

IN RE

**THE PERSONNEL BOARD HEARING
OF
NATHAN SCHNEIDER**

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 timely received 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; however, through his counsel, Appellant has agreed to extend the time for my decision up to and including October 16, 2013.

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 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, and 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.

The Personnel Board did not sustain any of the grounds for which Appellant was terminated and made an advisory recommendation not to uphold the termination, noting that same was too harsh in this case. In its discussions as to the evidence regarding whether Appellant had knowingly made false statements during the internal affairs investigations, the Board focused on whether Appellant changed his sworn testimony with the intent to deceive. The Board concluded that Appellant was not intentionally trying to lie in his successive statements but instead was attempting to clarify or correct the discrepancies therein. A majority of the Board members specifically stated, as to this charge, that Appellant's conduct warranted some discipline but not termination.

Division of Corrections General Post Orders numbers 3 and 29 impose similar duties, that all employees are responsible for reporting violations of institutional rules and that they must report, both verbally and in writing, all unusual incidents which occur during a tour of duty. The Board did not sustain the appointing authority's determination that Appellant had violated these Post Orders. However, the undisputed competent substantial evidence, specifically Appellant's own admission, established that he did not report the "shocking" conduct of a captain which occurred during his tour of duty. Also, there was no evidence that he prepared a written report of this clearly unusual incident. Therefore, I cannot accept the Board's findings that Appellant did not violate these two directives.

As to the allegation that Appellant failed to make accurate, complete and truthful reports and official records, I note that the Personnel Board in its deliberations specifically focused on whether his actions were knowing and intentional, concluding that they were not. However, subsection two

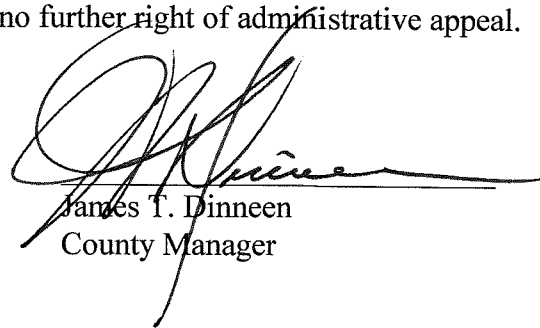
of this policy, with which Appellant was also charged, also prohibits employees from making or causing to be made “inaccurate, misleading, contradictory, or improper” official records and this section does not require proof of intent. [Division of Corrections Policy and Procedure 102.09(C)2.] This policy is written in the disjunctive and, while there was some discussion as to whether Appellant’s statements were contradictory, the Board did not address whether they were inaccurate, misleading or improper. Notwithstanding, I will accept the Board’s findings as to this violation but note that I am very troubled by the fact that Appellant’s first and second sworn statements regarding a material fact appear to me to be objectively irreconcilable.

Appellant was not an entry level employee. He was a senior corrections officer with almost eleven years experience and, in addition, was a field training officer (FTO). His responsibilities as a senior corrections officer included performing the duties of a supervisor in the absence of a sergeant and, as an FTO, training and evaluating new corrections officers on, among other things, their knowledge of policies and procedures. While all corrections officers are held to a higher standard in their day to day actions, Appellant’s duty was to know and comply with the policies and procedures which govern the quasi-military organization for which he worked was enhanced due to his supervisory authority and FTO status. A review of the totality of the information and evidence presented to the Personnel Board established that his actions, in failing to report the incident he admits to having witnessed, and in providing sworn statements which, in my view, were inconsistent, resulted in a waste of considerable time and resources. More egregious, Appellant’s actions ultimately contributed to management’s inability to reach an undisputed resolution of a very critical inquiry into allegations of sexual harassment made against a long tenured supervisor. Appellant's actions not only may have exposed the County to liability but also may have future negative implications on other matters which involve the County or Appellant.

In conclusion, based on the existence of competent substantial evidence to sustain

Appellant's violation of General Post Orders¹ numbers 3 and 29, I reject the findings as to same. However, I have decided to accept the recommendation of the Personnel Board not to terminate Appellant from employment. Based on the sustained violations and the totality of the evidence, including his own admissions, I have determined that the following disciplinary action is appropriate. Appellant will be demoted from the position of senior corrections officer to a corrections officer position at the classification level for which he is qualified. His rate of pay will be \$17.2396 per hour, which was his rate of pay prior to his promotion to senior corrections officer. He will serve a suspension from April 15, 2013 to his reinstatement date of May 25, 2013. He will be required to successfully complete refresher training on the Division of Corrections policies, procedures and post orders as designated by Corrections Director Marilyn Ford and will be required to pass a return to duty physical fitness examination. 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
Nathan Schneider
Erin Thompson, Esq.

¹ I want to be clear that my decision is based solely on these sustained violations, despite my stated concerns as to the Board's findings regarding the remaining veracity violations.

Mr. Winter stated that termination is entirely too harsh and as far as the County proving their case he does not think any discipline should be taken on the Appellant.

Mr. Reeves stated that he would have to agree with Mr. Winter and that he does not know how they got here because in some instances the Appellant is the result of not being able to prove anything on them trying to get something. Termination in this case should not be upheld.

Mr. Reeves made a motion to the County not uphold the termination action.

Mr. Winter seconded the motion.

Motion carries 5 – 0

V. BOARD'S RECOMMENDATION

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

SUBMITTED BY:  DATE: 9/27/13
COUNTY MANAGER  DATE: ~~9/29/13~~
10/16/13

- APPROVAL
- REJECTION
- MODIFICATION

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



APPELLANT: Nathan Schneider

POSITION HELD: Sergeant

DATE OF HIRE: February 4, 2002

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: Dave Vanis, Beach Safety
George Recktenwald, Public Protection Director
Tom Motes, Human Resources Director
Marilyn C. Ford, Director of Corrections

Appellant's Representative: Erin Thompson, Esq.

Appellant's Witnesses: Nathan Schneider

Recording Secretary: Ginger Hadley, Personnel Services

I. INTRODUCTION

The Volusia County Personnel Board convened on Friday, September 20, 2013 at 9:30 a.m. to hear the appeal filed by Appellant Nathan Schneider 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 March 21, 2013, George Recktenwald, Public Protection Director, issued a Notice of Intent to Dismiss to the 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.

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 June 22, 2012, Appellant Nathan Schneider was dismissed from employment with the Department of Corrections. Evidence presented to the Personnel Board was as follows:

On August 4, 2004, Correctional Officer Charles Cella was injured on the job when he slipped and fell in the kitchen, injuring his knee. Officer Cella did not return to work until November 2012.

On November 9, 2012, Officer Cella returned to work and filed a complaint against Captain Nina Hunter. In his written complaint he made some very serious allegations against Capt. Hunter as to her actions on August 4th. Based on the allegations which were very serious and sexual in nature, the information was provided to Mr. George Recktenwald, Director of the Public Protection. Mr. Recktenwald ordered that an internal investigation be conducted into the allegations regarding Capt. Hunter. Captain David Vanis was tasked with conducting the internal investigation. Capt. Vanis first met with Officer Cella at which time he identified several individuals that were either in the room or nearby when the alleged actions occurred.

On November 14, 2012, Sergeant Nathan Schneider (herein after Appellant) was noticed that he was a witness in the investigation against Capt. Hunter.

On November 20, 2012, the Appellant gave his sworn interview to Capt. Vanis and was asked two main areas that were alleged to have happened on August 4th regarding Capt. Hunter. The allegations were that Capt. Hunter had given Officer Cella a wet-willie and that she has licked the back of his head with her tongue. During the interview, when questioned about what the Appellant had witnessed he responded that he couldn't remember any specifics or that he couldn't recall. When Capt. Vanis asked specifically, "did you see Capt. Hunter lick Officer Cella's neck and head?" The Appellant replied "No!" Thirty-three minutes after the interview the Appellant contacted Ms. B. McClough, secretary in the Internal Affairs Unit and indicated that he had remembered something from his previous interview and would like to clarify his statement. Capt. Vanis returned to the jail approximately an hour and fifteen minutes later that same day. The Appellant remembered Capt. Hunter "saying something about him tasting salty and spitting it out so I'm pretty sure I do remember her licking him now." Capt. Vanis asked for clarification as to whether the Appellant witnessed Capt. Hunter lick Officer Cella and he stated, "that I don't remember her licking his neck, though. I remember her licking like his head." This statement contradicted the Appellant's previous testimony given earlier that morning.

On January 9, 2013, Capt. Vanis served the Appellant with a notice that an Internal Affairs Investigation had been opened with him as the subject for giving false statements in the Hunter-Cella investigation.

On January 18, 2013, the Appellant was interviewed by Capt. Vanis regarding his false statements. Capt. Vanis asked the Appellant to relate what he witnessed on August 4th in the shift commander's office. The Appellant stated that he saw Capt. Hunter attempt to give Officer Cella a wet-willie or stick her finger in his ear and that he did hear Capt. Hunter say that Officer Cella tasted salty and that he did see and hear her spit into the trash can. Capt. Vanis then asked the Appellant if he saw Capt. Hunter lick Officer Cella's head or neck. The Appellant replied "I did not physically see her lick him or her tongue touch his head or neck, no." This statement completely contradicted the statements given in his interview on November 20, 2012. Capt. Vanis asked if whether the Appellant thought his statements during the second interview on November 20th were truthful and he eventually responded "I'm going to have to say 'No'." At the end of this interview, Capt. Vanis asked again whether the Appellant's statement "I remember her licking like his head," was a truthful statement and the Appellant was very reluctant to answer the question. Capt. Vanis eventually had to order the Appellant to answer the question to which he responded "No" that it was not a truthful statement.

For a Senior Officer with 10 ½ years of experience and a past performance record that is less than exemplary, his false testimony in an Internal Affairs investigation is disturbing. Veracity is a serious matter and indeed critical in the justice arena. Therefore, based on the seriousness of the Appellant's actions Mr. Recktenwald terminated his employment.

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;

Ms. Thompson made a motion that the Appellant did knowingly give a false statement.

Ms. Duvall seconded the motion.

Discussion:

Mr. Lane argued against the motion stating that he was attempting to be complete in his answer and in by doing so he created a discrepancy in the two interviews. In his mind after hearing the exact recording of the interview it didn't come off to him like the Appellant was giving a false statement, it sounded like he was making a correction and trying to clean up what might have been a misstatement at the time.

Motion fails 0 – 5

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.

Ms. Thompson made a motion to not uphold this violation, the Appellant had no criminal intent or dishonest intent.

Mr. Reeves seconded the motion.

Discussion – None

Motion carries 5 – 0

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:

Mr. Lane stated that this one is a little more problematic to him because it does say contradictory.

Mr. Reeves stated that the Appellant was trying to correct himself and so he does not think in his mind that the County proved that he knowingly made false reports.

Ms. Thompson stated that when she looked at contradictory she looked at it like as a purposeful act and you contradict something and the Appellant was trying to correct an inaccuracy. She does not see that as contradictory.

Mr. Lane stated that he would agree with that.

Mr. Winter stated that he thinks that is was further clarification on the information that the Appellant remembered from 109 days before.

Mr. Lane stated that maybe he is getting hung up on the word they used earlier which was a discrepancy rather than a contradiction. He thinks that may be a little more accurate. There was a discrepancy there but it doesn't necessarily contradict the intent of what the Appellant was saying, to him it was not contradictory.

Mr. Reeves stated that in his mind the County did not prove outright falsification and lying.

He further made a motion that Volusia County Division of Corrections policy and procedure number 102.09(c), the County did not or failed to prove its case as stated.

Ms. Thompson seconded the motion.

Ms. Duvall stated that she wanted to go back to the third interview that's not contradictory? How are we using contradictory? Explain it to her again.

Mr. Lane stated that her questions was right on point and he believed in this context that their holding the Appellant to the strict letter of the word and the statements. He also thinks it could be, in his opinion it is not necessarily contradictory. He believed that the Appellant was pinned down to a... Mr. Lane stated that he thought the Appellant was lying when he said no I told a lie. Mr. Lane does not believe the Appellant did, he was forced to give a direct answer to a question.

Mr. Reeves stated that he does not believe that the Appellant knowingly did any of this, even if it was contradictory is wasn't anything intentional and he does not think the Appellant sat there and intentionally tried to screw things up so that they would come out in a certain way.

Mr. Winter stated that there was no reason for it, why would the Appellant do that?

Mr. Reeves stated that the County to him did not prove otherwise. Since they have to decide whether or not the County proved its case to him the answer is no because they have not proved that the Appellant intentionally knowingly did any of these that would cause him to be fired.

Ms. Thompson stated that there was no malice.

Mr. Reeves continued there was no malice there no proof to him or that the County has not proved to him sufficiently that there was malice or knowingly violating these rules.

Mr. Lane agreed with everything that Mr. Reeves said and if he responded to what Ms. Duvall's specific question the County, specifically the Division of Corrections does not deal very well with nuance and there is nothing of the intent in here, so he sees what she is saying and how is that not a contradiction on the official record here.

Ms. Duvall stated that she just had to settle that with herself before...

Mr. Lane stated that on the official record to him it looks like a contradiction.

Ms. Duvall stated that it does look like a contradiction on the official record.

Mr. Lane stated that it is unfortunate to which that was arrived. He thinks that there is an official contradiction there. Mr. Lane does not think the Appellant intended that to remain as the final word, no he does not think so because of all the reasons the Appellant was trying to clear it up and this was the wrong format to do it in and he was being pressured on this point. It states knowingly make or cause to be made any false report. He thinks that they had that discrepancy and they were pointing at it and said how is this not a discrepancy. Discrepancy with contradiction yes or no and he said no but the Appellant meant yes it was a discrepancy so Mr. Lane thinks that they got him there between saying yes and no but he does not think the Appellant intended that to be the case because of whole trying to clean it up the first time.

Ms. Duvall stated well intention is one thing and following the rules is another and that is what she is asking.

Mr. Lane asked what does she think.

Ms. Duvall stated that it is a contradiction.

Mr. Lane re-read the motion that the County did not prove this point.

Motion carries 4 - 1

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.

Ms. Thompson after reading the General Post Orders #3 asked what does all that mean.

Mr. Lane stated that this rule is a catch all.

Ms. Thompson agreed.

Mr. Lane stated if anything he thinks...

Ms. Thompson stated that it says responsibility of all employees to report a violation of institutional rules. She does not see any violation of institutional rules because the Appellant was just trying to correct something.

Mr. Lane stated that he would have to agree with that, if there had been a no wet-willie policy in effect it would have solved it.

Ms. Duvall stated that she agreed that there is no wet-willie policy there.

Mr. Lane stated again that there is a fine line between normal horseplay and going over the top.

Mr. Winter stated that head licking to him is bazaar behavior, he never tried it himself and he is certain that if he would have witnessed it he probably would have remembered it but again he thinks that there is horseplay involved nothing sexual involved. The officer who brought the complaint while working in the jail Mr. Winter is sure having his head licked didn't exactly make him have nightmares for weeks afterwards or any post traumatic stress disorder so he does not know that the Appellant even failing to report the wet-willie that the Appellant did anything wrong.

Mr. Lane stated that to him that was a matter of perspective and being sexual harassment in that area of discussion even just verbalizing something somebody might take it as harassment and some others obviously would not. It is certainly a grey enough to be in this area.

Mr. Winter stated that if you remember the place setting, this did occur in the jail so he is sure that is probably not the most bazaar thing that has ever happened.

Ms. Duvall stated probably not but these are professional people and they are supposed to have professional conduct.

Mr. Winter agreed but the Appellant did not engage in that, the Appellant didn't give anybody a wet-willie and he didn't lick anybody's head.

Ms. Duvall stated that they needed to go back to the institutional rules.

Mr. Lane asked if they were even clear that that is what they are talking about.

Mr. Winter stated that he was uncertain.

Mr. Lane stated that it was unclear to him.

Ms. Thompson stated that they do not specified in the division policies procedures administrative directives and post order, they don't...

Mr. Reeves stated that those were never brought up so he does not even know why they are a part of this.

Ms. Thompson stated that there could have something in there, there could not. They don't know.

Mr. Lane stated that in light of these comments that perhaps a motion would be in order to say that the County did not successfully prove that this condition existed or that the Appellant violated this one.

Mr. Winter seconded the motion.

Ms. Duvall asked if there is a policy about conduct like giving wet-willies.

Mrs. Jones stated that the testimony was that they are required to report not just unusual but regular course duties things so they are required to report everything. So whether there is a policy for wet-willies, she does not think it's that specific.

Ms. Thompson asked if there is a policy that says that officers will not participate in horseplay on the floor or anything like that.

Mr. Recktenwald stated that he is sure there is but he did not have the book here. You can't have horseplay in the jail.

Mrs. Jones stated that she believed that this directive and the testimony from Capt. Vanis she thinks was that had to do with failure to report what happened on August 4th what he ultimately did see.

Motion carries 5 – 0

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 they crammed a lot of things in that rule.

Mr. Lane agreed and stated that if everybody is going to be written up for not reporting seeing this kind of behavior that was apparently kind of rampant then...

Mr. Winter stated that they would have a whole lot more people here and the Appellant was not the only one in the room.

Mr. Lane continued with that said have they proven this, has the County proven this.

Ms. Thompson stated that she does not think so.

Mr. Winter stated no, he does not think so.

Ms. Duvall stated that she does not think so based on the fact that there was someone testified that these things happen all the time. The Appellant had seen wet-willies given before and it was par for the course it's what happened before and she thinks that this rule says unusual, now that is the wet-willie, what about the licking had that been seen before.

Mr. Lane stated that he did not recall that it had been.

Ms. Thompson stated that she thinks no on the licking, no they had not seen licking before.

Mr. Lane stated that he is not sure that it was seen this time. The Appellant had her head in between her tongue and the guys neck, he couldn't see what was going on. That was the first thing that came into his mind was that the Appellant saw someone lick somebody, how was the room set up, what was the perspective because you think you see something.

Ms. Duvall stated that because of the Appellant's position of where he was in the room he saw movement and then the rest of it is assumption.

Mr. Lane stated that at the end of the day what we are going to do is going to recommend whether or not the disciplinary action be upheld or not. But what we have all said is that we want the bad behavior to stop and if that comes out of this hearing then maybe we have not wasted everybody's time.

Ms. Duvall stated that she disagreed and that she does not think that this is a waste of people's time and if only that comes out of it that this bad behavior because these people are professionals and they need to act as such. She knows that there is commodore but she thinks that this is crossing the line.

Mr. Lane stated that was a poor choice of words on his part because this isn't a waste of time.

Ms. Duvall stated not she does not think it is.

Mr. Lane agreed with her completely and he did not mean to impugn anybody's efforts here today.

Mr. Reeves made a motion to not uphold Volusia County Division of Correction General Post Order #29.

Ms. Thompson Seconded the motion.

Motion carries 5 – 0