

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

In the Matter of the Appeal of:	*	
	*	Findings of Fact
	*	
Raymond Macdow	*	Conclusions
	*	
to his	*	Recommendation
	*	
Order of Termination Effective	*	
February 15, 2001	*	
	*	

PRELIMINARY STATEMENT

The hearing in this matter was held on January 14, 15, 29, 30, February 1, March 21 and March 29, 2002 before Judy A. Gust, duly appointed Hearing Officer for the Civil Service Commission. The appellant was represented by Albert Herman from Lawman & Herman APC. The Sheriff's Department was represented by Roy M. Winters, Human Resources Officer, Personnel Services Division of the Sultan County Sheriff's Department.

A Motion to Dismiss the Appeal was filed on December 20, 2001, and an Opposition to the Motion to Dismiss was filed, along with a Motion to Compel Discovery, on December 30, 2001. A telephonic conference regarding the Motions was had with the Hearing Officer and the parties' representatives on January 3, 2002. At the conclusion of the conference, the Hearing Officer asked the parties to submit additional information in order that she might rule on the Motion to Dismiss. After receiving the additional materials, the Hearing Officer directed the parties' representatives, through the Civil Service Commission Secretary, to appear at the scheduled hearing date of January 14, 2002, to present oral arguments regarding the Motion. The parties appeared, argued their respective positions, and the Hearing Officer ultimately denied the Motion to Dismiss¹. The parties then began presentation of the case.

Both parties, through their respective representatives, were provided an opportunity to present evidence through exhibits and the sworn testimony of witnesses who were subject to cross-examination. A stenographic record of the hearing was made by a Certified Court Reporter but no written transcript was ordered at the time. An audio recording of the hearing was also made and made available to the Hearing Officer. The record of this hearing was closed on March 29, 2002, following oral closing arguments by the parties' representatives.

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¹ The arguments and Hearing Officer's decision on the Motion are discussed in more detail in the body of this report.

APPEARANCES AND WITNESSES

For the Respondent

Roy M. Winters. Spokesperson, HR Officer, Sheriff's Department
 Jeremy Hunter Captain, Northeast Department Representative
 Martha Primm. Mother of Juvenile Reese Vicent
 Carter Brint Witness to Incident
 Beth Hill. Witness to Incident
 Ric Velum. Witness to Incident
 Pam Ferris Witness to Incident
 Tom Alfors Lieutenant, Internal Affairs
 Bill Belvin Lieutenant, Internal Affairs
 Richard Rolo Grandfather of Reese Vincent
 Peter Primm. Stepfather of Reese Vincent
 Reese Vincent Alleged Victim
 Ren Rivera. Criminalist
 Seth Simkin. Detective
 Gary Cross Deputy Sheriff
 Jim Larson Witness to Incident
 Jim Larson , Sr. Witness to Incident
 Dave Winston California Highway Patrol Officer
 Ralph Belcher Captain, Personnel Services

For the Appellant

Albert Herman. Counsel, Lawman & Herman
 Hall Jackson. Deputy Sheriff
 Don Macdow Appellant's Son

Discussion of the Motion to Dismiss and the Ruling Denying the Motion

The County's Motion to Dismiss the Appeal of Mr. Macdow's termination was based upon two arguments. The first argument concerned the Hearing Officer's lack of a viable remedy. This argument was based upon Appellant's misdemeanor convictions of violations of Section 240 of the Penal Code (PC) and Section 23152(a) and (b) of the Vehicle Code (CVC). Those convictions resulted in a sentence that restricted Appellant's driving privileges and prohibited him from possessing a firearm for a period of ten years. The County argued that the ability to meet the POST standards for employment as a Peace Officer in the State of California, the ability to possess and carry a firearm, and the ability to operate a motor vehicle are all conditions of employment as a Peace Officer in the County. Appellant's conviction and sentence rendered him unable to meet those conditions and, thus, precluded the Hearing Officer from reinstating the Appellant.

The County's second argument was that Appellant's criminal convictions for assault (PC 240) and driving under the influence of alcohol (CVC 32452 [a] and [b]) should have a collateral

estoppel effect, in that they conclusively establish his culpability on two of the four administrative charges that formed the basis of Appellant's discharge from employment. The factual issues decided in the criminal case are the same as those that are at issue in this appeal. According to the County, the issues have been litigated in a forum where the Appellant had a full, fair and impartial hearing and where the burden of proof was substantially greater (beyond a reasonable doubt) than that which would be applied in this administrative hearing (preponderance of the evidence). It argues that there is no basis or justification to re-litigate the matter. In the instant matter, application of the collateral estoppel doctrine would foster judicial economy in that the number of witnesses needed to prove the facts in this case could be reduced by approximately fifteen, the number of hearing days reduced by three to four days and the cost to the County, its witnesses and the Appellant would be substantially reduced.

The Appellant's Opposition to the Motion to Dismiss argued that Appellant's conviction is on appeal and, accordingly, is not a final judgment. Therefore, Appellant argued that the California Code of Civil Procedure (Section 1049) and California case law does not support reliance on the collateral estoppel doctrine where "*an action is deemed to be pending from the time of its commencement until its final determination on appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied*".

Oral argument also addressed the issue regarding the Hearing Officer's authority to reinstate Mr. Macdow. According to Appellant, PC 12021 permits any person employed as a peace officer to petition the court for return of the ability to carry a firearm. The Appellant argued that the Hearing Officer's decision should be made without regard to the ability to reinstate and that if just cause is not found, the Hearing Officer should order reinstatement with back pay, at least for the period between the date of termination and the date of sentencing when he was precluded from possessing a gun. If the Appellant is unable at the time of reinstatement to meet the conditions of employment, the County could then recharge the Appellant with not being able to meet the conditions of employment, provide another Skelly hearing, and ultimately provide another administrative appeal hearing to preclude Appellant from reemployment. Thus, Appellant's counsel infers that due both to the pending appeal of Macdow's convictions and the opportunity to petition to carry a firearm, there is no finality to the issue of whether or not Appellant could be legally reinstated to his former position as a Deputy.

The County argued that if the Appellant was reinstated, recharging Mr. Macdow anew would likely result in a "double jeopardy" problem.

This Hearing Officer was not persuaded by the County's double jeopardy argument. The potential "recharge" would actually be a new charge of inability to meet the required conditions of employment or qualifications for the position even though the reason that the Appellant is unable to meet the conditions of employment were based upon the circumstances at issue in this case. The fact that he could not possess a firearm could form the basis of a new charge.

The County then argued that PC 12021 was amended in 1993 to include misdemeanor conviction of PC 240 as one of the offenses which makes custody or control of any firearm by such person a public offense. The provision for petition for relief from the prohibition of

carrying a firearm was not amended and is limited to only those who have convictions under PC 273.5, 273.6 or 646.9. Accordingly, the County argues that Macdow would not be eligible to petition for relief from this requirement. Therefore, he would still be unable to meet the requirements for a peace officer to carry a gun.

This Hearing Officer was not convinced that Appellant would be precluded from petitioning for relief from his sentence that restricted his ability to possess a firearm. Legislative action often fails to amend all relevant parts of a statute. It is possible that the Penal Code could be amended to permit those convicted of misdemeanor 240 PC violations to petition for relief. Accordingly, the Motion would not be granted on this basis. Based upon that statement, the County then moved for a continuance until the matter of Macdow's appeal and any potential petition for relief were finalized.

Appellant objected strongly to the request for a continuance indicating that the Appellant would be severely damaged in his ability to present an adequate defense due to the potential loss of witnesses and other evidence. Appellant further argued that the burden of Appellant's loss of income should outweigh any burden that the County might encounter from having to present its case.

The Appellant also argued that the issues being litigated in this appeal are not identical to the issues of the former proceeding, again a requirement of California law, such that the doctrine of collateral estoppel should be not be invoked. The specific charges by the Department of battery against Jim Larson and Reese Vincent on July 20, 2000, punching Reese Vincent and hitting Richard Rolo on July 27, 2000, being under the influence in a public place with a blood alcohol level of .27% on August 10, 2000, and lying to CHP Officer Winston on August 10, 2000, were not adjudicated in the verdicts in the criminal matter. Those verdicts found two violations of PC 240, Assault, and two violations of the Vehicle Code, one on 23152(a), Driving Under the Influence of Alcohol or Drugs and 23152(b), and one on Driving While Having a 0.08% or Higher Blood Alcohol level. Appellant argued that none of these violations identically matched the charges that formed the basis of the termination.

The County responded by amending its Motion to Dismiss to include dismissing only the two issues, 2.a) and 3., of the Order of Disciplinary Action that had been conclusively adjudicated in the criminal matter so that all issues would not have to be proven. It concluded by asking that a written decision be made with request to the Motion and renewed its Motion for a Continuance under Rule 10, Section 10 of the Personnel Rules that permits continuance for good cause. The County argued that the Hearing Officer's inability to fashion a viable remedy provides good cause to delay the hearing until the pending appeal of the criminal convictions and Mr. Macdow's petition to carry a firearm are finalized.

The Appellant again strongly objected to the County's amended Motion for the same reasons as argued earlier.

After reviewing all of the information submitted and considering the oral argument of the representatives, the Hearing Officer made the following findings:

1. This appeal is an administrative hearing arising under the Personnel Rules of the County of San Bernardino as promulgated by the Board of Supervisors and agreed to between the County of San Bernardino and the San Bernardino County Safety Employees Association as the method by which Disciplinary Appeals shall be heard. It is not found to be a civil action² subject to the Code of Civil Procedure. Although there are references in the Personnel Rules that identify how certain procedures may parallel civil actions, and one reference in the Memorandum of Understanding³ permitting judicial review of a final administrative decision arising from this appeal process, there is no evidence of the parties' intent to incorporate the Code of Civil Procedure as governing rules for these administrative hearings.

2. Administrative appeals are intended to be informal proceedings not subject to the same rules of evidence or other constraints of the legal system.

3. The four charges upon which the Appellant's termination were based were not identical to the charges in the criminal proceeding. The criminal charges did not address Appellant's conduct on July 20, 2000; the convictions were for assaultive conduct on July 27, 2000, which were not identical to the Department's charges of consumption of alcohol and battery conduct on that date; the convictions for driving while under the influence and driving with a .08% blood alcohol level differed from the Department's charge of being under the influence in a public place with a blood alcohol level of .27% during work hours; and there were no criminal charges for the Department's fourth charge that Appellant lied to a California Highway Patrol Officer. Accordingly, the Appellant did not have an opportunity to defend himself on at least three of the four termination charges.

4. When the respective burdens to the parties were weighed together, it was found that further delay of the appeal hearing would more greatly harm the Appellant.

5. There is a well-recognized and long-standing bias in favor of granting an employee the right to appeal such disciplinary matters.

6. This appeal hearing has been scheduled for some time, the parties are present and the witnesses are available.

7. Continuing the hearing at this point to some unknown future date would subject all parties to further costs for rescheduling.

8. Further delay would risk the unavailability of witnesses.

Therefore, this Hearing Officer denied the County's original and amended Motions to Dismiss and its Motion to Continue. Further, it was ordered that the appeal hearing would proceed upon the entire Order of Discipline.

² A civil action was found to be an action in a court of law.

³ Article V, Section 4 of the MOU permits judicial review of the final administrative decision pursuant to Section 1094.5 of the California Code of Civil Procedure.

Background Information and Statement of the Case

Mr. Macdow was a Deputy Sheriff working out of the Northeast Station in July of 2000 up until the effective date of his termination on February 15, 2001. He filed a timely appeal of his termination in accordance with Rule X, Section 8, of the County of Sultan Personnel Rules and denied all causes listed in the Order of Disciplinary Action dated February 14, 2001. (Jt. Ex. 2, 3)

The Northeast Station serves 500 square miles in the Tunesia area and has a population of approximately 45,000 permanent residents.

On July 20, 2000, while off duty, Macdow attended the wine and jazz festival, a public event in the community of Banton. At that time, Macdow and another off-duty officer, Dan Stimson, approached a group of juveniles that Stimson believed had just conducted a drug transaction. When Macdow and Stimson asked the juveniles to leave, they refused. One of the juveniles stated that he was working there. Macdow placed his hands on two of the juveniles⁴ shoulders as they walked toward the exit ramp and told them to leave. The County alleges that this touching was unwanted by the juveniles and amounted to battery.

A week later, on July 27, 2000, Macdow again attended the wine and jazz festival while he was off duty. While at the Discount drug store in a small shopping center below where the festival was taking place, Macdow encountered the juvenile Vincent and exchanged unfriendly words with him. Both Macdow and Vincent returned separately to the parking lot where the festival was taking place. The County alleges that in an unprovoked attack, Macdow physically grabbed and punched Vincent, who was one of the juveniles that he had grabbed by the shoulders the week before. This occurred in a public place and was witnessed by a number of people who knew Macdow and knew that he was a Deputy Sheriff in Sultan County. The County further alleges that shortly after this altercation, Macdow then pushed Vincent's grandfather⁵ in the chest with open hands when the grandfather inquired about what had happened.

Macdow was then placed on paid administrative leave while the Department conducted an investigation of these incidents. During the pendency of this investigation and during his on-duty hours, the County alleges that Macdow consumed a large quantity of alcohol that resulted in a residual .27% blood alcohol level when he was tested several hours after the end of his duty hours. The County alleges that Macdow then lied to the CHP officer, who was investigating the traffic accident on that date that involved Macdow's motorcycle, by denying that he had had anything to drink.

A Board of Chiefs hearing and a Skelly hearing were conducted concerning the charges levied against Mr. Macdow. Presumptively, because the termination was finalized, Mr. Macdow offered insufficient evidence that would mitigate or alter the Department's intention to terminate

⁴ One of the juveniles was later identified as Ronnie Vincent.

⁵ The grandfather was later identified as Richard Rolo.

his employment. Accordingly, Macdow's termination was effective on February 15, 2001, as indicated by the Order of Disciplinary Action that was served on him on February 14, 2001.

Order of Disciplinary Action/Relevant Rules and Regulations

The specific reasons cited by the County for the Order of Termination are as follows:

- 1- *On July 20, 2000, while off duty at a jazz festival in Banton, you consumed an amount of alcohol and later displayed unacceptable conduct as a Deputy Sheriff and committed acts amounting to battery, when you grabbed Jim Larson and juvenile Reese Vincent by the back of their necks. This is a violation of County Personnel Rule X, Sections 2(c) and 2(e); and Department Rules and Regulations 1/215 and 1/215.70; and is cause for discipline under said rules.*

- 2- *On July 27, 2000, while off duty at a jazz festival in Banton you consumed an amount of alcohol and later displayed unacceptable conduct as a Deputy Sheriff when you:*
 - a) *punched juvenile Reese Vincent in the face without provocation.*

 - b) *hit Richard Rolo in the chest with your two open hands knocking him backwards, again without provocation.*

This is a violation of County Personnel Rule X, Sections 2(c) and 2(e); and Department Rules and Regulations 1/215, 1/215.70, 1/250.10 and 1/215.10; and is cause for discipline under said rules.

- 3- *On August 10, 2000, while on administrative leave, during your scheduled work period, and without authorization you consumed alcohol and was (sic) later found to be under the influence in a public place with a blood alcohol level of .27%. This is a violation of County Personnel Rule X, Sections 2(c) and 2(e); and Department Rules and Regulations 1/215, 1/215.10, 1/215.70 and 1/245; and is Cause for discipline under said rules.*

- 4- *On August 10, 2000, you compounded matters when you lied to California Highway Patrol Officer Winston, telling him you had not been drinking alcohol. You later admitted to Sergeant Alfors during an administrative interview on October 6, 2000, you had been drinking alcohol. This is a violation of County Personnel Rule X, Sections 2(c) and 2(e); and Department Rules and Regulations 1/215, 1/215/10, 1/215.30 and 1/215.70; and is cause for discipline under said rules.*

The Department Rules and Regulations cited above as being violated by Mr. Macdow include:

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.

1/215.10 STATUTORY OBLIGATIONS. Members, while on or off duty, shall respect and obey all federal, state, and local laws and ordinances at the provisions of the Department Manual.

1/215.30 TRUTHFULNESS. No member shall willfully depart from the truth, orally or in writing, either in giving testimony in a court of law or in his other official duties.

1/215.70 CONDUCT REFLECTING ADVERSELY ON THE DEPARTMENT OR EMPLOYEE. Members shall not conduct themselves, whether on or off duty, in a manner that might be construed by an observer as indecent, lewd, or disorderly, or which is of such a nature that it causes discredit to the Department or to the employee. They shall not be guilty of misconduct, neglect of duty, or acts tending to discredit the Department or themselves even though such conduct is not specifically set forth in this manual.

1/245 USE OF INTOXICANTS. There is an immediate lowering of esteem and suspicion of ineffectiveness when there is public contact by a Department employee evidencing the use of intoxicants. Additionally, the stress of law enforcement requires an employee to be mentally alert and physically responsive.

No Department employee off duty in any part of uniform dress shall drink any alcoholic beverage in public view or in a place accessible to the public. No employee while on duty shall consume any alcoholic beverage except when authorized in the performance of an official assignment, and only to the degree that shall not impair his on duty performance.

Employees shall not take any narcotics or controlled substances unless prescribed by a person licensed to practice medicine (refer to section 1/215.65).

No member, while off duty, shall consume alcoholic beverages to an extent which results in the commission of an obnoxious or offensive act which might tend to

discredit the Department. Whether on or off duty, no member is to engage in any law enforcement activity when impaired by or under the influence of any alcoholic, narcotic, or other controlled substance, except as authorized in the performance of an official assignment.

The odor of liquor on the breath of a member on duty, or any statutory defined illegal use of controlled substances by an employee on or off duty shall not be tolerated, and shall be cause for disciplinary action. Employees determined to be under the influence of alcohol or controlled substances may be subject to criminal prosecution and disciplinary action, including dismissal.

1/250.10 PUBLIC DEMEANOR. Members shall at all times be attentive to their duties and by their alertness and observation demonstrates (sic) their interest in their work. They shall act with dignity, and maintain a professional bearing. They shall not, while on duty, read newspapers, periodicals, or similar material in public view, except in the line of duty. They shall not show a lazy disposition, or lounge about or sleep while on duty, or place their feet on desks or other furniture in any Sheriff's Department's offices open to public view.

Respondent's Position

The Respondent argues that the preponderance of the evidence shows the accuracy and sufficiency of the facts that support the termination of the Appellant for the reasons outlined in the County's Personnel Rules and Department Rules and Regulations as described in the Department's Order of Disciplinary Action.

Regarding the incident on July 20, 2000, testimony from Reese Vincent and Jim Larson indicated that Macdow, while off duty, asked the juveniles to leave the jazz festival and placed his hands on their shoulders while trying to escort them off the property. Their testimony was supported by that of Larson's father who testified that his son called him from the festival and told him what happened. The County points to the investigative report of Macdow's interview where he admitted that he put his hands on the juveniles' shoulders and told them to leave. (Co. Ex. 3, pp.; 137)

On July 27, 2000, Macdow initiated a verbal altercation with Reese Vincent at the Discount drugstore. But for Macdow's action, there would not have been a confrontation between him and Reese Vincent. The witnesses' attention to the physical confrontation between Macdow and Vincent resulted from Macdow's "pushing through the crowd" towards Vincent. Several witnesses testified that Macdow punched Vincent without provocation. Further, the County argued that Macdow's own son disputed Macdow's version that Vincent was approaching him (Macdow) with clenched fists. The material testimony of the witnesses was consistent that after the physical confrontation with Vincent, Macdow then pushed Vincent's grandfather, Richard Rolo.

The third charge arose from the Department's belief that Macdow consumed alcohol while he was on duty on paid administrative leave. The County argues that Deputy Simpkin found Macdow in an intoxicated state before 5:00 p.m. on August 10, 2000. Although Macdow's blood alcohol test was not conducted until approximately 8:00 p.m. on that date, the resulting .27% level of alcohol in his system supports the Department's position that he was drinking during duty hours. From the time that Macdow was located at approximately 4:50 p.m. until the 8:00 p.m. test, he was accompanied by officers and had no opportunity to consume alcohol during that time.

As to the allegation that Macdow lied to Officer Winston about drinking, the County refutes the Appellant's position that he did not lie because Winston did not ask about alcohol specifically but only asked if he had had anything to drink. The County argues that this position is absurd. However, if that argument is accepted by the Hearing Officer, the County also argues that Macdow still was untruthful because Macdow denied drinking *anything* when he was asked whether or not he had anything to drink. It further points out that the lie was a material one as Macdow stood to benefit personally from it. Had Officer Winston taken Macdow's response to be truthful, Macdow would then have avoided any further investigation of or consequence for the incident.

The County argues that the standards for police officers are necessarily higher because of the position of trust that they hold. Further, these off-duty and on-duty incidents occurred within the small mountain community in which Macdow worked. The nexus between one's job and one's private life, so critical to a finding of cause for disciplining off-duty conduct, was present. There was evidence that several members of the community witnessed or directly heard about the incident on July 27, 2000, and that it caused an adverse public reaction. A local newspaper article appeared shortly thereafter which was critical of Macdow's behavior. Finally, the County argued that the testimony of witnesses showed that the County was civilly sued as a result of Macdow's conduct and a substantial settlement was paid to victim Vincent and related others.

As to the issue of penalty, the County argues that Macdow's discharge was consistent with the Department's guidelines for multiple offenses. It is also consistent with the only other recent instance of multiple acts of misconduct that included assault and that also disqualified the deputy pursuant to PC 12021. All of the violations committed by Macdow were non-progressive in nature and certain of the offenses are sufficient in and of themselves to support the penalty of discharge. Any act, on or off duty, which rises to the level of criminal conduct, is inconsistent with and contrary to the duties of a law enforcement officer whose duty is to enforce the law.

The County respectfully requests that this appeal be denied.

Appellant's Position

The Appellant argues that the Department failed to prove any of the charges. According to the Appellant, there is no factual evidence to support the charges, only supposition. He encourages the Hearing Officer to "bridge the analytical gap" and rely only on evidence that the appointing authority had at the time the decision to terminate was made.

Appellant asserts that the investigation was not thorough or complete. Captain Herman failed to compare the witness statements between their criminal and administrative interviews for consistency. Although Appellant concedes that an altercation with juvenile Vincent took place on July 27, 2000, he objects to the disappearance of evidence⁶ and argues that the investigation and resulting decision must therefore fail.

Appellant also argued that there was disparate treatment. He points to Captain Herman's testimony wherein he stated that there may have been others who were found drinking on duty and who were not discharged. Another example of disparate treatment was the fact that the Department did not conduct an investigation into Stimson's behavior on July 20, 2000,⁷ or investigate citizen complaints lodged against Jackson and Smith regarding the July 27, 2000, incident. Further, the July 20th incident was not reported until after the July 27th incident which infers that the incident was either insignificant or was contrived between the various witnesses who had opportunities to and did discuss the events of July 27th before making their statements to the investigators. Finally, the Appellant suggests that discrimination was a possible motive for this alleged disparate treatment -- "throwing a Latin employee to the wolves".

Another argument advanced by the Appellant is that he was not acting as a deputy within the course and scope of his employment on July 20th and July 27th but rather was acting as a parent. In order for charges one and two⁸ to be upheld, Appellant's acts must amount to a criminal showing of battery. With specific regard to the July 27, 2000, incident, Appellant argues that he was acting in self-defense because Vincent was attacking him.

As to the third charge, Appellant argues that there is no factual evidence of a .27% blood alcohol level in a public place while he was on duty. The reported times of the various actions on August 10, 2000, were only approximations and the time of the blood test, approximately 8:00 p.m., was well after his duty hours. Additionally, Appellant refutes the charge that his alcohol consumption on August 10 occurred in a public place. He was at the Northeast Station at approximately 8:00 p.m. when the blood alcohol test was taken that subsequently revealed a .27% concentration of alcohol in his system at the time of the test. The briefing room of the Northeast is not a public place.

With regard to the fourth charge of lying to CHP Officer Winston, Appellant argues that the charge must fail because Officer Winston failed to specifically ask him whether he had been drinking *alcohol*. He alleges that this charge is based only on supposition and conjecture and that the appointing authority did not have evidence of this infraction at the time the decision to terminate was made.

Finally, the Appellant takes issue with the credibility of the witnesses by alleging that the victim's mother, Martha Primm, was not truthful about the degree to which she had been

⁶ The original photos of Vincent's injuries were not available. The photocopies of the photos that were included in the Skelly package were illegible. (Co. Ex. 3, pps. 164-168, pp. 200)

⁷ Interviews about the July 20, 2000 incident alleged that Stimson also put his hands on two other minors in the group.

⁸ Charge one relates to the July 20, 2000, incident and charge two to the July 27, 2000, incident.

drinking on July 27th. Because Primm had gotten an attorney and pushed the July 27th incident, Vincent then had a motive to lie about what occurred on July 27th, presumptively to comply with his mother's wishes. Appellant also challenges the credibility of Brint by alleging that his testimony at hearing differed significantly from his statement during the administrative interview. Specifically, Appellant stated that Brint said Macdow punched Vincent ten times when interviewed in August 2000. At hearing, Brint testified that Macdow punched Vincent "left, right, left". The final witness challenged was Jim Larson whose "arrival in shackles defy (sic) logic". Additionally, the Larson family had had several adverse contacts with law enforcement in the past that would provide a motive for Larson to lie.

There is no one charge that can sustain a termination and there are no facts to support any of the charges. The Appellant's position is that there is no cause for his termination.

Analysis of the Evidence and Arguments

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. As argued by Appellant's counsel, this Hearing Officer's conclusion and recommendation must be based upon the evidence presented at the hearing. Accordingly, an analysis of the evidence and arguments follows.

Charge one alleges that Officer Macdow, while off duty at a jazz festival, consumed an amount of alcohol and later committed acts amounting to battery by grabbing Jim Larson and juvenile Reese Vincent by the back of their necks. Testimony from three witnesses, Reese Vincent, Carter Brint, and Jim Larson, support this charge. In comparing the statements given by Vincent and Brint in their respective administrative and criminal investigation interviews, in addition to their testimony in hearing, it is found that the information with regard to the material facts is consistent. (Co. Ex. 3, pps. 24-27; 169-170; 91-95; 171) Larson's testimony at hearing was also consistent with the information he gave in his administrative interview with Sgt. Alfors. (Co. Ex. 3, pps. 39-41)

Appellant's argument that this July 20th incident was not complained of or reported prior to the July 27th incident, and his inference that somehow this incident was contrived, is unpersuasive. Although Mr. Macdow did not testify, his statement to Sgt. Alfors in his administrative interview confirmed that he placed his hands on the shoulders of the juveniles and told Larson, "You don't work here. It's better you guys just leave." In that interview, Macdow also admitted that he had been drinking beer at the festival and "wasn't feeling any pain." (Co. Ex. 3, pps. 136-138) Macdow's statement also indicated that he trusted Stimson's conclusion that a drug transaction just occurred even though he did not witness it. Captain Herman testified that if an officer observes what he believes to be illegal activity while off duty, that officer has an obligation to decide upon his degree of involvement. He can either call in a report to have

officers respond and then be a good witness or, if he feels it is serious and he must take action, the officer has complete discretion about whether to intervene⁹.

In this case, Macdow's statement indicated that he did not personally observe the alleged drug deal. Rather, he relied on the statement of another off duty reserve officer (Stimson) and chose not to call on duty officers to respond. He and Stimson apparently used their discretion to eject the juveniles from the festival by placing their hands on the juveniles and attempting to escort them out. Irrespective of Macdow's motives, he did not take any official action as an officer but rather, according to the witnesses' testimony, disavowed himself of his official capacity as a police officer by stating to the juveniles something to the effect of: "I'm off-duty and I will fuck you up." When this incident is considered in light of the evidence of Mr. Macdow's precipitating behavior in the later, July 27th incident, it is more likely than not that Mr. Macdow did exhibit animus against these juveniles and Mr. Larson whom he (Macdow) suspected of being drug user if not drug dealer. However, as Appellant's counsel so clearly argued, supposition and "surmise" (sic) is not evidence. Hence, Macdow's presumption of illegal activity by these persons cannot justify his unwarranted touching or conduct that borders on harassment of them.

Appellant also argues that Macdow was the subject of disparate treatment because an investigation was not conducted into Stimson's conduct during the July 20, 2000, incident. Captain Herman testified that this incident was not the incident precipitating the investigation of Macdow. Rather, in investigating the July 27th incident, the earlier confrontation between Vincent and Macdow was disclosed. There was no citizen complaint made of the July 20th incident that would have necessitated an investigation of Stimson. Had the July 20th incident been the only infraction lodged against Macdow, it is doubtful that any serious discipline would have been imposed on Macdow. In order to find disparate treatment, one must find that the parties treated differently were similarly situated. In this case, Stimson was implicated in the July 20th incident and interviewed as part of the Macdow investigation. He denied that either he or Macdow had touched any of the juveniles. (Co. Ex. 3, pp. 55-56) Stimson was not a principal in the July 27th incident in a manner that would prompt an investigation such as Macdow's.

The second charge, that Macdow punched juvenile Reese Vincent in the face without provocation and hit Richard Rolo in the chest with two open hands, again without provocation, while off duty on July 27, 2000, at a jazz festival and after consuming an amount of alcohol, was testified to by several witnesses. Beth Hill, Pam Ferris, Ric Velum and Carter Brint all clearly testified that Macdow pushed through the crowd and attacked Vincent without provocation. Although Appellant argues that Brint changed his story from ten punches to three punches between his the statement given in his administrative interview and his testimony in this hearing, that was not found to be the case. When reviewing Brint's administrative interview, it states that Macdow "swing more than ten times and punched Ronnie three times in the face." (Co. Ex. pp. 93) Other witnesses also testified that Macdow continued to struggle and go after Vincent after the initial punches were thrown consistent with statements in their interviews. (Co. Ex. pp. 77, 86)

⁹ The implication in Captain Herman's testimony is that the off duty officer would then intervene in an official capacity consistent with the seriousness of the observed conduct.

Appellant also argues that each witness did not report all of the same attendant activity such as a woman with a baby being pushed by Macdow. It is not unusual to have minor variances in eye-witness reports. The altercation between Macdow and Vincent was the focal point and on that issue the witness reports were quite consistent. Additionally, the diagrams of where the incident took place was consistent between these witnesses. (Ap. Ex. F, G, H) These three witnesses, as well as Martha Primm, Peter Primm, Ronnie Vincent, and Richard Rolo also testified that Macdow pushed Martha Primm's hand away and pushed Richard Rolo in the chest. The consistency on material facts between these several witnesses' accounts of what happened is sufficiently convincing that Macdow was the aggressor.

Again, Macdow's own statements in his administrative interviews confirmed that he struck Vincent and that he was drinking both before coming to the jazz festival and while at the jazz festival. His statement to Sgt. Alfors concerning the consumption of alcohol was quoted as: "I would say I was too intoxicated to drive. It doesn't take very much. I was probably over the limit, but I was not close to being so intoxicated I couldn't take care of myself. I wasn't in the bag." (Co. Ex. 3, pps. 143) Macdow's explanation of the physical altercation with Vincent suggested that he was defending himself because when he looked up and saw Vincent, Vincent was looking at him and his hands went up. However, testimony from Macdow's son, Don, indicated that he did not see Reese Vincent come at his dad. Rather, Don Macdow testified that he grabbed ahold of his father because he saw a "not normal look on his face." In his criminal investigative interview, Don Macdow stated that it was obvious that his dad was angry and he knew his dad was going after Reese because there was nobody else in the area. Don wasn't sure whether his father was falling or whether he was lunging at Reese. At that point was when Don stated that he intervened and wrapped his arms around his father. (Co. Ex. pp. 189) Although Don's administrative interview and his testimony indicated that he did not see his father strike Reese Vincent, Don's statement supported the testimony of other witnesses that testified that Macdow was still struggling to try to get at Reese Vincent after the first physical encounter. (Co. Ex. 3, pp. 86) It was at this time that Macdow inadvertently hit his own son, Don Macdow, resulting in a bloody nose.

Appellant's counsel conceded that a physical altercation took place but, because the photos of Vincent's injuries were not available, argues that this charge must fail. In light of the other overwhelming evidence, one cannot reasonably find that Macdow's physical attack on Vincent was made in self defense. Further, the absence of proof of the extent of injuries to Vincent is not at issue such that the availability of the original injury photos¹⁰ would defeat this charge.

Appellant also argued that Jackson's testimony refuted that of Martha Primm who denied that she was intoxicated. Accordingly, Appellant argues that her testimony should be discounted as not credible. As one can tell from the above discussion, Ms. Primm's testimony was not relied upon as to the facts involving the altercation between Macdow and Reese Vincent. She was not even present at the time of the altercation between Macdow and her son. Further, as to the

¹⁰ Captain Herman and Sgt. Alfors testified that they believed the original injury photos of Vincent had been sent to the District Attorney's office for the criminal trial. They confirmed that the illegible photocopies were in the Skelly package.

charge that Macdow placed two open hands on Richard Rolo, Ms. Primm was only one of several witnesses to the contact between Macdow and Richard Rolo. Additionally, Macdow's own statement in his administrative interview supports a finding that he did make physical contact with Rolo. Again, Macdow argues that his action was in self-defense because Primm and Rolo were invading his personal space safety zone. (Co. Ex. 3, pp. 140) In consideration of all of the other testimony, Appellant's argument is unpersuasive.

The Appellant also argued that his behavior on July 20th and July 27th was that of a parent. He was not acting as a deputy within the course and scope of his employment. While the motivation for his conduct may have been parental, the fact remains that he is a sworn deputy, in a small community, and is held to a standard of conduct that is fully explained in the Department Rules and Regulations that he is charged with violating. Appellant's counsel suggested, by his line of questioning of Captain Herman, that Appellant had requested a transfer because of difficulty he was having living and working in the same small community. Although Captain Herman did not recall such a request in the few months that he had supervised Macdow and no evidence of a transfer request was ever introduced, this inference itself suggests that Macdow was concerned about his job in relation to the community. If true, arguably Macdow should have been even more cautious about and mindful of his behavior in the community in which he lived and worked.

There is no doubt that the family of Reese Vincent and other witnesses to the July 27, 2000, physical altercation between Macdow and Vincent were loud, perhaps abusive, demanding and upset. Based upon the entire record as contained in County Exhibit 3, and the testimony of Officer Jackson that Martha Primm was very confrontational to the point where he was concerned about a possible riot if he arrested her, it is obvious that the situation was a very delicate and public incident. However, there was concern about how the incident was being handled from more than Vincent's family. Hill, Ferris and Velum indicated in their testimony their concern about and impression that Officer Macdow was going to be protected by the other officers even though he was the aggressor and struck Vincent without provocation. It is quite likely that Vincent's family was swearing and making demands. However, all of this commotion and upset occurred after Macdow initiated contact with Vincent at the drugstore and again initiated physical contact with Vincent back at the jazz festival. Rude and even challenging behavior by Vincent's family, under these circumstances, cannot excuse Macdow's culpability in provoking and participating in the incident or in consuming alcohol on July 27, 2000, both before and during the festival.

Appellant again raises the argument of disparate treatment by alleging that the Department had an obligation under 832.5 PC to conduct an investigation into the citizen complaints made by Martha and Peter Primm and Richard Rolo against Officers Stimson, Jackson and Smith for their conduct on July 27, 2000. Captain Herman testified that he was aware that the Primm's were calling for a citizen's arrest and alcohol testing of Macdow on July 27th and were angry with the other officers for not complying. He further testified that the day after the incident the victim Vincent, his family and others visited his office demanding that something be done. Herman explained the officers' behavior on the prior evening and informed them of the administrative and criminal investigations that were underway. He also testified that he explained the citizen complaint process and how to initiate a complaint if they were not

satisfied with the results of the investigation. Herman indicated that the family was appeased with that and made no further complaint that would require an investigation of Stimson, Jackson and Smith. Because the nature of the concerns raised with Stimson, Jackson and Smith differed significantly from the behavior of Macdow, the two situations are again not similar. Therefore, no finding of disparate treatment can be made.

The last argument raised about disparate treatment suggests that the Department was discriminating against Macdow because of his "Latin" heritage. This inference hardly merits a response. However, because of Appellant's counsel's extraordinary concern throughout the hearing to get statements on the record, it appears that the Appellant is most likely to appeal an adverse ruling as permitted in the Memorandum of Understanding. Accordingly, the inference of discrimination will be addressed. Both Capt. Herman and Sgt. Alfors testified that they were not aware that Macdow was Hispanic or of Latin heritage. Beyond those few questions of Department witnesses and the allegation in Appellant's closing argument ("throwing a Latin employee to the wolves"), there was absolutely no evidence that the Appellant was of Hispanic or Latin heritage, no evidence that the Department knew of Macdow's heritage or that it in any way ever discriminated against him.

The issue of nexus between Macdow's off duty conduct on at least July 27, 2000, and the detrimental effects upon the reputation of the Department as well as the resources expended by the County in this matter has been clearly established. The incident occurred at a public event, was witnessed by several community members and, according to Officer Stimson, "crowd control was becoming a problem". (Co. Ex. 3, pp. 194) The incident was also reported in a local newspaper (Co. Ex. 4) and resulted in a civil lawsuit against the County that was ultimately settled for a significant, although undisclosed, amount of money. Although Appellant's counsel discounted the newspaper article because it was prompted by Vincent's mother, that fact does not neutralize the negative ramifications to the Department and the County of Macdow's conduct. One can hardly imagine a clearer nexus between Macdow's off duty conduct and his responsibilities to conduct himself in a manner that would not bring discredit on the department.

The third charge alleges that Macdow, while on administrative leave and during his scheduled work period, consumed alcohol and was later found to be under the influence in a public place with a blood alcohol level of .27%. Appellant's counsel argued vociferously about this charge and stated absolutely that it must fail. Counsel's basis for this conclusion was that none of the County's witnesses could testify that at the time Macdow was located, at the side of the road following his accident with his motorcycle, that his blood alcohol level was .27%. While this is technically correct, the ability to make a reasoned determination from other circumstantial and documentary evidence is a legitimate basis on which to make a decision. Although the times of the encounters were approximate as to how much before 5:00 p.m.¹¹ the accident and locating of Macdow occurred, there is no doubt that he was located before 5:00 p.m. There was no claim or any evidence that he was located after 5:00 p.m. There also is no doubt that locating Macdow sitting on the side of the road not far from his home was a public place. The argument arises from the timing of the drug test that was given at approximately 8:00 p.m. on the evening of August 10, 2000. It is more likely than not that at, or shortly before 5:00 p.m., Macdow's blood

¹¹ Macdow would have been "off duty" in his administrative leave assignment at 5:00 p.m. (Co. Ex. 5)

alcohol content was even greater than .27%, having time between then and his 8:00 p.m. test for the alcohol to metabolize. Macdow was in the custody of officers from the time that he was found alongside the road until his alcohol test around 8:00 p.m.. He had no opportunity to consume any more alcohol during that period of time. Common sense would suggest that the substance of the County's charge has been proven. Macdow did consume alcohol while on duty and was under the influence in a public place (alongside the road). Later that same evening, the level of Macdow's intoxication was determined to be .27%. Logic dictates that if his level of intoxication was .27% at 8:00 p.m. and he had no opportunity to consume alcohol between 5:00 and 8:00 p.m., his level of intoxication while on duty and in a public place had to have been at least .27%.

Further, although Macdow's conviction of Driving Under the Influence of Alcohol or Drugs occurred after the decision to terminate his employment was made, other reasonable persons (jurors) found "beyond a reasonable doubt" that Macdow was driving his motorcycle while under the influence. That driving is clearly shown to have occurred while he was on duty. While after-acquired evidence is questionable, in this case it only supports the logical conclusion otherwise made by this Hearing Officer.

The final charge is based upon the County's allegation that Macdow lied to CHP Officer Winston by telling him that he had not been drinking alcohol and later admitting that he had been drinking when interviewed by Sgt. Alfors on October 6, 2000. CHP Officer Winston testified that he arrived at the accident scene at 17:04 and began his investigation of the accident involving Macdow's motorcycle. He later left the scene and went to the Northeast Station where he interviewed Macdow. He observed that Macdow's eyes were bloodshot, glassy, that he smelled of alcohol and that his speech was slurred. He testified that he asked Macdow if he had been drinking to which Macdow answered "no, not at all". (Co. Ex. 3, pp. 209) On cross-examination Winston admitted that he did not specifically ask Macdow if he had been drinking alcohol. Based upon that admission, Appellant's counsel argued that one could not find that Macdow lied because the proper question – have you been drinking alcohol -- had not been asked. Unfortunately it appears that Macdow understood the question because he later admitted to Sgt. Alfors in his October 6, 2000, interview that he (Macdow) told Officer Winston that he had not been drinking even though he had. (Co. Ex. 3, pp. 148) To now claim that he did not know that Officer Winston was inquiring about his drinking of alcohol is outrageous. Even if one were to rely on Appellant counsel's assertion, Macdow still was not truthful to the question of "have you been drinking" in that Macdow answered "no" when he later admits that he was drinking vodka.

Appellant also argued that the Department did not have knowledge of this at the time the decision to terminate was made. There was no evidence to support this claim. Officer Winston's report that included the question to Macdow: "Have you had anything to drink?" and Macdow's answer: "No, not at all." was part of the Skelly package (Co. Ex. 3, pp. 209). Several witnesses testified that the Skelly package was the evidence considered by the Board of Chiefs in making the decision to terminate Mr. Macdow. There is simply no basis for concluding that the Department did not have knowledge of Macdow's lie and the drug test results showing a .27% alcohol level at the time of Macdow's termination. (Co. Ex. pp. 215)

In summary, there is ample evidence that is convincingly clear and that supports all four of the County's charges that form the basis of the termination. There was no evidence introduced to mitigate against the severity of the discipline which the Department and its witnesses testified was based upon the totality of the circumstances. Mr. Macdow's conduct was inappropriate on each of the occasions at issue and was clearly outside the standards expected of a sworn officer.

Findings of Fact

Based upon a preponderance of the evidence, the Department proved that:

1. On July 20, 2000, while off duty at a jazz festival in Banton, Deputy Macdow consumed an amount of alcohol and later displayed unacceptable conduct as a Deputy Sheriff and committed acts amounting to battery, when he grabbed Jim Larson and juvenile Reese Vincent, by the back of their necks in violation of County Personnel Rule X, Sections 2(c) and 2(e); and Department Rules and Regulations 1/215 and 1/215.70;

2. On July 27, 2000, while off duty at a jazz festival in Banton, Deputy Macdow consumed an amount of alcohol and later displayed unacceptable conduct as a Deputy Sheriff when he a) punched juvenile Reese Vincent in the face without provocation and b) hit Richard Rolo in the chest with two open hands, again without provocation in violation of County Personnel Rule X, Sections 2(c) and 2(e); and Department Rules and Regulations 1/215, 1/215.70 and 1/215.10;

3. On August 20, 2000, while on administrative leave, during his scheduled work period, and without authorization, Deputy Macdow consumed alcohol and was later found to be under the influence in a public place with a blood alcohol level of at least .27% in violation of County Personnel Rule X, Sections 2(c) and 2(e), and Department Rules and Regulations 1/215, 1/215.10, 1/215.70 and 1/245; and

4. On August 10, 2000, Macdow lied to CHP Officer Winston by telling Winston that he had not been drinking alcohol in violation of County Personnel Rule X, Sections 2(c) and 2(e), and Department Rules and Regulations 1/215, 1/215.10, 1/215.30 and 1/215.70.

Conclusion

It is the conclusion of this Hearing Officer that the County had just cause to terminate Mr. Macdow's employment in accordance with the County of Sultan Personnel Rule X, Section 2(c) and 2(e) and the Memorandum of Understanding between the County of Sultan and the Sultan County Employees Association, Article III (e).

Recommendation

Based upon the above analysis, findings of fact and conclusion, and the absence of any mitigating factors, it is recommended that the termination of Appellant be upheld.

Respectfully submitted,

Judy A. Gust
Hearing Officer
Ramona, California
April 25, 2001