

IN RE

**THE PERSONNEL BOARD HEARING
OF
BENJAMIN WEST**

COUNTY MANAGER'S DECISION

Pursuant to Volusia County Merit Rules and Regulations, section 86-485(g), I have considered the findings of fact and advisory decision of the Personnel Board in the above referenced matter. I have personally reviewed the written transcript of the deliberations and findings of the Personnel Board proceedings in this case, held on September 20, 2013.

The Personnel Board is required under section 86-485(f)(7) "to transmit its findings and advisory decision to the county manager for review and final decision within seven calendar days of the completion of the hearing or review." I have received¹ the above findings and advisory decision of the Personnel Board and have given both due consideration. Pursuant to section 86-485(g)(3), my decision "shall be rendered within ten working days of the receipt of the findings and advisory decision."

The Personnel Board has two responsibilities. The first is to determine whether employee wrongdoing is established by substantial evidence. The second is to recommend whether the punishment assessed by the appointing authority should be upheld or modified. Personnel Board hearing procedures require that the Board make clear findings of fact and conclusions and an advisory decision to the county manager for the final decision.

Appellant was dismissed for incidents which were determined by the Director of Public Protection to have violated the following: Merit Rules and Regulations, section 86-453, specifically: knowingly giving false statements to supervisors and conduct which interferes with effective job performance or has an adverse effect on the efficiency of county service; Division of

¹ Appellant agreed, through counsel, to extend the time for transmittal of the Personnel Board findings to October 2, 2013.

Corrections Policy and Procedure 102.09(C), knowingly making or causing to be made any false report or falsifying any official record, or, without regard to intent, making or causing to be made any inaccurate, misleading, contradictory, or improper record/official record; and Division of Corrections General Post Orders, number 3, requiring all employees to report a violation of institutional rules, number 29, requiring all employees to notify their supervisor and make a complete report of all unusual incidents that occur during a tour of duty and number 42, requiring prompt compliance and execution of orders/instructions of superior officers.

The Personnel Board sustained the findings that Appellant had violated General Post Orders numbers 3 and 29, failure to report a violation of institutional rules and failure to make a written report of an unusual incident that occurred during his tour of duty, but did not sustain the remaining grounds for termination.² In its discussion of these findings, the Board noted that the behavior Appellant said he observed, though not sexual in nature, was unusual, perhaps even aberrant, and was something which should have been reported to his supervisor. The Board noted that even if they did not consider the actions observed to be sexual harassment, it may be considered same depending on the County's policy. The Personnel Board's advisory recommendation was to modify the punishment assessed by the appointing authority in this case.

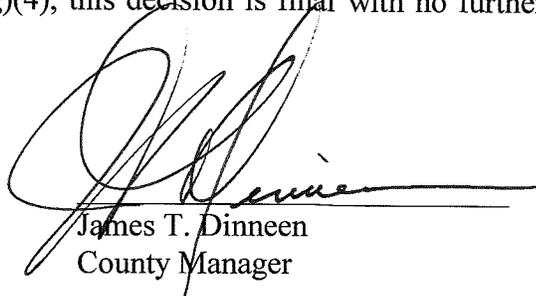
In evaluating the totality of the information and evidence presented to the Personnel Board, I note that Appellant was not an entry level employee. He was a sworn corrections sergeant supervisor with over fourteen years tenure. As such, he was held to a standard of conduct commensurate with such a position. Further, while all corrections officers are held to a higher

² With regard to the allegation that Appellant knowingly made false statements to supervisors, I accept the Board's findings that this charge was not sustained. However, these allegations, the evidence presented regarding same, and Appellant's explanation as to his actions with regard thereto are troubling, particularly in light of his position within the organization and management's expectations that his conduct, particularly as to veracity issues, will be above reproach. I find his explanation for the discrepancy between his sworn statements and those made to the internal affairs investigator less than compelling. Notwithstanding my stated concerns as to the Board's findings regarding the veracity violations, I want to be clear that my decision is based solely on those violations sustained by the Board.

standard due to the paramilitary nature of such positions, Appellant's duty to comply with and uphold the policies and procedures of both the County and the Division, was heightened due to the position of trust that he held. The evidence established that Appellant's actions, in failing to report the incident he admits to having witnessed, significantly contributed to an inconclusive finding in the investigation of extremely serious allegations of sexual harassment against another supervisor. Further, future ramifications of his actions on the operations of the County, including potential liability, remain unknown and therefore of concern.

In conclusion, I have decided to accept the recommendation of the Personnel Board not to terminate Appellant from employment. However, based on the sustained violations, his level of supervisory authority and the totality of the evidence, including evidence presented which demonstrated an inability to supervise and his failure to acknowledge or recognize the impact of his actions, I have determined that the following disciplinary action is appropriate. Appellant will be demoted from the position of Division of Corrections Sergeant and will be transferred to the Emergency Medical Services Division, within the Department of Public Protection, to the position of ambulance supply technician. His rate of pay will be \$18.1304 per hour.³ He will serve a suspension from April 15, 2013 to his reinstatement date of June 22, 2013. In accordance with Volusia County Merit Rule, section 86-485(g)(4), this decision is final with no further right of administrative appeal.

Dated this 16th day of October, 2013.

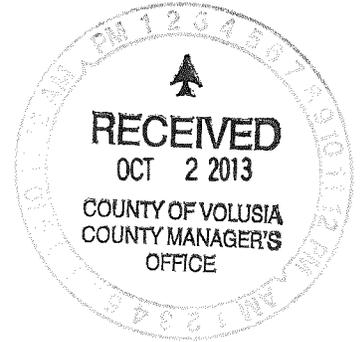


James T. Dinneen
County Manager

cc: Division of Corrections
Department of Public Protection
County Personnel
County Legal
Benjamin West
Erin Thompson, Esq.

³ This is the rate of pay he was receiving as a corrections officer, prior to his promotion. This hourly rate exceeds the pay range for the position to which he is being assigned. He will not be eligible for pay increases so long as his pay exceeds authorized for the position.

VOLUSIA COUNTY PERSONNEL BOARD
SUMMARY OF FINDINGS AND DETERMINATION
ADVERSE ACTION APPEAL #09202013



APPELLANT: Benjamin West

POSITION HELD: Sergeant

DATE OF HIRE: March 15, 1999

DATE OF APPEAL HEARING: September 20, 2013

SUBJECT: Termination

HEARING BODY: Personnel Board

FINAL AUTHORITY: County Manager

ATTENDEES:

Personnel Board Members Patrick Lane, Chair
Brenda Thompson
Ezell Reeves
Joe Winter
Fran Duvall

Ex-Officio Members

Executive Secretary: Tom Motes, Human Resources Director

Employer: Volusia County, Department of Corrections

Employer's Representative: Nancye Jones, Assistant County Attorney

Employer's Witnesses: Capt. David Vanis, Beach Safety
Lt. Shannon McBride, Volusia County Corrections
George Recktenwald, Public Protection Director
Marilyn C. Ford, Director of Corrections

Appellant's Representative: Erin Thompson, Esq.

Appellant's Witnesses: Gina West
Benjamin West

Recording Secretary: Ginger Hadley, Personnel Services

I. INTRODUCTION

The Volusia County Personnel Board convened on Friday, September 20, 2013 to hear the appeal filed by Appellant Benjamin West regarding his termination from the Department of Corrections.

BACKGROUND

1. The hearing before the Personnel Board was conducted in accordance with Merit System Rules and Regulations Sec. §86-485(f).
2. The hearing was held at the request of Appellant.

II. EMPLOYER'S ACTIONS

On April 15, 2013, George Recktenwald, Public Protection Director, issued a Notice of Dismissal to Appellant for violations of the following Merit System Rules and Regulations as well as Volusia County Division of Corrections Policies:

Merit Rules and Regulations

1. Section 86-453(12): Knowingly giving false statements to his supervisors, other officials or the public;
2. Section 86-453(8): Criminal, dishonest, or other conduct which interferes with effective job performance or has an adverse effect on the efficiency of county service.

Volusia County Division of Corrections Policies

1. 102.09(c): All staff shall make or cause to be made accurate, complete and truthful reports and official records.
 1. No staff member shall knowingly make or cause to be made any false report or falsify any official record.
 2. No staff member shall make or cause to be made any inaccurate, misleading, contradictory, or improper record/official record.
2. General Post Orders #3: Enforce all rules, regulations and policies of the Division. It is the responsibility of all employees to report a violation of institutional rules as specified in Division Policies and Procedures, Administrative Directives, and Post Orders.
3. General Post Orders #29: Notify their supervisor and make a complete written report of all unusual incidents that occur during a tour of duty or when off duty unusual incidents that pertain to the safety or security of the institution and its staff or inmates.

4. General Post Orders #42: Promptly comply with and execute direct orders or instructions given by a superior officer, and shall not refuse to comply or execute such orders or instructions when the orders or instructions are lawful and proper.

EMPLOYER'S REQUEST

The Employer requested that the Board uphold the action taken by the appointing authority.

APPELLANT'S POSITION AND REQUEST

Appellant opposed the County's position regarding his dismissal from the Department of Corrections.

Appellant requested that the Board recommend to the County Manager that his dismissal be rescinded.

III. SUMMARY OF EVIDENCE

On April 15, 2013, Appellant Benjamin West was dismissed from employment with the Department of Corrections. Evidence presented to the Personnel Board was as follows:

On August 4, 2012, Correctional Officer Charles Cella was injured his knee on the job when he slipped and fell. Sergeant Benjamin West (hereinafter Appellant) took Officer Cella to the clinic and then brought him into shift commander's office to complete paperwork. Due to his injury, Officer Cella did not return to work until November 9, 2012 and, upon his return, he filed a written complaint against Captain Nina Hunter, regarding conduct which he alleged had occurred on the day he was injured, while he was in the shift commander's office, and also during the summer of 2012 while he was on shift. Based on the allegations, which were very serious and sexual in nature, George Recktenwald, Director of the Public Protection, directed Captain David Vanis, acting internal affairs investigator for the Department of Public Protection, to conduct an internal investigation of Capt. Hunter. Capt. Vanis initially interviewed Officer Cella who identified several individuals that were either in the room or nearby when the alleged actions occurred in the shift commander's office.

On November 13, 2012, Appellant was notified that he was a witness in the investigation against Capt. Hunter and he was scheduled to give a sworn statement on November 20, 2012 to determine what, if anything, he had witnessed during the encounter with Capt. Hunter and Officer Cella. During the interview, when asked if he had observed anything unusual on August 4, 2012 in the shift commander's office, Appellant testified that he thought Capt. Hunter "licked the back of his head." Later in

the same interview, Appellant stated "I know when she licked his head, I know it really made him mad and I know he tensed up and his back was also hurting." Appellant stated that he did not see anything else, "that I can really think of" and that he did not remember Capt. Hunter saying anything to Cella during the encounter. He was asked if he saw Capt. Hunter lick her finger and put it in Cella's ear, and he said that he did not. When asked if he had reported the incident between Capt. Hunter and Cella to anyone, Appellant stated that he verbally reported it to his supervisor, Lt. Shannon McBride, when he encountered her outside as he was departing with Officer Cella to take him to the hospital, telling her that Capt. Hunter had licked Cella and that he was "pissed."

Lt. McBride was also interviewed as part of the Hunter internal affairs investigation and testified that Appellant did not advise her of the incident between Officer Cella and Capt. Hunter. She said that she would certainly have remembered it if he had told her something like that and that he had only asked her for assistance in filling out injury related paperwork. This contradicted what Appellant had testified to during his sworn interview on November 20. It was undisputed that Appellant did not prepare a written report of the unusual incident on August 4 or at any time thereafter.

Lt. McBride also testified at the personnel board hearing and flatly denied that Appellant had reported anything to her regarding Capt. Hunter having licked Cella or that Cella was "pissed" on August 4. She said that she had spoken to Appellant on the phone that morning, not outside the facility as Appellant testified, that their conversation only involved him asking for assistance on how to fill out the injury paperwork and that he did not tell her anything about Capt. Hunter's actions. She said that she did see Appellant and Cella outside later but they were in a car on the way to the hospital when she saw them and that her only conversation had been to ask Cella if he was doing ok. She was clear, consistent and undeterred in her testimony and stated that, had Appellant told her of such an incident, she herself would have had to report it. Lt. McBride was unequivocal that Appellant had not reported anything to her regarding Capt. Hunter's actions on August 4, 2012 or at any time thereafter.

On January 23, 2013, Appellant was re-interviewed by Capt. Vanis as part of the Hunter investigation regarding certain assertions she had made during her subject officer interview. At the end of Appellant's second interview, Capt. Vanis asked Appellant to relate what he had witnessed on August 4 in the shift commander's office. Appellant stated "I saw her lick; I saw her lick the back of his head." To confirm what Appellant said, Capt. Vains asked "ok, you are certain you saw her lick his head" and Appellant responded "yeah".

On February 1, 2013, while out of work for a non-duty related injury, Appellant contacted Capt. Vanis via telephone and advised that he wanted to clear up some things because he did not remember what he had testified to eight days earlier. During that telephone conversation, Appellant told Capt. Vanis that he never witnessed Capt. Hunter lick Officer Cella on August 4, 2012. Due to this conflict between Appellant's sworn testimony and his verbal statements to Capt. Vanis, Director Recktenwald directed the initiation of an internal affairs investigation into the veracity of Appellant. When Capt. Vanis went to Appellant's home to serve him with a notice of internal investigation, Appellant spontaneously reiterated that he wanted to be clear, that he did not see Capt. Hunter lick Officer Cella but that he did see her give him a "wet willie." These assertions by Appellant were inconsistent with both of his sworn interviews in the Hunter investigation.

On February 15, 2013, as part of his own internal investigation, Appellant was interviewed by Capt. Vanis about his retraction of his statements made previously under oath. In this interview, Appellant reported that, on August 4 while he was completing paperwork in the shift commander's office, he witnessed Capt. Hunter lick the back of Cella's head, but he did not see her give Cella a wet-willie. When Capt. Vanis questioned Appellant as to the discrepancies between his statements, Appellant stated that he had been out of work since January 26, 2013, and had been on pain medications which caused him to be confused. Appellant testified that he was unclear as to his recollection of the telephone conversation with Capt. Vanis on February 1, 2013, stating that he did not recall telling Capt. Vanis over the telephone that Capt. Hunter did not lick Officer Cella. Appellant's recollection was that he had expressed doubt about witnessing Capt. Hunter either lick Cella's head or give him a "wet willie." Appellant stated that he was confused because of the medications he was taking. When asked about the pain medications he had been on, Appellant provided two prescription bottles, one for 500mg Naproxen and one for Cyclobenzaprine (Flexeril), a muscle relaxant. At the personnel board hearing, Capt. Vanis testified that, as a sworn law enforcement officer, he had training to recognize signs of impairment and that Appellant did not appear to be under the influence of alcohol or any narcotics and showed no other signs of impairment during their conversation on February 1, 2013.

Evidence was presented as to certain statements made by Appellant as to his absences from work for his non-duty related injury during this period. Records showed that Appellant called out from his scheduled duty on Monday, January 28, 2013 stating that he hurt his back, that he had a doctor's appointment and may be out on January 29, 2013. Appellant was out of work on January 29, 2013. The physician's note that he later provided was dated January 31, 2013, and further stated "no work from 1/28 to 2/5, seen in the office today." It appeared that Appellant did not go to the physician until 2 –

3 days after he had called out from duty which seemed inconsistent with what he had reported when he called in. Although he was not to return to work, according to the doctor's note until February 5, 2013, Appellant attended an 8-hour pepper ball launcher and quelling simulated situation training on that date, which included both classroom and range physical activities, on overtime.

Also, on Thursday, January 31, 2013, Appellant reported to the scheduling supervisor that he would be out for his regular shift on February 1-3 and that the leave was unrelated to his previous leave. Appellant had been given previous direction to report call out to his Shift Commander, not the scheduling supervisor. When Appellant called in, he was directed to pick up FMLA paperwork and bring the necessary paperwork back on his next scheduled work day. However, the paperwork was not submitted in a timely manner and dates were inconsistent with the physician's excuse provided relating to his absences from duty.

Appellant's testimony at the personnel board hearing as to the Hunter/Cella interaction remained consistent with his sworn statements. He explained his inconsistent remarks to Capt. Vanis, stating that he was confused due to the medications he was on at the time. Evidence as to whether confusion is a side effect for either medication Appellant was taking at the time of his conversation with Capt. Vanis was conflicting. Appellant offered the testimony of his wife, a registered nurse, who described Appellant as "not himself" during the time in question due to his injury and a death in the family of a close relative. As to the evidence with regard to whether Appellant had reported the incident involving Capt. Hunter, as required by policy, to Lt. McBride, Appellant stated that Lt. McBride had lied in her testimony when she said he did not.

IV. BOARD'S FINDINGS OF FACTS AND CONCLUSIONS

Merit Rules and Regulations

Section 86-453(12): Knowingly giving false statements to his supervisors, other officials or the public;

Discussion:

Chairman Lane noted that the board was not bound to a standard of "beyond a reasonable doubt" in reviewing the evidence and also acknowledged that sexual harassment could involve words alone and not touching someone. Mr. Reeves stated that, as to whether Appellant "knowingly lied," since Appellant was on a phone call and not under oath when he talked to Capt. Vanis, "it's not part of it." However, Mr. Lane did

note that it would be “our expectation that he would be truthful to a supervisor, whether he was under oath or not.”

Ms. Duvall stated that “knowingly” was the operative word. Acknowledging that there were many facets to this case, she stated that the problem that she had with all of it when Lt. McBride got on the stand she was asked very specific questions and she was firm in her testimony, she was very specific, she executed confidence and she was very sure that the Appellant had not in any way mentioned this incident to her. Ms. Duvall commends the Appellant and thinks that he has a good record, but it bothered her when Lt. McBride testified that he had not reported the incident to her because her impression was that she was telling the truth and that meant that either Lt. McBride was lying or the Appellant was lying, it couldn't be both. Either he said it to her or he didn't and that's the part of this case that bothered her. She felt that Lt. McBride was so firm in her statement that she believed her and noted that since Appellant has 14 years with the department, he knows that he has to report.

Mr. Winter stated that the whole thing was regrettable and he felt like Appellant was set up to fail in that, the person that caused all of this (Capt. Hunter), walked off with a five day suspension for using foul language. He felt that Appellant was afraid of this exact thing happening to him and that this was what he was trying to avoid. Mr. Winter noted that they were considering ending a man's 14 year career here. Out of fear of retribution, Mr. Winter thought Appellant was set up to fail.

Mr. Lane questioned what the County's motivation would be to set Appellant up. Mr. Winter noted that what Appellant did was against the Merit rules but that he was taking the fall for Capt. Hunter and that was not fair.

Mr. Reeves made a motion that the County did not prove that there were false statements given to a supervisor or other officials.

Mr. Winter seconded the motion.

Mr. Lane and Ms. Duvall pointed out that it comes down to whether Appellant's actions were knowingly done.

Mr. Reeves stated that his reason for moving that the County did not prove this violation was because there were two sworn interviews and one off the record interview, noting that “off the record is supposed to be off the record.” Therefore, he did not believe that the County proved to him that there were false statements.

Motion carried 5 - 0

Section 86-453(8): Criminal, dishonest, or other conduct which interferes with effective job performance or has an adverse effect on the efficiency of county service.

Discussion:

Mr. Lane did not believe that anything criminal or dishonest happened. He felt that Appellant was confused and that if he could take back his phone call to Capt. Vanis, he would. However, this was an important thing because lack of truthfulness could have an adverse effect on the efficiency of County service.

Mr. Winters stated that he wondered why they did not hear from Capt. Hunter or the victim; that if they had heard from those people then they would know what the truth was. He not certain why these people couldn't have been subpoenaed. Mr. Lane noted that this case was, to some extent, not about the actions of Capt. Hunter.

Mr. Reeves made a motion that the County did not prove any criminal, dishonest or other conduct which interfered with effective job performance or had an adverse effect on the efficiency of County services.

Mr. Winter seconded the motion.

Ms. Duvall stated that, although she did not find that there was anything criminal, she was concerned about the dishonesty and the other conduct which interfered because somebody in the hearing lied and that bothered her, especially when this whole thing is about veracity and these employees are held to a higher standard. Because of that higher standard, their veracity has to be without question.

Mr. Lane noted that the County did not follow through on some of the allegations against Capt. Hunter because it would have ended up being he said/ she said situation.

Ms. Thompson stated that the County couldn't follow through because the two witnesses changed their testimony.

Motion carried 4 – 1, Ms. Duvall voting no.

Volusia County Division of Corrections Policies

102.09(c): All staff shall make or cause to be made accurate, complete and truthful reports and official records.

- 1. No staff member shall knowingly make or cause to be made any false report or falsify any official record.**
- 2. No staff member shall make or cause to be made any inaccurate, misleading, contradictory, or improper record/official record.**

Discussion:

Ms. Thompson asked official record Appellant falsified as most of it had been verbal but Mr. Lane stated that the interviews are definitely part of the official record.

During discussion of whether Appellant's phone call to Capt. Vanis was an "official record," Mr. Reeves noted that it was not under oath and Mr. Winter that Appellant had not been sworn in on the phone call. Noting that Appellant's position was that his medication confused him during the phone call, a motion was made that the County did not prove this offense.

Mr. Winter seconded the motion.

Motion carried 5 – 0

General Post Orders #3: Enforce all rules, regulations and policies of the Division. It is the responsibility of all employees to report a violation of institutional rules as specified in Division Policies and Procedures, Administrative Directives, and Post Orders and

General Post Orders #29: Notify their supervisor and make a complete written report of all unusual incidents that occur during a tour of duty or when off duty unusual incidents that pertain to the safety or security of the institution and its staff or inmates.

Discussion:

Ms. Thompson stated that this is such a general thing and it references policies and procedures administrative directives and post orders which they don't have or know anything about; however, Mr. Lane stated that he thought everybody was aware of sexual harassment.

Mr. Lane and Mr. Winter felt the action of Capt. Hunter was kind of stupid and bizarre. Ms. Thompson stated that it was inappropriate touching.

Mr. Winter felt that Appellant should have reported Capt. Hunter's actions to another supervisor in the chain of command and made him/her aware of it because her actions were disrespectful to the victim. Because it was something bizarre, Appellant should have reported it.

Ms. Duvall stated that she agreed with Mr. Winter that it should have been reported and not reporting it, it could happen again because people would think that they could get away with such behavior.

Noting that this was why such a rule was in place, Mr. Lane felt that it was important to report aberrant behavior.

Taking the two violations together since they involved the same alleged behavior, Mr. Reeves made a motion that the County had proven that Appellant violated General Post Orders #3 and #29.

Mr. Winter seconded the motion.

Motion carried 5 – 0

General Post Orders #42: Promptly comply with and execute direct orders or instructions given by a superior officer, and shall not refuse to comply or execute such orders or instructions when the orders or instructions are lawful and proper.

Discussion:

Mr. Lane stated that this related to the failure to return the FMLA paperwork in a timely fashion and reporting his absences in an incorrect fashion.

Mr. Lane stated that he did not understand the part Appellant saying he was not going to be in and then finding out that he did not have a doctor's appointment until two days later.

Ms. Thompson felt that Appellant he did everything that he should do.

Mr. Reeves stated that he does not think there was any lying or anything like that.

Mr. Winter made a motion that the County did not prove Appellant violated General Post Order #42.

Ms. Thompson seconded the motion.

Motion carried 5 – 0.

In summary, the Board sustained that Appellant had failed to report the incident with Capt. Hunter but did not sustain the remainder of the violations.

Appropriateness of Penalty:

Mr. Winter and Ms. Thompson felt that dismissal was too severe a penalty but that there should be some discipline.

Although Ms. Thompson stated that everybody is entitled to a mistake, Mr. Lane noted There are cases where one strike could result in termination.

Ms. Duvall stated that depends on the severity of the case but Ms. Thompson stated that this one did not warrant dismissal.

Mr. Lane stated unless the behavior was egregious, he believed that dismissal was too harsh in this case.

Ms. Thompson made a motion that the penalty of termination was too severe for what the County could not prove.

Mr. Reeves seconded the motion.

Motion carried 5 – 0

V. BOARD'S RECOMMENDATION

The Board voted 5-0 that Appellant's termination not be upheld.

SUBMITTED BY:  DATE: 10/2/13

COUNTY MANAGER  DATE: 10/16/13

- APPROVAL
- REJECTION
- MODIFICATION