

CIVIL SERVICE COMMISSION MINUTES

July 19, 2023

A meeting of the Civil Service Commission was held at 2:30 p.m., in-person in room 402-A at the County Administration Center; 1600 Pacific Hwy.; and via Videoconference/Teleconference.

Presents:

Bryan J. Fletcher
Melissa Johnson
Will Rodriguez-Kennedy
Peter B. Smith

Absent:

Comprising a quorum of the Commission

Support Staff Present:

Todd Adams, Executive Officer
Morgan Foley, Commission Legal Advisor.

Approved
Civil Service Commission
July 19, 2023

**SAN DIEGO COUNTY CIVIL SERVICE COMMISSION
REGULAR MEETING MINUTES
JULY 19, 2023**

- 1:30 p.m. CLOSED SESSION: Discussion of Personnel Matters and Pending Litigation
- 2:30 p.m. OPEN SESSION: Attend in-person at the County Administration Center, 1600 Pacific Highway, 4th Floor, Room 402A, San Diego, California; or Videoconference/Teleconference.
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Notice pursuant to Government Code Section 54954.2.

**CLOSED SESSION AGENDA
County Administration Center, Room 458**

Members of the public may be present at this location to hear the announcement of the closed session agenda.

- A. Commissioner Rodriguez-Kennedy: CONFERENCE WITH LEGAL COUNSEL - PENDING LITIGATION (GOV. CODE SEC. 54956.9(a)) **2022-157**, Toxicologist I, Department of the Medical Examiner, alleging discrimination by the Sheriff's Department.
- B. Commissioner Fletcher: CONSIDERATION OF PUBLIC EMPLOYEE DISCIPLINE (GOV. CODE SEC. 54957(B)) James Cunningham, Esq., on behalf of **2023-002P**, former Deputy Sheriff-Detentions/Court Services, appealing an Order of Termination and Charges from the Sheriff's Department.

OPEN SESSION AGENDA

ORDER OF BUSINESS

In Person and Videoconference/Teleconference

Announcement:

Commissioner Johnson expressed the condolences of the Commissioners and staff on the recent passing of former Commissioner Ira Sharp of District 3.

Commissioner Johnson also announced the appointment of P. Kay Coleman to Seat No. 3.

A. **ROLL CALL**

Present: Fletcher, Johnson, Rodriguez-Kennedy, Smith

Absent: None

B. **APPROVAL OF MINUTES:** Regular meeting of June 7, 2023.

Motion by Commissioner Smith to approve the minutes of June 7, 2023; seconded by Commissioner Rodriguez-Kennedy.

Motion carried with all Commissioners present in favor.

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

None.

D. **AGENDA ITEM DISCUSSION:**

Item No. 3 was pulled for discussion by the public.

E. **FORMATION OF CONSENT AGENDA**

Item No. 1 formed the Consent Agenda.

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

Motion carried with all Commissioners in favor.

F. **DISCUSSION ITEMS**

Item Nos. 2 & 3 were pulled for discussion.

AGENDA ITEMS

CONFIRMATION OF ASSIGNMENT

1. Commissioner Rodriguez-Kennedy: **2023-027**, former Psychiatric Nurse, Health and Human Services Agency, alleging discrimination by the Health and Human Services Agency.

Confirmed.

DISCRIMINATION

Findings

2. Commissioner Rodriguez-Kennedy: **2022-157**, Toxicologist I, Department of the Medical Examiner, alleging discrimination by the Sheriff's Department.

FINDINGS AND RECOMMENDATIONS:

The Civil Service Commission appointed, Commissioner Will Rodriguez-Kennedy, as its member to be the investigating officer in the matter of the complaint submitted by 2022-157 ("Employee"), who was at that time a Laboratory Assistant in the Sheriff's Department. Employee alleged discrimination based on age, marital status, protected activity (retaliation), and other non-job-related factors by the Sheriff's Department ("Department") regarding his non-selection for the classification of Criminalist I. In accordance with the established rules and procedures of the Commission, the matter was concurrently referred to the Office of Ethics and Compliance ("OEC") for investigation.

Employee also filed a timely Petition to Appeal Selection Process regarding his non-selection for the Criminalist I classification. In it, Employee alleges the Department's decision was biased, retaliatory, and based on non-job-related factors. Since the allegations in the Petition to Appeal Selection Process were substantially similar and related to the allegations in the discrimination complaint, the Petition to Appeal Selection Process was held in abeyance pending the outcome of the discrimination investigation.

The OEC concluded the discrimination investigation and has reported its findings to the Commission. The Investigating Officer has received and reviewed OEC's report and has taken into consideration all documentation submitted in this matter. The Investigating Officer concurs with OEC's Report and has concluded that: the evidence supports a finding of probable cause that a violation of discrimination laws may have occurred.

It is therefore recommended that:

1. Employee's discrimination complaint be pursued and that the matter proceeds to a hearing under the provisions of Civil Service Rule VI.

2. Employee's Petition to Appeal Selection Process (Rule X) be granted, and the hearing be held in conjunction with the Rule VI hearing.

3. That a hearing officer be assigned to conduct the hearing.

4. That the Commission approve and file this report with a finding of probable cause to believe that the Employee has been unlawfully discriminated against.

5. That a copy of this report, the discrimination complaint, and the report of OEC be served upon the parties within five working days of this decision.

Commissioner Rodriguez-Kennedy motioned to accept recommendations 1-5 above; seconded by Commissioner Smith.

Motion carried with all Commissioners in favor. Commissioner Rodriguez-Kennedy is assigned as the hearing officer.

DISCIPLINE

Findings

3. Commissioner Fletcher: James Cunningham, Esq., on behalf of **2023-002P**, former Deputy Sheriff-Detentions/Court Services, appealing an Order of Termination and Charges from the Sheriff's Department.

Prior to Commissioner Fletcher reading his report, James Cunningham, Esq., spoke on behalf of appellant 2023-002P. Mr. Cunningham stated that he objected to the charges and the level of discipline. This situation should not be considered as harassment as the two individuals were in a consensual relationship. The complaint came after the complainant decided to end the relationship and was encouraged by another co-worker to file allegations against the appellant. If the appellant is terminated based on these charges, he will not be able to work as a peace officer anywhere.

FINDINGS AND RECOMMENDATIONS:

Appellant 2023-002P ("Employee") appealed an Order of Termination and Charges terminating him from the position of Deputy Sheriff - Detentions/Court Services in the Sheriff's

Department ("Department"). The Commission appointed, Bryan J. Fletcher, to hear the appeal and submit findings, conclusions, and recommendations to the Civil Service Commission. Thereafter, a hearing was held on May 15, 16, and 26, 2023.

The causes of discipline were: conduct unbecoming an officer or employee of the County, incompetency, and acts incompatible with and/or inimical to the public service.

The Employee was employed as a Deputy in the Detentions and Court Services division of the Department from February 16, 2019, assigned to the George Bailey Detention Facility, until October 8, 2021, when he was re-assigned to an administrative position at Sheriff's Licensing while the Department conducted an investigation into allegations that he violated (I) conduct unbecoming an officer relating to Sheriff's Policy and Procedure Section 2.4 "Unbecoming Conduct"; (II) incompetency relating to Sheriff's Policy and Procedure Section 2.3 "Violation of Rules," which relates to Sheriff's Detentions Policy and Procedure Section 3.47 "Discrimination and Sexual Harassment"; and (III) acts incompatible with and/or inimical to the public service relating to San Diego County Sheriff's Department Executive Order and the Mission, Vision, Values and Goals. The three violations identified as Causes in the previous case are identical to the three violations identified as Causes in this matter.

The Employee and a coworker ("Coworker 1") started a friendship shortly after the Employee's reassignment to Sheriff's Licensing in October of 2021. The Employee, by all accounts, has an outgoing personality and an office friendship was established with Coworker 1, during which the two of them shared private information of their families - their children, marriage, or other relationships, etc. The Employee testified that he and Coworker 1 began using social media platforms to message one another while off duty. In her interview with Internal Affairs Investigator, Sergeant W., Coworker 1 stated that she added the Employee on her Instagram account "about a couple of days after" the Employee began working at the office. The Employee's online communications with Coworker 1 quickly turned flirtatious.

Coworker 1 told Sergeant W. that as the off-duty social media exchanges became more frequent the Employee's communications included messages that Coworker 1 had never heard before, such as she is "a great mom," "a great employee," "such a

good person," and "strong," boosting her own self-confidence. Coworker 1 welcomed these types of comments at that time. At some point the exchanges began to include comments of a sexual nature, culminating in the first naked photograph from Coworker 1 at some time in November. There was no objection from the Employee, and when he reciprocated with his own photograph of his naked body Coworker 1 did not object either. These exchanges ultimately included videos of themselves while naked; again, the first from Coworker 1, and reciprocated by the Employee. The Employee testified that he estimated there were ten to twenty pictures and videos exchanged between them during the months of November and December.

While there were no such communications during their work hours, Coworker 1 told Sergeant W. that there were times when there were sexual comments or innuendos, including hand gestures on the part of Employee, or showing Coworker 1 his tongue "in a sexual way; a very specific sexual way" as if he was licking something. These expressions or comments when he walked by her desk occurred between October 31, 2021, and through December.

In January of 2022, Coworker 1 wanted the intimate relationship communications and comments to stop with their sexual intensity, while maintaining a friendship both personally and professionally. The Employee testified that Coworker 1 initiated the de-escalation of communications to prevent others in the workplace from knowing that they were in such a private relationship.

In January of 2022, the relationship returned to cordial and professional communications, both at work and when off work. Coworker 1 told Sergeant W. that communications during that period were as friends although the Employee occasionally sent a message asking when the two were going to go beyond the friend zone; and expressing his desire for sexual intercourse with her. Coworker 1 admitted that sometime in February of 2022, she sent her final nude photograph of herself. She also testified, however, that repeated blocking and unblocking from social media continued during this period, but that unblocking the Employee from one of the accounts was because they had a conversation and she felt it was clear that he had changed for the better. This cordial relationship continued up until around March of 2022 when Coworker 1 "un-blocked" the Employee on social media because both Coworker 1 and the Employee had an in-person conversation that led Coworker 1 to believe that Employee was no longer

interested in pursuing any personal relationship with her. The following morning Coworker 1 received a photo of the Employee's penis through Instagram.

Immediately following the receipt of the picture of Employee's genitalia, Coworker 1 blocked the Employee from all social media platforms for the final time.

All photographs were sent either through Instagram or Snapchat. Because of the nature of Instagram and Snapchat messaging, none of the messages, photographs, or videos were saved by either the Employee or Coworker 1.

From that point the relationship between the Employee and Coworker 1 became less cordial in the workplace. When Coworker 1 told the Employee that the only communications that they would have would be limited to professional, not personal, and only in the workplace, the Employee began his attempts to find out "why" Coworker 1 had shut down their personal friendship. Coworker 1 testified that if she unblocked the Employee, he would reach out to her, much of it wanting to know why she terminated the relationship.

During the month of March of 2022, the Employee's insistence on trying to get Coworker 1 to explain why she terminated the relationship made Coworker 1 feel "bullied," and described his conduct as "harassment," and somewhat "aggressive." She recalled that the Employee confided in her that he was previously accused of sexual harassment and - based on many of the Employee's actions and words - made her feel that this might be happening to her, seeing harassment and aggression in his communications with her. The Employee was not satisfied that Coworker 1 terminated the relationship without his consent.

Between March 17, 2022, and March 24, 2022, several concerning events occurred.

On March 17, 2022, while Coworker 1 was away from her desk, the Employee removed a banana from the top of her desk, peeled it, took a bite out of it, and returned it to her desktop. Coworker 1 never consented to allow the Employee to share her banana with him.

On March 18, 2022, while Coworker 1 was away from her desk, Employee removed her jacket from where it was stored, put it on, and wore it around the worksite. Coworker 1 never consented to allow the Employee to wear her jacket for any

period of time. After work the Employee unblocked Coworker 1 on Instagram and messaged her "Hello." When Coworker 1 did not respond, the Employee sent a second message to her, on Instagram, and expressed an apology. Coworker 1 responded with a message for him to "leave me alone, in and out of the office." Coworker 1 then blocked the Employee on Instagram. Approximately 30 minutes later the Employee sent a third message to Coworker 1, this time on Venmo, to the effect that he wished that she had told him why she was uncomfortable. Coworker 1 then blocked the Employee on her Venmo account.

On March 23, 2022, the Employee followed Coworker 1 when she went to the printer in the copy room, alone, continually questioning her to find out "why," she no longer wanted to communicate with him on a personal level.

On March 24, 2022, the Employee again followed Coworker 1 into the copy room, when she went to the printer, and attempted to obtain Coworker 1's explanation of "why" she no longer wanted to communicate with him. Coworker 1 would not engage in the conversation and when another employee came to the copy room and the Employee needed to step aside from the entryway, Coworker 1 left and returned to her desk. When she sat down at her desk the Employee confronted Coworker 1 in the cubicle, sitting on the top of her desk and placing his legs in a location that prevented Coworker 1 from standing up from her chair, and leaving the cubicle.

Later, on March 24, 2022, when Coworker 1 went to the printer in the copy room, the Employee again followed her and confronted her, saying "I just want to let you know that I care about you." After the Employee followed Coworker 1 to her desk, talking louder and insisting that she explain her reasons, Coworker 1 felt that his persistence might escalate. Coworker 1 told her coworker ("Coworker 2") she was worried and didn't know what to do. It was at that point that Coworker 1 and Coworker 2 reported the Employee to their supervisor.

The person complaining in the previous case ("PC Coworker") was a female employed with the Department who worked with the Employee prior to his reassignment to Sheriff's Licensing.

On October 23, 2022, the Employee was served with an Order from the Department relating to the previous case, ordering him to "refrain from communicating with former Sheriff's employee [PC Coworker]. Communication includes but is not limited to: email, phone calls, text messages, social media,

cross-platform messaging service..., and/or peer-to-peer payment apps”.

The Order was dated 132 days following the Employee's 5-day suspension in the previous case and 24 days following the Employee's *Skelly* conference with Captain M. in this case.

Despite the Employee's assertions in his signed statement to Captain M. that “I have to be ok with [people not wanting to be a friend] and move on,” the Employee was not “ok” with moving on from PC Coworker, his suspension in the previous case and facing termination in this case, notwithstanding.

Employee is guilty of conduct unbecoming an officer or employee of the County in that the Employee, despite numerous entreaties by his coworker, Coworker 1, to end their private, off-duty, personal relationship, refused to accept her decision to end it and only have a cordial and professional relationship both at the workplace and in their private lives. The Employee's conduct in insisting that he was entitled to an explanation from Coworker 1 as to why she chose to terminate their prior personal relationship and insisting that he did not agree with that decision, was disruptive, created fear and intimidation, and failed to accept Coworker 1's right to work in an environment where she is safe and comfortable, and treated with respect and dignity.

Employee is guilty of incompetency by failing to perform his duties in compliance with Sheriff's policies relating to “Violation of Rules” and “Discrimination and Sexual Harassment”; when he unreasonably interfered with a coworker's work performance by creating an intimidating, hostile or offensive working environment. Further, his conduct was disruptive, created fear and intimidation, and failed to accept Coworker 1's right to work in a safe and comfortable work environment where she was treated with respect and dignity.

Employee is guilty of acts incompatible with and/or inimical to the public service where his actions violated Sheriff's 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 discipline imposed on the Employee was termination from the Department. When determining whether the discipline is appropriate, and not excessive, it is necessary for the

Commission to consider all factors, both mitigating and aggravating.

Even though the Employee's performance appraisal reports reflect that the Employee met the standards for the Department since his time at the academy, it cannot be ignored that this is the Employee's second, nearly identical, incident, requiring discipline.

Progressive discipline might suggest something less than termination where the first incident resulted in such a small suspension. However, it is important to consider the timing of the two incidents: The Employee was reassigned to Sheriff's Licensing because he was being investigated for the "same or similar" charges while at George Bailey Detention Facility. When he quickly struck up a relationship with Coworker 1, being flirtatious on social media, and quickly gaining the confidence of Coworker 1 - such that she would share private information about herself, then voluntarily sharing photographs and videos of her naked body - all within a period of two months of their meeting, there is a question of whether he learned anything from the investigation into the previous incident and how it caused him to be reassigned to non-sworn status pending the completion of that investigation.

Instead of considering the effects of his prior relationship on his employment status, the Employee struck up a new one almost immediately upon starting at Sheriff's Licensing.

Even more concerning is the timing of additional misconduct by contacting PC Coworker, the complainant in the previous incident, in October of 2022, through social media. This conduct occurred approximately 5 months after serving his suspension and being reassigned to San Diego Central Jail while the present matter was pending following an investigation, where he was interviewed by Internal Affairs. Further, it is astounding that his decision to contact PC Coworker came only 24 days following his *Skelly* conference in this matter.

Despite his assertion, in his letter to Captain M., that he has learned from his mistakes, and is committed to making himself a better person, his horrible judgment to reach out to PC Coworker, so soon after his knowledge that it is being recommended that he should be terminated for his conduct following the ending of a social media relationship with Coworker 1, leads this Commissioner to believe that reinstatement is not appropriate for this Employee.

Based on the findings and conclusions set forth above, it is hereby recommended that the following decision of Termination and Charges be affirmed; and that the proposed decision shall become effective upon the date of approval by the Civil Service Commission.

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

Motion carried with all Commissioners in favor.

ADJOURNED: 3:20 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.