

# County of Santa Clara

## Office of the Sheriff

55 West Younger Avenue  
San Jose, California 95110-1721  
(408) 808-4611



Laurie Smith  
Sheriff

### **HAND DELIVERED**

July 7, 2017

Rafael Rodriguez

**SUBJECT: Final Disciplinary Action: Termination  
Internal Affairs Case #2015-022**

Dear Deputy Rodriguez:

In a letter dated May 6, 2016, Sheriff Smith issued you a Recommended Disciplinary Action Letter advising you of the recommendation that you be terminated from your position as a Sheriff's Correctional Deputy for the County of Santa Clara effective May 21, 2016.

The May 6, 2016 Recommended Disciplinary Action letter reads, in relevant part, as follows:

"This is to advise you that I am recommending you be TERMINATED from your position as a Correctional Deputy for the County of Santa Clara, Sheriff's Office Custody Bureau, effective May 21, 2016.

Based on the findings of the attached investigation report, the Department sustains the following charges, which are the basis of this recommended disciplinary action:

Santa Clara County Merit System Rule A25-301(a)(1): "Violation of the county charter, merit system rules and regulations and written and published departmental rules and policies which do not conflict with this article."

Santa Clara County Merit System Rule A25-301(a)(4): "Brutality in the performance of duties."

Santa Clara County Merit System Rule A25-301(b)(2): "Guilty of immoral conduct or criminal act."

Santa Clara County Merit System Rule A25-301(b)(1): "Guilty of gross misconduct, or conduct unbecoming a county officer of employee which tends to discredit the county or county service."

D.O.C. Policy 3.31.II.A - Employee Relationships with Inmates: "Employees have the responsibility to provide for the safety, security and welfare of the inmates under their supervision."

D.O.C. Policy 3.31.II.B - Employee Relationships with Inmates: "Brutality will not be tolerated and is cause for dismissal and possible criminal charges."

D.O.C. Policy 3.31.II.C - Employee Relationships with Inmates: "Employees shall not touch an inmate except to: 1. Defend themselves. 2. Control or restrain an inmate. 3. Prevent the escape of an inmate. 4. Prevent serious injury or damage to a person or property. 5. Quell a disturbance. 6. Search an inmate. 7. Render medical aid."

D.O.C. Policy 3.31.IV.J.I.a - Employee Conduct/Conformance to Law: "Employees are expected to adhere to Department Policies and Procedures, County Personnel Regulations, County Administrative Procedures, Executive Orders, County Merit System Rules, and all laws applicable to the general public."

D.O.C Policy 3.31.IV.J.2. - Compliance with Order: "Employees shall obey a lawful order from a supervisor."

D.O.C. Policy 3.31.IV.J.3.a - Employee Conduct/Use of Force: "Employees shall only use force in accordance with the law and the Department Policy 9.01, Use of Force and Restraints."

D.O.C. Policy 3.31.IV.J.4.a. - Integrity of Reporting System. "Employees shall submit all necessary reports in accordance with established Department policy and procedures. These reports will be accurate, complete, and timely and will be submitted before the end of the employees' tour of duty unless permission is obtained from the on-duty watch Commander to do otherwise."

D.O.C. Policy 3.31.IV.J.9.a - Employee Conduct/Conduct Unbecoming: "An employee shall not commit any act which constitutes conduct unbecoming a Department employee. Conduct unbecoming an employee includes, but is not limited to, any criminal or dishonest act or an act of moral turpitude."

D.O.C. Policy 3.31.IV.J.10.b - Neglect of Duty/Unsatisfactory Performance: "Unsatisfactory performance is demonstrated by an inability or unwillingness to

perform assigned tasks, failure to take appropriate action in a situation needing attention, or failure to conform to work standards established for the employee's rank, grade or position."

D.O.C. Policy 3.31.IV.J.14.a - Employee Conduct/Untruthful Statements: "Employees shall not make less than truthful statements, either verbal or written."

D.O.C. Policy 9.01.I.A.1 - Use of Force: "In the performance of their duties, badge staff is authorized to use that level of force, which is necessary and objectively reasonable, under the circumstances."

D.O.C. Policy 9.01.I.A.2 - Use of Force: "Badge staff will not use force to discipline..."

D.O.C. Policy 9.27.I.B - Reporting of Incidents: "Staff made aware of reportable incidents or conditions shall promptly notify their supervisor. The seriousness of the situation shall dictate the means of notification. All staff involved in a reportable incident shall submit a written Incident Report describing the event in detail to the supervisor."

**The facts which are the basis for these charges:**

(See attached Investigative Report (Statement of Findings IAU#2015-022) from Renne Sloan Holtzman Sakai LLP, dated February 2, 2016)

**The Basis for the Recommendation:**

The administrative investigation revealed that, on August 26, 2015, between 10:38 p.m. and 11:09 p.m., during a cell search of \_\_\_\_\_ for excess clothing, you, Deputy Lubrin and Deputy Farris used excessive and unnecessary force to discipline \_\_\_\_\_ and \_\_\_\_\_ for disruptions that occurred earlier in the evening in \_\_\_\_\_ and \_\_\_\_\_ were protective custody inmates with mental health issues. Witness accounts and video documentation established that you, Deputy Lubrin and Deputy Farris were present inside \_\_\_\_\_ and \_\_\_\_\_ cells when the excessive and unnecessary force was used on them. Witness accounts also establish that while you, Deputy Lubrin and Deputy Farris were present inside each cell they heard sounds and statements coming from each cell that would lead a reasonable person to believe force was being used on the inmate in the cell.

On August 27, 2015, at approximately 12:12 p.m. (0012 hours), Deputy Lubrin found \_\_\_\_\_ in his cell unresponsive and summoned assistance. Although life saving measures were taken, at 12:35 a.m. \_\_\_\_\_ was declared dead.

, a 44-year-old inmate, suffered injuries to his arm, shoulder, wrist and knee, causing visual bruising as a result of the excessive and unnecessary force you, Deputy Lubrin and Deputy Farris used on him.

The Medical Examiner's Report concluded that a 31-year-old inmate, sustained a severed spleen and liver as the result of the infliction of blunt force trauma at the hands of another. He died of exsanguination and his death was classified as a homicide. The unnecessary and excessive force you, Deputy Lubrin and Deputy Farris used on caused the injuries that resulted in his death.

After death, you made false and misleading statements during incident briefings and in your written Employee Reports. In fact, you did not report any use of force against or on the night of the incident as required by Department policy.

On September 3, 2015, the Sheriff's Department notified you to appear for an investigative interview on October 1, 2015. The interview was continued to October 30, 2015. On October 30, 2015, you appeared, accompanied by counsel, for your Investigative Interview. You were given the Lybarger admonition, which compelled you to cooperate with the Administrative Investigation by truthfully and candidly answering all questions asked by the investigators. You were advised that failure to do so would be considered insubordination, which could lead to termination from the Department. With this knowledge, you chose to invoke your Fifth Amendment right against self-incrimination and refused to cooperate with the Administrative Investigation.

The preponderance of the evidence established by the investigation, found that you participated in using excessive and unnecessary force on and to discipline them for disruptions they were a part of earlier in the shift. Your brutal treatment of these two inmates was purposeful, malicious and immoral.

Your failure to file the necessary use of force reports, and the misleading and incomplete statements you made in your written employee's report dated August 27, 2015 was conduct which was unprofessional, dishonest, self-serving and unbecoming of a Santa Clara County correctional deputy.

Your actions during and after the incident, can only be categorized as misconduct that was negligent, unprofessional, indifferent, irresponsible, dishonest, unbecoming a Correctional Deputy, and violated County and Department policy.

As a deputy with your level of experience and training, you knew, or reasonably should have known, the importance of adhering to Department policy, using good judgment that supports department policy and your absolute responsibility to protect inmates from cruel and unusual punishment. Instead, your actions demonstrated a lack of concern for the physical and mental well-being of inmates in your care and custody. You knew, or reasonably should have known,

that it was your responsibility and duty when faced with an uncooperative or disruptive inmate, especially an inmate with mental health issues, to competently resolve the situation without or with the least amount of force necessary. You understood, or reasonably should have understood the magnitude and possible ramifications of your decisions and actions and made the proper decisions to include intervening to prevent harm to the inmates, not participate in the brutal treatment of inmates and immediately report those who do.

The administrative investigation established facts that support a conclusion that you used excessive and unnecessary force, failed to discharge your duties in a responsible and professional manner, failed to exercise good judgment, failed to uphold the law, failed to report your actions, and failed to follow Department and County policy. Based on your training, knowledge and experience you knew, or reasonably should have known, that the actions you took against [redacted] and [redacted] violated County Merit System Rules and Department policies and would result in the death of Inmate Tyree and would physically and emotionally harm Inmate Villa.

Based upon the foregoing, I am recommending that you be TERMINATED from your position as a Sheriff's Correctional Deputy with the Santa Clara County Department of Correction/Office of the Sheriff- Custody Bureau effective May 21, 2016.

The above-mentioned discipline is a recommendation. Therefore, the termination date listed is tentative. Any actual discipline dates will be listed on a Final Disciplinary Action Letter that will be served to you.

History/Past Disciplines:

None"

This concludes the relevant quotation from Sheriff Smith's May 6, 2016 Recommended Disciplinary Action letter.

### **Administrative Hearing:**

On June 1, 2017, the Sheriff's Office provided you and your attorney, [redacted], with a letter enclosing a copy of your May 6, 2016 Recommended Disciplinary Action letter. The letter stated that Assistant Sheriff Ken Binder would serve as your Administrative Hearing Officer relating to your administrative disciplinary matter. Your Administrative Hearing was scheduled to occur in San Mateo County Jail on June 8, 2017 at 4:00 p.m. On June 7, 2017, [redacted] of the [redacted] emailed the Sheriff's Office to request that your June 8th Administrative Hearing be rescheduled because [redacted] had become ill and was unable to appear on the scheduled hearing date. In response, the Sheriff's Office agreed to postpone the June 8th hearing and set a new Administrative Hearing date of June 13, 2017 at 4:00 p.m. On June 8th, the Sheriff's Office hand-delivered to you a new letter indicating a rescheduled Administrative Hearing date of June 13, 2017 at 4:00 p.m.

On June 9, 2017, \_\_\_\_\_ sent a letter to Assistant Sheriff Binder again requesting that the Sheriff's Office reschedule the Administrative Hearing date. \_\_\_\_\_ stated that she was unable to appear on the June 13th hearing date due to another hearing she had scheduled for that same date, and that \_\_\_\_\_ remained medically unable to attend the hearing. The Sheriff's Office agreed to postpone and reschedule your Administrative Hearing, this time to Friday, June 30, 2017 at 1:00 p.m. Your hearing was moved to June 30 because \_\_\_\_\_ stated that she would be back from vacation by then and that she would be able to attend the hearing in place of \_\_\_\_\_, in case he remained ill. On June 13, the Sheriff's Office hand-delivered to you a new letter indicating a rescheduled Administrative Hearing date of June 30, 2017 at 4:00 p.m. This letter further advised you that if you were unable to make the June 30 hearing, then you or your counsel could provide a written response to Assistant Sheriff Binder prior to June 30, 2017, and he would consider any response so submitted prior to rendering a decision.

On June 27, 2017, \_\_\_\_\_ called Captain Frank Zacharisen to advise that \_\_\_\_\_ was still medically unable to attend the June 30th hearing. \_\_\_\_\_ stated that after conferring with \_\_\_\_\_, she determined that she would be providing a written response in lieu of an in-person Skelly hearing. On June 30, 2017 at 4:44 p.m., \_\_\_\_\_ emailed her written response to the Sheriff's Office. \_\_\_\_\_ written response is attached to this letter as Exhibit A.

### **Administrative Hearing Officer's Decision:**

After reviewing the Internal Affairs investigative file, the May 6, 2016 Recommended Disciplinary Action letter, the evidence provided during the investigation, and \_\_\_\_\_ written response to the Recommended Disciplinary Action letter, I find that there are sufficient grounds to believe that you engaged in the alleged misconduct listed in the Recommended Disciplinary Action letter and that your misconduct supports the recommended disciplinary action of termination. I also find that your misconduct constitutes a violation of the Merit System Rules and Department of Correction Policies and Procedures listed on pages 1-3 of this letter. Your voluntary misconduct has caused irreparable damage to this organization.

In her written response, \_\_\_\_\_ raises three concerns, paraphrased here:

1. The allegation of insubordination in connection with the internal administrative interview cannot stand because the Sheriff's Office was incapable of conducting an impartial investigation based on public comments made by Sheriff Smith;
2. The order that you participate in the internal administrative interview was not proper because the Sheriff's Office could not adequately safeguard your Fifth Amendment rights against self-incrimination; and

3. To the extent that your termination is based on the verdict returned by the jury in your criminal trial, it is premature because a jury verdict does not equate to a formal conviction which would legally bar you from acting as a peace officer.

As to the first issue, I do not find \_\_\_\_\_ concern credible because the Sheriff's Office did not conduct the administrative investigation. Instead, and in order to ensure impartiality, the Sheriff's Office caused a third party, Renne Sloan Holtzman Sakai LLP to conduct and complete the administrative investigation.

With respect to the second issue, \_\_\_\_\_ does not offer any evidence supporting her theory that your administratively compelled statements would be improperly used in connection with your criminal proceedings. You were issued a lawful order by a superior officer to cooperate with the administrative investigation and you were assured that those administratively compelled statements would only be used in the administrative investigation in compliance with *Lybarger v. City of Los Angeles*. Prior to your administrative interview, you were read the Lybarger admonition which informed you that administratively compelled statements could not be used for criminal proceedings except as required by law.

\_\_\_\_\_ asserted in her written response that the Sheriff's Office could not "...provide adequate assurances that any administratively compelled statements would not be accessed during the criminal investigation..." \_\_\_\_\_ did not indicate what assurances she would have considered adequate, but the facts are that the Sheriff's Office is aware of the requirements surrounding the confidentiality of administratively compelled statements, the Sheriff's Office does not share administratively compelled statements with an ongoing criminal investigation; and the Sheriff's Office was within its rights to order the administratively compelled statement pursuant to *Speilbauer v. County of Santa Clara*. This makes your superior officer's order that you participate in the administrative investigation both lawful and proper.

The third issue raised by \_\_\_\_\_ does not apply to this disciplinary action. The May 6, 2016 Recommended Disciplinary Action letter and charges put forth against you in that letter were based upon the 2016 administrative investigation report attached to that letter and were not based upon your recent jury verdict in June of 2017.

In my view, your termination is warranted based on the sustained findings of misconduct in the Sheriff's Office administrative investigative report and based upon the charges levied against you in the May 6, 2016 Recommended Disciplinary Action letter. The list of sustained allegations against you includes brutality, insubordination, gross misconduct, and untruthful statements. While circumstances vary from case to case, any of these sustained charges standing alone could warrant termination from this department. In your case, I believe that any one of these sustained charges standing on its own would merit your termination, but when considered as a whole it forms an insurmountable impediment to your continued employment with this law enforcement agency.

Your position as a Correctional Deputy is a position that requires the trust of the public, the inmates you supervise, your peers and supervisors, and the administration of the Department of Correction and Office of the Sheriff. Based on the investigation and sustained findings against you for brutality, insubordination, gross misconduct and untruthful statements, your actions have broken the trust required for you to perform your duties as a Correctional Deputy.

As an employer of law enforcement personnel, the County has a mandated responsibility to ensure that all employees, particularly peace officers employed by the department, maintain the highest standards of ethical, moral and legal behavior. The County also has a responsibility to ensure employees do not expose themselves or the County to criticism, disgrace or public ridicule. You have failed in your mandated responsibility to uphold the ethical, moral and legal standards of this County and your appointed position, and you have greatly damaged the reputation of the Office of the Sheriff, the Department of Correction, and everyone who works here. Allowing you to continue working in a public law enforcement agency and jail environment would send a message of tolerance in an area of behavior and conduct where I believe none should be shown. Based on the foregoing, I am upholding the recommended disciplinary action. Therefore, you will be **TERMINATED** from your position as a Sheriff's Correctional Deputy with the County of Santa Clara, Office of the Sheriff, Custody Bureau **effective July 7, 2017.**

**Right to Appeal:**

Should you be dissatisfied with the decision in this Final Disciplinary Action Letter ("final action"), the County of Santa Clara Charter, Section 708(c) gives you the right to appeal the decision. You may appeal the final action within ten (10) working days of receipt of the final action to the Personnel Board pursuant to County of Santa Clara Charter, Section 708(c):

*"The employee shall have ten working days from receipt of such written notice within which to file an answer to the statement of charges should the employee desire to do so, and the filing of such an answer shall be deemed to be an automatic request for a hearing unless such employee otherwise indicates. The answer to such charges shall be filed with the Personnel Board."*

Should you choose to appeal the decision you must send a written notice to:

William Anderson  
Chairperson, Personnel Board  
c/o Clerk of the Board  
70 West Hedding Street, 10th Floor East Wing  
San Jose, California 95110

Alternatively, should you voluntarily waive your right to appeal any disciplinary action to the Personnel Board, by filing for arbitration of your appeal pursuant to Section 23 Grievance



Procedure, of the Memorandum of Understanding between the County of Santa Clara and the Santa Clara County Correctional Peace Officers' Association, Inc. to appeal the disciplinary action to arbitration by submitting a request in writing to the Office of Labor Relations within fifteen (15) working days from receipt of the Final Notice (Skelly Decision) of disciplinary action. Should you choose to do so, you must send the written request to:

Mitchell Buellesbach  
Employee Services Agency, Labor Relations  
70 West Hedding Street, 8th Floor East Wing  
San Jose, California 95110

You may seek either a hearing before the Personnel Board or an arbitration hearing, but not both.

Filing a request for an arbitration hearing, under Section 23 of the MOU shall be deemed an automatic waiver of the employee's right to appeal to Personnel Board.

You have the right to be represented in your appeal by your union or another representative of your choice. You can contact your union at:

Santa Clara County Correctional Peace Officers' Association (CPOA)  
1930 O'Toole Way  
San Jose, CA 95131  
(408) 526-0606

You have the right to the materials upon which this action is based. Those materials have already been provided to you through your attorney.

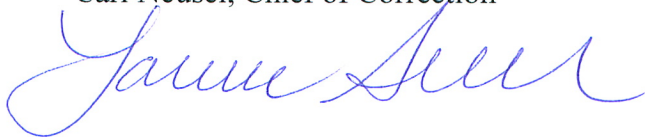
Sincerely,



Ken Binder, Assistant Sheriff  
Administrative Hearing Officer



Carl Neusel, Chief of Correction



LAURIE SMITH, Sheriff

c: Troy Beliveau, Assistant Sheriff, Custody Bureau  
Captain Eric Taylor, Main Jail Division

Captain Tim Davis, Elmwood Division  
Captain Frank Zacharisen, Personnel Division  
Juan Gallardo, Director of Administrative Services  
Mitchell Buellesbach, Labor Relations Representative, ESA  
Anita Asher, Human Resources Manager, ESA

Rafael Rodriguez (hand-delivered at Maguire Correctional Facility, Redwood City, California)

enc: Exhibit A: Written Response in Lieu of Skelly Hearing for Deputy Rafael Rodriguez, dated June 30, 2017

# Exhibit A



June 30, 2017

*Via Electronic Mail and Regular Mail*

Ken Binder, Assistant Sheriff  
County of Santa Clara Sheriff's Office  
55 West Younger Avenue  
San Jose, CA 95110

**Re: *Written Response in Lieu of Skelly Hearing for Deputy Rafael Rodriguez***

Dear Assistant Sheriff Binder:

Thank you for the courtesies extended in postponing the pre-disciplinary hearing for Deputy Rafael Rodriguez in light of the medical condition that has afflicted his primary counsel, . Both and Mr. Rodriguez have authorized me to present this written response *in lieu* of a pre-disciplinary hearing.

As a preliminary matter, please be advised that Deputy Rodriguez denies all the allegations outlined in the correspondence dated May 6, 2016, disagrees with each of the findings made, incorporates by reference as though fully set forth, all of the evidence and arguments presented at his criminal trial, and reserves the right to present arguments and evidence beyond that outlined in this correspondence should the Sheriff decide to proceed with the recommended disciplinary action.

As to the allegation of insubordination during the internal interview on October 30, 2015, that charge must fail because the Department could not perform its legal obligation to conduct a full, fair, and complete investigation that included adequate safeguards for his constitutional rights. The reason: the extensive press coverage of the case, including the comments made by the Sheriff as well as other representatives of her agency, demonstrated that the Santa Clara County Sheriff's Office could not, and still cannot, provide Deputy Rodriguez with a fair opportunity to respond to the allegations. The circumstances created a "probability of actual bias on the part of the ... decision maker [that] is too high to be constitutionally tolerable." *Mennig v. City Council* (1978) 86 Cal. App. 3d 341, at 350 further held: "The decision cannot be made by a decision maker who has become 'personally embroiled' in the controversy to be decided." (*Id.*)

Here, the public statements made by Sheriff Smith prove her actual bias in this matter and that she was personally embroiled in the controversy to be decided. Indeed, Sheriff Smith publicly condemned Deputy Rodriguez at the time she sought his arrest. As constitutional due process requires a neutral decision maker, that obligation could not be provided at the time of the interview, nor can it be provided at the pre-disciplinary stage as long Sheriff Smith, or any of her agents and representatives, are involved.

Assistant Sheriff K. Binder

June 30, 2015

**Re: Written Response in Lieu of Skelly Hearing for Deputy Rafael Rodriguez**

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Further, the order that Deputy Rodriguez participate in the internal interview failed because the Sheriff's Office was simultaneously the lead investigative body for the criminal charges as well as the final decision maker on the administrative allegations. Given the provisions of Penal Code section 832.7(a)(1), the Sheriff's Office could not adequately safeguard Deputy Rodriguez's Fifth Amendment rights during the administrative investigation, nor provide adequate assurances that any administratively compelled statements would not be accessed during the criminal investigation, nor that the prosecution team would not improperly use his compelled statement in connection with the criminal proceedings.

Finally, to the degree the termination is based in any part on the jury verdict, it is premature. In *Boyll v. State Personnel Board*, 146 Cal. App. 3d 1070 (1983), the court ruled that a peace officer is not convicted within the meaning of Penal Code section 1029 until after a judgment issues on the verdict. The court stated:

As appears in the case law, the terms "convicted or "conviction" do not have a uniform or unambiguous meaning in California. Sometimes they are used in a narrow sense signifying a verdict or guilty plea, some other times they are given a broader scope so as to include both the jury verdict (or guilty plea) *and* the judgment pronounced thereon. [Citations omitted.] However, where as in the instant case, a civil disability flows as a consequence of the conviction, the majority and better rule is that "conviction" must include both the guilty verdict (or guilty plea) *and* a judgment entered upon such verdict or plea.

*Id.* at 1074 (emphasis in original). The court went on to state: "[I]n the absence of a judgment of conviction or imposition of sentence" a peace officer "cannot be deemed to be 'convicted' under section 1029," and therefore cannot be deprived of the fundamental right to obtain or maintain public employment.

Since no judgment has yet issued against Deputy Rodriguez, he cannot be considered disqualified under Penal Code section 1029. In other words, until such time as the criminal proceedings complete and a judgment of conviction is entered, the Sheriff's Office should hold off on any formal decisions concerning Deputy Rodriguez's employment status.

Thank you for your courtesy in considering this response.

Very truly yours,

cc:

Rafael Rodriguez