

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KEITH GEORGE,)
)
 Petitioner,)
)
 vs.) Case No. 03-0966
)
 PINELLAS COUNTY SHERIFF'S OFFICE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was held in this case on May 12 and 13, 2003, in Largo, Florida, before William R. Pfeiffer, a duly-appointed Administrative Law Judge within the Division of Administrative Hearings.

APPEARANCES

For Petitioner: William M. Laubach, Esquire
Pinellas County Police
Benevolent Association
14450 46th Street North, Suite 115
Clearwater, Florida 33762

For Respondent: Keith C. Tischler, Esquire
Allen, Norton & Blue, P.A.
1669 Mahan Center Boulevard.
Tallahassee, Florida 32308

STATEMENT OF THE ISSUES

The issues in this case are whether Petitioner violated the Pinellas County Sheriff's Office Civil Service Act and its rules

and regulations by engaging in sexual harassment, and, if so, what is the appropriate discipline?

PRELIMINARY STATEMENT

On March 10, 2003, Sheriff Everett S. Rice (Respondent) notified Detention Deputy, Keith George (Petitioner), that the Administrative Review Board had determined that Petitioner had violated the Pinellas County Sheriff Office Civil Service Act and the rules and regulations of the Pinellas County Sheriff's Office. Respondent notified Petitioner that he was being suspended for fifteen days without pay and demoted from the rank of lieutenant to the rank of sergeant.

Petitioner denied the charges, contested the imposed penalty and requested a formal hearing. The matter was forwarded to the Division of Administrative Hearings and assigned to an Administrative Law Judge to conduct a formal hearing.

At the final hearing, Petitioner testified and introduced three exhibits into evidence. Respondent called nine witnesses and offered 16 exhibits, 14 of which were received into evidence. The parties also admitted one joint exhibit. The transcript of the proceedings was filed on May 21, 2003. The parties timely filed their respective Proposed Findings of Fact and Conclusions of Law, which have been duly considered.

FINDINGS OF FACTS

1. Respondent is the Sheriff of Pinellas County and is a constitutional officer for the State of Florida. He is responsible for providing law enforcement and correctional services within Pinellas County, Florida.

2. Petitioner is a 16-year employee with the Pinellas County Sheriff's Office and has never received a derogatory employee evaluation. Between March 2002 and October 2002, Petitioner worked as a detention deputy at the Pinellas County Jail and held the rank of lieutenant.

3. On March 4, 2002, Ms. Lori Atwater commenced employment with the Pinellas County Sheriff's Office and served as an inmate-counselor within Petitioner's unit. Ms. Atwater and Petitioner established a friendly professional relationship that developed into inappropriate conduct. On October 30, 2002, Ms. Atwater filed a written complaint against Petitioner alleging that he sexually harassed her.

4. Ms. Atwater and Petitioner each testified before the undersigned at the administrative hearing and provided conflicting versions of the alleged actions. Ms. Atwater presented more credible testimony. The evidence demonstrates by a preponderance of the evidence that Petitioner, on multiple occasions, exhibited inappropriate verbal and physical behavior toward his subordinate, Ms. Atwater. Specifically, Petitioner

periodically told her that he had difficulty avoiding watching her walk across the room. In addition, Petitioner frequently referred to Ms. Atwater, despite her objections, as "Ms. Ashwood," a person Ms. Atwater believed to be of poor reputation.

5. Moreover, on one occasion, Petitioner instructed Ms. Atwater to meet him for lunch and then, during the course of the lunch, broached the possibility of an extramarital relationship with her. On another occasion, Petitioner telephoned Ms. Atwater, inquired about the type of underwear she was wearing and questioned her about private sexual matters.

6. Although Ms. Atwater did not file any formal complaint against Petitioner for the improper verbal comments, she did advise Ms. Jacqueline Hobbs, a nine-year veteran with the Pinellas County Sheriff's Office, that she was experiencing inappropriate verbal contact from an un-named employee. Ms. Atwater was aware of the complaint procedures but explains that she was a new employee in the unit, was on probationary status during the relevant time period and did not want to complain about Petitioner and potentially jeopardize her employment.

7. In addition to Petitioner's improper verbal comments toward Ms. Atwater, the evidence demonstrates by a preponderance of the evidence that Petitioner made unsolicited, inappropriate physical contact with her. On one occasion in May 2002,

following a meeting to discuss her job performance, Petitioner insisted on hugging Ms. Atwater and inappropriately continued to hug her even after she resisted and ceased the embrace.

8. On another, yet more egregious occasion on October 24, 2002, Petitioner entered Ms. Atwater's office under the guise of discussing work-related matter and touched her inappropriately. Specifically, Petitioner entered Ms. Atwater's office, closed her door, approached her from behind, placed his hands around her neck and began kissing her neck and rubbing his groin area against her buttocks. Ms. Atwater turned around, physically resisted him, and told him that she had to handle an emergency outside of her office.

9. Notwithstanding her resistance, Petitioner backed her against the wall, again placed his arms around her and attempted to kiss her mouth. Again, Ms. Atwater immediately resisted. She ducked under his arms and fled her office.

10. Six days later, on October 30, 2002, Ms. Atwater notified Petitioner's superiors of the incident and filed a 3-page formal written complaint outlining his behavior. Shortly thereafter, Major Kirk Bruner referred the complaint to the Administrative Inspections Division for investigation.

11. Petitioner denies Ms. Atwater's allegations that he had inappropriate verbal and physical contact with her and argues that they maintained a friendly professional

relationship. He further states that Ms. Atwater continually requested him to get involved with EXCEL telecommunications and was upset that he refused. He also contends that Ms. Atwater became too personal with him and sent him inappropriate e-mails.

12. Considering the evidence, Petitioner's contentions are less credible. Although it is clear that Ms. Atwater sent Petitioner an e-mail on October 23, 2002, stating, "You have a way of getting a message across. Thank you so much," there is no evidence that Ms. Atwater was overly friendly, encouraged his behavior, or engaged in any inappropriate conduct.

13. Following the Division's investigation and report, the Administrative Review Board, comprised of various employees with the Pinellas County Sheriff's Office, reviewed the evidence compiled by the investigators. The Board unanimously determined that Petitioner had violated the Pinellas County Sheriff's Office Civil Service Act, Laws of Florida, 89-404, as amended by Laws of Florida, 90-395, as well as Rule 5.16 of the Rules and Regulations of the Pinellas County Sheriff's Office relating to sexual harassment and discrimination as defined in General Order 3-4. The Administrative Review Board forwarded its findings to Respondent.

14. Petitioner's available range of discipline was calculated in conformance with the matrix contained within General Order 10-2 of the Pinellas County Sheriff's Office which

allocates a point scale to various violations. The matrix provides that a Level Five offense, which includes sexual harassment, results in a 50-point assessment. Since Petitioner had no previous disciplinary record, Petitioner scored a total of 50 cumulative points which includes a disciplinary range of a five-day suspension up to and including termination. Demotion is also authorized under the applicable General Order.

15. After considering the evidence and available sanctions, Respondent notified Petitioner on March 10, 2003, that he was imposing a fifteen-day suspension, demoting him from the rank of lieutenant to the rank of sergeant and requiring him to undergo sexual harassment remedial training.

16. Following the investigation and imposition of discipline, Petitioner commented to his superior, Captain Peter Nesbitt, that "I was wrong. I spoke to my wife and am forgiven."

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action pursuant to Sections 120.57(1) and 120.68(8), Florida Statutes, and Chapter 89-404, Section 8, Laws of Florida, as amended by Chapters 90-395, Section 8, Laws of Florida.

18. The burden of proof 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). Respondent must prove the allegations in its complaint.

19. The parties disagree about the applicable standard of proof in this case. While Petitioner argues that Respondent must prove its case by a preponderance of the evidence and Respondent contends that it must prove its case by competent and substantial evidence, neither Chapters 89-404 and 90-395, Laws of Florida nor any of Respondent's office rules, regulations or policies expressly identify the applicable standard of proof necessary to find a violation.

20. Although Section 8 of Chapter 90-395, Florida Statutes, specifically authorizes Respondent "to contract with the Division of Administrative Hearings to have hearings pursuant to Chapter 120, Florida Statutes," it is apparent that the Legislature did not intend to require the Administrative Law Judge to apply Section 120.57(1)(j), Florida Statutes, which specifically provides that "Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized."

21. While Respondent's proposed discipline is penal in nature, Section 8 of Chapter 90-395, Florida Statutes, merely

authorizes Respondent to contract with the Division for hearing services. It does not require the Administrative Law Judge to base the ultimate findings of fact upon a standard of proof greater than a preponderance of the evidence.

22. To the contrary, it is evident that the preponderance of evidence standard has been consistently applied in cases involving the termination of employment. See Dalem v. Department of Corrections, 720 So. 2d 575 (Fla. 4th DCA 1998). In addition, the District Court of Appeal, First District, held that the imposition of discipline upon a career service employee requires proof by a preponderance of the evidence. Latham v. Florida Commission on Ethics, 694 So. 2d 83, (Fla. 1st DCA 1997); Department of Agriculture and Consumer Services v. Edwards, 654 So. 2d 628 (Fla. 1st DCA 1995); Fitzpatrick v. City of Miami Beach, 328 So. 2d 578 (Fla. 3d DCA 1976).

23. Petitioner further argues that the clear and convincing evidence standard is appropriate, given the rationale expressed within In re Rudy Maloy, DOAH Case No. 02-1231EC. However, his argument provides little assistance since that case involved an alleged violation by a public official of the Florida Ethics Code pursuant to Section 112.317(1)(a), Florida Statutes.

24. This case solely involves Respondent sheriff seeking to discipline Petitioner, his employee, for verbal and physical

sexual harassment. And while Petitioner is not directly within the state of Florida's Career Service system, he is similarly situated within the protected Classified Service system of the Pinellas County Sheriff's Office and has attained permanent status as an employee. See Chapter 89-404, Laws of Florida.

25. The appropriate standard of proof required is a preponderance of the evidence. In order to prevail, Respondent must prove the allegations within the complaint against Petitioner by a preponderance of the evidence.

26. Chapter 89-404, Section 6, Laws of Florida, authorizes the Sheriff to suspend, dismiss or demote classified employees for certain offenses. It provides in pertinent part the following:

(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 admitted 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.

27. In addition, Chapter 89-404, Section 2, Laws of Florida, authorizes Respondent to adopt rules, regulations and policies which establish the standard of conduct for employees of the Pinellas County Sheriff's Office.

28. Respondent has adopted Pinellas County Sheriff's Office General Order 3-4 which defines and prohibits sexual harassment. Pursuant to General Order 3-4, sexual harassment is defined as:

1. All unwelcome or unwanted advances; including sexual advances or unwanted sexual attention, whether between person(s) of the opposite or same sex. This includes, but is no limited to, leering, touching, patting, brushing against, hugging, kissing, fondling, any other similar physical contact, or quid pro quo arrangements (i.e., a situation in which an employee is forced to engage in unwelcomed sexual conduct in order to protect or advance his/her job.)

2. Unwelcome requests or demands for favors, including sexual favors. This consists of subtle or blatant expectations, pressures, or request for any type of favor, including sexual favor, including unwelcome requests for dates, whether or not the request is accompanied by an implied or stated promise of preferential treatment or negative consequences.

3. Inappropriate third party comments or one time comments made which do not a constitute hostile work environment, language not directed at the offended member, jokes (spoken, printed or drawn) that are not directed at the offended member or joint banter of a sexual or offensive nature in which the offended member may or may not be a party.

29. Respondent's complaint alleges that Petitioner violated the Pinellas County Sheriff's Office Civil Service Act and its rules, regulations and operating procedures by engaging in sexual harassment of Lori Atwater. Respondent proved by a preponderance of the evidence that Petitioner repeatedly engaged in inappropriate and unsolicited verbal comments and physical contact toward Ms. Atwater. Respondent met its burden and proved by a preponderance of the evidence that Petitioner's conduct violated the rules, regulations and operating procedures of the Office of the Sheriff.

30. As noted above, the Pinellas County Sheriff's Office General Order 3-1, divides employee violations of its standards of conduct into five categories ranging from Level One to Level Five. According to Section 3-1.1(5.16) of the Order, Petitioner's sexual harassment conduct is designated a Level 5 violation.

31. Pursuant to Pinellas County Sheriff's Office General Order 10-2, a violation of any level of conduct will result in the assignment of specific disciplinary points commensurate with the violation. A violation of the sexual harassment policy equates to fifty prescribed points with a minimum disciplinary range of five days suspension and a maximum range of termination.

32. Considering the evidence, Respondent established that Petitioner's fifteen-day suspension and demotion is reasonable and within the prescribed disciplinary range.

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 that:

1. Petitioner committed the conduct alleged in the charging document and violated the rules, regulations, and policies of the Pinellas County Sheriff's Office.

2. Petitioner's 15 days' suspension from his employment as a detention deputy with the Pinellas County Sheriff's Office is appropriate.

3. Petitioner's demotion from his previous rank of lieutenant to the rank of sergeant is appropriate.

4. Petitioner's requirement of remedial training related to sexual harassment is appropriate.

DONE AND ENTERED this 22nd day of July, 2003, in
Tallahassee, Leon County, Florida.



WILLIAM R. PFEIFFER
Administrative Law Judge
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Filed with the Clerk of the
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this 22nd day of July, 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.