STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS COUNTY SHERIFF'S OFFICE,	)	
Petitioner,	)	
vs.	)	Case No. 08-1520
PATRICK MILEWSKY,	)	
Respondent.	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on September 30 and October 1, 2008, in Largo, Florida.

APPEARANCES

For Petitioner: Sherwood S. Coleman, Esquire
Shannon R. Kennedy, Esquire
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Office of the General Counsel
10750 Ulmerton Road
Largo, Florida 33778

For Respondent: Larry Sandefer, Esquire
Sandefer & Murtha, P.A.
711 South Belcher Road
Clearwater, Florida 33764

STATEMENT OF THE ISSUES

The issues are whether Petitioner should terminate Respondent from his employment as a deputy sheriff for allegedly

engaging in prohibited conduct pursuant to Chapter 89-404, Laws of Florida, as amended by Chapter 90-395, Section 6, Subsection 4, Laws of Florida (the Civil Service Act), and Petitioner's General Order Section 3-1.1, Rule and Regulation 5.2--relating to loyalty, Rule and Regulation 5.4--relating to duties and responsibilities, and Rule and Regulation 5.6--relating to truthfulness; General Order Section 3-1.3, Rule and Regulation 3.20--relating to reporting procedures for the use of force; and General Order 3-2--relating to ethical requirements.

PRELIMINARY STATEMENT

On March 14, 2008, Petitioner determined that Respondent engaged in prohibited conduct and terminated Respondent's employment. Respondent timely requested an administrative hearing, and Respondent referred the matter to DOAH to conduct the hearing.

At the hearing, Petitioner presented the testimony of 12 witnesses and submitted 14 exhibits and one supplemental exhibit for admission into evidence. Respondent testified, presented the testimony of four other witnesses, and submitted four exhibits for admission into evidence.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the three-volume Transcript of the hearing filed with DOAH on November 4, 2008. Petitioner and

Respondent timely filed their respective Proposed Recommended Orders on November 17 and 14, 2008.

FINDINGS OF FACT

1. Petitioner is the Sheriff of Pinellas County and a constitutional officer described in Article VIII, Section 1, Florida Constitution. From sometime in 1989 until the termination of Respondent's employment on March 14, 2008, Petitioner employed Respondent as a deputy sheriff in the Pinellas County Sheriff's Office (the PCSO). Respondent was last assigned to the courthouse security division of the PCSO.

2. On Saturday, November 3, 2007, Respondent was off-duty and volunteering as one of a number of parents who were supervising several high school bands that were practicing at Clearwater High School (CHS). Three juvenile males on bicycles approached the band practice area. Respondent yelled at them to stop, but did not identify himself as a deputy sheriff. One juvenile stopped. The other two juveniles ignored the commands and proceeded toward the Tarpon Springs Band. One of the riders wore a back pack with a baseball bat attached to the pack.

3. Respondent reasonably believed that the juveniles, who were approximately 16 and 17 years old,[1] presented an imminent danger of running into and potentially injuring members of the nearby Tarpon Springs Band. Respondent ran after the juvenile with a bat attached to his pack, grabbed the bat, and separated

the juvenile from the moving bicycle. The second juvenile stopped at the point of separation.

4. The juvenile with the baseball bat struck Respondent with his fist, and Respondent delivered a knee-spike[2] to the mid-section of the juvenile. The knee-spike disabled the juvenile. The second juvenile was preparing to strike Respondent, when another parent pulled that juvenile away.

5. Petitioner notified Respondent of the charges against him in a memorandum dated March 14, 2008 (the charging document). In relevant part, the charging document alleges in a paragraph entitled "Synopsis" that, during the altercation, Respondent failed to act within the scope of his responsibilities as a deputy sheriff. If that allegation were properly construed to allege that Respondent used excessive force, the fact-finder finds that a preponderance of evidence does not support a finding that Respondent is guilty of that charge of misconduct.

6. Respondent acted reasonably during the altercation. Respondent used reasonable force to protect band members from harm, and Respondent used reasonable force to defend himself from a juvenile. The exigencies of the moment did not afford time for Respondent to disclose his employment with the PCSO before taking action he reasonably believed to be necessary to protect members of the Tarpon Springs Band.

7. Respondent cooperated with the police investigation at CHS. CHS is located within the jurisdiction of both the PCSO and the Clearwater Police Department. The Clearwater Police Department responded to the scene and conducted an investigation. The investigation was documented in Clearwater Police Report No. CW07-33468 (the police report).

8. Another allegation in the synopsis of the charging document is that Respondent was untruthful by deliberately or intentionally omitting or misrepresenting material facts outlining his involvement in the altercation, including a memorandum Petitioner authored on November 5, 2007. The fact-finder finds that a preponderance of evidence does not support a finding that Respondent is guilty of this charge of misconduct.

9. It is undisputed that Respondent telephoned Corporal Victor Griffin, Respondent's immediate supervisor on the evening of November 3, 2007, and reported the altercation in detail, including the attack by the juvenile and Respondent's use of a knee-spike. Corporal Griffin instructed Respondent to inform Sergeant Edward Marshall, the next in command. Respondent telephoned Sergeant Marshall that night and informed him of the use of force and the details of the incident.

10. At the hearing, Sergeant Marshall had little or no recall of the details of the conversation with Respondent on

November 3, 2007. The only credible and persuasive testimony concerning that conversation is the testimony of Respondent.

11. On the evening of November 3, 2007, Sergeant Marshall instructed Respondent to write a memorandum describing the incident and Respondent's use of force when Respondent returned to work on Monday, November 5, 2007. Sergeant Marshall instructed Respondent to either reference the police report in the memorandum or attach a copy of the police report to the memorandum.

12. Respondent drafted a memorandum on November 5, 2007. The memorandum referred to the police report, and Respondent submitted the memorandum to his supervisor.

13. The police report included a handwritten, detailed description by Respondent of the use of force in the altercation. Petitioner had reasonable access to the police report. The Clearwater Police Department and the PCSO, by agreement, utilize a computerized joint records management system identified in the record as ACISS.

14. Another allegation in the synopsis of the charging document is that Respondent failed to document the use of force, as required by agency policy. The fact-finder finds that a preponderance of the evidence does not support a finding that Respondent is guilty of this charge of misconduct.

15. A complete description of the altercation and use of force was attached to the police report. That information fully documented the use of force and was available to Petitioner through ACISS.[3]

16. Another allegation in the synopsis of the charging document is that Respondent compromised the criminal investigation of the altercation by "accessing unauthorized information" and by "interfering with an ongoing investigation." This allegation is based in substantial part on two undisputed facts that occurred on or about November 5, 2007. First, Respondent obtained a copy of the police report and discovered that the police report listed Respondent as a "victim/suspect." Suspects are not entitled to a copy of a police report, but law enforcement officers may access the report. Second, Respondent persuaded the property department to change the status of brass knuckles found in a back pack at the scene of the altercation from being held for destruction to being held as evidence, so that the brass knuckles would not be destroyed.

17. The fact-finder finds that a preponderance of the evidence does not support a finding that the undisputed actions of Respondent compromised the criminal investigation by accessing unauthorized information and intervening into an investigation in which Respondent was listed in the police report as a suspect. The undisputed actions of Respondent were

consistent with the actions of the Clearwater Police Department, and neither action by Respondent compromised the investigation.

18. The investigating officer for the Clearwater Police Department was off-duty on Monday and Tuesday, and she did not return to work until Wednesday, November 7, 2007. When the investigating officer returned to work, her sergeant instructed her to change the police report to list Respondent as a law enforcement officer, to delete his address from the report, and to change the designation of Respondent from a "victim/suspect"[4] to a "victim" before finalizing the report. The investigating officer made those changes to the police report by computer entries on November 7, 2007, and those changes were available to the PCSO through ACISS.

19. The sergeant also instructed the investigating officer to change the status of the brass knuckles from being held for destruction to being held as evidence, so that they would not be destroyed. The investigating officer contacted the property department of the PCSO to change the status of the brass knuckles to that of evidence and discovered the property department had already made that change at Respondent's request.

20. Respondent was entitled to a copy of the report because he was a law enforcement officer and was incorrectly listed on the report as a suspect. The actions of Respondent in changing the status of the brass knuckles so that they were

listed as evidence was consistent with the actions of the Clearwater Police Department.

21. Respondent did nothing on November 5, 2007, that the Clearwater Police Department did not do on November 7, 2007. If the investigating officer were to have returned to work on Monday, November 5, 2007, it is reasonable to conclude that the Clearwater Police Department would have provided a copy of the police report to Respondent, because Respondent would not have been listed as a suspect, and the Department would have changed the status of the brass knuckles so that they were being held as evidence. The investigating officer and her sergeant concluded the altercation was a matter of mutual combat and did not refer the case for prosecution by the state attorney.

22. The nascence of the charges against Respondent emerged from two events. First, the mother of the two juveniles filed a complaint of excessive force against the PCSO. Second, when the investigating officer discovered that Respondent had already persuaded the property department to change the status of the brass knuckles, so that they would not be destroyed, the Clearwater Police Department complained to the PCSO about a deputy sheriff allegedly interfering with evidence. As a result, Petitioner initiated an administrative investigation that led to this proceeding.

23. The penultimate allegation in the synopsis of the charging document is that Respondent provided confidential information regarding an open criminal case to another suspect. It is undisputed that when Respondent discovered on November 5, 2007, that he was listed as a suspect in the police report, Respondent told the parent that had prevented the second juvenile from attacking Respondent that the parent was also listed in the report as a suspect.

24. The disclosure by Respondent was immaterial and had no impact on a pending criminal investigation. The Clearwater Police Department classified the altercation as mutual combat and did not refer the case for prosecution.

25. The final allegation in the synopsis of the charging document is that Respondent failed to advise his supervisors of material facts regarding his "involvement in the ongoing . . . criminal investigation" and "subsequent actions" that Respondent took. The distinction, if any, between "involvement in the ongoing investigation" and "subsequent actions" is unclear to the fact-finder because the charges deal with Respondent's actions during a pending investigation. The charges of misconduct do not address Respondent's "subsequent actions" after the investigation was completed and case was closed.

26. The investigating officer did not inform Respondent when she responded to the scene on November 3, 2007, that she

was listing Respondent as a suspect. She did not decide to list Respondent as a suspect until she prepared her report that evening, long after Respondent had completed his written report that was included with the police report and had left the scene.

27. Respondent did not learn that he was a suspect until Respondent obtained a copy of the police report on November 5, 2007. After obtaining a copy of the police report, Respondent talked to Lieutenant Rachel Hughes of the Courthouse Security Division at the PCSO and another of Respondent's supervisors.

28. Significant variation exists in the separate accounts of the conversation between Respondent and Lieutenant Hughes. The testimony of Lieutenant Hughes is inconsistent, self-contradictory, and less than credible and persuasive. The only credible and persuasive testimony concerning the conversation is the testimony of Respondent.

29. During the conversation between Respondent and Lieutenant Hughes, Respondent expressed his displeasure at being listed in the police report as a suspect, stated that he would like to complain to someone at the Clearwater Police Department, and asked if Lieutenant Hughes knew anyone there. Lieutenant Hughes suggested that Lieutenant James Steffens at the Clearwater Police Department is a "good guy."

30. Before contacting Lieutenant Steffens, Respondent called the property department and identified himself as

"Milewsky from over at the courthouse." Respondent did not disclose that he was a suspect in the case involving the brass knuckles. Respondent knew or should have known that the property department employee reasonably believed that the call and request was related to official business.

31. Lieutenant Larry Smith was in charge of the property department at the time and testified at the hearing. The property department would not have enhanced the status of the brass knuckles at the request of someone who was listed as a suspect in the police report.

32. The failure to disclose to the property department that Respondent was a suspect in the case is not alleged in the charging document, and the ALJ cannot find Respondent guilty of a charge not alleged in the charging document. The relevant language in the charging document is confined to an allegation that Respondent failed to advise his "supervisors" of his "involvement in the ongoing . . . investigation" and his "subsequent actions." Those assigned to the property department are not "supervisors" of Respondent.

33. Respondent next telephoned Lieutenant Steffens of the Clearwater Police Department to discuss the fact that Respondent was listed as a suspect in the police report. Respondent and Lieutenant Steffens disagree over material details of the conversation, including the issue of whether Respondent

requested Lieutenant Steffens to change the police report to delete Respondent's name as a suspect.

34. The fact-finder resolves the disparity in testimony between Respondent and Lieutenant Steffens against Respondent. The testimony of Lieutenant Steffens is the only credible and persuasive testimony concerning the conversation between the two men.

35. Respondent did not want to remain listed as a suspect, but denied that the purpose of his call to Lieutenant Steffens was to have the report changed to delete his status as a suspect. Respondent insisted that his telephone call to Lieutenant Steffens was "unrelated" to changing his designation as a suspect.

36. The testimony of Lieutenant Steffens was plausible, credible, and persuasive. Lieutenant Steffens recalled that Respondent advised Lieutenant Steffens that a Clearwater Police Department investigation contained erroneous information, and Respondent sought to get the error corrected "as soon as possible." After emphasizing Respondent's seniority and the lack of experience of the investigating officer, who was a rookie, Respondent stated that he did not want to make a complaint against the investigating officer, but just wanted the report changed so that Respondent was listed solely as a victim

in the report. Respondent asked Lieutenant Steffens if they could get that done as quickly as possible.

37. Lieutenant Steffens sent a message by email in this regard to Sergeant Wilton Lee, the supervisor for the investigating officer, asking Sergeant Lee to telephone Respondent. Sergeant Lee did not return to work until Wednesday, November 7, 2007.

38. Before Lieutenant Steffens heard from Sergeant Lee, Lieutenant Steffens received a voice mail from Respondent inquiring as to why nothing had been done yet on the case. Lieutenant Steffens also received a telephone call from another suspect. Lieutenant Steffens telephoned Sergeant Lee directly about the inquiries.

39. When Sergeant Lee reported to work on November 7, 2007, the police report was waiting for his approval. Sergeant Lee telephoned Respondent, whom Sergeant Lee knew to be a deputy sheriff, and agreed that Respondent should not be listed in the police report as a suspect.

40. Respondent failed to advise his supervisors of two forms of involvement in the investigation. First, Respondent failed to advise his supervisors of his involvement in the enhancement of the brass knuckles from that of waiting for destruction to that of evidence. Second, Respondent failed to

advise his supervisors of his efforts to change the police report to delete his name as a suspect.

41. A preponderance of the evidence supports a finding that the failures described in the preceding paragraph violate requirements for loyalty and truthfulness. Those requirements are described in General Order 3-1.1 and Rules and Regulations 5.2 and 5.6.

42. The Progressive Discipline Worksheet assigns 75 Progressive Discipline Points for violations of all of the charges in the charging document. However, a preponderance of the evidence supports a finding that Respondent is guilty of violating only two of the six charges of misconduct described in the synopsis in the charging document. The Worksheet does not delineate the points assigned to each charge, and Petitioner has not promulgated intelligible standards that enable the fact-finder to determine the points that should be allocated to the two violations committed by Respondent.

43. No aggravating factors are evidenced in this proceeding. Respondent has no prior discipline during his 19 years of experience with the PCSO. The culpable actions of Respondent did not result in physical or financial harm to a member of the public or members of either the PCSO or the Clearwater Police Department. The culpable actions of Respondent did not compromise an ongoing criminal investigation.

44. A preponderance of the evidence does not show that termination of employment is a reasonable penalty. Untruthfulness and disloyalty are serious offenses but, absent any aggravating circumstances, a reasonable penalty is suspension without pay beginning on March 14, 2008, and reinstatement to the former position of employment immediately upon the entry of a final order.

CONCLUSIONS OF LAW

45. DOAH has jurisdiction over the subject matter of and the parties to this action. The parties received adequate notice of the administrative hearing. §§ 120.57(1) and 120.68(8), Fla. Stat. (2008).

46. 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. However, the party asserting the affirmative of any issue bears the burden of proving the assertion. 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).

47. For reasons stated in the Findings of Fact, a preponderance of the evidence supports a finding that Respondent is guilty of violating two of the six charges of misconduct described in the synopsis of the charging document. A

preponderance of the evidence does not support a finding that termination of employment is a reasonable penalty under the circumstances.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order adopting the findings of this Recommended Order; suspending Respondent's employment without pay from March 14, 2008, to the date of the final order; and returning Respondent to his former position of employment as of the date of the final order.

DONE AND ENTERED this 22nd day of December, 2008, 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 22nd day of December, 2008.

ENDNOTES

[1/] The incident occurred on November 3, 2007. One juvenile would celebrate his 17th birthday on December 4, 2007, and the second juvenile would celebrate his 16th birthday on January 16, 2008.

[2/] One delivers a knee spike to an attacker by bending the attacker at the waist and raising a knee to the solar plexus with sufficient force to momentarily deprive the attacker of sufficient oxygen to breathe.

[3/] There is obvious confusion concerning the verbal disclosure of the use of force on November 3, 2007. The confusion is, in part, a result of the language of Petitioner's written orders and rules and regulations requiring disclosure of the use of force. The written orders, rules, and regulations assume that the officer who used force is also the officer preparing a police report. In this case, Respondent was a victim and did not prepare the police report.

[4/] The parties agree that being listed as a suspect in a police report creates grave consequences for a law enforcement officer, but the fact-finder never really understood the extent of those consequences and cannot articulate them in this Recommended Order.

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.