

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS COUNTY SHERIFF'S)
OFFICE,)
)
Petitioner,)
) Case No. 09-0702
vs.)
)
ROBERT HAIMES,)
)
Respondent.)
_____)

AMENDED RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal proceeding before Lawrence P. Stevenson, a duly-designated Administrative Law Judge, in Largo, Florida, on June 10, 2009.

APPEARANCES

For Petitioner: Sherwood S. Coleman, Esquire
Pinellas County Sheriff's Office
Post Office Drawer 2500
Largo, Florida 33779-2500

For Respondent: Jeffrey G. Brown, Esquire
Brown & Doherty, P.A.
450 Carillon Parkway, Suite 120
St. Petersburg, Florida 33716

STATEMENT OF THE ISSUES

At issue in this proceeding is whether the Petitioner, Pinellas County Sheriff's Office (PCSO or Petitioner), properly disciplined Respondent Robert Haimes for violations of Chapter 89-404, Laws of Florida, as amended by Chapters 90-395 and 2008-

285, Laws of Florida (the Pinellas County Sheriff's Civil Service Act), and the General Orders and Rules and Regulations of the PCSO.

PRELIMINARY STATEMENT

On January 19, 2009, Petitioner determined that Respondent, then a Sergeant with the PCSO, had violated the Pinellas County Sheriff's Civil Service Act by violating certain provisions of the rules, regulations and operating procedures of the PCSO. The charging document set forth the determinations reached by Petitioner's Administrative Review Board (ARB) as follows:

You violated Pinellas County Sheriff's Office General Order, 3-1.1, Rule and Regulation 5.14c, relating to Conduct Unbecoming Members of the Agency, Knowingly making a false entry or cause a false entry to be made in any official record of the agency, General Order, 3-1.2, Rule and Regulation 4.9b, relating to Improper Conduct by Members of the Agency, Absence without leave, and General Order, 3-1.3, Rule and Regulation 3.31g, Improper Conduct by Members of the Agency, Failure to properly supervise subordinates.

Synopsis: Between the months of August 2008 through November 2008, you were found to have left your assigned work duties prior to the completion of your scheduled work shift. You admitted that you did not notify your supervisor that you were leaving work, and you did not complete the required paperwork showing you left work prior to completing the required number of work hours. You admitted that this absence without leave, and without notifying your supervisor, caused false entries to be made. This occurred on seven (7) dates totaling 23.7

hours.

You admitted that while on duty on two (2) occasions you went to a relative's house to watch a televised sporting event for an extended period of time, neglecting your supervisory responsibilities. This occurred on October 22, 2008 for approximately 1 hour and 20 minutes, and again on October 26, 2008, for approximately 3.5 hours. Based on these admissions, you failed to properly supervisor [sic] your subordinates.

Your absence without leave, as well as your being away from your assigned squad conducting personal business for extended periods of time, also constitutes a failure to properly supervise subordinates.

Disciplinary Points and Recommended Discipline Range:

Sergeant Haimes was found to be in violation of one (1) Level five (5) violation, one (1) Level four (4) violation, and one (1) Level three (3) violation, resulting in a cumulative point total of 95. By policy, this cumulative point total reverts back to 75 points. The recommended discipline range for 75 points is a ten (10) days suspension to termination.

Respondent was demoted from the rank of Sergeant to that of Deputy Sheriff, and was given an 80-hour suspension.

Respondent timely filed a notice of appeal with the PCSO's Civil Service Board, which referred the matter to the Division of Administrative Hearings (DOAH) under the contract entered into pursuant to Section 11, paragraph (8) of the Pinellas

County Sheriff's Civil Service Act as amended. The hearing was continued once before the final hearing was held on June 10, 2009.

At the hearing, the PCSO presented the testimony of Lieutenant Dale Jones, Captain Teresa Dioquino, and Sergeant Michael Holbrook. The PCSO presented the rebuttal testimony of Sergeant Michael Peasley; Toni Fino, a payroll clerk for the PCSO; and Lieutenant Timothy Pelella. The deposition testimony of Sergeant Bruce Hauck was also submitted into evidence. The PCSO's Exhibits 1 through 8, 18 through 33, and 35 were admitted into evidence. Respondent testified on his own behalf and presented the testimony of Grace Haines, Respondent's wife; Judith Haines, Respondent's mother; Corporal Matthew Hilliard; Sergeant Jeffrey Esterline; Sergeant Nathan Samoranski; retired Sergeant John Pikramenos; Sergeant Clark Wagner; retired Deputy John Paul Melton; Deputy Michael Smalley; Corporal Thomas Hoddinott; Deputy Randy Ream; Deputy James Vickers; and Rosalita Diana, Respondent's cousin. Respondent's Exhibit 1 was admitted into evidence.

A two-volume Transcript of the final hearing was filed at the DOAH on July 8, 2009. On July 9, 2009, the parties filed a joint motion for extension of the time for filing proposed recommended orders, which was granted by order issued on July 13, 2009. The order provided that the parties were to file

their proposed recommended orders no later than the close of business on August 24, 2009. Respondent filed his proposed recommended order on August 21, 2009. PCSO's proposed recommended order was filed at 8:00 a.m. on August 25, 2009, slightly later than time set forth in the order granting extension. Respondent has not objected to the late filing. Both parties' proposed recommended orders have been carefully considered in the writing of this recommended order.

Unless otherwise stated, all statutory references are to the 2008 edition of the Florida Statutes. References to the PCSO's General Orders are to the versions in effect at the time of the underlying events.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the following findings of fact are made:

1. Petitioner is the Sheriff of Pinellas County. The Sheriff commands the operations of the PCSO and is responsible for providing law enforcement and corrections services in Pinellas County, Florida. The Sheriff is authorized to impose discipline on PCSO employees, in accordance with the Pinellas County Sheriff's Civil Service Act.

2. At all times relevant to this proceeding, Respondent was employed by the PCSO as a Sergeant. Respondent worked in

one of three PCSO Statistical Tactical Analytical Response (STAR) units, elite patrol units that perform special assignments such as criminal surveillance and security for presidential visits. The regular hours for Respondent's STAR unit were from 5:00 p.m. until 3:00 a.m., though the unit's varied assignments often required that its members work an irregular schedule.

3. Lieutenant Dale Jones is the evening shift commander in the patrol division of the PCSO's main office. Lt. Jones oversees administrative and operational duties for his shift, including the maintenance of the official attendance records. When Lt. Jones is off duty, another lieutenant or a sergeant steps into the role of acting shift commander.

4. On September 30, 2008, acting shift commander Sgt. Bruce Hauck raised a question with Lt. Jones as to Respondent's attendance. Sgt. Hauck did not feel comfortable marking Respondent present for his entire ten hour shift, because Respondent was not where he was supposed to be when his STAR unit responded to an emergency situation. Sgt. Hauck checked the Global Positioning System (GPS) and Computer Assisted Dispatch (CAD), which record the location of a given patrol car at all times during its driver's shift. The GPS indicated that Respondent's car was at his residence for several hours of his

shift.¹ Respondent had given Sgt. Hauck no indication that he was taking time off on September 30.

5. Lt. Jones looked into the matter when he came to work the next day. He noted the discrepancy in Respondent's work hours and consulted his captain, Wayne Morris. Lt. Jones and Capt. Morris agreed that Lt. Jones should check Respondent's time entries over a period of time to determine whether September 30, 2008 represented an isolated instance of inaccurate accounting or was part of a larger pattern of discrepancies. Lt. Jones decided to review Respondent's time records for the entire month of September 2008, with the assistance of a computer expert regarding the GPS and CAD records.

6. Lt. Jones found records from several nights in September that caused him to question whether Respondent had worked a full shift and/or whether Respondent was in his assigned patrol area. Respondent had not requested time off on any of the nights in question.

7. Lt. Jones reported his findings to Captain Morris and Major Stephen Allen. Major Allen decided that the investigation should be turned over to the PCSO's Administrative Investigative Division (AID). Sergeant Michael Holbrook of the AID was assigned to conduct the investigation.

8. Sgt. Holbrook broadened the temporal scope of the investigation, with findings that ultimately included dates from August 20, 2008 through November 2, 2008. In addition to reviewing the GPS and CAD records, Sgt. Holbrook conducted interviews with Respondent and other PCSO employees with knowledge of the incidents in question. Sgt. Holbrook reviewed the PCSO's in-house e-mail system, Respondent's cell phone records, the PCSO's payroll and budgeting computer records, paper attendance logs and calendar books, and data from the PCSO key card system that records every employee's entrance and exit from PCSO facilities.

9. Sgt. Holbrook wrote an investigative report, dated November 6, 2008. The report concluded that there was a discrepancy of 23.7 hours on seven days between the time Respondent had been paid for working and the time that he was demonstrably at work. Sgt. Holbrook testified that he was not trying to "nitpick" and that Respondent was given the benefit of every doubt regarding his hours worked. Respondent was given credit from the time the computer in his patrol car was logged on until the time it was shut down.² Sgt. Holbrook reviewed Respondent's attendance records for the days adjoining those showing discrepancies, to make sure that Respondent had not "flexed" hours on those days.

10. Flex-time is a substitute for paid overtime. PCSO Personnel Rule 11 describes flex-time as "a scheduling method, based on operational needs of the Sheriff's Office and managed by supervisors, which allows members to take time off during normal duty hours preceding or following approved work outside of normal duty hours. Such time off will be on an hour off for hour worked basis." In other words, when a deputy has worked approved hours outside of his regular shift, he may shorten his regular shift for that day or may "flex" the time off on another day during the same pay period. Lt. Jones testified that deputies are not allowed to adjust their hours on their own. Flex-time must be approved by the commanding officer, who must ensure that there is adequate coverage for the shift in question.

11. The investigative report found that Respondent appeared to have been paid for 3.7 hours that he did not work on August 20, 2008; 2.0 hours on September 16, 2008; 3.0 hours on September 22, 2008; 3.5 hours on September 29, 2008; 8.5 hours on September 30, 2008; 1.0 hours on October 26, 2008; and 2.0 hours on November 2, 2008.

12. For August 20, 2008, CAD records indicated that Respondent began his shift at 1017 hours and logged out at 1633 hours.³ GPS records indicated that Respondent logged on and logged off of the system at or near his personal residence. Key

card records indicated that Respondent entered the SAB at 1045 hours and at 1523 hours. Cell phone records indicated that Respondent used the phone at times from 1142 hours and 1615 hours.

13. Sgt. Holbrook testified that he knew that the hours worked by Respondent did not coincide with his usual shift, but that he did not know whether the STAR unit had been assigned to some special detail requiring it to work odd hours. Sgt. Holbrook relied on the GPS records, which showed that Respondent worked 3.7 hours less than the ten hours for which he was paid.

14. Respondent had no firm recollection of the events of Wednesday August 20, 2008. He recalled that he had just returned from a cruise on the previous Sunday morning when he received a phone call from Lt. Jones telling him that his STAR unit had to come in early to cover patrol sectors. Respondent was also sure that his hours had been adjusted to reflect the change in his shift, but could not speak to the specific date in question. Respondent firmly denied having knowingly made a false entry or caused a false entry to be made into an official PCSO record.

15. On September 16, 2008, Respondent began his shift at 1616 hours.⁴ The CAD records showed no log-off time. GPS records indicated that Respondent started at 1616 hours and

ended at 2209 hours. Respondent also attended a two-hour training class on this date, making the cumulative total of his training and working time eight hours. Respondent was paid for a full ten hour shift, leaving a two hour shortfall. Key card records indicated that Respondent entered the SAB six times between 1531 and 2004 hours. Cell phone records indicated that Respondent used the phone at times between 0916 to 2244 hours.

16. Respondent again had no clear recollection of why his hours reflected a two hour shortfall. At about this time, he was experiencing problems with his patrol car's computer, which he believed might explain some of the discrepancy. Respondent also stated that during this period he often came into the office early to talk with members of the Criminal Investigations Division (CID) in an effort to maintain open communications between CID and his STAR unit. As with all of the other dates in question, Respondent was adamant that he did not intentionally falsify his time entries or attempt to be paid for time not worked. Respondent believed that he must have flexed the two hours on some other date, because such was the only explanation for the shortfall.

17. For September 22, 2008, GPS records indicated that Respondent started his shift at 1326 hours and ended his shift at 2024 hours. He started and ended the shift at or near his residence. Cell phone records indicated that Respondent used

the phone at times between 1332 hours and 2147 hours.

Respondent was paid for ten hours worked on this date, leaving a shortfall of three hours.

18. Respondent's shift for September 22 was changed because his STAR unit was assigned to the Belleview Biltmore hotel. Respondent's unit was assigned to work security for a campaign visit by then-candidate Barack Obama on September 23, 2008, and was engaged in a briefing detail at the site of the visit on the date in question. Respondent testified that his shift had to have been adjusted by his lieutenant, because as the sergeant he was not authorized to adjust that much time on his own. Respondent had no clear recollection to explain the shortfall in his hours, though again he insisted that he must have flexed the time because he would never intentionally cut his hours.

19. For September 29, 2008, Respondent's CAD records indicated two log-on and log-off times. Respondent first logged on at 1031 hours and logged off at 1047 hours. He logged on again at 1730 hours and logged off at 2350 hours. Respondent was paid for ten hours, and is recorded as working for just over 6.5 hours, leaving a shortfall of roughly 3.5 hours for the shift.

20. Respondent explained that the shortfall on September 29 was due to his having taken his patrol vehicle to

Dimmitt Chevrolet in Clearwater for repairs under a recall that affected all of the Chevrolet Impalas in the PCSO fleet.

Lt. Jones testified that deputies were allowed to take their cars to the dealer during their working hours, or could take the cars on their own time and then obtain flex credit for the hours, provided they did the proper paperwork or notified their superior of the schedule adjustment.

21. Respondent took his car to the dealership at 1030 hours, which accounted for the morning log in on his CAD records. Respondent testified that it took him about an hour to take the car to the dealership, receive service, hand over the keys, and return to his home. The dealership told him to expect the car to be ready by 3:00 or 3:30 p.m.

22. Respondent phoned Sergeant Jeffrey Esterline to ask for a ride back to the dealership at 3:00 p.m. Sgt. Esterline confirmed that he picked Respondent up at his home and dropped him off at Dimmitt Chevrolet at 3:00 p.m. on September 29. Sgt. Esterline had no idea how long Respondent waited at the dealership after he dropped him off.

23. Respondent testified that the car was not ready when he arrived at the dealership, and that he had to wait until at least 5:00 p.m. and possibly as late as 5:30 p.m. While he waited, Respondent phoned Corporal Matthew Hilliard and asked

him to convey to the commanding officer that Respondent would not make it for roll call at 5 p.m.

24. Respondent has actually accounted for the time discrepancy on September 29, 2008, if it is accepted that he spent one hour dropping off the car and waited roughly two and one half hours to pick up the car in the afternoon. The only question as to September 29 is whether Respondent properly flexed the hours that he spent dealing with the repairs to his vehicle. The issue of flexing procedure is discussed at Findings of Fact 43-59, infra.

25. On September 30, 2008, CAD records showed that Respondent logged on at 1440 hours and logged off at 0732 hours on October 1, 2008. The vehicle's GPS indicated that Respondent logged on at 1440 hours and logged off at 1606 hours. Respondent logged off at or near his home. Based on the GPS log, Respondent appeared to have worked for only 1.5 hours on September 30, though he was paid for a full ten hour shift.

26. Respondent conceded that he left work early on September 30, 2008, due to a situation at home with his wife. Respondent's wife, Grace Haines, testified that she had inadvertently overheard a phone conversation between her husband and another woman. The conversation made Mrs. Haines extremely upset. She phoned Respondent at work to tell him she was packing a bag, taking their children and leaving him.

27. Respondent told Cpl. Hilliard that he had to go home. Cpl. Hilliard was left in charge of the STAR unit and Respondent drove his patrol car to his residence, where he remained for the rest of his shift. Respondent testified that he had assumed that Cpl. Hilliard would take care of the "Form 30" paperwork to document his time off on that date. Respondent conceded that he did not expressly ask Cpl. Hilliard to complete the Form 30. In fact, Cpl. Hilliard did not fill out the paperwork for Respondent's time off on September 30, 2008.

28. For October 22, 2008, GPS data showed that Respondent's patrol vehicle remained stationary at his parents' residence between 2119 hours and 2246 hours. The date and time coincided with Game One of the 2008 World Series, which featured the Tampa Bay Rays. Respondent and his mother, Judith Haines, each testified that Respondent stopped at his parents' home during the game on October 22, 2008. Sgt. Holbrook did not include October 22, 2008 in his investigative report and did not count any work time missed on that date as part of the 23.7 cumulative hours that Respondent is alleged to have been paid without working.

29. For October 26, 2008, CAD records indicated that Respondent logged in at 1628 hours. The GPS records from his patrol vehicle indicated that Respondent's activity ended at or near his residence at 2351 hours. Respondent submitted a Form

30 for two hours' sick leave on October 26. The two hours' sick leave plus the roughly seven hours at work equaled nine hours. Respondent was paid for ten hours' work on October 26, 2008.

30. On October 26, Respondent's subordinates in the STAR unit had been assigned to special duty under another sergeant. Respondent was therefore designated as patrol unit "S30B," meaning that for that evening he was the road supervisor for patrol Squad Three. The squad's regular supervisor, Sergeant Michael Peasley, had been injured and was restricted to light duty in the office. Prior to the commencement of the shift, Sgt. Peasley met with Respondent.

31. Respondent testified that Sgt. Peasley told him that his corporal would be out on the road supervising the squad and that Sgt. Peasley would be available in the office to take calls from the deputies on the road. Also, a third sergeant, Joseph Gerretz, would be working with Squad Three. According to Respondent, Sgt. Peasley told him, "We've got it covered," and that Respondent needed only to listen for pursuits or other emergency situations.

32. Sgt. Peasley testified that he never intended to give Respondent the impression that he was not needed to supervise Squad Three. Sgt. Peasley concurred that he said he would handle administrative matters in the office and that he would be monitoring his squad, but denied telling Respondent anything

that should have made him think he was relieved of his operational duties to supervise the squad in the field.

33. In any event, on the evening of October 26, 2008, Game Four of the World Series was played. From 2004 hours until 2331 hours, Respondent's patrol vehicle was stationary at his parents' residence. Respondent admitted that he was watching the World Series game at his parents' house.

34. Respondent testified that he stopped by to see his parents and somehow got caught up in watching the game. At all times, Respondent was monitoring his radio and would have heard if a deputy called S30B. Every ten or fifteen minutes, Respondent would walk out to his patrol car to check the computer. Respondent also had his cell phone. Respondent freely admitted that he should have been out on patrol rather than watching the game at his parents' house, but denied that he was absent without leave from his job.

35. Respondent's mother credibly corroborated his testimony that he constantly monitored his radio and would go out to the car between innings. In fact, she found Respondent's radio irritating because it interfered with the sound from the television. Respondent was wearing his full patrol uniform and did not sit down while he watched the game.

36. For November 2, 2008, CAD records indicated that Respondent logged in at 1626 hours and logged out at 0056 hours

on November 3, showing a two hour shortfall from the ten hours for which Respondent was paid. Because Respondent was taking several days of vacation after November 2, 2008, he was required to leave his patrol car at the SAB at the close of his shift. Respondent asked his second-in-command, Cpl. Hilliard, to give him a ride home.

37. Both Respondent and Cpl. Hilliard testified that they considered themselves on duty and supervising their unit while Cpl. Hilliard drove Respondent home at about 1 a.m.⁵ Both men were monitoring their radios, and their subordinates were aware that Cpl. Hilliard was taking Respondent home.

38. Cpl. Hilliard testified that he and Respondent left no specific instructions as to who was supervising the squad while he gave Respondent a ride home. Cpl. Hilliard stated that he would have turned his car around and gone to help a deputy had there been an emergency.

39. Respondent contended that he was entitled to flex the two hour shortfall on November 2, 2008, because he had taken some new uniform shirts to the cleaners to be altered. Sgt. Holbrook confirmed that PCSO employees may flex time for taking their uniforms for alteration, but only if they go to one of three designated cleaners. These cleaners perform the alterations at no charge to the individual employee. The PCSO pays the cleaners for the alterations. Sgt. Holbrook testified

that one of the designated cleaners, Americana Cleaners, is about a mile and a half from the SAB, and another is in the northern part of the county, closer to Respondent's home.

40. However, Respondent did not take his shirts to one of the designated cleaners. He went to Royal Cleaners, at the intersection of Alderman Road and U.S. 19, about 20 minutes from his house. Royal Cleaners is operated by Respondent's aunt, Rosalina Diana, who also does tailoring.

41. Respondent testified that he had just been issued nine new long-sleeved shirts. A cold snap had come through Pinellas County, and Respondent wanted to wear these warm shirts as soon as possible. He had always used Americana Cleaners, though it was far from his house and closed at 5:00 p.m. On this occasion, he took the shirts to Royal Cleaners because it was more convenient and because he knew his aunt could quickly perform the alterations to the shirts. Respondent paid for the alterations out of his own pocket in the interest of saving time.

42. If a deputy is willing to absorb the cost of alterations, it seems unfair to disallow him flex-time to take his uniforms to the cleaners of his choice, provided the location is a reasonable distance from the SAB or is on the deputy's route from home to the SAB.⁶ However, even if Respondent was entitled to flex the time he spent taking his

shirts to Royal Cleaners, there remains the question whether he could flex the time without submitting paperwork.

43. In each instance of a discrepancy between time paid and recorded time worked, Respondent claimed that the only possible explanation was that he flexed the differential. Even on those shifts that he could not clearly recall, Respondent was adamant that he never intentionally shorted his time and that he must have flexed the hours. The PCSO responded that Respondent could not have flexed the hours in question without creating a record and obtaining approval pursuant to PCSO Personnel Rule 11. See Finding of Fact 10, supra.

44. Personnel Rule 11 requires that employees performing approved work for subsequent flex-time off "will submit a Request for Overtime Compensation to a supervisor immediately after the time worked. Overtime that has been flexed must be so noted on the overtime memo. The form will be forwarded to Fiscal."

45. Respondent did not notify his supervisors of his intention to flex hours in the situations presented by this case, and he did not submit the paperwork to document the changes to his schedule. On the following dates, Respondent simply submitted paperwork indicating that he worked a regular ten-hour shift despite the fact that records indicated he worked fewer than ten hours, and Respondent had no explanation for the

discrepancy: August 20, 2008, September 16, 2008, September 22, 2008, and October 26, 2008.

46. For September 29, 2008, Respondent accounted for the time differential through his testimony regarding the warranty repairs to his patrol car, but he did not file the required paperwork to indicate that he did anything other than work a regular ten-hour shift. For September 30, 2008, Respondent explained his 8.5 hour absence from work through his testimony regarding the emergency situation with his wife, but again allowed paperwork to be filed indicating that he worked a regular ten-hour shift. For November 2, 2008, Respondent explained the two hour differential as flex-time for having taken his shirts to be altered, but again allowed paperwork to be submitted indicating that he worked a regular ten-hour shift.

47. Sgt. Holbrook testified that he investigated all of the days in the relevant pay periods in an effort to find documentation that Respondent had worked extra hours to balance the shortfalls, but he could find no such extra time.

48. Respondent contended that, during the time period in question, there was no strict requirement that paperwork be filed for flex time in the STAR unit. Flexing, rather than paid overtime or comp time, has been used more extensively by the PCSO in light of the budget crises of the past few years, and Respondent testified that it was commonplace for deputies to

flex time without submitting paperwork. Respondent testified that the paperwork requirement has only been enforced since the investigation into his time entries, and that throughout the PCSO, the requirement is known as the "Bobby Haimes Rule."

49. Several current and former PCSO employees testified in support of Respondent's contention. Cpl. Hilliard testified that when he flexed hours, he told his sergeant that he was doing so but filled out no paperwork. He did not know whether the sergeant or lieutenant in charge later filled out the paperwork.

50. Sgt. Esterline was asked whether paperwork was filled out for flexing when he worked in the Narcotics division, and answered as follows:

There was a time when there was no paperwork filled out, and over the years there has been numerous incidents that have changed the way we do payroll. Usually, it's an incident that happens that causes some tightening up of the policies, but it depends on who you work for and where you work for them and what the policy was. It's been done in different places for years.

51. Sgt. Esterline testified that Respondent's troubles had ended the practice of flexing without paperwork, and caused a new procedure to be instituted whereby deputies are required to fill out paperwork even when they take flex-time off on the same day they worked extra off-shift hours.

52. Sergeant Nathan Samoranski, a 22-year veteran of the PCSO, testified that he had always done flexing with paperwork until he was transferred to the STAR unit in 2008. When he moved to the STAR unit, Sgt. Samoranski was told that he did not need to fill out paperwork for same-day flexing. He told the timekeeper that he would prefer to do paperwork for all flexing, and was told that he could require paperwork for the deputies under his command.

53. John Pikramenos, who retired in 2008 after 30 years with the PCSO, was a STAR sergeant with the north county unit, though he never worked with Respondent. Mr. Pikramenos testified that throughout his career, the people who worked for him flexed without paperwork, provided they gave him notice and flexed the hours on the same day. He would do paperwork if more than an hour or two was being flexed, or if the deputy was taking flex-time off on a different day than the one on which the time flexed was worked.

54. Sergeant Clark Wagner has been in the K9 unit for four years but worked in the same STAR unit as Respondent for the two immediately preceding years. Sgt. Wagner testified that flexing without paperwork was ubiquitous until six to eight months ago, when the directive was issued that paperwork must be done for same-day flexing. Prior to the directive, deputies would

commonly flex two hours without paperwork, provided their supervisors were aware that they were flexing.

55. Deputy Michael Smalley has spent nine years with the PCSO, two of which were in the STAR unit. Dep. Smalley testified that the STAR unit flexed without paperwork "all the time" provided the sergeant knew about it. He did not know how the time was entered in the unit's attendance book. Dep. Smalley only knew that there was no problem so long as the deputy worked a total of 40 hours for the week.

56. Deputy Randy Ream, who has worked in the DUI and vice squads, testified that same-day flexing without paperwork stopped in the DUI squad as soon as Respondent was disciplined.

57. Deputy James Vickers has worked in the K9 unit since January 2001 and earlier worked in the DUI squad. Dep. Vickers testified that same-day flexing without paperwork was commonplace throughout the special operations divisions of the PCSO, until the change occurred in the past year. Dep. Vickers confirmed that the change is referred to as the "Bobby Haines Rule."

58. All of these witnesses supported Respondent's assertion that same-day flexing without paperwork was common throughout the PCSO, despite the formal requirements of Personnel Rule 11. However, none of these witnesses testified that it was ever the practice in the PCSO for employees to flex

hours without first notifying their superiors. The evidence established that, except for September 30, 2008, when he informed Cpl. Hilliard that he was going home to deal with his wife, Respondent never gave notice to a superior or acting supervisor that he was flexing the hours that he now claims to have taken.

59. Further, Respondent's supporting witnesses also confirmed under cross-examination that no amendment was made to the PCSO's General Orders or Rules and Regulations in order to give effect to the "Bobby Haines Rule." They understood that no amendment was necessary because the practice of same-day flexing without paperwork was never in keeping with Personnel Rule 11, and that the practice was undertaken with a wink and a nod by some sergeants, corporals and deputies in certain units of the PCSO. In his testimony before the Administrative Review Board, Respondent claimed that he was unaware that the General Orders required documentation of flex-time. The evidence clearly demonstrated that superior officers such as Lt. Jones were unaware that flexing without paperwork was happening in their commands. The "Bobby Haines Rule" was simply the incident that caused "some tightening up" of the enforcement of the personnel rules that had always been in place.

60. Even if Respondent's claim is credited, and it is accepted that he took flex-time for the missing hours but

followed the then-common practice and failed to submit paperwork, the problem remains that there is no documentation that Respondent actually worked the extra hours that would have entitled him to take flex-time off. Lt. Jones and Sgt. Holbrook made diligent efforts to document the extra hours, but could not find them in the records. Aside from his testimony regarding the September 29, 2008, car repairs and the November 2, 2008, trip to the cleaners, Respondent could provide only speculation and vague guesses as to how he might have earned flex-time on the dates in question.

61. General Order 3-1 establishes the standard of conduct expected of members of the PCSO. The disciplinary system is divided into five categories, from Level One to Level Five, in increasing order of seriousness. General Order 3-1.1 sets forth Level Five violations, and includes Rule and Regulation 5.14, "Conduct Unbecoming Members of the Agency," which further subsumes Rule and Regulation 5.14c, "Knowingly making a false entry or cause a false entry to be made in any official record of the agency."

62. A preponderance of the evidence established that Respondent caused false entries to be made in official records of the agency, in that he allowed inaccurate time entries to be made and accepted the payments generated by those inaccurate entries. Respondent conceded that false entries were made, at

least insofar as he failed to document the extra hours for which he claimed to have earned flex-time. The only point in question is whether Respondent "knowingly" caused false entries to be made in the PCSO's official records.

63. The PCSO's rules do not include a special definition of the term "knowingly," which indicates intent to rely on common legal usage of this term, which entails concepts of willful or intentional action. In the context of Rule and Regulation 5.14c, it may be said that an employee "knowingly" acts when he makes a false entry with actual knowledge of the requirements of the personnel rules, or makes a false entry with deliberate ignorance or reckless disregard of the requirements of the personnel rules. In this case, Respondent claimed not to have actual knowledge that Personnel Rule 11 required documentation of flex-time. If this claim were credited, the question would then arise whether a sergeant with 19 years of experience in the PCSO could be unaware of his agency's personnel rules in the absence of deliberate ignorance or reckless disregard. Respondent's claim of ignorance is not plausible.

64. Respondent presented evidence sufficient to establish that the practice of same-day flexing without paperwork was commonplace within certain units of the PCSO. However, the evidence also established that most employees indulging in the

practice understood that they were not complying with the PCSO's rules, and that their superior officers were unaware that the rules were not being followed. Respondent was not "singled out" for punishment. He merely had the bad luck of being the first person caught casually violating Personnel Rule 11 in this fashion, which in turn triggered an agency-wide tightening of enforcement of the paperwork requirement. The totality of the evidence established that Respondent believed it was acceptable to flex without paperwork because other people did so and no punishment ever seemed to ensue, not because he believed that PCSO rules permitted the practice. The preponderance of the evidence established that Respondent knowingly caused false entries to be made in the official records of the PCSO, in violation of Rule and Regulation 5.14c.

65. General Order 3-1.2 sets forth Level Four violations, and includes Rule and Regulation 4.9, "Improper Conduct by Members of the Agency," which further subsumes Rule and Regulation 4.9b, "Absence without leave from duty." Respondent is alleged to have violated Rule and Regulation 4.9b when he spent a portion of his October 26, 2008 shift at his parents' house watching the World Series.

66. Respondent conceded that he watched the World Series at his parents' house while on duty, but contends that he should not be charged with the Level Four offense of being absent

without leave. Respondent asserts that it would be more appropriate to charge him with a violation of Rule and Regulation 3.13, which forbids, among other things, "loafing" and "idling" while on duty. Rule and Regulation 3.13 is a Level Three violation.

67. In his defense, Respondent noted that he was in uniform, constantly monitored his radio, and periodically went to his patrol car to check his computer while he stood and watched the baseball games. Respondent's mother credibly supported his description. As to the evening of October 26, Respondent testified that he had no one under his command and that he was needed only for pursuits or other emergencies. Sgt. Peasley, the regular supervisor of Squad Three, denied telling Respondent that he was not needed to patrol as the S30B on the night of October 26, 2008.

68. Rule and Regulation 4.9b does not define the term "absent without leave from duty."⁷ However, under any common sense reading of the term, it is clear that Respondent was not present at his place of duty for approximately three and one-half hours on the night of October 26, 2008, while he watched a World Series game at his parents' house. He may also have been "loafing" or "idling" while at his parents' house, but such does not disprove that he was absent from his place on patrol as the road supervisor for Squad Three. As Chief Deputy Gualtieri

admonished Respondent at the Administrative Review Board, "As long as there is a deputy on the street, you've got somebody to supervise." The preponderance of the evidence established that Respondent was absent without leave from duty, in violation of Rule and Regulation 4.9b.

69. General Order 3-1.3 sets forth Level Three violations, and includes Rule and Regulation 3.31, "Inappropriate Conduct by Members of the Agency," which further subsumes Rule and Regulation 3.31g, the relevant portion of which includes, "Failure to properly supervise subordinates...." Respondent is alleged to have violated Rule and Regulation 3.31g when he left his squad unattended while Cpl. Hilliard drove him home on November 2, 2008, and when he spent a portion of his October 26, 2008 shift at his parents' house watching the World Series. Based on the findings of fact above, the preponderance of the evidence established that Respondent failed to properly supervise subordinates, in violation of Rule and Regulation 3.31g, on both occasions.

70. General Order 10-2 sets forth the PCSO's disciplinary procedures, including the scale to be used in determining the amount of discipline rendered for sustained violations, based on their severity. The Progressive Discipline Worksheet prepared by the PCSO in accordance with the point scale found in General Order 10-2 assigned 50 points to the single Level Five violation

sustained against Respondent, 30 points for the single sustained Level Four violation, and 15 points for the single sustained Level Three violation, for a total of 95 points.

71. Rule and Regulation 10-2.6D provides that if the point value falls between disciplinary ranges, the lower point value is to be used in determining discipline. Respondent's total fell between 75 and 100+ points on the disciplinary range, and therefore he is subject to the range of discipline provided for a total of 75 points.

72. The minimum discipline for 75 points is a ten day suspension. The maximum discipline is termination. General Order 10-2 also reserves to the Sheriff the right to demote a supervisor as part of the disciplinary process.

73. The Sheriff concluded that Respondent should be demoted from the rank of sergeant to that of deputy, and that he should receive the minimum ten day suspension. The preponderance of the evidence shows that this is a reasonable penalty.

CONCLUSIONS OF LAW

74. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

75. The Pinellas County Sheriff's Civil Service Act governs these proceedings and authorizes the Sheriff to take

disciplinary actions against classified employees such as Respondent.

76. Section 8 of the Pinellas County Sheriff's Civil Service Act sets forth the duties and authority of the Civil Service Board, which hears appeals arising from personnel actions that could result in dismissal, suspension for more than one working day, demotion, or reduction in base pay for disciplinary or job performance reasons. Subsection (3) of Section 8 sets forth the scope of the Civil Service Board's review:

... In hearing appeals, the Civil Service Board shall:

(a) Determine whether the aggrieved member engaged in conduct prohibited by section 6 [setting forth causes for suspension, dismissal or demotion] or by a departmental rule promulgated by the Sheriff;

(b) Determine whether the action taken against the aggrieved member is consistent with action taken against other members; and

(c) Make findings of fact and state a conclusion as specified in subsection (6).⁸

77. The burden of proof in an administrative proceeding is on the party asserting the affirmative of the issue unless the burden is otherwise established by statute. 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). 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.

78. For reasons stated in the Findings of Fact, a preponderance of the evidence supports a finding that Respondent is guilty of committing the three violations alleged by Petitioner in the charging document, and that demotion and a ten day (80 hour) suspension is a reasonable penalty.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered finding that Respondent engaged in the prohibited conduct alleged by the charging document, and upholding the discipline imposed by the Sheriff as recommended by the Administrative Review Board.

DONE AND ENTERED this 8th day of October, 2009, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of October, 2009.

ENDNOTES

^{1/} Respondent's residence was in the extreme northern part of Pinellas County, whereas his STAR unit was working "South County," i.e., everything south of Gulf-to-Bay Boulevard (State Road 60).

^{2/} Evidence at the hearing established that deputies drive their patrol cars home after work, and are required to turn on the car's computer (which includes the GPS) at the time they leave home for their next shift. However, deputies are not paid for their travel time from home to their office. Respondent lives more than twenty miles from the Sheriff's Administration Building (hereinafter referred to as the SAB) to which he reported for duty during the period in question, meaning that Sgt. Holbrook credited Respondent for a significant amount of time during which Respondent was not technically on the clock.

^{3/} PCSO records employ military time. For ease of referral, this Recommended Order will retain the military time format.

^{4/} In this instance, Respondent was not credited with driving time from his residence. The GPS in his patrol car indicated that Respondent logged on at his house at 15:42 hours.

^{5/} In this instance, Respondent was not credited with the driving time for the approximately 20 mile ride home with Cpl. Hilliard, presumably because he was not in his own vehicle and GPS records were therefore not available.

^{6/} In addition to Sgt. Holbrook's testimony, a colloquy between Respondent and Chief Deputy Robert Gaultieri at the Administrative Review Board indicated that employees were not allowed to choose their own tailors. In fact, Chief Deputy Gaultieri called the notion "a bunch of nonsense." However, Petitioner offered no rule or regulation of the PCSO that requires deputies to use only certain cleaners. At the hearing, the undersigned was left with the impression that the restriction is a contractual arrangement between PCSO and certain cleaners, not a matter of agency policy.

^{7/} Article 86 of the Uniform Code of Military Justice, 10 U.S.C. § 886, provides the following under the title, "Absence without leave:"

Any member of the armed forces who, without authority—

(1) fails to go to his appointed place of duty at the time prescribed;

(2) goes from that place; or

(3) absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed;

shall be punished as a court-martial may direct.

There is no authority to strictly apply the UCMJ definition to an employee of the PCSO. However, this definition is useful in arriving at a workable distinction between "absence without leave" and "loafing" or "idling."

^{8/} Subsection (6) of Section 8 provides as follows:

Within 10 days of the conclusion of the appeals hearing, or receipt of the proposed recommended order from the Division of Administrative Hearings, whichever is longer, unless the parties agree to a longer period, the Civil Service Board, by a majority vote, shall dispose of the appeal and shall make findings of fact and state a conclusion; such findings of fact and conclusion shall be separately stated and shall be in writing. Such conclusion shall either sustain, modify, or not sustain the action being appealed. Upon a finding that cause did not exist for a suspension, demotion, reduction in pay, or dismissal, the Civil Service Board shall reinstate the appellant and direct the Sheriff to pay the appellant for the period of any suspension, demotion, loss of pay, or dismissal. The Civil Service Board shall not have the authority to impose any penalty more severe

than that which formed the basis of the appeal. Should the Civil Service Board be unable to reach a majority decision on any appeal, the personnel action taken shall be sustained.

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.