STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS COUNTY SHERIFF'S OFFICE,	)	
Petitioner,	)	
vs.	)	Case No. 06-1971
JOHN GALEENER,	)	
Respondent.	)	

RECOMMENDED ORDER

Administrative Law Judge Daniel Manry conducted the formal hearing in this proceeding on August 24, 2006, in Largo, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Keith C. Tischler, Esquire
Jolly & Peterson, P.A.
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Tallahassee, Florida 32315

For Respondent: John W. Galeener, pro se
18308 Caufield Road
Spring Hill, Florida 34610

STATEMENT OF THE ISSUES

The issues presented are whether Petitioner engaged in untruthful and unbecoming conduct and committed insubordination in violation of General Order (Rule) 3-1.1, Sections 5.6 and

5.14c and Rule 3-1.3, Section 5.17a, and, if so, whether the proposed discipline is reasonable.

PRELIMINARY STATEMENT

In an Inter-Office Memorandum dated May 18, 2006 (the charging document), Petitioner notified Respondent that Petitioner intended to terminate Respondent's employment based on the violations alleged therein. Respondent timely requested an administrative hearing.

At the hearing, Petitioner submitted for admission into evidence 21 exhibits, the live testimony of eight witnesses, and the deposition testimony of the sheriff. Respondent testified in his own behalf and submitted six 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 August 31, 2006. Petitioner timely filed its Proposed Recommended Order (PRO) with DOAH on September 8, 2006. Respondent did not file a PRO.

FINDINGS OF FACT

1. Petitioner is the constitutional officer responsible for providing law enforcement and correctional services within Pinellas County, Florida. At all times pertinent to this case, Petitioner employed Respondent as a deputy sheriff, and

Respondent was governed by the rules cited in the charging document.

2. By rule, Petitioner requires its employees, including Respondent, to ensure that information in Petitioner's records concerning the employee's physical residence is accurate. Petitioner must be able to contact employees during emergencies when the usual means of communication are interrupted, and Petitioner must be able to direct written communication to the physical residence of each employee.

3. In November 2004, Respondent listed in Petitioner's records a physical residence in Largo, Florida. However, Respondent never resided at that location.

4. In July 2005, Respondent's supervisor instructed Respondent to ensure that the residence address listed for Respondent was correct and current. Respondent did not correct his residence of record.

5. From November 2004 until February 2006, Respondent had no residence and was unable to report a residence to Petitioner. In February 2006, Respondent moved into his sister's house in Spring Hill in Pasco County, Florida (Spring Hill). After moving to Spring Hill, Respondent did not report the Spring Hill address to Petitioner.

6. Prior to November 2004, Respondent experienced severe financial distress caused by a four-year divorce proceeding and

custody "battle." Respondent's personal vehicle was repossessed. Respondent was unable to pay the rent due for his apartment and did not have sufficient credit or creditworthiness to move to another apartment. In November 2004, Respondent became homeless.

7. From November 2004 until sometime in January 2005, Respondent lived in the vehicle issued to him by Petitioner (department vehicle). Respondent showered before work in facilities at the workplace. From sometime in January 2005 until his accident in February 2006, Respondent resided in a camper with a female in the parking lots of apartments in Oldsmar and Tarpon Springs in Pinellas County, Florida. On December 13, 2005, the IRS garnished Respondent's salary. After the accident in February 2006, Respondent resided with his sister in Spring Hill.

8. Respondent did not report an accurate physical residence to Petitioner because Respondent was ashamed and embarrassed over his financial distress. As Respondent explained in his testimony:

> I didn't have an address, and I didn't have the balls to tell anybody I didn't have an address, nor did I have the desire to go through an internal affairs investigation as to how I allowed myself to get into such financial distress.

Transcript at 187.

9. Petitioner classified the most severe violations as "Level Five Violations" within the meaning of Rule 3-1.1. Respondent committed two level-five violations. The false and untruthful information that Respondent caused to be entered into the official record maintained by Petitioner prior to July 2005 violated Rule 3-1.1, Section 5.14c., related to conduct unbecoming Petitioner's employees. The second level-five violation occurred in July 2005, when Respondent failed to correct his address of record.

10. Petitioner devoted a substantial portion of the hearing to evidence of a third level-five violation in which Respondent allegedly failed to disclose an accurate physical residence during the administrative investigation that preceded this proceeding. However, the charging document does not allege facts involving the administrative investigation. The factual allegations in the charging document relevant to the false address are contained in one paragraph on pages one and two of the charging document. That relevant paragraph alleges:

> You had the address . . . in Largo listed as your residence. . . . Your supervisor requested you update the address to ensure a current listing for hurricane preparedness. You indicated to your supervisor that the address was both correct and current. This was later determined to be untruthful and caused false entries to be made in official agency records.

11. Petitioner determines discipline in specific cases based on a point system published in Rule 10-2.6, last revised on November 12, 2004. Points are allocated by "determining the level of violation" prescribed in Rule 3-1 "combined with the number of charges per level." A level-five violation is the most severe class of violations, and a level-three violation is a less severe violation.

12. The point system allocates 60 points for two, level-five violations. The Progressive Discipline Worksheet admitted as Petitioner's Exhibit 25 (the worksheet), shows that Petitioner allocated 75 points for two, level-five violations of Rule 3-1.1, Section 5.6, and an additional 15 points for a third, level-five violation of Rule 3-1.1, Section 5.14c; for a total of 90 points. The apparent mathematical error is harmless because the point system requires only 50 points to impose a maximum penalty of termination from employment.

13. By rule, Petitioner prohibits employees, including Respondent, from driving department motor vehicles outside the county without prior permission from a supervisor. Supervisors routinely grant permission for work-related travel, but not for personal travel. Employees who reside outside of Pinellas County are required to leave department vehicles in Pinellas County after work. Personal use of department vehicles inside Pinellas County does not require prior permission.

14. The charging document sets forth the relevant factual allegations on page two and alleges:

> [Y]ou have been taking your assigned department vehicle out of county repeatedly without authorization in violation of agency policy.

Paragraph number two in the charging document alleges that this is a level-three violation which is a less severe violation than a level five violation.

15. In January 2006, Respondent was assigned to Petitioner's Court Services Division (Division). The Division is responsible for security at the Pinellas County Courthouse (the courthouse). An annual review of department vehicles assigned to the Division revealed that Respondent's department vehicle accumulated excessive miles when compared to: Respondent's job responsibilities; miles driven by other employees with similar job responsibilities; and Respondent's residence of record, which was five and one-half miles from the workplace.

16. Petitioner issued a new vehicle to Respondent on October 13, 2004, with 115 miles on the odometer. Petitioner suspended Respondent's use of the vehicle on February 17, 2006. In approximately 16 months, Respondent's department vehicle accumulated 33,137 miles. Excluding miles attributable to the daily commute based on the residence of record, Respondent

accumulated 29,624 duty-miles compared to 5,544 and 2,800 duty-miles accumulated by two comparable employees during similar intervals.

17. From approximately February 9 through 16, 2006, investigators tracked Respondent's department vehicle by hiding a global positioning system on the vehicle. The recorded data showed that Respondent was driving the vehicle each day approximately 108 miles from Spring Hill to work and back.

18. The unauthorized use of the vehicle violated Rule 3-1.3, Section 3.3, requiring obedience to pertinent rules and regulations. The unauthorized use of the vehicle is a level-three violation. The point system authorizes the allocation of 15 points for one level-three violation. The worksheet shows that Petitioner allocated no points for this single level-three violation. The 15 points that Petitioner did allocate in the worksheet is allocated for a third level-five violation.

19. The charging document alleges in paragraph number four on page one that Petitioner committed insubordination in violation of Rule "3-1.3" [sic], Section 5.17c. Rule 3-1.3 addresses level three violations and does not include a "Section 5.17c." Rule 3-1.3, Section 3.4 requires personnel to perform duties required by a lawful order, but the charging document does not charge that the alleged insubordination

violated Rule 3-1.3, Section 3.4. Nor does the charging document charge that the alleged insubordination violated Rule 3-1.1.

20. The error in the notice of charges provided in the charging document appears to be harmless. The worksheet shows that Petitioner allocated no points to the alleged insubordination. Although Petitioner devoted a substantial amount of time in the formal hearing attempting to prove allegations of insubordination, the inadequate notice in the charging document and the omission of points from the worksheet render the issue of insubordination moot and make findings concerning the allegations of insubordination unnecessary for the proposed agency action to be authorized.

21. If findings concerning the issue of insubordination were necessary to authorize the proposed agency action, a preponderance of evidence does not support a finding of insubordination. The charging document alleges:

> During the course of this Administrative Investigation, you were . . . insubordinate to both your supervisor and to the Inspections Bureau Commander. You were ordered by your supervisor to call in every Tuesday and Friday until your return to duty. You knowingly failed to follow this directive. Furthermore, you were ordered by the Inspection Bureau Commander . . . to contact Administrative Investigation by a specific date to set your subject interview.

> You failed to respond to this directive within the specified time.

Charging document, page two.

22. Rule 3-1.1, Section 5.17c, defines insubordination, in relevant part, to be a "failure or deliberate refusal to obey a lawful order." Without the capacity to obey a lawful order, Respondent would be incapable of failing or deliberately refusing to obey the order. A finding that Respondent had the capacity to comply with the orders given to him is not supported by a preponderance of the evidence.

23. Respondent was absent from duty due to an injury he suffered on the job and for which he was being treated during a pending workers' compensation claim. During the time in which the alleged insubordination occurred, Respondent underwent surgery and was on prescribed pain medications. A finding that Respondent had either the physical or mental capacity to obey the relevant orders is not supported by a preponderance of the evidence. As Respondent explained:

> I can certainly testify to my own knowledge . . . that the taking of these medications kept me in a state of . . . semi-consciousness. The extent of my abilities while being on these medications was sleeping and maybe eating one meal over the course of three. . . . I also suffered from memory loss. I had no ability to carry on a conversation, either in person or on the telephone. I would get phone calls from friends. . . . I couldn't even speak to them on the telephone. I couldn't carry on

> a conversation with them. I'd answer the telephone or get on the telephone and end up falling asleep.

Transcript at 188, 189.

It is unnecessary to find that a preponderance of evidence supports a finding that Respondent lacked the capacity to obey the orders.

24. Petitioner prescribes the range of penalties applicable to specific discipline cases on page eight of Rule 10-2 entitled "Discipline Ranges." The minimum discipline for violations of 60 points is a suspension of seven days. The maximum discipline for violations totaling 60 points is termination from employment.

25. The Discipline Ranges do not prescribe intelligible standards, including aggravating and mitigating circumstances, to guide the exercise of agency discretion required to choose discipline that is authorized with in the minimum and maximum ranges in a particular case or to determine whether the choice of discipline in a particular case is reasonable. That determination is subject to the sole discretion of a single individual, the sheriff. The participation of a collective body such as the administrative review board is excluded from the choice of discipline to be imposed in a particular case.

26. Several mitigating factors make termination from employment an unreasonable level of discipline in this case.

Prior to the acts committed by Respondent in this proceeding, Respondent had a long history of service to Petitioner without discipline. When Respondent committed the violations that are the subject of this proceeding, Respondent was suffering from a confluence of adverse circumstances that included divorce, financial distress, injury, and medical treatment. The violations that Respondent committed did not harm a member of the public and did not impugn the public reputation of Petitioner for integrity in the execution of Petitioner's constitutional duties.

27. Respondent has 22 years of credible service and requests a suspension until June 30, 2006, rather than termination, so that Respondent may "submit [his] retirement papers effective June 30, 2006." Respondent does not seek reinstatement or back pay. A suspension without pay will result in no prejudice to Petitioner and will acknowledge a long history of service to Petitioner prior to the events that lead us here.

CONCLUSIONS OF LAW

28. DOAH has jurisdiction over the subject matter and the parties in this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2005). DOAH provided the parties with adequate notice of the formal hearing.

29. 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 discipline. 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).

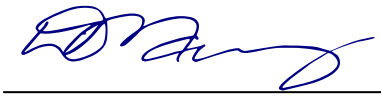
30. Petitioner satisfied its burden of proof concerning the alleged offenses other than insubordination. For reasons stated in the findings of fact, however, Petitioner did not prove by a preponderance of the evidence that the proposed discipline, although authorized, is reasonable under the circumstances.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order finding Respondent guilty of the alleged violations other than insubordination and suspending Respondent without pay through June 30, 2006.

DONE AND ENTERED this 10th day of October, 2006, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 10th day of October, 2006.

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.