

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EVERETT S. RICE, PINELLAS)
COUNTY SHERIFF,)
)
Petitioner,)
)
vs.) Case No. 03-0627
)
LENDEL BRIGHT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to stipulation of the parties during a telephonic motion hearing on June 10, 2003, this matter was submitted to the Division of Administrative Hearings and its duly-designated Administrative Law Judge, Carolyn S. Holifield, on undisputed facts, without further evidentiary hearing.

APPEARANCES

For Petitioner: Keith C. Tischler, Esquire
Allen, Norton and Blue, P.A.
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For Respondent: Kenneth J. Afienko, Esquire
Kenneth J. Afienko, P.A.
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STATEMENT OF THE ISSUES

Whether Respondent was terminated as a deputy sheriff for offenses for which he had been previously disciplined and, if

so, whether the termination is barred by principle of "double jeopardy."

PRELIMINARY STATEMENT

By interoffice memorandum dated February 10, 2003, Respondent, Lendel Bright, was notified by Petitioner, Everett S. Rice, Pinellas County Sheriff, that the Administrative Review Board determined that Respondent had violated the Pinellas County Sheriff's Office Civil Service Act (Civil Service Act) and rules and regulations of the Pinellas County Sheriff's Office. Specifically, Respondent was charged with violating Pinellas County Sheriff's Office rules relating to truthfulness, falsification of Sheriff's Office records, bringing discredit to the Sheriff's Office, and the use of agency equipment for personal purposes. Based on these charges, Respondent was terminated as an employee of the Pinellas County Sheriff's Office.

Respondent timely challenged the charges and the penalty imposed and requested a formal hearing. On or about February 25, 2003, the matter was forwarded to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct the hearing. By notice issued May 5, 2003, the final hearing was set for June 10, 2003.

On May 30, 2003, prior to the final hearing, Respondent filed a Motion for Final Summary Judgment and Waiver of

Requirements of Pre-Trial Order and Formal Hearing and a Memorandum of Law in Support of Motion for Final Summary Judgment. On June 3, 2003, Petitioner filed a response to Respondent's motion for summary final order and a cross-motion for summary final order (Motions). Subsection 120.57(1)(h), Florida Statutes, authorizes the issuance of summary final orders in cases in which the Administrative Law Judge has final order authority. Because this is not such a case, the Motions are deemed to be and considered a motion for summary recommended order and a cross-motion for summary recommended order. On June 10, 2003, a telephone hearing on the Motions was held. During that proceeding, the parties made legal arguments and stipulated that there were no genuine issues of material fact regarding the charges against Respondent. The only issues are those set forth above.

All citations are to Florida Statutes (2002) unless otherwise indicated.

FINDINGS OF FACT

1. At all times pertinent to this case, Respondent, Lendel Bright (Respondent), was employed by Petitioner, Everett S. Rice, Pinellas County Sheriff (Petitioner or the Sheriff), as a deputy sheriff or a sergeant.

2. In May 2000, Petitioner received a complaint from Mark Parker, the husband of Belinda Parker, that his wife was having

an extra-marital relationship with Respondent. At the time this complaint was filed, Respondent was a sergeant with the Pinellas County Sheriff's Office (Sheriff's Office), assigned to the Child Protection Investigations Division, and Belinda Parker was a civilian employee in the same division and was supervised by Respondent.

3. As a result of the May 2000 complaint, Respondent's supervisor, Lt. Dennis Fowler, forwarded an Administrative Inquiry Form to the Administrative Investigations Division (AID). The inquiry form was subsequently returned to the command level for investigation and documentation.

4. When questioned by Lt. Fowler and Capt. Rodney Steckel, Respondent denied having an extra-marital relationship with Ms. Parker. The allegation was also denied by Ms. Parker.

5. The May 2000 complaint filed by Mr. Parker was later determined to be unfounded based upon several factors. First, during the investigation, both Respondent and Ms. Parker made statements denying the relationship. Second, Mr. Parker retracted his May 2000 complaint and requested that the matter be abandoned.

6. On or about January 31, 2001, Mr. Parker again alleged that Respondent was having an extra-marital relationship with his wife. In this instance, the complaint was made to

Capt. Steckel, who on February 1, 2001, made a second complaint to the Sheriff's Office.

7. As a result of this second complaint, an investigation was initiated and conducted by the AID. This matter was assigned Administrative Inquiry No. AI-01-009 (AI-01-009).

8. During the course of the investigation of AI-01-009, Respondent, while under oath, denied having an extra-marital relationship with Ms. Parker. Respondent also denied utilizing his agency cell phone for personal phone calls to Ms. Parker.

9. At the conclusion of the investigation of AI-01-009, the matter was referred to the Administrative Review Board (ARB). Thereafter, the ARB convened to conduct a proceeding.

10. At the ARB hearing, Respondent, while under oath, denied having an extra-marital relationship with Ms. Parker. Respondent also denied utilizing his agency cell phone for personal phone calls to Ms. Parker.

11. In making these denials of the existence of an extra-marital relationship with Ms. Parker to the AID investigators and to the ARB, Respondent was untruthful.

12. At the conclusion of the ARB hearing, the ARB recommended to Petitioner that Respondent be found guilty of violating Sheriff's Office rules and regulations related to untruthfulness and performance of duty. The ARB recommended

that Respondent receive a ten-day suspension for these violations.

13. On June 19, 2001, after the ARB hearing, at the request of Respondent's attorney, Petitioner agreed to modify the ARB recommendation. As part of this agreement, Petitioner did not accept the ARB's recommended finding of untruthfulness against Respondent, but instead found that Respondent was guilty of a single Level Five violation related to duties and responsibilities. For Respondent's part, he agreed to accept a demotion from the rank of sergeant to deputy sheriff and to waive his right to seek review of the discipline under the Civil Service Act.

14. This agreement was reached to avoid Respondent's jeopardizing his law enforcement certificate with the State of Florida, Department of Law Enforcement, by having a finding of untruthfulness.

15. Respondent voluntarily entered into the agreement discussed in paragraphs 13 and 14, and he received the benefit of the agreement. Pursuant to the agreement, there was no finding of guilt against Respondent as it relates to untruthfulness, and Respondent was demoted from sergeant to deputy sheriff, effective July 15, 2001, and continued to work for the Sheriff's Office. With this resolution, AI-01-009 was closed on or about June 19, 2001.

16. The Notice of Sustained Complaint, dated June 19, 2001, to Respondent from the Sheriff, memorialized the agreement between the Sheriff and Respondent that there would be no finding as to untruthfulness and that Respondent would be demoted. This Notice of Sustained Complaint concerned AI-01-009 and was based on incidents which occurred between "January 2000 and February 2001."

17. Between December 2001 and December 2002, after entering into the agreement discussed in paragraphs 13, 14, and 15, Respondent wrote a series of memoranda and correspondence to the Sheriff and others within the Sheriff's Office administration. In those written communications, Respondent continued to deny the existence of an extra-marital relationship between himself and Ms. Parker. In those communications, Respondent also alleged that the investigation in AI-01-009 was conducted inappropriately, that he was not treated fairly and equally, and that he had not requested the demotion that he agreed to in June 2001.

18. In making the denials described in paragraph 17 regarding the extra-marital relationship between himself and Ms. Parker and the manner in which AI-01-009 was conducted and resolved, Respondent was untruthful.

19. In February 2002, the AID again received a complaint from Mr. Parker that his wife was continuing to have an extra-marital relationship with Respondent.

20. As a result of the complaint and additional information provided by Mr. Parker, the AID again initiated an investigation into the allegations of the extra-marital relationship.

21. In July 2002, Ms. Parker provided a sworn statement admitting the existence of an extra-marital relationship between herself and Respondent. Ms. Parker also provided additional information regarding the circumstances surrounding that extra-marital relationship.

22. In December 2002, the Sheriff submitted an interoffice memorandum to the AID notifying Respondent that he was the subject of an administrative investigation regarding violations related to truthfulness and conduct unbecoming a member of the Sheriff's Office. Petitioner stated in the interoffice memorandum that as a result of Respondent's correspondence, in which he repeatedly denied having an inappropriate relationship with Ms. Parker and claimed that the prior investigation was unfair, Petitioner "feels obligated to take the extraordinary measure to direct the Administrative Investigations Division to 're-examine this particular matter' and present the findings to the ARB."

23. As a result of the December 2002 interoffice memorandum, the AID conducted an investigation into the actions of Respondent as they related to his conduct, the use of agency equipment, and his testimony and statements previously given to supervisors or in previous investigations. This matter was assigned Administrative Inquiry No. AI-02-082 (AI-02-082).

24. During the investigation of AI-02-082 that followed, the AID confirmed the statement of Ms. Parker regarding the existence of an extra-marital relationship between her and Respondent.

25. As part of the investigation of AI-02-082, on January 22, 2003, Respondent gave a sworn statement, in which he admitted to having an extra-marital relationship with Ms. Parker. Respondent also admitted that he had been untruthful in his previous statements regarding the extra-marital relationship.

26. During the investigation related to AI-02-082, in his January 22, 2003, sworn statement, Respondent admitted to utilizing Sheriff's Office property, a cell phone, for personal purposes without providing reimbursement to the Sheriff's Office for the personal usage. Many of these phone calls were to Ms. Parker and took place after the closure of AI-01-009.

27. During the investigation related to AI-02-082, in a sworn statement, Respondent admitted to authoring official

Sheriff's Office documents, interoffice memoranda, and correspondence, that contained falsehoods. In one memo, written in or about December 2001, to the chief deputy in the Sheriff's Office, Respondent stated, "I never had or considered having an affair with Mrs. Parker, there was only a personal friendship" and that he "was truthful at all times." These memoranda were official Sheriff's Office communications that were written and disseminated by Respondent after the closure of AI-01-009.

28. Notwithstanding Respondent's repeated and continuous denials in official Sheriff's Office documents, he continued to have an extra-marital relationship with Ms. Parker after AI-01-009 was settled and closed. By Respondent's own admission, the extra-marital relationship with Ms. Parker began in January 2000 and did not end until February or March 2002.

29. After the investigation of AI-02-082 was concluded, an ARB hearing was convened on or about February 10, 2003. During this proceeding, Respondent again admitted to having an extra-marital relationship with Ms. Parker and to his having been untruthful in his previous statements regarding the extra-marital relationship. Respondent also admitted that he utilized the Sheriff's Office property, a cell phone, for personal purposes without providing reimbursement to the Sheriff's Office for the personal usage. Moreover, Respondent admitted that he

wrote and distributed interoffice memoranda and correspondence, referenced above, that contained falsehoods.

30. Based on its review of the allegations and the evidence related to AI-02-082, the ARB determined that Respondent was guilty of violating the Civil Service Act and the rules, regulations, and operating procedures of the Sheriff's Office.

31. A February 10, 2003, interoffice memorandum sets forth the violations with which Respondent is charged and the conduct, which is the basis of those violations. The violations and conduct are summarized as follows:

a. Pinellas County Sheriff's Office Rule 3-1.1 (Level Five violation), 5.6 related to Truthfulness; to wit: Members are required to be truthful at all times when acting in an official capacity, whether under oath or not, such as when offering testimony in legal proceedings and administrative investigations.

Synopsis: Respondent was untruthful, repeatedly, to both supervision and the Administrative Investigations Division (while under oath) concerning his involvement in a paramour relationship.

b. Pinellas County Sheriff's Office Rule 3-1.1 (Level Five Violation), 5.14 related to Conduct Unbecoming Members of the Agency, to wit: Knowingly making false entry or cause false entry to be made in any official record of the Sheriff's Office.

Synopsis: Respondent knowingly made false entry on official agency records by repeatedly submitting inter-office

memorandums, which he now admits contained both falsehoods and mistruths.

c. Pinellas County Sheriff's Office Rule 3-1.3 (Level Three Violation), 3.1 related to Standard of Conduct, to wit: Members shall conduct their private and professional lives in such a manner as to not bring discredit to the Sheriff's Office.

Synopsis: Due to Respondent's paramour relationship and his attempt to perpetrate falsehood and mistruths concerning the administrative investigative process, he brought discredit to the Sheriff's Office.

d. Pinellas County Sheriff's Office Rule 3-1.1 (Level Three Violation), 3.1 related to Unauthorized Use of Agency Equipment, to wit: Members will not appropriate equipment owned by the agency for their own use.

Synopsis: Respondent repeatedly used the agency-issued cellular telephone for personal use and failed to reimburse the agency for those calls.

32. The violations resulted in a cumulative point total of 75, which allows for discipline from a ten-day suspension to termination.

33. The ARB recommended to the Sheriff's Office that Respondent be terminated. The Sheriff reviewed the recommendation of the ARB and agreed with the recommendation. In the Notification of Sustained Complaint dated February 10, 2003, the Sheriff notified Respondent that he was being terminated from employment with the Sheriff's Office. The notification indicated that the complaint which was the basis of

the sustained complaint involved incidents that occurred on "June 2000 through [p]resent."

34. The violations in AI-01-009 and the underlying conduct, which was the basis for those violations, were resolved pursuant to the negotiated settlement agreement between the Sheriff and Respondent. Therefore, that conduct is not actionable in a subsequent disciplinary proceeding. However, the Sheriff is not precluded from imposing discipline for conduct which occurred after AI-01-009 was closed.

CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this action pursuant to Sections 120.57 and 120.68(8), Florida Statutes, and Chapter 89-404, Section 8, Laws of Florida, as amended by Chapter 90-395, Section 8, Laws of Florida.

36. Chapter 89-404, Section 6, Laws of Florida, as amended by Chapter 90-395, Laws of Florida, authorizes Petitioner to suspend, dismiss, or demote classified employees for offenses enumerated in that provision. That section provides, in relevant part, that disciplinary action may be imposed for inefficiency or inadequate job performance; dishonesty; violation of the provision of law or the rules, regulations, and operating procedures of the Sheriff's Office; and conduct unbecoming to a public servant.

37. Pursuant to Chapter 89-404, Laws of Florida, as amended by Chapter 90-395, Laws of Florida, deputy sheriffs are civil service or classified employees and are subject to the provisions thereof.

38. The charging document filed against Respondent in this proceeding alleges that Respondent violated rules and regulations of the Sheriff's Office related to truthfulness, conduct unbecoming members of the agency, standard of conduct, and unauthorized use of agency equipment.

39. It is well established that the burden is on the party asserting the affirmative of an issue in an administrative proceeding. *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). However, that burden is inapplicable in this case because Respondent does not dispute the material factual allegations.

40. Respondent contends that Sheriff's decision to terminate Respondent's employment is barred by the principle of double jeopardy enunciated in Article I, Section 9, Florida Constitution. That section provides, "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be

compelled in any criminal matter to be a witness against oneself."

41. Respondent argues that the underlying allegations in AI-02-082, which are the basis of his termination, are based on the "exact same offense" that he was found guilty of in AI-01-009.

42. Respondent's contention that his proposed termination from employment by Petitioner is prohibited by the double jeopardy is rejected.

43. It is a well-established principle that double jeopardy does not apply to administrative proceedings. See *Department of Professional Regulation v. Burnstein*, Case No. 87-4793 (DOAH February 25, 1988) (Final Order entered on July 11, 1988), in which the hearing officer declined to apply double jeopardy to an administrative proceeding, stating "[w]hile 'penal in nature,' administrative proceedings are not criminal actions in which a principle such as double jeopardy would attach."

44. Although double jeopardy does not apply in administrative proceedings, clearly to discipline Respondent for the same conduct, which was the underlying basis for previous disciplinary action, would violate all notions of fundamental fairness and due process. See *School Board of Pinellas County v. James E. Wilkins, Jr.*, Case No. 85-2267 (DOAH

December 2, 1985) (Final Order entered March 12, 1986), in which hearing officer stated that, "while double jeopardy is not specifically applicable to administrative proceedings, the principles on which Article V of the United States Constitution and [Article I] Section 9 of the Florida Constitution are based clearly preclude one receiving an administrative punishment twice for the same offense." Applying that principle to this case, any conduct which was the underlying basis of AI-01-009, cannot be the basis for the disciplinary action which is at issue in this proceeding.

45. Conduct in which Respondent engaged after that time and for which Respondent had not previously been disciplined may be the basis for disciplinary action being sought in this case. However, conduct which occurred prior to June 19, 2001, and for which Respondent has been disciplined may not be used to support the alleged violations in this case.

46. The complaint in this case alleges that Respondent violated four Sheriff's Office rules.

47. First, it is alleged that Respondent violated Sheriff's Office Rule 3-1.1, 5.6 (a Level Five violation) related to truthfulness. That rule requires civil service members be truthful at all times when acting in an official capacity, whether under oath or not, such as when offering testimony in legal proceedings and administrative

investigations. The Sheriff alleges that Respondent violated this provision by being untruthful "to both supervision and the Administrative Investigations Division (while under oath) concerning his paramour relationship."

48. The alleged violation of Sheriff's Office Rule 3-1.1, 5.6 is not sustained. It is undisputed that Respondent made untruthful statements to his supervisors and to the AID concerning his relationship with Ms. Parker while he was under oath. However, this conduct was the underlying basis for violations in AI-01-009, a matter that was resolved pursuant to a negotiated settlement and for which Respondent was disciplined.

49. Second, it is alleged that Respondent violated Sheriff's Office Rule 3-1.1, 5.14 (a Level Five violation) by knowingly making false entries in official records of the Sheriff's Office. Such actions are deemed to be "conduct unbecoming members of the agency." It is alleged that Respondent knowingly made false entries on official agency records "by repeatedly submitting inter-office memorandums, which he now admits contained both falsehoods and mistruths."

50. The violation of Rule 3-1.1, 5.14, is sustained. It is undisputed that in several memoranda deemed to be official records and all written after June 19, 2001, Petitioner repeatedly stated that he had been treated unfairly in the

previous proceeding and that he had not agreed to the negotiated settlement in AI-01-009. It is also undisputed that in or about December 2001, Respondent stated in one of these memoranda that he "never had or considered having an affair with Mrs. Parker," although at that time he was, in fact, having an affair with her. These statements were false and known by Respondent to be false at the time he made them. Moreover, this conduct was not conduct for which Respondent had been previously disciplined. Therefore, it is a proper basis to establish the violation of Sheriff's Office Rule 3-1.1, 5.14.

51. Third, it is alleged that Respondent violated Sheriff's Office Rule 3-2.1, 3.1 (a Level Three violation) which requires that members conduct their private and professional lives in such a manner as to not bring discredit to the Sheriff's Office. It is alleged that Respondent violated this rule "due to his paramour relationship and his attempt to perpetrate falsehoods and mistruths concerning the administrative process, he brought discredit to the Sheriff's office." This violation is sustained.

52. It is undisputed that Respondent continued to have an extra-marital affair with Ms. Parker, a civilian employee of the Sheriff's Office, well after June 19, 2001, when AI-01-009 was resolved. Respondent's conduct in this regard brought discredit to the Sheriff's Office.

53. Finally, it is alleged that Respondent violated Sheriff's Office Rule 3-1.1, 3.1, related to unauthorized use of agency equipment by repeatedly using his agency-issued cellular telephone for personal calls and failed to reimburse the agency for those calls. This violation is sustained.

54. It is undisputed that after June 19, 2001, Respondent used his agency-issued cellular telephone to make personal calls to Ms. Parker and that he never reimbursed the Sheriff's Office for these calls.

55. Based on the foregoing, Respondent is guilty of violating Sheriff's Office Rule 3-1.1, 5.14, related to conduct unbecoming members of the agency, a Level Five violation; Sheriff's Office Rule 3-1.1, 3.1, related to standard of conduct, a Level Three violation; and Sheriff's Office Rule 3-1.1, 3.1, related to unauthorized use of agency equipment, a Level Three violation.

RECOMMENDATION

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

RECOMMENDED that the Civil Service Board of the Pinellas County Sheriff's Office enter a final order finding Respondent guilty of violating Sheriff's Office Rule 3-1.1, 5.14, related to conduct unbecoming members of the agency; Sheriff's Office Rule 3-1.1, 3.1, related to standard of conduct; and Sheriff's

Office Rule 3-1.1, 3.1, related to unauthorized use of agency equipment; and upholding Respondent's termination as a deputy sheriff with the Pinellas County Sheriff's Office.

DONE AND ENTERED this 3rd day of September, 2003, in Tallahassee, Leon County, Florida.

Carolyn S. Holifield

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Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of September, 2003.

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.