

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EVERETT S. RICE, PINELLAS)
COUNTY SHERIFF,)
)
Petitioner,)
)
vs.) Case No. 00-4703
)
THOMAS BROOME,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Administrative Law Judge, Daniel Manry, conducted the administrative hearing of this case on February 21 and 22, 2001, in Largo, Florida.

APPEARANCES

For Petitioner: Keith C. Tischler, Esquire
Powers, Quaschnick, Tischler, et al.
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Tallahassee, Florida 32317-2186

For Respondent: Richard C. Millian, Esquire
Tew, Barnes and Atkinson, L.L.P.
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STATEMENT OF THE ISSUE

The issue for determination is whether Respondent engaged in conduct unbecoming a public servant in violation of

Chapter 89-404, Section 8, Laws of Florida, as amended by Chapter 90-395, Section 8, Laws of Florida (the "Civil Service Act") and Rules 3-1.1 and 3-1.3 of the Pinellas County Sheriff's Office ("Rules 3-1.1 and 3-1.3").

PRELIMINARY STATEMENT

On November 6, 2000, Petitioner notified Respondent that an Administrative Review Board (the "Board") had determined that Respondent violated the Civil Service Act and Rules 3-1.1 and 3-1.3 and imposed disciplinary action by terminating Respondent's employment. Respondent timely requested an administrative hearing.

At the hearing, Petitioner submitted 26 exhibits and the testimony of 11 witnesses for admission in evidence. Respondent testified in his own behalf, called four other witnesses, and submitted two exhibits for admission in evidence. The parties submitted one joint exhibit. The identity of the witnesses and exhibits and any attendant rulings are set forth in the Transcript of the hearing filed on March 6, 2001. The parties timely filed their Proposed Recommended Orders ("PROs") on March 16, 2000.

FINDINGS OF FACT

1. Petitioner is a constitutional officer of the State of Florida who is responsible for providing law enforcement and correctional services within Pinellas County, Florida. At all

times pertinent to this case, Respondent was employed by Petitioner.

2. On September 6, 1999, Respondent responded as backup deputy sheriff to the apartment of Mr. Cornell Cunningham and Ms. Karen Stewart. The purpose of the response was to arrest Mr. Cunningham on a civil warrant for failure to pay child support.

3. Deputy Ward Snyder was the primary deputy on the call. Deputy Snyder is also employed by Respondent.

4. It was raining outside when the two deputies arrived at Mr. Cunningham's residence. Mr. Cunningham invited both deputies inside.

5. Once inside, Deputy Snyder talked to Mr. Cunningham and advised him of the civil arrest warrant. Deputy Snyder also contacted the Sheriff's Office to confirm that the warrant was still valid.

6. While Deputy Snyder was talking to Mr. Cunningham and the Sheriff's Office, Respondent conducted a security search of the residence to confirm that no one else was present in Mr. Cunningham's apartment. By the time Respondent completed the security search, Deputy Snyder had finished his telephone call.

7. Respondent concluded his search of the residence in the kitchen. While standing in the kitchen, Respondent stood

adjacent to and viewed a countertop that separated the kitchen from the dining area. The kitchen and counter top were well lit with florescent lighting.

8. Respondent observed a marijuana seed on the countertop. Respondent picked the seed up from the countertop and held it up for Deputy Snyder to see. Respondent said, "We got a problem here." Deputy Snyder and Mr. Cunningham were standing in the dining room adjacent to the countertop that separated the kitchen from the dining room. Deputy Snyder had a clear and unobstructed view of the countertop.

9. A Nike shoebox was on the countertop inside the kitchen. The shoebox contained a hinged top that opened from one side and also contained circular holes in the sides.

10. Respondent, Deputy Snyder, and Mr. Cunningham were within two or three feet of the shoebox. The top on the shoebox was closed. There was no other access into the shoebox other than through the top of the shoebox.

11. Respondent removed his flashlight from his belt, turned it on, shined the light into the holes in the side of the shoebox, and observed the contents of the shoebox. Respondent then opened the shoebox and looked inside the shoebox.

12. Respondent observed a small bag of marijuana and a small scale inside the box. Respondent then told Deputy Snyder

that there was "a problem." Respondent then showed Deputy Snyder the contents of the box.

13. Mr. Cunningham denied ownership of the shoebox as well as any knowledge of its contents. The deputies arrested Mr. Cunningham based on the civil warrant for failure to pay child support. Mr. Cunningham protested his arrest and asserted that the matter had been taken care of. However, he did not physically resist, did not threaten either deputy, and did not display any intent to flee.

14. Neither deputy charged or arrested Mr. Cunningham at the time with any offense related to the marijuana or the scale. Deputy Snyder transported Mr. Cunningham to the Pinellas County Jail on the original civil warrant.

15. While Deputy Snyder was transporting Mr. Cunningham to jail, Respondent contacted Deputy Snyder by radio. Respondent told Deputy Snyder that Respondent was going to charge Ms. Stewart with criminal offenses related to the possession of marijuana and the scale. Mr. Cunningham overheard the radio conversation between the two deputies and stated that he would claim ownership of the marijuana and scale. Upon hearing this, Deputy Snyder advised Mr. Cunningham of his rights. Mr. Cunningham then denied ownership of the contraband.

16. While Deputy Snyder transported Mr. Cunningham to jail, Respondent remained at Mr. Cunningham's residence and awaited the arrival of Ms. Stewart. With the consent of Ms. Stewart, Respondent conducted a further search of the residence. The further search revealed additional marijuana in a drawer located in the kitchen where the shoebox was located.

17. Respondent combined the marijuana found in the drawer with the seed on the countertop and the marijuana previously found in the shoebox. Respondent then seized the contraband and proceeded to the jail where he charged Mr. Cunningham with felony possession of marijuana and misdemeanor possession of paraphernalia.

18. Respondent prepared an arrest report stating that Respondent had observed marijuana "scattered" on top of the kitchen counter. Respondent also stated in the report that, "Laying next to the scattered marijuana in a partially opened Nike shoebox, was a clear plastic baggie filled with marijuana and also laying next to that baggie was a silver hand-held weight scale." Respondent's supervisor, Sergeant Robert Helmick, approved the report on the same day that Respondent prepared the report.

19. On the following day, September 7, 1999, Deputy Snyder prepared his supplemental report of the events occurring at the Cunningham residence. In his report, Deputy Snyder stated that

Respondent "pointed out a seed on the kitchen countertop. There was a Nike shoebox also on the countertop. Deputy Broome used his flashlight to illuminate the inside of the box by shining the light through a hole in the box. Deputy Broome then opened the box and displayed a bag of what appeared to be marijuana and a small balance scale." Deputy Snyder's report also recited the events occurring in his vehicle as he transported Mr. Cunningham to jail.

20. Sergeant Helmick, who was off duty that day, did not review or approve Deputy Snyder's report. Rather, Corporal Larry Weiland approved Deputy Snyder's report. Sergeant Helmick did not see Deputy Snyder's report until much later.

21. Three days later, on September 10, 1999, Respondent participated in a pre-filing investigation conducted at the office of the State Attorney for Pinellas County. Assistant State Attorney Patricia Cope conducted the investigation.

22. As part of the investigation, Ms. Cope took the sworn testimony of Respondent. In his testimony to Ms. Cope, Respondent repeated the same version of events found in his report.

23. Respondent testified to Ms. Cope that he had observed marijuana scattered on the countertop and that the top of the shoebox on the countertop was ajar. Respondent further testified that he was able to see the marijuana and the scale

inside the shoebox through the space created by the partially open top of the shoebox.

24. Ms. Cope specifically asked Respondent whether the shoebox was open or closed in order to confirm that Respondent's search was within the scope of the plain view doctrine. Respondent testified that the shoebox was open. Ms. Cope did not speak with Deputy Snyder or review his report. As a result of the investigation and the information provided by Respondent, Mr. Cunningham was charged with felony possession of marijuana and misdemeanor possession of paraphernalia.

25. Sometime after Ms. Cope's conversation with Respondent, Deputy Snyder spoke with Sergeant Helmick concerning the discrepancies between the two reports filed by Deputy Snyder and Respondent. Sergeant Helmick advised Deputy Snyder to allow the discrepancies to be worked out by the state attorney's office and to allow the criminal process to run its course. Sergeant Helmick did not report the discrepancies to the state attorney's office, to his supervisors, or to anyone else. At the time, Sergeant Helmick did not initiate any complaint or investigation against either Respondent or Deputy Snyder.

26. In June 2000, depositions were set in the criminal prosecution of Mr. Cunningham. Ms. Cope contacted Deputy Snyder to inquire about the possibility of having the shoebox tested for fingerprints. At that time, Deputy Snyder directed

Ms. Cope's attention to the discrepancies in the respective reports prepared by Deputy Snyder and Respondent.

27. Ms. Cope reviewed the reports and the discrepancies between the two reports. Ms. Cope concluded that the discrepancies would create a problem in the criminal prosecution of Mr. Cunningham.

28. The discrepancies between the accounts by Respondent and Deputy Snyder created the possibility that Respondent had conducted an illegal search of the shoebox that would render the evidence seized as a part of that search inadmissible. The plain view doctrine applicable to the law of search and seizure would allow the search of the shoebox if the top had been ajar and the contents of the shoebox could be observed. However, the search would not be lawful if the shoebox top was closed and observation of the contents could have only been accomplished by shining a light through the holes in the box.

29. The differing statements in the reports of the two deputies placed the credibility of Respondent in question. No independent evidence was available, including the testimony of Mr. Cunningham, from which it could be ascertained which deputy was being truthful. The State Attorney's Office deemed it unfair to the defendant, the court, and the witnesses to proceed on a case where the prosecution could not be certain if the evidence was properly seized.

30. Ms. Cope referred the matter to Mr. Robert Lewis, her supervisor. Mr. Lewis reviewed the reports of the two deputies and agreed with Ms. Cope's assessment that the discrepancies precluded any further criminal prosecution of Mr. Cunningham. Ms. Cope cancelled the depositions set in the Cunningham case on the grounds that Respondent had been accused of lying and that the two investigating police officers recalled two inconsistent views of the events that occurred at Mr. Cunningham's residence. Mr. Lewis then instructed Ms. Cope to enter a nolle prosequi of the charges against Mr. Cunningham.

31. After the State Attorney's Office filed the nolle prosequi, the State Attorney's Office referred the matter to the Sheriff's Office. The matter was brought to the attention of Major Samuel F. Lynn, the commander of the road patrol division. Major Lynn prepared an administrative inquiry form that disclosed the allegations communicated to him by the State Attorney's Office. Thereafter, the Administrative Investigation Division of the Sheriff's Office ("AID") initiated an investigation.

32. During the investigation, Respondent and Deputy Snyder each provided a sworn statement to the investigators. The investigators also obtained a sworn statement from Ms. Cope and a letter from Mr. Lewis. The investigators were unable to locate Mr. Cunningham and therefore did not interview him or

ascertain his account of the matters at issue in this proceeding.

33. During the investigation, Respondent had the opportunity to offer additional information or comments. Respondent's attorney placed a statement on the record at the conclusion of Respondent's sworn statement. Respondent did not offer any witnesses on his behalf or provide the investigators with any information pertaining to the location of Mr. Cunningham.

34. At the conclusion of the investigation, the Board conducted a hearing concerning the charges against Respondent. The charges were:

- a. Violation of Pinellas County Sheriff's Office Civil Service Act, Laws of Florida, 89-404, as amended by Laws of Florida, 90-395, Section 6, subsection 4: violations of the provisions of law or the rules, regulations, and operating procedures of the office of the Sheriff;
- b. Violation of Rule and Regulation of the Pinellas County Sheriff's Office, 3-1.1 (Level Five violation), 006, relating to untruthfulness by being untruthful in relation to the seizure of narcotics at the Cunningham residence.
- c. Violation of Rule and Regulation of the Pinellas County Sheriff's Office, 3-1.3 (Level Three violation), 060, relating to standards of conduct by bringing discredit upon the Pinellas County Sheriff's Office by being untruthful and by inaccurately documenting facts and circumstances submitted to the State Attorney's Office.

35. Respondent was present at the hearing, had an opportunity to offer a statement, responded to questions, and presented additional evidence. At the conclusion of the hearing, the Board determined that Respondent violated the Civil Service Act and Rules 3-1.1 and 3-1.3.

36. The violations resulted in a cumulative point total of 65 points under the progressive discipline policy of the Sheriff's office. The 65 points were added to 23 discipline points that the Sheriff's Office had previously assessed against Respondent for a total of 88 progressive discipline points. When a deputy has 88 progressive discipline points, Petitioner's progressive discipline policy authorizes discipline that ranges from a ten-day suspension to termination. Petitioner terminated Respondent's employment.

37. Respondent violated relevant portions of the Civil Service Act and Rule 3-1.1 by being untruthful in relation to the seizure of narcotics at the Cunningham residence. Respondent conducted an improper search at the residence of Mr. Cunningham. Respondent then charged Mr. Cunningham with a felony and misdemeanor offense related to the fruits of that search. Respondent then prepared a false report relating the events occurring at Mr. Cunningham's residence and then provided false testimony under oath to the State Attorney's Office.

38. Respondent violated relevant portions of the Civil Service Act Rule 3-1.3 and by bringing discredit upon the Sheriff's Office. Respondent was untruthful by inaccurately documenting facts and circumstances submitted to the State Attorney's Office. Respondent's conduct discredited the Sheriff's Office by encouraging mistrust of law enforcement officers and by creating the appearance that persons in law enforcement engage in improper tactics to effectuate an arrest. Respondent's untruthfulness resulted in the improper arrest and prosecution of an individual.

39. Truthfulness on the part of a deputy sheriff is an important part of the job. It is necessary in order to maintain discipline and to preserve the integrity of the agency and the functions performed. Respondent's untruthfulness violated those essential elements and exposed the Sheriff's Office to the potential for civil liability for an improper arrest.

40. Although much of Respondent's testimony was credible and persuasive, there were significant parts of Respondent's testimony that were neither credible nor persuasive. The flawed part of Respondent's testimony was inconsistent with prior statements by Respondent and with the testimony of Deputy Snyder.

41. For the most part, no one inconsistency in Respondent's testimony, standing alone, would be sufficient to

adversely affect Respondent's credibility. However, the cumulative effect of all of the inconsistencies deprives Respondent's testimony of credibility and persuasiveness concerning material issues in this case.

42. In an earlier sworn statement to AID, Respondent testified that he found marijuana on the countertop in Mr. Cunningham's apartment, showed the seed to Deputy Snyder, and then looked inside the shoebox. At the final hearing, however, Respondent testified that he found the marijuana seed on the countertop, saw the marijuana in the shoebox, and then walked over to Deputy Snyder to show him the marijuana seed. Respondent further testified at the final hearing that he could not recall whether he picked up the seed first or saw the marijuana in the shoebox first.

43. Respondent made inconsistent statements regarding the location of Deputy Snyder and Mr. Cunningham at the time that Respondent found the seed and searched the shoebox. At the final hearing, Respondent insisted that Deputy Snyder and Mr. Cunningham never got within ten to fourteen feet of the shoebox. In an earlier sworn statement to AID, however, Respondent indicated that Deputy Snyder and Mr. Cunningham were two to three feet from the shoebox.

44. Respondent made inconsistent statements regarding the position of the top of the shoebox at the time that Respondent

found the seed and searched the shoebox. Respondent testified at final hearing that the shoebox was open between 1.5 and 2.0 inches. In a sworn statement to AID, however, Respondent testified that the top of the shoebox was open less than one inch.

45. Respondent made inconsistent statements regarding the manner in which he shined light from his flashlight into the shoebox. At final hearing, Respondent testified that he shined light into the holes on the side of the shoebox. In an earlier deposition, however, Respondent testified that he shined the light in the top of the shoebox where the top was open and could not remember if the shoebox had holes.

46. Respondent made inconsistent statements regarding the location of the marijuana on the countertop. At the final hearing, Respondent indicated that the marijuana was spread out into the center of the dark countertop where there was a white paint spot, as shown in one of the photographs in evidence. However, the drawing provided during the course of Respondent's earlier deposition did not indicate that marijuana was spread into the center of the dark countertop where the white paint spot was located.

47. The testimony of Respondent differed from that of Deputy Snyder regarding the location of the shoebox. Respondent placed the shoebox close to the wall where it may have been more

difficult for Deputy Snyder to view the box. Deputy Snyder placed the shoebox in the middle of the countertop where it was more easily seen.

48. The testimony of Respondent differed from that of Deputy Snyder regarding the vantage points of Respondent and Deputy Snyder. Respondent placed Deputy Snyder ten to fourteen feet from the shoebox and stated that Deputy Snyder could not see the shoebox or the marijuana from that vantage point. Deputy Snyder placed himself within two to three feet of the shoebox and stated that he had an unobstructed and clear view of the countertop and the shoebox. Deputy Snyder's testimony was consistent with an earlier sworn statement to AID by Respondent indicating that Deputy Snyder and Mr. Cunningham were two to three feet from the shoebox. See Finding of Fact 43.

49. The testimony of Respondent differed from that of Deputy Snyder regarding the amount of marijuana on the countertop. Respondent stated there was a considerable amount of marijuana on the countertop. Deputy Snyder stated there was no marijuana on the countertop except the seed displayed to him by Respondent.

50. The testimony of Respondent differed from that of Deputy Snyder regarding the actions taken by Respondent in looking into the shoebox. Respondent testified that he identified the debris, saw the marijuana in the shoebox, showed

the seed to Snyder, and then looked into the shoebox. Deputy Snyder testified that Respondent showed him a seed, shined his light into a hole in the shoebox, and then opened the shoebox.

51. The testimony of Respondent differed from that of Deputy Snyder regarding the actions of Respondent after discovering the marijuana and the shoebox. Respondent claimed he walked from the kitchen into the living and dining area to display the seed to Deputy Snyder. Deputy Snyder testified that Respondent remained in the kitchen and displayed the seed across the countertop.

52. The testimony of Respondent differed from that of Deputy Snyder regarding the issue of whether Respondent had his flashlight out before he looked into the shoebox or removed it in order to look inside the shoebox. Respondent testified he had the flashlight out the entire time he was in the residence. Deputy Snyder stated that Respondent removed the flashlight from his belt in order to look into the shoebox.

53. The testimony of Respondent differed from that of Deputy Snyder regarding the issue of whether Deputy Snyder was on the telephone when Respondent observed the marijuana and shoebox and pointed these items out to Deputy Snyder. Respondent stated that Deputy Snyder was on the telephone when these events occurred. Deputy Snyder testified that he had

completed his call by the time Respondent arrived in the kitchen.

54. The testimony of Respondent differed from that of Deputy Snyder regarding the ability of Deputy Snyder and Mr. Cunningham to be in the dining room and close to the countertop. Respondent claimed that the dining room table and chairs did not allow sufficient room for Deputy Snyder and Mr. Cunningham to be within two or three feet of the countertop in the dining room. Deputy Snyder and other testimony by Respondent concerning the dimensions of the dining room and table and chairs indicated there was sufficient room for Deputy Snyder and Mr. Cunningham to stand in the dining room within two or three feet of the shoebox.

55. The testimony of Respondent differed from that of Deputy Snyder regarding Respondent's testimony that he searched the shoebox, in part, because he was concerned over the existence of booby traps in the shoebox. Deputy Snyder saw no such concern indicated in Respondent's actions.

56. Respondent's testimony that he was concerned the shoebox contained booby traps is neither credible nor persuasive. Respondent testified that the room was sufficiently well lit to allow him to clearly see the marijuana inside the partially open shoebox without shining his flashlight into the shoebox before opening it. Respondent attempted to explain why

he used his flashlight in a well-lit kitchen by expressing concern that the shoebox may have contained booby traps.

57. Regarding the discrepancies between the testimony of Respondent and Deputy Snyder, there is no apparent motive for Deputy Snyder to fabricate his version of the events or to attempt to create any form of disciplinary problem for Respondent. Respondent had no prior experience with Deputy Snyder that would create a reason for Deputy Snyder to be untruthful.

58. Respondent suggested that Deputy Snyder fabricated his report and testimony in exchange for a transfer to a position as a detective. That testimony is neither credible nor persuasive. Deputy Snyder's transfer occurred months before any concerns arose pertaining to Respondent. There is no evidence that Deputy Snyder played any role in the initiation of the investigation. Deputy Snyder's initial disclosure to his supervisor did not result in any investigation or action against Respondent. The transfer to the detective unit was a lateral transfer without any increase in rank, pay, or benefits.

59. The evaluation system in effect at the Sheriff's Office provided a specific component for self-initiated arrests. The arrest of Mr. Cunningham in this case falls into the category of self-initiated arrests and could have resulted in a

positive evaluation component for Respondent, who already had 23 disciplinary points against him.

60. Respondent has a prior disciplinary history. In June 1999, Respondent received a one-day suspension and five disciplinary points for violating rules that are not relevant to this proceeding. In January 2000, Respondent received a three-day suspension and 15 disciplinary points for violating rules that are not relevant to this proceeding. The two violations resulted in 20 progressive points with a range of discipline from reprimand to a three-day suspension.

61. In August 2000, Respondent received a seven-day suspension for violating rules that are not relevant to this proceeding. The violations consisted of three level three violations resulting in the assignment of 40 disciplinary points. The 40 points were combined with ten "modified points" from the prior violations and resulted in a total of 50 progressive points with a range of discipline from a five-day suspension to termination.

CONCLUSIONS OF LAW

62. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this action. The parties received adequate notice of the administrative hearing. Sections 120.57(1) and 120.68(8),

Florida Statutes (2000). (All section references are to Florida Statutes (2000) unless otherwise stated.)

63. Petitioner has the burden of proof in this proceeding. Petitioner must show by a preponderance of the evidence that Respondent committed the acts alleged in the charging document and the reasonableness of the proposed penalty. Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

64. The Civil Service Act authorizes the Sheriff's Office to suspend, dismiss, or demote Respondent for offenses enumerated in the Act. In relevant part, the Act provides:

(4) Cause for suspension, dismissal or demotion shall include, but shall not be limited to: negligence, inefficiency, or inadequate job performance; inability to perform the assigned duties, incompetence, dishonesty, insubordination, violation of the provisions of law or the rules, regulations, and operating procedures of the Office of the Sheriff, conduct unbecoming to a public servant, misconduct, or proof and/or admission use of illegal drugs. . . .

(5) The listing of causes for suspension, demotion, or dismissal in this section is not intended to be exclusive. The Sheriff, by department rule, may add to this list of causes for suspension, dismissal or demotion.

65. The Civil Service Act authorizes the Sheriff to adopt rules necessary to implement and administer the Act. Petitioner

has adopted rules and policies, including Rules 3-1.1 and 3-1.3, which establish the standard of conduct to be followed by all employees of the Pinellas County Sheriff's Office.

66. Respondent violated relevant portions of the Civil Service Act and Rules 3-1.1 and 3-1.3 by engaging in conduct unbecoming a public servant and by being untruthful. The nature and scope of those violations have been previously discussed in the Findings of Fact and need not be repeated.

67. The point totals assigned by Petitioner are appropriate under Petitioner's progressive discipline policy. The discipline imposed is appropriate based upon the facts and circumstances of this case and the progressive point totals assessed against Respondent for prior violations.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Board enter a Final Order finding Respondent guilty of conduct unbecoming a public servant and terminating Respondent's employment.

DONE AND ENTERED this 1st day of May, 2001, in Tallahassee,
Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of May, 2001.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within
15 days from the date of this Recommended Order. Any exceptions
to this Recommended Order should be filed with the agency that
will issue the Final Order in this case.