

**FEDERAL MEDIATION AND CONCILIATION SERVICE**

In the Matter of the Arbitration Between

COASTAL FLORIDA POLICE  
BENEVOLENT ASSOCIATION

Robert Finn  
Grievant,

vs.

FLAGLER COUNTY SHERIFFS OFFICE

Employer.

OPINION AND

AWARD

FMCS File No.180622-05840

APPEARANCES: For the Association

Greg Forhan, Esq.  
General Counsel  
Coastal Florida PBA  
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For the County Sheriffs Office

Marc A. Sugerman, Esq.  
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BEFORE: Peter A. Prosper  
Arbitrator

In accordance with Article 15 of the Collective Bargaining Agreement between Flagler County Sheriffs Office and Coastal Florida Police Benevolent Association [Joint Exhibit No.1] the undersigned was selected as Arbitrator to hear and decide the grievance submitted by the parties to arbitration. Hearings were held at Flagler County Court House, Bunnell, Florida, on March 20, 2019, at which all parties were given full opportunity to submit data, memoranda and other documentary evidence, provide oral arguments and testimony, examine and cross-examine witnesses, and otherwise support their respective positions. The hearing was stenographically recorded and a transcript was made and sent to all parties. The parties requested submission of post-hearing briefs, which was granted. The post-hearing briefs were mutually exchanged electronically and provided to the Arbitrator in a timely manner, whereupon the hearing was declared closed. This Opinion and its accompanying Award are based on the record as thus constituted.

### **ISSUE**

Did the Flagler County Sheriff's Office have just cause to terminate Robert Finn?

If not, what shall be the remedy?

## **BACKGROUND**

On April 16, 2018, Deputy Robert Finn was on duty. The Dispatcher contacted Finn, sending him as a backup to a medical call at Carlson Lane in Palm Coast. He entered Interstate 95 expressway heading southbound at about 2:09 a.m. responding with lights and sirens activated and exited the highway at Palm Coast Parkway. As he was exiting the highway with his lights and sirens still activated, he encountered a vehicle driving the wrong way right down the pavement on the exit ramp and had to swerve onto the shoulder to avoid a head on collision. He continued to the address of the medical situation and found that the medical situation was resolved, and about the same time, at 2:13 a.m. a call came in from dispatch that there was a two-car collision on I-95 South just north of the Palm Coast Parkway exit. Finn responded to the crash on I-95 and arrived at 2:20 a.m. Finn assisted with activities at the crash scene and eventually spoke with Commander Fink at the scene that he passed the suspect vehicle driving the wrong way on the exit ramp. Commander Fink told Deputy Finn to share that information with FHP, who was investigating the crash, because he was now considered a "wheel witness" and to prepare an incident report because they needed to document his involvement for the criminal investigation.

In a memorandum [Employer Exhibit No. 9] Undersheriff Jack Bisland reassigned Finn to the Communications Unit. On May 29, 2018, by memorandum

[Employer Exhibit No. 10] Commander Chris Sepe notified Finn that an Internal Investigation was begun to examine an allegation of unsatisfactory or incompetent performance by Finn. The Report [Employer Exhibit No. 12] was completed and presented to Undersheriff Bisland on July 9, 2018 [Employer Exhibit No. 13.] A Notice of Intent to Discipline [Employer Exhibit No. 14] was presented to Finn, and recommended disciplinary action of termination.

Deputy Sheriff Robert Finn contacted his representative Greg Forhan, Esq., General Counsel, Coastal Florida Police Benevolent Association, after which a grievance was filed on July 24, 2018 [Employer Exhibit No. 17] protesting the termination of Deputy Sheriff Robert Finn. The issue was unresolved at Steps 2 and 3 of the Grievance Procedure, and the issue was submitted to the Federal Mediation and Conciliation Service for processing. The undersigned was appointed Arbitrator, and the issue is now properly before me for evaluation and binding decision.

## **RELEVANT CONTRACT PROVISIONS**

### **ARTICLE 5 DISCIPLINARY ACTION**

#### **Section 1**

No employee of the Sheriff's Office as defined in Article 1, Section 2(A) shall be removed, dismissed, discharged, demoted, suspended, or reprimanded except for just cause.

### **ARTICLE 15 GRIEVANCE AND ARBITRATION PROCEDURES**

#### **Section 4**

The parties agree that disciplinary grievances arising under this Collective Bargaining Agreement shall be heard by an arbitrator within forty-five (45) days of the Coastal Florida Police Benevolent Association initiating the arbitration process.

The parties shall request the Federal Mediation and Conciliation Service to provide a panel of seven (7) arbitrators. Within five (5) days of receiving the new panel, the selection process shall begin. The Union shall have the right to strike the first name; the Employer shall then strike one name. The process shall be repeated and the remaining person shall be the new permanent Arbitrator. Both parties shall make a reasonable attempt to commence arbitration within forty-five (45) days of the selection of the Arbitrator.

The Arbitrator hereunder shall be without power to alter, amend, add to, or detract from the language of the Agreement. The decision of the Arbitrator shall be final and binding upon the parties. The Arbitrator shall submit in writing his findings of fact and decision after the conclusion of testimony and argument.

The expense of the Arbitrator's services and the proceedings shall be borne by the losing party or by both parties (50/50) in the event of a compromise solution as determined by the Arbitrator. If either party desires a verbatim record of the proceedings, it may cause such a record to be made, providing it pays for the record and provides a copy without charge to the Arbitrator, if requested. If both parties request or obtain a copy of the transcript, the parties will split the cost of the transcript.

### **POSITION OF THE FLAGLER COUNTY SHERIFF'S OFFICE**

The Employer charges that on April 16, 2018, Deputy Finn intentionally disregarded his most basic obligation as a law enforcement officer to take appropriate action on the occasion of a crime or other condition requiring police action. Deputy Robert Finn saw a vehicle drive the wrong way onto a highway and did nothing – he made no attempt to apprehend the driver despite clear probable cause, he made no real attempt to stop the vehicle from driving the wrong way on the highway, and he did not even call it out over the radio. Instead, he continued responding as a backup to a medical call.

The Employer states that Finn entered the I-95 expressway heading southbound at about 2:09 AM and exited the highway at about 2:11a.m., a few seconds after Deputy Colson announced over the radio that the scene was cleared. Deputy Finn claimed that with the sirens and other noises he didn't hear the transmission. The Employer is dubious about Deputy Finn's claim. Finn said that as he was exiting the

highway with his lights and sirens activated he encountered a vehicle driving the wrong way right down the pavement on the exit ramp and had to swerve onto the shoulder to avoid a head on collision. The Employer claims that Finn said that he slowed down to look in his back windows and mirrors to see where the vehicle was going, and that when he got to the top of the ramp, he thought he saw the vehicle correct itself and turn right on the highway with the flow of traffic. The Employer argues that Finn's testimony is not credible and that reality is that he continued to go down the ramp and on to Route 95.

The Employer argues that Finn did not turn around and try to stop the car from driving the wrong way, did not stay on the scene to confirm for certain that the car was traveling in the right direction, did not make any attempt to apprehend the vehicle, he simply kept driving to the to the medical call. He told Commander Fink that he passed the suspect vehicle driving the wrong way on the exit ramp. Yet he ignored it.

The Employer argues that Finn could have driven straight across Palm Coast Parkway and re-enter the highway going north to try to pull over the car. The Employer emphasized that Deputy Finn did not take the most basic police action that he could have taken, that is, call it out.

When he discovered that the medical situation was ended, Deputy Finn then drove to respond to the crash on I-95 and spent the next fifteen minutes at the crash

scene assisting with several tasks. While at the crash scene, Deputy Finn spoke with a witness who said that he saw the vehicle involved in the crash driving the wrong way on the exit ramp right past a police car with lights and sirens. Knowing that the information would become known, Deputy Finn approached Commander Fink and after shutting off his body worn camera, told Commander Fink that he passed the suspect vehicle driving the wrong way on the exit ramp.

The Employer argues that Finn's conduct was a clear and undisputable violation of agency policy requiring police officers to take appropriate police action when the circumstances require. His unmistakable inaction and lack of judgment are predictors of future behavior and threatens the ability of the Sheriff's Office to maintain the public trust. He cannot be permitted to return to his position as a deputy sheriff with the Flagler County Sheriff's Office.

The Employer concludes that evidence in this case demands that the grievance be denied and that the arbitrator sustain Deputy Finn's termination.

### **POSITION OF THE POLICE BENEVOLENT ASSOCIATION**

The Union first argues that procedurally that Deputy Finn's firing must be set aside because the Sheriff violated Finn's due process rights by failing to provide him a *Loudermill* hearing before the decision to terminate was made. The Union states that



federal courts have determined that an essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for a hearing appropriate to the nature of the case." Deputy Finn never had an opportunity to present his side of the story before the Sheriff reached the decision to terminate and publicly announced that termination was required under the circumstances. It argues that the Sheriff and Undersheriff both admitted that the decision to terminate Deputy Finn was made on July 9, 2018, which was 11 days before the *Loudermill* hearing was held on July 20, 2018. This fact was further confirmed by the Sheriff's press release advising that Deputy Finn was fired. Failing to reinstate Deputy Finn would impermissibly affirm the Sheriff's blatant violation of due process.

Regarding the issue of whether Deputy Finn's actions or inactions were deserving of termination, the Union characterized several factors that it said would show that Deputy Finn was not guilty of the charge.

While the Deputy was stopping his vehicle, he believed he saw the vehicle make a right turn to head south on the interstate. The Union notes that none of the witnesses faulted Deputy Finn for his erroneous observation.

The Union states that Deputy Finn did not have proper notice about the rules and the agency expectations. The Union notes that Commander Mike Fink testified that the general orders of the agency forbid an employee from pursuing a vehicle the wrong

way down a divided highway. He also testified that had Deputy Finn attempted to pursue the vehicle the wrong way that he would have ordered Deputy Finn not to do so. Commander Sepe, on the other hand, (the Internal Affairs investigator) testified that protocols forbidding pursuit of a vehicle going the wrong way down a divided highway were only guidelines, not mandatory rules to be followed. The Undersheriff testified for the Employer that the general orders were not guidelines, but were in fact rules that must be obeyed. The Union argues that Deputy Finn cannot be held violative of a rule or regulation that senior personnel cannot agree on its application. In addition argues the Union, the vehicle apprehension policy clearly states on page 4 of the policy in subsection 2d that, "...deputies should not follow a suspect vehicle the wrong way on a divided roadway." The Union asserts that it would have been dangerous for Deputy Finn to turn around and follow the vehicle going the wrong way on a divided roadway.

The Union rejects the Employer's argument that Deputy Finn should have crossed the southbound lanes of Interstate 95, crossed through the median, and followed the vehicle from the northbound lanes of Interstate 95. The Union states that there were guardrails on the median and there was no way that Deputy Finn could have crossed the median as alleged. The Union states that a certified traffic homicide

investigator testified that there was nothing that Deputy Finn could have done to stop the vehicle and prevent the crash.

Finally, the Union states that if there is any justification to discipline Deputy Finn, the test of just cause still requires that the level of discipline be fair in light of the employee's history and in light of discipline given to other employees for similar or more severe offenses. Deputy Finn was a hard-working loyal employee for seven years. During that seven years Deputy Finn was never disciplined. Deputy Finn had numerous commendations, and aside from criticizing his decision-making on the night in question, no one had anything negative to say about Deputy Finn. Deputy Finn had never received a bad performance evaluation, and in seven years he only missed one day of work.

On behalf of Deputy Robert Finn the Union respectfully asked that he be reinstated and that he be made whole for all lost wages, retirement benefits, lost extra duty details, and all other benefits.

## **DISCUSSION AND EVALUATION**

The Union contends that Deputy Finn's firing must be set aside because the Sheriff violated his due process rights by failing to provide him a *Loudermill* hearing before the decision to terminate was made. The Union argues that the Sheriff and

Undersheriff both admitted that the decision to terminate Deputy Finn was made on July 9, 2018, which was 11 days before the *Loudermill* hearing was held on July 20, 2018. Thus, without a fair hearing to evaluate Deputy Finn's explanation, he was terminated without cause.

I find that Deputy Finn was not terminated on July 9, 2018. Deputy Finn was reassigned from Community Policing Division (Patrol) to the Communications Unit on April 16, 2018 [Employer Exhibit No. 9], pending the outcome of an Internal Investigation. He was notified of the Internal Investigation on May 29, 2018 [Employer No. 10], and the Report was completed and issued on or about July 9, 2018. The Report did not recommend discipline, but did note that Deputy Finn was sustained on a Category 9 violation, for which the recommended disciplinary action "includes all ranges of discipline, from written reprimands up to and including termination."

On July 9, 2018, Undersheriff Jack Bisland issued a memorandum [Employer Exhibit No. 15], which, in part, stated, "D/S Finn was provided a 'Notice of Completed Internal Investigation' by Chief Paul Bovino as well as the 'Notice of Intent of to Discipline' with the recommendation of Termination.'" It also stated, "D/S Finn was advised that he had 10 working days, until July 23, 2018, in which to schedule a '*Loudermill* Hearing' with Undersheriff Bisland." It finally stated, "D/S Finn will be paid 3 hours overtime for today and receive pay through July 23, 2018." If he had

been terminated on July 9, 2018, the Employer would not have paid Deputy Finn through July 23, 2018.

On July 24, 2018, Undersheriff Jack Bisland set a Memorandum [Employer Exhibit No. 16] stating, “After carefully evaluating your statement provided Friday July 20, 2018 at the *Loudermill* hearing and examining the case and discipline recommended against you, I have determined that both the case and discipline have merit. Your termination stands as recommended.”

In a News Release by Flagler County Sheriff’s Office [Union Exhibit No. 5] on July 9, 2018, it states, “Flagler County Sheriff’s Deputy Robert Finn was served with his notice of intent to discipline with termination on Monday afternoon...”

In the Daytona Beach News Journal, it states, “On Monday, Finn, a patrol deputy for seven years, was served with a ‘notice of intent to terminate..’”

As arbitrator, I may decide only if the charge of the Union is accurate, that is, was Deputy Finn terminated prior to a *Loudermill* hearing. From a careful reading of the Exhibits submitted by both parties, I find that Deputy Finn was terminated on July 20, 2018, at the conclusion of the *Loudermill* hearing. The statements, articles, and Reports forwarded by the Union for which it concludes that Deputy Finn was terminated by officials in the Flagler County Sheriff’s Office, state only that the Office and appropriate personnel limited their remarks to “intent to terminate.”

Therefore, I find that the Flagler County Sheriff's Office did not violate Deputy Finn's right to due process.

The Union defends Deputy Finn in his actions on the night of April 16, 2018. Deputy Finn, states the Union, was appropriately at the Palm Coast Parkway entering Highway 95 in order to assist another Deputy on a medical problem incident. As he initially entered the highway going south an automobile (Chevrolet Cobalt) was driving the wrong way on the highway. The Union states that Deputy Finn slowed down to look in his back windows and mirrors to see where the vehicle was going, and that when he got to the top of the ramp he got out of his patrol car and thought he saw the vehicle correct itself and turn right on the highway with the flow of traffic driving in the right direction.

Deputy Finn said that he thought that the driver of the car had turned around and began driving in the correct direction. There is no indication by Deputy Finn that he had established with certainty that the driver had turned around. Not being sure if he was correct, it was incumbent on Deputy Finn to alert his dispatcher, or attempt to follow the vehicle going the wrong way rather than continuing south on the highway. Deputy Finn erred in not contacting his dispatcher.

The Employer argues that Deputy Finn should have turned around and chased the Chevy Cobalt driving in the wrong way on the highway. It was the opinion of one

witness for the Employer that Deputy Finn could have, and should have, turned his patrol car around and drove his car on the wrong way of the highway. Another witness, Commander Mike Fink, testified that the general orders of the agency forbid an employee from pursuing a vehicle the wrong way down a divided highway. He also testified that had Deputy Finn attempted to pursue the vehicle the wrong way that he would have ordered Deputy Finn not to do so. Had Deputy Finn driven north on the south side of the highway he may have been in an accident himself running into one or more vehicles traveling the correct way on the highway. As suggested by some Employer witnesses he would be found disobeying Sheriff regulations. I find that Deputy Finn cannot be faulted for not turning his vehicle around to drive the wrong way on the highway.

The Employer asserts that Deputy Finn could have crossed the median of the highway and driven on the north side of the highway until he spotted the car driving the wrong way, that is going north on the south lanes of the highway. At the arbitration hearing I was not taken to the area where Deputy Finn got on the highway, nor was I taken to the area of the accident. Witnesses for the grievant testified that there were guide rails in that area making it impossible to turn around and enter the highway going north. No one testified about the closeness of a turnaround (the areas

where state police turn from north to south or south to north.) Nevertheless, the wisdom of attempting to intercept a vehicle in that manner is dubious.

Further, there was a short time between Deputy Finn seeing the Chevy Cobalt driving the wrong way on the southbound lane and when the accident occurred. If Deputy Finn had found a way to turn around in order to drive on the northbound lane to intercept the rogue vehicle, the accident might have occurred prior to Deputy Finn seeing the vehicle. It was stated by the Employer that just a few minutes between the time Deputy Finn saw the vehicle going the wrong way and the time the accident occurred.

Commander Fink testified that Deputy Finn should have known he did something wrong by failing to take police action, failing to call out the vehicle on the radio, and failing to immediately report what he saw. The testimony of Commander Fink is accepted. Deputy Finn failed to call his dispatcher concerning the vehicle driving the wrong way, especially because he stated that he didn't know for sure if the driver of the vehicle turned around and got his vehicle going the correct way on the southbound highway.

The accident that occurred was very serious, one in which an innocent person was very seriously injured. The proximate cause of the accident was the fact that an individual was driving his car north on a southbound highway. There is no way to



determine if the actions or non-actions by Deputy Finn had any direct influence on the accident. The totality of the information presented does not indicate that conclusion. Nonetheless, Deputy Finn erred several times and disobeyed rules and regulations of Flagler Sheriff's Office for which he remains responsible and accountable.

Therefore, as arbitrator, as duly selected arbitrator, after careful consideration and review of the evidence, arguments and submissions of the parties, I hereby make the following

### AWARD

The Flagler County Sheriff's Office did not have just cause to terminate Deputy Sheriff Robert Finn, but did have just cause to discipline him for failure to follow and obey rules, regulations and policies of the Flagler County Sheriff's Office.

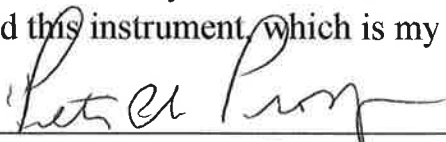
The appropriate remedy, therefore, is suspension without pay and benefits from July 24, 2018 to date.

The Villages, Florida  
July 26, 2019

  
\_\_\_\_\_  
Peter A. Prosper  
Arbitrator

I, PETER A. PROSPER, do hereby affirm on my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

July 26, 2019

  
\_\_\_\_\_  
Peter A. Prosper