

CIVIL SERVICE COMMISSION MINUTES

November 2, 2022

A meeting of the Civil Service Commission was held at 2:45 p.m., via Videoconference/Teleconference.

Present via Videoconference:

Melissa Johnson
Will Rodriguez-Kennedy
Ira Sharp
Peter B. Smith

Absent:

Bryan J. Fletcher

Comprising a quorum of the Commission

Support Staff Present:

Todd Adams, Executive Officer
Morgan Foley, Commission Legal Advisor

Approved
Civil Service Commission
November 16, 2022

**SAN DIEGO COUNTY CIVIL SERVICE COMMISSION
REGULAR MEETING MINUTES
NOVEMBER 2, 2022**

1:30 p.m. CLOSED SESSION: Discussion of Personnel Matters and Pending Litigation

2:30 p.m. OPEN SESSION: Videoconference/Teleconference

Notice pursuant to Government Code Section 54954.2.

**CLOSED SESSION AGENDA
Videoconference - Not open to public**

- A. Commissioner Smith: CONSIDERATION OF PUBLIC EMPLOYEE DISCIPLINE (GOV. CODE SEC. 54957(B)) Donovan J. Jacobs, Esq, on behalf of **2022-151P**, Deputy Sheriff Detention/Court Services, appealing an Order of Suspension and Charges from the Sheriff's Department.
- B. Commissioner Smith: CONSIDERATION OF PUBLIC EMPLOYEE DISCIPLINE (GOV. CODE SEC. 54957(B)) Richard Pinckard, Esq., on behalf of **2022-190P** former Deputy Sheriff-Detentions/Court Services, appealing an Order of Termination and Charges from the Sheriff's Department.

**OPEN SESSION AGENDA
Videoconference/Teleconference**

ORDER OF BUSINESS

A. **ROLL CALL**

Present: Johnson, Rodriguez-Kennedy, Sharp, Smith

Absent: Fletcher

B. **APPROVAL OF MINUTES:** Regular meeting of October 5, 2022.

Motion by Commissioner Sharp to approve the minutes of October 5, 2022; seconded by Commissioner Smith.

Motion carried with all Commissioners present in favor.

C. **NON-AGENDA PUBLIC COMMENT:**

None.

D. **AGENDA ITEM DISCUSSION:**

None.

E. **FORMATION OF CONSENT AGENDA**

Item Nos. 1-3 and 6 formed the Consent Agenda.

Motion by Commissioner Smith to approve the Consent Agenda; seconded by Commissioner Rodriguez-Kennedy.

Motion carried with all Commissioners present in favor.

F. **DISCUSSION ITEMS**

Item Nos. 4 and 5 were pulled for discussion.

AGENDA ITEMS

TELECONFERENCED PUBLIC MEETINGS

1. Continuance of Teleconferencing Meeting Option Pursuant to Government Code Section 54953(e).

RECOMMENDATION: Approve motion to find, pursuant to Government Code section 54953(e)(3), the Civil Service Commission has reconsidered the circumstances of the State of Emergency and state and local officials continue to recommend measures to promote social distancing.

Approved.

CONFIRMATION OF ASSIGNMENT

2. Commissioner Fletcher: Jennifer Spirit, Senior Advocacy Center Organizer, SEIU Local 221, on behalf of **2022-210**, former Sheriff's Fingerprint Examiner, appealing an Order of Termination and Charges from the Sheriff's Department.

Confirmed.

3. Commissioner Sharp: **2022-148**, former Office Assistant, appealing a Final Order of Removal and Charges from the Health and Human Services Agency. (Previously assigned to Commissioner Rodriguez-Kennedy)

Confirmed.

DISCIPLINE

Findings

4. Commissioner Smith: Donovan J. Jacobs, Esq., on behalf of **2022-151P**, Deputy Sheriff-Detention/Court Services, appealing an Order of Suspension and Charges from the Sheriff's Department.

FINDINGS AND RECOMMENDATIONS:

Employee 2022-151P appealed an Order of Suspension of three days (25.5 hours) from the class and position of Deputy Sheriff-Detentions in the Sheriff's Department. The Commission appointed Commissioner Peter B. Smith to hear the appeal and submit findings, conclusions, and recommendations to the Civil Service Commission. A hearing was held on September 14 and 15, 2022.

The causes of discipline were inefficiency, incompetency, and acts that are incompatible with and/or inimical to the public service.

At or around 12:30 a.m., on February 6, 2021, an incarcerated person ("IP") at the Vista Detention Facility caused an alarm to sound by covering the vent to his medical isolation cell with paper.

Three deputy sheriffs responded to the alarm. These deputies proceeded to verbally command the IP to remove the obstruction from the vent. When the IP refused to comply with these commands the three deputies entered the cell and continued to order the IP to remove the obstruction. The IP continued to refuse and ultimately took a fighting stance with clenched fists to prevent the deputies from removing the obstruction.

The IP's response was interpreted as a possible assault on the deputies in the cell and though the Deputies made numerous attempts to de-escalate the situation, the IP refused to comply and continued to display a combative stance. At that point, the IP was taken to the ground by the deputies to prevent him from attacking them.

Before the three deputies took the IP to the floor a sergeant radioed for additional deputies to ensure safety on the scene. A total of 13 deputies responded to the scene. The Employee was one of the responding deputies and he entered the cell to assist in securing the IP.

The Employee took a position kneeling at the IP's head and shoulders with both knees on either side of the IP's head and was using his hands to hold the IP's head to the floor. Two of the other deputies entering the cell joined the Employee and other deputies to restrain the IP from his continued thrashing, by grabbing and applying downward pressure to the IP's legs. By the time the IP was secure there were five deputies restraining him.

During the time that the Employee was restraining the IP's head and shoulders until a gurney was rolled into the cell - a span of 2 minutes and 42 seconds - the Employee delivered four strikes to the IP's face and head.

The first strike delivered by the Employee was a palm heel strike to the back of the head to disorient the IP and to draw the IP's attention away from the other deputies in the cell who were attempting to handcuff and place leg chains on the IP.

The second strike, a closed right fist to the right cheek, was delivered by the Employee on the grounds that the pressure he was using on the IP's head was ineffective.

The third strike, a closed fist to the nose area, was delivered by the Employee after the IP bit a knuckle on the Employee's left hand.

The fourth strike, a hammer fist with his left hand to the forehead, was delivered by the Employee after his hand slipped from the IP's head and the IP turned his head to the side, creating the threat of another possible bite to the Employee's hand.

The Cell was crowded with the IP and up to 11 deputies, including the Employee, with commands being given by various deputies for the IP to stop resisting and to cooperate with efforts to secure his hands with cuffs, and his feet with chains.

A sergeant witnessed the Employee deliver strikes one and two to the IP's face and head while being restrained by five

deputies. Before the IP was secured the sergeant witnessed the Employee's third strike to the IP's facial area. After the IP was completely handcuffed and leg chains were attached, the sergeant announced that the IP was secured. Approximately five to eight seconds after announcing "secured" the sergeant witnessed the Employee deliver the fourth strike to the IP's head.

Except for the bite to the knuckle on the Employee's left hand, the IP did not display assaultive behavior while face down on the floor with deputies restraining his arms, back, legs, and head.

Employee is guilty of inefficiency by failing to comply with Department policies when he delivered strike two and strike four to the head and face of the IP when he was in a prone position on the floor of the cell. At the time of both strike two and strike four the IP's assaultive behavior was no longer a factor in the deputies' efforts to secure him and remove him from the cell, there was only resistance. The IP's arms were firmly restrained, there was downward pressure on his shoulder and back, both of his ankles were held and pressed to the floor, and his right leg was being restrained. The Employee's reason for strike two was because the IP continued to thrash his head, and the Employee felt his pressure on the head was ineffective. Strike four is puzzling. There was no second bite and it was delivered approximately five to eight seconds after the IP was secured with handcuffs and leg chains, and the sergeant announced "secured." It is clear that the Employee did not properly visually or audibly assess the circumstances prior to delivering a hammer fist to the IP's forehead.

Use of Force Guidelines requires deputies to "utilize appropriate control techniques or tactics which employ maximum effectiveness with minimum force to effectively terminate or afford the deputy control of the incident." It also requires deputies to consider "de-escalation" tactics to mitigate the threats to the deputy and others, so long as doing so does not risk their own safety or that of the public. Examples include moving to a different location away from the threat; and decreasing the exposure to potential threats by distance. The Employee did not attempt to de-escalate the situation.

Employee is guilty of incompetency by failing to comply with Department policies when he delivered strike two and strike four to the head and face of the IP. While the Employee was

having difficulty keeping the IP's head from thrashing, four other deputies had firm grips on the IP's arms, back and shoulder, and both legs, and there was adequate means for the Employee to move away from the IP through the open Cell door. This is compounded by the fact that there were six more deputies in the Cell available to assist if necessary to secure the IP with handcuffs and leg chains.

Further, with the IP restrained, he was not showing assaultive behavior toward any of the deputies by the time that the Employee arrived on scene, nor at any time thereafter, except for the bite inflicted on the Employee prior to strike three. The Employee did not attempt to de-escalate the situation in any manner consistent with policy.

Employee is guilty of acts incompatible with and/or inimical to the public service where his actions violated Department policies, resulting in a failure to provide the highest quality of public safety service, and erodes the respect and confidence of the public in the Department as a public safety organization.

The initial recommended discipline was a one-day suspension. It was later changed to a five-day suspension by an alternative recommendation from a Commander; then reduced to a three-day suspension by an Assistant Sheriff, which was ultimately approved by the Sheriff.

A suspension of three (3) days is insufficient. At no stage of this discipline has the Employee accepted that his actions in delivering strike two and strike four were unreasonable and unnecessary under the circumstances. As pointed out by the Commander in his alternative recommendation, "Progressive discipline is an essential process for developing employees and correcting behavior, however there is a glaring detail in this case," which supported his alternative recommendation. It is that the Employee "believes he did nothing wrong." The Commander goes on to add, "We expect [the Employee] to carry the core values and overarching mission of our department in his words and actions," and recommended the increased number of days "so that he may grasp the severity of this incident and correct his behavior." In this case, even the alternative recommendation of Commander One is insufficient.

Based on the findings and conclusions set forth above, it is hereby recommended that the Order of Suspension and Charges suspending Employee for three (3) days (25.5 hours) be modified and increased to a suspension of twenty (20) days

(170 hours); and, that the proposed decision shall become effective upon the date of approval by the Civil Service Commission.

Motion by Commissioner Smith to approve the Findings and Recommendations; seconded by Commissioner Rodriguez-Kennedy.

Motion carried with all Commissioners in favor.

5. Commissioner Smith: Richard L. Pinckard, Esq., on behalf of **2022-190P**, former Deputy Sheriff-Detentions/Court Services, appealing an Order of Termination and Charges from the Sheriff's Department.

FINDINGS AND RECOMMENDATIONS:

Employee 2022-190P appealed an Order of Termination and Charges terminating him from the position of Deputy Sheriff-Detentions in the Sheriff's Department. The Commission appointed Commissioner Peter B. Smith to hear the appeal and submit findings, conclusions, and recommendations to the Civil Service Commission. A hearing was held on September 9, 12 and 21, 2022.

The causes of discipline were two charges of incompetency and one charge of acts that are incompatible with and/or inimical to the public service.

On the morning of March 14, 2021, at the Vista Detention Facility, the Employee was assigned to perform a "hard count" of and passing out "chow" to the incarcerated persons in cells located at North House Modules #1, #2, and #3. The Employee prepared for the hard counts by pre-circling the V and P on the hard count sheets for all but one of the cells. Circling the V and P on the hard count sheet indicates the Employee received a verbal or physical acknowledgement from an incarcerated person, which is required by department policy for a hard count. Prior to March 14th, the Employee had utilized this practice of pre-circling the V and P, approximately five to ten times, to save time and be more efficient on those occasions when the North House was short of staff, as was the case that morning.

After completing the hard count in North House Module #1, at 10:03:41 a.m., the Employee arrived at cell #22 (the "Cell") in Module #2, in which were housed two incarcerated persons. The Employee performed the hard count on one of the

incarcerated persons in that cell but did not perform the hard count for the other incarcerated person ("IP") who was lying on the floor with his hand over his head. The Employee observed the IP's chest rise and fall, indicating no physical distress, and assumed that the IP was simply refusing to cooperate with the hard count process. The Employee spent one minute and forty-nine seconds attempting to get both a verbal and a physical acknowledgment from the IP but was not successful.

After leaving the Cell and continuing with his hard count and distribution of meals to the remaining cells on the second level of Module #2 and checking the shower room at the end of the hall, the Employee returned to cell #22 at 10:07:44 a.m. to again attempt to perform the hard count on the IP.

The Employee spent another one minute and forty-seven seconds attempting to complete the hard count with the IP. During this time the Employee opened the Cell door and handed the IP's meal to the cellmate, and observed the IP in the same position, still not showing distress of any sort.

The Employee marked the IP's entry on the hard count sheet with a star, to remind himself that he needed to return to the Cell and obtain the IP's temperature after he completed his hard count with Module #3.

Upon completing his hard count with Module #3 the Employee returned to the control desk for the North House and set his clipboard down inside to free his hands to assist in returning "chow carts" to the kitchen.

At approximately 10:52:00 a.m., the Employee and Deputy One were both performing a security check inside Module #2. Deputy One was tasked with performing the security check on the upper tier while the Employee was performing a security check on the lower tier. At that time Deputy One discovered the IP unresponsive and in an awkward position on the floor of the Cell. The Employee joined Deputy One and, after removing the IP's cellmate for safety purposes, they performed CPR on the IP until the medical team arrived at the Cell.

Except for his return during the security check the Employee never returned to the Cell, never completed his hard count of the IP, and never changed his hard count sheet to reflect that the pre-circled V and P for the IP was inaccurate.

The Manual of Policies and Procedures for the Department's Detention Services Bureau, Number I.43 ("Policy I.43") requires the physical counts of incarcerated persons are either "soft" counts or "hard" counts. Hard counts are conducted to verify "each [incarcerated person's] well-being through verbal or physical acknowledgment from the [incarcerated person] AND uses one of the approved methods" to confirm the identity of every [incarcerated person] in a facility.

The Employee admits that his pre-circling of the V and P on the hard count sheets violates Policy I.43.

Employee is guilty of incompetency by failing to perform his duties in compliance with Detentions Policy and Procedure Section I.43 when he failed to obtain a verbal or physical acknowledgment from the IP in Cell #22, at the North House of the Vista Detention Facility during a hard count the morning of March 14, 2021.

Even though the Employee could visually (1) match IP's face with the photograph on the hard count sheet, and (2) observe the IP's chest or stomach rising and falling as well as his hand over his head, both from outside the Cell and with the door opened to hand the cellmate the IP's meal, he never received any acknowledgment from the IP.

In mitigation, Employee did not choose to enter the Cell alone, as he was aware of the possibility of the IP (alone or in concert with the cellmate) may be intentionally ignoring his commands to give an acknowledgment in order to draw the Employee into the Cell without backup and then accost him, causing him injury. Also, the Employee was aware that other incarcerated persons have, in the past, easily "popped" a locked cell door open, and to enter alone might create a similarly dangerous situation to him or the incarcerated persons in the Cell without the backup of another deputy.

In further mitigation the Department was operating the North House at the Vista Detention Facility without being fully staffed with deputies, and the Employee was performing the hard counts, along with the distribution of meals, to three (3) modules without the benefit of another deputy to assist him.

Employee is guilty of incompetency in that in the morning of March 14, 2021, prior to his hard counts of Modules #1, #2, and #3, in the North House of the Vista Detention Facility,

the Employee pre-circled the V and P portions of the hard count sheets without having confirmed either a verbal or physical acknowledgment from the IP housed in the Cell. By pre-circling the V and P the Employee violated Policy I.43.

Employee has admitted to pre-circling the V and P for incarcerated persons in Modules #1, #2, and #3 that morning. He admits that doing so is in violation of Policy I.43. And although he denies "submitting" the hard count sheets to the control deputy that morning, he admits that he left the clipboard in the control desk for the North House before assisting in the return of the chow carts and, later, performing a security check, or "soft count," in Module #2 with Deputy One.

Employee is not guilty of incompetency by knowingly submitting a false report, or a report with a false statement. There was no evidence produced by the Department to support a finding that the Employee "submitted" the hard count sheets to the control deputy.

The Employee consistently denied telling the control deputy that the hard count sheets were "complete," or "good to go," as was his normal communication to the control deputy to whom he was submitting the records. In fact, because the Employee had marked the IP's box with a "star," it is more likely that he did intend on returning to check the IP's temperature and obtain the necessary acknowledgment before submitting the report. It is the Department's burden to produce a witness that would provide evidence that the Employee "submitted" the hard count report in violation of Policy and Procedure Section 2.41. The statements or testimony of the control deputy might have made this clearer, but since the Department provided nothing of that sort, a violation of Section 2.41 cannot be sustained.

Employee is guilty of acts incompatible with and/or inimical to the public service where his actions resulted in a failure to provide the highest quality of public safety service and erodes the respect and confidence of the public in the Department. Such actions and poor decision-making have the potential to erode, rather than earn, the respect and confidence of the public as a professional public safety organization.

The foregoing findings of violations of policy by the Employee are not completely consistent with those of the Department. The evidence supports poor judgement and performance,

knowingly and intentionally cutting corners to save time when not fully staffed, and such conduct is not appropriate for a training officer with the Employee's experience. There are no hard and fast rules for the appropriate level of discipline in this case.

In fact, the first level recommendation of discipline by the Employee's immediate supervisor was for a ten (10) day suspension, which is consistent with the concept of progressive discipline.

It wasn't until it was passed to the Commander that the Department accepted an alternative discipline of termination. We take note that this Commander, in case 2022-151P, which was just decided, takes the position that a deputy found to deliver two strikes to a restrained but resisting incarcerated person (even while secured with handcuffs and leg chains) should only be subject to a five-day suspension, where it was a first offense, like Employee's. Why the difference? In 2022-151P the employee has never taken responsibility for his actions, and it is unclear whether that employee will modify his conduct, while in this appeal the Employee not only admitted that his conduct was a violation, but he also has acknowledged that it shall not be repeated and has already modified his behavior.

The level of discipline should be based on consistency with other comparable violations.

In this case the Department failed to charge the Employee with dishonesty, and while it attempted to sow the seeds of such misconduct during the hearing it chose not to request an amendment or supplement to the charges. Accordingly, the Department has agreed that the Employee was not dishonest.

What is left is consideration of discipline without prior guidance, involving a long-term employee that violated Department and Bureau policies and procedures. An employee who has no prior comparable discipline in his history, who has had positive performance ratings that reflect that he meets expectations, who was recognized for his contributions and experience to be made a Corporal, a position serving as a training officer for other deputies, and who had modified his behavior prior to termination, should not suffer the ultimate level of discipline.

Further, the Employee acknowledged - from the very start - that he violated Policy I.43 by pre-circling the V and P and

failing to obtain verbal or physical acknowledgment from the IP during the hard count. His defense is that while he intentionally pre-circled the V and P and forgot to go back to obtain a verbal or physical acknowledgment from the IP, he was so busy that he simply forgot and made an error by not revising the hard count record. The Department's position that any time a deputy makes an honest mistake in a record, which finds its way to being "submitted" by the deputy, is a violation of Section 2.41.

Based on the findings and conclusions set forth above, it is hereby recommended that the Order of Termination and Charges be modified to a suspension of ten (10) days (85 hours); that Employee be awarded back pay, benefits, and interest from the date of removal to the date of this decision, minus wages attributable to the ten (10) days (85 hours) suspension, and minus any wages, benefits or other compensation Employee received from other employment, unemployment benefits or other assistance programs; and that the proposed decision shall become effective upon the date of approval by the Civil Service Commission.

Motion by Commissioner Smith to approve the Findings and Recommendations; seconded by Commissioner Sharp.

Motion carried with all Commissioners in favor.

INFORMATION

6. Edward J. Southcott, Esq., on behalf of **2022-156P**, former Deputy Sheriff-Detentions/Court Services, withdrawal of appeal of an Order of Termination and Charges from the Sheriff's Department. (Commissioner Fletcher)

Withdrawn.

ADJOURNED: 3:22 p.m.

ASSISTANCE FOR THE DISABLED:

Agendas and records are available in alternative formats upon request. Contact the Civil Service Commission office at (619)531-5751 with questions or to request a disability-related accommodation. Individuals requiring sign language interpreters should contact the Americans with Disabilities Coordinator at (619)531-4908. To the extent reasonably possible, requests for accommodation or assistance should be submitted at least 24 hours in advance of the meeting so that arrangements may be made. An

area in the front of the room is designated for individuals requiring the use of wheelchair or other accessible devices.