergeant, likely due to the position's added demands and complexities. In particular, Giusto "lacks the characterological coping skills to modify his behavior." Dr. Reynolds thus concluded: "I do not see a basis for restoring fitness," and "[t]he prognosis for a workable reconciliation and succeeding at work is very poor."[4]

[4] Dr. Reynolds provided additional detail: "[Giusto] does not possess good coping skills to resolve conflicts with superiors. He tends to be moralistic and rigid. He is unaware of and denies his own emotional reactivity and displays of emotion. He is not motivated to develop self-awareness based on feedback from others. He resists criticism and does not want professional mental health assistance. His defensive psychological nature leads to resistance to treatment approaches."

On November 26, 2003, the Department notified Giusto that it intended to terminate him from employment because he was unfit for duty. The Department gave Giusto and his attorney an opportunity to respond to its decision at a January 2004 hearing. But finding no basis to alter its decision following the hearing, the Department terminated Giusto on January 27, 2004.

Giusto appealed the Department's termination decision to the Board. At a six-day hearing, the Board heard testimony from Chief Manheimer, Lieutenant Hammerman, Giusto, Dr. Reynolds, and two of Giusto's experts, Dr. Paul Berg and Dr. James Missett. Of significance, Chief Manheimer and Lieutenant Hammerman provided testimony that explained and confirmed information they had previously provided to Dr. Reynolds in the form of the written correspondence described above. Chief Manheimer also emphasized that, once Dr. Reynolds found Giusto unfit for duty, she had no choice but to terminate him, given her responsibility for the City's and the Department's safety and welfare. She noted that police officers were entrusted with a substantial amount of discretion, and thus had to be able to maintain emotional self-control when challenged, particularly when such challenges were made out on the streets at 2:00 a.m. with few witnesses present.

Dr. Reynolds, in addition to confirming the findings and conclusions rendered in his reports, noted that his and the Department's goal from the start was to find a remedy to enable Giusto to return to work. However, Dr. Reynolds concluded no such remedy was available because Giusto did not see any problems with his work performance; rather, he believed his evaluators had the problems. In particular, Dr. Reynolds noted that Giusto claimed during his interview that Chief Manheimer was lying about his poor performance,

that Lieutenant Hammerman was motivated by a desire for a promotion, and that Captain Greenman was incompetent.

Both Dr. Berg and Dr. Missett disagreed with Dr. Reynolds's lack-of-fitness determination, and found his earlier "provisionally-fit" determination extremely unusual.[5] Dr. Berg, a psychologist, examined Giusto for two hours before first testifying before the Board. Dr. Berg determined Giusto had no personality disorder and was fit for duty. Dr. Berg opined that Dr. Reynolds changed his determination from "provisionally fit" to "not fit" based only on the negative performance evaluation of Giusto submitted by Lieutenant Hammerman, rather than any clinical evaluation. Dr. Berg admitted, however, that he lacked access to all the information Dr. Reynolds had regarding Giusto, and thus that the basis for his opinion was more limited. Dr. Berg also admitted that a pattern of not accepting criticism could be considered a personality disorder, and that fitness-for-duty evaluations should consider all mental disorders, including personality disorders.

[5] The Board initially declined to admit into evidence the testimony of Doctors Berg and Missett on the ground that their opinions were not available to the Department when it rendered the decision to terminate Giusto. Following an initial decision by the Board affirming his termination on November 4, 2004, Giusto petitioned the trial court for a writ of mandate to order the Board to admit the testimony, which the trial court granted. The Board thereafter complied with the writ, hearing and considering the testimony of both witnesses before rendering its final decision.

Dr. Missett, a psychiatrist, interviewed Giusto for three hours, and concluded that he had "mild schizoid" aspects to his personality, but was otherwise fit for duty. Dr. Missett testified that he respected Dr. Reynolds, that he would not disregard Dr. Reynolds's work, and in fact that he agreed with 98 percent of Dr. Reynolds's findings in this case. Nonetheless, Dr. Missett disagreed with Dr. Reynolds's ultimate conclusion that Giusto was not fit for duty. Dr. Missett acknowledged, however, that a person diagnosed with a "personality disorder not otherwise specified" could be disqualified from law enforcement work; that he himself had diagnosed persons as having such disorders; that the ability to accept criticism and to maintain emotional self-control "can be" necessary traits for police officers; and that personality issues such as lack of emotional control can be the basis for a lack-of-fitness finding. Like Dr. Berg, Dr. Missett acknowledged having less information about Giusto available to him than Dr. Reynolds had, and that more such information would have been helpful.

On July 10, 2006, the Board issued a seven-page decision upholding the Department's termination of Giusto's employment. In its decision, the Board concluded as follows: "The Board heard and considered testimony offered on behalf of Sergeant Giusto by Doctors Missett and Berg to the effect that their examinations, interviews and testing of Sergeant Giusto led them to reject Dr. Reynolds's conclusion that Sergeant Giusto was not fit for duty. The Board was not persuaded by this testimony to reject the conclusion reached by Dr. Reynolds, a competent professional with extensive experience in conducting fitness for duty assessments, because the examinations, interviews and testing conducted by Doctors Missett and Berg were more remote in time and more importantly were more limited in nature than the examinations, interviews and tests conducted by Dr. Reynolds. Having reached this conclusion, the Board finds that the Chief had due cause to terminate Sergeant Giusto and none of the evidence presented creates a basis upon which to overturn or modify that decision."

Giusto then filed a petition for writ of mandate challenging the Board's decision. On November 15, 2007, the trial court granted the

petition and ordered the Board to set aside its decision affirming the termination of Giusto's employment, and to issue a new decision. In doing so, the trial court reasoned as follows:

"This court finds, as a matter of law, that a public employee's good faith firm belief that his supervisors are incorrect, if expressed in an appropriate manner, does not render the public employee psychologically unfit for duty, regardless of whether or not such belief technically qualifies as a personality disorder. This court takes judicial notice of the Court of Appeal decision in *Giusto v. City of San Mateo* affirming this court's ruling that Real Party in Interest acted illegally by suspending Petitioner's salary while the psychologically unfit for duty finding was pending review. Since the Petitioner's belief that the suspension of his salary was improper has been vindicated by this court and the Court of Appeal, such belief cannot as a matter of law, render Petitioner unfit for duty. Even if it could, the fact that a public employee has hired attorneys and expressed an intention to defend his rights cannot, as a matter of law, constitute good cause for the termination of public employment or evidence that the public employee's fitness for duty cannot be restored. The undisputed testimony by Dr. Missett established that a wide variety of personality traits that technically qualify as personality disorders do not render a person unfit for duty, but to the contrary are likely to enhance performance. On cross-examination, Dr. Reynolds conceded that he himself possessed some of the same personality traits evidencing the personality disorder attributed to Petitioner. Thus, the technical classification of a given trait as comprising a personality disorder per se does not transform such trait into grounds for finding an officer unfit for duty or unlikely to be restored to fitness for duty . . . ."

This appeal followed.

DISCUSSION

On appeal, appellants ask that we vacate the writ of mandate issued by the trial court, enter a new order denying Giusto's writ petition, and enter a new judgment upholding the Board's decision that the Department had due cause to terminate Giusto's employment. Appellants reason that the trial court erred in issuing the writ by: (1) failing to apply a presumption of correctness to the Board's decision; (2) failing to place the burden on Giusto to prove the Board's decision was against the weight of the evidence; (3) and failing to consider all the evidence. For the reasons set forth below, we agree.[6]

[6] As an initial matter, appellants raise an argument that the trial court lacked jurisdiction to hear Giusto's writ petition because it was time-barred under Code of Civil Procedure section 1094.6. We disagree. Under section 1094.6, subdivision (b), there is a 90-day limitations period for seeking judicial review of an agency's decision. Here, as we previously set forth, the Board initially rendered a decision affirming Giusto's termination on November 4, 2004. (See footnote 5, ante.) Giusto thereafter filed a petition for writ of mandate, which the trial court granted, compelling the Board to set aside its original decision and to hear further testimony from Doctors Berg and Missett. Consistent with the writ, the Board held another hearing on May 23, 2006, and thereafter issued a new decision, the one at issue here, on July 10, 2006. On October 10, 2006, Giusto filed an unopposed motion requesting leave to file a supplemental writ under the same case number challenging the new opinion. At that time, the matter was still pending before the trial court because no return on the original writ had been filed. The trial court granted the motion. When appellants thereafter challenged the timeliness of Giusto's supplemental petition, the trial court disagreed, ruling that "this is a continuance of [the] prior action that was appropriate." We agree. Because the trial court retained jurisdiction, and because the supplemental writ related back to the same matter, the trial court had the authority to decide the supplemental writ on the merits. (Professional Engineers in Cal. Government v. State Personnel Bd. (1980) 114 Cal.App.3d 101, 112 ["[T]he trial court has continuing jurisdiction to enforce its writ. (Citation.) The statute of limitations is tolled during the pendency of litigation seeking to have the same matter adjudicated on another basis."].)

I. The Standard of Review.

The Board is a local administrative agency. (San Mateo Municipal Code, § 2.57.040.) Much like a trial court, the Board is empowered to make factual findings and exercise discretion on matters within its jurisdiction, which include reviewing decisions to terminate the employment of the City's police officers. (*Id*. at §§ 2.57.050, 2.57.130; City of San Mateo Police Sergeants' Unit Memorandum of Understanding, § 12.3.)

In reviewing a decision of an administrative agency like the Board, the trial court exercises its independent judgment on the evidence presented in the administrative hearing and determines whether the weight of the evidence supports the agency's decision. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817 [*Fukuda*].) In doing so, the trial court must employ a "strong presumption of correctness" to the agency's findings. (*Ibid*.) Further, the party challenging the agency's decision bears the burden of proving that such findings were against the weight of the evidence. (*Ibid*.; see also *Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th 1064, 1077-1078 [*Breslin*] ["In the trial court, the officers had the burden of proof to show that the [agency's] decision was not supported by the weight of the evidence—that is, that the decision was not supported by the preponderance of the evidence."].)

In fleshing out this standard, the *Fukuda* court explained: "The findings of a board where formal hearings are held should and do come before the courts with a strong presumption in their favor based primarily on the [rebuttable] presumption contained in section 1963, subsection 15, of the Code of Civil Procedure [currently Evidence Code section 664] 'That official duty has been regularly performed.' Obviously, considerable weight should be given to the findings of experienced administrative bodies made after a full and formal hearing, especially in cases involving technical and scientific evidence." (*Fukuda, supra,* 20 Cal.4th at p. 812; see also *Mason v. Office of Admin. Hearings* (2001) 89 Cal.App.4th 1119, 1131 [*Mason*].) The *Fukuda* court further noted the applicable procedure ' "gives the reviewing court the power and duty of exercising an independent judgment as to both facts and law, but contemplates that . . . the burden shall rest upon the petitioner to support his challenge affirmatively, competently, and convincingly. In other words, rarely, if ever, will a board determination be disturbed unless the petitioner is able to show a jurisdictional excess, a serious error of law, or an abuse of discretion on the facts." ([*Sipper v. Urban* (1943) 22 Cal.2d 138, 144] (conc. opn. of Schauer, J.).)' (*Fukuda v. City of Angels, supra*, 20 Cal.4th at p. 814.)" (*Mason, supra*, 89 Cal.App.4th at p. 1131.)

On appeal, we must determine whether the trial court's judgment is supported by substantial evidence. (*Fukuda, supra*, 20 Cal.4th at p. 824; see also *Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 72-73 ["the question before this court turns upon whether the evidence reveals substantial support, contradicted or uncontradicted, for the trial court's conclusion that the weight of the evidence does not [support the agency's findings]"].) We thus must uphold the trial court's factual findings unless they "so lack evidentiary support that they are unreasonable. We may not uphold a finding based on inherently improbable evidence or evidence that is irrelevant to the issues before us. [Citation.]" (*Breslin, supra*, 146 Cal.App.4th at p. 1078; see also *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377, 1387.)

With respect to the trial court's legal conclusions, however, we perform a de novo review. (*Breslin, supra,* 146 Cal.App.4th at pp. 1076-1077; *Pollak v. State Personnel Bd.* (2001) 88 Cal.App.4th 1394, 1404.)

II. The Trial Court's Decision.

Here, in vacating the Board's decision that due cause supported termination of Giusto's employment, the trial court independently reviewed the record and concluded that: (1) a public employee's good faith belief that his supervisors are incorrect, if expressed in an appropriate manner, does not render the public employee psychologically unfit for duty, regardless of whether or not such belief technically qualifies as a personality disorder; (2) because this court previously affirmed the trial court's decision that suspension of Giusto's salary was improper, Giusto's belief that it was improper cannot render him unfit for duty; (3) the fact that a public employee has hired attorneys and expressed an intention to defend his rights cannot constitute good cause for the termination of public employment or evidence that the public employee's fitness for duty cannot be restored; and (4) the technical classification of a given trait as a personality disorder does not transform such trait into grounds for finding an officer unfit for duty or unlikely to be restored to fitness for duty.

As set forth above, we review these legal conclusions de novo. (*Breslin, supra,* 146 Cal.App.4th at pp. 1076-1077). In doing so, we must ensure that the trial court employed the requisite "strong presumption of correctness" to the Board's decision (*Fukuda, supra,* 20 Cal.4th at p. 817), that it placed the burden on Giusto to prove the Board's findings were against the weight of the evidence (*Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1053 [*Sager*]), and that it

"look[ed] to the *entire record* for *substantial evidence* supportive of the [agency's] findings of fact" and did not limit its review " 'to isolated bits of evidence selected by the [challenger]" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874).

We start with the trial court's first conclusion – that, as a matter of law, a public employee's good faith belief that his supervisors are incorrect, if expressed in an appropriate manner, does not render the public employee psychologically unfit for duty, regardless of whether or not such belief technically qualifies as a personality disorder. Of significance, Chief Manheimer gave undisputed testimony at the hearing that she based her decision to terminate Giusto's employment on Dr. Reynolds's opinion that Giusto was not fit for duty. Dr. Reynolds, in turn, testified that his opinion that Giusto was unfit for duty was based on Giusto's serious functional limitations, including his failure to accept supervision and constructive criticism, his failure to maintain emotional self control, and his inaccurate self-appraisal. Thus, contrary to what is suggested by the trial court's first conclusion, Dr. Reynolds's opinion was not that Giusto lacked fitness because of his "good faith belief that his supervisors [we]re incorrect" in criticizing his work performance. As such, even if true, we fail to grasp how this conclusion provided a basis for overturning the Board's decision that due cause existed to terminate him.

In so concluding, we acknowledge that Doctors Berg and Missett suggested at the hearing that Giusto's termination was likely the result of his genuine disagreement with his supervisors regarding the quality of his job performance, rather than the result of his having a personality disorder. However, while the trial court could have credited Dr. Berg's and Dr. Missett's testimony and disregarded Dr. Reynolds's testimony in this regard, "[e]ven where there is a conflict among competent experts, that will not normally meet a petitioner's burden to show 'that the administrative findings were contrary to the weight of the evidence.' " (*Sager, supra*, 156 Cal.App.4th at p. 1061. See also *Mason, supra*, 89 Cal.App.4th at p. 1131 ["the trial court was required to give considerable deference to the technical expertise of the administrative officers and experts, as well as to the administrative judge's decision, which was supported by detailed findings"]; *Fukuda, supra,* 20 Cal.4th at p. 819 ["the trial court [must] first afford 'great weight' to [the agency's] credibility determinations, and then exercise independent judgment in making its own findings"].)

Further, we reject Giusto's argument that Dr. Reynolds's opinions failed to constitute substantial evidence because they were "based predominately on hearsay evidence" taken from Giusto's personnel file. Government Code 11513, subdivision (d), provides that, in formal administrative hearings, "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." Here, the "other evidence" required under Government Code 11513, subdivision (d), existed. Dr. Reynolds relied in part on hearsay evidence in Giusto's file in forming his opinions. However, Dr. Reynolds also relied on his own clinical testing and evaluation of Giusto. Moreover, much of the hearsay in Giusto's file was later confirmed at the hearing by the testimony of Chief Manheimer and Lieutenant Hammerman. As such, we conclude Dr. Reynolds's opinions were properly admitted into evidence and relied upon by the Board. As one appellate court has explained, information in a personnel file is "of a type upon which experts were entitled to place reasonable reliance." (*Board of Education v. Haas* (1978) 82 Cal.App.3d 278, 282-283.) To hold otherwise would leave experts in complex fields such as psychiatry "to form their opinions in a vacuum." (*Ibid*.) We thus proceed to the trial court's next conclusion.

The trial court's second legal conclusion is as follows: Because this court previously affirmed the trial court's decision that suspension of Giusto's salary was improper, Giusto's belief that it was improper cannot, as a matter of law, render him unfit for duty. The flaw in this conclusion is that no evidence exists in the record to prove that the people involved in the decision to terminate Giusto – Dr. Reynolds, Chief Manheimer and the Board – based their decision on Giusto's belief that it was improper to suspend his salary. Indeed, Giusto remained on paid administrative leave until *after* Dr. Reynolds determined he was unfit for duty. As such, we conclude again that the trial court's conclusion was not a sufficient basis for overturning the Board's decision. (See *Breslin, supra*, 146 Cal.App.4th at p. 1078 ["We may not uphold a finding based on inherently improbable evidence or evidence that is irrelevant to the issues before us."].)

We thus consider the trial court's third conclusion – that, as a matter of law, the fact that a public employee has hired attorneys and expressed an intention to defend his rights cannot constitute good cause for terminating the employee or for concluding his fitness for duty cannot be restored. Again, putting aside whether such statement is true, we fail to find substantial evidence in the record proving that Giusto was terminated for hiring an attorney or expressing an interest in defending his rights. In suggesting otherwise, the trial court appears to have relied upon the following discussion in Dr. Reynolds's 32-page report:

> "With time, Sgt. Giusto has become even more entrenched in maintaining and defending his view that he is right and the employer is wrong. The employer has applied personnel actions that Sgt. Giusto believes are unfair. (Following my determination that he was not fit for duty, he has not been receiving his salary.) He does not trust the employer to be fair in the future. *He has sought legal counsel and indicated that he will seek legal remedies to defend his rights against abuses from the employer.* The prognosis for a workable reconciliation and succeeding at work is very poor."

Despite this isolated statement, Chief Manheimer's undisputed testimony at the hearing was that Giusto was terminated after Dr. Reynolds concluded he was unfit for duty. As we previously explained, Dr. Reynolds's conclusion, according to his testimony and reports, was based on his finding that Giusto had serious functional limitations, including problems with emotional self-control, self-appraisal, and benefiting from supervision and corrective feedback. These limitations, in turn, were identified by Dr. Reynolds following his extensive interviewing of Giusto, his review of Giusto's personnel file (which included statements by several of his supervisors, including Chief Manheimer and Lieutenant Hammerman), and his review of Giusto's psychological test results and self-assessment questionnaires.

Further, Dr. Reynolds's ultimate conclusion that Giusto could not be restored to fitness was likewise based on his extensive interviewing, testing and document review. As Dr. Reynolds testified, the goal from the start was to find a remedy to permit Giusto to return to work. That goal failed, however, not because Giusto hired an attorney or sought to defend his rights. Rather, it failed because Dr. Reynolds concluded Giusto had no interest in changing his attitude, saw no problems with his attitude or job performance

(although several different people at different times and in different positions had observed them), and saw others as having the problems rather than himself.

Given this evidence, we conclude the trial court's third conclusion, like the others, was not a basis for overturning the Board's decision. (*Breslin, supra*, 146 Cal.App.4th at p. 1078; *Mason, supra*, 89 Cal.App.4th at p. 1131.)

Finally, we address the trial court's fourth legal conclusion – that the technical classification of a given trait as a personality disorder does not transform such trait into grounds for finding an officer unfit for duty or unlikely to be restored to fitness for duty. As before, we conclude that, even assuming such conclusion is true, it disregards the substantial evidence the Board had before it of Giusto's lack of fitness. In particular, substantial evidence proved that, in this case, Giusto had a personality disorder that rendered him unfit for duty and unlikely to be restored to fitness for duty. Dr. Reynolds diagnosed Giusto as having a "personality disorder not otherwise specified," that resulted in the serious functional limitations described above, and precluded him from benefiting from restorative measures. As Giusto's experts, Doctors Berg and Missett, acknowledged, a "personality disorder not otherwise specified" is a recognized psychiatric diagnosis, and can be a legitimate basis for finding a police officer unfit for duty. In particular, Dr. Missett acknowledged that a person having a "personality disorder not otherwise specified" could be disqualified from law enforcement work on that basis; that he had in the past found patients unfit for duty on that basis; and that personality issues such as the inability to maintain emotional control can render a person unfit for duty. Dr. Berg, in turn, acknowledged that a pattern of not accepting constructive criticism – a pattern which several witnesses, including Dr. Reynolds, Chief Manheimer and Lieutenant Hammerman, attributed to Giusto – could qualify as a personality disorder. Dr. Berg also acknowledged that, in rendering a fitness-for-duty evaluation, one must consider all mental disorders, including personality disorders. He nonetheless disagreed with Dr. Reynolds that Giusto had any such disorder.

In light of Dr. Reynolds's conclusion that Giusto had a personality disorder that in fact rendered him unfit for duty, and the acknowledgment by Giusto's experts that such a personality disorder can be a legitimate basis for finding a person unfit for duty, we conclude the trial court's fourth conclusion again misses the mark. (See *Breslin, supra*, 146 Cal.App.4th at p. 1078; *Mason, supra*, 89 Cal.App.4th at p. 1131.)

III. Conclusion.

Having now rejected each of the trial court's justifications for overturning the Board's decision, we reach the unavoidable conclusion that the trial court failed to apply the proper standards in reviewing that decision. As the California Supreme Court has made clear, the trial court's independent judgment review of an administrative decision " 'does not mean that the preliminary work performed by the administrative board in sifting the evidence and in making its findings is wasted effort. . . . In weighing the evidence the courts can and should be assisted by the findings of the board. *The findings of the board come before the court with a strong presumption of their correctness, and the burden rests on the complaining party to convince the court that the board's decision is contrary to the weight of the evidence.*' " (*Fukada, supra*, 20 Cal.4th at p. 812.) As such, " 'rarely, if ever, will a board determination be disturbed unless the petitioner is able to show a jurisdictional excess, a serious error of law, or an abuse of discretion on the facts.' [Citation.]" (*Id*. at p. 814.)

Here, it does not appear from this record that the trial court was assisted by the Board's findings, much less that it held Giusto to his burden of proving the Board's decision stemmed from jurisdictional excess, a serious error of law, or an abuse of discretion on the facts. (*Fukada,*

supra, 20 Cal.4th at pp. 812, 814.) As such, because we cannot conclude the trial court engaged in a review of the Board's findings and decision in a manner consistent with the governing principles, we conclude the judgment must be reversed. (*Id.* at pp. 824-825; see also *Mason, supra*, 89 Cal.App.4th at p. 1131 [concluding that "there was insufficient evidence supporting the trial court's determination that the ALJ committed ' "a jurisdictional excess, a serious error of law, or an abuse of discretion on the facts." ' " and that "[h]ence, the trial court abused its discretion in disturbing the ALJ's . . . determinations"]; *Sager, supra*, 156 Cal.App.4th at pp. 1060-1061 [reversing the trial court's decision where the trial court applied the wrong standard in reviewing the County's decision to terminate a veteran police officer].)

Moreover, because, as demonstrated above, abundant evidence supported the Board's decision, we conclude "remand would be an idle act." (*Sager, supra*, 156 Cal.App.4th at p. 1061 [concluding that remand would be inappropriate where abundant evidence supported the County's decision and application of the appropriate standard of review to the relevant evidence provided no basis upon which to sustain the officer's challenge to the decision]; see also *Mason, supra*, 89 Cal.App.4th at p. 1131.) Had the trial court applied the correct standard of review to the Board's decision, there would have been no basis upon which to find that Giusto had met his burden to prove the Board's findings were against the weight of the evidence. As such, we direct the trial court to deny Giusto's petition and to issue a new judgment reinstating the Board's decision.

DISPOSITION

The judgment is reversed. The trial court is directed to deny Giusto's petition for writ of mandate and to enter a new judgment affirming the Board's decision. Giusto shall pay appellants' costs on appeal.

We concur: McGuiness, P. J., Pollak, J.