

**BEFORE THE CIVIL SERVICE COMMISSION
COUNTY OF MELROSE**

In the Matter of the Appeal of:	*	
	*	Findings of Fact
	*	
Mike R. Connelly	*	Conclusions
	*	
to his	*	Recommendation
	*	
Order of Termination dated	*	
September 12, 2000	*	
	*	

PRELIMINARY STATEMENT

The hearing in this matter was held on October 29, 31 and November 7, 2001 before Judy A. Gust, duly appointed Hearing Officer for the Civil Service Commission. The appellant was represented by Richard M. Kreesin, from the Law Offices of Kreesin and Cross. The Sheriff's Department was represented by Cassidy S. Aaron, Deputy County Counsel, County of Melrose.

Both parties were provided an opportunity to present evidence through exhibits and the sworn testimony of witnesses who were subject to cross-examination. The record of this hearing was closed on November 7, 2001 following oral closing arguments by the representatives.

WITNESSES

For the Respondent

Mke R. Connelly Appellant
Jeffree Barton Deputy
A. Blake Othello Sergeant
Roy G. Gostart. Deputy
Mitchel Frontera Special Undercover Employee
Leonard Hart Lieutenant
Sean Martin. Sergeant
Ronald Best Captain

For the Appellant

David Flaherty. Deputy
George Smith. Detective
Jack Beautrand. Detective
Roberto Franklin Deputy

Charlotte Samuel Deputy
 James D. Woods Sergeant
 Ricky Earnest Deputy
 Robert Darnell Sergeant

Background Information and Statement of the Case

The Appellant, Mike R. Connelly, had been a Deputy with the County of Milrose for approximately 24 ½ years prior to his termination on September 13, 2000. He also served as a reserve officer prior to his full-time appointment in 1976. At the time of his termination, Connelly was assigned to Narcotics.

The incident prompting his termination occurred on April 19, 2000 following an all-day narcotics surveillance action. Deputy Jeff Barton and Connelly exchanged unprofessional comments over the radio towards the end of the shift. At the end of the shift, all of the deputies reported to a parking lot adjacent to a McDonald's for a debriefing. While waiting for the Sergeant, who was to conduct the briefing, to finish a telephone call, several of the deputies were standing around talking near Deputy Gostart's vehicle. Connelly was one of the last to arrive. He parked his car some distance away from the other cars and walked toward the group. He approached Barton from behind and tapped him on the shoulder or arm to get his attention and asked Barton something to the effect of – do you have something to say to my face? Barton moved his other arm and removed Connelly's hand from his arm as he (Barton) was turning around. Barton responded with something to the effect of – yeah, I have something to say. As Barton was turning around to face Connelly, Connelly's flat, open hand made contact with Barton's cheek and chin. The whole incident reportedly occurred in from two to five seconds.

Following this incident, Sergeant Brown, the team's supervisor, and Sergeant Martin, assigned at that time to Internal Affairs, conducted an investigation of the incident. Sergeant Brown was also interviewed as part of the investigation as a witness to the team's environment and as the party responsible for team morale. Although Connelly suggested that David Flaherty be interviewed as a witness to Barton's past conduct that Connelly contended was an aggravating factor, Sergeant Martin determined that Flaherty's information was not relevant to the investigation. Consequently, Flaherty was not officially interviewed as part of the investigation. The investigative report and Connelly's employment history were presented to the Deputy Chief's Board which made the decision to terminate Mr. Connelly's employment.

Order of Disciplinary Action/Relevant Rules and Regulations

Following are the causes cited by the Sheriff of Melrose County supporting its decision to terminate Mr. Connelly:

On April 19, 2000, while on duty, you demonstrated unacceptable behavior as a deputy Sheriff when you struck Deputy Jeffree Barton. Said conduct is in violation of County Personnel Rule X, Section 2(b), 2(l) and 2(q); and departmental Rules and Regulations 1/215 and 1/215.40; and is cause for discipline under said rules.

County Personnel Rule X

2(b) Discourteous treatment of the public or other employees.

2(l) Neglect of duties.

2(q) Any action inconsistent with these Rules or officially promulgated department rules.

Departmental Rules and Regulations

1/215 MISCONDUCT – SAFETY EMPLOYEES. A law enforcement officer is the most conspicuous representative of government, and to the majority of the people he is a symbol of stability and authority upon whom they can rely. An officer's conduct is closely scrutinized, and when his actions are found to be excessive, unwarranted, or unjustified, they are criticized far more severely than comparable conduct of persons in other walks of life. Since the conduct of an officer, on or off duty, may reflect directly upon the Department, an officer must, at all times, conduct himself in a manner which does not bring discredit to himself, the Department, or the County.

1/215.40 RESPECT AMONG MEMBERS. Members shall avoid conduct or speech that is subversive to good order and discipline. They shall treat each other with the utmost courtesy and respect, and at all times refrain from making any derogatory remarks concerning each other. They shall direct and coordinate their efforts to establish and maintain the highest level of efficiency, morale, and achievement. They shall conduct themselves in such a manner as to bring about the greatest harmony among the various organic units in the Department.

Discourteous treatment of the public or other employees may be cause for demotion, suspension, reduction in salary step, or dismissal.

Respondent's Position

The Respondent's position is that the preponderance of the evidence showed the accuracy and sufficiency of the facts that support the termination of the Appellant, Mike Connelly. It argues that Connelly engaged in a verbal altercation with Deputy Barton both on the radio and on the cell phone. As a result of these interactions, Connelly was angry and could not control his temper. That anger resulted in his intentional slapping of Barton when the group later met to debrief behind a McDonalds restaurant. The Respondent pointed to the testimony of other deputies at the scene: Frontera's testimony that the slap was a slap of confrontation, Othello's testimony that it was a "bitch slap" and Connelly's own response, when questioned by Gostart about why he "hit" Barton, that he didn't hit him but slapped him.

Respondent further argues that even if Barton made the comments alleged by Connelly, such verbal insults were no justification for physical violence. The radio comments made by Barton on the night of the incident occurred at approximately 10:00 p.m. and the cell phone

exchange took place from 30-60 minutes later. The team did not meet until approximately 11:45 that night to debrief and, according to the Respondent, Connelly was still angry and initiated the physical contact with Barton.

Although the Respondent does not dispute Connelly's good record, it asserts that a good record does not negate such misconduct. Deputies find themselves in stressful situations daily and need to control their temper and remain calm. In this case, the Respondent asserts that Connelly was mad and that his temper led him to strike Barton without justification.

The level of discipline was appropriate in this case because the fact that Connelly struck Barton is undisputed, the discipline was consistent with other employees who were recently terminated for violent conduct, Connelly has a history of this type of behavior (having received a three-day suspension in 1993 for slapping a juvenile), and that such progressive discipline in the past put Connelly on notice that he could be terminated for further behavior of this sort.

The Respondent relies on the testimony of Sergeant Martin and Captain Best to rebut the Appellant's assertion that he was not given a fair investigation. Martin testified that he assisted Brown in the investigation and conducted an informal interview with Dave Flaherty, a witness who was suggested by Connelly who could testify to Barton's past inappropriate comments. Sgt. Martin concluded that Flaherty's information was not relevant as he was not involved or at the scene of the April 19, 2000 incident that prompted the investigation of Connelly. As a result of Martin's conclusion that the information was not relevant, Maartin did not formally interview Flaherty as part of the investigation or include Flaherty's comments in the investigative report. Captain Best, the Commander of Personnel Services to which Internal Affairs reports, testified that Sergeant Brown's role as the lead investigator on the Connelly investigation of the of April 19, 2000 incident was appropriate and in compliance with departmental policy. That policy is to keep the investigation at the lowest level of supervision with an Internal Affairs investigator assigned as a partner in the investigation. Captain Best testified that this allows line Sergeants to gain experience with internal investigations and comports with their "mentor" program. Further, Best testified that because Brown was not present at the incident, he did not find anything inappropriate about Brown being interviewed by Martin as part of the investigation to ascertain the relationship between Connelly and Barton.

In summary, the Respondent asks that the termination be upheld because the facts were true -- that Connelly lost his temper and slapped Barton; that Connelly has a history of this behavior and had sufficient notice that further discipline could occur for similar behavior; and that the action was consistent with the Department's policies and procedures.

Appellant's Position

The Appellant's position is that the Department failed to prove a violation of any Department regulation in that Connelly's striking of Barton was an unintentional reaction to Barton's quick turn around and raising of his arm to remove Connelly's arm from his shoulder. Appellant points out that Connelly was the one most focused on the issue and in the best position to observe what was happening in the two to five second incident. The Department's attempt to

prove that Connelly's action was intentional was rebutted by the testimony of several witnesses who, while testifying that they could not get inside Connelly's head to know his intent, nevertheless attributed intent to his action in their interpretation. Connelly denied any intent to strike Barton. Rather, Connelly's testimony was that he intended to "talk it out" with Barton to clear up a long-standing issue with Barton's inappropriate communications over the radio. As the Appellant argued, it is unlikely that a 27-year veteran would approach a co-worker in front of multiple witnesses to intentionally engage in a physical altercation. Connelly testified that he touched Barton on the shoulder to get his attention as Barton's back was to him and asked Barton "do you have something to say to my face". Barton turned around quickly and raised his left arm and hand to brush away Connelly's hand from his shoulder and yelled, "yeah, I have something to say". Barton didn't deny turning around and brushing or pushing Connelly's arm. At that time, Connelly testified that he felt threatened and just reacted to protect what might follow so he raised his arm and his open hand struck Barton on the chin.

Connelly also testified that he had complained to Sergeant Brown about Barton's conduct on the radio over a period of time but observed no improvement. Brown's role as the lead investigator of the incident, while also being a percipient witness, raises doubts about the fairness of the investigation. Connelly also testified that others in the Department had voiced concerns over Barton's comments over the radio. Sergeant Martin's decision that Flaherty's information was not relevant to the case raises further doubts about the fairness of the investigation. Flaherty testified that he also had objections to Barton's inappropriate comments, specifically Barton's comments at a debriefing in front of other deputies about Flaherty's brother. Flaherty's information may have been exculpatory and without being interviewed, his information never had an opportunity to reach the decision-makers in this case. Although in closing argument the Appellant stated that Brown's involvement in the investigation was not the meat of the case, Appellant does point out that good investigative procedure would preclude a percipient witness from being responsible for the investigation. This would be even more important where that investigator might be reluctant to challenge witnesses' recollections or probe deeply into provocation for fear of an allegation that he failed to properly supervise Barton.

Appellant also questions the credibility of the witnesses as they were neither focused on the event before it occurred nor observed it directly until it was in progress, a time span of some one to five seconds. Further, these witnesses reported essentially the same version of the incident with little variation. In Appellant's investigative experience, several perspectives and interpretations are likely when multiple witnesses report on an incident. That experience suggests that the witnesses testified to what they thought occurred based on discussions occurring after the incident.

Finally, the Appellant addresses the appropriateness of the discipline. Connelly admitted that he used the word "ass" in reply to Barton's earlier comment to Connelly to "get his head out of his ass" and admitted that his comment was inappropriate. Connelly also testified that about ten minutes after the radio exchange, he called Barton on the phone and told him to be careful about what he said over the air to which Barton replied, "fuck you". However, Connelly rebuts the progressive discipline argument of the Department by pointing out that the 1996 incident involved his grabbing of a juvenile theft suspect that he thought might get away. The 1996

incident resulted in a three-day suspension that Connelly did not appeal. Additionally, the facts of the two incidents were dissimilar as the 1996 incident did not involve a fellow officer. Since that time, Connelly has received four overall "exceeds standard" performance evaluations. In the words of the Appellant's representative, the penalty "shocks the conscience" and "reaches too far" when considered in light of the totality of the circumstances. Appellant points out that the Department does not have a "zero tolerance" policy on touching and cited the testimony of Captain Best about a few recent cases where a difference of opinion and physical interaction occurred between not only deputies but between management employees. In those cases the participants were not terminated.

Discussion of the Evidence

As set forth in the County's Personnel Rules, specifically Rule X, Section 14, the appointing authority has the burden of proving the accuracy and sufficiency of the facts upon which the dismissal is based upon a preponderance of the evidence.

In this case, the accuracy of the fact determination depends largely on credibility of both the principals (Barton and Connelly) as well as the witnesses. Barton testified that the strike by Connelly was intentional and not accidental. Connelly testified that he had no intent to strike but rather that he approached Barton prior to the debriefing to "talk it out" with him concerning the comments made that evening as well as prior comments made by Barton that Connelly believed were inappropriate. The contact with Barton was a normal protective and inadvertent reaction to Barton's physical actions of turning around quickly and raising his arm to push Connelly's hand from his shoulder. Ordinarily one must question the credibility of the person who stands to gain the most. That would be Connelly in this instance. However, Connelly's testimony is found to be the more credible based upon the contradictions and denials made by Barton as compared with Connelly's straightforward, unhesitating testimony that also admitted some culpability on his part as to the discourteous remark that included the word "ass".

The first contradiction noted concerned Barton's possession of a radio during the verbal exchange that occurred at about 10:00 p.m. Barton testified that he was briefing the team that was taking over the surveillance. At that time Othello called Barton to say that someone was trying to reach him. Barton testified that he wasn't listening to the radio traffic while he was talking on the phone to the relief team about what had been going on during Melrose's surveillance. Because the complete relief team was not there yet, Barton's team was to follow the two cars that were leaving the surveillance area. Barton testified that he didn't have his Sheriff's radio so he called Othello and asked him to broadcast that their team should follow the cars. Barton then finished briefing the relief team and asked where his team was at now. That was the first interchange with Connelly when Connelly said, "if you'd listen to your radio you would know". That is when Barton testified that he responded, "pull your head out of your butt and tell me where you're at". Barton testified that another team member identified their location. Barton then testified that he then gave the radios to the relief team and went to where his team was located. If Barton did not have a radio, the question arises as to what radios he gave to the relief team before joining his own team. While not a fatal contradiction to the issue at hand, it does diminish one's confidence in Barton's entire account of the event.

Barton also testified that he was leaning against the fender of Gostart's Bronco and later testified that Connelly approached him from behind and that he had to turn to see who had touched his arm. If Barton was leaning against the fender, it is difficult to imagine how Connelly approached him from behind without crawling over the hood of the car. It is more probable that in the few seconds of the entire altercation and Barton's surprise at Connelly's contact and inquiry, that memories have either faded and/or were less than accurate to begin with.

Connelly testified that he called Barton shortly after the radio exchange to tell Barton to watch what he said over the radio. He further testified that Barton replied with "fuck you". Barton did corroborate that Connelly initiated the call to him but denied saying "fuck you" to Connelly. Rather, Barton testified that he tried to explain why he didn't hear the radio traffic and Connelly hung up on him. Logic would suggest that Connelly initiated the call because he had something to say to Barton and didn't make the call just to hear Barton's side of the story and then hang up. Connelly's testimony in this regard is found to be the more credible.

The next credibility assessment that must be made concerns the credibility of the witnesses who testified about Connelly's intent. The witnesses presented by the Respondent testified that they believed that Connelly intended to strike Barton even though they were otherwise engaged in conversation when the less than five second exchange began. In contradiction to these attributions of intent, these witnesses also testified that they could not really say "what was in Mike's head" or, in other words, could not determine his intent. Ordinarily one considers giving more weight to the testimony of disinterested parties. If one were to do that in this case, the intent attributed to Connelly by the various witnesses might be more persuasive. However, one must be sure that the witnesses are truly disinterested. That may not be the case in this situation. The three deputies who testified for the Respondent -- Barton, Gostart and Othello -- have all been with the department approximately 12 years, presumably starting at about the same time and sharing their introductory periods within the Department. On the other hand, Connelly had more than twice as much service time as these witnesses. Further, Connelly was considered to have "boundless energy" and "no difficulty keeping pace with his teammates". (App. Ex. A-2) Connelly's performance evaluations for 1996, 97, 98 and 2000, clearly reflect an exemplary deputy who has a great deal of knowledge and experience to share with other deputies. However, Connelly also appears to have difficulty in delivering his suggestions and constructive criticism to others in an effective manner. It is more likely than not that these witnesses have been the recipients of Connelly's suggestions and/or criticism in the past and harbored resentment toward him.

Also of concern regarding the testimony of the Respondent's witnesses is the fact that one precipient witness, Sergeant Brown, was in charge of the investigation. Although Lieutenant Best testified that having the Sergeant of the employee being investigated head the investigation was compliant with departmental policy, he also testified that Brown's role in supervising Barton, given Connelly's prior complaints to Barton, might have disqualified him if that was known at the time. The only people that should have known of Connelly's prior complaints were Connelly and Brown. Further, Connelly testified that after complaining to Brown about Barton's radio communications, Brown counseled Connelly about his radio comments. Connelly also testified that when Brown conducted these counselings, he did so without benefit of hearing Barton's previous comments that Connelly was replying to. That Brown did not recuse himself

and have someone else at least take the lead in the investigation raises questions about the objectivity and thoroughness of the investigation especially in regard to whether the witnesses that attributed intent to Connelly's behavior were accurate and/or impartial.

On Connelly's behalf, other witnesses testified as to Connelly's professionalism, his concern for officer safety and his continued assistance to the Department even after his termination.

That Connelly was concerned about what he perceived to be inappropriate comments by Barton over a long period of time is not disputed. Connelly testified that he was aware of other deputies' concerns about comments made by Barton, specifically Deputy Franklin who objected to Barton's comments in reference to Connelly's daughter, and Deputy Flaherty who objected to Barton's comments about Deputy Flaherty's brother. However, Connelly's concern about Barton's comments is just as likely to support Connelly's testimony that he wanted to "talk it out" with Barton as it is to support the Respondent's position that Connelly was mad and intentionally struck Barton. In light of the Respondent's burden to prove the accuracy of the facts, the disparate testimony of witnesses and the questionable investigative process, the testimony of both parties' witnesses is inconclusive as to the *intentions* of Connelly when he approached Barton in the parking lot.

The Respondent also argues that Connelly's comment to the Internal Affairs investigator following the incident evidences his intent to strike and harm Barton. Connelly admitted making the comment "like the bitch that he is" in reference to Barton. However, as argued by the Appellant, he was frustrated because he had seen no improvement subsequent to reporting his concerns about Barton to Sergeant Brown. Again, Connelly's discontent with Barton was well known and the statement Connelly made is not sufficient in and of itself for a finding that Connelly's physical contact with Barton was intentional.

As the Respondent so aptly points out, frustration and disagreement with the behavior of another deputy does not justify physical violence in the workplace. However, in view of some of the questionable testimony by Barton, and Connelly's testimony as to his intent – to talk out his concerns with Barton -- the evidence falls short of the preponderance necessary to show that Connelly intended a physical altercation with Barton. Given that the Respondent has the burden of proving its claim, that burden has not been met as to intentionality on Connelly's part. It is just as probable, if not more likely, that Connelly's open handed contact with Barton's face was an inadvertent reaction to Barton's physical movements in quickly turning around, yelling his reply and brushing/pushing Connelly's hand from his (Barton's) arm. Accordingly, the charge that Connelly was angry, lost his temper, was out of control and intentionally struck Barton cannot be sustained.

The Respondent advances its progressive discipline argument to support the appropriateness of the type of discipline imposed on Connelly. What is also implied by the evidence of Connelly's prior discipline is that Connelly has a history of violent behavior. That implication as well as the severity of the discipline must be addressed.

Connelly testified about the circumstances that led to his 1996 three-day suspension that he did not appeal. In that case, he was assisting a reserve officer who found another robbery suspect in a vehicle after the vehicle had been called "clear". Connelly grabbed the suspect when Connelly observed that the officer who placed the suspect against the car then removed his hands from the suspect. That situation is clearly different from the present matter and did not involve physical contact with another deputy. No implication can be drawn from this isolated and dissimilar incident about any tendency towards violence on Connelly's part.

The second issue, the severity of the discipline, must also be considered in this case. As was pointed out, deputies are put in stressful situations daily calling for good judgment and composure. Connelly has had no discipline since the 1996 incident, for physical contact or any other infraction. In fact, Connelly has received four performance evaluations since that time that reflect an overall "exceeds standard" performance rating which also include high marks for judgment and stability.

Being unable to sustain the Respondent's charge that Connelly intentionally struck Barton, the one remaining issue that was charged against Connelly concerns the verbal exchange made over the radio between Barton and Connelly. Connelly admitted that he told Barton "if you'd get your head out of your ass, you'd know" in response to a similar statement made by Barton. Because the accuracy of whether or not Barton used the word "ass" first is not at issue here, the admission by Connelly of using that language over the radio sustains a charge of discourteous treatment of a fellow officer. However, again, the appropriateness of the penalty must be reviewed.

Although rebuttal witness Lieutenant Best testified that there were two other cases (1991 and 1993) where physical altercations resulted in termination, he also testified about two recent cases where physical contact was made and the principals were not terminated. It is clear from the record and this testimony that the Department does not have a "zero-tolerance" policy and, as Lieutenant Hart testified, each case is looked at separately, implying discretion on the part of management.

The Appellant's representative argued that the severity of this penalty, under the totality of the circumstances, "shocks the conscience" and "reaches too far". This hearing officer would agree. Connelly's recent performance evaluations are compelling as to the overreaching of this discipline. Although there is one area of concern relating to how effectively or not Connelly shares his vast knowledge and experience with others, this deficiency is noted only in the comments section on areas for development. Nowhere in the performance factors themselves is he ever marked below job standards or unsatisfactory. Rather, his many "exceeds job standards" ratings far exceed even the "meets standard" ratings and the comments on his exemplary performance track accordingly. In 1996, 97, and 98, Connelly rated 7 or 8 out of a possible 9 on judgment and stability (as well as others) with stability being defined as "Is emotionally well-balanced. Shows good self-control and poise and can be relied upon to perform under pressure." Consequently it appears that this April 19, 2000, incident was seized upon as a way to get rid of a loyal and dedicated employee who has high standards, productivity and performance and who also exhibits some impatience when trying to get others to meet the high standards he sets for

himself. That accuracy and sufficiency of the facts simply do not support the act of termination of employment.

Findings of Fact

As to the first charge, "discourteous treatment of the public or other employees", it is found that Deputy Connelly did treat Deputy Barton discourteously when he responded in kind to an offensive remark made by Deputy Barton over the radio.

Regarding the second charge, there was no evidence presented that Deputy Connelly neglected his duties on April 19, 2000, or at any other time.

The third and fourth causes cited by the Department are found duplicative of the first charge; more specifically, Departmental Rules and Regulations 1/215 (Misconduct) and 1/215.40 (Respect Among Members). As noted above, the preponderance of the evidence supports only a finding of discourteous treatment of a co-worker in violation of Department Rule 1/215.40. The evidence was insufficient to find that Connelly intentionally struck Deputy James Barton on April 19, 2000, or that his behavior under the circumstances was excessive, unwarranted, or unjustified or that it brought discredit to the Department. That he spoke disrespectfully to a fellow officer is the only charge that can be sustained.

Conclusion

It is the conclusion of this hearing officer that the termination of Deputy Connelly was unwarranted and not supported by either the accuracy or sufficiency of the evidence.

Recommendation

Based upon the above analysis, findings of fact and conclusion, it is recommended that the Appellant be reinstated to his former position with full back pay and benefits less the equivalent of a five-day suspension for his discourteous treatment of a fellow officer. Further, it is recommended that Appellant be required to complete an applied (includes practice) oral communications class or seminar that focuses on effectively delivering information and constructive criticism within six months following reinstatement.

Respectfully submitted,

Judy A. Gust
Hearing Officer
Ramona, California
November 26, 2001