

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHANE COLLINSWORTH,)
)
 Petitioner,)
)
 vs.) Case No. 05-1888
)
 PINELLAS COUNTY SHERIFF,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the formal hearing of this case on August 30, 2005, in Largo, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Kenneth J. Afienko, Esquire
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For Respondent: Keith C. Tischler, Esquire
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STATEMENT OF THE ISSUES

The issues presented are whether Respondent properly terminated Petitioner from his employment as a deputy sheriff for alleged insubordination 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 Respondent's General Order Section 3-1.1, Rule and Regulation 5.17(a), and, if not, whether Respondent should reinstate Petitioner to his former position with back pay, benefits, and seniority.

PRELIMINARY STATEMENT

On May 13, 2005, Respondent determined that Petitioner committed insubordination and also engaged in prohibited conduct, in violation of the Civil Service Act and Section 3-1.1, Rule and Regulation 5.17(a), and Rule and Regulation 3.1. Respondent terminated Petitioner's employment as a deputy sheriff, and Petitioner timely requested an administrative hearing. Respondent referred the matter to DOAH to conduct the hearing.

Prior to the hearing, Petitioner withdrew his request for a hearing to challenge the alleged violation of standards of conduct in Rule and Regulation 3.1. The only disputed ground for termination that remains at issue in this proceeding is the alleged insubordination.

The parties agree that in the absence of a finding of insubordination, termination of employment is not an appropriate penalty for the prohibited conduct that Petitioner does not

challenge. Petitioner asserts that a finding of insubordination does not warrant termination of employment.

At the hearing, Respondent proceeded first with its case in chief. The parties agree that Respondent has the burden of proof.

Respondent presented the testimony of three witnesses and submitted 10 exhibits for admission into evidence. Petitioner testified in his own behalf, presented the testimony of two witnesses, and submitted three exhibits for admission into evidence.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the Transcript of the hearing filed with DOAH on September 8, 2005. Petitioner and Respondent timely filed their respective Proposed Recommended Orders (PROs) on September 16 and 19, 2005.

FINDINGS OF FACT

1. Respondent is a constitutional officer of the State of Florida. Respondent is responsible for providing law enforcement and correctional services within Pinellas County, Florida. At all times pertinent to this case, Respondent employed Petitioner as a deputy sheriff, and Petitioner was subject to relevant rules and regulations identified in the record as General Orders and Rules.

2. Sometime in July 2004, Ms. Caroline Hart, a private citizen, communicated to Petitioner that she had previously been the subject of inappropriate sexual misconduct from Deputy Sheriff Gerald Akins when Deputy Akins responded to a call from Ms. Hart within the city of Dunedin, Florida. Ms. Hart knew Petitioner from a previous relationship.

3. Petitioner was uncertain of the procedure he should follow, and sought advice from Corporal James Cooper, Petitioner's immediate supervisor. Corporal Cooper was the acting sergeant for their squad. No sergeant was scheduled to be on duty that night when the squad was to begin its shift.

4. Petitioner telephoned Corporal Cooper and reported the accusations by Ms. Hart. Corporal Cooper assured Petitioner that Petitioner had followed the correct procedure and that Corporal Cooper would report the information to Sergeant Michael Rogers, the shift commander for the shift that included their squad and that of Sergeant Rogers.

5. During the conversation between Corporal Cooper and Petitioner, Corporal Cooper stated that Petitioner should not discuss the matter with Deputy Akins. Petitioner subsequently telephoned Deputy Akins and told him about the accusations by Ms. Hart.

6. Respondent alleges that when Petitioner communicated with Deputy Akins Petitioner committed insubordination by

"refusing to obey a lawful order" from Corporal Cooper within the meaning of General Order Section 3-1.1, Subsection 5.17(a)(the rule). Petitioner asserts that the statement by Corporal Cooper was advice, rather than an order, and that Petitioner did not commit insubordination.

7. The factual issue presented is whether Corporal Cooper ordered Petitioner not to speak to Deputy Akins. A finding of insubordination requires a preponderance of evidence to show that Corporal Cooper intended to issue an order, that the express words used by Corporal Cooper clearly stated an order, that Petitioner understood the statement to be an order, and that Petitioner intentionally refused to follow an order.

8. Relevant rules do not define terms such as an "order" or "refusing an order" and do not distinguish an "order" or an "instruction" from "advice." The trier of fact defines relevant terms based on the plain and ordinary meaning of relevant terms as they are defined in The American Heritage Dictionary of the English Language, 4th ed., at 25, 1238, and 1469 (Boston 2000), and as explained in relevant testimony during the hearing. As the Chief Deputy explained during his testimony:

The terminology that we use is a lawful order. I'm not certain that there is a specific definition within the policies. My understanding of the . . . the term order . . . in the context of our rules and regulations is basically the definition that

I guess you would refer to in a dictionary in terms of when an order is given.

Transcript (TR) at 220.

9. Corporal Cooper clearly intended to order Petitioner to refrain from talking to Deputy Akins. Corporal Cooper assumed in his own mind there was a possibility for either a criminal or internal investigation, or both. Consistent with standard operating procedures in either type of investigation, Corporal Cooper intended to preserve the opportunity for investigators to "blind side" Deputy Akins by not giving him a head's up before questioning him.

10. A preponderance of evidence does not support a finding that Corporal Cooper ever articulated the disputed order. The words used by Corporal Cooper to articulate the alleged order are not in evidence. Corporal Cooper does not recall what he said to Petitioner.

11. The words used to communicate an order are essential to the existence of an order and to an understanding in the mind of a recipient, such as Petitioner, that he is receiving an order. As the Chief Deputy explained during his testimony:

Obviously you need to be clear as to what words were used at the time when Corporal Cooper spoke with Deputy Collinsworth as it related to any communication with Deputy Akins.

TR at 221-222.

12. Corporal Cooper does not recall the exact words he used to communicate with Petitioner. Petitioner understood Corporal Cooper to advise Petitioner not to contact Deputy Akins. Corporal Cooper and Petitioner were the only parties to their conversation.

13. The exact words used by Corporal Cooper, if they were in evidence, must also be interpreted in the context of the conversation with Petitioner. In response to a question from the trier of fact concerning the distinction between an order and advice, the Chief Deputy explained:

And I think that the best way to describe that is in the context of . . . the words used. . . . [T]here would be some question as to the specific verbiage that was used and putting that into context as you made your decision.

TR at 221-222.

14. The conversation between Corporal Cooper and Petitioner arose in the context of Petitioner soliciting advice from Corporal Cooper. Corporal Cooper gave Petitioner advice in the same conversation in which he intended to "instruct" Petitioner to refrain from talking with Deputy Akins. However, Corporal Cooper did not verbally distinguish the advice from the instruction or clearly segue from advice to an order.

15. Conflict testimony from Corporal Cooper during direct and cross examination elucidates the ambiguous context of the

conversation with Petitioner. During direct examination by counsel for Respondent, Corporal Cooper testified that he gave Petitioner an instruction in response to Petitioner's request for advice:

A. Deputy Collinsworth had called. He was upset. He stated he needed some advice.

Q. Did you give Mr. Collinsworth some advice regarding his dealings with Ms. Hart?

A. Yes. I told him not to talk with her any further, ignore her phone calls and not to have any personal contact with her.

Q. And what did you tell Mr. Collinsworth about the allegations that Ms. Hart had made pertaining to Deputy Akins?

A. Well . . . I told him that he started at the right spot and that I was going to have to get with Sergeant Rogers, because he was our shift commander at the time, and present the information to him and see where it goes from there.

Q. And did you give . . . Deputy Collinsworth any other instructions about how he should deal with this information?

A. I did tell him not to contact Akins, so I wanted to get a word for word from Akins. I didn't want him to have a head's up.
(emphasis supplied)

TR at 53-55.

16. On cross-examination, Corporal Cooper did not recall the exact words he used to communicate with Petitioner and cast the conversation with Petitioner in a different light. In relevant part, Corporal Cooper testified:

Q. And Shane was off duty to the best of your knowledge?

A. Yes.

Q. 'Cause he worked with you on the same shift, is that correct?

A. Yes.

Q. And you gave advice to Deputy Collinsworth about this whole situation, didn't you?

A. Yes.

Q. And some of your advice was to terminate all the phone calls with Ms. Hart and all the communication and all that, is that correct?

A. Yes.

Q. And that wasn't an order, was it?

A. No.

Q. Now when you were testifying on direct you mentioned that you went into the conversation about what to do with Akins, is that correct?

A. Yes.

Q. Did you preface anything in between the conversation about Hart and now talking about Akins, did you preface it with anything such as, well, now this is an order? Did you make any suggestion that you were changing from advice to an order?

A. Not in that manner, no.

Q. And as a matter of fact you don't remember what you said verbatim, is that correct?

A. That's correct.

Q. As a matter of fact you could have said I don't think you should call him. Could you have said that?

A. Yes.

Q. And that wouldn't be an order, would it?

A. No.

Q. And you could have also said I don't think it's a good idea to call him. Could you have said that?

A. Yes.

Q. And if you did indeed say that, that wouldn't be an order, would it?

A. No.

Q. And you could have also said, no, I wouldn't. Why get him upset? You could have said that, couldn't you?

A. Yes.

Q. And had you said that, that wouldn't be an order, would it?

A. No.

Q. Deputy Collinsworth has never disobeyed your orders in the past, is that correct?

A. Correct.
(emphasis supplied)

TR at 69-71.

17. Petitioner's understanding that Corporal Cooper advised, rather than ordered, Petitioner not to talk to Deputy Akins was corroborated by Deputy Akins. At a time more

proximate to the incident, Petitioner asked Deputy Akins not to tell anyone about their conversation because Corporal Cooper had "advised" Petitioner not to discuss the matter with Deputy Akins. In relevant part, Deputy Akins testified:

Q. Did Deputy Collinsworth tell you whether you should expect a call from Corporal Cooper?

A. No, he did not.

Q. Do you recall how this conversation concluded with Deputy Collinsworth?

A. He stated that if anyone asked if we had spoken, to say no, we had not.

Q. And did you ask him why he was asking you to do that?

A. Yes.

Q. And what did he say in response to that?

A. Because he was advised by Corporal Cooper not to talk to me. . . . I don't remember verbatim word by word how the conversation went, but . . . I'm absolutely positive of the context of the conversation and how it was said. (emphasis supplied)

TR at 112 and 116-117.

18. It is undisputed that advice is not an order. Advice is a recommendation or suggestion. An order is a command or instruction given by a superior to a subordinate to act or to refrain from an act.

19. The words used by Corporal Cooper and the context of the conversation with Petitioner did not create an understanding

in the mind of Petitioner that he had received an order not to contact Deputy Akins. Petitioner lacked the requisite intent to refuse to follow an order.

20. Respondent urges that Petitioner should have understood he was receiving an order from Corporal Cooper. As the Chief Deputy explained during his testimony:

But I would also tell you that Corporal Cooper and Deputy Collinsworth were both aware of the fact that an allegation is made, that there is potential for an administrative investigation, and in the context of their discussion if Corporal Cooper was clear that there was the possibility of an administrative investigation, then at that point by general order there is no discussion with the principal. (emphasis supplied)

TR at 222.

21. Corporal Cooper was not clear that there was the possibility of an administrative investigation. Corporal Cooper advised Petitioner that he had started at the right place and that Corporal Cooper would report to the shift commander and see where it goes from there.

22. Even if Corporal Cooper clearly stated that an administrative investigation were possible, Respondent did not terminate Petitioner from his employment on the alleged ground that Petitioner violated Respondent's written policy. The synopsis of the charge against Petitioner states:

You were ordered by Corporal Cooper not to call or speak to Deputy Akins regarding an allegation concerning him. You disregarded this order and then you told Deputy Akins not to tell Corporal Cooper that you called him concerning the allegation. (emphasis supplied)

Inter-Office Memorandum dated May 13, 2005.

23. The expression, "see where it goes from there" is not synonymous with an administrative investigation. The matter could have been resolved through informal investigation by a front line supervisor. As Sergeant Rogers explained during cross-examination by counsel for Respondent:

Q. If Akins was making improper comments to a member of the public, particularly someone that was a victim of a crime that he was involved in investigating, that would be improper?

A. Yes, sir.

Q. That would be subject to an investigation?

A. Depends on what type of investigation you mean. Whether it would be a formal investigation or one done by a front line supervisor. That was my intent, I was going to have a front line supervisor look into it.

TR at 247.

24. Sergeant Rogers did not request an administrative investigation. When Corporal Cooper reported the allegations against Deputy Akins to Sergeant Rogers, the shift commander told Corporal Cooper to refer the matter to a sergeant

identified in the record as either Sergeant Hubbard or Marshall (Sergeant Marshall). Sergeant Marshall was the shift commander for the squad or squads assigned to the city of Dunedin, Florida, the situs of the alleged violation.

25. Sergeant Rogers ordered Corporal Cooper to refer the matter to Sergeant Marshall for investigation the next day. Sergeant Rogers received the report from Corporal Cooper at about 4:00 a.m. Ms. Hart was "extremely drunk," according to the information available to Sergeant Rogers, when Ms. Hart made the allegations against Deputy Akins. As Sergeant Rogers explained during cross-examination by counsel for Respondent:

[T]he woman was extremely drunk. Why would I call her back at four or five in the morning when she's probably passed out? Let her sober up and let another supervisor talk to her later.

TR at 248.

26. Respondent did not undertake an administrative investigation of the allegations by Ms. Hart against Deputy Akins until months later when Respondent discovered those allegations during the administrative investigation of Petitioner that led to this proceeding. The investigation of the allegations by Ms. Hart exonerated Deputy Akins.

27. Even if the words used by Corporal Cooper to communicate his intended order to Petitioner were in evidence, the disclosure by Petitioner to Deputy Akins of the allegations

by Ms. Hart did not defeat the purpose of the alleged order from Corporal Cooper. As the Chief Deputy explained during his testimony:

Q. Did the basis for exonerating Deputy Akins, if you know, have any relationship with the potential harm created by the disclosure of the allegations by petitioner to Deputy Akins?

A. [I]n fact I don't believe it would have changed the final outcome. It [exoneration] probably still would have been followed The primary concern was the [lack of] veracity of the [alleged] victim.

TR at 226-227.

28. The refusal of Petitioner to follow the advice of Corporal Cooper arguably may have been disrespectful. The refusal arguably may have been made contemptuous by the efforts of Petitioner to conceal his conversation with Deputy Akins. However, disrespectful and contemptuous disregard of advice is not insubordination.

29. Corporal Cooper did not treat the disclosure by Petitioner to Deputy Akins as insubordination. Respondent's written policies require Corporal Cooper to report insubordination to his superior. Corporal Cooper neither reported the alleged insubordination to Sergeant Rogers nor filed a written report of insubordination. Corporal Cooper explained, in substance, that he routinely does not write up

subordinates because he needs to maintain a working relationship with his deputies.

30. Corporal Cooper thinks he may have filed a verbal report with the shift commander but, again, does not recall the exact words in his verbal report. The shift commander does not recall such a report.

31. When Deputy Akins informed Corporal Cooper that Petitioner had disclosed the allegations by Ms. Hart earlier that evening, Corporal Cooper did not respond in a manner consistent with a perception that Petitioner had committed insubordination. As Deputy Akins explained during direct examination by counsel for Respondent:

Q. And what did Corporal Cooper tell you in that conversation?

A. He asked me if I had spoken with Deputy Collinsworth and I advised him yes.

Q. Did he say anything in response to that?

A. He stated he had a feeling that Collinsworth might have called me.

TR at 113.

32. Corporal Cooper had no reason to believe that Petitioner "might" commit insubordination. Petitioner had never disobeyed orders from Corporal Cooper in the past.

CONCLUSIONS OF LAW

33. DOAH has jurisdiction of the subject matter and the parties to this action. The parties received adequate notice of the administrative hearing. §§ 120.57(1) and 120.68(8), Fla. Stat. (2005).

34. Respondent has the burden of proof in this proceeding. Respondent 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).

35. Respondent did not show by a preponderance of the evidence that Corporal Cooper articulated an order. The words used to articulate the alleged order are not in evidence. Without an order, there can be no insubordination. Compare Rosario v. Burke, 605 So. 2d 523, 524 (Fla. 2d DCA 1992)(no insubordination in the absence of an order), Rutan v. Pasco County School Board, 435 So. 2d 399, 400-401 (Fla. 2d DCA 1983)(record does not demonstrate an order from anyone ever existed) and Smith v. School Board of Leon County, 405 So. 2d 183, 185 (Fla. 1st DCA 1981)(record did not demonstrate existence of an order) with Dolega v. School Board of Miami-Dade County, 840 So. 2d 445, 446 (Fla. 3d DCA 2003)(noncompliance

with written directive is insubordination), Johnson v. School Board of Dade County, Florida, 578 So. 2d 387 (Fla. 3d DCA 1991)(touching students after previous instructions not to do so was insubordination), and Thomas v. Brevard County Sheriff's Office Civil Service Board, 456 So. 2d 540 (Fla. 5th DCA 1984)(refusal to obey direct order to answer question during investigation was insubordination).

36. Respondent did not show by a preponderance of the evidence that Petitioner possessed the requisite intent to disobey an order from Corporal Cooper. Without proof of intent, there is no insubordination. Cf. Forehand v. School Board of Gulf County, 600 So. 2d 1187, 1192-1193 (Fla. 1st DCA 1992)(no intent to disobey previous orders to exclude student conduct from calculation of academic grades when supervisor could not recall exact words of teacher concerning teacher's use of student conduct in grading system).

37. The attempt by Petitioner to conceal his conversation with Deputy Akins arguably was disrespectful or contemptuous of the advice he received from Corporal Cooper. However, neither disrespect nor contempt is evidence of insubordination in the absence of an order. Rosario, 605 So. 2d at 524 (evidence of disrespect, friction, and disagreement is not evidence of insubordination in the absence of a direct order); Smith, 405 So. 2d at 184-185 (crumpling of evaluation form into small ball,

throwing it toward supervisor's desk, and saying, "This is what I think of this and you too" is not insubordination in the absence of a direct order).

38. It is undisputed that the historical disciplinary procedure for employees of Respondent has recently changed and that Respondent is now the sole arbiter of discipline for employees of the Office of the Sheriff of Pinellas County, Florida. The Administrative Review Board makes findings but no longer participates further in the discipline of employees.

39. This proceeding is not conducted for the purpose of reviewing the evidence available to Respondent when Respondent terminated Petitioner's employment. This is a de novo proceeding conducted to formulate final agency action rather than to review agency action previously taken. The ALJ must consider relevant and material evidence available at the time of the hearing even if such evidence were previously unavailable to the agency at the time the agency acted. McDonald v. Department of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order finding Petitioner not guilty of insubordination, rescinding the termination of employment, and reinstating Petitioner to his

former position of employment with back pay, benefits, and seniority.

DONE AND ENTERED this 7th day of October, 2005, in Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
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this 7th day of October, 2005.

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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.