

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS COUNTY SHERIFF'S
OFFICE,

Petitioner,

vs.

Case No. 18-0248

JAYNE A. JOHNSON,

Respondent.

_____ /

RECOMMENDED ORDER

On March 23, 2018, Administrative Law Judge Hetal Desai, of the Division of Administrative Hearings (DOAH), held a final hearing in St. Petersburg, Florida.

APPEARANCES

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

For Respondent: Craig L. Berman, Esquire
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STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On December 15, 2017, Petitioner, Pinellas County Sheriff's Office (PCSO), determined that Respondent, Jayne Johnson, engaged in prohibited conduct in violation of the Civil Service Act and Sheriff's Office General Order 3-1.1. Specifically, PCSO found Respondent in violation of Rule 5.4, Duties and Responsibilities; Rule 5.5, Obedience to Laws and Ordinances; and Rule 3.18, Unauthorized Use of Automated Systems. On the same day, the PCSO notified Respondent that it was terminating her employment.

On December 19, 2017, Respondent timely appealed her termination to the PCSO, pursuant to the Pinellas County Civil Service Act, section 9. On January 12, 2018, the Pinellas County Sheriff's Civil Service Board referred the matter to DOAH where it was assigned and set for hearing.

The PCSO filed a Motion to Relinquish Jurisdiction on March 8, 2018; Respondent did not file a written response. This motion was heard during the pre-hearing conference on March 19, 2018. The undersigned denied the motion and entered a written Order on March 20, 2018.

At the March 19, 2018, pre-hearing conference, the parties also discussed procedural aspects of the final hearing, such as order of presentation, the burden of proof and submission of joint exhibits. The parties stipulated to a number of "Admitted Facts," which have been incorporated into this Recommended Order.

During the final hearing, the PCSO presented the testimony of Pinellas County Sheriff Bob Gualtieri (the Sheriff) and Respondent. Respondent did not have any additional witnesses, but testified on her own behalf. The parties offered Joint Exhibits 1 through 23, which were admitted in evidence.

At the close of the March 23, 2018, final hearing, the parties waived the 10-day timeframe to file proposed recommended orders (PROs) and, instead, requested a deadline of 30 days after the receipt of the hearing transcript to file post-hearing submittals.

A Transcript of the final hearing was filed with DOAH on May 11, 2018. Both parties timely filed PROs on June 11, 2018. The PROs have been duly considered in preparing this Recommended Order.

FINDINGS OF FACT

Parties

1. Petitioner is a public entity commanded by Bob Gualtieri, the Sheriff of Pinellas County, whose 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").

2. The PCSO is responsible for providing law enforcement and other services within Pinellas County, Florida, including child protection investigative services.

3. As part of his responsibilities, the Sheriff is authorized to impose discipline upon PCSO employees and members who are found to have violated PCSO rules and regulations. He is the final decision-maker for all terminations.

4. At all times pertinent to this case, Respondent was employed by the PCSO as a supervisor in the Child Protection Investigation (CPI) division.

5. Although there was no evidence of Respondent's job description, the parties stipulated that as part of her position, Respondent was required to comply with all PCSO rules, regulations, general orders, and standard operating procedures, as well as the laws of the State of Florida.

6. At the time of her termination, Respondent had been employed by the PCSO for approximately 17 years.

The PCSO's Investigation of Respondent

7. Pertinent to this proceeding, the PCSO's General Orders include the following:

Rule 5.4 Duties and Responsibilities

Rule 5.5 Obedience to Laws and Ordinances

Rule 3.18 Unauthorized Use of Automated Systems

8. In August 2017, the Sheriff received a letter from Circuit Court Judge Jack Helinger (judge) informing the Sheriff that Respondent had authored an "evaluation letter" of a parent that had been offered as part of a custody dispute. Respondent's

evaluation letter indicated that she had interviewed the children involved in the custody dispute, and that the children had informed Respondent that the mother "smokes weed and drinks while pregnant" and the mother's boyfriend made "cigarettes with green stuff" and drank alcohol. The evaluation letter also noted that the children preferred the father's home because there they did not get yelled at or threatened. The evaluation letter to the judge concluded:

While it is the court's decision regarding custodial matters and visitation, I would strongly recommend not only therapy for each child but also random urinalysis for the mother and her husband, especially concerning in light of mother's current pregnancy.

* * *

I would have to support father's home as the safer environment for the children based on the information gathered from the children's point of view.

9. When the letter was offered at the custody hearing, the mother and the mother's attorney were unaware the children had been evaluated by Respondent. Upon further inquiry into the evaluation by the judge, it was disclosed that Respondent was a friend of the father's mother-in-law, and Respondent had conducted the evaluation "pro bono" as a favor to this friend.

10. The judge wrote to the Sheriff:

I am highly concerned about this situation. It was done with the appearance of a formal CPI investigation. Certainly, I and [the mother's attorney] were led to believe that

until I inquired further. I question whether a CPI investigator can conduct an independent evaluation/investigation in your office. Most certainly this was not an independent unbiased letter. It originated from the relationship between [Respondent] Ms. Johnson and [the father's relative].

Fortunately, because all of this was disclosed in the middle of the Final Hearing, it was not used against the mother. It certainly appeared to me that it was intended to be used for the benefit of the father without disclosure of Ms. Johnson's position with the Pinellas County Sheriff's Office or her relationship to this case.

11. Upon receipt of the judge's letter, the Sheriff referred the matter to the PCSO's Professional Standards Bureau, which in turn filed a complaint with the PCSO's Administrative Investigations division (IA).

12. The IA staff investigated the matter as a complaint of misconduct in violation General Order 3-1.1, Rule and Regulation 5.4 pertaining to duties and responsibilities.

13. The PCSO General Orders describe an administrative review board (ARB), which is a "chain-of-command" review board that resolves issues of fact and makes recommendations to the Sheriff regarding the disposition of disciplinary matters.

14. After the ARB completes its fact-finding role, it presents its conclusions to the Sheriff, who makes a decision as to whether to concur with the ARB's findings and to determine a final disciplinary action.

15. The ARB met on December 14, 2017, regarding the investigation of Respondent. The ARB members reviewed the IA file on Respondent, questioned Respondent, and gave Respondent an opportunity to make a statement.

16. After reviewing the ARB's findings and recommendations, the Sheriff made the decision to terminate Respondent, finding her guilty of violating Rule 5.4. He also found she had committed additional violations of Rule 5.5, pertaining to observance and obedience to the law, and Rule 3.18, pertaining to the unauthorized use of automated systems.

17. The Sheriff's unrefuted testimony was that he would have terminated Respondent based solely on the violation of Rule 5.4.

18. When asked about other employees who had been disciplined for violation of Rule 5.4, the Sheriff testified there had been no other employee with conduct comparable to Respondent's conduct.

19. Respondent put forth a specific employee as a comparator, who was also found guilty of violating Rule 5.4, but was disciplined with a suspension. That employee, however, was disciplined for chronic neglect of duties, not for abusing her position and performing duties without authorization. As such, the undersigned finds there were no similarly situated employees who were treated differently.

Violation of Rule 5.4, Duties and Responsibilities

20. Rule 5.4 states:

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.

21. Based on the stipulation of facts and Respondent's own testimony at the hearing, it is clear that there are no disputed facts as to Respondent's conduct regarding the evaluation of the children at the PCSO, or her creation and submittal of the evaluation letter.

22. There was no open child protection investigation against the mother, nor did the PCSO authorize Respondent to evaluate the children or investigate the mother.

23. Respondent interviewed the children while on duty on PCSO property, using PCSO equipment. Later, Respondent met with the mother of the children, and used PCSO staff to research the mother. This meeting took place on PCSO property during her regular shift and was not authorized or related to PCSO business.

24. Even though she led the judge and mother to believe she was acting within her capacity as a PCSO employee, Respondent's conduct relating to the evaluation and preparation of the evaluation letter was unauthorized and outside the scope of her duties. She abused her position, using it to influence a custody

proceeding, and did so for personal reasons as a favor to a friend.

25. Based on the competent substantial evidence presented at the final hearing, the preponderance of the evidence proves Respondent violated Rule 5.4.

Violation of Rule 5.5, Obedience to Laws and Ordinances

26. Rule 5.5 states:

Obedience to Laws and Ordinances -Agency personnel shall observe and obey all laws and ordinances. Members are required to personally report all violations which have resulted in their arrest or their non-duty related involvement as a suspect in any criminal action to their supervisor without delay. Upon returning to their first duty shift, they must complete an inter-office memorandum reporting the incident to the Administrative Investigation Division.

27. The PCSO's determination that Respondent violated Rule 5.5 was based on the premise that Respondent was a "mandatory reporter," and that she committed a felony when she failed to refer alleged abuse reported to her by the children to the Department of Children and Families (DCF) central abuse hotline, pursuant to section 39.201, Florida Statutes (2017).^{1/}

28. As an initial matter, the PCSO's labeling of Respondent as a "mandatory reporter" at the hearing (and in its PRO), is misleading. Technically everyone is a "mandatory reporter" for child abuse.^{2/} Section 39.201(1)(a) requires "[a]ny person who knows, or has reasonable cause to suspect, that a child is

abused . . . by a parent . . . shall report such knowledge or suspicion to" the DCF hotline. (Emphasis added.) The statute does not impose a special duty to report abuse on child protective investigators.

29. Section 39.205 provides penalties relating to the failure of reporting child abuse. It states in relevant part,

39.205 Penalties relating to reporting of child abuse, abandonment, or neglect.—

(1) A person who is required to report known or suspected child abuse, abandonment, or neglect and who knowingly and willfully fails to do so, or who knowingly and willfully prevents another person from doing so, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

30. Although the Sheriff testified he found Respondent guilty of a Rule 5.5 violation because he believed Respondent had committed a felony, there was no convincing evidence Respondent "knowingly and willfully" failed to report known or suspected child abuse.

31. "Abuse" is defined as:

[A]ny willful act or threatened act that results in any physical, mental, or sexual abuse, injury, or harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired. Abuse of a child includes acts or omissions. Corporal discipline of a child by a parent or legal custodian for disciplinary purposes does not in itself constitute abuse when it does not result in harm to the child.

§ 39.01(2), Fla. Stat.

32. There was no evidence at trial that the children's physical, mental, or emotional health was or was likely to be significantly impaired. Moreover, other than the children's hearsay statements in the evaluation letter, there was no evidence that the mother was actually smoking marijuana or drinking alcohol in front of the children or endangering her unborn child. Although exposure to a controlled substance can constitute harm under the statute, it can only be established by evidence that the parent's alcohol or substance abuse is "extensive, abusive, and chronic." § 39.01(30)(g)2., Fla. Stat.

33. Respondent did suggest in her evaluation letter that the judge require urinalysis of the mother, but there was no evidence Respondent believed the children she interviewed were being abused or harmed as defined by chapter 39. Thus, there was insufficient evidence that Respondent had committed a felony.

34. The PCSO failed to meet its burden in proving Respondent violated Rule 5.5.

Violation of Rule 3.18, Unauthorized Use of Automated Systems

35. Rule 3.18 states in relevant part:

Rule 3.18 Unauthorized Use of Automated
Systems

* * *

b. Members may only use computer equipment
as authorized in General Orders.

36. During the course of her unofficial evaluation and her interaction with the mother, Respondent asked a subordinate to do a check on the mother on the Florida Safe Families Network (FSFN), which is a secure database containing confidential and sensitive information.

37. The FSFN is an "automated system" governed by a user agreement with DCF. It is not to be used out of curiosity or to obtain information for personal use.

38. The preponderance of the competent substantial evidence presented at the final hearing, establishes Respondent violated Rule 3.18.

Rules of Conduct and Disciplinary Scoring

39. PCSO General Order 10-2 covers discipline and ranks certain violations of the PCSO rules.

40. PCSO General Order 10-2 ranks offenses from Level 1 to Level 5, with Level 1 offenses being the least severe and Level 5 offenses being the most severe.

41. Rules 5.4 and 5.5 are level 5 violations.

42. Rule 3.18 is a level 3 violation.

43. The General Orders set forth a procedure for assigning points for each sustained violation and provide a table indicating the range of punishment depending on the total points scored.

44. The disciplinary scoring applicable to Respondent's case are calculated as follows: Level 5 violations constitute 50 points for the first infraction, and ten additional points for subsequent infractions; and the level 3 violation is an additional 15 points.

45. Under PCSO General Order 10-2, termination is the appropriate maximum discipline if the violation(s) total 50-points or more.

46. A score of over 50 points warrants a minimum discipline of suspension of five to 15 days.

47. For example, for violations totaling a 60-point score an employee must be disciplined with a seven-day suspension, but can receive a maximum discipline of termination; for a 75-point violation the minimum discipline is a ten-day suspension with a maximum discipline of termination.

48. The Sheriff was within his discretion to terminate Respondent based on his finding of the Rule 5.4 violation alone, which would be assessed 50 points and warrants a range of discipline from a five-day suspension to termination.

49. Based on the disciplinary scoring calculations, a violation of Rule 5.4 (50 points) and Rule 3.18 (15 points) would total 65 points.

50. The minimum disciplinary action for a 65-point violation calculation is seven days; the maximum disciplinary action is termination.

51. Consequently, the PCSO met its burden of establishing sufficient grounds to terminate Respondent from her position as a child protection investigation supervisor.

CONCLUSIONS OF LAW

52. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this appeal proceeding pursuant to section 120.65(6), Florida Statutes and the Civil Service Act.^{3/}

53. As an initial matter, Respondent argues the Sheriff had an insufficient basis to terminate her for violations of Rules 5.5 and 3.18. In this administrative proceeding, however, the undersigned is not bound by the conclusions or factual findings of the AI investigators, the ARB, or the Sheriff. Similarly, the undersigned gives no deference to the Sheriff's acceptance and amendment of the ARB's recommendation.

54. Accordingly, whether the PCSO 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)(k), Fla. Stat.

55. Similarly, the undersigned may disregard unproven or unsupported evidence that was previously considered. Instead, a new evidentiary record was established based on the relevant evidence and witness testimony developed during the final hearing.

56. Regarding the evidence at trial, a number of sworn statements taken as part of the IA's investigation were offered as joint exhibits at the hearing. These statements, however, are out-of-court statements and 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.

57. 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. See 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), defining a preponderance of the evidence 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.”).

58. The burden 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 PCSO, as the party seeking to take disciplinary action on Respondent, carries the ultimate burden of persuasion in this administrative matter.

59. The Civil Service Act, section 8(3), defines the scope of this proceeding and limits the issues to be decided to the following:

- 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).

60. Section 6 of the Civil Service Act requires the undersigned to recommend the Civil Service Board "either sustain, modify, or not sustain the action being appealed."

61. Turning to the first issue of whether Respondent violated PCSO rules, for the reasons stated in the finding of facts, the undersigned finds the PCSO 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 PCSO proved that Respondent violated Rule 5.4, Duties and Responsibilities, and Rule 3.18, Unauthorized Use of Automated Systems.

62. As for the second issue relating to consistency of the discipline as compared with other PCSO employees, the PCSO demonstrated that the Sheriff exercised his authority, within the disciplinary range authorized by General Order 10-2, to terminate Respondent's employment.

63. There was no evidence the PCSO had disciplined other members differently based on the same circumstances or similar violations. Although Respondent argued another employee had also been found guilty of violating Rule 5.4., but given less harsh discipline, the conduct of that employee involved the lack of performance of duties, not abuse of the position.

64. In employment discrimination cases, courts have held that for allegations of disparate discipline, the fact-finder

must consider "whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." See White v. Dixie, No. 17-11123, 2018 U.S. App. LEXIS 18581, at *18 (11th Cir. July 9, 2018) (finding in discriminatory discipline case the comparator's performance deficiencies were not of the same quantity or quality as the plaintiff employee to permit comparison).

65. There was no evidence in the record that any other employee engaged in similar conduct--using his or her PCSO authority, skills and resources to influence a legal proceeding as a favor for a friend. As such, the termination of Respondent was not inconsistent with the discipline taken against other members.

66. Finally, the undersigned concludes that the Civil Service Board should sustain the Sheriff's decision to dismiss Respondent for cause under the Civil Service Act. Respondent's violations of Rules 5.4 and 3.18 total 65 points under the disciplinary scale set forth in General Order 10-2. The discipline range for 65 points includes termination. Therefore, the Sheriff was authorized to terminate Respondent's employment based on her violations of PCSO's rules and regulations.

67. In conclusion, the PCSO met its burden of proving, by a preponderance of the competent, substantial evidence that Respondent violated Civil Service Act, section 6, and General

Order 3-1. Therefore, the Sheriff had "cause" to dismiss Respondent. The PCSO also proved that there were no similarly situated comparators and the discipline the Sheriff elected to impose--termination--was appropriate.

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:

Respondent, Jayne A. Johnson, violated Rules 5.4 and 3.18, and sustaining the Sheriff's decision to terminate Respondent from her employment with the Pinellas County Sheriff's Office.

DONE AND ENTERED this 16th day of July, 2018, in Tallahassee, Leon County, Florida.



HETAL DESAI
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of July, 2018.

ENDNOTES

^{1/} All references to Florida Statutes and PCSO rules, regulations, and orders are to the 2017 versions unless otherwise stated.

^{2/} The statute was significantly amended in 2003, but previously stated in relevant part:

(1) Any person, including, but not limited to, any:

(a) Physician, osteopathic physician, medical examiner, chiropractic physician, nurse, or hospital personnel engaged in the admission, examination, care, or treatment of persons;

(b) Health or mental health professional other than one listed in paragraph (a);

(c) Practitioner who relies solely on spiritual means for healing;

(d) School teacher or other school official or personnel;

(e) Social worker, day care center worker, or other professional child care, foster care, residential, or institutional worker;

(f) Law enforcement officer; or

(g) Judge, who knows, or has reasonable cause to suspect, that a child is abused, abandoned, or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare shall report such knowledge or suspicion to the department in the manner prescribed in subsection (2).

§ 39.201, Fla. Stat (2002). The current version does require certain reporters to provide their names to the hotline staff, such as doctors, social workers, law enforcement officers, and judges. § 39.201(1)(d), Fla Stat. There was nothing in the record indicating that anyone else from the PCSO or the judge involved in the custody case or this appeal contacted the DCF Hotline.

^{3/} This proceeding is governed by the Civil Service Act and implementing procedural rules authorized by the PCSO Civil Service Board. When a PCSO employee exercises his or her 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 and 5, PCSO Civil Service Board Rules of Procedure. When, as in this case, DOAH conducts the appeal hearing, the Administrative Law Judge enters a recommended order and the PCSO Civil Service Board renders the final determination. Rule 7, PCSO Civil Serv. Bd. Rules of Procedure.

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.