

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS COUNTY SHERIFF'S
OFFICE,

Petitioner,

vs.

Case No. 15-5054

CYNTHIA GRAHAM,

Respondent.

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RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.65(6), 120.569, and 120.57(1), Florida Statutes (2016),^{1/} on January 20, 2017, by video teleconference with sites in Tallahassee and St. Petersburg and on February 3, 2017, in St. Petersburg, Florida.

APPEARANCES

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

For Respondent: Jan Thomas Govan, Esquire
Govan Law Group, P.A.
542 Bay Avenue
Clearwater, Florida 33756

STATEMENT OF THE ISSUE

The issue in this matter is whether the Pinellas County Sheriff's Office properly dismissed Respondent from her employment as a deputy sheriff.

PRELIMINARY STATEMENT

On August 14, 2015, Petitioner, Pinellas County Sheriff's Office (the "Sheriff's Office"), determined that Respondent, Cynthia Graham, engaged in prohibited conduct in violation of the Civil Service Act and Sheriff's Office General Order 3-1. Specifically, the Sheriff's Office found that Respondent violated General Order 3-1.1, Rule and Regulation 5.4, Duties and Responsibilities; and Rule and Regulation ("Rule") 5.6, Truthfulness. On that same day, the Sheriff's Office notified Respondent that, based on its findings, it was terminating her employment as a deputy sheriff.

On August 18, 2015, Respondent timely appealed her termination to the Sheriff's Office. On September 14, 2015, the Pinellas County Sheriff's Civil Service Board referred the matter to the Division of Administrative Hearings ("DOAH") to hear Respondent's appeal pursuant to chapter 120.

The final hearing was initially set for November 10, 2015. On October 14, 2015, the final hearing was rescheduled to November 13, 2015, due to Petitioner's conflict. On November 2, 2015, Respondent filed a Petition for Writ of Prohibition in the

Sixth Judicial Circuit in Pinellas County, Florida, seeking to prevent the Civil Service Board from acting outside its jurisdiction in hearing this matter. Respondent alleged that the Sheriff's Office had exceeded the required time period in which to hear Respondent's appeal. The DOAH proceeding was stayed during the pendency of Respondent's writ of prohibition from November 9, 2015, through August 8, 2016. After review by both the Appellate Division of the Sixth Judicial Circuit, as well as the Second District Court of Appeal, on July 18, 2016, Respondent's writ of prohibition was ultimately denied.^{2/}

After the appellate proceedings resolved the issues raised in Respondent's writ of prohibition, the DOAH final hearing was rescheduled for January 20, 2017.^{3/} The final hearing could not be completed on that date. The final hearing was continued to February 3, 2017, when it was completed.

During the final hearing, the Sheriff's Office presented the testimony of Sheriff Bob Gualtieri (Sheriff for Pinellas County), Sergeant Amy White, Corporal Gilberto Perez^{4/}, Deputy Michelle Gammon, and Deputy Daunika Burge. The Sheriff's Office offered Exhibits 1 through 17, 20, 22, and 23, which were admitted in evidence. Respondent testified on her own behalf. Respondent offered Exhibits 10A and 10B, which were admitted in evidence.

A one-volume Transcript of the final hearing held on January 20, 2017, was filed with DOAH on February 8, 2017. A

second one-volume Transcript from the continuation of the final hearing held on February 3, 2017, was filed with DOAH on April 3, 2017.

At the close of the final hearing on February 3, 2017, the parties were advised of a ten-day timeframe following receipt of the hearing transcript at DOAH to file post-hearing submittals. By agreement of the parties, the deadline to file proposed recommended orders was extended to April 13, 2017. By agreeing to a deadline more than ten days after the filing of the hearing transcript, the parties waived the 30-day time period for filing the recommended order.^{5/} On April 12, 2017, following Respondent's Motion for Extension of Time to File Post Hearing Submittal, the deadline for filing post-hearing submittals was further extended until April 27, 2017. Both parties filed proposed recommended orders which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. At all times pertinent to this matter, Respondent was employed by the Sheriff's Office as a deputy sheriff. In 2015, Respondent was assigned to the Pinellas County Department of Detention and Corrections. She worked at the Pinellas County Jail (the "Jail").

2. At the time of her dismissal, Respondent had worked for the Sheriff's Office for approximately 16 years.

3. Bob Gualtieri is the duly-appointed Sheriff of Pinellas County, Florida, and is in command of Sheriff's Office operations.

4. As part of his responsibilities, Sheriff Gualtieri is authorized to impose discipline upon Sheriff's Office employees and members who are found to have violated Sheriff's Office rules and regulations. Sheriff Gualtieri's authority is set forth in chapter 89-404, as amended by chapter 90-395, Laws of Florida, entitled the Pinellas County Sheriff's Civil Service System (the "Civil Service Act").

5. As a deputy sheriff, Respondent was charged with the responsibility of complying with all Sheriff's Office rules, regulations, general orders, and standard operating procedures.

6. Respondent's termination is based on her alleged misconduct during and after an incident on April 10, 2015, when Deputy Daunika Burge mistakenly carried her service revolver into the Jail in violation of Sheriff's Office policies. The Sheriff's Office determined that Respondent was aware of the presence of Deputy Burge's sidearm in the Jail, but did not take prompt and effective action to remove or report it. Thereafter, the Sheriff's Office believes that Respondent lied to Sheriff's Office investigators by denying any knowledge of the pistol's presence in the Jail. Sheriff Gualtieri terminated Respondent on August 14, 2015.

7. On April 10, 2015, Deputy Burge was assigned to the Judicial Operations Bureau, also known as the "court squad." Around 6:00 that morning, she was escorting several inmates through the Jail. As she was standing on F-wing, one of the inmates pointed to Deputy Burge's side and remarked that she was still wearing her sidearm.

8. The Jail is a maximum security facility. As such, all firearms, even for sheriff deputies, are prohibited from the premises. As Sheriff Gualtieri expressed, "the Jail is a completely sterile environment. It's probably one of the few sacrosanct things. Because nobody has got weapons . . . no one is armed in that facility." Sheriff Gualtieri further described, "I can't think of anything that is more serious, that has the potential to wreak havoc and to get people killed, than to introduce a firearm into a jail setting, especially a maximum security jail setting . . . people's lives, literally, are at risk by having that gun in there."

9. Lockers placed just outside the Jail entrance are designated as the storage location for all firearms. Sheriff officers are instructed to store all weapons in the lockers prior to entering the Jail.

10. Unfortunately, Deputy Burge forgot to secure her sidearm before she entered the Jail. After realizing her mistake, Deputy Burge decided to store her weapon inside the Jail

in the 1F control room, which was the closest secure location nearby.

11. The 1F control room is the security post located inside the Jail between the "Hotel" (the inmate living area) and the exterior hallways that lead to courtrooms and other public areas. The control room is approximately twelve feet long and eight feet wide. Large glass windows line the upper half of the control room walls from approximately four feet high up to the ceiling.

12. The 1F control room is staffed by at least one deputy at all times. To access the control room from the exterior hallways, the deputy inside the control room must remotely unlock (then relock) two control gates. Like the rest of the Jail, the 1F control room is a secure area in which weapons and ammunition are prohibited.

13. Deputy Burge entered the 1F control room with her firearm at approximately 6:22 a.m. Two deputies, Corporal Gilberto Perez and Deputy Michelle Gammon, were present in the control room. After she entered, Deputy Burge testified that she announced to Corporal Perez and Deputy Gammon that, "I have something I shouldn't have." Deputy Burge then quickly removed her gun belt and pistol and moved to a small cabinet or cupboard that is located under a counter in the corner of the room. There, she placed her firearm and two magazines of ammunition into the cabinet. Deputy Burge stated that she laid her pistol

and ammunition on the bottom of the cabinet and covered them with clothing that she found inside the cabinet. The cabinet was not secured and could not be locked. Thereafter, she quickly exited the control room.

14. On that same morning, Respondent was assigned to work the day shift in the 1F control room. Her shift began at 7:00 a.m. Respondent reported to the control room just before 6:50 a.m. (approximately 30 minutes after Deputy Burge placed her pistol in the cabinet). In the control room, Respondent relieved Corporal Perez who was her night shift counterpart.

15. The Sheriff's Office alleges that, just before he departed from his shift, Corporal Perez informed Respondent that another deputy left a weapon in the control room cabinet. Respondent disputes this allegation.

16. Corporal Perez was the night-shift commander of the 1F control room. Corporal Perez testified that near the end of his shift, a deputy (later identified as Deputy Burge) enter the control room. She walked passed him, and he heard her say that she had forgotten to remove her sidearm prior to entering the Jail. He then saw her kneel down in front of the cabinet in the corner of the room. He observed her place a pistol in the cabinet. Corporal Perez relayed that he heard the deputy express that she was going to leave her weapon in the control room, and she would be back to pick it up later. After the deputy left the

control room, Corporal Perez opened the cabinet door and looked inside. He saw a pistol and two clips of ammunition lying on the bottom of the cabinet.

17. Corporal Perez stated that he directly told Respondent about Deputy Burge's weapon in the cabinet. When Respondent reported for her shift at 6:50 a.m., Corporal Perez attested that before he left the control room, he advised Respondent that a court squad deputy left her firearm in the cabinet. Corporal Perez then motioned for Respondent to walk with him to the cabinet. He opened the cabinet door in front of Respondent, and pointed to the pistol laying inside. Corporal Perez relayed that Respondent, who was standing right next to him, nodded her head. Respondent then bent down and saw the object to which he was pointing. He also showed her the ammunition. Corporal Perez had no doubt that Respondent saw the pistol.

18. Corporal Perez then told Respondent that the deputy was returning to pick up the weapon at the end of her shift. Corporal Perez did not know who the deputy was. Therefore, he described her to Respondent. According to Corporal Perez, Respondent correctly guessed that the officer was Deputy Burge. Corporal Perez left the 1F control room approximately six minutes after Respondent entered.

19. At the final hearing, the Sheriff's Office introduced a security video from a fixed position surveillance camera mounted

outside the 1F control room. The video camera was located in a long corridor that connected the different wings of the Jail. The camera looked across the corridor into the interior of the control room. Because the control room walls were lined with windows, most of the activity and persons moving about inside were reasonably visible and identifiable. (The video recording did not capture audio sounds or conversations.)

20. The cabinet in which Deputy Burge stored her firearm, however, was located under a counter in one of the corners of the control room. The cabinet was not visible by the camera. Furthermore, the corner post of the control room wall blocked from view any person opening the cabinet door or looking inside.

21. At approximately 6:50 a.m., the video recording of the 1F control room shows Corporal Perez acknowledging Respondent's arrival. Shortly thereafter, Corporal Perez and Respondent move together to the corner of the room where the cabinet is located. Both individuals disappear from the video, effectively obscured by the corner post. Corporal Perez testified that during this brief period, he opened the cabinet door, pointed to the weapon, and Respondent bent over and looked at the pistol.

22. The video recording corroborates Corporal Perez's testimony that he and Respondent communicated after she entered the control room. The video also establishes that Corporal Perez and Respondent walked together to the corner of the room where

the cabinet is located. However, the video does not show, outside a brief quiver of someone's clothing, Corporal Perez opening the cabinet door or directing Respondent's attention to Deputy Burge's sidearm. Neither does the video confirm that Respondent peered inside the cabinet.

23. Deputy Gammon was also present in the 1F control room when Deputy Burge entered on the morning of April 10, 2015. Deputy Gammon denied having any knowledge at the time that Deputy Burge was carrying a weapon. Neither did she observe Deputy Burge place her sidearm in the cabinet. However, Deputy Gammon did hear Deputy Burge utter something to the effect of "I have something I shouldn't have."

24. Deputy Gammon was also present in the 1F control room when Respondent arrived to begin her work shift. Shortly after Respondent entered the control room, Deputy Gammon saw Respondent and Corporal Perez move together to the corner of the room where the cabinet was located. Deputy Gammon, however, did not hear Respondent's conversation with Corporal Perez. Neither did she speak with Respondent about Deputy Burge's weapon.

25. According to the video recording, Deputy Burge returned to the 1F control room to retrieve her pistol and ammunition at 7:52 a.m. Respondent was not present when she entered the room. In fact, the video showed that three minutes earlier (at 7:49 a.m.), Respondent walked out of and away from the

control room. (Respondent explained that she left the control room to get some coffee.)

26. In the control room, Deputy Burge pulled her pistol out of the cabinet and placed it, along with the ammunition clips, in a black bag. She then exited the control room intending to leave the Jail.

27. As she left the 1F control room, Deputy Burge testified that she bumped into Respondent and a deputy recruit standing just outside the control room door. Deputy Burge relayed that Respondent said to her, "I hope you're here to get what you left earlier." Deputy Burge replied to Respondent that she was and stated, "That's why I have my black bag." Respondent then inquired, "Did you get everything?"

28. Deputy Burge conveyed that neither she nor Respondent used the word "firearm," "gun," or "weapon." However, she interpreted Respondent's statements as questions specifically concerning her pistol. Deputy Burge testified that, based on this exchange, she had no doubt that Respondent knew that her gun was in the 1F control room.

29. As with the cabinet, the control room doorway is obscured from the video camera's vantage point. Any persons standing outside the control room are hidden from view. Deputy Burge testified that, despite the fact that the video does not

show her meeting Respondent, she did, in fact, speak with her outside the control room door.

30. However, the video recording completely discredits and subverts Deputy Burge's story. True to her testimony, at 7:52 a.m., the video shows Deputy Burge walking with a black bag down a corridor and into the control room. Once there, she moves across the room to the corner where the cabinet is located (disappearing from view). Soon thereafter, she walks back across the control room, through the doorway (again disappearing from view), and reemerges back in the corridor walking away from the control room.

31. However, moments later, just after Deputy Burge disappears from view up the corridor, the video recording shows Respondent appear in the corridor, walking toward the 1F control room from the opposite direction. Respondent turns a corner, disappears from view, then walks through the control room door carrying a cup of coffee. The video provides compelling evidence that Deputy Burge did not encounter Respondent outside the control room door (much less carry on a conversation about the weapon). The video establishes that Deputy Burge did not see Respondent at any time while she was retrieving her pistol.

32. When Deputy Burge was asked at the final hearing whether, based on the video record, she did, in fact, confront Respondent outside the control room doorway and discuss her

sidearm, Deputy Burge testified that "the video shows that we didn't . . . I did not have a conversation with [Respondent]."

33. Deputy Burge's mistake of carrying her sidearm into the Jail led to an internal administrative investigation, which commenced on May 1, 2015. Deputy Burge, Corporal Perez, and Deputy Gammon were all charged with violating Sheriff's Office General Order 3-1.1, Rule 5.4, pertaining to duties and responsibilities.

34. The investigation was conducted by the Sheriff's Office's Administrative Investigations Division, Professional Standards Bureau ("AID"). Sergeant Amy White was assigned to lead the investigation. One of Sergeant White's goals was to determine who knew about the presence of Deputy Burge's sidearm in the control room. As Sheriff Gualtieri described, anybody who had knowledge that "a loaded firearm is within that environment, should immediately – must immediately take action to determine if it has occurred. And if it has, to take swift remedial action." Therefore, Sergeant White initiated her investigation to determine whether Corporal Perez and Deputy Gammon failed to take action or notify anyone of the situation.

35. On May 22, 2015, AID questioned Respondent as a witness to the incident. Three AID sergeants met with Respondent to determine what, if anything, she knew about the presence of Deputy Burge's weapon in the 1F control room on April 10, 2015.

As the questioning began, Respondent remarked, "Are you talking about the gun, or do you mean the gun[?]" Prior to Respondent's statement, Sergeant White had not made any comments to Respondent about a gun, firearm, or weapon being the subject of the investigation. Consequently, Sergeant White interpreted Respondent's unsolicited comment to mean that Respondent had learned that Deputy Burge had left her pistol in the control room at the time it happened (April 10, 2015) and from no other source after April 10, 2015.

36. One of the AID investigators then directly asked Respondent if she knew that a gun had been brought into the 1F control room. At the final hearing, Sergeant White described Respondent's response as, "she, you know, then kind of tilted her head, and got this kind of, for lack of a better term, smile or smirk on her face. And said may - stated maybe. . . ." This reaction confirmed in Sergeant White's mind that Respondent knew about the presence of Deputy Burge's sidearm in the control room on April 10, 2015.

37. That same day (May 22, 2015), the Sheriff's Office changed Respondent's status to a subject of the investigation. The complaint of misconduct filed against Respondent alleged that on April 10, 2015, she violated General Order 3-1.1, Rule 5.4, pertaining to duties and responsibilities. (The same charge the

Sheriff's Office filed against Deputy Burge, Corporal Perez, and Deputy Gammon.)

38. On June 16, 2015, Respondent made a sworn statement to AID. In her statement, Respondent denied any knowledge of the presence of Deputy Burge's sidearm in the 1F control room on April 10, 2015. Respondent specifically expressed that Corporal Perez did not tell her that Deputy Burge brought her gun into the control room. Respondent explicitly stated that "Nobody specifically told me that there was a weapon in that control room," and that she was "totally unaware of a weapon."

39. The Sheriff's Office believed that Respondent's sworn statement directly contradicted the statement she made during her initial interview on May 22, 2015, in which she said the word "gun" and then tilted her head and kind of smirked. Therefore, the Sheriff's Office concluded that Respondent's sworn statement on June 16, 2015, was a lie. Consequently, on June 24, 2015, the Sheriff's Office supplemented Respondent's initial complaint of misconduct with another complaint. This second complaint added the allegation that on, but not limited to, June 16, 2015, Respondent violated General Order 3-1.1, Rule 5.6, pertaining to truthfulness.

40. In the course of its investigation, AID compiled an investigation record. This record was provided to the Sheriff's Office's Administrative Review Board (the "ARB") which considered

the complaints of misconduct against Respondent. The ARB was a five-person panel composed of members of Respondent's chain-of-command.

41. The ARB was charged with reviewing the evidence and resolving issues of disputed fact. Thereafter, the ARB would make a recommendation to Sheriff Gualtieri regarding the disposition of the matter, as well as any discipline that should be imposed. Sheriff Gualtieri would then decide whether to follow the ARB's recommendation, and what discipline, if any, the member was to receive.

42. The ARB reviewed AID's investigation record including statements made by the witnesses. The ARB also heard live testimony from Respondent, as well as the other deputies charged with misconduct. Thereafter, the ARB substantiated both complaints of misconduct against Respondent.

43. On August 14, 2015, Sheriff Gualtieri issued an Inter-office Memorandum to Respondent. Sheriff Gualtieri relayed that the ARB determined that Respondent committed the following violations of General Order 3-1.1:

1. You violated Pinellas County Sheriff's Office General Order 3-1.1, Rule and Regulation 5.4, Duties and Responsibilities:

Synopsis: You relieved the night shift 1F Control Room post and were advised that a firearm had been left in a lockless cabinet, in that control room, by another deputy. The loaded and charged gun, accompanied by two

full magazines, was displayed to you and you acknowledged its presence in the unsecured cabinet. You took no action to rectify this acute situation.

To compound this integrity compromise of the maximum security facility of the Pinellas County jail, you were also acting in the capacity of Field Training Officer. You and your recruit were notified of the presence of the gun and discussed it in the control room. You misled your recruit with flippant and impotent remarks. You had an obligation, not only to restore security, but to teach your trainee proper and effective security measures.

You failed to fulfill these responsibilities.

2. You violated Pinellas County Sheriff's Office General Order 3-1.1, Rule and Regulation 5.6, Truthfulness:

Synopsis: You affirmed, to three Administrative Investigation Division (AID) Sergeants, that you were aware of the presence of a gun in the 1F Control Room while you were assigned to and accountable for the security of that control room. Consequently, you were identified as a subject in this case.

During your subject interview, you provided testimony which contradicted the statements you originally made to the AID investigators. When presented with this conflict, you denied making the statements to the three investigators.

Four (4) additional staff members, two of whom were equally culpable for this incident, consistently attested to your awareness that a firearm was carelessly stored in the control room. In the same interview, you, again, denied being notified of the presence of the weapon and made counter accusations against some of the members.

In a second subject interview, this being your third meeting with AID investigators, you maintained your denial and repeatedly swore that witness testimony was false and made "no sense." To the contrary, however, witness' testimonies were logical and independent yet consistent and they were supported by recorded video of this incident.

At your Administrative Review Board, you were, again, presented with witness testimony and video evidence which bore stark contrast to your sworn statements. Your replies to direct questions from the Board were evasive, and insufficient to prove your candor in this case.

44. In essence, Respondent was alleged to have been aware that a weapon was brought into the 1F control room against regulations, and she took no action to rectify the situation and restore security. Thereafter, Respondent was not truthful in that she lied to Sheriff's Office investigators by denying that she knew about the presence of the firearm in the control room.

45. Sheriff Gualtieri "substantiated" the ARB's findings. Sheriff Gualtieri explained at the final hearing that he reached his conclusion based on the "abundance of evidence that was presented to me that indicated that she knew the gun was there, and denied it." Sheriff Gualtieri did not conduct an independent investigation into the incident, or Respondent's involvement in the same. Sheriff Gualtieri did not read the investigation documents themselves or witness statements. (He never takes that

step.) Sheriff Gualtieri did not speak to Respondent about what happened on April 10, 2015.

46. Instead, Sheriff Gualtieri met with the members of the ARB and was briefed on the evidence and the ARB's recommendation.^{6/} Sheriff Gualtieri based his decision on "the volume of the evidence" against Respondent, specifically:

a. During her May 22, 2015, interview with AID, Sheriff Gualtieri found it significant that Respondent "initiated the inquiry about the gun. [The AID investigators] didn't say gun to her. She said gun to them." Sheriff Gualtieri concluded that Respondent knew about Deputy Burge's mishandling of her pistol and "once it became evident to Respondent that she might have some culpability for knowing about the firearm, she changed her story and began denying any knowledge of it."

b. Sheriff Gualtieri found it significant that "all these people . . . said that they knew that [Respondent] knew about the gun . . . you have all of the totality of several people saying that." Sheriff Gualtieri did not personally speak with any witnesses involved in AID's investigation. Instead, he relied on what he was told the witnesses admitted to the investigators. In reaching his conclusion to terminate Respondent, Sheriff Gualtieri specifically referenced statements given by Deputy Burge and Corporal Perez who asserted that they expressly told

Respondent that Deputy Burge had left her sidearm in the cabinet.^{7/}

c. Sheriff Gualtieri also referenced the video recording which he believed corroborated Corporal Perez's testimony. He commented that "there's a video of Perez with her at the cabinet where the gun is stored." Sheriff Gualtieri did not view the video. However, he described that he understood it showed Respondent "bending over and looking to a storage area where the gun is stored."

47. Thereafter, Sheriff Gualtieri took all of the evidence gathered to that point including "the numerous statements by numerous deputies that they personally told her; they either heard somebody tell her, et cetera. And, then the video, with her looking in the cabinet where the gun was, that I concluded that she did have knowledge." Sheriff Gualtieri also commented that Respondent had ample opportunity to reconsider her denial of knowledge of the weapon's presence and tell the truth. Instead, Respondent continued to refuse "to do the right thing." Consequently, on August 14, 2015, Sheriff Gualtieri sustained the complaint against Respondent.

48. Sheriff's Office General Order 10-2, Disciplinary Procedures, establishes disciplinary guidelines for the Sheriff's Office. Violations of Sheriff's Office standards of conduct are categorized into five distinct levels which range from Level 1 to

Level 5. Level 5 violations result in the most serious discipline. Pursuant to General Order 3-1, violations of Rule 5.4, Duties and Responsibilities, and Rule 5.6, Truthfulness, are Level 5 violations.

49. According to the General Order 10-2 point scale, 60 points were assigned for Respondent's two Level 5 violations. On the disciplinary scale, the discipline that the Sheriff may impose for 60 points ranges from a minimum suspension of seven days up to termination from the Sheriff's Office.

50. Sheriff Gualtieri determined that the appropriate discipline for Respondent's two rule violations was to terminate her employment. On her progressive discipline worksheet, Sheriff Gualtieri wrote that Respondent was terminated "because of lying." Sheriff Gualtieri explained at the final hearing:

[T]he most serious part of the allegation, which was the most concerning part of the facts to me, was the lying I will not tolerate, and have never tolerated a deputy sheriff lying and not telling the truth. There's nothing that is more important than our veracity and our credibility, individually. And, everybody in the agency knows, or should know . . . that if a determination is made, based upon the facts, that you lied, you're not going to work at the Pinellas County Sheriff's Office.

51. Sheriff Gualtieri further explained:

There's nothing more important than your candor - than your character. And, it really brings discredit on an individual [and] the agency. . . . It really prevents

you from being an effective deputy sheriff. Because you're going to get called in - everything you do, is going to get called into question. . . . So, very simply . . . the underlying conduct is in one bucket, and would have been dealt with separately. Then, you add the lying onto it. And, the lying is what resulted in the termination.

52. Sheriff Gualtieri testified that he has terminated every Sheriff's Office deputy who has been found to violate the policy requiring truthfulness. As he succinctly stated at the final hearing, "Everybody that I have determined that has lied, I fired them."

53. Sheriff Gualtieri also substantiated the ARB's findings that Deputy Burge, Corporal Perez, and Deputy Gammon violated General Order 3-1.1, Rule 5.4, Duties and Responsibilities. Sheriff Gualtieri explained that he would have expected these deputies to take immediate, swift action to remove the gun from the Jail.

54. Based on their violations, Sheriff Gualtieri suspended Deputy Burge for 120 hours and reassigned her from the court squad to the Jail. Corporal Perez was suspended for 40 hours and demoted from corporal to deputy (which is the loss of a supervisory rank). Deputy Gammon was suspended for 40 hours. None were terminated. Sheriff Gualtieri expressed that while these deputies made a mistake, none of them lied about the

situation. None were charged with violating General Order 3-1.1, Rule 5.6, Truthfulness.

55. Respondent asserts that she was wrongfully terminated. At the final hearing, Respondent staunchly denied that she knew of the presence of Deputy Burge's firearm in the 1F control room on the day in question. Respondent also disputed that she lied in her sworn statement on June 16, 2015, when she denied any knowledge that Deputy Burge brought her pistol into the control room.

56. Respondent further refuted having any conversation with Deputy Burge outside the control room door on the morning of April 10, 2015. (The surveillance video supports Respondent's testimony.)

57. Respondent admitted that she had a brief conversation with Corporal Perez when she reported to the 1F control room to start her shift. However, she denied that Corporal Perez notified her that a weapon was in the cabinet. She further denied that he pointed out the pistol to her, or that she bent down to look into the cabinet to see the weapon.

58. At the final hearing, Respondent commented about her statement during the May 22, 2015, interview during which she uttered the word "gun." Respondent explained that her remark was based on the "gossip" and "rumor and innuendo" that she had heard about the incident.

59. Respondent also challenges the fairness of Sheriff Gualtieri's decision to terminate her while the other three deputies remain with the Sheriff's Office. Deputy Burge actually caused the trouble by wrongfully bringing her sidearm into the Jail. Yet, Sheriff Gualtieri allowed her to keep her job.

60. Respondent also pointed out that, because Corporal Perez was aware of the weapon's presence in the control room (prior to her arrival), he should have assumed primary responsibility for reporting and removing it. Therefore, even if Respondent did err in not timely communicating the pistol's existence in the Jail, Corporal Perez was more negligent by not immediately securing the weapon. Sheriff Gualtieri, however, also allowed him to keep his job.

61. Finally, Respondent testified regarding two other deputies who she believed the Sheriff's Office punished inconsistently. Respondent represented that both Detention Deputy Alexandra Zuloaga and Deputy Jeanette Pettiford violated the Sheriff's Office rules for truthfulness, but were not terminated.^{8/}

62. However, the Sheriff's Office presented evidence that neither of these "comparators" were punished for the same rule violation as Respondent. Deputy Zuloaga was disciplined for loyalty, not "truthfulness." Similarly, a charge of untruthfulness was not substantiated against Deputy Pettiford.

63. Based on the competent substantial evidence presented at the final hearing, the preponderance of the evidence provides the Sheriff's Office sufficient factual and legal "cause" to dismiss Respondent. Consequently, the Sheriff's Office met its burden of establishing sufficient grounds to terminate Respondent from her position as a deputy sheriff.

CONCLUSIONS OF LAW

64. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to section 120.65(6) and the Civil Service Act.

65. The Civil Service Act empowers the Sheriff of Pinellas County to adopt rules and regulations necessary to carry out Sheriff's Office functions. The Civil Service Act further authorizes the Sheriff's Office to take disciplinary action against members of the Classified Service, including detention deputy sheriffs (such as Respondent).

66. Under section 6 of the Civil Service Act, Respondent, as a member of the Classified Service, may be dismissed from service only "for cause." "Cause" for dismissal includes, but is not limited to, "violation of the provisions of law or the rules, regulations, and operating procedures of the Office of the Sheriff."

67. The Civil Service Act authorizes the Sheriff to create a Civil Service Board to hear all appeals arising from personnel

actions which result in dismissal. The Civil Service Board acts as the "agency head" and makes the final determination in this matter. See Section 7 and 8, Civil Service Act; and Rule 7, Civil Service Board Rules of Procedure.

68. The Civil Service Board may contract with DOAH to hear the appeal of the personnel action. The appeal hearing will be conducted pursuant to chapter 120, as well as the rules followed by DOAH in accordance with Florida Statutes. See Sections 8 and 11, Civil Service Act; and Rules 4 and 5, Civil Service Board Rules of Procedure.

69. The Civil Service Act, section 8(3), defines the scope of review and issues to be decided in this matter. In hearing appeals, the Civil Service Board (or DOAH) shall:

- 1) Determine whether the aggrieved member engaged in conduct prohibited by section 6 or by a departmental rule promulgated by the Sheriff;
- 2) Determine whether the action taken against the aggrieved member is consistent with action taken against other members; and
- 3) Make findings of fact and state a conclusion as specified in subsection (6).

70. Under subsection (6) of the Civil Service Act, the Civil Service Board shall either sustain, modify, or not sustain the action being appealed. If the Civil Service Board does not sustain the underlying action (e.g., finding that no "cause"

exists for dismissal), the Civil Service Board shall reinstate the member of the Classified Service to the Sheriff's Office.

71. Pursuant to the Civil Service Act, Sheriff Gualtieri adopted General Order 3-1, Rules and Regulations, which establishes a standard of conduct which must be followed by members of the Sheriff's Office. The Sheriff's Office alleges that Respondent violated General Order 3-1.1, Rule 5.4, and Rule 5.6, which provide as follows:

Rule 5.4, Duties and Responsibilities – The primary responsibility of all Sheriff's Office personnel is to be aware of their assigned duties and responsibilities. All personnel are always subject to duty and are responsible for taking prompt and effective action within the scope of their duties and abilities whenever required.

Rule 5.6, Truthfulness – Members are required to be truthful at all times when acting in an official capacity, whether under oath or not, such as when offering testimony in legal proceedings and administrative investigations. This includes a prohibition against deliberate or intentional omissions or misrepresentations of material fact.

72. The Sheriff's Office specifically alleges that, 1) Respondent failed to take prompt and effective action to secure a firearm and ammunition that another deputy had left in a control room under Respondent's command, and 2) Respondent was not truthful during the internal investigation into that incident.

73. The burden of proof in this chapter 120 proceeding, absent a statutory directive to the contrary, is on the party

asserting the affirmative of the issue. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); see also Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996) ("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."). Therefore, the Sheriff's Office, as the party seeking to take disciplinary action on Respondent, carries the ultimate burden of persuasion in this administrative matter.

74. The burden of proof in this proceeding is governed by the preponderance of the evidence standard. See § 120.57(1)(j), Fla. Stat. A preponderance of the evidence is defined as "the greater weight of the evidence" or evidence that "more likely than not" tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000). See also S. Fla. Water Mgmt. v. RLI Live Oak, LLC, 139 So. 3d 869, 872 n.1 (Fla. 2014) citing to Black's Law Dictionary 1301 (9th ed. 2009) (A preponderance of the evidence is defined as "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.").

75. Turning to the issues to be reviewed in this matter under the Civil Service Act:

- 1) Determine whether the aggrieved member engaged in conduct prohibited by section 6 or by a departmental rule promulgated by the Sheriff.

76. After careful consideration of the competent substantial evidence in the record, the undersigned finds that the Sheriff's Office demonstrated, by a preponderance of the evidence, that Respondent engaged in conduct prohibited by the Civil Service Act, section 6, and General Order 3-1. Specifically, the Sheriff's Office proved that Respondent violated General Order 3-1.1, Rule 5.4, Duties and Responsibilities, and Rule 5.6, Truthfulness.

77. The facts found in this matter proved the evidence shows that Respondent was aware of the presence of a firearm in the 1F control room on April 10, 2015. Respondent failed to take prompt action to secure the firearm. Further, Respondent was not truthful during the ensuing AID investigation when she denied to investigators any knowledge of the weapon in the control room.

78. The ultimate finding of fact turns on the competing testimony between Corporal Perez and Respondent. (The remaining evidence as identified in the Findings of Fact above, is not sufficiently credible or persuasive to support the Sheriff's Office's allegations.) Based on the facts in the record, the

greater weight of the evidence supports Corporal Perez's testimony that he informed Respondent, on the morning of April 10, 2015, that Deputy Burge placed her sidearm in the cabinet in the 1F control room. To summarize the key aspects of the evidence, Corporal Perez was aware Deputy Burge brought her pistol into the control room and deposited it in the cabinet. When Respondent arrived for her duty shift, Corporal Perez asked her to accompany him to the cabinet at which point he informed her that the weapon was located inside.

79. Corporal Perez's testimony is supported by two factual findings. First, Deputy Gammon was present in the 1F control room at the time Corporal Perez asserts that he informed Respondent about the weapon. Although Deputy Gammon denied knowing of the firearm's presence, or that she overheard the conversation between Corporal Perez and Respondent, she did see them walk together to the cabinet. Thus, Deputy Gammon corroborates Corporal Perez's testimony that he communicated with Respondent about the weapon and showed her where it was located.

80. Second, the video recording of the 1F control room also tracked Corporal Perez and Respondent's movements through the room. The video displayed Corporal Perez and Respondent moving together to the corner of the control room where the cabinet was located at the time Corporal Perez stated that he discussed the firearm with Respondent.

81. At the final hearing, Corporal Perez testified consistently and persuasively.^{9/} Through his testimony, as supported by the findings above, the Sheriff's Office demonstrated, by a preponderance of the evidence, that Respondent learned about the presence of Deputy Burge's sidearm in the 1F control room on April 10, 2015.

82. Accordingly, the Sheriff's Office met its burden of proving that Respondent engaged in conduct prohibited by Civil Service Act, section 6, and General Order 3-1. Specifically, the evidence establishes that Respondent violated General Order 3-1.1, Rule 5.4, Duties and Responsibilities, and Rule 5.6, Truthfulness. Therefore, the Sheriff is authorized to discipline Respondent for "cause" under the Civil Service Act.

2) Determine whether the action taken against the aggrieved member is consistent with action taken against other members.

83. The Sheriff's Office further demonstrated that the disciplinary action against Respondent (dismissal) is consistent with discipline the Sheriff has taken against other members who committed the same prohibited conduct. Sheriff Gualtieri exercised his authority, within the disciplinary range authorized by General Order 10-2, to terminate Respondent's employment. Sheriff Gualtieri emphatically testified that he has fired every member of the Sheriff's Office who he has determined violated the

policy on truthfulness. No evidence was presented to the contrary.

84. Respondent did not present persuasive evidence that the Sheriff's Office has disciplined other members differently based on a violation of General Order 3-1, Rule 5-6, Truthfulness. Although, of the four individuals investigated for misconduct, Respondent was the only deputy who Sheriff Gualtieri dismissed, none of the others were charged with violating Rule 5-6, Truthfulness. Further, neither of the two "comparators" Respondent referenced at the final hearing, were disciplined (and not terminated) based on a charge of untruthfulness.

3) State a conclusion whether the Civil Service Board should either sustain, modify, or not sustain the action being appealed.

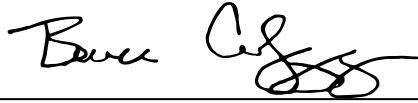
85. Based on the evidence in the record, the undersigned concludes that the Civil Service Board should sustain Sheriff Gualtieri's decision to dismiss Respondent for cause under the Civil Service Act. Respondent's violations of General Order 3-1.1, Rule 5.4 and Rule 5.6, total 60 points under the disciplinary scale set forth in General Order 10-2. The discipline range for 60 points includes termination. Therefore, Sheriff Gualtieri was authorized to terminate Respondent's employment based on her violations of Sheriff's Office rules and regulations.

86. In sum, the Sheriff's Office met its burden of proving, by a preponderance of the competent, substantial evidence in the record, that Respondent violated Civil Service Act, section 6, and General Order 3-1. Therefore, Sheriff Gualtieri had "cause" to dismiss Respondent. The Sheriff's Office also proved that the discipline Sheriff Gualtieri elected to impose (dismissal) is consistent with action taken against other members who contravened the Sheriff's policy on truthfulness. Accordingly, the Sheriff's Office provided sufficient grounds and a legal basis to terminate Respondent.

RECOMMENDATIONS

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, Cynthia Graham, violated General Order 3-1.1, Rule 5.4, Duties and Responsibilities, and Rule 5.6, Truthfulness. It is further RECOMMENDED that Sheriff Gualtieri's decision to terminate Respondent from her employment with the Pinellas County Sheriff's Office be sustained.

DONE AND ENTERED this 19th day of July, 2017, in
Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of July, 2017.

ENDNOTES

^{1/} All references to Florida Statutes will be to the 2016 version.

^{2/} See Graham v. Pinellas County Sheriffs Office, Case No. 15-0063-AP-88B (6th Jud. Cir. App. Div.) (Order and Opinion of July 13, 2016, docketed with DOAH on July 18, 2016).

^{3/} At the start of the final hearing, the undersigned addressed several motions. Following argument from the parties, the undersigned denied Petitioner's Motion in Limine Concerning Comparator Discipline and Respondent's Income, as well as Petitioner's Motion to Strike and Exclude Respondent's Notice of Exhibits and Witnesses, filed January 17, 2017. The undersigned granted Petitioner's Motion to Quash Subpoenas to Deputies Gilberto Perez and Michelle Gammon, and for a Protective Order; and Motion to Quash Subpoena to Deputy Daunika Burge, and for a Protective Order.

Respondent renewed her Notice of Expiration of Hearing Responsibility and Motion for Dismissal of Findings of Interoffice Memorandum dated August 14, 2015. This motion was denied. Respondent also moved for a directed verdict, which was denied. At the conclusion of the evidence, Respondent again

renewed her "Notice of Expiration of Hearing Responsibility and Motion for Dismissal of Findings of Interoffice Memorandum dated August 14, 2015," which was denied.

^{4/} On April 10, 2015, Gilberto Perez held the rank of Corporal. As such, he is referred to as "Corporal Perez" in this Recommended Order. Sheriff Gualtieri subsequently demoted Corporal Perez to deputy based on his actions in this matter.

^{5/} See Fla. Admin. Code R. 28-106.216.

^{6/} In this administrative proceeding, the undersigned is not bound by the conclusions or factual findings of the AID investigators or the ARB. Similarly, the undersigned gives no deference to Sheriff Gualtieri's acceptance and endorsement of the ARB's recommendation. The Civil Service Act directs that the undersigned is to conduct the final hearing "pursuant to chapter 120, Florida Statutes," and "according to the rules followed by DOAH in accordance with Florida Statutes." See Civil Service Act, Section 8(d), and Civil Service Board Rules of Procedure, Section 5. As such, this proceeding was conducted "de novo." See § 120.057(1)(k), Fla. Stat.

Accordingly, whether the Sheriff's Office produced sufficient competent substantial evidence to meet its burden of proof in this "de novo" administrative proceeding is based on and measured by all the evidence and testimony adduced during the final hearing. See § 120.057(1)(l), Fla. Stat. Therefore, the undersigned's analysis may include evidence and observations Sheriff Gualtieri did not previously contemplate. Similarly, the undersigned may disregard unproven or unsupported evidence that was previously considered.

In particular, at the final hearing, the Sheriff's Office introduced evidence of prior recorded statements from Deputy Lindsey Knaut and Deputy Brook Mahoney, which AID investigators and the ARB obtained during the 2015 investigation. These out-of-court statements are clearly hearsay. See § 90.801(1)(c), Fla. Stat. Under the Administrative Procedure Act, "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." See § 120.57(1)(c), Fla. Stat. Consequently, the undersigned makes no findings of fact based solely on these out-of-court statements.

Further, if the purpose of the chapter 120 evidentiary hearing is to suss out all the relevant facts and allow the "affected parties an opportunity to change the agency's mind," then, logically, it should be the facts and observations gathered at the hearing that carry the day and upon which any final action by the agency is predicated. See J.D. v. Fla. Dep't of Child. & Fams., 114 So. 3d 1127 (Fla. 1st DCA 2013), citing with approval Couch Const. Co. v. Dep't of Transp., 361 So. 2d 172 (Fla. 1st DCA 1978); see also Caber Sys., Inc. v. Dep't of Gen. Servs., 530 So. 2d 325, 334 (Fla. 1st DCA 1988). Consequently, in this administrative proceeding, the undersigned created a new evidentiary record based upon an impartial and unbiased review of the historical and objective facts and witness testimony developed during the final hearing.

^{7/} As indicated in endnote 6 above, Sheriff Gualtieri also testified that he relied on statements reportedly made by Deputy Knaut and Deputy Mahoney to AID investigators and the ARB. Neither Deputy Knaut nor Deputy Mahoney spoke directly to Sheriff Gualtieri about the incident. Neither did they testify at the final hearing. Consequently, no findings of fact are made based on their hearsay statements. See § 120.57(1)(c), Fla. Stat., and Fla. Admin. Code R. 28-106.213(3).

^{8/} Respondent supported her "comparator" testimony with documents indicating that Deputy Zuloaga's discipline is found in PSCO Case No.: AI-14-038, dated January 28, 2015; and that Deputy Pettiford's discipline is found in PSCO Case No.: AI-15-040, dated October 12, 2015.

^{9/} See Young v. Dep't of Educ., 943 So. 2d 901, 902 (Fla. 1st DCA 2006) ("[I]t is the responsibility of the administrative law judge to evaluate and weigh the testimony and other evidence submitted at the hearing to resolve factual conflicts, and to arrive at findings of fact."); Reily Enters., LLC v. Fla. Dep't of Env'tl. Prot., 990 So. 2d 1248, 1251 (Fla. 4th DCA 2008) ("Evidentiary matters such as credibility of witnesses and resolution of conflicting evidence are the prerogative of the [Administrative Law Judge] as finder of fact in administrative proceedings.); and Resnick v. Flagler Cnty. Sch. Bd., 46 So. 3d 1110, 1112 (Fla. 5th DCA 2010) ("[W]here an employee's conduct is at issue, great weight is given to the findings of the [Administrative Law Judge], who has the opportunity to hear the witnesses' testimony and evaluate their credibility.").

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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.