STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS COUNTY SHERIFF'S OFFICE,

Petitioner,

vs. Case No. 15-0952

RAYMOND FERRIO,

Respondent.
_____/

RECOMMENDED ORDER

An evidentiary hearing was held on July 22, 2015, by video teleconference with sites in St. Petersburg and Tallahassee, Florida, before Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Paul Grant Rozelle, Esquire
Pinellas County Sheriff's Office
10750 Ulmerton Road
Largo, Florida 33778

For Respondent: Brandi L. Hawkins, Esquire
The Cochran Firm, South Florida
657 South Drive, Suite 304
Miami Springs, Florida 33166[1/]

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner properly terminated Respondent's employment as a deputy sheriff for engaging in conduct that violated General Order 3-1.1, Rule and

Regulation 5.15, governing the custody of arrestees and prisoners.

PRELIMINARY STATEMENT

On January 16, 2015, Petitioner, the Pinellas County Sheriff's Office (Petitioner or PCSO), determined that Respondent, Raymond Ferrio, engaged in prohibited conduct that violated Petitioner's General Order 3-1.1, Rule and Regulation 5.15, Custody of Arrestees/Prisoners. On January 20, 2015, Respondent was notified that as a result of the determination, his employment as a PCSO deputy sheriff was terminated. Respondent timely filed a notice of appeal to contest the termination, and Petitioner referred the matter to DOAH to conduct an administrative hearing.

With the parties' input, the hearing was originally set for May 6, 2015, by video teleconference between St. Petersburg and Tallahassee, Florida. In March 2015, Respondent's original counsel sought and was granted leave to withdraw. On April 20, 2015, Ms. Hawkins filed a Notice of Appearance for Respondent. On April 23, 2015, the parties filed a joint motion for continuance, which was granted, and the hearing was rescheduled for July 22, 2015.

A variety of motions were filed in the two weeks before the hearing; the motions and their disposition are reflected on the docket. The parties filed a Joint Pre-Hearing Stipulation

setting forth several admitted facts and agreed issues of law. The stipulations are incorporated below to the extent relevant.

At the hearing, Petitioner presented the testimony of Sheriff Bob Gualtieri, the Pinellas County Sheriff; Paula Rogers, a medication nurse at the Pinellas County Jail; and Respondent.

Respondent presented additional testimony on his own behalf. Respondent did not call any other witnesses.

The parties offered Joint Exhibits 1 through 16, which were admitted in evidence. In addition, during the hearing, the parties requested leave to keep the record open to receive as Joint Exhibit 17 a compact disc (CD) containing the entire investigative file, to be transmitted post-hearing by Petitioner. The post-hearing transmittal was allowed, and Joint Exhibit 17 was admitted for the limited purpose of documenting what was considered by Petitioner in making the decision to terminate Respondent's employment.[2/] Neither party offered any exhibits besides the 17 joint exhibits.

The hearing Transcript was filed on August 19, 2015. By agreement at the end of the hearing, the deadline to file proposed recommended orders (PROs) was set for September 3, 2015. The parties timely filed their PROs, which have been considered in preparing this Recommended Order.

On September 4, 2015, an unsigned two-page letter was received by DOAH. In the first paragraph, the representation was

made that the letter was written and submitted by Respondent's spouse. The undersigned stopped reading after the first paragraph, on the assumption that the letter was a prohibited communication regarding the merits of the case. A Notice of Ex-Parte Communication was issued on September 9, 2015, apprising the parties of the prohibited ex-parte communication and placing the letter on the record (but not in the evidentiary record) of this proceeding, as required. See § 120.66, Fla. Stat. (2015).[3/] Both the fact that the letter was submitted and its unread contents have been disregarded.

FINDINGS OF FACT

Admitted Facts

1. Bob Gualtieri is the duly-appointed Sheriff of Pinellas County, Florida.

2. Sheriff Gualtieri is in command of the operations of PCSO.

3. Sheriff Gualtieri's responsibilities include providing law enforcement services within Pinellas County.

4. Sheriff Gualtieri is authorized to impose discipline, in accordance with the Civil Service Act, on PCSO members and employees who are found to violate PCSO rules or regulations.

5. At all times pertinent to this case, Respondent was employed by PCSO as a deputy sheriff. At the time of his

termination, Respondent had been employed by PCSO for approximately 14 years.

6. As a deputy sheriff, Respondent was charged with the responsibility of complying with all PCSO rules, regulations, general orders, and standard operating procedures.

7. PCSO General Orders require that PCSO "members shall use only that degree of force necessary to perform official duties. The member shall not strike or use physical force against a person except when necessary in self-defense, in defense of another, to overcome physical resistance to arrest, to take an individual into protective custody, or to prevent escape of an arrested person." PSCO General Order 13-3.1(A).

8. Respondent used force on an inmate at the Pinellas County Jail on October 1, 2014.

9. A complaint of misconduct was filed against Respondent on or about October 6, 2014. The complaint alleged that on October 1, 2014, Respondent violated General Order 3-1.1, Rule and Regulation 5.15, pertaining to the custody of arrestees/prisoners.

10. An investigation was conducted by Petitioner's Administrative Investigations Division. The investigation record was provided to Petitioner's Administrative Review Board, which considered the complaint of misconduct and determined that

Respondent's use of force on October 1, 2014, constituted a violation of General Order 3-1.1, Rule and Regulation 5.15.

11. Pursuant to PCSO General Orders, 50 points were assigned to the sustained violation found by the Administrative Review Board.

12. Respondent had 30 carryover points from prior discipline.

13. Pursuant to PCSO General Orders, the 80-point total reverts to 75 points, for which the authorized discipline ranges from a ten-day suspension to and including termination of employment.

14. Sheriff Gualtieri terminated Respondent's employment with PCSO.

Additional Facts Found

15. The central dispute to be resolved is whether Respondent's use of force on October 1, 2014, was necessary and not excessive, as Respondent contends, or was unnecessary and excessive, as Petitioner contends.

16. On the day in question, Respondent was working as a deputy sheriff in the healthcare division of the Pinellas County Jail. He was stationed at the duty desk located between two "pods"--open housing areas for inmates.

17. At the doorway to one of the pods, a medication nurse was performing "med pass," i.e., she was passing out medications

to inmates from a medication cart. A deputy--not Respondent--stood in the pod doorway next to the nurse, to supervise and provide security. Inside the pod, near the doorway, a few inmates waited in line for their medication.

18. The deputy supervising med pass, Deputy Pettiford, was also calling the names of some of the inmates in the pod for "sick call," meaning the inmates were to be taken from the pod to the healthcare clinic.

19. One of the inmates waiting in the med pass line whose name was called for the clinic was Eugene Borkowski, a sickly-looking elderly man in a wheelchair. At the time, he was 63 years old, but he looked more frail and older than someone that age. He had Parkinson's disease. He had been housed in the healthcare division for months, and had never caused a problem or been involved in a use of force by staff.

20. When Mr. Borkowski's name was called for sick call, he refused to go. At first, he ignored Deputy Pettiford when she called his name. The deputy called his name a few more times, and he responded verbally, saying, and then yelling, with a sprinkling of profanities, that he was not going to go and that he would have to be dragged down there. Mr. Borkowski's behavior was verbal only; he remained in place in his wheelchair in line to receive his medication. By all appearances from the video evidence captured on two security cameras, Mr. Borkowski's verbal

outbursts were unremarkable, in that several inmates milling about the pod continued to go about their business, and nursing staff continued to administer medications, seemingly undisturbed.

21. Without anyone asking for his assistance, Respondent took it upon himself to leave the desk area outside of the pod, enter the pod, and address Mr. Borkowski.[4/]

22. The video evidence shows that in a matter of seconds, Respondent entered the pod, walked up to Mr. Borkowski in his wheelchair, slowed down slightly at the side of the wheelchair (appearing to be stepping around something on the floor), and continued seamlessly around the wheelchair to stand behind it, grab the handles, and start pushing the wheelchair towards the pod doorway.

23. Mr. Borkowski put his feet on the floor to stop the forward movement of the wheelchair. When he did so, he rose slightly to a partial standing position for a fraction of a second, then immediately returned to a seated position. When Mr. Borkowski braced and tensed in this manner, he had his back to Respondent; Respondent stood behind the wheelchair and Mr. Borkowski faced forward. He did not turn around towards Respondent, even in part.

24. Respondent then moved to the right side of the wheelchair, placing his left hand on Mr. Borkowski's back. Respondent's left arm rose up Mr. Borkowski's back, and when it

reached above the shoulder to the neck area, Respondent's left arm wrapped around Mr. Borkowski's neck, controlling his neck and head. Respondent admitted that his arm was "probably" underneath Mr. Borkowski's chin. (Tr. 140). Then, in rather startling violent fashion, Respondent lifted Mr. Borkowski up from his wheelchair seat by his neck and head and slammed him face down to the floor with enough force to break Mr. Borkowski's dentures into pieces and topple the wheelchair. The wheelchair landed upended near the pod doorway. Respondent pinned a flattened Mr. Borkowski to the floor, with Respondent's left knee pressing on the inmate's back.

25. There was some evidence that after Respondent moved to the right side of the wheelchair, either just before or at the same time as Respondent began his takedown, a small paper or plastic cup that had been in Mr. Borkowski's right hand was dislodged, either going up in the air or up and backward. The cup may have had a small amount of water in it, or it may have been empty. Respondent testified that Mr. Borkowski tried to throw his cup at Respondent. However, if the cup was thrown on purpose, it was not thrown in the direction of Respondent, who was next to--not behind--the inmate; neither the cup nor any contents that may have been in the cup came into contact with Respondent. The evidence does not support a finding that Mr. Borkowski aggressively attacked Respondent by throwing a cup

of water at Respondent. Instead, it is more plausible that: the cup was dislodged when Respondent began the takedown; this inmate with Parkinson's disease involuntarily lost his grip; or the inmate intended to throw the cup as a distraction, not aimed at Respondent or anyone else.

26. Respondent also offered, as justification for the takedown, his testimony that when he moved to the right of the wheelchair, he felt something that he perceived to be Mr. Borkowski's hand on Respondent's left side, where Respondent's Taser and radio were. Here too, however, Respondent's statements were inconsistent. In the incident report that he was required to complete, Respondent stated that Mr. Borkowski grabbed Respondent's shirt. When questioned, however, Respondent said that his statement had been inaccurate. Respondent conceded that Mr. Borkowski did not actually grab Respondent or Respondent's shirt. But as to what actually happened, Respondent offered a variety of different statements: it was an attempted grab, not really a grab at all; Respondent perceived something like a grab with an arm, hand, or something; or Respondent just had a perception of something. Ultimately, Respondent admitted that what he perceived he felt may have been nothing more than the side of the wheelchair.

27. Respondent acknowledged that when he perceived whatever he perceived, he did not actually see Mr. Borkowski move a hand

or arm towards Respondent. The video evidence appears to confirm that there was no such movement.

28. After the takedown, not surprisingly, the inmate struggled with Respondent on top of him. Respondent secured one of the inmate's hands fairly quickly, but then struggled to secure the inmate's other hand behind his back to cuff him. The videos show Respondent on top of the inmate, using both upper and lower limbs to deliver blows to the inmate's side and up around his head. While it is impossible to discern from the video whether Respondent delivered full closed-fisted punches, it does appear that Respondent delivered blows of some kind, pulling both arms and right leg back, then forcefully moving them forward to connect with not only the inmate's body, but also the inmate's head. Whether the blows were administered with Respondent's knees, fists, or both cannot be determined, but the difference is inconsequential. Respondent acknowledges that he delivered at least four knee strikes to Mr. Borkowski for pain compliance, although Respondent said that the strikes were delivered to the inmate's torso. Respondent testified that he did not remember whether he punched Mr. Borkowski, although he did admit that it was possible that he punched the inmate.

29. After the takedown, while Respondent was on the floor struggling with Mr. Borkowski, Deputy Pettiford came into the pod with her Taser. After she attempted ineffectively to deliver a

drive-strike to the inmate, Respondent grabbed her arm with the Taser and brought the Taser into contact with Mr. Borkowski.

30. As a result of the takedown, Mr. Borkowski suffered cuts and bruising to the head and face, and his dentures were broken in pieces.

31. Respondent denied that he anticipated a use of force when he left his desk to go into the pod, but he offered conflicting versions to explain what he intended to do when he left his desk to go into the pod: during his investigation, Respondent initially said that Mr. Borkowski could not refuse to go to the clinic, so he went in to take Mr. Borkowski out of the pod to speak with Corporal Bolle, who was nearby in the pod on the other side of the officer's station. Later, after acknowledging that Mr. Borkowski had the right to refuse to go to the clinic, Respondent said that he went into the pod only planning to speak with Mr. Borkowski to try to convince him to stop yelling. Finally, in a blend of the two versions, Respondent said that he went into the pod only with the intent of speaking with Mr. Borkowski to calm him down, but that Mr. Borkowski's behavior escalated to aggression and at that point Respondent decided to remove the inmate from the pod out of concern for staff and other inmates.

32. The evidence does not support Respondent's explanation that he only intended to talk to Mr. Borkowski to calm him down.

The video display shows that hardly more than a second passed from the time Respondent entered the pod and approached Mr. Borkowski to when Respondent moved to the back of the wheelchair and began pushing Mr. Borkowski towards the doorway to exit the pod. If a calming talk was the objective, Respondent gave up pretty quickly. Apparently, Respondent did not consider or deliver the one calming line that would have addressed the inmate's problem--telling him that if he did not want to go to the health clinic, he did not have to go to the health clinic.

33. As Respondent admitted, inmates have the right to refuse to go to the health clinic. Sheriff Gualtieri convincingly explained the significance of that right here:

> Even if you're in jail, you have rights. Even if you're in jail, you don't have to eat the food. You don't have to go see the doctor. There are a lot of things you don't have to do. And if you don't want to go see the doctor, you shouldn't be forced to go see the doctor. I mean, it's real clear. The healthcare practitioner can come see him. But engaging to that extent all over the fact that the man didn't want to go to sick call, that is just so wrong. (Tr. 52).

34. The evidence also does not support Respondent's explanation that he only made the decision to remove the inmate from the pod when the inmate's behavior escalated. Instead, until Respondent attempted to push the wheelchair towards the pod exit, Respondent admitted that the inmate was not irate and that his behavior had not escalated beyond mere verbal resistance to

being taken to the clinic. The video evidence confirms that in the scant seconds between Respondent's entry into the pod and when Respondent moved behind the wheelchair and began pushing the inmate towards the door, Mr. Borkowski displayed no sign of movements or gestures that would indicate escalating behavior.

35. Finally, with regard to Respondent's testimony that his plan was not to force Mr. Borkowski to go to the clinic, but rather, to simply remove Mr. Borkowski from the pod and take him to talk to a supervisor, Respondent admitted that he never shared this plan with Mr. Borkowski; he did not tell Mr. Borkowski that Respondent was not taking him to the clinic. When asked if the inmate may have thought that Respondent was trying to take him to sick call when the inmate had just said he was not going, Respondent conceded: "He could have perceived that. He could have perceived that, yes." (Jt. Exh. 5 at 111). Not only is that possible, but it is the most likely impression given by Respondent's failure to tell the inmate that he was not being forced to go to the clinic.

36. A determination of whether a use of force is necessary requires due consideration of the totality of circumstances, including subject/officer factors such as the relative ages, size, and physical condition of the subject and the officer. Likewise, a determination of whether the degree of force is reasonable or excessive must be made with due consideration of

the totality of circumstances. Sheriff Gualtieri explained how he viewed the circumstances in making the determination that Respondent's use of force was prohibited conduct because it was unnecessary and excessive:

> A big factor for me was, what was the nature of the initial point of contact between Deputy Ferrio and the inmate? We have a 63-year-old male in a wheelchair who had Parkinson's who was disabled, who had signed up to go to sick call. We don't make people go to sick call. If somebody wants to go to sick call, they go to sick call. He didn't want to go. If there was an issue or a problem with him going, don't make him go or go get with medical and make a determination as to what's appropriate or how to do it.
>
> What was striking to me was the reason for the contact. This wasn't an inmate refusing to come out of a cell or we needed to do a cell extraction. He wasn't threatening anybody. He was sitting in his wheelchair minding his own business and just didn't want to go to sick call. At that point, Deputy Ferrio tried to force him to go to sick call and that is where the incident went very bad from the beginning because he shouldn't have been forced to go to sick call at all.
>
> Once he did that, the inmate put his feet on the floor. He braced a little bit by putting his feet on the floor. Okay, so what? The inmate put his feet on the floor. The next thing that really happens of significance is Deputy Ferrio grabbing this 63-year-old guy sitting in a wheelchair by the neck and slamming him on the ground with such force that it causes the guy's dentures to break. He slams his face down on the ground and then pummels him with his knees and fists. This is all over this guy, this inmate, who didn't want to go to sick call.

> There was some discussion about this. We discussed it during the decision-making process. It was discussed during the board about this alleged water throwing. Well, there's no water throwing[.] [And] this alleged touching. Even if they occurred, they are nominal events. This isn't that some guy took a bottle of water and threw it in his face or caused him to be incapacitated. This is a 63-year-old frail guy with Parkinson's disease who's sitting in a wheelchair who at the most, and I don't think it happened from watching it, is may have turned his cup maybe towards Deputy Ferrio or something along those lines, but there was no justification. No justification at all for using that amount of force to take the guy by the head and neck, slam him on the ground to the point where his dentures break and then pummel him with his hands and fists.
>
> That is what I considered in making a decision that it was excessive force under the circumstances. I gave some consideration to Deputy Ferrio's statements in this case. But even if there was some justification to do something, it wasn't slamming the guy to the ground and kicking and punching him. Maybe tilting the wheelchair back and pulling him out. Maybe telling him not to brace with his legs. Maybe something along those lines, but not what he did.

(Tr. 42-45).

37. Sheriff Gualtieri's assessment of Respondent's use of force in the context of the totality of the circumstances in which that use of force occurred is fully supported by the record evidence and the findings made above, is reasonable, and is credited.

38. Respondent's use of force was not justified, and was not a reasonable response under the totality of circumstances. This finding is not a reflection of hindsight examination of the circumstances. Instead, the undersigned finds that a reasonable officer on the scene on October 1, 2014, would not have responded to the circumstances the way Respondent did.

39. Respondent's changing description of the events at issue and shifting rationales for his actions call into question Respondent's credibility. Respondent's evolving story suggests that it was Respondent who engaged in hindsight evaluation of his own actions, and, finding them wanting, revised the details in an effort to paint a more reasonable picture.

40. What cannot be changed is the vivid picture of what transpired, recorded by two security cameras. While the two views do not perfectly capture every detail, they provide a clear visual record of what actually transpired that day, with images that cannot be denied or changed over time. The picture portrayed is more in keeping with Respondent's admissions to the Administrative Review Board that he probably should not have gone into the pod and used force on the inmate (Jt. Exh. 6 at 148); and that even after the inmate braced and tensed, he did not have to rip him out of the wheelchair and take him down, but did so acting in "[t]he heat of the moment." (Jt. Exh. 6 at 149).

41. It is found, as a matter of ultimate fact, that Respondent's use of force on October 1, 2014, was not necessary to accomplish a legitimate law enforcement task, was not justified by the totality of circumstances presented that day, and was excessive in degree, in violation of General Order 3-1.1, Rule and Regulation 5.15.

42. Pursuant to General Order 3-1, a violation of Rule 5.15 is a level five violation--the most serious level under the PCSO disciplinary system. According to the point scale in General Order 10-2, 50 points were properly assigned for this violation. The discipline provided for this single 50-point violation ranges from a five-day suspension to termination.

43. However, Respondent had a significant prior disciplinary history, with 30 carryover points from previous discipline. In accordance with the concept of progressive discipline built into Petitioner's disciplinary system, the carryover points increased the authorized discipline to a range of from a ten-day suspension to termination. See General Order 10-2.6.

44. Under Petitioner's disciplinary system, prior counseling is another factor relevant to the progressive discipline process, although counseling does not count toward the progressive point total. The evidence established that Respondent had been counseled previously about uses of force, in

contexts bearing some similarities to this case. Respondent acknowledged that he previously was counseled by his superiors and warned about grabbing an inmate by the neck to execute a takedown. The inmate, Mr. Strempel, was also elderly and was in the same healthcare unit as Mr. Borkowski. Respondent was also counseled for a separate incident involving an inmate, Mr. Griffith, who refused to go to Advisory Court, which was the inmate's right (just as it was Mr. Borkowski's right to refuse to go to sick call). Respondent forced the inmate to go, engaging in a use of force to cuff the inmate. When counseled, Respondent told his superiors that he did not know the inmate could refuse.

45. The evidence established that the disciplinary action against Respondent is consistent with the disciplinary action taken against other members who committed the same or similar conduct. Petitioner offered the unrebutted testimony of Sheriff Gualtieri that he has always imposed termination as the disciplinary consequence for other members, after it was substantiated that they engaged in the same sort of prohibited conducted as Respondent.

46. Respondent did not offer any evidence to the contrary, to refute the Sheriff's testimony that he has consistently applied discipline in all cases similar to Respondent's case. Indeed, the Sheriff's testimony was actually corroborated by Respondent, who testified that he is not aware of any other PSCO

member who was found to have committed the same or similar conduct and who received a lesser form of discipline than Respondent.

47. The Sheriff reasonably exercised his authority, within the disciplinary range authorized by General Order 10-2 and consistent with the discipline imposed in similar cases, to terminate Respondent's employment.

CONCLUSIONS OF LAW

48. DOAH has jurisdiction over the parties and subject matter of this proceeding. § 120.65(6), Fla. Stat.; Ch. 89-404, Laws of Fla., as amended (the Civil Service Act).

49. This proceeding is governed by the Civil Service Act and implementing procedural rules authorized by the Pinellas County Sheriff's Civil Service Board, filed by Petitioner at the outset of this proceeding. When the Civil Service Act confers the right to an appeal hearing, the Civil Service Board can elect to hear the appeal itself or refer the case to DOAH to conduct the appeal hearing, "according to the rules followed by DOAH in accordance with Florida Statutes." Rules 4, 5, Civil Service Board Rules of Procedure. When DOAH conducts the appeal hearing, the Civil Service Board is the agency head that makes the final determination. Rule 7, Civil Service Board Rules of Procedure.

50. Under the Civil Service Act, Respondent was entitled to appeal Petitioner's decision to terminate his employment, and he did so by timely filing a notice of appeal.

51. The issues for determination, pursuant to the Civil Service Act, are whether Respondent engaged in prohibited conduct and, if so, whether the action taken by Petitioner--termination of Respondent's employment--is consistent with action taken against other members.

52. The Civil Service Act authorizes Petitioner to take disciplinary action against classified employees, and to adopt implementing rules and regulations. Pursuant to that authority, Petitioner adopted General Order 3-1, with rules establishing standards of conduct that must be followed by employees.

53. General Order 3-1 also provides the framework for disciplinary action based on violations of the prescribed standards of conduct. Violations are broken down into five levels, with level five being the most serious. The level five rules, set forth in General Order 3-1.1, include Rule 5.15 at issue in this proceeding, which provides:

> Custody of Arrestees/Prisoners – Arrestees/ prisoners shall be kept secured and treated humanely and shall not be subject to physical abuse. The use of physical force shall be restricted to circumstances specified by law when necessary to accomplish a police task.

54. As the parties stipulated, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent engaged in conduct prohibited by General Order 3-1.1, Rule 5.15. Accord Pinellas Cnty. Sheriff's Off. v. Richard Stotts, Case No. 13-3024 (Fla. DOAH Nov. 12, 2013, PCSO Dec. 12, 2013).

55. Petitioner met its burden of proving that Respondent's conduct on October 1, 2014, violated General Order 3-1.1, Rule and Regulation 5.15. Respondent's use of physical force was not necessary to accomplish a law enforcement task. Instead, Respondent took it upon himself to intercede when a sickly, elderly inmate in a wheelchair refused to go to sick call, which was the inmate's right. As Respondent admitted (at least at times), at the point in time when Respondent interceded, the inmate was not a threat, was not disruptive, and was simply expressing his strong opposition to being taken out of the medication line to go to the healthcare clinic. Respondent entered the pod without being asked and without any apparent need, grabbed the wheelchair handles and started pushing the inmate out of the pod. Had Respondent stayed at his desk outside the pod, or had Respondent simply approached the inmate to tell him that he did not have to go to the clinic, there likely would have been no use of force and no need for use of force. Respondent's encounter with inmate Borkowski was not necessary to accomplish a legitimate law enforcement task, because the inmate

was entitled to refuse to go to sick call and Respondent was not authorized to force him to go.

56. Respondent argued that a use of force became necessary to respond to the inmate's escalated resistance (that began when Respondent started pushing the inmate's wheelchair). This ignores the standard of conduct that required Respondent to limit his use of physical force to the degree that is necessary. See General Order 13-3.1(A) ("In accordance with [PCSO] General Orders, members shall use only that degree of force necessary to perform official duties.")(emphasis added).

57. While some response by Respondent to the inmate's bracing and tensing may have been warranted, the physical force actually used by Respondent was completely out of proportion to the inmate's conduct and went far beyond what was necessary to accomplish any legitimate law enforcement task. The evidence established that the degree of force used by Respondent in lifting the inmate up and out of his wheelchair by his head and neck and slamming the inmate to the floor with such force as to shatter the inmate's dentures and upend the wheelchair was unnecessary and excessive.

58. Respondent's use of force was not reasonable under the totality of circumstances. A reasonable officer on the scene would not have responded by using the force Respondent used. See

General Order 13-3(R) (citing Graham v. Connor, 409 U.S. 386, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989)).

59. The evidence also established that the termination of Respondent's employment was reasonable discipline for his unnecessary, excessive use of force in violation of General Order 3-3.1, Rule and Regulation 5.15.

60. As found above, Respondent's violation earned 50 points. Thus, termination is authorized as discipline for the violation of rule 5.15 alone. See, e.g., Pinellas Cnty. Sheriff's Off. v. Richard Stotts, supra (termination of a deputy sheriff was reasonable discipline based on a single substantiated use of force incident that violated General Order 3-3.1, Rule and Regulation 5.15, to which 50 points were assigned).

61. Termination is even more appropriate as discipline for this 50-point level five violation where carryover points from prior discipline increase the point total to a level in a higher discipline range category. Respondent's 75 points places him two discipline range categories higher than the 50-point category for which termination is authorized. See General Order 10-2 at p. 9.

62. The reasonableness of imposing discipline at the high end of the authorized discipline range is buttressed by the fact that, in addition to his prior discipline, Respondent previously was counseled on two occasions for similar conduct.

63. The disciplinary action of termination in this case is consistent with the disciplinary action taken against other members who committed the same or similar prohibited conduct. This conclusion is supported by Petitioner's precedent. See Pinellas Cnty. Sheriff's Off. v. Richard Stotts, supra.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Pinellas County Sheriff's Office, enter a final order finding that Respondent, Raymond Ferrio, engaged in prohibited conduct by violating General Order 3-1.1, Rule and Regulation 5.15, and upholding the termination of Respondent's employment.

DONE AND ENTERED this 20th day of October, 2015, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of October, 2015.

ENDNOTES

[1/] Counsel for Respondent is shown in the appearances at her address of record, at the firm where she was an associate, as of the final hearing. Thereafter, she left the firm, but apparently the files for this case have been retained by the firm and counsel for Respondent will be given access to them as needed. When counsel's departure from her law firm became known (because she was not at the firm when contacted), counsel for Respondent was directed to confirm whether she still represented Respondent and, if so, to comply with Florida Administrative Code Rule 28-106.104(5) (requiring counsel to promptly notify DOAH and other parties of any changes in their contact information by filing a Notice of Change). Counsel for Respondent immediately responded, confirming that she was still Respondent's counsel. She filed and served her new contact information, but requested that the contact information be redacted before her filing was placed on the docket. No authority was offered to support the requested redaction; instead, counsel just characterized her contact information as personal. However, DOAH's procedural rules require that counsel representing parties in pending proceedings file their contact information. Filings in DOAH proceedings are public records and are not subject to redaction upon request, unless the request is predicated on an applicable exemption from the public records laws.

[2/] Separate from the CD, Respondent transmitted two pages, identified as pages four and five of an October 16, 2014, investigative interview of Corporal Chrystal Bolle, which were left out of the CD. These two pages have been marked as Joint Exhibit 17 Supplement, and admitted for the same limited purpose as Joint Exhibit 17.

[3/] References to Florida Statutes are to the 2015 codification, unless otherwise specified.

[4/] Respondent gave conflicting statements as to what prompted him to get up from his desk to go into the pod. One version was that Deputy Pettiford told him that the inmate refused to go to sick call, and Respondent simply took it upon himself to go speak to the inmate. See, e.g., Jt. Exh. 5 at 35, 38-39. The other version was that from the duty desk ten feet away from the pod doorway, Respondent heard the inmate yelling and screaming so loudly that Respondent became concerned with the disruption to the ongoing med pass. (Tr. 165-166). The nurse conducting the med pass corroborated the first version: "Deputy Pettiford had said something to Deputy Ferrio about the patient not going to

clinic or whatever they called him for." (Tr. 100). The nurse did not corroborate Respondent's other version that the inmate was yelling and screaming so loudly that he was disrupting the med pass. Instead, the nurse testified that before Respondent went into the pod, she was conducting the med pass like she always did, and she saw Mr. Borkowski sitting in line. Nothing caught her attention during the med pass until later, after Respondent went into the pod. The first version, corroborated by the nurse, is found to be more credible.

COPIES FURNISHED:

Paul Grant Rozelle, Esquire
Pinellas County Sheriff's Office
10750 Ulmerton Road
Largo, Florida 33778
(eServed)

Brandi L. Hawkins, Esquire
Apartment 501
17103 North Bay Road
Sunny Isles Beach, Florida 33160
(eServed)

Michele Wallace, Esquire
Pinellas County Attorney's Office
315 Court Street, Sixth Floor
Clearwater, Florida 33756

Brandi L. Hawkins, Esquire
The Cochran Firm, South Florida
657 South Drive, Suite 304
Miami Springs, Florida 33166
(eServed)

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.